



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. E036 OF 2020**

**DESBRO (KENYA) LIMITED.....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**GENERAL PRINTERS LIMITED.....DEFENDANT/JUDGMENT DEBTOR**

**AND**

**I & M BANK LIMITED.....OBJECTOR/APPLICANT**

**AND**

**NCBA BANK KENYA PLC.....OBJECTOR/APPLICANT**

**RULING**

**Introduction**

**1. Desbro (Kenya) Limited**, the Decree Holder and the Plaintiff herein obtained judgment against the Defendant on 5<sup>th</sup> June 2020. The Plaintiff thereafter commenced execution proceedings which prompted two applications by the two Objectors, namely **I & M BANK LIMITED** and **NCBA BANK KENYA PLC** respectively.

**First application**

**2.** The first application is by a Notice of Motion application dated 17<sup>th</sup> March, 2021, filed by I & M Bank Limited which is the 1<sup>st</sup> Objector. It sought the following orders:

***a) A mandatory injunction do issue compelling High Class Auctioneers to return to the Objector forthwith, and deliver up the proclaimed and attached assets as particularized in the Proclamation dated 22<sup>nd</sup> February 2021 or any other assets set out in the Fixed and Floating Debenture dated 24<sup>th</sup> March, 2015 and in the Further Debenture dated 30<sup>th</sup> January, 2019.***

***b) There be a stay of execution by attachment, sale of property or otherwise in execution of the decree passed by this Court on 30<sup>th</sup> June, 2020.***

c) *This honorable court be pleased to raise and/or lift the warrants of attachment of movable property in execution of the decree and the warrants of sale of property in execution of the decree both dated 9<sup>th</sup> March 2021.*

d) *There be a stay of execution by attachment and sale of all the proclaimed and attached assets as particularized in the Proclamation by High Class Auctioneers dated 22<sup>nd</sup> February, 2021.*

e) *This honorable court be pleased to raise and/ or lift the attachment of the entire assets as particularized in the Proclamation by High Class Auctioneers dated 22<sup>nd</sup> February, 2021.*

f) *This honorable court be pleased to quash and declare the Proclamation by High Class Auctioneers dated 22<sup>nd</sup> February 2021 null and void ab initio.*

g) *Costs be provided for.*

2. The application is brought under **Section 1A, 1B and 3A** of the **Civil Procedure Act, Order 22 Rules 51 (1), (2) & (3)** and **Order 22 Rule 52 and 53, Order 40 Rule 1 and 2, and Order 51 Rule 1** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law. It is predicated on the grounds on the face of it and supported by an Affidavit sworn on even date by **PERIS WAIRIMU CHEGE**, the 1<sup>st</sup> Objector's Senior Legal Manager.

3. She deposed that by a Decree passed by this honourable court on 30<sup>th</sup> June, 2020 in the present suit, the Defendant was ordered to pay the Plaintiff the sum of Kshs. 17,940,334.02 and USD 168,634.79 being the sum of the decretal sum and the taxed costs. On 9<sup>th</sup> March, 2021, this Court issued a Warrant of Attachment of movable property in execution of decree for money and Warrants of sale of property in execution of decree for money. By a Proclamation dated 22<sup>nd</sup> February, 2021, High Class Auctioneers proclaimed the assets belonging to the Defendant as more particularized in the Proclamation.

4. She averred that by a Debenture dated 24<sup>th</sup> March, 2015, the Defendant created a Fixed and Floating Debenture for an amount of Kshs. 927,100,000.00 over all the assets of the Company which was duly registered at the Companies' Registry on 28<sup>th</sup> April, 2015. By a Further Debenture dated 30<sup>th</sup> January, 2019, the Defendant created a further Fixed and Floating Debenture for an amount of Kshs. 389,862,188.00 over all the assets of the Company and duly registered the same at the Companies' Registry on 8<sup>th</sup> February, 2019.

5. It was her contention that following the issuance of decree and warrants, the charge over the said assets has crystalized and the said crystallization has created a first priority right in favor of the 1<sup>st</sup> Objector over the said assets overriding any other party's rights including the Plaintiff herein.

