

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. E203 OF 2025

HON. JUSTICE ALEEM VISRAM

17TH MARCH, 2026

DIB BANK KENYA LIMITED.....
PLAINTIFF/APPLICANT

VERSUS

TYSONS LIMITED 1ST DEFENDANT

GULUMWOYO LIMITED.....2ND DEFENDANT

PHILLIPS INTERNATIONAL AUCTIONEERS 3RD
DEFENDANT

UPPER HILL DENTAL CENTRE LIMITED 4TH
DEFENDANT

RULING

Introduction

1. Before the Court is the Plaintiff's Notice of Motion dated 17th March, 2025, seeking, principally, orders restraining the 1st, 2nd and 3rd Defendants from auctioning, selling, transferring, or otherwise interfering with the 4th Defendant's movable assets proclaimed on 29th October, 2024, at the 2nd Defendant's premises known as Nelson Awori Centre, Nairobi. The Plaintiff also seeks

declaratory relief that the said assets are charged to it under a debenture dated 11th July, 2023, and that such charge ranks in priority over the levy of distress for rent.

2. The application is supported by the affidavit of Njeri Waitimu and is opposed by the Replying Affidavit of Wycliffe Ongwae sworn on 2nd April, 2025, on behalf of the 1st and 2nd Defendants. The parties filed written submissions, which the Court has carefully considered together with the affidavits filed in support and in opposition to the Application.

Background Facts

3. It is common ground that the Plaintiff is the holder of a registered debenture dated 11th July, 2023, executed by the 4th Defendant, creating security over its assets. It is also not in dispute that the 4th Defendant is a tenant of the 2nd Defendant and that rent arrears had accrued.
4. On 29th October, 2024, the 3rd Defendant, acting on the instructions of the 2nd Defendant, proclaimed certain movable assets found on the demised premises in purported exercise of the common law remedy of distress for rent.
5. The Plaintiff moved this Court contending that the proclaimed assets were subject to its debenture and that the attempted distress was unlawful and

subordinate to its security interest and sought injunctive orders restraining interference with the said assets.

Issues for Determination

6. The sole question for determination is whether or not the injunctive orders ought to issue?

Analysis and Determination

7. The threshold for a grant of injunction are set out in the seminal decision of ***Giella v Cassman Brown [1973] EA 358***, namely: the Applicant must: -

- a. Establish his case only at a prima facie level,***
- b. Demonstrate irreparable injury that cannot be compensated by way of damages if a temporary injunction is not granted, and***
- c. Ally any doubts as to (b) by showing that the balance of convenience is in his favour.***

(a) Prima Facie Case

8. The Plaintiff's case rests on the proposition that its debenture, by operation of its terms, crystallised upon the levy of distress and thereby acquired priority over the landlord's remedy.

9. The Plaintiff relied on the decision of the court in *Kitamaiyu Limited versus China Gansu International Corporation for Technical Cooperation Co. Ltd; Credit Bank Limited (Objector) (Environment & Land Case 128 of 2018) [2023]*, where the Environment and Land Court held that in objector proceedings a secured creditor's charge prevails over an unsecured creditor's levy where three conditions are met. The conditions are as follows:-

i. First, the security rights must be registered.

ii. Second, the attachment and execution against the Company's assets must be included as some of the events of default in the asset debenture. Once this event takes place, the floating charge created over the assets crystallizes and the debenture holder gains priority over the assets of the Company.

iii. Finally, the execution process should not have been completed by the time the proceedings have been initiated.

10. The Plaintiff submitted that all three conditions have been met but conceded that no default had been declared.

11. Noting the above, the Court accepts, at this interlocutory stage, that the debenture created a floating charge over the assets of the 4th Defendant. Looking at the agreement, clause 6 of the same provides only a general description of the assets that are subject to the debenture. Although it makes

reference to the Second Schedule, the said schedule does not list any specific assets. Failure to specify the assets is consistent with the notion that a general description of assets ought to be construed to mean the creation of a floating charge over those assets as opposed to a fixed charge. See *Sokhi International (K) Ltd v Giro Commercial Bank Limited [2006] KEHC 3069 (KLR)*.

12. Having found the above, the decisive question, is therefore, whether that floating charge had crystallised before the levy of distress so as to defeat the landlord's priority?
13. The law on this point is settled. A floating charge does not attach to specific assets until crystallisation. Crystallisation may occur by various triggers, including default or appointment of a receiver, and parties may contractually agree that certain events shall cause crystallisation. However, crystallisation may not operate retrospectively so as to defeat rights that have already lawfully attached in favour of third parties.
14. Distress for rent, once levied, creates a possessory security in favour of the landlord. In my view, where distress is levied before crystallisation of a floating charge, the landlord's remedy takes priority. Where crystallisation occurs before distress, the debenture holder prevails.

15. In the present matter, the Plaintiff conceded that no default has been declared.

Further, the very act relied upon by the Plaintiff as triggering crystallisation is the levy of distress itself. It is therefore clear that distress was levied first; crystallisation, even if automatic under the debenture, followed as a consequence of that levy. I do not think that a contractual clause may reorder time so as to allow crystallisation to defeat the distress that triggered it.

16. On the material placed before the Court, there is no evidence that the Plaintiff had, prior to the proclamation, taken steps to enforce the debenture by appointing a receiver or otherwise effecting crystallisation independent of the distress. On the contrary, the evidence suggests that at the time of proclamation, the charge remained floating.

17. In *Lochab Brothers vs. Kenya Furfural Co. Ltd [1983] eKLR*, where Chesoni, Ag. JA endorsed Paragraph 17/1/10 of the Supreme Court Practice (1982) to the effect that:-

"A debenture usually creates a floating charge on a company's assets, and only where the charge has been crystallized - 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."

18. Similarly, in *Diversity Lever East Africa Ltd vs. Mohanson Foods Distributors Ltd and Another [2004] 1 EA 43*, whose facts are more or less similar to the facts of this case, it was held that:-

"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 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 is 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)

19. Guided by the above law and based on the facts in the present matter, I am not persuaded that the Plaintiff has demonstrated, at this stage, a prima facie right ranking in priority over the 2nd Defendant's levy of distress.

(b) Irreparable Harm

20. Even if the Court were in doubt on the first limb, the Plaintiff must still demonstrate irreparable harm that may not be compensated by way of damages.

21. The proclaimed assets are commercial chattels with ascertainable monetary value. The Plaintiff has also conceded that the loan facility is secured by other securities, including guarantees and charges over land. The Plaintiff has not

demonstrated that the sale of the proclaimed goods would occasion harm incapable of compensation by damages.

22. The threshold of irreparable injury, as articulated by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*; has therefore not been met. Namely, an injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

(c) Balance of Convenience

23. The balance of convenience in this matter tilts against granting the injunction. The 2nd Defendant is a landlord seeking to recover admitted rent arrears through a lawful remedy. To restrain distress in circumstances where the debenture holder has not yet enforced its security would permit the tenant to continue in occupation without payment, to the prejudice of the landlord.

24. Equity does not permit a debenture holder to allow a company to continue trading, incur obligations, and occupy premises without payment, while reserving its rights to the detriment of those who deal with the company in good faith.

On the Nature of the Additional Prayers

25. The Court further notes that the prayers seeking declarations on priority and access to secure the assets are, in substance, final in nature. Such relief cannot properly be granted at an interlocutory stage without a full hearing on evidence.

Disposition

26. For the foregoing reasons, the Court finds that the Plaintiff has not met the threshold for the grant of interlocutory injunctive relief.

27. The Notice of Motion dated 17th March, 2025, is therefore dismissed with costs.

Dated and delivered virtually via Microsoft Teams this 17th day of March, 2026

**ALEEM VISRAM, FCIArb
JUDGE**

**In the presence of;
Court Assistant: Lispa**

.....for
Plaintiff/Applicant

.....for 1st Defendant

.....for 2nd Defendant

.....for 3rd Defendant

.....for
Defendant

4th

ORIGINAL