



REPUBLIC OF KENYA



I & M Limited v Ufanisi Freighters Limited & 3 others (Civil Appeal E144 of 2021) [2023] KEHC 2058 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E144 OF 2021**

**F WANGARI, J
MARCH 2, 2023**

BETWEEN

I & M LIMITED APPELLANT

AND

UFANISI FREIGHTERS LIMITED 1ST RESPONDENT

PREMIER FLOUR MILLS LIMITED 2ND RESPONDENT

ATTA (KENYA) LIMITED 3RD RESPONDENT

MILLING CORPORATION KENYA (2009) LTD 4TH RESPONDENT

(Being an appeal against the Ruling and Order of the Chief Magistrates' Court at Mombasa (Hon. E.K. Makori, C.M.) dated 22nd September, 2021 in Mombasa Civil Case No. 1477 of 2017)

JUDGMENT

1. This is an appeal against the ruling delivered by Honourable E.K. Makori, Chief Magistrate (as he then was) on September 22, 2021. The appellant being dissatisfied with the said ruling has preferred this appeal. The appellant preferred four (4) extensive grounds of appeal in urging this court to set aside the ruling and order made on May 22, 2021 amongst them that: -
2. The Learned Magistrate erred in law and in fact in dismissing the Appellant's application dated July 5, 2021 as he failed to appreciate the following salient legal issues:
 - a. The Learned Magistrate failed to appreciate that the Appellant has a legal interest in the attached properties by virtue of the Fixed and Floating Debenture dated March 3, 2015.
 - b. The Learned Magistrate failed to appreciate that for the Appellant to be entitled to an injunction, it ought to have proved that the Floating Charge indeed crystallized.



- c. The Learned Magistrate failed to appreciate that one of the events that may lead to crystallization of the said floating charge was the execution of any final judgement or order against the assets of the 3rd Respondent or any decree, order, warrant, sequestration or distress against the said assets.
 - d. The Learned Magistrate failed to appreciate that the Appellant had indeed discharged the said burden of proving crystallization as the said assets had been proclaimed and attached pursuant to the decree passed on May 18, 2021.
 - e. The Learned Magistrate failed to appreciate that the Appellant's application could only be dismissed where the assets had been proclaimed or attached and sold in execution of the said decree.
3. Directions were taken and the appeal was disposed of by way of written submissions where both the Appellant and the 1st Respondent duly complied and relied on various decisions in support of their rival positions. The other parties though named as objectors did not participate either in the objection proceedings before the Lower Court and on this appeal.
 4. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968)* EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
 5. I have carefully perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the ruling ought to stand or otherwise I will carefully revisit the record.
 6. The 1st Respondent vide a decree passed by the Chief Magistrates' Court on May 18, 2021 proceeded to execute the same against the 2nd, 3rd and 4th Respondents herein. Warrants of attachment and proclamation having been issued, the Appellant was apprehensive that its securities would be carted off and sold and thus they filed objection proceedings through an application dated July 5, 2021. The application was heard and vide a ruling delivered on September 22, 2021, the Lower Court dismissed the said application. It is this ruling that precipitated the present appeal.

Appellants' submissions

7. The appellant had preferred four (4) extensive grounds of appeal but in its submissions, it condensed the grounds of appeal to two (2). The condensed grounds were that: -
 - a. The Learned Magistrate erred in law and fact by failing to recognize the legal rights and interests of the Appellant in the attached properties;
 - b. The Learned Magistrate erred in law and fact by misinterpreting and misdirecting himself on the law on crystallization vis a vis appointment of a receiver thereby reaching wrong conclusion.
8. The Appellant referred to the provisions of Order 22 Rule 51 (1) of the *Civil Procedure Rules* and the case of *Michira Messah & Co. Advocates v Katana Kalume Ndurya* [2021] eKLR on the requirements that has to be laid by an objector for any successful objection. It concluded that the Appellant had a



- legal interest in the attached properties by virtue of the fixed and floating debenture dated March 3, 2015 which had created a fixed and floating charge over the said properties. Citing the case of *Lochab Brothers v Kenya Furfural Co. Ltd* [1983] eKLR, the Appellant submitted that legal interest included the interest of a debenture holder who was entitled to file objection proceedings to stop the attachment or sale of assets secured by the debenture.
9. The Appellant further submitted that it had interest in the proclaimed properties because the security in the debenture had crystallized. In support of this, the Appellant referred to clauses 7.1 and 7.15 of the debenture dated March 3, 2015 on circumstances under which the charge shall crystallize. The Appellant further submitted that one of the events that will lead to crystallization is the execution of any final judgement or order against the assets of the 2nd Respondent or any decree, order, warrant, sequestration or distress against the said assets. Further reliance was placed on clauses 3.4, 3.4.2 and 3.4.4 of the debenture dated March 3, 2015 for the proposition that the charge had crystallized.
 10. The Appellant cited the cases of *Mackenzie (Kenya) Ltd v Pharmico Ltd* [1976] eKLR and *Menengai Rolling Mills Limited & Another v Blue Nile Wire Products Ltd & Another* [2019] eKLR for the proposition that the Appellant had priority over the attached properties because the same was yet to be sold. The Appellant submitted that since the properties had only been proclaimed and not sold, execution was yet to be completed.
 11. On appointment of a receiver as a condition precedent for crystallization, the Appellant submitted that appointment of a receiver is not the only event that may lead to crystallization of the charge. It therefore urged that the appeal be allowed with costs.

