



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 87 OF 2017**

**SAVICHEM AFRICA LIMITED .....PLAINTIFF**

**-VERSUS-**

**GENERAL PRINTERS LIMITED.....DEFENDANT**

**RULING**

1. **Savichem Africa Limited**, the plaintiff herein, obtained judgment against the defendant, **General Printers Limited**, on **8th May 2019**.
2. The present application, under consideration, is filed by **I & M Bank Limited (the Bank)**. The Bank has filed the Notice of Motion dated **18th July 2019** as an objector to the execution by the plaintiff of the judgment hereof. By that application the Bank seeks the execution by the plaintiff be lifted. The application is brought under **Order 22 Rules 51 (1), (2) and (3)**, and **Rules 52 and 53** of the **Civil procedure Rules** (the Rules). **Rule 51** of that order provides:
  - (1)*Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.*
  - (2)*Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.*
  - (3)*Such notice of objection and application shall be served within seven days from the date of filing on all the parties.*
3. From the provisions of the above Rule it becomes clear that the Bank needs to prove that it has legal or equitable interest in the goods the subject of the execution by the plaintiff. It is not denied that the plaintiff, through **Tigwood Auctioneers**, proclaimed various items of property of the defendant on **11th June** and **15th July 2019**.
4. The Bank's application is supported by the affidavit of its legal manager, namely **Andrew Muchina**. By that affidavit the deponent stated that Bank advanced the defendant money pursuant to which the defendant executed and perfected various securities in respect to its indebtedness to the Bank. Those securities included a Debenture dated **24th March 2015** for the sum of Ksh. 927,100,000.00 over all of the defendant's assets.
5. In that regard the deponent referred to Clause 6.1 (f) of that Debenture viz:

**"If any judgment or order made against the Company (the defendant) is not complied with within seven (7) days or if any execution distress sequestration or other process is levied or enforced upon or sued out against any part of the charged Assets;"**
6. The deponent stated that the said clause stipulates to the effect that the principal monies and interest secured by the Debenture become payable without any demand protest or any other notice when a judgment or order is made against the defendant which is not complied with within seven days. It is because of that provision that the deponent stated that execution by the plaintiff over the defendant's assets is illegal and unlawful, because the floating charge the Bank had over the defendant's assets had crystallized in favour of the Bank on **8th May 2019**, when judgment was entered against the defendant. That accordingly, the Bank has the first right on the said assets and properties in priority to any party including the plaintiff.
7. Leaned counsel for the Bank, **Mr. Kigata**, submitted that the Bank has a floating charge over the defendant's assets which fact had not been contradicted by the plaintiff. The learned advocate referred to the case **MACKENZIE (KENYA) LTD =V= PHARMICO LTD**

(1976) eKLR and specifically referred in the following:

“A slightly different statement appearing in *Palmer’s company Law* (21st Edn) 404 reads:

A floating charge is valid as against execution creditors, save that if the execution creditor takes property in execution, eg by seizure and sale by the sheriff, or obtains a garnishee order absolute (but not a garnishee order nisi) before the charge crystallizes he obtains priority.

In *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, the debenture had not been crystallised by the appointment of a receiver and a garnishee order nisi was made absolute by the Court. In *Robinson v Burnell’s Vienna Bakers Co Ltd* [1904] 2 KB 624 the goods of the judgment debtor were seized, in consequence of which payments were made to the sheriff to avoid a sale. No receiver having been appointed, the execution creditors were entitled to cash. Channel J said, at page 626:”

8. The application was opposed by the plaintiff. In advancing the grounds of objection filed on behalf of the plaintiff the learned advocate, **Mr Mogeni**, submitted the application was an abuse of the process of the court. He submitted that there was no compliance with the companies Act because the floating charge only crystallizes under the Companies Act when an administrator is appointed. In support of those submissions counsel referred to the case LOCHAB BROTHERS =V= KENYA FURFURAL CO. LTD (1983) eKLR as follows:

“At para 17/1/10 of the *Supreme Court Practice* (1982) it is stated as follows:

“A debenture usually creates a floating charge on a company’s assets, and only where the charge has been crystallised - eg by appointment of a receiver by seizure and sale do the rights of the debenture holder have priority over those of the execution creditor.”