6. By a Management Agreement dated 1<sup>st</sup> November 2019, in consideration of the 1<sup>st</sup> Objector financing the working capital requirements of the Defendant, the Defendant engaged the services of a Manager whose function was, *inter alia*, to render the management and operational services necessary to the Company for the benefit of all the creditors of the Company. In the course of the management of the Defendant, the 1<sup>st</sup> Objector obtained a list of creditors of the Defendant Company. It was noted that the Defendant is indebted to various creditors to the tune of Kshs. 402,688,976.40 and urgent orders are necessary to restrict such creditors from proclaiming, attaching, selling, advertising for sale, disposing of, transferring, selling by public auction or in any manner whatsoever dealing with the assets of the Defendant Company described in the said Debentures.

7. She deposed that the 1<sup>st</sup> Objector Bank is in the process of appointing an Administrator to take over the functions of the said Manager to further safeguard the assets secured by the said debentures. However, she is apprehensive that should the Plaintiff go ahead with the proclamation and attachment, the same will jeopardize the intended process of appointing an administrator. Further, that any such proclamation will

be illegal and unlawful as the Bank has a legal and/or equitable interest in the whole of the Defendant's proclaimed and attached assets by virtue of the said debentures.

8. She averred that under Clause 6.1. (f) and (h) of the Debenture dated 24<sup>th</sup> March, 2015, the Charge crystallized upon the decree being issued on 30<sup>th</sup> June, 2020 and under Clause 12.4 of the Further Debenture dated 30<sup>th</sup> January, 2019, the Charge also crystallized upon the decree being issued on 30<sup>th</sup> June, 2020. She reiterated that the Charge having crystalized, the Bank has a first priority right over the said assets overriding any other party's rights including the Plaintiff herein.

9. She averred that unless this application is heard urgently, the said assets described in the assets shall be sold thereby causing irreparable loss to the Bank.

### **Second application**

10. The second application is filed by NCBA Bank Kenya PLC, the 2<sup>nd</sup> Objector. It is the **Notice of Motion** dated 18<sup>th</sup> March, 2021 brought under **Order 22 Rule 51(1), 52 and 51 Rule 1, Sections 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the law**. The Objector had also filed a Notice of Objection, objecting to the proclamation of the properties set out in the proclamation dated 12<sup>th</sup> of March, 2021 issued by Garam Auctioneers to the Defendant/Judgment Debtor. The Party agreed to proceed with the Notice of Motion.

11. It is prayed that a stay do issue restraining the attachment, removal, sale, disposition or any other interference with all the properties listed in the Proclamation dated 12<sup>th</sup> March, 20221 issued by GARAM AUCTIONEERS pursuant to instructions issued to them by the Claimant/ Decree Holder pending hearing of the application.

12. The application is supported by an Affidavit sworn on even date by **STEPHEN ATENYA**, the 2<sup>nd</sup> Objector's Senior Legal Manager.

13. He averred that he was been informed by the Defendant that on 12<sup>th</sup> March, 2021 it was served with Proclamation Notices dated 12<sup>th</sup> March, 2021 in respect of various moveable assets located at the Defendant's premises. He stated that the 2<sup>nd</sup> Objector has a legal interest in the items proclaimed within the meaning of **Order 22 Rule 51(1)** of the **Civil Procedure Rules**, on the basis of several Debentures including one dated 3<sup>rd</sup> July, 2012 issued to it by the Defendant thus the proclaimed items are not available for attachment by the Plaintiff.

14. He contended that the 2<sup>nd</sup> Objector Bank has a prior security right which prevails over the rights of the Plaintiff and all other third parties as it registered its Debentures under **Section 92 of the Moveable Property Security Rights Act No. 13 of 2017**. Therefore, there is a real and imminent danger that the Plaintiff may execute at any time. He noted that failure to lift the said Proclamation notices on a most urgent basis would result in irreparable loss to be unnecessarily suffered by the 2<sup>nd</sup> Objector Bank as it is patently clear that the above noted properties ought not to have been proclaimed.