1st Respondent's submissions

12. For the 1st Respondent, it was submitted that the Honourable Magistrate (as he then was) exercised his discretion judicially and arrived at a correct decision. It submitted that the Appellant being a limited liability company and the claim based on debenture, the provisions of Order 22 Rule 51 (1) of the *Civil Procedure Rules* cannot be read in isolation of section 96 (20 of the *Companies Act* and sections 89, 91, 92 and 93 of the *Movable Property Security Act, 2017*.
13. Citing the case of *Kenya Chemical & Allied Workers Union v Packaging Manufacturers* [1976] Ltd [2014] eKLR, the 1st Respondent submitted that the debenture document was not compliant with the provisions of section 96 (2) of the *Companies Act*, Cap 486. The 1st Respondent further cited the case of *Sokhi International (K) Ltd v Giro Commercial Bank Ltd* [2006] eKLR for the proposition that the debenture holder cannot take the position that he will allow the company to continue to carry business and reserve the right while still permitting it to go on obtaining credit or preventing any one who deals with it from getting paid.
14. The objectors and the appellants are one and the same person who only change names to evade meeting their financial obligations. It further submitted that no evidence had been tendered to prove that the attached goods belonged to the Appellant or that it had any interest in the attached goods. The 1st Respondent contended that no evidence had been tendered to prove that the debenture had crystallized. Reliance was placed on clauses 7.1 and 7.1.5 as well as clause 8.2 of the debenture dated 3rd March, 2015.
15. The 1st Respondent submitted that clauses 3.4, 3.4.2 and 3.4.4 of the debenture must be read together with clauses 7.1, 7.1.5 and 8.2. Citing the case of *Landmark Port Conveyors Ltd v Buzeki Enterprises Ltd & Another* [2019] eKLR, the 1st Respondent noted that clauses 7.1, 7.1.5 and 8.2 of the debenture



was applicable to third parties in execution of decrees. The 1st Respondent urged the court to dismiss the appeal with costs.

Analysis and determination

16. After considering the pleadings, proceedings, submissions and the law, I find that there is only one (1) issue for determination: -
 - a. Whether the charge had crystallized to give the Appellant the right of first priority.
17. The application subject of the appeal was brought under Order 22 Rules 51 (1), (2) and (3), and Rules 52 and 53 of the *Civil Procedure Rules* (the Rules). Rule 51 of that order provides:
 - (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.
 - (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
 - (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.
18. From the provisions of the above rule it becomes clear that the Appellant needed to prove that it has legal or equitable interest in the goods the subject of the execution by the 1st Respondent. It is not denied that the 1st Respondent, through Makini Auctioneers Agencies, proclaimed various items of property of the 2nd Respondent on May 31, 2021.
19. It is not in doubt that there existed a debenture between the Appellant and the 3rd Respondent. It is equally not in doubt that in the said debenture, there was a provision as to when the floating charge shall be converted to a fixed charge (see clause 3.4 of the debenture dated March 3, 2015. Clause 8 of the debenture provided for appointment of receivers. The Appellant was required to adduce evidence to show that a receiver had been appointed. As was held in *Lochab Brothers v Kenya Furfural Co Ltd* [1983] eKLR which was extensively quoted by the Appellant and the 1st Respondent, the floating charge could only crystallize upon the appointment of a receiver.
20. In *Diversity Lever East Africa Ltd vs. Mohanson Foods Distributors Ltd and Another* [2004] 1 EA 43, whose facts are more or less similar to the facts of this case, 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. As no receiver had been appointed by the objector in the present case, the debenture had not crystallized. 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.”
21. Further in the case of *Savichem Africa Limited v General Printers Limited* [2019] eKLR, a similar application as the one subject of the present appeal was dismissed as no evidence of appointment of a receiver had been tendered. Since there is no evidence that the floating charge had crystallized, I see no reason to upset the Lower Court’s judgement.



22. The debenture was a contract between the Appellant and the 3rd Respondent. It is a cardinal principle of the interpretation of all documents that they must be read as a whole. A particular phrase or sentence cannot be read in isolation from the document as a whole (see the case of *Attorney- General v Prince Ernest Augustus of Hanover* [1957] AC 436 at [461]). It was therefore not open for the Appellant to cherry pick which clauses of the debenture it was going to give effect to. Clause 3 could not be read in isolation of other clauses such as clause 8.
23. Based on the foregoing, I will not interfere with the Lower Court's decision. On the issue of costs, the same follows the event as decreed by Section 27 of the *Civil Procedure Act*.
24. In conclusion thus, the trial court arrived at the correct decision. I do not see how the court can be flouted. The appeal therefore fails.
25. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -
 - a) The Appeal is hereby dismissed accordingly;
 - b) The 1st Respondent is awarded the costs of this appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF MARCH, 2023.

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F. WANGARI

JUDGE

In the presence of:

Wawire Advocate for the Appellant

Osina Advocate for the 1st Respondent

N/A by the 2nd, 3rd and 4th Respondents

Guyo, Court Assistant

