IN THE COURT OF APPEAL

AT NAKURU

(Coram: Madan, Kneller JJA & Chesoni Ag JA)

CIVIL APPEAL NO 78 OF 1982

BETWEEN

LOCHAB BROTHERS .....APPELLANT

AND

KENYA FURFURAL CO LTD.....RESPONDENT

JUDGMENT

The appellants/plaintiffs obtained judgment against the respondent/ defendant in the High Court. They applied for execution of the decree by attachment and sale of the defendant's property which was seized by the court broker on May 31, 1982. Before however a sale of the property took place the objectors were appointed joint receivers and managers (receivers) on June 15, 1982 of all the property and assets of the defendant by Development Finance Company of Kenya Ltd under powers contained in two debentures dated December 4, 1978 and October 30, 1981 executed by the defendant in its favour. Notice of their appointment as receivers was filed with the Registrar of Companies. The receivers objected to the attachment and sale of the defendant's property by the plaintiff under order XXI rule 53 of the Civil Procedure Rules. The plaintiffs having intimated to the court under rule 56 that they proposed to proceed with the attachment, the receivers took objection proceedings under rules 56 and 57 to establish their claim. Mbaya J allowed their objection. The plaintiffs have appealed.

The grounds of appeal are that the learned judge erred in law in upholding the objection proceedings, in not taking into consideration that the objectors had no *locus standi*, and they could not bring the proceedings in their own name as the proper objector was the Development Finance Company of Kenya Ltd, in holding that the receivers were properly appointed, in not distinguishing this case from *Mackenzie (Kenya) Ltd v Pharmico Ltd* [1976] KLR 270, and finally, relying upon the decision in *Colonial Blankets Trading Co v National & Grindlays Bank Ltd* [1962] EA 537, also in not holding that execution was complete when the defendant's goods were attached by the court broker.

With respect, the *ratio decidendi* in *Colonial Blankets* (supra) has no bearing on the proceedings here, nor does the decision in that case, in my opinion, say that execution is complete when the goods are attached. The decision in that case turned upon the effect of section 27(1) of the Sale of Goods Act (cap 31). The defendant therein purporting to act under two letters of the debtor before the magistrate's court clerk, acting in the role of a court broker, arrived at the debtor's shop to execute the warrant of attachment and sale issued by the court in execution of the decree. The court decided that the property in the goods was bound by the warrant from the time of its delivery to the office of the first class magistrate; as the defendant had notice of the warrant before and at the time of seizure it could not therefore avail itself of the saving provision contained in the proviso to section 27(1), the purpose of which is to provide for the

contingency where, before actual seizure can be effected after receipt by the sheriff of a warrant, the title to the goods passes without good faith or at a time when the person obtaining the title is aware of the existence of the writ in the sheriff's hands. Therefore the seizure and later disposal of the debtor's goods by the defendant was wrongful under and by virtue of the provisions of section 27(1).

There is a difference of title between a letter of hypothecation and a debenture. To hypothecate property is to charge it with the payment of a sum of money on the performance of an obligation, giving the person in whose favour it exists neither the right to the possession of the property, nor the right to sell it, but merely the right of realization by judicial proceedings in case of default by the person who made the hypothecation: I *Jowitt's Dictionary of English Law* (2nd Edn) p 933. A receiver appointed out of court under a debenture, as in the instant case, is an agent of all or any part of the property and assets thereby charged or agreed to be charged (clauses 8 and 10 of debentures). The receivers were appointed as agents of the defendant (ibid, clause 10).

