



Arm Cement PLC (Under Administration) v GM Kariuki Hardware Limited & another (Civil Suit E549 of 2020) [2025] KEHC 1703 (KLR) (Commercial and Tax) (7 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E549 OF 2020
FG MUGAMBI, J
FEBRUARY 7, 2025**

BETWEEN

ARM CEMENT PLC (UNDER ADMINISTRATION) DECREE HOLDER

AND

GM KARIUKI HARDWARE LIMITED 1ST JUDGMENT DEBTOR

PETER MUTHEE 2ND JUDGMENT DEBTOR

RULING

Background and introduction

1. This court (Mulwa, J), entered judgment on 19th May, 2022 against the judgment debtors (hereinafter the JDs), for the amount of Kshs.78,260,331.15 together with interest and costs. On 30th September 2022, costs totaling Kshs.4,874,946.69 were taxed, and a subsequent reference against these costs was dismissed on 20th June 2024. The JDs filed a Notice of Appeal and a Memorandum of Appeal. According to the decree holder, which is the applicant herein, the JDs are yet to file a Record of Appeal or prosecute their appeal.
2. The applicant filed this Notice of Motion dated 28th February, 2023 which was amended on 7th February, 2024 and further amended on 10th June 2024 under Sections 3A and 38 of the [Civil Procedure Act](#), Order 22 Rule 6 and Order 22 Rule 40(1)(a)(i) of the [Civil Procedure Rules](#) 2010.
3. The applicant claims that the JDs haven't paid the decretal sum and costs to date, causing interest to accrue. They also state that the 2nd JD, a former shareholder in several companies, has hindered execution by transferring shares to third parties. The companies in question are: G.M. Kariuki Hardware Limited, New Age Developers and Construction Company Limited, Anchor Flour Millers Company Limited, Giraffe Ark Game Lodge Limited, Golden Pearl Properties Limited and Nest



Manor Residence and Suites Limited (hereinafter the six companies). Moreover, the applicant notes that the JDs failed to provide the court-ordered security of KShs. 50,000,000/= by the 3rd July 2023 deadline.

4. In response, the JDs challenge the validity of the further amended Notice of Motion, claiming that no leave to amend was obtained. The 2nd JD asserts that the assets and shares in G.M. Kariuki Hardware Limited and Anchor Flour Millers Company Limited are encumbered by charges to Standard Chartered Bank, with fixed floating charges dated 6th July 2025 and 27th May 2015, respectively. Similarly, the assets and shares in New Age Developers Limited and Construction Company Limited are charged to Co-operative Bank of Kenya, with a fixed floating charge dated 6th March 2015.
5. Consequently, the 2nd JD contends that he holds no shares in these companies due to these charges, making the orders sought in the motion unfeasible. It is also his case that he is not a shareholder in any of the six companies as alleged by the applicant.

Analysis and Determination

6. Following directions issued by this court, the parties filed written submissions, which I have carefully considered alongside the pleadings, caselaw and evidence presented in support of their cases.
7. The first preliminary point that necessitates determination is that raised by the JDs regarding the validity of the application before court, noting that no leave was sought to file the further amended application. A review of the record confirms that the applicant in fact amended its Notice of Motion twice without seeking leave of the court, in breach of Order 8 Rule 5 of the *Civil Procedure Rules*.
8. The requirement for seeking leave to amend pleadings is crucial as it ensures procedural fairness, allows the court to maintain control over the proceedings and prevents potential prejudice to the opposing party. I concur with the JDs that the applicant's failure to seek leave on both occasions is a clear procedural misstep. Such actions undermine the orderly administration of justice and should not be repeated.
9. That said and notwithstanding the applicant's arguments, this court is fundamentally a court of justice, and its primary aim is to ensure that all relevant information is brought to the attention of the court for a final and just determination of disputes. The amendments made by the applicant addressed a critical omission by including Nest Manor Residence and Suites Limited to the list of companies where the 2nd JD is said to be a former shareholder. This information was necessary for the determination of all the issues in controversy between the parties.
10. In striking a balance between procedural compliance and substantive justice, this court is guided by Article 159(2)(d) of the *Constitution*, which mandates courts to administer justice without undue regard to procedural technicalities. As stated in *Raila Odinga v IEBC & Others*, [2013] eKLR:

“The essence of Article 159(2)(d) is to ensure that procedural technicalities do not override substantive justice, while recognizing that procedural rules are integral to the administration of justice.”
11. I note that the JDs have exercised their right of reply and already submitted their responses to the amended applications. This is an indication that they have not been unduly prejudiced by the amendments. As such, I find no reason to strike out the further amended Motion and instead find that in the interest of justice, the amendments are hereby deemed as properly on record and the matter ought to be determined on its merits, which I now proceed to do.