### **Response by the Plaintiff**

15. The Plaintiff/Decree holder responded to the 1<sup>st</sup> Objector's application vide a Replying Affidavit sworn on 31<sup>st</sup> March, 2021 by its Director **SUMAN KUMAR SENNIK**. However, the response applies *mutatis mutandis* to the 2<sup>nd</sup> Objector's case. He averred that the Application has been made in bad faith and is a deliberate attempt to obstruct the cause of justice contrary to the overriding objective of this Court without any justifiable cause and with the intention of further denying the Plaintiff herein the fruits of its judgment unlawfully. He stated that the Application is otherwise an abuse of Court process and does not merit the reliefs sought therein as the 1<sup>st</sup> Objector is culpable of distortion, misrepresentation and/or non-disclosure of material facts with intent to mislead this honorable Court into granting favorable

orders.

**16.** He deposed that the Plaintiff instituted the suit herein sometime in 2020 and subsequently obtained judgment in default on 5<sup>th</sup> June, 2020 as the Defendant failed to defend the suit. Thereafter, the Plaintiff proceeded to extract a decree for purposes of execution. The Defendant approached the Plaintiff through its counsel and requested that it be allowed to pay the decretal sum in installments and in this regard, it offered a payment plan which the Plaintiff accepted in good faith. However, the Defendant failed to honor the said payment plan and the Plaintiff opted to exercise its rights under the law to execute against the Defendant.

**17.** The Plaintiff proceeded to conduct an investigation as to the assets of the Defendant available for execution and it established that the following motor vehicles were owned by the Defendant and were free from encumbrance; KAZ 178L, KHMA 706N, KHMA 616E, KBA 317T, KAZ 667B, KBR 029S, KAZ 951B, KAK 790L, KMDD 024S, KMCC 384J and KAW 778S. As such, the Plaintiff proceeded to instruct Garam Auctioneers to proceed and attach the said motor vehicles together with any other movable properties of the Defendant that would be sufficient to satisfy the decree herein and acting on the said instructions, the auctioneers proceeded to proclaim the Defendant's goods.

**18.** He averred that the nature of the debenture produced before this honorable court by the 1<sup>st</sup> Objector is a floating debenture irrespective of the provisions of clause 3 (charging clause) which purports to create a fixed charge over all the assets of the company such as motor vehicles and machinery as a fixed charge cannot be created over circulating assets.

**19.** It was contended that a floating debenture only crystallizes upon the appointment of a receiver and/or an administrator under the Insolvency Act, 2015. However, as at the time of proclamation of the goods, the 1<sup>st</sup> Objector had not appointed an administrator and/or receiver and therefore the charge was yet to crystallize and in the premises, the said goods were available for attachment and the rights of the Plaintiff have to rank first to those of the Objector.

**20.** The Plaintiff noted that despite the provisions of clause 3.4 of the debenture that the floating charge would convert into a fixed charge upon occurrence of any events of default set out under clause 6 which included failure by the Defendant to have any judgment so entered against it settled within 7 days, clause 6 clearly provided that upon occurrence of the default event, the outstanding facilities would become payable and the debenture would become enforceable through appointment of a receiver under clause 7 thereof.

**21.** It was argued that it is clearly evident that the Defendant has defaulted in performance of its obligation under the debenture as envisaged under clause 6 of the debenture as the decretal sum herein was not paid within 7 days as envisaged under clause 6.1. (f) and the 1<sup>st</sup> Objector has allowed it to continue with the said default. He stated that at the time of proclaiming the goods herein, the said debentures were yet to crystallize and therefore the rights of the 1<sup>st</sup> Objector have to be subordinated to the Plaintiff's rights as far as the goods so proclaimed are concerned.

**22.** Further, that the motor vehicles herein were not encumbered as evidenced by the motor vehicle searches produced herewith. In his view, the 1<sup>st</sup> Objector ought not only to have had the motor vehicles registered jointly with the Defendant herein but ought to also have had hire purchase agreements prepared and registered. That in this instance, the motor vehicles were neither registered jointly with the 1<sup>st</sup> Objector nor are there any hire purchase agreements produced herewith by the 1<sup>st</sup> Objector thus the 1<sup>st</sup> Objector cannot lay any claim over the said motor vehicles.