> "It is also necessary to consider the effect of these letters of hypothecation and the nature of the rights which arose under them. Hypothecation of goods, at least in the sense in which the letters of hypothecation were given, is a means of pledging the goods as security for a debt or demand without the pledge or parting with the possession of the goods. There is very little case law in England, and virtually none in East Africa, on the nature of the rights created by hypothecation, but it would seem that the bank not infrequently makes use of this form of security. As regards goods in existence at the time of the hypothecation, since they are pledged as security an interest *in rem* must be created by the act of hypothecation; but as possession of the goods remains with the borrower, the lender does not by the mere act of hypothecation acquire any right to take possession of the goods nor any right to sell them, but merely a right by judicial proceedings to realize the value of the goods. If the lender seeks to obtain rights, such as a means of enforcement of the security without recourse to litigation, additional to the rights created by the act of hypothecation, then he must obtain those rights by agreement with the borrower."

The receivers would appear to have been properly appointed as the defendant allowed its goods to be seized by the court broker in breach of clause 6(f) of the debenture.

The execution is completed after seizure and sale of the attached property, not before. Until then it remains the property of the execution debtor, and no property in the attached goods passes to the execution creditor. On this aspect of the appeal, although the goods were under the control of the court broker but not having been sold they remained subject to the floating charge created by the debentures, which crystallised by the appointment of the receivers; therefore the decree-holder was not entitled to proceed with the attachment. *Mackenzie (Kenya) Ltd v Pharmico Ltd* (supra); 1 *Supreme Court Practice* (1982) pp 733-754, para 0.45/1/17. A floating charge is valid against execution creditors. 1 *Palmer's Company Law* (22nd Edn) 43-15, p 464. The more serious objection is that the receivers had no *locus standi* and they could not bring the proceedings in their own name. They were authorized to take proceedings only in the name of the company whose agents they were, or otherwise as may be deemed expedient (clause 10(a) of debentures). There was no attempt to show that it was deemed expedient to take proceedings otherwise.

A receiver cannot sue in his own name as receiver, since he has no property vested in him, and so acquires no right of action by his appointment. Nor can the court give a receiver leave to sue as receiver. 33 *Atkins Court Forms* (2nd Edn) p 147, para 20.

According to the practice a receiver was never allowed to originate any proceedings: *Parker v Dunn* (1845) 50 ER 195, 196. As a comparison, a receiver appointed in action, is to take care of, and receive the property which is put under his charge. He is not at liberty, and is not entitled, to bring an action in his own name; the reason being that he has no property vested in him. His appointment does not vest any property in him. *Sartoris v Sartoris* [1892] 1 Ch 1114, 22.

An example of proceedings jointly taken in the name of receivers and the company that created the charge by a debenture is provided by Civ App 9 of 1982 *Thomson Smith Aikman and Mbo-I-Kamiti Farmers*

Company Ltd v Bernard Kimani Muchoki (unreported). The security must however first crystalise into a fixed security before any equity will be born for the debenture holder.

The receivers were not entitled to take the objection proceedings in their name alone without joining the defendant, the owner of the goods, and the court ought to have non-suited them unless allowed to amend.

I have considered whether the receivers' incompetent proceedings can be saved from an order dismissing them in view of order I of the Civil Procedure Rules which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

I think no because the receivers have neither any rights nor any interests in the property. Their proceedings were not merely irregular but a nullity. They also did not apply to amend, either before the learned judge or to us, in order to rectify the defect by joinder of the defendant as a party with them.

I also think no because the debenture holder and the receivers would not suffer any real prejudice because if the attached goods are sold they would still be able to give notice of their objection to attachment of the property at any time prior to payment out of the court of the proceeds of sale of such property as laid down in order XXI rule 53; it may turn out to be a Pyrrhic victory for the plaintiffs who may still recover nothing.

For these reasons I would allow the appeal with costs, set aside the order of the High Court and substitute therefor an order dismissing the objection proceedings with costs.

As Kneller JA and Chesoni Ag JA agree it is so ordered

. **Kneller JA.** Lochab Brothers, the appellant plaintiff, is an Eldoret firm and Kenya Furfural Co Ltd, the respondent defendant, is a Nairobi limited liability company which was sued on April 20, 1982 by Lochab in the High Court at Eldoret for Kshs 1,168,554.50 for goods sold and delivered during 1981 and 1982 for which sum, with interest at 12% a year and costs, judgment was entered on May 18, 1982 in default of appearance.

