IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MAKHANDIA, OTIENO-ODEK & KANTAI, JJ.A.)

CIVIL APPEAL NO. 169 OF 2007

BETWEEN

BARCLAYS BANK OF KENYA LTD……..……...…APPELLANT

AND

KEPHA NYABERA & 191 OTHERS…….....1ST RESPONDENT

KENYA FARMERS ASSOCIATION LTD…….....2ND RESPONDENT

(An appeal from the Ruling/Order of the High Court of Kenya at Nakuru (Luka Kimaru, J.) dated the 1st day of December, 2006.)

in

HCCC NO. 560 OF 1998)

****

JUDGMENT OF THE COURT

1.This is an appeal arising from a ruling delivered by the High Court (*L. Kimaru, J.*) issuing a garnishee order absolute against the appellant to satisfy the decretal sum payable by the 2nd respondent to the 1st respondent.

2.The brief facts of the case are that, the 1st respondents were the plaintiff while the 2nd respondent was the defendant, in Nakuru HCCC No. 560 of 1998, whereby judgment was entered in favour of the 1st respondents in the sum of Ksh. 43,000,000/=. In order to realize the fruits of the judgment, the 1st respondents moved the High Court under **Order XXII Rule 1 & 1(a)** of the former **Civil Procedure Rules,** seeking to attach the amounts held by the judgment debtor at the Co-operative bank of Kenya and Barclays Bank of Kenya, Nakuru East Branch (A/C No. 2009627), the appellant herein by way of garnishee order. The High Court issued a garnishee order nisi (subsequently made absolute) against the appellant and Co-operative bank. The order nisi prohibited the banks from obeying any mandate issued by the 2nd respondent pending the hearing and determination of the garnishee proceedings. On its part, the Co-operative bank and the 1st respondents entered into a consent whereby the sum of Kshs 35,055/= being held by the Co-operative bank was released to the 1st respondents. The appellant bank had a credit

sum of Ksh. 2,806,636.65 in favour of the 2nd respondent judgment debtor in Account No. 2009627. The appellant disputed the garnishee order issued against it.

3.The appellant disputed the garnishee order through the replying affidavit of one Alfornse Kisilu who described himself as the head of Corporate Recoveries of the appellant. In the said affidavit, Mr. Kisilu averred that the account no. 2009727 sought to be attached, was *"merely the judgment debtor's fuel and lubricants account."* He further averred that the said account stood in credit in the sum of Kshs 2,806,635/65 as at 11th May, 2006 and that the same was still in credit. He also stated as follows:-

"the judgment debtor is also the bank's customer in an ordinary loan account no. 027/2009678 in which it presently owes to the bank the sum of Kshs 740,679,040/89."

4.He went further to attach statements of accounts in evidence of his averments. Mr. Kisilu further deponed that a charge instrument dated 2nd February 1996 had been registered over some properties when the loan in the sum of Kshs 77,200,000.00 was advancedto the 2nd respondent and that as per clause 18 of the charge, the bank had the right to combine, consolidate all and any of thejudgment debtor's accounts held with the bank and set off or transfer any standing amount therein to the credit of any one or more of such accounts towards the satisfaction of any moneys, obligations or liabilities of the judgment debtor to the bank whether present, actual, contingent, primary, collateral, joint and/or several.

5.He further referred to ***Clause 8 (g)*** of the charge which reads as follows:

"8 This security shall become enforceable and all moneys, obligations and liabilities secured shall immediately become due and payable and the chargor shall provide cash cover on demand for all notes for all contingent liabilities of the chargor to the chargee and for all notes or bills accepted, advanced or discounted and all bonds, guarantees, indemnities, documentary or other credits or any instruments whatsoever from time to time entered into by the chargee for or at the request of the chargor on the occurrence of any of the following:-

a)……

b)…..

c) …..

d)……

e) ……

f)……

g)if any decree, order, warrant or process is issued or other action is taken whereby a distress, attachment or execution is or may be levies or enforced upon or against any of the property or assets of the chargor."

