



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 43 OF 2017

LANDMARK PORT CONVEYORS LIMITEDPLAINTIFF

VERSUS

BUZEKI ENTRPRISES LIMITEDDEFENDANT

&

NIC BANK (K) PLC..... OBJECTOR

RULING

The plaintiff and defendant herein have been engaged in protracted litigation, resting with the decree in favour of the plaintiff in the sum of Kshs. 118,556,172/= which has not been reviewed, appealed or set aside. Upon proclamation and attachment of the defendant's assets in execution of the decree, the objector herein raised a notice of objection under Order 22 Rule 51 of the Civil Procedure Rules. This was followed by an application dated 1st and filed on 2nd July, 2019 seeking orders that the proclamation be set aside and hat the attached motor vehicles be released unconditionally.

The court was also asked to prohibit the execution of the judgment and decree, against any and or the trucks and trailers listed in the objector's advocates letter dated 26th June, 2019 for being subject of a debenture dated 30th March, 2006 and other debentures listed under prayer 5 of the application, in favour of the applicant over the assets of the defendant judgment debtor. The objector also asked for costs to be awarded against both the plaintiff and the defendant, jointly and severally.

The application is supported by an affidavit sworn by the objector's Senior Manager Legal Services followed by a supplementary affidavit to which plaintiff's director has filed replying affidavits in opposition thereto. The parties have also filed submissions as directed by the court in the argument of the application. Several authorities have been cited by counsel appearing for the parties which I have considered. In the event that I do not make specific reference to any such authorities, that should not be considered to be wanting in substance.

There are some facts that are indisputable. These are; the plaintiff has a decree against the defendant in the sum of Kshs. 118,566,172/= which remains unsatisfied. Upon application for execution, proclamation was issued upon 53 trucks followed by seizure of 7 trucks so far. The objector herein, NIC Bank, has 5 floating debentures over the assets of defendant to secure a sum of Kshs. 2.7 billion.

In this application, it is the objector's position that the floating debentures have all crystallized and therefore acquired priority above all other creditors. It is also the objector's case that 334 trucks and trailers belonging to the defendant are registered jointly in the names of the defendant and the bank.

On the other hand however, the plaintiff submits the floating charges have not crystallised and therefore the judgment creditor takes precedence over the objector.

The objector has raised some issues relating to whether or not the judgment creditor can attach and sell trucks and trailers, whose log books are in the joint names of the defendant and the bank.

Execution process starts with an application at the instance of the judgment creditor, which is presented to the court upon which an order is given to proceed with the execution. Upon receipt of the warrants of sale of movable property in execution of the decree, the auctioneer appointed issues proclamation of attachment. In that proclamation, a schedule of movable property is given in the form of description, condition and estimated value.

It is important to note that, clause 7 of the proclamation contains the conditions to be followed by the auctioneer and more importantly, reference is made to property described in the schedule. It is logical therefore to conclude, any property not appearing in the schedule may not be subject to attachment and seizure. The objector is therefore right in the submission that the judgment creditor herein may not benefit

from the attachment and seizure of the 7 trucks that the auctioneer has taken possession of, as they were not in the schedule to the proclamation.

On whether or not execution may be levied upon the trucks registered in the joint names of the defendant and the bank, one would have expected that in addition to the log books, hire purchase agreements should have been attached to the application. However, as the final decision of this application does not turn on that issue, I let it rest at this stage.

The dominant issue in my view is, whether or not the objector is right in declaring that the floating charges have crystallised, and therefore take priority against all other creditors including the plaintiff herein.

The debentures creating the floating charge had provided that the floating charge will crystallise upon the happening of an event or a particular step being taken by the chargee. The objector has held onto that position and submitted that, it was not necessary for it to commence the realisation of its security to appoint a receiver before automatic crystallization occurs. This is because, automatic crystallization was provided for under clause 3.4 of the 1st debenture and clause 14 of the 5th further debenture whereby, the floating charge would automatically crystallize into a fixed charge upon certain events happening which included, among others, execution either by court order, decree or process.

It may be necessary to refer to a definition that relates to a fixed charge as opposed to a floating charge. The Taxman's Law Dictionary provides,

“A fixed charge is a charge on specific property of a company, as contrasted with a floating charge. It gives the holder of the charge an immediate proprietary interest in the assets subject to charge which binds all those into whose hands the assets may come with notice of charge. Unless it obtained consent of the holder of the charge, the company would be unable to deal with the assets without committing a breach of terms of charge....In short, a fixed charge would deprive the company of access to its cash flow, which is the life blood of a business. Where, therefore, the parties contemplated that the company would continue to carry out business despite the existence of the charge, they must be taken to have agreed on the form of the charge which did not possess the ordinary incidence of a fixed charge.”

The court having issued a decree herein, and the execution process having been initiated by proclamation and attachment, the floating charge crystallised and therefore in the objector's view, the appointment of a receiver was not necessary.

I note however that, the debentures expressly provided that the defendant had some obligations that it ought to have fulfilled before the parties, that is the defendant and objector, can gain any benefit from the protection of the terms and conditions of the debentures.

The debenture is a contract between the parties executing the same. In the present case, it is between the defendant and the objector. The defendant bound itself that in the event of any judgment or order made against the company, it has to be complied with within 7 days – see clause 7.1 (f) at page 31.

Again, the company bound itself to abide by the terms of the payment of the money secured. In fact the benefit would be lost if the company stopped payment or agreed to declare a moratorium or is unable to pay its debts as and when they fall due.

The judgement against the defendant herein has not been subjected to the terms of the debenture and therefore the defendant is in default in its relationship with the objector, yet the objector has not appointed a receiver. Collusion between parties to a contract may not be expressed but may be imputed from the conduct of the parties. In the present case, it appears the objector has allowed the defendant to continue operating, notwithstanding default on its part. This may not necessarily amount to collusion, but inability to act on the face of obvious breach may compromise the objector's rights reserved in the debentures.

In the case of **Sokhi International (K) Limited vs. Giro Commercial Bank Limited (2006)eKLR** the court agreed with the observation in the case of **Evans vs. Rival Granite quarries Limited (1910) 2KB979** where 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 anyone who deals with it from getting paid.”

There is another condition that has been highlighted in the plaintiff's submissions, to the effect that to convert a floating charge into a fixed charge the objector was supposed to give notice which has not been done see – clause 3.5 of annexure SA-1A.

The picture that emerges is that the objector has treated the defendant with velvet gloves. In the process, the interests of other creditors have been put to risk and jeopardy. The defendant has defaulted in terms of the debenture. The objector on the other hand has shied away from exercising its right under the terms of the debenture. It appears the two parties have agreed to brick wall themselves in anticipation of adverse consequences, and this may not be appealing to any court intent on upholding the principles of equity because, such a situation may be open to abuse by a defaulting party.

Both the defendant and objector are riding on the back of their respective default to perform their obligations under the terms of the debenture. The court cannot countenance such a situation.

When all facts relating to the dispute herein are taken into consideration, the irresistible conclusion is that the floating charge has not crystallized and therefore the objector may not claim priority.

The position would have been different had the receiver been appointed, in which case the floating charge would have crystallised. See Misc Application No. 100 of 2013 Njeri Onyango & Co. Advocates Vs. Ufundi Co – Operative Savings And Credit Society And Co-Operative Bank Of Kenya Limited.

In that case the court citing the case of Kahagi vs. Ken city Clothing Limited (1982) KLR 642 stated as follows,

“.....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, technically, the execution creditor should have priority over the debenture holder whose charge has not yet crystalized. Further, a debenture holder cannot have priority above the execution creditor over the proceeds of the sale of attached goods sold before the appointment of a receiver just as the debenture holder cannot have a similar priority over attached goods which have been seized before the floating charge crystalizes on the appointment of a receiver but before the sale.

The judgment creditor in this case has moved to attach the shares objected to in these proceedings but before the charge created thereon crystalized. The courts have been consistent in holding that where such assets fall within the category of a floating charge, then the attaching creditor has priority above the debenture holder. See Douglas Watson Vs. Kenya Cold Storage (Food) Limited Vs Commercial Bank Limited (2001) eKLR and Sokhi International Vs Giro Commercial Bank (2009) eKLR.

The objector’s interest in the contested shares may be legal but not absolute for reasons clearly set out above. The attaching creditor is first in line and as has been observed, the judgment debtor being a running concern and not in receivership cannot claim protection based on the objector’s debenture. If the objector did not create a fixed charge over the said shares that omission cannot be applied to the prejudice of the judgment creditor”

The above position is similar to the present. I find that the objector cannot dislodge the priority of the judgment creditor herein, and therefore dismiss the objector application with costs to the judgement creditor.

Dated, signed and delivered at Nairobi this 27th day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE