



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL, COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.E010 OF 2020

PAUL M. MUNYAO

ADAMS K.B MUTHAMA

GEORGE K. KASHINDI T/A MUNYAO, MUTHAMA &

KASHINDI ADVOCATES.....DECREE HOLDER

-VERSUS-

CIVICON LIMITED.....JUDGMENT DEBTOR

AEA LIMITED.....1ST OBJECTOR

EQUITY BANK (K) LIMITED.....2ND OBJECTOR

RULING

1. There are two applications for objection proceedings dated **28th January, 2021** and **3rd February, 2021** by the 1st and 2nd Objectors, respectively. By court orders of **12th February, 2021**, it was directed that the two applications be heard together. That direction was informed by the fact that the two applications were objecting the attachment of same goods proclaimed vide a **Proclamation Notice** dated **21st January, 2021** and further to avoid piecemeal adjudications.

2. However, since the Objectors are claiming different rights on the proclaimed assets, it is clear they will attract different decisions even if embodied in one ruling. I will therefore consider every each application separately in the order of the time of filing. In that scheme of things, the 1st Objector's application which is dated **28th January, 2021** will be referred

to and discussed at "*the first application*" while the one dated **3rd February, 2021** that was taken out by the 2nd Objector is dealt with as "*The second application*".

The First Application

3. The **Notion of Motion** application by the 1st Objector, **M/s A.E.A Limited** is brought under the provisions of **Article 40, 50(1) and 25(c)** all of the **Constitution of Kenya, 2010**, **Order 22 Rule 51, 52 & 45**, **Order 51 Rules (1) & (4)** all of the **Civil Procedure Rules, 2010** and **Sections 1A, 1B & 3A** of the **Civil Procedure Act**. In that application, the first Objector seeks for the following orders:-

a) *Spent*;

b) *Spent*;

c) *The Decree Holder through their agents including Makini Auctioneers Agencies or any other Auctioneers, whether by themselves or their representatives, servants, agents, and/or assigns or howsoever acting be precluded from proclaiming or having proclaimed, from attaching, or selling the Objector's equipment in the said premises or the ones proclaimed in the said Notice of Proclamation dated 21st January, 2021, in answer of the Decree of this Honourable Court.*

d) The costs of this application be provided for.

4. The application is supported by **two affidavits** of **Nicholus Kithinji**, who is described as the 1st Objector's, **The Chief Executive Officer**. The first Objector is a limited liability company and claims to have legal and equitable ownership of all equipment in the premises on **L.R**

No.CR62958 some of which have been attached and/or proclaimed by the Judgment Creditor/Decree holder herein through its agents **Makini Auctioneers Ltd** vide a **Proclamation Notice** dated **21st January, 2021**.

5. The 1st Objector argued that it leased the parcel of land **L.R No.CR62958** and later purchased all the equipment in the said premises vide a sale agreement dated **12th June, 2019** at a consideration of Kshs.200 Million. Copies of the lease agreement, the sale agreement and a receipt for payment of the Kshs200million were attached as a bundled of documents marked as "**NK-1**" as evidence of transfer of ownership.

6. The 1st Objector further invited the court to have notice of the fact that a similar attempt on execution was altered by a temporary injunction granted by the High Court at Nairobi Milimani Law Court on **18th August, 2020** and requested the court to allow the instant application so that the temporary injunctive orders are not rendered nugatory.

7. In the **Supplementary Affidavit** sworn on **16th March 2021**, it is denied that the Objector and the Judgment Debtor colluded so as to defeat the execution and termed the allegations as grossly malicious and unfounded. It was reiterated that the lease agreement was never contested and that leads to a rebuttable presumption that the equipment in the leased premises was the property of the Objector and although the lease was not registered, the reason was because that the leased property had been registered as security in favour of Equity Bank.

8. Further, that the receipt for purchase is proof of ownership to both registrable equipment like the motor vehicles and non-registrable items i.e office equipment, computers, containers which payment was effected through E.F.T transfer. However, it was stated that the transfer on motor vehicles had not been completed for the reason that they had been registered in joint names of the Judgment Debtor and the respective banks and for the other items, only the purchase receipt can show their title of ownership.