Nine days later, May 27, Lochab applied to the same court for orders to attach and sell Furfural's property which included stores for its factory and a lathe machine which makes new parts (for something which was not specified). The orders were granted the same day.

Lochab and the Sirikwa Court Brokers and Auctioneers levied execution on May 22 (which was five days earlier) and again on May 31 (four days after the relevant orders) on the loose assets of Furfural to the value of Kshs 1,214,479 which is a shortfall of Kshs 954.60 from the amount claimed in Lochab's plaint. They took away everything save for the lathe machine which was too cumbersome to move.

There were other decree holders besides Lochab interested in the seized goods but there was no sale of them because the administration on behalf of the government, which has a majority shareholding in Furfural, held up the sale but by what authority it is not clear.

The Development Finance Company of Kenya, the Kenya Commercial Bank Ltd and the Industrial Development Bank were debenture holders of all the assets of Furfural and they appointed Joseph Kamande Muiruri and Joe Kamau Muchekehu joint receivers and managers of Furfural on 15, 18 and 22, 1982 respectively.

These two gave notice of objection to the attachment and sale on July 2, 1982 under order XXI rule 53 of the Civil Procedure Rules stating the nature of their interest as objectors was because they were joint receivers and managers of Furfural appointed out of court by the debenture holders.

Here is order XXI rule 53:

> "53(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 court of the proceeds of sale of such property give notice in writing to the court of his objection to the attachment of such property.
> (2) Such notice shall set out shortly the nature of the claim which such person makes to the whole or portion of the property attached."

Note, first, who may object, namely, any person to be entitled to or to have a legal or equitable interest in the attached property and, secondly, the time limit, which is 'any time prior to payment out of court of the proceeds of sale of the attached property'. There do not appear to be any reported decisions on this rule by the courts of East Africa save in *Noor Khan v Ramji Kanji & Co and Others* [1966] EA 506 in which Farrell J held, among other things, that order XXI did not apply to the attachment of debts.

Lochab told the deputy registrar of the High Court it wished to proceed with the sale of everything of Furfural's the brokers had seized, and when this was passed on to the objectors, they filed on August 26, 1982 a summons in chambers under order XXI rule 57 and order XLVI rule 6 for an order lifting the attachment. One objector, Joseph Kamande Muiruri, in a supporting affidavit attested that he and the other one were partners in a firm of Nairobi chartered accountants and they were appointed joint receivers and managers of Furfural by the Development Finance Company of Kenya Ltd on June 15, 1982 under the powers contained in its debentures of December 4, 1978 and October 30, 1981. Copies of the debentures and notices of their appointments filed with the registrar of companies were annexed to the affidavit. He asserted that the charge contained in the debenture crystallised over all the assets of Furfural on the date of their appointment which was June 15, 1982 which was three weeks after some of Furfural's loose assets were seized or two weeks after the order for their attachment and sale was granted. There was no affidavit in reply.

Order XXI rule 57 deals with the procedure to be followed by an objector if the attaching creditor proposes to proceed with the attachment. Order XLVI rule 6 provides for all interlocutory applications in a suit proceeding in a district registry to be made and taken before the district registrar but when the summons was heard there was a resident judge in Eldoret so he dealt with it.

Mr Curruthers appeared for the objectors and submitted that the registration of the first debenture on December 4 and the second on December 6, 1978 under section 99 of the Companies Act (cap 486) gave notice to Furfural's creditors, if they searched the register, of the interest of the debenture holder.

Mr Gautama, for Lochab, the decree holder, urged the judge to dismiss the summons because neither objector had any *locus standi*, they were not shown to have been lawfully appointed and, indeed, there was no indication of why they were appointed. Developing these, Mr Gautama added that a receiver and manager is an agent and cannot bring objection proceedings in his own name, the debentures did not provide for the denture holder to appoint receivers where Furfural's property was attached by law and the affidavit of the objector did not assert that Furfural's property or the debenture holder's interest was in jeopardy. Furthermore, he submitted the objectors had not proved the attached goods belonged to them and they had a greater right to them than the decree holder. The goods were seized by the bailiff and execution was complete before they were appointed. Lochab seized the property under a judgment of the court before the objectors' notice was filed.

