



Key Freight Limited v Abdi; Middle East Bank Kenya Limited (Applicant) (Civil Appeal 32 of 2019) [2025] KEHC 18988 (KLR) (22 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 32 OF 2019
TM MATHEKA, J
DECEMBER 22, 2025**

BETWEEN

KEY FREIGHT LIMITED APPELLANT

AND

MOHAMMED ABDI RESPONDENT

AND

MIDDLE EAST BANK KENYA LIMITED APPLICANT

RULING

1. Before me is the Notice of Motion brought under order 22 rule 51 (1) rule 52, order 40 rule 1 &2, order 50 rule 1 and 2 of the Civil procedure rules Section 1A ,1B, 3A, 63 (c) (e) of the Civil Procedure Act Article 50(1), 40 (1) and 159(2) (b) of the Constitution.
2. The application is dated 20th June 2025 accompanying the Objection of the same date by the objector applicant and the applicant seeks orders that the court be pleased to unconditionally raise or lift the attachment of all the attached properties in execution of the decree herein as being properties charged to the applicant/ objector.
3. The grounds are on the face of the application that it came to the attention of the applicant/ objector of the issuance of a proclamation notice dated 16 June 2025 and warrants of attachment by Moran auctioneers in relation to properties charged and held a security by the applicant objector under a duly registered debenture dated 6th January 2022 between Hacienda Logistics Limited, the applicant objector and the appellant of US dollars 500,000 plus accrued interest.
4. According to the objector, the proclamation is in violation of the objector /applicant’s legal rights over the attached properties and that it is a stranger to the appeal filed herein by the appellant against the respondent; that the financial facility and accrued interest covered under the debenture is yet to be fully



repaid; that the applicant /objector stands to suffer irreparable loss in its business if the attachment of its charged properties in execution of the decree in this matter is not lifted.

5. The application is supported by the affidavit of Elizabeth Ong'are the credit manager of the applicant/objector. They have attached the debenture dated 6th January 2022 between the objector and Hacienda Logistics Limited and Middle East Bank Kenya Limited. At clause 2:1 , the charging clause the company is the beneficial owner of charges in favor of the bank for the payment and discharge of the secured obligations all estates and other interests in the freehold leasehold and other immovable property including buildings wheresoever situate now or hereafter of the company... vehicles , plant machinery whether or not fixed on immovable property... tools. chattels and all movable assets whatsoever, including any held under any hiring hire purchase retention of title or leasing agreements etcetera... all the chattels now or at any time hereafter hired leased or rented by the company to any other person together in each case with the benefit of the related hiring leasing or rental contract and any guarantee indemnity or other security for the performance of the obligations of any person under or in respect of such contracts.... all stocks ,shares, bonds, debentures loan capital of any kind whatsoever, ...goodwill and called for capital trade names, brand names registered and unregistered, benefits of all licenses, concerns, and authorizations which the company may attend time and from time to time up to the payment of any money or release vesting or transfer of any other property, or present and future book debts and other debts and all rentals and royalties...etc.
6. The application is opposed through the replying of Jane N WAIRIMU a legal officer at Kenyan Alliance Insurance Company Limited the insurer of the respondent decree holder. The respondent draws to this court's attention the failure by the applicant objector to comply by the directions of this court to serve the application upon the respondent within three days of grant of interim orders and that it was only after counsel for the respondent perused the CTS that they came across the orders that were issued in this court; that this is an inexcusable failure which constitutes laches and reveals a deliberate strategy to undermine justice through ambush, procedural delays and tactical concealment therefore obstructing the lawful execution of the decree.
7. That besides , it is deponed that the advice of counsel is that the objector has not demonstrated that the proclaimed vehicles are covered by a fixed charge; That assets under a floating charge remain executable in the ordinary course of business until crystallization which the objector has not proven. It is also deponed that this debenture purporting to charge all of the appellant /judgment decree debtors assets as created fraudulently and as part of a conspiracy between the objector and the appellant judgment debtor to defeat the course of justice and prevent the respondent decree holder and by extension Kenyan Alliance Insurance Company Limited from realizing the fruits of the judgment that this in itself undermines the principles of fair dealing and ought to be set aside as unconscionable and contrary to justice.
8. It is deponed further that there is an unhealthy relationship between the objector and Middle East Bank Kenya Limited and another company by the name Ace Freight. That the objector is managed by one Isaac Njiru Mwigie who is also director of Ace Freight a company formed through a merger between the appellant judgment debtor and Hacienda logistics; That the dual roles of Mr. Mwigie demonstrate a deliberate scheme to shield the appellant judgment debtor's asset from execution by creating a sham debenture in favor of Middle East Bank Limited where the said Mwigie exercises significant control.
9. It is deponed further that in prior execution attempts at Makindu SPMCC 152 of 2017 the managing director of Hacienda Logistics and the said Isaac Njiru Mwigie swore affidavits which are annexed, objecting to the execution claiming no association between Hacienda logistics and their appellant judgment debtor asserting that Key Freight Limited were merely previous tenants at their commercial premises in Embakasi. It is deponed that these affidavits were false and concealed material facts as Ace



