

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 548 of 2002

CO-OPERATIVE BANK OF KENYA..... PLAINTIFF

VERSUS

CHEMAGRO LIMITED.....DEFENDANT

RULING

Before me is an application by Notice of Motion dated 20.6.2007 by the decree holder which seeks one prayer, a part from costs, that the Guarantee dated 23.8.2005 and signed by Henry Ogola and Merab Apondi Ogola the directors of the defendant, be adopted by the court and do form part of the record of the court.

The application is expressed to be brought under the provisions of Sections 3A and 92 of the Civil Procedure Act. It is predicated on two grounds that –

1) Henry Ogola and Merab Apondi Ogola signed a guarantee to be held personally liable and to pay the amounts due to the plaintiff by the defendant.

2) The plaintiff wishes to execute as against the said guarantors and it is necessary for the court to adopt the guarantee and for the same to form part of the court record in accordance with the order made on 30.1.2006 to enable the plaintiff proceed with execution.

The application is supported by an affidavit sworn by one Peris Mburu the Manager Credit Risk Department of the plaintiff. Annexed to the affidavit are copies of the decree in this suit, an order by the Deputy Registrar given on 2.6.2005, the guarantee, and a letter of demand from the decree holders advocates to the guarantors.

The application is opposed on the basis of Grounds of Opposition filed by the advocates of the defendant.

I have considered the application, the supporting affidavit and the grounds of opposition. I have also carefully given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. There is really no dispute that the guarantee dated 23.8.2005 was duly executed by Henry Ogola and Merab Apondi Ogola. They guaranteed payment of the decretal amount together with interest and further costs. The same appears to have been the subject of proceedings before Deputy Registrars of this court who were of the view that execution against the guarantors would not be lawfully levied unless the guarantee was made part of the court record. There is no material before the court that the guarantee has been successfully challenged. Its validity is therefore not in issue now. Should I adopt it?

The defendant's advocate has argued that the decree holder's application is incompetent as incorrect provisions of the Law have been invoked. In his view, the application should have been brought under Order L. Rule 1. That rule provides that all applications save where otherwise provided should be by motion. The decree holder did not invoke that Order and Rule. But the application is by motion on notice. I agree with counsel for the decree holder that such an objection is expressly prohibited by Order

L. Rule 12 of the Civil Procedure Rules. I reject the objection that this application is bad in law, misconceived and incompetent. It is also not an abuse of the process of the court.

Counsel for the defendant further argued that the plaintiff is guilty of non-disclosure of material facts and that the guarantee has been overtaken by events and is not enforceable. He predicated his arguments on the fact that the guarantee is not under seal and the consideration for the same has wholly failed by reason of the fact that the decree holder despite the guarantee proceeded to examine the guarantors as directors of the defendant as to the assets of the defendant. In counsel's view that cross-examination vitiated the guarantee whose consideration was the forbearance to execute against the defendant. With respect to counsel, those arguments would be valid on an application to invalidate the guarantee. This is not such an application. The present application is for adoption of the guarantee. The defendant or anyone else is at liberty to challenge its validity in appropriate proceedings. I cannot therefore decline the application on the basis that the applicant is guilty of material non-disclosure or that the guarantee has been overtaken by events.

In the end, having considered all the material before the court, I see no impediment to the adoption of the guarantee dated 23.8.2005 as part of the record of the court. The plaintiff's application dated 20.6.2007 is therefore allowed as prayed.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ms. Mbaabu for the plaintiff/applicant.