



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. APPL. NO. 161 OF 2016**

**BANK OF AFRICA KENYA LIMITED.....APPLICANT**

**VERSUS**

**TECHSPA GENERAL SUPPLIES LIMITED.....RESPONDENT**

**AND**

**GUARANTY TRUST BANK(KENYA) LIMITED.....GARNISHEE**

**RULING**

1. These Originating Summons are proceedings commenced under the Provisions of Order 37 Rule 4 of the Civil Procedure Rules which provides:-

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee”.

2. The Summons which are dated 5<sup>th</sup> April, 2016 sets out the Claim by Bank of Africa Kenya Limited (**The Applicant or Bank**) against Techspa General Supplies Limited (**The Respondent or Techspa**) and the Affidavit of Charles Waiyaki sworn on the same day provides the evidence in support thereto.

3. On 30<sup>th</sup> August, 2010, Techspa executed a Debenture in favour of the Bank. The Bank asserts that Clauses 4 and 5 of the Debenture are of significance to the matter herein. Clause 4, in part, provides:-

“The Company as beneficial owner HEREBY CHARGES as a continuing Security in favour of the Bank:-

*‘THIRDLY all book and other debts revenues and claims (including bank deposits and credit balances) and the proceeds of sale of all the Land and Fixtures the Securities the stock-in-trade and all thins in action due or owing or which may become due or owing to or purchased or otherwise acquired by the Company and the full benefit of all rights and remedies relating thereto including but not limited to any negotiable or non-negotiable*

*instruments guarantees indemnities debentures legal and inequitable charges and other security reservation of proprietary rights rights of tracing liens and all other rights and remedies of whatsoever nature in respect of the same in all cases both present and future”.*  
(my emphasis)

4. And then the purport of Clause 5 is that the charge created by the Debenture would rank as a first charge on all the property and assets thereby charged and as regards all book and other debts revenues and claims (including bank deposits and credit balances), it shall constitute a first fixed specific charge.

5. It is stated by the Bank that as at 8<sup>th</sup> February 2016, Techspa was indebted to the Bank in the sum of Kshs.47,746,488 cents 75 which sum continued to attract interest at 28% per annum until payments in full.

6. The Bank also asserts that between December 2014 and December 2015 Guaranty Trust Bank (Kenya) ltd held sums of Kshs.2,292,392 cents 85 to the Credit of Techspa.

7. Techspa has not controverted any of the allegations above and this Court has no reason to disbelieve them.

8. Techspa having defaulted in its obligations, the Bank is entitled to call in its security. One of the remedies under the Debenture is a right to foreclose Techspa’s Bank Deposits and Credit Balances. In my Ruling of 16<sup>th</sup> February 2017, herein I observed:-

“The Debenture is in the nature of a charge and so the Applicant bank would in that sense be a chargee. Order 37 Rule 4 seems to permit a mortgagee (reads as well a chargee) who has the right to foreclose any charge to take out, as of course, an Originating Summons for such relief”.

9. I hold that the Bank has established its claim and is entitled to prayer 3 of the Originating Summons of 5<sup>th</sup> April, 2016. The Bank shall also have costs of these proceedings.

**Dated, Signed and Delivered in Court at Nairobi this 13<sup>th</sup> day of July,2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Omino for Applicant

N/A for Respondent

Carlos - Court Clerk