Mbaya J in his ruling of October 18, 1982 rejected Mr Gautama's submissions and allowed the application of the objectors with costs.

He held that these objectors had the right to sue (with respect, he meant to bring the proceedings before him) in their own name and *Carver v MacJohn* [1938/39] 18 KLR, 97, Lucie-Smith J did not apply. They had a legal interest in the assets that were attached. The Development Finance Company of Kenya had an equitable interest in them. He found that there was nothing to suggest the receivers were illegally or improperly appointed. He was also of the opinion that when the Development Finance Corporation of Kenya became aware of the attachment of Furfural's assets it felt its debentures were in jeopardy which was sufficient reason for their appointment of these receivers and managers.

Finally, he agreed with Simpson J (as he then was) that until the attached goods are sold an objector may apply for the attachment of the goods to be raised. *Mackenzie (Kenya) Ltd v Pharmico Ltd* [1976] KLR 270. He cast aside Mr Gautama's arguments that Mackenzie was wrongly decided.

Lochab appealed and in its memorandum began by claiming Mbaya J erred in law when he sustained the objection and then went on to set out Mr Gautama's submissions as the remaining grounds of appeal.

At the hearing, Mr Aggarwal and Mr Kwach, the advocates for Lochab and the objectors, in effect, added little to what had gone before, so I now turn to the issues in the appeal.

Could these objectors, if the Development Finance Company of Kenya appointed them receivers and managers of the company under clause 9 of the deed or any provision of law, bring these proceedings in their own name? Mr Kwach relied on *Queensway Trustees Ltd v The Official Receivers and Liquidator of Tanneries of Kenya Ltd* (1982-88) 1 KAR 128, as authority for somebody other than the company or its debenture holder having the right to bring proceedings in its own name in matters relating to either or both of them.

Queensway Trustees Ltd were appointed trustees for the debenture stockholders of the company by a Trust Deed sealed by them all to secure Kshs 1,600,000 furnished to the company for its finances by the debenture stockholders. They filed a summons in chambers for directions under section 224 of the Companies Act (cap 486) for the disposal of the proceeds of a sale of the company's land which both an unsecured creditor and Queensway Trustees Ltd, a secured creditor, claimed. It did not bring objection proceedings, it was not appointed receiver and manager of the company by the debenture stockholders and there was no objection to its applying in its own name which, in fact, had been specifically provided for in the agreement for sale of the land. So in my judgment, that is not an authority for anything relevant to this appeal.

Lucie-Smith J held in the Supreme Court of Kenya in *Carver v MacJohn* [1938/9] 18 KLR 97 a receiver appointed under a debenture by a company in favour of a creditor had no right to sue in his own name the landlord of a company for the return of some of the company's chattels which the landlord purported to distrain on the company's premises for arrears of rent, or for damages in lieu. The company's deed charging its property and assets was dated June 8, 1936. The debenture holder appointed Carver to be receiver and manager of the property charged. He was specifically given powers of:

> "taking possession, collecting and getting in the property charged by the debenture and for that purpose taking any proceedings in the name of the company or otherwise".

Here in this appeal the receivers and managers have the same powers according to clause 10(a) of the relevant deeds.

On January 16, 1937 the landlord in *Carver v MacJohn* (ibid) distrained for rent and his agent, Bemister, seized and disposed of the goods of the company.

On April 12, 1939 the creditor debenture holder ratified by deed Carver's appointment.