12. There are two issues that the 2nd JD raises in defeating the application. The first is with respect to the encumbrances over the shares and assets of four of the six companies which makes the orders sought, untenable, according to the JDs. The encumbrances are by way of fixed and floating charges.
13. A The distinction between a fixed and floating charge is significant. According to the *Taxman's Law Dictionary*:

“A fixed charge is a charge on specific property of a company, as a 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.”
14. In other words, a floating charge allows a company to use and dispose of the charged assets in the ordinary course of business until the charge crystallizes, typically upon the occurrence of a specified event such as default, appointment of a receiver or insolvency. Until crystallization, the floating charge does not attach to specific assets, and the company retains control over them. The same applies to a debenture secured by a floating charge.
15. It therefore follows that if the floating charge has not crystallized, the assets remain available for execution by unsecured creditors. This ensures that unsecured creditors can recover their debts, especially when the secured creditor's interest has not yet become fixed on specific assets.
16. Judicial precedent supports this view and establishes the rationale that a debenture holder cannot claim to allow the company to continue operations while preventing anyone who does business with the company from being paid. This principle was upheld in *Lochab Brothers v Kenya Furfural Co Ltd*, [1983] KECA 51 (KLR) where the Court of Appeal cited with approval from para 17/1/10 of the Supreme Court Practice (1982) as follows:

“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. Likewise, in *Njeri Onyango & Co Advocates v Ufundi Co-Operative Savings & Credit Society And Co-Operative Bank Of Kenya Limited*, Misc Appln No. 100 of 2013, the court considered the circumstances when an execution creditor's rights rank in priority to a debenture holder's rights. Citing the case of *Kabagi v Ken City Clothing Ltd*, (1982) KLR 642 this court 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 crystallized. 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 crystallizes 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 crystallized. 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 v Kenya Cold Storage (Food) Limited & Commercial Bank Limited* (2001) eKLR and *Sokhi International v 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."

18. Based on my reading of these and other judicial pronouncements, the key issue here is whether the Bank's rights under each of the debentures had crystallized. This determination affects the question whether the applicant, as an executing creditor, can assert rights that take precedence over the Banks'.
19. Documents filed by the 2nd JD reveal that a fixed and floating debenture was created on 6th March 2015 in favour of Cooperative Bank of Kenya by New Age Developers and Construction Company Limited (the first debenture). A second debenture was created on 6th July 2015 by G.M. Kariuki Hardware to Standard Chartered Bank Limited (the second debenture) and a final debenture on 27th May 2015 by Anchor Flour Millers Company Limited, also to Standard Chartered Bank Limited (the third debenture). The Certificates of Registration for these securities are attached to the 2nd JDs documents.
20. Clause 6 of the first debenture stipulates that the floating charge would convert into a fixed charge over the company's assets and property upon the occurrence of specific events outlined in Clauses 7.1 to 7.4. Of particular relevance is Clause 7.3, which states:

“When any creditor or other person attempts to levy or issue any distress or execution against any of the properties or assets of the Company whether by court order, decree or other process. ...”
21. Clause 7.3 has the effect of causing the floating charge to crystallize into a fixed charge when any attempt is made to enforce a claim against the company's assets through legal means. This conversion secures the assets specifically for the Bank, preventing other parties from executing against them. Similarly, Clauses 5 and 8 of the second and third debentures include provisions for the floating charge to convert into a fixed charge upon any execution against the company's assets. The outcome is identical to that of the first debenture.
22. In light of this position, I am of the view that issuing an injunction over the shares previously held by the 2nd JD in New Age Developers Construction Company Limited, G.M. Kariuki Hardware Limited, and Anchor Flour Millers Company Limited would serve no practical purpose, as the Banks' interests take priority.
23. The 2nd JD has also presented before this court, a letter of offer dated 24th November 2020 to demonstrate that the assets belonging to Nest Manor Residence and Suites Limited, are also charged to Cooperative Bank of Kenya Limited. In the absence of evidence of executed and perfected securities, the letter of offer alone is insufficient to establish that the assets of Nest Manor Residence and Suites Limited are charged to Cooperative Bank of Kenya Limited.



