



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

Civil Suit 758 of 2002

SOKHI INTERNATIONAL (K) LTD.....PLAINTIFF

VERSUS

KEC INTONATION (K) LIMITED.....1ST DEFENDANT

GIRO COMMERCIAL BANK LIMITED.....2ND DEFENDANT

AND

GIRO COMMERCIAL BANK LIMITEDOBJECTOR

R U L I N G

The application before court is by the objector, Southern Credit Banking Corporation Ltd.

The objector's chamber summons is brought under Order XXI Rules 56 and 57 of the Civil Procedure Rules.

The objector seeks the lifting of the attachment, hereof by the 1st defendant, over the assets of the plaintiff.

It was argued on behalf of the objector that the plaintiff had on or about 19th October 2004, created a debenture in favour of the objector, on all the assets of the plaintiff, which created a fixed as well as a floating charge. That the goods attached by the 1st defendant constituted part of the objector's security and accordingly the objector has an inalienable legal and equitable right to the attached assets. That those legal and equitable rights rank above the attaching creditor's rights. That the registration of the debenture was notice to the world at large and more particularly to the attaching creditor that the plaintiff's assets were charged to the objector.

The application was opposed. 1st defendant's learned counsel began by saying that the present objection was being raised after the plaintiff unsuccessfully failed to set aside the order of costs awarded to the 1st defendant, and that it was also raised two days before the sale of the attached goods. Counsel was therefore of the view that the objection was not overboard.

1st defendant's counsel faulted the objector for failing to define fixed and floating charge. That having failed to so define, that the objector had not satisfied the burden, which is their responsibility to do, that

they have a legal or equitable right over the attached goods. 1st defendant's counsel requested the court to closely examine the debenture, which he said shows that its effect was to create a floating charge. That it is important to note that it is not the words used but the effect of those words in a debenture, which would prove that what the objector had, was a floating charge. 1st defendant's counsel referred to pages 5 and 6 of the debenture, which he argued that they mentioned machinery, vehicles and computers without specifically identifying them. That the fact that those items had not been withdrawn from the plaintiff by the objector proved that the charge was a floating rather than being fixed. That being a floating charge that the objector's rights do not rank in priority to the attaching creditor.

The objector granted overdraft facilities to the plaintiff for an aggregate principal of kshs 15 million and as security the plaintiff executed a debenture dated 19th October 2004.

The court has examined the debenture and has found that the debenture holder stated that it has a fixed specific charge No. KISUMU MUNICIPALITY/BLOCK 2/107 and over specific motor vehicles stated in the second schedule of the debenture. It is however only one motor vehicle namely vehicle NO. KAM 612J, in that schedule which is the subject of the attachment being objected. In regard to the other clauses of the debenture the court finds that they provided for a floating security, in that they created a charge in respect of circulating assets which are not definitely identified, for example charge over all plant, machinery, computers, all stock shares bonds and securities of any kind and so forth. The language used in these clauses is not conclusive and although the debenture describes these clauses as fixed charge, on construction of those clauses, the court finds, and there is no doubt, that the objector had a floating charge over the assets of the plaintiff including the immovable property. Such a floating charge remains dormant and inoperative as regards any particular assets until it is converted into a charge by the intervention of the debenture holder by making it to attach to all the existing assets of the company. Therefore until such intervention, the company is free to continue carrying on business indeed paragraph 14 (h) of the debenture states that the company shall: -

“Maintain the right to carry on the present business of the company and to take all steps necessary to maintain and renew all right powers privileges concessions franchises and licenses and authorities which are necessary or useful in the conduct of such business.....”

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”.

The 1st defendant's attachment has priority over the objector's charge.

The end of the matter is that the objectors application dated 31st January 2006 is dismissed with costs to the 1st defendant.

Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 24th March 2006.

MARY KASANGO

JUDGE