freight formation through a merger between the appellant judgment debtor and Hacienda Logistics with Mwige as a director confirms their association That their perjury misled the lower court and obstructed the lawful execution of the decree. The court was urged to dismiss the objection.

10. Elizabeth Ong'are swore a further affidavit where she depones that on the advice of counsel under a floating debenture the rights of a secured creditor take priority over those of a judgment creditor ;That under floating debenture one of the events which trigger crystallization is the levying of distress execution against the charged assets; That no evidence has been placed before the court to support the claim that the applicant's objectors debenture was a conspiracy to defeat the cause of justice and therefore this remains a baseless allegation That the alleged inextricable relationship between the applicant objector and the appellant is supported by annexures which are totally noncompliant with the rules of electronic evidence and that the court is invited to strike them out; that in any event even if it is demonstrated that the applicant objector and Ace Fright share a common director the relationship does not in any way stop the appellant from charging its properties to the applicant objector.
11. Jane N Wairimu swore further affidavit in which she attached the latest CR12 For Ace Freight Limited confirming that Isaac Njiru Mwige is a director. This is to support the averment that Isaac Njiru Mwige manages the applicant/ objector ,Middle East Bank Kenya limited and Ace Freight Limited formed through a merger between the appellant judgment debtor and Hacienda Logistics. She attracts that this is Evidence of a fraudulent conspiracy to frustrate the respondent decree holder's lawful execution because the CR12 demonstrates the long standing Directorship of Isaac Njiru Mwige Ace Freight Limited contradicting his prior affidavit in Makindu SBMCC #152 of 2017 denying association with the appellant judgment debtor thus evidencing a deliberate scheme to shield assets through a sham debenture.

Parties filed written submissions through their respective counsel.

12. For the applicant objector the main issue for determination Is whether or not the applicant objector has met the threshold for granting orders lifting the attachment of all the properties of the appellant charged in its favor.
13. The applicant objector relies on several authorities but more importantly on clause 2:1 as read with clause 2 :4 (b) of the debenture which provides that one of the events which could trigger crystallization of the floating charge would be the levying of execution or other process against the charged assets.

For the respondent four issues are set out for determination;

Whether or not the objectors are entitled to or have a legal or equitable interest in the whole of the attached property; whether or not the execution creditor is entitled to proceed with the attachment and sale of the attached property; whether or not the applicant objector's debenture over the judgment debtor's assets is tainted by fraud and conspiracy rendering it un enforceable; and which party should bear the costs of this proceedings.

14. The respondent also relies on several authorities and proceeds to point out to the court that the debenture is a private contract exclusively binding Hacienda logistics, the judgment debtor and the objector; that it has express terms making the objectors ability to enforce security entirely contingent on the debtor's punctual performance of specified obligations. It is submitted that clause 6.1 (e) at page 17 of the debenture commits the judgment debtor to comply with any judgment or order against it within seven days of its issuance, and a related covenant that any suspension of payments, moratorium, or inability to pay debts as they fall due immediately terminates the debentures benefit.
15. It is submitted that in this case judgment was entered against Key Freight Limited yet the seven day compliance window lapsed without the judgment debtor performance: That this was a clear default



but the objector took no steps to crystallize its floating charge neither did it serve notice of enforcement on the debtor and failed to appoint a receiver as the debenture expressly permits. It is submitted that by permitting the judgment debtor to carry on trading after this default the objector has effectively waived or compromised its right reserved under the debenture leaving the floating charge uncrystallized and its security unenforceable against both the debtor and 3rd party creditors.

