



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 576 of 2006

PRIME BANK LIMITED.....PLAINTIFF

VERSUS

VIPIN MAGANLAL SHAH.....1ST DEFENDANT

RAJESH BOGHILAL VYAS.....2ND DEFENDANT

TALIB ABUBAKER AHMED.....3RD DEFENDANT

RULING

By a notice of motion dated 11th September 2007, Rajesh Boghilal Vyas, the 2nd defendant/applicant seeks orders for extension of the order of stay of execution granted on 22nd August 2007, until the determination of Winding Up Cause Number 5 of 2006. The application is premised on the following grounds:-

- *That the respondent is trying to establish a debt owned by Discount Cash and Carry Limited who is the Principal borrower.*
- *That the respondent has not enjoined the Principal Debtor as a party to the suit.*
- *That a just debt against Discount Cash and Carry Limited has not been proven and default thereof given to the applicant the alleged guarantor.*
- *That the respondent has a Winding Up Cause Number 5 of 2006 before the court which was coming up for hearing on 30th October 2007.*
- *That the suit against the applicant is premature and He therefore has a good defence with high chances of success.*

The application is also supported by an affidavit the deponent of whom is not clear as it is sworn by Raju Boghilal Shah and signed by Rajesh Boghilal Vyas. Ms Maina who appeared for the applicant has urged the court to grant the application contending that an appropriate appeal has been filed against this court's ruling of 31st July 2007. It is maintained the debt has not been proved against the Principal Borrower and the guarantee cannot arise.

The application is opposed on grounds stated in a replying affidavit sworn by Alka Shah on 14th September 2007. In short it is contended that the applicant is liable to the respondent as guarantor, the Principal Debtor having defaulted in the repayment of the amount owed and due demand having been made upon the applicant as guarantor. It was further contended that the applicant had failed to meet the terms set for the conditional order of stay granted on 22nd August 2007, and was therefore not worthy of the exercise of the court's discretion.

It was maintained that the application lacked merit as the court has already made a finding that the defendant does not have a meritorious defence. It was reiterated that the respondent was at liberty to sue the guarantors first provided it could prove that the Principal Debtor has defaulted.

Having considered the application and the submissions of counsels, I find first and foremost, that the affidavit sworn in support of the application is defective as the facts deposed to are stated by one Raju Boghilal Shah who claims to be the applicant and yet the same affidavit is sworn by Rajesh Boghilal Vyas.

Secondly the applicant is seeking extension of the order of stay of execution granted on 22nd August 2007. That order for stay of execution was predicated upon the provision of security by way of a Bank guarantee of Kshs. Ten Million within 30 days from 22nd August 2007. As at 17th September 2007, when this application was argued the applicant had not met this condition nor did He give any indication of any intention to comply. The applicant cannot therefore seek to have extension of an order whose terms He has not complied with.

Finally, although the applicant maintains that He has a good defence, this court in its ruling of 31st July 2007, did consider that defence but found that it did not provide any plausible defence to the respondent's claim. For the above reasons, I find no merit in the application as there is no just and proper reason upon which this court can exercise its discretion in the applicant's favour.

Accordingly, the notice of motion dated 11th September 2007 is dismissed with costs.

Dated, signed and delivered this 22nd day of November 2007.

H. M. OKWENGU

JUDGE