**23.** In the premises, he averred that it is in the best interests of justice that this Court exercises its discretion in the Plaintiff's favor by dismissing with costs the Notice of Motion Application dated 17<sup>th</sup> March, 2021, vacating the orders and allowing the Plaintiff to proceed with the attachment of the said goods to allow it to recover the decretal sum herein.

## Submissions

24. The Applications were canvassed by both oral and written submissions.

### The 1<sup>st</sup> Objector's Submissions

25. In the 1<sup>st</sup> Objector's Written Submissions dated 16<sup>th</sup> April, 2021, it was submitted that on 24<sup>th</sup> March, 2021, the 1<sup>st</sup> Objector Bank appointed Mr. Ponangipalli Venakata Ramana Rao as the Administrator of the Defendant Company. The submissions were grounded on five issues as below:

#### (i) The Objector has a legal interest in the properties described in the Proclamation and Debenture

26. It was submitted that the 1<sup>st</sup> Objector having established a legal interest in the attached properties by virtue of the Fixed and Floating Debenture dated 24<sup>th</sup> March, 2015 and a Further Debenture dated 30<sup>th</sup> January 2019 which created a Fixed and Floating Charge over the proclaimed properties, **Order 40 Rule 1, 2 & 4 of the Civil Procedure Rules, 2010** entitles it to move this honorable court and obtain an order of injunction to stop the attachment and sale of the said properties. The 1<sup>st</sup> Objector stated that in **Lochab Brothers v Kenya Furfural Co Ltd [1983] eKLR**, legal interest was held to include the interest of a Debenture holder who is entitled to file Objection Proceedings to stop the attachment or sale of assets secured by the Debenture.

#### (ii) The Objector has interest in the proclaimed properties because the security in the Debenture has crystallized.

27. The 1<sup>st</sup> Objector submitted that it obtained a legal interest in the proclaimed properties by virtue of the Floating Charge which crystallized as a result of the said proclamation and attachment. It referred the court to **Clauses 6.1 [f] and 12.2 and 12.4** of the Debentures dated 24<sup>th</sup> March, 2015 and 30<sup>th</sup> January, 2019 respectively for the circumstances under which the Charge shall crystallize.

#### (iii) Crystallization and Conversion of Floating Charge

28. The 1<sup>st</sup> Objector reiterated that from the aforesaid clauses, it is quite clear that one of the events that will lead to crystallization is the execution of any **"final judgment or order"** against the assets of the Defendant or any **"decree, order, warrant, sequestration or distress"** against the said assets. It noted that it is also clear that for the Objector to be entitled to an injunction, it must prove that the Floating Charge has crystallized which burden the Objector has duly discharged. It relied on the case of **Lochab Brothers v Kenya Furfural Co Ltd [supra]** for the position that a security must first crystallize into a fixed security before any equity will be born for the debenture holder.

#### (iv) The Objector has priority over the said properties because the properties have not been sold.

29. Further, the 1<sup>st</sup> Objector contended that in view of the fact that the properties have not been sold by the Plaintiff in execution of the said decree, it has priority over the said properties and is entitled to an injunction to prevent them from being sold. It relied on the case of **Mackenzie (Kenya) Ltd v Pharmico Ltd [1976] eKLR**, where the court held, *inter alia*, that the rights of execution creditors only have priority over those of the debenture-holders where execution has been completed by sale of the attached property before the charge crystallizes.

