

**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**COMMERCIAL & TAX DIVISION**

**ARB NO. E042 OF 2022**

**M&R CONSULT**

**LTD.....DECREE**

**HOLDER**

**VERSUS**

**MHASIBU PROPERTIES**

**LIMITED.....JUDGEMENT DEBTOR**

**AND**

**MHASIBU SACCO SOCIETY**

**LIMITED.....INTERESTED PARTY**

**RULING**

1.The decree holder filed the notice of motion dated 25.4.2024 under **Order 22 Rule 8(1) of the Civil Procedure Rules**. It seeks to execute an arbitral award dated 9.2.2022, adopted as a

decree on 30.5.2023, to recover Kshs. 135,327,407.08/- as of the date of the application.

2.The decree holder seeks the following specific orders: -

**(2) an Order for the attachment and sale of the property known as L.R. No. 2/406 (Orig. 2/69/2) Kilimani, Nairobi (subject property) in execution of the Judgment and Decree issued on 21.7.2023.**

**(3) an Order that the Decree Holder takes first priority over the existing Charge dated 8.7.2019 over the subject property to Mhasibu Savings and Credit Cooperative Society Limited.**

**(4) an Order directing the judgment debtor to produce the documents and material relating to the purported debt transaction between it and the interested party and the subject Charge as per the Notice to Make Discovery on Oath dated 25.4.2024.**

**(5) the court be pleased to settle the terms of sale of the subject property and**

**a notice of settlement of terms of sale be issued.**

**(6) warrants of attachment and sale do issue to Betabase Auctioneers or otherwise or as may be renewed from time to time.**

3.The application is supported by the affidavits sworn by **Stephen Onchiri Nyamato** on 22.4.2024 and 16.4.2025 and written submissions dated 14.5.2025.

4.In brief, the background is that in 2013, the decree holder and the judgment debtor entered into a contract for the provision of professional consultancy services for a commercial office building in **Kilimani, Nairobi** (L.R. No. 2/406). A dispute ensued after the the decree holder claimed that it delivered 75% of the work but the judgment debtor failed to pay, leading to arbitral proceedings commenced in December 2017.

5.The application is premised on the following grounds: -

(1)The 2019 charge was a fraudulent preference and a transaction between related parties

executed during the arbitration to shield the property from execution.

(2)The interested party owns the company that owns the judgment debtor, hence the charge was not a bona fide commercial transaction.

(3)There is no evidence that any loan was advanced when the charge was created.

(4)The charge does not specify the principle amount secured and is based on past consideration which is legally untenable.

6.The decree holder faulted the judgment debtor and the interested party for not producing the underlying loan documents despite the discovery notice.

7.The decree holder relied on **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR** on finality of arbitral awards; **Kenya Akiba Micro Financing Limited v Ezekiel Chebii [2012] eKLR** on the court's power to make inferences when evidence is concealed; **Rufus & another v African Banking Corporation Limited [2024] eKLR** on the requirement that a charge must be supported by actual consideration

and **Margaret Njeri Muiruri v Bank of Baroda [2014] eKLR** on the court's power to interfere with unconscionable or oppressive contracts.

## **Responses**

- 8.The judgement debtor opposed the application through a replying affidavit sworn by its director, **James Aggrey Ojwang** on 2.7.2024 and written submissions dated 21.5.2025.
- 9.The interested party also opposed the application through a replying affidavit sworn by its legal manager, **Ferdinand Wanga Makani** on 25.7.2024 and primary and supplementary submissions dated 10.4.2025 and 30.7.2025.
- 10.The decree holder highlighted that from the judgment debtor's financial statements for 2022 and 2023, there is no reference to any loan advanced in monetary form concurrently with the charge by the interested party.
- 11.The judgment debtor and the interested party asserted that the charge was created on 8.7.2019 to secure a principal sum of Kshs. 76,350,824, well before the arbitral award was adopted as a decree. They contended that the registered

charge is sufficient proof and that the doctrine of privity of contract applies to the extent that the decree holder cannot benefit from nor enforce the rights emanating from the charge.

12.The judgment debtor stated that the interested party financed the initial purchase of the subject property; that it created a dual financing facility in return for financing the subject property establishing both equity (shareholding) and debt and that it is the interested party's debt facility that was regularized through registration of the charge.

13.The judgment debtor denied that fraud claims, posing that it their intention was to prevent the decree holder's enjoyment of the fruits of judgment, the charge would have been registered much later in 2023 post the award and would have been registered for the entire value of the property.

14.The judgment debtor revealed that it is in a state of insolvency and would soon commence motions to be wound up.