9. As regards the 40ft containers, it was deponed that the same were purchase from **EN Group** and the purchase agreement as well as the quotation thereof was annexed to the application dated **3rd February, 2021** as "**NK-2**". With that evidence on record, the 1st Objector was of the view that it was now upon the Decree holder to show why they believed the goods to belong to the Judgment Debtor.

10. However, before I proceed to the response with regard to this application, I wish to point out that the 1st Objector filed yet another application dated **3rd February, 2021** in which the substantive prayer that is pending is for an order to compel **Makini Auctioneers Agencies** to render an account of all goods and equipment taken from the 1st Objector's leased premises and have the same returned to the same premises in the quantity and state they were taken.

11. This application is also based on the same grounds as those canvassed in the application date **28th January, 2021** with an addition that the 40ft containers had been procured by the Objector from **EN Group Ltd** and the quotation for supply together with contract thereof.

12. In my view, the prayer to render accounts can only stand and be issued if this court makes an affirmative conclusion on the first application that the 1st Objector has legal and equitable rights over the assets and properties proclaimed by the Decree Holder. However, I hold the view that the court can on its own motion determine the validity of the Proclamation Notices and whether or not they comply with the **Auctioneer Rules**.

13. For record purposes I will point out that the Decree Holder opposed the application dated **3rd February, 2021** by the 1st Objector vide a **Replying Affidavit** sworn on **11th February, 2021** by **Adams Muthama** and filed on the **12th February, 2021**.

14. Nonetheless, to support her two applications, the 1st Objector filed one set of submissions on **17th March, 2021** which were highlighted by the learned counsel, **M/s Mwangi** on **18th March, 2021**. She pointed out three issues which she seemed fit for determination, as being, *whether the notice of proclamation dated 21st January, 2021 and the process of attachment was legally incompetent, whether the Objector has legal and/or equitable interest in the equipment and lastly whether the Applicant/Petitioner is entitled to the orders sought.*

15. On the first issue, she submitted that the proclamation was vague and ambiguous in describing the items being proclaimed. For example, the notices identified some items as assorted metal parts and even never indicated their prices but merely stated that the price was to be advised later.

16. In view of the learned counsel, the proclamation for those reasons contravened the provisions of **Order 22 Rule 8** of the **Civil Procedure Rules** as well as **Rule 12** of the **Auctioneers Rules**. She invited the court to consider the case of **Hasmukh Sumaria & 6 Others –vs- Gut Ventures Ltd [2006] eKLR**, where the court declared proclamation notice as ambiguous for describing the goods attached as "All distrainable goods within this premises". Similarly, the court in the case of **Hughes Ltd –vs- Mohamed S. Kassam [2008]eKLR**, reiterated that the description of the goods attached as "all attached goods enough to satisfy the costs and decretal amount are hereby proclaimed i.e motor vehicles, office furniture, as being fatally defective for not itemizing the goods stating their status and their prices. And lastly, in the case of **Africa Merchant Assurance Co. Ltd –vs- Hezron Getuma Onsongo [2019] eKLR**, the court held that a notice of proclamation that had not stated the actual value of the items proclaimed but casually stated that the value was to be valued at the actual time of seizure which was not complacent with **Rule 12 (1)(b)**. Flowing from those

authorities, the 1st Objector concluded that the proclamation dated **21st January, 2021** was legally flawed and incompetent in law.

17. It is further submitted that the Auctioneer was under an obligation to investigate the ownership of the goods proclaimed before attaching them, failure of which resulted to dereliction of statutory duty and consequently marred the whole process of proclamation. In this case, it is submitted that the auctioneers did not first ascertain that the goods proclaimed belonged to the Judgment Debtor and the stronger case dictates that by virtue of the lease agreement all the goods in the premises are presumed to belong to the 1st Objector.

18. Lastly, the 1st Objector reiterated that the sale agreement and the receipt of payment thereof is clear evidence to show that by the time the equipment were transferred, the title had successfully passed to its favour and there is no evidence adduced to defeat the said transaction. He adduced judicial precedents which support this position.

Decree Holder's Case

19. For the Decree holder, the application was opposed on the basis of the **Replying Affidavit** sworn by **Adams Muthama** on **3rd February, 2021** and filed on even date. The position taken therein is that the first application is misleading and an abuse of the court process, only aimed at frustrating and ultimately preventing the execution of the subject decree while on the other hand assisting the Judgment Debtor to completely strip and transfer the movable assets from the reach of this court. In his view, the Objector has not shown any proprietary interests on the items already proclaimed since no transfer instruments have been tendered as evidence. He adds that if indeed the Objector had purchased the equipment on consideration of Kshs.200,000,000/= as purported, then more credible evidence such as RTGS payment advice slip would have been produced as opposed to a receipt which the deponent thinks was prepared at the Objector's offices.

20. As regards the lease agreement and the agreement for sale, the deponent faulted them as being merely desktop documents deliberately created by the Objector and the Judgment Debtor for purposes of misleading the courts and consequently defeat the interests of various persons holding various decrees against the Judgment Debtor. For the lease agreement, it is deposited that the same was not registered against the title to the parcel of the land or any evidence as regards the payment of the stamp duty shown. As such, it is submitted that the lease is nothing beyond a mere contract between the parties which cannot preclude claims by a third party.

21. On the other hand, the sale agreement is faulted for not indicating logbooks or any other forms of ownership instruments to the equipment which can rebut the annexed logbooks after a recent search which shows that the vehicles are still registered in the names of the Judgment Debtor.

22. With regard to the assertions on the existence of similar proceedings in Nairobi wherein an interim injunction was purportedly issued, it is the decree holder's assertion that those proceedings are not binding or related to the cause of action in the present matter, In any event, the assertions were made with a sole view of fetching sympathy for exercise of the court's discretion in favour of the Objector.

23. Lastly, it is the decree holder's view that both the Judgment Debtor and the Objector are related parties who share common directors and the objection proceedings taken are out are nothing more than mere smokescreen castigated to defeat the execution.

24. These grounds were further reiterated in the submissions filed on **18th March, 2021** which were also highlighted by Learned Counsel **M/s Gitari** on **18th March, 2021** with an addition that it was not upon the Objector to challenge the competency of the Proclamation Notice or the legality of the process of attachment which was exclusively within the purview of Judgment Debtor who has not participated in these proceedings. She relied on the case of **Precast Portal Structures –vs- Kenya Pencil Company Ltd & 2 Others [1993]eKLR** to submit that the burden was on the Objector to prove and establish its right to have the attached property released from attachment. In that view, the Objector ought to have shown that the property, when attached was not held in trust for the Judgment Debtor but that the Objector held the property on its own account. The same point of view was adopted in the case of **Stephen Kiprotich Koech –vs- Edwin K. Barchile, Joel Sitienei (Objector) [2019]eKLR**.

Determination of the First Application

25. With that summary of facts and submissions in mind, the only issue that isolates itself for determination is whether a case has been made out by the 1st Objector that it is entitled to or have legal and equitable interests on the goods proclaimed by the decree holder. I will however, endeavour to establish whether the Proclamation Notices were valid in light of **Rule 12** of the **Auctioneers Rules**.

26. It will be necessary to reproduce the provisions of **Order 22 Rule 51(1)** of the **Civil Procedure Rules** which provide on objection to attachment. It reads as follows:-

(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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.

27. A clear reading of the above provision leads to the conclusion that the Objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property.

28. The Objector's claim in this case is based on the lease agreement dated **30th November, 2018** and the sale of equipment agreement dated **12th June 2019**. By virtue of the said lease, it was the Objector's case that it leased the premises from which the goods were proclaimed and there is therefore a rebuttable presumption that the goods in the leased premises belonged to the Objector and not the Judgment Debtor. I have read through that lease agreement which is annexed as "NK-1" to the application dated **28/1/2021**. It provides that the lease would run for a period of six (6) years starting from **1st December, 2018** and goes on to describe the rights of each party including the manner on payment of rent under **Clause 3** of the **agreement**.

29. However, it is a common ground that the said lease is not registered against the title of the leased premises and I am satisfied that the agreement only prevails as a contract inter parties but gives no protection against the rights of the third parties. The third party rights I am referring to are such as the right of sale by a financier or other rights which attach directly to the title of the leased premises. In the instant suit, no such claim has been made by any of the parties herein. The only reason why the lease agreement was annexed to the application is to advance the presumption that the goods in the said premises were the goods of the 1st Objector. However, in my view this presumption is watered down by the existence of the alleged sale agreement which was executed seven months after the commencement of the lease.

30. By adducing the agreement for sale of the equipment, the Objector acknowledges that the equipment on the leased premises were owned by the Judgment Debtor for at least seven (7) months after the commencement of the lease. It was therefore incumbent for the Objector to proffer strong evidence to rebut the fact that the goods were still under the ownership of the Judgment Debtor. This is in line with the burden of proof under **Sections 107 and 108** of the **Evidence Act, Cap 80 Laws of Kenya**, that he who alleges must prove.

31. In view of the foregoing, it is expected that an Objector who commences objection proceedings will produce strong evidence of ownership of the subject goods to rebut the *prima facie* presumption of the ownership of the goods by the Judgment Debtor. It is therefore expected that an Objector will produce title documents or evidence that go towards establishing the Objector's claim to ownership of the subject goods. The issue of title to the goods cannot be left to speculation. In my view therefore, it is only after such strong evidence has been produced by an Objector that the evidentiary burden shifts to the decree-holder to show otherwise.

32. I have looked at the Proclamations Notice dated **21st January, 2021** produced by the Objector. Most of the items proclaimed and subsequently attached are Motor Vehicles, some in working conditions while others are not, office equipment and containers. At this point, a finding could have been made that where premises are rented, an executed lease over the

premises would have been a *prima facie* evidence of the items therein. As I indicated earlier, that presumption cannot stand since the Objector by implication through the sale agreement acknowledges the goods proclaimed, despite the existed of a valid lease belonged to the Judgment Debtor thereby necessitating the agreement for sale which is dated **12th June, 2019**. The sale agreement is between the Judgment Debtor herein and the 1st Objector. The relevant recital provides as follows:-

"A. The Vendor has agreed to deliver and sell to the purchaser motor vehicles, heavy duty machinery and other equipment and inventory (hereinafter called "the Equipment") more particular described in the schedule hereto;

THE PURCHASE PRICE

1. The purchase price of the equipment shall be a total of Kenya

Shillings two hundred million (Kshs.200,000,000) and shall be payable by way of RTGS to a nominated bank account.

2. The Purchase price shall be financed and shall be payable within ninety (90) days of:-

a) For the vehicles and equipment with logbooks, delivery of the original log books and duly executed transfer in the National Transport and Safety Board (NTSA) portal of the equipment.

b) For all other vehicles and equipment, duly executed and signed deeds of title transfer in a form acceptable to the buyer"

33. The agreement shows that the purchase price of the "equipment" was Kshs.200,000,000/= which was payable by way of RTGS within 90 days of delivery of original logbooks with respect to motor vehicles and duly executed deeds of transfer for all other equipment. The Objector further annexed a receipt indicating the payment of the Kshs.200,000,000/= prepared by the Judgment Debtor.

34. Looking at the agreement, several questions arise. *Firstly*, There is no RTGS from any bank as indicated under clause one (1) of the agreement, as evidence that the Kshs.200,000,000/= or any part thereof changed hands. The agreement had expressly indicated that the purchase price SHALL be payable by way of RTGS and the purported receipt of payment cannot in my view be evidence of any RTGS transfer. Secondly, the payment was conditioned on the premises that the Judgment Debtor hands over the original Log books or executed deeds of title for the equipment subject to the sale. None of these conditions were fulfilled for there is no original log books transferred to the

name of the Objector or deeds of title executed in its favour. The explanation which was offered is that the logbooks could not be transferred in the names of the Objector because they had been registered in the joint names of both the Judgment Debtor and Equity Bank and negotiations were on going seeking the banks consent to have the logbooks transferred. Nonetheless, no evidence has been adduced to buttress the assertion that a request has ever been made to the bank seeking it to accede to the logbooks being transferred. My view is that there may be more to it than what appears in that agreement. In other words the agreement is not convincing.

35. Lastly, the Counsel for the Decree Holder raised an issue on both the lease agreement and the sale agreement that they cannot be admitted as evidence against claims by a third party for not having a stamp duty as provided under **Section 19 of the Stamp Duty Act**. The said **Section 19(1) of the Stamp Duty Act** provides that “*an instrument chargeable with stamp duty shall not be received in evidence in criminal and civil proceedings unless they are duly stamped under the Act*”.

36. In light of the two agreements as considered together with the **Section 19 of the Stamp Duty Act**, the clear hypothesis in the instant case is that apart from the dates indicated on either the lease agreement or the sale agreement, there is nothing on record to show that those agreements were actually executed in the dates indicated thereon. They may as well have been prepared specifically for these proceedings or such other proceedings.

37. On a further scrutiny of the terms agreed on by the parties in both agreements, they show that those terms were not followed to the letter. Even if I was to uphold and follow the terms of the sale agreement, I find no specific motor vehicle or any other specific equipment that can be pin pointed as being subject of the sale agreement. The Court is not able to identify to which item the receipt produced relates. Therefore, in my view, the veracity of those documents is doubtful.

38. The foregoing notwithstanding, the log books for the vehicles proclaimed as annexed in the **Replying Affidavit** shows that the vehicles are registered in the joint names of the Judgment Debtor herein and Equity Bank Limited who are the *prima facie* owners of the Motor Vehicles for all purposes unless the contrary is proved. The contrary has not been proved. The fact that the joint registered owners of the attached Motor Vehicles in the log books are **Civicon Ltd** and **Equity Bank Ltd** as a matter of law, that is what this court takes judicial notice of.

39. However, I wish to add that the above finding is not geared towards determining the ownership of the subject Motor Vehicles except that the fact is important in this case as it assists the court to determine whether the Objector is entitled to or have a legal or equitable interest in the whole or part of any property attached in execution of a decree.

40. In light thereof, I find that the Objector has not established legal or equitable rights in the proclaimed goods either on the basis of the lease agreement or the sale agreement. Consequently, the objection by the 1st Objector be and is hereby dismissed with costs to the Respondent/Judgment Decree Holder.

The Second Application

41. The second Objection application is dated 3rd February, 2021 and filed on even date by the **Equity Bank (K) Ltd**. The substantive prayer pending therein is that the application seeks for an order that the decree holder through their agents including **Makini Auctioneers** or any other Auctioneer, whether by themselves or their representatives, servants, agents, and/or assigns or howsoever acting be precluded from proclaiming or having proclaimed, from attaching or selling the Objector’s equipment in the said premises or the ones proclaimed in the said notice of proclamation dated 21st January, 2021, in answer of the decree of this Honourable Court.

42. The bank claims that the goods do not belong to the Judgment Debtor but to itself owing to a debenture dated 6th May, 2015 and duly registered on its favour in addition to a legal charge over property title **number CR.62958** which is dated 27th May, 2015.

43. In the **Supporting Affidavit** of **Mr. Kariuki King’ori**, who is the Bank’s Legal Services Manager, it is averred that the debenture was created on all the current and assets of the Judgment Debtor to secure the payment of a sum of USD.47,010,000/=. It is the Bank’s case that by virtue of the floating charge, the Judgment Debtor’s assets including the one in stock are not liable to any proclamation or attachment.

44. It was further averred that some of the assets were registered jointly in the names of the Judgment Debtor and the Bank which cannot be subjected to proclamation. Such properties were listed to include, Motor Vehicles Registration Nos.KCC 940L, KCC 937L, KCC 943L, KCC 911Q, KCC 941L, KBL 617R, KCC 936L, KCC 937L, KCC 937L, KCC 938L and KCC 939L.

45. In its submissions, the bank submitted that by virtue of **Section 8 of the Traffic Act, Cap 403**, “*a person in whose name is a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle*”. Since the bank has shown that the logbooks are registered jointly in its name and that of the Judgment Debtor, then its rights prevails over the rights of the Decree Holder. That point of view was buttressed with excerpts from the cases of **Michael Kwena –vs- Raza Properties Limited & Another [2008]eKLR**, **Securicor Kenya Ltd -vs- Kyumba Holdings, Civil Appeal No.73 of 2002** and **Stephen Kiprotich Koech –vs- Edwin K. Barchiles Joel Sitiene [2019]eKLR**.

46. To enunciate the effect of the debenture, the bank relied on the case of **Kenya Chemical & Allied Workers Union (Claimant/Decree holder) –vs- East African Portland Cement Company Limited (Respondent/Judgment Debtor) & Kenya Commercial Bank Kenya Limited (Objector/Applicant) [2018]eKLR**, where the court observed thus;

“As evidenced above, it appears that the Judgment Debtor charged all its assets present and future to the Objector/Applicant. In the circumstances, I find the Objector has a privileged position over the said properties and as such the Objection/Application succeeds and I set aside the proclamation and attachment as prayed.”

47. The application was also opposed vide a **Replying Affidavit** sworn by **Adams Muthama**, a partner of the executing creditor on **11th February, 2021**. He termed it as misconceived and only meant to mislead the court so as to delay the execution or place the Judgment Debtor's assets from the reach of the Decree Holder. He says it is alarming that the a third party who is the 1st Objector herein purports to have purchased all the Judgment Debtors assets and equipment vide a Sale Agreement dated **12th June, 2019** while on the other hand the bank submits that there is a floating charge over all the Judgment Debtor's assets since the **year 2015**. This only means that at the time the sale agreement was executed, there was already a debenture in place and either way, Mr. **Muthama** purports that the objections herein are purposely meant to derail the execution.

48. The above notwithstanding, **Mr. Muthama** asserts that a search conducted in the Company Registry indicated that as at **10th February, 2021**, the Judgment Debtor had no known or registered encumbrances. The search which is dated **10th February, 2021** was annexed as **“MMK-2”**. These grounds are further reiterated in the decree holder's submissions filed on **16th March, 2021**.

Determination of the Second Application

49. As in the first application, these are also objection proceedings and the test is the same one set out under **Order 22 rule 51(1)** of the **Civil Procedure Rules**, and as reiterated in the determination of the said application. Once again, the question is has the Objector shown, on the balance of probabilities, that they are *entitled to or have a legal or equitable interest in the whole or part of any property attached in execution of a decree?*

50. However, before considering the ultimate question above, there is some preliminary issue which needs to be determined in limine. That is, at what stage can a debenture confer equitable rights to the debenture- holder over the rights of unsecured creditors? A **‘debenture’** is defined in the **Black's Law Dictionary** as:-

“A debt secured only by the Debtor's earning power, not by lien on any specific asset.....An instrument acknowledging such debt.”

51. The learned author of that Dictionary in further explaining the meaning of the word stated:-

“..The word is now, however, generally used to indicate an acknowledgment of indebtedness given under seal by an Incorporated Company, containing a charge on assets of the company.....”

52. Further in the case of **Robson -vs- Smith (1895) 2 Ch. 118** Romer, J thus stated:-

“Debentures constitute to what is called a “floating security” – that is to say, they allow the company to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture -holders, or, as it has been said they constitute a charge, but give a license to the company to carry on its business. So long as the debentures remain a mere floating security, or, in other words, the licence to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture -holders, provided that the dealing be completed before the debentures cease to be merely a floating security.”

53. The thinking in the above case is well captured in the case of **Sokhi International (K) Ltd -vs- Giro Commercial Bank Limited [2006] eKLR**, thus:

“In this case the plaintiff would still have power, notwithstanding the floating charge, to apply its assets to the liquidation of the debts incurred by it, such as the debt in this present case. In the case of Evans -vs- Rival Granite Quarries, Limited [1910] 2 K.B.979, it was stated: -

“The debenture holder cannot take up the position that he will allow the company to continue to carry on business, and reserve the right, while still permitting it to go on obtaining credit, of preventing any one who deals with it from getting paid.”

The court having found that the debenture created a floating charge is of the view that the Objector, having not intervened in regard to that debenture cannot now come at execution stage to stop the sale of the attached goods. Cases in point are Kahagi -vs- Kencity Clothing Ltd: [1982] KLR 465, and Diversey Lever East Africa Ltd - vs - Mohanson Foods Distributors Ltd & Another [2004] 1 EA 43 where it was held: -

“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 the 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 has been put in motion by an execution creditor, then the execution creditor has priority over the debenture holder whose charge has not yet crystallized”. (Emphasis mine)

54. From the above precedents, whose facts were more or less similar to the circumstances of the case herein, it is clear that it is only when a floating security becomes fixed that it constitutes a charge over the property or assets belonging to the company. Before that the property of the company may be dealt with in the ordinary course of business as if the debenture had not been given.

55. I have considered the copy of the debenture which is dated the **18th February, 2015** and annexed to the 2nd Objector’s application. Clause seven thereof creates the charges over the Judgment Debtor’s immovable properties, while **Clause 12** provides on crystallization and conversion of the floating charge. **Clause 12** provides that the floating charge would crystallize on happenings of a number of events as stipulated under **Clause 11** thereof or on appointment of a receiver under **Clause 13** of the debenture agreement. Some events which have happened since the execution of the debenture are worrying and can be better explained by the parties therein since at this point it has been left as mere speculation.

56. The one I would like to point out is the sale agreement between the first Objector herein and the Judgment Debtor where it was purported that the Judgment Debtor had sold its equipment entirely to the 1st Objector. In terms of **Clause 11.7** of the debenture agreement, disposal of material part of the Judgment Debtor would only happen on with consent of the debenture-holder lest the debenture would crystallize. The bank has not stated at any point it acquiesced to the selling of the Judgment Debtor’s equipment or has it been shown that the debenture has ever crystallized or converted to fixed charge.

57. Be that as it may, there is no evidence whatsoever in the affidavit of **Kariuki King’ori** to show that any of the steps which have to be taken by the debenture-holder i.e. the 2nd Objector, to convert the floating security which the Objector now holds into a fixed charge have been taken. Such steps as pointed out in the authorities cited herein above and as expressly provided under the debenture agreement would obviously include the appointment of a receiver at the instance of the debenture holder. Without such steps, a floating security remains just that and cannot be used to prevent an attaching decree holder from proceeding with the execution process. That ground of objection is therefore overruled.

58. The other ground taken by the 2nd Objector is that some of the assets are registered in the joint names of the Judgment Debtor and the bank. The log books provided are prima facie evidence that the bank has legal rights over the subject Motor Vehicles. I have gone through the log books annexed to the 2nd Objector’s application and confirm that a number of vehicles which have already been proclaimed are registered in joint names as purported by the 2nd Objector. It is therefore undisputed that the 2nd Objector is the co-owner of the suit Motor Vehicles, albeit in its capacity as the financier of the purchase of the said Motor Vehicles. The law as I understand it, is that a financier of the said Motor Vehicles, who in this case is the 2nd Objector, has a first lien over the suit Motor Vehicles and any attachment thereof would be against the law since they belong to a third party.

59. I therefore hold that the 2nd Objector has established ownership of the proclaimed Motor Vehicles and it is clear that the Plaintiff did not undertake due diligence to establish the legal ownership of the attached Motor Vehicles.

60. In the upshot, it is my conclusion that where it is established that a property is jointly registered in the name of a Judgment Debtor and another person, a decree holder cannot attach the said property in execution of a decree of the court.

61. In the premises thereof, the 2nd Objector’s application dated **3rd February, 2021** in respect of the Motor Vehicles jointly registered in its name and the name of the Judgment Debtor is hereby allowed. The proclamation and attachment of any namely Motor Vehicles Registration Nos. KCC 940L, KCC 937L, KCC 943L, KCC 911Q, KCC 941L, KBL 617R, KCC 936L, KCC 937L, KCC 937L, KCC 938L & KCC 939L in execution of the decree issued in favour of the decree holder is hereby set aside and attachment as ordered lifted forthwith. Execution on the other items save for the vehicles mentioned above, shall proceed accordingly.

62. As regard costs, I have already stated that the Respondent/Decree Holder is awarded costs as to the first application while in the second application, each party shall bear its own costs.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF JULY, 2021.

D. CHEPKWONY

JUDGE