30. Reliance was also placed on the **Lochab Brothers Case (supra)** where **Kneller JA** pronounced himself as follows:

***"What would be the effect, however, of that appointment after attachment and sale of Furfural's goods but before the proceeds of sale are paid out" The execution creditor would have priority because the floating charge on Furfural's assets created by the debenture crystallized by***

***appointment of the receivers after execution e.g., by seizure and sale by the broker.”***

31. Further, it was submitted that in the same case, **Chesoni Ag JA** opined as follows:

***“Since in the present case the respondent’s goods had only been seized and were not yet sold execution was not complete. The appointment of the receivers crystallized the floating charge by making it a fixed charge which took priority over the execution creditors’ interest”***

32. The 1<sup>st</sup> Objector also cited the case of **Menengai Rolling Mills Limited & Another v Blue Nile Wire Products Limited & Another [2019] eKLR** where Tuiyott J. appreciated that the right of an executing creditor ranks in priority over that of a debenture-holder only where execution has been completed by sale of the attached property before the charge crystallizes.

33. It was contended that in view of the authorities cited, since the properties have only been proclaimed, and have not been sold, execution is not yet complete. The 1<sup>st</sup> Objector reiterated that proclamation on the said properties crystalized the floating charge under **Clause Clauses 6.1 [f], 12.2 and 12.4** of the Debentures by making it a fixed charge which takes priority over the Plaintiff’s interest in the properties.

**(v) Appointment of a Receiver as a condition precedent for crystallization ..**

34. The 1<sup>st</sup> Objector rejected the Plaintiff’s contention that it has priority over the Defendant’s assets as against the bank since the 1<sup>st</sup> Objector had not appointed a receiver. It argued that all the authorities cited by the Plaintiff in that regard are High Court authorities and none has been cited from the Court of Appeal to counter the position as laid down in the **Lochab (supra)** and **Mackenzie (supra)** Cases.

35. It reiterated that the *ratio decidendi* in the said Court of Appeal cases is that once the floating charge becomes crystalized through any of the events of default mentioned in the Debentures, the Bank has priority over the assets of the Company unless the said assets have been sold. It submitted that this is contrary to the *ratio decidendi* in the High Court cases cited by the Plaintiff which is to the effect that the Plaintiff has priority over the charged assets which priority can only be superseded by the action of appointing a receiver. It noted that in the circumstances, the said Court of Appeal decisions are binding on this court under the doctrine of *stare decisis* unlike the said High Court decision which are only persuasive.

36. Further, it was submitted that more importantly, the said authorities are distinguishable from the case herein because the issue of appointment of a receiver is just but one of the events and not the sole event that may lead to crystallization of the charge.

37. During the oral highlighting of the parties respective submissions, learned counsel for the 1<sup>st</sup> Objector Mr. Wawire reiterated the foregoing and urged that its Notice of Motion dated 17<sup>th</sup> March, 2021 be allowed with costs.

### **The 2<sup>nd</sup> Objector’s Submissions**

38. In the 2<sup>nd</sup> Objector’s written submissions dated 26<sup>th</sup> April, 2021, it reiterated the averments in the Affidavit filed in support of its Notice of Objection. The 2<sup>nd</sup> Objector added that a similar situation arose in **Kenya Chemical and Allied Workers Union (Claimant/Decree holder) v East African Portland Cement Company Limited (Respondent/Judgment Debtor) & Kenya Commercial Bank Kenya Limited (Objector/Applicant) [2018] eKLR** where the court held that a Debenture holder who had registered its Debenture over movables under the **Moveable Property Security Rights Act No. 13 of 2017** had priority over an unsecured executing creditor. It argued that the authorities cited by the Plaintiff did not have this security component. Further, that under clause 5.2 of the Debenture, it automatically crystalized and became fixed charge on execution issuing.

39. Mr. Wafula, learned counsel for the Objector reiterated these submissions in his oral arguments

before this court. He added that the authorities cited by the Plaintiff were decided under the repealed Companies Act but the operating legislation now is the Movable Property Security Rights Act which introduced the concept of prior security rights by virtue of registration of debentures under that Act. Counsel stated that since the 2<sup>nd</sup> Objector's Debenture was registered under this Act, it makes NCBA have priority over the Plaintiff.

40. Further, counsel submitted that under **Section 560 of the Insolvency Act**, once a company is placed under administration, a statutory moratorium of all proceedings arises. Hence, the assets as proclaimed by the Plaintiff are no longer available for attachment or execution proceedings. He thus urged the court to allow the Objection raised by the 2<sup>nd</sup> Objector.