24. I now turn to the issue of shareholding, specifically the 2nd JD's shareholding in Golden Pearl Properties Limited, Nest Manor Residence and Suites Limited and Giraffe Ark Game Lodge Limited (the three companies), which are not affected by my finding on the first issue. The applicant demonstrated by way of copies of CR12 that the 2nd JD held shares not just in these three but in all the six companies. The CR12 forms represent records held at the Companies Registry as of 23rd February 2023 and 18th August 2023 in the case of Manor Residence and Suites Limited. However, evidence provided by the 2nd JD shows that between these dates and 20th August 2023, he ceased to be a shareholder in all six companies.
25. Be that as it may, it is clear that the 2nd JD was a shareholder in all the six companies at the time judgment was entered against the JDs on 19th May, 2022 as well as when the first application, dated 28th February 2023 was filed to preserve the 2nd JD's shares in the companies. By this time, the decree remained unsatisfied.
26. The applicant's submission that the 2nd JD transferred shares to third parties to frustrate the execution process persuades me. While the 2nd JD was within his rights to transfer shares under the Companies Act, the timing of these transfers is highly suspect and raises serious doubts over the intention. The transfers were made despite the 2nd JD's awareness of the existing decree, his default, and the ongoing execution process to satisfy the decree. Based on this, I find that the 2nd JD acted in bad faith by transferring his shares in the remaining three companies between 2023 and 2024, deliberately attempting to shield his assets from the execution process.
27. It is crucial to emphasize that court judgments are intended to be enforced to ensure justice is not reduced to an illusion. Courts have a duty to intervene when it is evident that there is a deliberate scheme to defeat justice through deceit, thereby denying a deserving party the fruits of its judgment. Allowing the 2nd JD to evade execution through strategic share transfers would undermine public confidence in the judicial system and erode the rule of law. In *Moses Wachira v Niels Bruel*, [2019] eKLR, this court aptly noted:
- “The execution process is a key component of the judicial system. Without the enforcement of decrees, the purpose of litigation and the rule of law are undermined. Courts must ensure that the enforcement process is not obstructed unjustly.”
28. I am convinced that the share transfers executed by the 2nd JD were fraudulent conveyances. These transactions are voidable and must be set aside to safeguard the rights of the executing creditor.

Disposition

29. Accordingly, I find the Further Amended Notice of Motion dated June 10, 2024 to be partially meritorious, and I hereby allow it in the following terms:
- i. An order is hereby issued, directed to the Registrar of Companies for the reversal of all share transfers undertaken by Peter Mahu Muthee, the 2nd Defendant/Judgment Debtor in the following companies: Golden Pearl Properties Limited, Nest Manor Residence and Suites Limited and Giraffe Ark Game Lodge Limited.
 - ii. An order is further hereby issued directed to the Registrar of Companies that the above shares be registered in the name of ARM Cement PLC (in liquidation) to facilitate their sale for the purpose of satisfying the decretal sum of Kshs 78,260,331.15 together with costs and accruing interest.



- iii. An order is hereby issued for the attachment and sale of moveable property in the form of all the shares previously held by Peter Mahu Muthee, the 2nd Defendant/Judgment Debtor as listed below in the realization of the decretal sum of Kshs 78,260,331.15 together with costs and accruing interest:
 - a. 600 ordinary shares previously held in Golden Pearl Properties Limited Company Registration Number CPR/2015/206201;
 - b. 50,000 ordinary shares previously held in Giraffe Ark Game Lodge Limited Company Registration Number CPR/2012/91678 and
 - c. 500 ordinary shares previously held in Nest Manor Residence and Suites Limited Company Registration No. CPR/2012/76358.
- iv. The official receiver shall oversee the registration and sale process to ensure transparency and accountability.
- v. The applicant is awarded half of the costs of the application, as it has been partially successful.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7TH DAY OF FEBRUARY 2025.

F. MUGAMBI

JUDGE