Since in the present case the respondent’s goods had only been seized and were not yet sold execution was not complete. The appointment of the receivers crystallised the floating charge by `making it a fixed charge which took priority over the execution creditors’ interest.”

9. Learned advocate submitted that in this case upon execution taking place the plaintiff took priority over the Bank’s rights. This is because the Bank had not appointed a receiver. The plaintiff in emphasizing relied on the decision in the case Ayaz Hussein Mukhi v Sundip Patel & 3 others [2017] eKLR thus:

“Similarly, in Diversity Lever East Africa Ltd vs. Mohanson Foods Distributors Ltd and Another [2004] 1 EA 43, whose facts are more or less similar to the facts of this case, it was held that:

"Where there was a floating charge over the movable property of an execution debtor created by a debenture, the floating charge crystallized on the date of appointment of the receiver. As no receiver had been appointed by the objector in the present case, the debenture had not crystallized. If before the appointment of a receiver by a debenture holder the machinery of execution by attachment and sale is put in motion by an execution creditor, then the execution creditor has priority over the debenture holder whose charge has not yet crystallized."

#### ANALYSIS AND DETERMINATION

10. Although the Bank in response prayed that the court will find that the floating charge had crystallized there is really nothing placed before the court to show that indeed it had crystallized. Debenture is defined in the Black’s Law Dictionary as:

“A debt secured only by the debtor’s earning power, not by lien on any specific asset.....An instrument acknowledging such debt.”

11. The learned author of that Dictionary further in explaining the meaning of the word stated:

“..The word is now, however, generally used to indicate an acknowledgment of indebtedness given under seal by a incorporated company, containing a charge on assets of the company.....”

12. Both the plaintiff and the Bank are really speaking the same thing in this matter. That is that a floating charge remains floating until it crystallizes. The Bank did not present any evidence that it had crystallized. The thinking I am communicating here is best captured in the case Sokhi International (K) Ltd v Giro Commercial Bank Limited [2006] eKLR, thus:

“In this case the plaintiff would still have power, notwithstanding the floating charge, to apply its assets to the liquidation of the debts incurred by it, such as the debt in this present case. In the case EVANS – RIVAL GRANITE QUARRIES, LIMITED [1910] 2 K.B.979, it was stated: -

“The debenture holder cannot take up the position that he will allow the company to continue to carry on business, and reserve the right, while still permitting it to go on obtaining credit, of preventing any one who deals with it from getting paid.”

The court having found that the debenture created a floating charge is of the view that the objector, having not intervened in regard to that debenture cannot now come at execution stage to stop the sale of the attached goods. Cases in point are KAHAGI – V – KENCITY CLOTHING Ltd: [1982] KLR 465, and DIVERSEY LEVER EAST AFRICA Ltd – V – MOHANSON FOODS DISTRIBUTORS Ltd and ANOTHER [2004] 1 EA 43 where it was held: -

***“Where there was a floating charged over the movable property of an execution debtor created by a debenture, the floating charge crystallised on the date of the appointment of the receiver. As no receiver had been appointed by the objector in the present case, the debenture had not crystallised.***

***If before the appointment of a receiver by a debenture holder the machinery of execution by attachment and sale has been put in motion by an execution creditor, then the execution creditor has priority over the debenture holder whose charge has not yet crystallised”.***

13. The Bank cannot at execution stage, as stated in the above case, seek to lift execution when the floating charge was not at execution stage, nor now, crystallised. The Bank has failed therefore to prove it has a legal or equitable interest in the goods the subject of the execution. It is because of that finding that the Notice of Motion dated 18th July 2019 fails. Having failed the costs thereof must follow the event and will be awarded to the plaintiff.

14. In the end the Notice of Motion dated 18th July 2019 is dismissed and the costs thereof are awarded to the plaintiff.

**DATED and SIGNED at NAIROBI this 29<sup>TH</sup> day of JULY, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read in Open Court in the presence of:**

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**