15.The interested party stated that the judgment debtor was incorporated as a special purpose vehicle to construct a commercial office block building. It was incorporated on 5.11.2012 as a public limited liability company. At the time of incorporation, the interested party has already executed the agreement for sale over the subject property. The interested party was the buyer and the property was registered in the name of the judgment debtor. The conveyance was deposited with the interested party in creation of an informal charge. The conveyance dated 21.1.2012 was produced. The project ran into headwinds and the interested party perfected the formal charge over the property.

16.The interested party revealed that it was in the process of exercising its statutory power of sale when the prohibition order was issued. It urged the court to lift the order so that it can proceed with statutory sale process.

17.The grounds of opposition are: -

(1)The existing charge is valid, lawful, and entitles the interested party to priority over the suit property.

(2)The charge was created on 8.7.2019 to secure a principal sum of Kshs. 76,350,824, well before the arbitral award was adopted as a decree.

(3)Under the Land Act and Land Registration Act, a registered chargee holds a first-ranking interest that cannot be arbitrarily displaced by an unsecured decree holder.

(4)The transaction was conducted in a transparent manner and registered with the Lands and Companies registries.

(5)The registered charge is sufficient proof. The doctrine of privity of contract applies.

(6)The property is valued at Kshs. 165 Million and is sufficient to cover the charge and any execution by the decree holder must respect the interested party's prior interest.

18.They relied on **sections 79, 80, 81 and 82 of the Land Act** on creation and effect of charges; **section 45 and 59 of the Land Registration**

**Act** on the requirement for the lender's consent to transfer. They also relied on the doctrine of corporate separate legal personality to argue that they are separate legal entities with capacity to contract with each other.

19.They submitted that although arbitration is final, execution must comply with the relevant Land laws. They relied on **Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others [2004] KECA 163 (KLR)** to assert that a chargee's rights supersede an unsecured creditor's rights.

### **Analysis and Determination**

20.The substantive issues are: -

- (1)Whether the decree holder takes priority over the existing charge over the subject property.
- (2)Whether the prohibitory orders should be lifted.
- (3)Whether the warrants of attachment and sale ought to be issued in favour of the decree holder.

21.The decree holder has claimed that the charge was fraudulent and meant to shield the judgment debtor from the consequences of the arbitration.

This is because the charge was created while the arbitration was ongoing. The decree holder highlighted that the charge does not specify the principle amount secured and is based on past consideration which is legally untenable. It argued that the charge is only enforceable where there has been an actual lending of money. It also faulted the judgment debtor for not producing the other supporting documents to show that the loan was disbursed.

22. Fraud is quasi-criminal. Fraud must be specifically pleaded and strictly proved. The standard of proof is higher than that of an ordinary civil case which is proven on a balance of probabilities but lower than the standard of beyond reasonable doubt applicable to criminal cases. **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR,**

23. In my considered view, impeachment of the charge is a serious matter which ought to be raised in a separate civil action for that purpose so as to permit full and proper consideration and determination of the issue upon trial. Subject to

law, this option is open to the applicant so as to avert any demented attempt by a party to avoid execution of a lawful decree of the court.

24.The interesting party exhibited: -

(1)the agreement for sale dated 5.6.2012 in respect of the subject property. It was the purchaser.

(2)the conveyance dated 21.1.2012 registered in the judgment debtor's name.

(3)charge over the subject property

(4)statutory notices dated 16.1.2023 and 20.4.2023.

25.These coupled with the fact that the interested party is registered as a charge and what I have stated, make prayers 3 and 4 not feasible within the framework of these proceedings.

26.Prayers 2 and 6 are not contested. Leaving the residual issue to be the settlement of the terms of sale as sought in prayer 5.

27.The value of the property was assessed at Kshs. 165,000,000/- as per the valuation report prepared by Africa and Beyond.

28.The decree holder sought to recover Kshs. 135,327,407.08/- as of the date of the application.

29.On the other hand, the charge secures an amount of Kshs. 76,350,824/-.

### **Disposal**

30.The application dated 25.4.2026 is partially allowed, in the following terms: -

(1)Prayers 2 and 6 are allowed.

(2)The interested party shall rank first in priority in the sale. Outstanding loan amount as at the date of the application to be offset first from the sale proceeds.

(3)Balance of sale proceeds shall go to the decree holder to offset the decretal sum.

(4)Costs of the application to be borne by the judgment debtor.

**Dated, signed and delivered at Nairobi through Microsoft Teams online application this 19<sup>th</sup> day of February, 2026**

-----

**F. Gikonyo M**

**Judge**

**In the presence of: -**

**Lubeto for Respondent**

**Kirui for Juma for Interested party**

**Muma & Kanjama for Applicant Ooko holding  
brief**

**CA- Ivan/Aggrey**