### **The Plaintiff's submissions**

41. The Plaintiff on its part filed two similar sets of submissions dated 9<sup>th</sup> April, 2021 in respect to the 1<sup>st</sup> and 2<sup>nd</sup> Objectors' application and notice respectively. It submitted on three issues as follows:

**a. Whether the Objector herein has a legal or equitable interest in the whole or part of the property attached in execution of the Decree.**

42. In addressing this issue, the Plaintiff formulated two other issues which it submitted on as follows:

**i. Whether the Objector's debenture is a floating debenture and whether at the time of proclamation of the goods it had crystallised**

43. The Plaintiff submitted that the debenture created herein was a floating debenture irrespective of it providing at clauses 4.5 and 4.6 that a fixed charge would be created over the plant and machinery. In its view, this is because a fixed charge cannot be created over circulating assets and reliance was placed on the pronouncement in that regard by the court in **Sokhi International (K) Ltd v Giro Commercial Bank Limited [2006] eKLR**. The Plaintiff submitted that the Objector's debenture was floating in nature and such a debenture can only crystallize upon appointment of a receiver. It was emphatic that in that before such appointment, the assets remain free and the creditors are at liberty to execute against the debtor. In support of this position, it relied on the case of **James Job Kihori Kahagi v Kencity Clothing Ltd [1977] KLR**. It was argued that in the latter case, the court went further on to find that where goods are attached before crystallization of a floating debenture, the attaching creditor has priority above the holder of the floating debenture.

44. Further reliance was placed on the case of **Savichem Africa Limited y General Printers Limited (2019) eKLR** wherein despite the debenture containing the following clause; "***If any judgment or order made against the Company (the defendant) is not complied with within seven (7) days or if any execution distress sequestration or other process is levied or enforced upon or sued out against any part of the charged Assets;***" the court found that the floating charge could only crystallize upon appointment of a receiver.

45. Further, the Plaintiff argued that despite the debenture at clause 5.2. providing 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 against any of such charged property, it was also clear that the debenture would become enforceable upon occurrence of an event of default under clause 14.1 and the same would be enforced through appointment of a receiver under clause 16 thereof. According to the Plaintiff therefore, the debenture was yet to crystallize since the 1<sup>st</sup> Objector had not appointed a receiver. Reliance was placed on the case of **Ayaz Hussein Mukhi v Sundip Patel & 3 others [2017] eKLR** where the court affirmed this position.

46. Further, the Plaintiff faulted the 1<sup>st</sup> Objector for not producing before this honorable court the letter of offer which is said to contain the events of default. In its view, this shows collusion with the creditor and condoning of the ongoing breach by the Objector to the detriment of the other creditors. The Plaintiff

supported this argument with the case of **Landmark Port Conveyors Limited v Buzeki Enterprises Limited & Another [2019] eKLR** which had similar facts to this case and the court held, *inter alia*, that the Objector therein had treated the defendant therein with velvet gloves thus putting the interests of other creditors at risk and jeopardy.

47. The Plaintiff reiterated that at the time of proclamation of the goods, the floating debenture was yet to crystallize hence the goods were free to be attached and the Plaintiff's rights rank first to those of the 1<sup>st</sup> Objector's.

ii. **Whether the motor vehicles were unencumbered and the Applicant has no claim over them.**

48. It was the Plaintiff's submission that the motor vehicle searches produced before this honorable court show that they were registered in the name of the Defendant and not jointly with the 1<sup>st</sup> Objector. Also, the 1<sup>st</sup> Objector has not produced any Hire Purchase Agreements in evidence to show that they have a claim against the said motor vehicles. The Plaintiff cited the case of **Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR** where the court found thus with respect to failure to have valid hire purchase agreements between the objector bank therein and the Defendant therein over the Defendant's motor vehicles and failure to be jointly registered as co-owners. In its view therefore, the 1<sup>st</sup> Objector has no claim over the said motor vehicles.

b. **Whether the Plaintiff's rights over the proclaimed goods rank first to those of the Applicant**

