

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 423 OF 1999

ASG SCAN CARGO.....PLAINTIFF

VERSUS

NAIROBI CONVEYORS LIMITED.....DEFENDANT

RULING

Background:

In the Chamber Summons dated 14th December, 1999 the applicant is asking the court to issue an order raising the attachment as to the whole of the property attached in execution of the decree herein. The application is prompted by the attachment of the goods in question. The objector says that these goods belonged to the objector and the Decree Holder knew or ought to have known so. It is the objectors position that the goods being subjected to a debenture in favour of the objector, the Decree Holder could not attach them. In term of this debenture Nairobi conveyors Ltd. had charged all the properties in favour of the objector.

FINDINGS

The objector has in this application annexed a copy of the debenture dated 22nd January, 1997 in favour of the Barclays Bank of Kenya Ltd. In his submission on behalf of the objector, Mr. K'Owade relied on clause (1) of the debenture which provides that the borrower had charged all the properties referred to in the second schedule thereto by way of a fixed charge. The attaching creditor maintains that the goods attached did not belong to the objector as there was no indication either from the judgment/debtor or the objector at the time of attaching that the goods were subject to a fixed charge. See paragraph 6, 7, 8 and 9 of the replying affidavit by Mr. Amos Mugambi Advocate for the attaching creditor. The emphasis on this reply is on the fact that the objector had not indicted its interests in the goods until 19.10.99 when attachment was effected on 2.8.99. The objector counters this by explaining that they only became aware of the attachment when they saw it in the newspapers. Mr. Mugambi for the attaching creditor relied on order 21 rule 27 and 58 of the Civil Procedure Rules which applies if the objection proceedings are not brought within the time stipulated by the Rules as was the case in this application.

He further submitted that the objector has adequate remedies as per the provision of the Debenture and referred to clauses 9© and 11 of the Debenture.

I have considered these submissions by the counsels and I have also considered the affidavit in support and the replying affidavit.

On the question whether the debenture covered the attached properties, it is quite clear from the provisions of the debenture in clause 1 (a) that there is a fixed charge over the properties described in the schedule to the debenture then in clause (b) of the debenture there is a charge by way of a fixed charge over the movables. This being the case I find that all the properties movable and immovable are subject to the charge in favour of the Bank and this would answer the claim that the movables were not covered by the Debenture.

One aspect of this application which appeared to escape the notice of the plaintiff is the importance of registration of a debenture under Section 196 of the Companies Act with the Registrar of Companies. The purpose of such registration is to inform the whole world of the state of the Company, so that anybody

wishing to deal with it would be aware of the commitment of the company with other persons, in other words, so that such a person can be aware of its financial commitment. Such a person is deemed to know and if he did not bother to find out he has only himself to blame. Here the plaintiff says that it was not aware of the existence of the Debenture when it effected the attachment. This contention could be valid if the debenture was not registered under Section 196 of the Company's Act.

This provision cannot be subservient to procedural requirements in the civil procedure rules relied upon by the plaintiff. I therefore find that the objectors rights are established by the existence of the Debenture.

Based on these findings, I HOLD that the goods cannot be subject to attachment by the plaintiff and consequently the application is allowed as per prayer one of the Chamber Summons.

The costs of this application shall be paid by the plaintiff.

Dated and delivered this 6th day of March, 2000.

KASANGA MULWA
JUDGE