



**UnEEK Freight Services Limited v Typotech Imaging Systems Limited;
NCBA Bank Kenya PLC (Objector) (Commercial Case 219 of 2019)
[2024] KEHC 11278 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 219 OF 2019
PM MULWA, J
SEPTEMBER 19, 2024**

BETWEEN

UNEEK FREIGHT SERVICES LIMITED PLAINTIFF

AND

TYPOTECH IMAGING SYSTEMS LIMITED DEFENDANT

AND

NCBA BANK KENYA PLC OBJECTOR

RULING

1. On 9th August 2023 the Objector filed the Notice of Motion application seeking the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this application, an order of injunction do issue restraining the attachment, sale, disposition and any other interference with all the assets listed in the proclamation of attachment dated 3rd August 2023 issued by BEAFECT Auctioneers pursuant to the instructions issued by the plaintiff.
 - iii. The proclamation of attachment dated 3rd August 2023 issued by BEAFECT Auctioneers be lifted.
 - iv. This honourable court be pleased to quash and declare the proclamation of attachment by BEAFECT Auctioneers dated 3rd August 2023 null and void ab initio
 - v. That the costs of the application be awarded to the objector.



2. The application was brought under Order 22 Rule 51 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#). It is predicated on the grounds on the face of it and supported by the affidavit of Steve Atenya the principal legal counsel of the objector sworn on 9th August 2023.
3. The applicant deposes that the plaintiff in executing the decree issued against the defendant on 26th January 2021 instructed Beafects Auctioneers. The auctioneers have served the objector with proclamations and warrants of attachments of the objector's assets. It is contended that the objector is a secured creditor of the defendant's assets holding a duly registered debenture dated 13th September 2011, a further debenture dated 23rd August 2012, and second further debenture dated 21st April 2015. It is deposed that the proclaimed goods are not available for attachments as the objector has prior legal and equitable interest over the plaintiff. That there is imminent danger if the plaintiff is allowed to proceed with the execution.
4. Opposing the application Michael Mamuta an accountant with the plaintiff swore a replying affidavit on 26th March 2024. He deposes that pursuant to the plaint filed on 3rd September 2019 the plaintiff sought judgment against the defendant for the sum of Euro 180,078.92 due and owing on account of freight services rendered. That partial judgment on admission was entered for Euro 150,993.88 and by a ruling of 26th January 2021, the plaintiff was allowed to proceed with the execution of the partial decree.
5. It was argued that the plaintiff be allowed to proceed with execution since the assets are in the possession and ownership of the judgment debtor. And further that the existence of a debenture is not a ground for issuing a blanket stay of execution, that the defendant does not intend to settle the decretal amount and intends to hide behind NCBA Bank, and that the instant application is made in bad faith in an attempt to obstruct the cause of justice.
6. It was submitted for the plaintiff that the debenture is floating in nature and will only crystalize upon the appointment of a receiver, and before such appointment the assets remain free and the plaintiff is at liberty to execute against the defendant. Furthermore, clause 8 of the debenture provides for automatic conversion of the floating charge to a fixed charge upon any person levying distress or attempts to levy distress, attachment, execution or other legal process.
7. The application was heard by way of written submissions. The objector filed submissions dated 26th April 2024 while the plaintiff filed submissions dated 12th June 2024.
8. I have considered the application, the affidavit in response, the parties' rival submissions and the authorities cited. The issue which isolates itself for determination is whether the objector has made out a case that it is entitled to have legal and equitable interests of the goods proclaimed by plaintiff as the decree-holder.
9. The provisions of Order 22 Rule 51 of the [Civil Procedure Rules](#), under which the application is brought, require that the objector ought to prove it has a legal or equitable right to the defendant's assets subject to execution. The objector submits it is a secured creditor of the defendant's assets holding the duly registered debenture dated 13th September 2011, further debenture dated 23rd August 2012 and second further debenture dated 21st April 2015.
10. I have perused the copies of the debentures annexed to the objector's application, clause 8 provides for the crystallization and conversion of the floating charge to a fixed charge upon the happening of several events including but not limited to any person levying distress or attempt to levy distress, attachment, execution or legal process. The crystallization of the debenture was to happen upon the appointment of a receiver by the objector.



11. In my view, the objector, as per the provisions of Sections 107 and 108 of the [Evidence Act](#) bears the burden to prove that the debenture has crystallized and the necessary steps taken to convert the floating charge to a fixed charge. To my mind, before a floating charge crystallises the executing party obtains priority over the debenture holder.
12. In the case of [Mackenzie \(K\) Ltd v Pharmico Ltd](#) [1976] eKLR, it was held that:

“...A floating charge is valid as against execution creditors, save that if the execution creditor takes property in execution, e.g by seizure and sale by the sheriff, or obtains a garnishee order absolute (but not a garnishee order nisi) before the charge crystalizes, he obtains priority.”
13. Similarly, in [Diversity Lever East Africa Ltd v Mohanson Foods Distributors Ltd and Another](#) [2004] 1 EA 43 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... 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.”
14. The objector herein has not availed evidence to show what steps it has taken to convert the floating charge into a fixed charge as per the provisions of clause 8. In the circumstances, therefore, I agree with the plaintiff that in the absence of evidence to show the steps taken by the Objector, the floating charge remains as such and cannot be used to bar any execution of the defendant's assets.
15. Guided by the above decisions, and having established the floating charge has not crystallized, it follows that the bank cannot seek to lift the execution. The plaintiff has in its favour a judgment whose fruits it ought to enjoy. There is no evidence that the objector has taken any steps in the conversion of the floating charge to a fixed charge and therefore, has failed to demonstrate to the court it has a legal or equitable interest in the proclaimed goods.

Disposition

16. I find no merit in the application dated 9th August 2023. The same is dismissed with costs. The result is that the plaintiff is allowed to proceed with the proclamation and warrants of attachment of 3rd August 2023.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 19TH DAY OF SEPTEMBER 2024.

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P. MULWA

JUDGE

In the presence of:

N/A for plaintiff

Mr. Ogola for respondent

N/A.for objector

Court Assistant: Carlos