49. The Plaintiff further submitted that where goods are attached before the proclamation, the rights of the creditors rank first to those of the debenture holder. It was emphatic that its rights rank first to those of the 1<sup>st</sup> Objector as the proclamation was done before the crystallization of the floating debenture herein. It relied on the case of **Ayaz Hussein Mukhi v Sundip Patel & 3 others [supra]** where the court affirmed the foregoing and quoted with approval the case of **Diversity Lever East Africa Ltd vs. Mohanson Foods Distributors Ltd and Another [2004] 1 EA 43** as follows;

*"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."*

The court in the aforementioned case went further to find thus;

*"In the premises, it is plain that the Objector's application is untenable, for the reason that whereas the assets in question were charged to the Objector, it is not the case that the Objector's rights, which have not crystallized thus far, rank in priority over the Decree herein. The Notice of Motion dated 13 April 2017 is accordingly dismissed with costs."*

50. Further reliance was placed in the case of **Douglas Watson Vs. Kenya Cold Storage (Food) Limited v Commercial Bank Limited [2001] eKLR** where the court found as follows;

*"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"*

c. **Whether the Objector has met the threshold for the grant of the orders sought in the Notice of Motion Application.**

51. The Plaintiff submitted that in view of the foregoing, the Objector's Application herein has to fail and the Plaintiff be allowed to proceed with the execution process as at the time of proclamation of the goods the floating debenture was yet to crystallize and therefore the 1<sup>st</sup> Objector cannot lay any claim over the proclaimed goods. The Plaintiff further urged that the interim orders granted herein be vacated.

52. Counsel for the Plaintiff, Mr. Waigwa reiterated these submissions in his oral arguments before the court. He argued that the only issue before the court is when does a debenture crystallize? He was emphatic that this only happens upon the appointment of a receiver which had not been done in this case hence, the assets that were proclaimed were outside of the crystallization which happened *ex post facto*.

### **The Defendant's position**

53. On the part of the Defendant, learned Mr. Kivindyó stated that they are not opposed to any applications and as such, did not file any documents to that effect.

### **Analysis and Determination**

54. I have carefully considered the applications by the Objectors herein, the respective Affidavits in support of the same, the response by the Plaintiff as well as the respective rival submissions by the parties herein. I find that the only issue for determination is whether the Objectors' interest over the Defendant's attached property rank's higher to that of the Plaintiff.

55. It is evidently clear from the various duly registered Debentures annexed by the Objectors herein that they have legal interest in the assets which were proclaimed by the Plaintiff as the said assets are the subject of various Floating Charges created in favour of both Objectors. The said Debentures specifically provided for the circumstances which would lead to the crystallization of the floating charges.

56. In the Debenture dated 24<sup>th</sup> March, 2015, the Defendant created a Fixed and Floating Charge for an amount of Kshs. 927,100,000.00 over all the assets of the Company in favour of the 1<sup>st</sup> Objector. **Clauses 6.1 [f]** thereof states as follows:

***"6.1. The Bank shall cease to be under any further commitment to the Company in respect of any facilities that may be made available to the Company otherwise and the Secured Obligations shall immediately become due and payable on demand and the Company hereby agrees that it shall provide cash cover on demand for all its contingent liabilities of the Company to the Bank including, without limitation, liabilities in respect of all notes or bills accepted, indorsed or discounted and all bonds guarantees indemnities documentary or other credits or other instruments whatsoever from time to time issued or entered into by the Bank for or on behalf of or at the request of the Company on the occurrence of any of the following events (whether or not caused by any reason whatsoever outside the control of the Company) or if any of the following events may occur with the passage of time or giving notice:***

***[f] if any judgment or order made against the Company is not complied with within seven [7] days or if any execution, distress, sequestration or other process is levied or enforced upon or sued out against any part of the Charged Assets."***

57. In the Further Debenture dated 30<sup>th</sup> January, 2019, the Defendant created a further Fixed and Floating Charge for an amount of Kshs. 389,862,188.00 over all the assets of the Company in favour of the 1<sup>st</sup> Objector. **Clause 12.2 and 12.4** thereof states as follows:

***"12. The principal monies and interest and other moneys by the existing security and hereby secured shall immediately become due and payable without any demand protest or other notice of any kind all of which are expressly waived by the Company and the Company shall provide cash cover on demand for all contingent liabilities of the company to the Bank for all notes and bills confirmed accepted endorsed or discounted and all bonds guarantees indemnities***

*documentary and other credits or any instruments whatsoever from time to time entered into by the Bank for or at the request of the Company on the happening of any event stated hereunder (Events of Default):*

*12.2 if a distress, sequestration or execution either by virtue of any court order decree or process or otherwise howsoever is levied or enforced upon or issued against any part of the property and assets of the Company and shall not be removed or discharged within Fourteen [14] days of it being so levied or the Company commits any act or default by reason of which any such distress or execution might be levied enforced upon or issued against;*

*12.4 If any judgment or order made against the Company is not complied with in accordance with the terms of the judgment or order within seven [7] days unless a valid appeal has been lodged by the Company against such judgment or order or if any decree, order, warrant or process is issued or other action is taken whereby a distress attachment or execution is or may be levied or enforced upon or against any assets of the Company.”*

58. In another Debenture dated 3<sup>rd</sup> July, 2012, the Defendant created a further Fixed and Floating charge for an amount USD 1,423,000 and Kshs. 1,326,734,000/= over all the assets of the Company in favour of the 2<sup>nd</sup> Objector. Under **clause 5.2** of the Debenture, the floating charge automatically crystallized and became fixed charge upon execution issuing. It provides as follows:

**“5.2. Automatic Conversion**

*If, without the prior consent of the Bank, the Borrower creates any Security interest (other than a permitted security interest) over any of the Charged Property not expressed to be subject to a fixed charge under this Debenture, or attempts to do so, or if any person levies or attempts to levy any distress, attachment, execution or other legal process against any of such Charged Property, the floating charge created by this Debenture over the Charged Property the subject of such Security Interest or process will automatically, without notice, be converted into a fixed charge as soon as such event occurs.” (emphasis added).*

59. From the foregoing, it is that attachment and execution were some of the agreed circumstances under which crystallization would occur. This means that in the instant case, the act of proclaiming the charged property had the immediate effect of crystallizing the floating charges. The Debentures did not envisage the appointment of a Receiver by the Objector(s) as the point of crystallization as argued by the Plaintiff. In the case of **Lochab Brothers v Kenya Furfural Co. Ltd [supra]**, the Court of Appeal noted that once a Floating Charge becomes crystallized through any of the events of default mentioned in a Debenture, the Debenture Holder gains priority over the assets of a company unless the said assets have been sold and or execution is complete. This position was affirmed in the case of **Mackenzie (Kenya) Ltd v Pharmico Ltd [supra]**

60. In the instant case, it is evident that whereas the Defendant’s assets have been attached by the Plaintiff who is the executing creditor herein, the execution process has not been completed since the assets have not been sold. In the circumstances, I find that the Objectors’ interest in the attached assets of the Defendant takes precedence over that of the Plaintiff. (See **Menengai Rolling Mills Limited & another v Blue Nile Wire Products Limited & another [supra]**).

61. In the premises, I hereby allow the 1<sup>st</sup> Objector’s (I&M) application dated 17<sup>th</sup> March, 2021 according to prayers 5, 6, 7, 8, 9 and 10. I also hereby allow the 2<sup>nd</sup> Objector’s (NCBA) Notice of Objection and Notice of Motion dated 18<sup>th</sup> March, 2021 in terms of prayers 2 and 3. I order that each party to bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> MAY, 2021.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Wawire for the 1<sup>st</sup> Objector/ Applicant.*
3. *Mr. Ogunda h/b for Mr. Wafula for the 2<sup>nd</sup> Objector/ Applicant.*
4. *Mr. Waigwa for the Plaintiff/ Respondent/Decree Holder.*
5. *Mr.Kivindyo for the Defendant.*