

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.1164 OF 1999

MUUS KENYA LIMITED ::: PLAINTIFF

VERSUS

EVERGREEN AGENCIES LIMITED ::: DEFENDANT

RULING

Before me is an application by the Plaintiff for two main orders that Zacharia Kimemia Gakunju and Mary Ruth Wanjiru Gakunju be declared guarantors and sureties of the judgment debtor and be ordered to satisfy the decree and that their personal assets be attached in execution decree of the if they fail to satisfy the decree.

The application is brought under Order L. Rule 1 of the Civil Procedure Rules and sections 3A, 34 and 92 of Civil Procedure Act and other enabling provisions of the Law. The reasons for the application are that the said Zacharia Kimemia Gakunju and Mary Ruth Wanjiru Gakunju had guaranteed the transaction between the decree holder and the judgment debtor and as the judgment debtor has defaulted they as sureties have not honoured their commitment to the decree holder. The decree holder further states that Zacharia Kimemia Gakunju issued personal cheques for Ksh 1,400,000/= towards payment of the decretal amount which cheques were dishonored on presentation for payment. The further reason for the application is that the said Zacharia Kimemia Gakunju and Mary Ruth Wanjiru Gakunju have rendered themselves liable to the decree holder for liabilities of the judgment debtor. The application is supported by an affidavit sworn by one Erastus Mwangi the decree holder's Chief Accountant. To the said affidavit are annexed three exhibits.

The application is opposed and the said Zacharia Kimemia Gakunju and one Mary Warurii Gakunju have filed replying affidavits.

Mr. Omuga argued the application for the decree holder and Mr. Waweru opposed the same for the said Zacharia Kimemia Gakunju and Mary Ruth Gakunju whom I will refer to as the proposed sureties. Counsel for the decree holder in a nutshell submitted that by annexure ANN "A" the proposed sureties guaranteed the transaction between the Plaintiff and the judgment debtor. The judgment debtor defaulted. On execution Kshs 480,000/= was recovered. The 1st proposed similarly negotiated with the Decree holder and proposed to settle the decretal amount by instalments and issued 6 cheques for shs 200,000/= each two of which cheques were on presentation on their due dates returned unpaid. In Counsel's view the proposed sureties by their conduct took over the judgment debtor's liability.

Counsel relied on Halsbury's Laws of England 4th Edition paragraphs 101 102 105 and 107 and on the decision in Re-Conley (1938) Vol.2 A.C.127 – 140.

In opposition to the decree holder's application, Counsel for the proposed sureties, submitted that the proposed sureties were merely directors of the judgment debtor and did not assume personal liability as the judgment debtor has a separate legal existence. For directors to become personally liable the corporate Vail has to be removed before liability can attach. According to Counsel, the decree holder's option is to institute a separate suit in respect of the said cheques. It was further argued that the decree holder cannot proceed against he proposed sureties without showing that the judgment debtor is unable to settle its liability. In Counsel's view if the decree holder wishes to proceed against the directors of the judgment debtor it should first seek to orally examine the directors under Rule 36 of Order 21 of the Civil Procedure Rules. Reliance was placed on the decisions in the case of Ultimate Laboratories – v- Tasha

Business (unreported): Nairobi HCCC No.1287 of 2000 (unreported) and Corporate Insurance Company Ltd – v- Severance Insurance Brokers Ltd: Nairobi HCCC No. 125 of 2002 (unreported) for the proposition that before directors of a company may be liable they should first be examined.

I have considered the application. I have perused the exhibits and listened to Counsel, I have decided to consider the position of the proposed sureties separately. As regards the 2nd proposed surety I entirely agree with Counsel for her that there is nothing on the record for her to be treated as surety or guarantor. Annexure “ANN A” dated 13th October 1998 which forms the basis of the decree holder’s application was not signed by the 2nd proposed surety. The same annexure indicates that one Mary Gakunju is a director of the judgment debtor and not the proposed surety.

The proposed second surety did not issue any of the cheques exhibited by the decree holder as “ANN 3”. There is therefore no basis for declaring Mary Ruth Wanjiru Gakunju a guarantor and surety of the Judgment debtor. The decree holders application in respect of her is accordingly dismissed.

Turning now to the 1st proposed surety the record shows that he signed annexure “ANN A” aforesaid. This is the credit application form that was the basis of the transaction between the decree holder and the judgment debtor. He signed the application form as a Director of the judgment debtor. Clause 12 of the said form provides for the signatures of the proprietors/directors as personal guarantes. The 1st proposed surety signed this clause. This application was however signed before the suit was filed. Execution of this form per se could not form the basis of an application under Sections 34 or 92 of the Civil Procedure Act. The form may however, found an action on a guarantee. The proposed 1st surety also signed the 6 cheques exhibited by the decree/holder as annexure ‘ANN 3.” The fact that the proposed 1st surety signed these cheques does not of itself make him liable for the debts of the judgment debtor. The decree holder must still pursue the judgment debtor to recover its claim. It is only if the judgment debtor cannot settle its liability with the decree holder that the decree holder may seek to recover the same from the judgment debtor’s directors subject of course to the principles governing the lifting of the corporate Vail. Instead, it seeks to enforce an alleged personal guarantee signed before this suit was filed. Such enforcement is not available to the decree holder under Section 34 or 92 of the Civil Procedure Act. The decree holder has also the option of suing the 1st proposed surety on account of the cheques he issued.

In the result, the entire application has no merit. It is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 29th DAY OF JUNE 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of:-