Lucie-Smith J followed the English authorities before 1939 on the point. They held that a receiver acquires no right of action because he has been appointed as such, so he cannot sue in his own name as receiver, and the court cannot authorize him to do so. He must maintain the action in the name of the person or persons entitled to sue, who would be the one who has the legal or equitable title on which the action is founded. The fact is, the property which is put under his care and the income which he is entitled to receive does not vest in him. Lindley LJ in *Rhodes v Dawson* (1886) 16 QBD 548, 554 (CA); Fry LJ in *Re Sacker, exp Sacker* (1888) 22 QBD 179, 185 (CA); Chitty J in *Re Sartoris's Estate* [1892] 1 Ch 11, 14, 15 (Ch) and Lindley LJ at p 22 (CA).

There are cases in which the receiver acquires a right of action in the course of his receivership but not in consequence of it alone eg, if he is the holder of a bill of exchange he had a right to sue at law in his own

name; Lord Esher MR in *Re Sacker* (ibid) 183; or if as receiver he is possessed of chattels and they are unlawfully removed from him. Fry LJ in *Re Sacker* (ibid) 185.

Does it make any difference (as Mbaya J thought) that the receivers and managers were objecting in their own names and not suing? In my view it does not. Lindley LJ declared it was clearly a mistake to make a receiver of a business the claimant in an interpleader summons: *Rhodes v Dawson* (ibid) 552: because the issue was between the owner of the business and the plaintiff.

The issue here was which had the better right to these goods?

Before execution it was between Furfural and Lochab and after the debenture holder appointed these receivers and managers it was between the Development Finance Company of Kenya and Lochab but never between the receiver and managers of Furfural and Lochab.

The mistake was *bona fide* but the objectors had notice of it before Mbaya J and took no steps to rectify it and in my view it would not be right for this court to interfere at so late a stage under order I rule 9 or 10 as Mr Kwach invited it to do.

So on that ground alone this appeal must succeed but as there are other weighty grounds which were fully argued they should also be tackled.

The next was that the receivers and managers had been improperly appointed. Their appointment was made out of court and was not by way of motion in a debenture holder's action for their appointment as in *Campbell v London Pressed Hinged Company Ltd* [1905] 1 Ch 576. This being so, it is the debenture deed which governs the propriety or otherwise of their appointment. Here Development Finance Company Ltd of Kenya had under clause 9 the power to appoint receivers and managers of the property and assets of the company to be charged when the debenture became enforceable and that, according, to clause 8, was when Development Finance Company of Kenya wrote to Furfural and informed them the principal amount of the loan provided for in the agreement then outstanding was due and payable instantly or Furfural committed a breach of the covenants or agreements contained or implied in the debenture on its part to be performed and observed. Now if Development Finance Company of Kenya had not written to Furfural in that vein and Furfural had not committed any such breach these receivers and managers were illegally appointed. There were matters that Lochab and the court normally could not and would not know and Furfural and the debenture stockholder would, so that onus of proving the appointments were lawful was on the latter. They did not discharge that onus, and in my judgment. This ground also succeeds.

Next I turn to the complaint that the receivers and managers were unlawfully appointed because Furfural's assets were not shown to be in jeopardy. This is necessary if the debenture holder has not appointed the receiver and manager under clause 8 or 9 of the deed, namely, because, under clause 8, it had written to Furfural and said the balance of the loan was payable and due instantly or Furfural was in breach of its covenants or agreements, then if its right were a legal one it could make the appointment when it chose to do so but if it were an equitable one it must show good reason why the court should at its instance take possession by a receiver appointed by the court. One good reason is the anticipated acts of an execution creditor which brings in whether or not the security is in jeopardy. *Wildy v Mid Hants Rly Co* 16 WR 409; *Campbell v London Pressed Hinge Company Ltd* (ibid) 583.

Returning to the facts in the application before Mbaya J and this court, however, it will be recalled that the objectors were not shown to have been appointed under clause 8 and 9 of the deeds or any statutory provision and there was no application to the court to appoint them, so whether or not the security of the debenture holder was in jeopardy was irrelevant.

Lochab's next two grounds of appeal were:

> "5 The learned judge erred in not distinguishing the present case from that of *Mackenzie (Kenya) Ltd v Pharmico Ltd*.

6. The learned judge erred in not holding that the execution was complete when the defendant company's assets were attached by the court broker."

Earlier in this judgment it was noted that objection may be taken to attachment and sale of property in execution of a decree at any time prior to payment out of court of proceeds of the sale of that property by any person who claims to be entitled to have or to have a legal or equitable interest in the whole or part of the attached property. Order XXI rule 53(1) Civil Procedure Rules. The objectors made such a claim and the proceeds of the sale of the property had not been paid out of court before they did so.

When the warrant to attach and sell the goods of Furfural was delivered to Sirikwa Court Brokers and Auctioneers to execute it the warrant bound the property in it: section 2(1) and (2) of the Sale of Goods Act (cap 31). Attachment is to be by actual seizure if it is movable property other than agricultural produce. Order XXI rule 38. Here execution was perfected in obedience to a judgment and decree of the High Court. There was no fraud or bad faith alleged against Lochab the decree holder. Anyone else who acquired or acquires title to the goods in good faith and for valuable consideration is not prejudiced by the delivery of the warrant to the court broker if, when he acquired his title, he had no notice of the delivery of the warrant to the broker and that it remained unexecuted in the hands of the broker. See the proviso to section 27(1) of the Sale of Goods Act (cap 31). Thus, a bank had to pay damages for conversion of goods it knew were bound by delivery of such a warrant by a decree holder to someone authorized to execute it but seized them under two letters of hypothecation to it of these goods by the judgment debtor. *Colonial Blankets Trading Co v National & Grindlays Bank Ltd* [1962] EA 537, 541 Edmonds J.

Here the receivers and managers for Furfural were appointed and registered by the Development Finance Company of Kenya Ltd after Furfural's goods had been attached but not sold, it is true, but they had not seized the goods at any stage so the decision in *Colonial Blankets Trading Co v National & Grindlays Bank Ltd* (ibid) does not apply.

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 crystallised by appointment of the receivers after execution eg, by seizure and sale by the broker. *Mackenzie (Kenya) Ltd v Pharmico Ltd* [1976] KLR 270, 274 Simpson J.

And what is it if the debenture holder appoints the receivers and managers after the broker gets the warrant and or after he has attached the goods which are the security for the loan but before their sale? The floating charge is valid and has priority over the seizure by the broker *Palmer's Company Law* (21st Edn) p 404: Simpson J in *Mackenzie (Kenya) Ltd v Pharmico Ltd* (ibid) 274 D to F inclusive.

For these reasons I would allow the appeal and I agree with the orders proposed by Madan JA

Chesoni Ag JA. In April 1982 the appellants, Lochab Brothers filed suit No 53 of 1982 against the first respondent Kenya Furfural Co Ltd in the High Court at Eldoret claiming Kshs 1,168,554.60 for goods sold and delivered and/or services rendered by the appellants to the first respondent in 1981 and 1982. The first respondent failed to enter appearance and an *ex parte* judgment was entered in favour of the appellants as prayed in the plaint with interest at 12% pa. The appellants obtained a decree against the first respondent and were then granted warrant of attachment and sale of the first respondent's movable property over which Development Finance Company of Kenya Ltd had a floating charge through two debentures. The relevant debentures are dated December 4, 1978 and October 30, 1981 and there is no dispute that these debentures were duly properly registered in time at the Companies Registry under the Companies Act (cap 486). The execution proceedings were levied. On May 22, 1982 and on June 15, 1982 the second respondents Joseph Kamande Muiruri and Joe Muchekehu both of Pannel Bellhouse Mwangi & Co were appointed receivers and managers of all the property and assets charged to DFCK Ltd with powers to act jointly and severally and they were entitled to exercise all the powers conferred upon receivers and managers by the said debentures and by statute and otherwise.

On August 26, 1982 the second respondents filed a chambers summons under order XXI rule 57 and

order XLVI rule 6 objecting to the attachment and sought an order lifting the attachment on the goods attached by Sirikwa Court Brokers. The objection application was heard by Mbaya J who allowed it with costs. This appeal is from Mbaya J's ruling. The six grounds of appeal are as follows:

1. The learned judge erred in law when he upheld the objection proceedings.
2. The learned judge failed to consider and properly evaluate the arguments put forward by the plaintiff's advocate.
3. The learned judge erred in law when he failed to take into consideration that the objectors had no *locus standi* and could not bring proceedings in their names and that the proper objectors were Development Finance Company of Kenya and not the receivers.
4. The learned judge erred in holding that the receivers were properly appointed.
5. The learned judge erred in not distinguishing the present case from that of *Mackenzie (Kenya) Ltd v Pharmico Ltd*.
6. The learned judge erred in not holding that the execution was complete when the goods of the defendants' company were attached by the court brokers.

Mr Aggarwal for the appellants said that he adopted the arguments advanced by Mr Gautama before Mbaya J. Let me first consider ground 4 that the receivers were not properly appointed. Clause 9 of each of the two debentures provides that at any time after this security has become enforceable DFCK may by writing appoint any person whether an officer or agent of DFCK or not to be a receiver of the property and assets of the company upon such terms as to remuneration and otherwise as DFCK shall think fit. Clause 8 of each debenture stipulates when all the moneys and liabilities intended to be secured under each debenture becomes immediately payable and that is (b) if the company shall commit a breach of any of the covenants or agreements therein contained or implied on its part to be performed or observed. One of the covenants to be observed is 6(f) which forbade the company to transfer, assign charge mortgage lease sublease or otherwise part with the possession of the charged property and assets or with any part thereof except in the ordinary course of business or with the prior written consent of DFCK. Mr Aggarwal informed us that except for one machine all the property attached had been removed from the first respondent's premises and was with the court brokers. The attachment of the goods was by a court order and it was not clear whether covenant 6(1) referred to only voluntary parting with the goods. Nevertheless there was no dispute whether or not DFCK's security had become enforceable and whether or not the appointment of the receivers was proper.

Ground 6 raises the question 'when is execution complete?' Mr Aggarwal submitted that execution is complete when the property is attached and sale is a mere formality. Mr Gautama had in the High Court relied on section 27 of the Sale of Goods Act (cap 31). I would agree with Mr Kwach for the respondents that section 27 of the Sales of Goods Act has no application here as that Act applies only to goods as defined therein. Section 27 of that Act is therefore not of general application. Mere attachment of property does not constitute complete execution. Execution is completed by seizure and sale and not by seizure alone - (*Palmer's Company Law* (22nd Edn) p 464).

At para 17/1/10 of the *Supreme Court Practice* (1982) it is stated as follows:

> "A debenture usually creates a floating charge on a company's assets, and only where the charge has been crystallised - eg by appointment of a receiver by seizure and sale do the rights of the debenture holder have priority over those of the execution creditor."

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 crystallised the floating charge by making it a fixed charge which took priority over the execution creditors' interest.

As to ground 5 the facts in the case of *Mackenzie (Kenya) Ltd v Pharmico Ltd* [1976] KLR 270 differ from those in this case as in that case the bank itself and not the receiver was the objector, but what was said by Simpson J (as he then was) in the *Mackenzie* case on completion of execution and crystallising of a floating charge is relevant, especially the passage at p 274 which reads:

> "When a debenture has created a floating charge over the whole movable property of a company which is a going concern, it attaches to the property as it varies from time to time. If any of the company's property is subsequently attached in execution that property, although in the custody of the court broker, remains the property of the company and therefore subject to the floating charge. On the appointment of a receiver the charge crystallises; that is, it becomes a fixed charge over the movable property of the company as at that date including any attached property which has not yet been sold."

In my opinion any distinction of the *Mackenzie* case is of no consequence.