16. It is submitted that this is evidence of the collusion between the contracting parties where the objectors deliberate in action in the face of an obvious breach suggests a purpose other than the proper enforcement of contractual rights as it renders the debenture a sham device designed to shield the judgment debtor's assets from lawful execution. It is further submitted that the judgment debtor's failure to comply with clauses of the debenture and the objectors refusal to enforce its contractual remedies demonstrates a fundamental breach of the debentures conditions; That equity will not allow a security instrument to be used as both a sword and shield when its core obligations have been ignored: That in this case the judgment debtor has failed to honor its side of the bargain but the objector consistently declines to trigger its contractual rights and that both parties appear to prefer to lock horns behind a wall of mutual non-performance rather than face the consequences of defaulting the debenture.
17. The respondent relies on Sokhi International (K) Limited vs Giro Commercial Bank Limited [2006]eKLR where court cited from *Evan v Rival Granite Quarries Limited (1910)* ... 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 anyone who deals with it from getting paid
18. I have carefully considered the rival submissions, the rival affidavits and the record; the issue for determination is whether the applicant has made a case for the lifting of the attachment in the execution of the decree here in; whether there are grounds rendering the objector's debenture over the judgment debtor assets unenforceable.
19. In my considered view the objection dated 20th June 2025 and the attendant application are grounded on the strength of the debenture in particular clause 2:1 as read with clause 2:4. These clauses provide what assets are charged and what would trigger crystallization. It is not in dispute that one of the events that would trigger crystallization is the event of an execution of a decree such as the decree in this case.
20. It says that the floating charge created by Clause 2:1(b) shall automatically and without notice be converted into a fixed charge in respect of any charged asset Subject to the floating charge inter alia ... If and when any person levies or notifies the company that it intends to levy a distress, execution, sequestration or other process against this charged assets .
21. I have perused the proclamation by Moran Auctioneers. It lists 10 m/vehicles in the schedule of movable property. According to this clause, the moment the proclamation was made the floating charge became a fixed charge over these motor vehicles.
22. On the other hand, clause 6 of the debenture provides for EVENTS OF DEFAULT. At 6:1 it says without prejudice to the right of the bank to demand the repayment of any facilities made available to the company which are repayable on demand ,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 or 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, endorsed , and 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 reasons whatsoever outside the control of the company):

(e) If any judgment order made against the company is not complied with within seven 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 and not discharged or lifted within seven days

23. My plain reading of 6:1 is that there are certain events that trigger the situation where the objector ,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 or otherwise and the secured obligations shall immediately become due and payable on demand...in effect the end of the debenture where the Bank calls out for what is due to it's from the Company. It is not something that the bank has a choice about: Clause 6:1 (e) presents court related events: a judgment order which must be complied with within 7 days , or an execution not discharged or lifted in 7 days : these are such events as the one indicated in the warrants of attachment herein where the appellant was ordered by a decree of the court passed on the 12th April 2024 to pay to the plaintiff the sum of Kenya shillings one million one hundred and twenty four zero forty two Ksh 1,124,042. This event triggered clause 6:1 of the debenture. The appellant (the company) did not comply within the requisite 7 days i.e. by the 19th April 2024, yet the objector applicant did not call the appellant out in accordance with clause 6:1 of the debenture.
24. The events of 2:4 and those of 6:1 cannot be activated in isolation. In my considered view they go hand in hand . The objector failed to act when it was required to it cannot choose when to do so when it is clearly written in the debenture what ought to be done.
25. Surely the objector cannot be allowed to apply some clauses and not others of the debenture. There is no explanation for that failure to act by the objector,
26. True, the objector has come to seek the lifting of the attachment . However, one can see that that comes second after the requirement for compliance with a judgment order in the hierarchy of default events under Clause 6:1 (e). This position in Clause 6:1 and 6:1(e) in the debenture supports the position that before the charge has crystallized, the judgment creditor has priority over the charged assets.
27. In the circumstances I am in agreement with the submissions that while the objector enjoyed protection under clauses 2:1 as read with 2:4 of the debenture , the failure by the objector to act in accordance with clause 6:1 as read with 6: (e) in the first instance, rendered the debenture unenforceable in vis a vis the appellant.
28. In the circumstances the application is therefore untenable and is refused with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA CTS THIS 22ND DECEMBER 2025

MUMBUA T MATHEKA

JUDGE

