



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 335 OF 2014

AYAZ HUSSEIN MUKHI.....PLAINTIFF

VERSUS

SUNDIP PATEL.....1ST DEFENDANT

HINA PATEL.....2ND DEFENDANT

KAPU LIMITED.....3RD DEFENDANT

AND

MIDDLE EAST BANK LIMITED.....OBJECTOR

RULING

[1] Before the Court for determination is the Objector's application dated **13 April 2017**. It is expressed to have been filed pursuant to **Sections 1A, 1B, 3A and 34** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 22 Rule 52** and **Order 51 Rules 1, 2, 3 and 4** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law. It is seeking the following orders:

[a] Spent

[b] Spent

[c] That the Court be pleased to declare and/or pronounce that the assorted assets, at the foot of the Proclamation Notice dated **21 February 2017**, issued by **Multi-Concepts Auctioneers** in execution of the Decree of this Court are charged to the Objector/Applicant by virtue of the Debenture dated **27 April 2012** and the said Charge stands in priority to the attachment in execution of the Decree of this Court dated **7 December 2016**;

[d] That consequent to Prayer **[c]** hereinabove being granted, the Court be pleased to discharge, vary and/or rescind the attachment of the assorted assets listed on the Proclamation Notice dated **21 February, 2017**.

[e] That the costs of the application together with the Auctioneer's charges, if any, be borne by the

Defendants/Judgment Debtors and the nominated Auctioneer.

[2] The application was premised on the grounds that, by a Facility Letters dated **24 April 2012** and **27 July 2016**, and at the request and instance of the Defendants, the Objector extended to the Defendants financial facilities to the tune of **Kshs. 267,000,000/=**; which was secured by a Debenture that comprised a First Fixed Charge over all the assets of the 3rd Defendant. It was averred by the Objector that it had come to its attention that the Debenture assets had been attached by **Multi-Concepts Auctioneers** in satisfaction of the Decree passed herein against the Defendants; and that the said attachment, being unlawful and wrongful, ought to be lifted.

[3] The application was premised on the affidavit annexed thereto, sworn by **Martin Muhando** on **13 April 2017** in which it was deposed that the Objector extended to the Defendant financial facilities to the tune of **Kshs. 267,000,000** on **24 April 2012** and **27 July 2016**; and that the Defendants were still indebted to the Objector to the tune of **Kshs. 34,477,925.50** when it came to its knowledge that the assets that are the subject of the Debenture had been attached by **Multi-Concepts Auctioneers** in satisfaction of the Decree passed herein. It was averred on behalf of the Objector that the attachment is unlawful and wrongful for the reason that the said assets are secured to it by virtue of the Debenture aforementioned; and that the Debenture takes priority over the Decree herein.

[4] The application was opposed by the Plaintiff/Decree-Holder vide his Replying Affidavit that was sworn on **26 May 2017** and filed herein on **29 May 2017**. His case was that he obtained Judgment in his favour in this matter on the **14 September 2016** in the sum of **Kshs. 40,775,898/=** with interest thereon at **14%** per annum. Subsequently, a Decree was issued by the Court dated **15 September, 2016**, which remained unpaid by **21 November 2016** when the Plaintiff requested for the issuance of a Warrants of Attachment and Sale in execution. The Warrants were served on Multi-Concepts Auctioneers on **7 December 2016**. It was further deposed by the Plaintiff that the Defendants thereafter issued the Auctioneer with cheques amounting to **Kshs. 5,000,000/=** which were all dishonoured for lack of funds. Thereafter, the Defendants purposefully placed roadblocks in the way of the Plaintiff to deter him from realizing the fruits of his Judgment. Accordingly, the Plaintiff averred that the instant application is one of those designs by the Defendants, in collusion with the Objector, to frustrate his efforts at realizing the fruits of his Judgment. He thus, urged the Court to dismiss the application with costs.

[5] The application was disposed of by way of written submissions pursuant to the directions given by the Court on **29 May 2017**. In its written submissions filed herein on **5 July 2017**, the Objector flagged up two issues for determination, namely:

[a] Whether the Debenture dated **27 April 2012** is valid;

[b] Whether the Objector herein has a legal or equitable interest in the whole or part of the property attached in execution of the Decree.

[6] Counsel for the Objector cited **Section 99** of the **Companies Act, Chapter 486** of the Laws of **Kenya**, (now repealed) that governed the creation of the **Debenture** dated **27 April 2012** and urged the Court to find and hold that the said Debenture, which was annexed to the Supporting Affidavit and marked **Annexure "M.M-2a"** was prepared and registered in accordance with the aforementioned provision, and a Certificate of Registration accordingly issued. A copy of the Certificate of Registration has also been annexed to the Supporting Affidavit and is marked **Annexure "M.M-2b"**. It was therefore the submission of Counsel that the Debenture is, in the premises, valid and enforceable.

[7] On whether the Objector has a legal or equitable interest in the attached property, it was the submission of Counsel that ownership of the property is immaterial for purposes of **Order 22 Rule 51** of the **Civil Procedure Rules**. He relied on the case of **Dubai Bank (K) Ltd vs. Come-Cons Africa Ltd and Another [2012] eKLR** to support his argument that what the Court is required to determine in such circumstances is whether the Objector has a legal or equitable interest in the attached property. According to Counsel, the paramount consideration is that the Objector is a secured creditor, and therefore his submission was that the Court is precluded from enforcing the Decree herein by way of attachment and

sale of the assets charged under the Debenture. Counsel relied on the case of **Arun C. Sharma vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates & 4 others [2014] eKLR** to underscore the contention that the Objector had discharged the burden of proving that it has an interest in the attached property that ranks in priority over the Decree herein.

[8] The Plaintiff's written submissions were filed herein on **25 July 2017**. He refuted the contention by the Objector that it has priority rights over the attached assets. According to Learned Counsel for the Plaintiff, since the Objector had not taken any action to realize its security, the Debenture has not yet crystallized; and therefore from the moment the Warrants of Attachment and Sale were issued, the Plaintiff's interests as a Decree-Holder took priority and should continue unimpaired to completion. Counsel relied on the following authorities in support of this proposition:

[a] Sokhi International (K) Ltd vs. Giro Commercial Bank Ltd [2006] eKLR;

[b] Lochab Brothers vs. Kenya Furfural Co. Ltd [1983] eKLR;

[c] James Job Kihoro Kahagi vs. Kencity Clothing Ltd [1977] eKLR

[9] The Court was further urged by the Plaintiff to bear in mind that he has been unable to realize the fruits of the Decree passed herein and that attachment and sale of the Defendants' assets would be the only way of realizing the same, given the Defendants' reluctance to settle the same in spite of demand. Counsel therefore argued that to entertain or allow the Objector's application would be to leave the Plaintiff without any recourse, and would therefore go against **Article 48 of the Constitution**. In this regard, Counsel relied on the case of **Saira Banu Gandrokhai & Another vs. Principal Secretary Ministry of Interior and Coordination of National Government & Another [2017] eKLR**, in which it was held that:

"Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgments due to roadblocks placed on their paths ..."

[10] Counsel for the Plaintiff proceeded to suggest, on the basis of the **James Job Kihoro Kahagi Case** (supra), in which similar facts presented themselves, that a practical alternative would be for the Objectors to pay the Plaintiff the decretal sum plus costs and subject the same to the Debenture for recovery along with the sum of **Kshs. 34,477,925.50** that is owed to it by the Defendants. Counsel otherwise urged the Court to dismiss the Objector's application with costs.

[11] Having given due consideration to the application, the grounds in support thereof as set out in the application and the Supporting Affidavit, as well as the Plaintiff's averments in the Replying Affidavit, the written submissions filed herein by Counsel and the proceedings to date, there is no dispute as to the facts leading up to the issuance on **15 September 2016** of the Decree herein or the Warrants of Attachment and Sale dated **7 December 2016**. Those warrants were issued to a Licensed Auctioneer, **Darius Wambua Kimwele T/A Multi-Concepts Auctioneers**, who proceeded to make a Proclamation of Attachment on the Defendants' movable properties as more particularly set out in the Proclamation dated **8 December 2016**.

[12] In reaction thereto, the Objector has moved the Court, vide the Notice of Motion dated **13 April 2017**, contending that the attached goods are the subject of a Debenture dated **27 April 2012**, produced herein and marked **Annexure "M.M-2a"**. The Objector's application was filed under **Order 22 Rule 52** of the **Civil Procedure Rules**, in respect of which **Order 22 Rule 51** states that:

"(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."

[13] The Debenture dated **27 April 2012** was made as a deed between the 3rd Defendant and the Objector to the tune of **Kshs. 231,000,000/=** and was duly registered and a Certificate of Registration issued in compliance with **Section 99** of the **Companies Act** (now repealed); and as rightly pointed out by Counsel for the Plaintiff, there is no disputation about its existence or validity. Accordingly, the only issue that presents itself for my determination is nature of the Objector's rights and whether the Debenture has priority over the Decree of the Court dated **15 September 2016**.

[14] It is now trite that in objection proceedings, the Court is concerned, not with ownership but with the question whether the Objector has a legal or equitable interest in the attached property. (see **Dubai Bank (K) Ltd vs. Come-Cons Africa Ltd & Another [2012] eKLR** and **Arun Sharma vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates & 4 Others [2014] eKLR**). What the Debenture created was a fixed and floating First Charge over the fixed and movable assets of the 3rd Defendant, both present and future, as set out in **Clause 4** thereof. The assets were classified into First to Fifth categories; and in respect of the Fifth Category, where the movable assets set out in the Proclamation fall, **Clause 5** of the Debenture provides as follows:

"The Charge created by this Debenture shall rank as a first charge on all the property and assets hereby charged and as regards ... the property Fifthly described it shall constitute a floating charge but so that the Company shall not be at liberty without the written consent of the Bank to create any mortgage or charge or other encumbrance to rank either in priority to or pari passu with or subsequent to the charges hereby created it being the intention that the Company shall have no power without the consent of the Bank to part with dispose of or alienate any part of the property and assets hereby charged except ... by way of sale in the ordinary course of business and upon the terms that the proceeds of any and all such sales effected in the ordinary course of business shall be paid into the Company's account or accounts with the Bank."

[15] Attachment and sale in execution of a Court Decree, cannot be said to be a disposition by the 3rd Defendant and does not, to my mind, fall within the provisions of **Clause 5** aforesaid. But even assuming that it does, **Clause 12.1** of the Debenture is explicit that:

"The floating charge constituted by this Debenture shall immediately crystallize and attach by way of fixed charge to the property and assets comprised herein then subject to the floating charge without presentment demand protest or notice if the Bank shall take any action to enforce this security and shall also automatically crystallize and attach as aforesaid without any presentment demand protest or notice of any kind all of which are hereby expressly waived by the Company upon the happening of any of the events specified in sub-clauses 11.2 11.3 11.5 11.7 and 11.14 of Clause 11 hereinabove."

[15] **Clause 11** details what the parties agreed to be the Events of Default and while they include execution by virtue of a Court Decree (**Clause 11.2**), the prescribed remedy was that the principal monies and interest and other monies secured by the Debenture would become immediately due and payable without any demand protest or other notice of any kind, whereupon a Receiver would be appointed pursuant to **Clause 13**, which Clause provides that:

"At any time after the principal moneys hereby secured become payable either as a result of lawful demand being made by the Bank or under the provisions of Clause 11 hereof or if requested by the Company and so that no delay or waiver of the rights to exercise the powers hereby conferred shall prejudice the future exercise of such powers and without prejudice to any other remedies provided by law the Bank may in writing under the hand of any of its officers or attorneys or under its common seal appoint in writing any person or persons whether an officer or officers or agent or agents of the Bank or not to be a receiver or

receiver and manager or joint receivers or receivers and manager of the property and assets hereby charged or any part thereof ... upon such terms as to remuneration or otherwise as the Bank shall think fit..."

[16] Thus, whereas the Objector does have a legitimate right over the attached property, there being no indication that the Objector had appointed a receiver as envisaged under **Clause 13**, by the time the Proclamation of Attachment was made, it is my considered finding that Objector's rights under the Debenture cannot be said to have crystallized fully in the circumstances. Indeed, in **Lochab Brothers vs. Kenya Furfural Co. Ltd [1983] eKLR, Chesoni, Ag. JA** endorsed Paragraph 17/1/10 of the Supreme Court Practice (1982) to the effect that:

"A debenture usually creates a floating charge on a company's assets, and only where the charge has been crystallized - 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."

[17] 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."

[18] In the premises, it is plain that the Objector's application is untenable, for the reason that whereas the assets in question were charged to the Objector, it is not the case that the Objector's rights, which have not crystallized thus far, rank in priority over the Decree herein. The Notice of Motion dated **13 April 2017** is accordingly dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2017

OLGA SEWE

JUDGE