In ground 3 Aggarwal repeating what Mr Gautama said in the lower court emphasised the submission that the second respondents had no *locus standi* and could not bring these proceedings in their own names as the proper objector and DFCK. Clause 10 of the two debentures provided that the receivers appointed were agents of the company (first respondents). Clause 10(a) reads as follows (referring to the receivers).

> "Generally to take possession or collect and get in all or any part of the property and assets hereby charged or agreed to be charged and for that purpose to take proceedings in the name of the company or otherwise as may be deemed expedient."

The purpose of appointing a receiver is not for the benefit of the debtor, but for protecting the appointing debenture holder's interest. A receiver therefore wears two hats that is the debtor's and the debenture holder's. But even then it cannot be said that in bringing the objection proceedings the receivers were exercising the powers conferred onto them by clause 10(a) of the debentures; that they were collecting taking possession of and getting in all or part of the charged property and assets of the company and so in doing that they could take proceedings either in the name of the company or in their own names especially when clause 10(a) provides for their acting as the company's and not debenture holder's agents. In their notice of objection under order XXI rule 53 they stated that their interest was as joint receivers and managers appointed by DFCK Ltd, KCB and IDB Ltd, who were debenture holders of all of the judgment debtor's (first respondent's) assets, but was that enough to entitle them to object in their own names? Did they have a place to stand on (*locus standi*) in the matter as agents of the company in protecting the debenture holders' interest?

When the objection application came up for hearing Mr Gautama's (for the appellants) first objection was that the application was by receivers and not by the debenture holders DFCK and that the receivers had no right in law to sue in their names. There was therefore a non-joinder of DFCK Ltd. The objection to non-joinder of the debenture holders was therefore raised at the earliest opportunity. There was however no application by the respondents to amend the chamber summons by joining DFCK Ltd as the objector. Was the non-joinder fatal to the objection proceedings? The respondent's counsel urged us to cure the omission with order I rule 9 which reads as follows:

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

In *Quresh v Patel* (1951) 18 EACA 1 the plaintiff, a tenant in common with his brother of a plot of land, sued alone for recovery of rent thereof without pleading co-ownership. The question of co-ownership was raised in the defence and at the trial the plaintiff admitted it. The defence called no evidence and argued that the action was bad for non-joinder. The plaintiff's application for leave to amend the plaint and join his brother at the close of defendant's case against the refusal was dismissed and the Court of Appeal for Eastern Africa in dismissing the appeal said (p2):

> "… there is an Indian case cited by Mulla at p 468 (10th Edn) the report of which is not available where it appears to have been held that if a plaintiff in spite of objection raised persists in the suit without joining the absent parties the suit will be dismissed. ((1930) *Kantichandra v Rahman* 127 IC 59)".

In my view this is exactly the position in this case. As it is stated in the *Supreme Court Practice* (1982) p 207, para 15/6/2, which is similar to our order I rule 9, that order has not altered the legal principles with regard to parties to action, and, in no way qualifies the necessity for having before the court the proper parties necessary for determining the point at issue. Indeed, a mere misjoinder or non-joinder which is capable of being cured will not defeat a claim and is no defence, but that is not the case here. In this case the receivers have no interest, legal or equitable in the attached goods. The legal interest in the goods is held by the debenture holder ie DFCK Ltd. That being the case the receivers were not entitled to bring objection proceedings against execution creditors without joining the holders of the legal interest in those goods as parties to the action. The receivers had no *locus standi* in the matter and their action was a nullity in law. In my opinion the third ground of appeal succeeds.

The second and first grounds of appeal automatically succeed following the success of the third ground.

I agree with the judgment of Madan JA which I had the advantage of reading in draft and would allow this appeal, set aside the High Court order and in substitution therefor dismiss the objection proceedings. I would award costs of the appeal and objection to the appellant.

Dated and deliverd at Nakuru this 21st day of November, 1983.

C.B MADAN

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

Z.R CHESONI

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Ag, JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR