

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE E007 OF 2023**

NEW KENYA PLANTERS  
CO-OPERATIVE UNION (PLC).....PLAINTIFF/JUDGMENT DEBTOR

VERSUS

FERTIPLANT EAST AFRICA LIMITED.....DEFENDANT/JUDGMENT CREDITOR

AND

NCBA BANK KENYA PLC.....OBJECTOR/APPLICANT

**RULING**

1. The Objector/ Applicant moved this court vide a Notice of Motion dated 12<sup>th</sup> August, 2025 and expressed under Order 22 rule 51, 52 and 53, Order 51 rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3B of the Civil Procedure Act, Cap 21 Laws of Kenya, seeking the following Orders:-

***1) Spent.***

***2) The Court be pleased to set aside the warrants of attachment dated 28th July, 2025, issued to Direct O Auctioneers.***

***3) A declaration that the Objection is merited and the Applicant has a valid subsisting interest over the properties described in the Proclamation Notice by virtue of a fixed and floating Debentures dated 14<sup>th</sup> January, 2009; 23<sup>rd</sup> May, 2013; and 17<sup>th</sup> January, 2020 created over all the assets of the judgement debtor and duly registered at the companies Registry.***

***4) That costs of the Application be borne by the Judgment Creditor.***

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit dated 12<sup>th</sup> August, 2025 and sworn by Kenneth Mawira, the senior Legal counsel of the Objector. He states that by the Letters of Offer dated 22<sup>nd</sup> February, 2021, 16<sup>th</sup> December, 2022, and 5<sup>th</sup> April, 2023, the Applicant at the request of the Judgment Debtor agreed to advance the following loan facilities to the judgment debtor: Term Loan

USD 6,500,000, restructured term loan: USD 8,780,000, restructured term loan: USD 6,274,000, restructured short term loan: USD 5,900,000, overdraft: USD 3,500,000, overdraft: USD 8,000,000 and overdraft: USD 5,900,000, all totalling to USD 44,854,000

3. In addition to legal charges that were executed and created over various properties, the Judgment Debtor herein had duly executed in favour of the Applicant three (3) Debenture Instruments creating a floating charge over all its assets, which was duly registered at the Companies Registry as follows:  
(a) Supplementary Debenture dated 14<sup>th</sup> January, 2009 for Kshs. 580,000,000 (b) Second Further Debenture dated 23<sup>rd</sup> May, 2013 for Kshs. 70,000,000 and (c) All Assets Debenture dated 17<sup>th</sup> January, 2020 for USD 10,000,000.
4. He states that the said facilities were to be governed under the terms stipulated inter alia, in the Letters of Offer and the Charge instruments duly registered in favour of the Applicant herein.
5. The deponent states that as at 6<sup>th</sup> May, 2025, the Judgment debtor had defaulted to the tune of Kshs. Two Billion, Three Hundred and Forty-Four Million, Three Hundred and Thirty-Eight Thousand, Five Hundred and Fifty and Twenty-Three Cents. (Kshs. 2,344,338,550.23).
6. Consequently, the Applicant desiring to exercise its statutory power of sale issued a Demand Notice dated 12<sup>th</sup> May, 2025, pursuant to Section 90(1) of the Land Act No. 6 of 2012 as read with Section 56 (2) of the Land Registration Act. However, it came to the notice of the Applicant that the instant legal proceedings were commenced and concluded against the Plaintiff/judgment debtor and warrants of attachment issued on 28<sup>th</sup> July, 2025, for recovery of the Decretal sum of Kshs. 25,379,680.
7. He states that the Proclamation Notice was issued to the Judgment debtor on the same date against several properties belonging to the judgment /debtor, cognizant of the said warrants of attachment.

8. The deponent states that, by virtue of the said all assets floating Debenture duly registered in favour of the Objector/Applicant over all the assets of the judgment debtor, the Applicant has a prior and superior legal interest in the assets sought to be attached by the Decree Holder, which interest overrides the claims of unsecured creditors, including the Decree-Holder herein.
9. Further to the above, it is reiterated that the Applicant's right to exercise its statutory remedies had already crystallised before the purported attachment by the Decree-Holder and therefore it is extremely urgent, necessary and just that the execution of warrants of attachment dated 28<sup>th</sup> July, 2025 is stayed and subsequently set aside.
10. He reiterates that the assets of the Judgment debtor are legally encumbered and/or not available for attachment in view of the above facts, and therefore the proclamation and the intended attachment are illegal, irregular and untenable in law.
11. He urges this Honourable court to stay and subsequently set aside the warrant of attachment in force and the resultant proclamation notice, both dated 28<sup>th</sup> July, 2025.
12. In response to this Application, the Plaintiff/Decree Holder filed the replying affidavit sworn on 8<sup>th</sup> September, 2025, by Suleiman Wandati, the Principal Legal Counsel of the Plaintiff. He states that the Objector/Applicant's application before the Court is incompetent, defective, and bad in law, and the best option is for it to be dismissed with costs.
13. The deponent maintains that the Objector's application is a mischievous and misconceived afterthought, strategically calculated to frustrate the Plaintiff's right to enjoy the fruits of a hard-won litigation.
14. He further asserts that the application is an ill-advised manoeuvre designed to undermine and trash the valid orders of this Honourable Court, treating them as though they were illegally issued in a blatant attempt to defeat the course of justice.

15. Furthermore, the deponent contends that the application is fundamentally wanting in both form and substance, as the Objector has failed to tender any concrete evidence to support what he describes as imaginary and fictitious cover-up antics. Ultimately, he urges this Court to act based on substantiated evidential facts rather than conjecture and speculation currently being offered by the Objector.
16. The deponent states that the Plaintiff filed this suit in the year 2023 and diligently and prudently pursued this suit against the Defendant, who had obtained money from it but failed to deliver goods in terms of fertilizers, ordered for its member farmers, and which the Defendant kept on promising.
17. The Defendant had agreed to refund the Plaintiffs' money, which they did not despite several reminders, appeals, requests, and representations made to it, and that is what prompted the Plaintiff to institute these recovery proceedings.
18. It is argued that Counsel lacks personal knowledge of the underlying facts and has deponed to matters that remain entirely unsubstantiated by documentary evidence. Consequently, the Decree Holder maintains that such an affidavit carries no probative weight as it fails to provide a factual foundation for the claims asserted.
19. He avers that the Objector/Applicant has not made a full disclosure of its alleged claim and lien over the Judgment Debtor's property, which is the subject of these proceedings, either through the proclamation already made against the Defendant's property by the Auctioneers or the alleged charge, mortgage or debenture by the purporting Objector/Applicant.
20. Further, the Court did not have any inhibition, restriction, or any impediments that could have compelled or obliged the Honourable Court from not issuing the orders sought.

21. He states that if indeed the Defendant defaulted, the Objector had to issue a demand notice and exercise its statutory power of sale which from this unsubstantiated and sweeping statement, these allegations are not only suspicious but also not convincing and they cannot convince this Court to set aside a validly made ruling, judgment and orders legally and procedurally issued by this Court.
22. The deponent states that the Objector/Applicant has claimed before this Court, based on documents which are not before this Honourable Court, that a floating charge has crystallised, and which, strictly speaking, is not before this Honourable Court.
23. Accordingly, there are no compelling reasons and grounds that have been adduced before this Honourable Court by the Objector/Applicant to warrant and justify the orders that are being sought in the Notice of Motion application herein, and the very objective of the application is to subvert the cause of justice.
24. He adds that even if the Objector/Applicant had substantiated their claim before this Honourable Court, which they have not done, the Honourable Court could have proceeded based on the valuation of the existing assets against the liabilities and thereafter make appropriate orders.
25. The deponent reiterates that this Court is a Court of justice that protects all the interests of all the parties that are before it irrespective of the size and magnitude or their respective debts.
26. He urges this Court to dismiss the Objector/Applicant's application as it is frivolous, vexatious, and an outright abuse of the Court process.
27. The Application was canvassed by written submissions.

### **Objectors Submissions**

28. The Objector submitted on three issues;-

- 1) *Whether the Applicant/Objector has established a legal or equitable interest in the attached properties within the meaning of Order 22 Rule 51 CPR,*
- 2) *Whether the floating charge created by the debentures in favour of the Applicant had crystallised before the proclamation, thereby taking priority over execution proceedings.*
- 3) *Whether the warrants of attachment issued herein ought to be lifted and/or set aside.*

29. On whether the Applicant/Objector has established a legal or equitable interest in the attached properties within the meaning of Order 22 Rule 51 Civil Procedure Rules, he argues that the threshold to be satisfied in an Application under Order 22 rule 51 is twofold: that an Applicant must demonstrate existence of a legal or an equitable interest in the property sought to be attached and; that execution of the warrants of attachment has not been perfected.

30. To support this, he cited the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR*, where the court held as follows:-

*“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. Has the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree.”*

31. He argues that Section 90(1) of the Land Act, No. 6 of 2012 empowers a chargee to issue a statutory demand notice to the chargor upon default, while Section 56 (2) of the Land Registration Act, 2012, reinforces the rights of a charge to realize security upon default.

32. Consequently, he argues, the Applicant has an unimpeachable legal interest over all the assets of the Judgment debtor cognizant to the charge and debenture instruments duly registered over all assets of the Judgment Debtor in its favour, an interest that has been demonstrated through various debenture instruments produced as KM 2(a-c).
33. In support of this argument, reliance is placed on the case of ***Savichem Africa Limited v. General Printers Limited [2019]eKLR***, where this legal principle was enunciated. He submits that in that decision, the High Court quoted with approval the holding in ***Mackenzie (Kenya) LTD v. Pharmico LTD [1976] eKLR***, where it was held that a valid floating debenture confers upon the debenture holder a proprietary interest over the assets of the company, which must be respected before unsecured creditors.
34. Further reliance is placed on ***Kuria v. Gachanjo & Another; Gathara & Another (OBJECTOR) (Miscellaneous Civil Application 444 of 2017) [2023] KEHC 18476 (KLR)***, and argues that the High Court reiterated that objection proceedings succeed where the Objector demonstrates a proprietary or legal interest in the attached property. Therefore, he argues that as at 6<sup>th</sup> May, 2025, the judgment Debtor was in default to the tune of Kshs. 2,344, 338, 550.23 and was issued with all the required statutory notices, the effect of which was that all its assets became due and subject to execution by the Applicant.
35. He further urges this court to be guided by the observation in ***Tusker Mattresses Limited v. Equity Bank Kenya Limited & Another [2022] KEHC 258 (KLR)*** where it was observed that:-

***“More fundamentally, though, is the undisputed fact that the Bank is a secured creditor. As a secured creditor, the Bank is entitled to exercise its statutory power of sale without recourse to the court exercising insolvency jurisdiction. I therefore reiterate the holding in East Africa Cables PLC v Ecobank Kenya Limited HC COMM***

*Misc. E043 of 2020 [2020] eKLR that it is settled law that a secured creditor is entitled to exercise its rights under the security document or statute in the event of default by the company and that the power is not subject to insolvency proceedings commenced against the company by any other creditor.”*

36. He argues that, whereas the instant matter is not an insolvency proceeding, the above precedent is relevant to demonstrate that a secured creditor’s statutory rights are enforceable in priority to those of a judgment creditor.

37. To reinforce this argument, he cites the case of *Eltex Sacco Limited v. Rift Valley Textiles Limited & Another; Civil Suit No. 61 of 2004 [2020] EKL*R, where the court held that;-

*“A secured creditor has rights over the property protected by the security agreement and statutory provisions where applicable. These rights take precedence over the administration and liquidation process in the sense that the holder of those rights is entitled to exercise them at any time. The position is summarized in Halsbury’s Laws of England (3rd Ed, Vol. 6) at para. 968 where the learned authors state as follows: As a general rule, however, the holder of a debenture or debenture stock of a company has a charge or where the debenture stock is secured by a trust deed the trustees usually have a legal mortgage on specific assets of the company, and, if so, he or they can enforce the usual remedies of a legal or equitable mortgage against the company in the same manner as it were an individual. One of these rights is to have a sale of the property charged, either under the power given by the charge or by statute, or with the assistance of the court. If the company goes into liquidation, the rights of a secured creditor under his security are not prejudiced, and the liquidator cannot obtain an injunction to restrain a sale by the secured creditor except on the usual terms of*

***paying the amount due, or, if it is not agreed, paying the amount claimed into court.”***

38. He thus urges the court to find that the Objector has established a legal or equitable interest in the attached properties within the meaning of Order 22 Rule 51 Civil Procedure Rules.

39. On whether the floating charge created by the debentures in favour of the Applicant had crystallised before the proclamation, thereby taking priority over execution proceedings, he argues that it is not in dispute that the Judgment Debtor executed in favour of the Objector several debentures and particularly the All Assets Debenture dated 17<sup>th</sup> January 2020 and duly registered at the Companies Registry, creating a floating charge over all the assets and undertakings of the Judgment Debtor.

40. It is submitted that the legal character of a floating charge is well established: it hovers over the company's assets, allowing the company to deal with them in the ordinary course of business until the charge crystallises, at which point it attaches specifically to the assets and becomes a fixed charge.

41. He argues that this was true in this case because, as at 6<sup>th</sup> May 2025, the Judgment Debtor had defaulted in repayment to the tune of Kshs. 2,344,338,550.23, and the Applicant, in exercise of its statutory rights, issued a demand notice pursuant to Section 90(1) of the Land Act, No. 6 of 2012, as read with Section 56(2) of the Land Registration Act. The effect of this statutory notice was to crystallise the floating charge, thereby converting it into a fixed charge over all the assets of the Judgment Debtor.

42. He argues that once a floating charge crystallises, the rights of the debenture-holder take priority over all unsecured creditors and execution proceedings. In support of this argument, reliance is placed on the case of ***Bhanoo Shashikant Jai vs. Multi Options Limited & 2 others; MCC Civil Suit No. 718 of 2008) [2018] eKLR***, arguing that the Court therein held that

a crystallised floating charge takes precedence over the claims of unsecured creditors and that execution against assets subject to such a charge cannot stand.

43. Applying this principle, the Applicant submits that it is evident that by the time the Decree Holder procured warrants of attachment and proclamation on 28<sup>th</sup> July 2025, the Applicant's floating charge had already crystallised into a fixed charge on 6<sup>th</sup> May 2025.

44. He states that the assets of the Judgment Debtor were therefore no longer available for execution by unsecured creditors. Hence, the warrants of attachment and the proclamation issued pursuant thereto were illegal, irregular, and void as they purported to attach property over which the Applicant had a prior and superior interest.

45. On whether the warrants of attachment issued herein ought to be lifted and/or set aside, it was submitted that Order 22 Rule 51 of the Civil Procedure Rules expressly allows any person claiming a legal or equitable interest in attached property to object to the attachment. Once such an objection is lodged, the Court is enjoined under Order 22 Rule 52 to investigate the claim and determine whether the objector's interest overrides the attachment.

46. The Applicant submits that it holds a first-ranking floating debenture over all assets of the Judgment Debtor, which crystallised into a fixed charge on 6<sup>th</sup> May, 2025, upon the issuance of a statutory notice following a significant default.

47. Given that this crystallisation occurred months before the Decree Holder procured warrants and proclamation on 28<sup>th</sup> July, 2025, the Applicant maintained that the subject assets were already encumbered and legally unavailable for execution by an unsecured creditor. Consequently, the Applicant argues that the intended attachment is an irregular attempt to defeat a superior proprietary interest in violation of settled legal principles,

and it urges the Court to exercise its discretion under Section 3A of the Civil Procedure Act to set aside the warrants and prevent an abuse of the judicial process.

48. In conclusion, the Applicant submits that its application has merit as it has demonstrated a valid, subsisting legal interest in the proclaimed assets via registered debentures that crystallised on 6<sup>th</sup> May, 2025. That this crystallisation conferred proprietary rights that take precedence over unsecured creditors, rendering the subsequent warrants and proclamation of 28<sup>th</sup> July, 2025, illegal and untenable. Accordingly, the Applicant urges the Court to set aside the attachment to balance the scales of justice and protect its superior interest.

#### **Plaintiff/ Respondent's Submissions**

49. The Plaintiff submitted on one issue, that is, **whether the Objector/Applicant should be granted the relief it seeks from the Court through the Notice of Motion dated 12<sup>th</sup> August 2025.** The Plaintiff cites the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR* wherein the Supreme Court of Kenya pronounced itself as follows:

***"[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

50. On that note, it is argued that the Applicant's claim rests on an alleged indebtedness exceeding Kshs. 2.3 billion and the purported crystallisation of a floating charge under an All Assets Debenture dated 17<sup>th</sup> January 2020. However, this position is legally untenable as the Applicant failed to register

the security instrument under the Movable Property Security Rights Act, 2017, and further failed to comply with the enforcement requirements of the Insolvency Act, such as the appointment of an administrator.

51. It is submitted that in the absence of proof of registration or a fixed charge, the Applicant has not met its burden of proof, rendering the application an unsubstantiated attempt to frustrate the Plaintiff's right to execute its judgment. In support of this position, reliance is placed on the case of ***Douglas D Watson Vs Kenya Cold Storage (Foods) Ltd Kenya Commercial Bank Ltd [2001] KEHC 652(KLR)*** wherein the Court pronounced itself as follows:

*“It is therefore clear that it is only when the floating security becomes fixed that it constitutes a charge over the property or assets belonging to the company. Before that the property of the company may be dealt with in the ordinary course of business as if the debenture had not been given. Although no copy of the three debentures has been annexed to any of the affidavits filed herein, I think it is fair to proceed in this matter on the basis that the debentures do exist. I say so because the depositions of Mr. Chaudhri to that effect in his affidavit have not been denied in the replying affidavit. There is however no evidence whatsoever in the said affidavit to show that any of the steps which have to be taken by the debenture holder i.e. the objector, to convert the floating security which the objector now holds into a fixed charge have been taken. Such steps would obviously include winding up of the company or appointment of a receiver at the instance of the debentures holder. Without such steps, a floating security remains just that and cannot be used to prevent an attaching decree holder from proceeding with the execution process. For the above reasons,*

***my view is that the objector's application is misconceived and cannot succeed. It is dismissed with costs."***

52. It is argued that the Applicant has also not attached Hire Purchase Agreements and or Motor Vehicle Registration Certificates and or Searches showing that the motor vehicles and or trailers/trucks that the Plaintiff seeks execution in respect of are registered jointly in the names of the Applicant and the Judgement Debtor. The said goods and others as proclaimed were therefore available for attachment to satisfy the judgment of the Court. Moreover, movable goods such as motor vehicles and machinery are circulating assets, and a fixed charge cannot be created over them.

53. He argues, therefore, that at no point did the floating charge become a fixed charge as alleged, and the execution that is in motion ought to proceed to the logical end to enable the Judgement Creditor to realise the fruits of its judgment.

54. The Plaintiff raises concerns regarding the authenticity of the evidence provided to substantiate the alleged crystallisation of the floating charge. He observes that while the Applicant's pleadings reference a Statutory Notice dated 6<sup>th</sup> May 2025, the document annexed to the Supporting Affidavit is actually dated 12<sup>th</sup> May 2025, revealing an inexplicable and troubling discrepancy in dates. Furthermore, the proof of service is deeply flawed; the postage receipts provided are faint, illegible, and bear glaring alterations. He terms this lack of clarity particularly suspicious, given that the Applicant successfully produced crystal-clear documents dating back to 2009, yet failed to provide a legible copy of a document purportedly generated only months ago.

55. Beyond the physical state of the documents, the Plaintiff emphasises a total failure of procedural proof, noting the absence of a Certificate of Posting or any electronic correspondence to verify service upon the Defendant.

56. The Plaintiff argues that these inconsistencies suggest that the Statutory Notice was conveniently backdated to precede the finalisation of the suit, serving as a tactical manoeuvre to frustrate the recovery of the decretal amount.
57. He ultimately argues that because the service of this singular, highly suspicious document has not been substantiated, it lacks any probative value. He argues that to grant relief based on such tainted evidence would be untenable and would allow a disingenuous attempt to defeat the ends of justice.
58. To support this argument, reliance was placed on the case of ***I&M Bank Kenya Limited another v Synergy Industrial Credit Limited 2 others (Civil Appeal E758 E788 of 2021 (Consolidated)) [2024] KECA855(KLR)***, wherein the Court of Appeal, in part, pronounced itself as follows:

***“ I think, with respect, there is much persuasive force in the view, propounded by Synergy, that the placing of Cape Holdings under Administration was a well-calculated move resorted to by the Bank in thinly veiled collusion as one last ditch attempt to aid Cape Holdings in its spirited quest to evade execution of the long-outstanding decree once all room for legal stratagems had been exhausted. What is writ large on the record is an Administration activated under the most suspicious timing, immediately, the Supreme Court placed the final nail on the coffin of legal manoeuvring. The Bank took this drastic action against a company that was not in default and whose accounts clearly indicated that it was patently solvent. It was so solvent that it was demonstrable from the Bank statements that it had rental income far exceeding the monthly loan repayments, and part of the surplus funds were being used by its directors, with the Banks knowledge and concurrence, to put up a construction on their other company's different property,***

*being L.R. No. 5884/16 Riverside Towers. I am thus persuaded, on a balance of probabilities, in fact more, that the statutory management was executed for the sole purpose of aiding Cape Holdings to escape execution. It appears to me to be a rather ingenuous and cynical exploitation of a statute to perpetuate an injustice against a decree holder. Given the collusion and the malafides, it sounds ill, in my way of thinking, that the Bank should expect to benefit from the salutary jurisprudence that is founded on debentures that are created and resorted to in good faith, a virtue signally lacking in the case at hand. My inevitable answer on the question whether the Bank did sufficiently establish its legal interest in the suit property is in the negative.”*

59. Accordingly, that the facts and circumstances of this application are a copy and paste of the scenario in the above case and that it is clear that the Defendant was all along heavily indebted to the Applicant, but it was treated with velvet gloves. In fact, that the Applicant kept loaning the Defendant more money on top, despite the fact that it was extremely leveraged already. Thus, the alleged Statutory Notice cannot stand in these prevailing circumstances.
60. The Statutory Notice and the Application before Court are a clear pointer to collusion and connivance between the Objector and the Judgement Debtor to defeat the rights of the Decree Holder.
61. The Plaintiff argues that the application is essentially mischievous and ill-advised, designed with the singular intent to scuttle and frustrate the realisation of the fruits of the judgment. Rather than a bona fide legal challenge, the motion is characterised as a calculated manoeuvre and machination intended to manipulate the Court into granting prayers that are entirely unmerited. Consequently, the Plaintiff submits that the application is incompetent and lacks any legal basis, and as such, it ought to be

dismissed with costs. In conclusion, Plaintiff prays for the dismissal of the Objector's Application and for costs to be awarded to them.

**Analysis and Determination**

62. This Court has considered the Notice of Motion dated 12<sup>th</sup> August 2025, the Affidavits in support and in opposition thereto, together with the rival submissions filed by the parties. The issues that fall for determination are as follows:-

1. **Whether the Objector/Applicant has established a valid legal or equitable interest in the attached property.**
2. **Whether the alleged debenture created a charge that had crystallised prior to the attachment.**
3. **Whether the Objector's interest, if any, takes priority over the Decree Holder's claim.**
4. **Whether the warrants of attachment dated 28th July 2025 should be set aside.**
5. **Who should bear the costs of the application?**

63. On whether the Objector has established a legal interest, Order 22 Rules 51-54 of the Civil Procedure Rules provides that:-

*“Objection to attachment [Order 22, rule 51](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 the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.(2)Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.(3)Such notice of objection and application shall be served within seven days from the date of filing on all the*

*parties.52. Stay of execution [Order 22, rule 52]Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part. 53. Raising of attachment [Order 22, rule 53] Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.54. Notice of intention to proceed [Order 22, rule 54]If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.”*

64. The Objector contends that they hold a registered floating charge over the entirety of the Defendant’s assets, thereby vesting in them an equitable right over the properties currently subject to these execution proceedings. In support of this contention, the Objector produced three letters of offer dated 22<sup>nd</sup> February 2021 for the sum of USD 6.5 Million, 16<sup>th</sup> December 2022 for the sum of USD 8.78 Million and 5<sup>th</sup> April 2023 for the sum of USD 6.274 Million.

65. These instruments sufficiently demonstrate that the Defendant (the Judgment Debtor) sought and obtained various credit facilities from the Objector. As security for these facilities, the Judgment Debtor provided various security instruments, an All Assets Debenture dated 17<sup>th</sup> January 2020 and registered on 30<sup>th</sup> January 2020 in favour of the Objector, encumbering both movable and immovable assets.

66. The scope of this security is defined under Clause 4 of the Debenture. Paragraph 4.1 expressly provides that;-

***“The security operates as a specific first fixed and floating charge over the following assets... [Clause 4.1.8] all plants, machinery, vehicles, computers, and other equipment of the company and all spare parts, replacements, modifications, and additions for the same and the full benefits of all warranties and maintenance contracts for any of the same, in all cases both present and future.”***

67. In this suit, the Decree Holder obtained judgment against the Judgment Debtor and moved to execute said judgment through Direct “O” Auctioneers. The auctioneers subsequently proclaimed the Judgment Debtor’s goods, as evidenced by the Proclamation dated 28<sup>th</sup> July 2025.

68. The items listed therein include motor vehicles, containers, conveyor belts, lorries, trailers, storage tanks, and fuel containers. In addition, the Notice of Attachment of even date identifies additional seized assets, including desktop computers, laptops, generators, manufacturing equipment, furniture, electronic equipment, manufacturing machinery, servers, internet equipment, finished products, and fertilizers.

69. Upon a review of the evidence, it is clear that the attached items consist of movable goods expressly covered under Paragraph 4.1.8 of the aforementioned Debenture. Consequently, this court is satisfied that the Objector has successfully demonstrated a valid and subsisting legal interest in the proclaimed goods.

70. On whether the said Debenture created a charge that had crystallised before the attachment, this court notes that in **Lochab Brothers v Kenya Furfural Co Ltd [1983] KECA 51 (KLR)** Chesoni Ag. JA cited the Supreme Court Practice (1982) that 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.”***

71. Essentially, therefore, a floating charge is dormant until it crystallises, and this typically happens through specific events, most notably the appointment of a receiver or the company going into administration. It is only after crystallisation that the charge attaches to the specific assets and gains priority over an execution creditor. However, before crystallisation, the company is free to deal with its assets, and judgment creditors are free to attach them.

72. The Debenture under consideration includes specific provisions governing the transition of the security interest from a floating to a fixed nature. Specifically, Clause 6 delineates three conditions under which the floating charge crystallises.

73. These triggers include; first, the appointment of a receiver, a manager, or both, in instances of the Company's insolvency., secondly, third-Party Crystallisation, in that if any floating or other security interest granted to a third-party security holder (other than the Bank) automatically attaches, becomes fixed, or otherwise crystallises over any part of the Company’s properties or assets and thirdly, immediately upon the Bank issuing a formal notice to the Company, converting the charge into a fixed charge over all assets subject to the security or over specific assets as identified within said notice.

74. The Bank has predicated its argument regarding the crystallisation of its floating charge upon the issuance of a notice to the company. In support of this, the Bank tendered a statutory notice of demand for payment dated 12<sup>th</sup> May 2025. This notice was addressed to Lee Ngugi, providing 90 days' notice pursuant to Section 90 of the Land Act in respect of legal charges created over LR No. 209/7503 (Original part of 6863/70), LR No. 420/19 Naivasha (Original No. 420/12/2), and LR No. 420/161 Naivasha (Original part of 420/12/4) ("the charged properties").
75. While it is alleged that this letter was dispatched to Mr. Ngugi via postage, the postage receipts produced in evidence were illegible. Consequently, this court is unable to ascertain whether such service was ever effectively carried out.
76. Furthermore, the court notes that under Clause 6.3 of the Debenture, a floating charge crystallises upon the issuance of a formal notice to the company, converting the charge into a fixed charge over all assets subject to the security or over specific assets identified therein. However, the notice annexed as evidence was addressed to Lee Ngugi personally rather than to the defaulting company.
77. Though this court acknowledges that Lee Ngugi is a director of the Judgment Debtor company and acts as its personal guarantor, the director remains a distinct legal personality from the company. As the company is a separate legal entity, it was incumbent upon the Bank to serve the company itself.
78. Although Clause 30 of the Debenture states that a notice or demand is presumed served if the same is served on either its Directors or its Secretary, such notice must nonetheless be addressed to the borrower company and not to a Director in their individual capacity, as done here. This court finds that service of the required notice was not properly effected. Without such a valid service, the floating charge failed to crystallise.

79. On whether the Objector's interest takes priority over the Decree Holder's claim, it is undisputed that the Objector is a secured creditor, as established hereinabove. However, this court's finding herein that the requisite notice was not properly served upon the Judgment Debtor is fatal to the Objector's claim of priority. In the absence of proper service, the floating charge remained uncrystallised at the material time. It follows, therefore, that the Objector's interest cannot take precedence over the claims of other creditors, whether secured or unsecured, in respect of the proclaimed goods.

80. Regarding whether the warrants of attachment dated 28<sup>th</sup> July 2025 should be set aside, the court finds that since the Objector's floating charge failed to crystallise, the Objector has not demonstrated a superior or fixed interest that would justify the vacation of said warrants. As the interest remained floating at the time of execution, it did not attach to the specific assets in a manner that would preclude the Decree Holder's claim. Consequently, the application to set aside the warrants of attachment dated 28<sup>th</sup> July 2025 is hereby dismissed.

81. On costs, the Supreme Court in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR*, stated as follows:

*“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and*

***conduct of the parties, prior to, during, and subsequent-to the actual process of litigation.”***

82. Accordingly, having opposed the Application successfully, the decree-holder shall be awarded costs of this application. Ultimately, the Objector's application dated 12<sup>th</sup> August, 2025, is without merit and therefore dismissed with costs to the Decree- holder.

**Dated, signed and delivered at Nakuru this 11<sup>th</sup> Day of May, 2026.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

**Mr. Muriuki for Plaintiff/ Decree-Holder**

**N/A for Defendant**

**N/A for Objector/Applicant**

**Erickson, Court Assistant**