



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO. 1278 OF 1999**

**DOUGLAS D. WATSON ..... PLAINTIFF**

**VERSUS**

**KENYA COLD STORAGE (FOODS) LTD. .... DEFENDANT**

**AND**

**KENYA COMMERCIAL BANK LTD. .... OBJECTOR**

**RULING**

These are objection proceedings. They have been brought under O. XXI Rule 56 of the Civil Procedure Rules by Kenya Commercial Bank Limited which claims that it holds a debentures over all the movable properties of the defendant.

In the affidavit in support of the application sworn on 14.8.2000 by Ferhan Mohammed Chaudhri who is the objector's advocate, it is claimed that the objector holds a debenture as well as two supplemental debentures over the movable assets of the defendant and therefore, because of those debentures, any attachment of the movable property of the defendant would prejudice the rights of the objector, it being a secured creditor whose debts rank in priority over those of the plaintiff.

The plaintiff opposes the objector's application. He says that the application has been brought in bad faith with the object of not only defeating the ends of justice but also depriving the plaintiff of the fruits of his judgment. Several other allegations and assertions are made in the replying affidavit sworn by the plaintiff in opposition to the application but having regard to the view I take of this matter, I do not consider it necessary to set them out in full in this ruling for the purpose of determining this application for in my opinion these objection proceedings have been commenced on the basis of mistaken view of the law relating to debentures and attachment in execution of decrees.

In the case of Robson V. Smith (1895) 2 Ch. 118, Romer, J. stated:-

***“Debentures like the plaintiff's have been frequently considered by the Courts. They constitute what is called a “floating security” – that is to say, they allow the company to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture -holders, or, as it has been said they constitute a charge, but give a licence to the company to carry on its business. So long as the debentures remain a mere floating security, or, in other words, the***

***licence to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture -holders, provided that the dealing be completed before the debentures cease to be merely a floating security.”***

And in Halsburys Laws of England 2nd Edition, Volume 5 at para. 784 it is stated:-

***“..... the Court will not restrain an execution from proceeding nor refuse to make a garnishee order absolute unless the debenture -holder takes some steps to turn his security from a floating into a fixed charge.”***

In paragraph 785 of the same text it is stated as follows:-

***“When a floating security upon all the property or assets of the company becomes fixed, it constitutes a charge upon all the property or assets then belonging to the company. It has priority over any subsequent equitable charges and over unsecured creditors.”***

It is therefore clear that it is only when the floating security becomes fixed that it constitutes a charge over the property or assets belonging to the company. Before that the property of the company may be dealt with in the ordinary course of business as if the debenture had not been given.

Although no copy of the three debentures has been annexed to any of the affidavits filed herein, I think it is fair to proceed in this matter on the basis that the debentures do exist. I say so because the depositions of Mr. Chaudhri to that effect in his affidavit have not been denied in the replying affidavit. There is however no evidence whatsoever in the said affidavit to show that any of the steps which have to be taken by the debenture holder i.e. the objector, to convert the floating security which the objector now holds into a fixed charge have been taken. Such steps would obviously include winding up of the company or appointment of a receiver at the instance of the debentures holder. Without such steps, a floating security remains just that and cannot be used to prevent an attaching decree holder from proceeding with the execution process.

For the above reasons, my view is that the objector’s application is misconceived and cannot succeed. It is dismissed with costs.

**Dated at Nairobi this 26th day of January, 2001.**

**T. MBALUTO**

**JUDGE**