6.Further, at paragraph 9 of his affidavit, *Mr. Kisilu* deponed that there was an enormous net liability of the judgment debtor to the bank and in the circumstances; the bank was indeed the creditor of the judgment debtor. He also attached a demand letter dated 17th March, 2006 from the appellants to the 2nd respondent. We shall revert to the contents of the said letter in the course of this judgment. The same was promptly replied to by the 2nd respondent by its letter dated 29th March, 2006 whereby it acknowledged the debt and promised to revert back by 20th April, 2006.

7.The foregoing sets out in summary the issues which were before the learned Judge, who upon considering the application, the affidavits on record and submissions on the matter, allowed the application; observing in part of his ruling thus:-

"I therefore agree with the submissions made by Mr. Karanja that by the time the garnishee order nisi was issued by this court on the 10th of May, 2006 the provision of clause 8 of the charge instrument had not accrued and neither has it accrued to date because the garnishee has made no effort to realize the securities charged to it by the defendant/judgment debtor. It is therefore clear that the resistance by the garnishee to give effect to the garnishee order issued by this court has been made with the active connivance of the defendant/judgment debtor. I find no merit with the objection by the garnishee to give effect to the order nisi issued by this court on the 10th of May, 2006. I therefore order that the garnishee do with immediate effect release the said sum of Kshs 2,806,636/65 to the plaintiffs/decree holders in compliance with the garnishee order issued by this Court."

8.Being aggrieved by the said Ruling, the appellant lodged the present appeal.

9.The appeal came before us for hearing at Nakuru on 13th February, 2013 when it was ably argued by *Mr. Bwire*, learned counsel for the appellant; *Mr. Karanja,* learned counsel for the 1st respondent and *Mr. Kisila* for the 2nd respondent.

10.During the hearing, *Mr Bwire*, learned counsel for the appellant argued all the gro*und*s together. Briefly, the appellant maintains that the learned judge erred in law and misdirected himself in allowing the application on the basis that the appellant was indebted to the 2nd Respondent and that the appellant being a banker did not have a common law right of combination as well as a contractual right of consolidation and set off against the 2nd respondent who was holding various accounts with it. The appellant has asked us to allow the appeal, set aside the garnishee order absolute and reverse the ruling of the superior court.

11.*Mr. Bwire*argued that the learned judge erred in interpreting Order 22 of the former Civil Procedure Rules. He based his submissions on the averments of *Mr. Kisilu's* affidavit. He further referred to paragraph 8 (g) of the charge instrument which allowed the appellant bank to recall the security in the event a decree or order of distress is issued. He maintained that the appellant is not indebted to the 2nd respondent but in essence, it had a right to combine and consolidate the accounts it held with the 2nd respondent.

12.On his part, *Mr. Karanja* submitted that the account in question was operational before the garnishee proceedings with deposits and withdrawals being made. In reference to clause 8 (g) of the charge instrument, he pointed out that to date, the appellant had not taken any steps to recall the loan due to it from the 2nd respondent. He submitted that the credit sum of Kshs 2,806,636/65in account no. 2009627is readily available. It was submitted that money in an operational account outside the loan account is not security. He therefore urged the court to dismiss the appeal.

13.*Mr. Kisila*, Counsel for the 2nd respondent did not make any address to the court on the merits of the case save for the fact that his client is making arrangements to settle the debt due to the appellant.

14.We have carefully considered the memorandum of appeal, the record of appeal, the submissions made before us by the respective counsels and the law. Notably, no authorities were cited either in support of or in opposition of the appeal. There are various issues for us to consider. First, is there a debt due from each Garnishee to the Judgment- Debtor capable of being attached? ***Order 22, rule 1*** of the Civil Procedure Rules provides for attachment of debts (other than the salary or allowance coming within the provisions of ***Order 21***, ***rule 43)*** due to a judgment-debtor from any person in satisfaction of the decree against the judgment-debtor. The judgment-creditor must establish that there is a sum of money held by the garnishee that is due to and recoverable by the judgment-debtor. That is what would constitute a debt for purposes of garnishee proceedings.

15.In the present case, the issue is whether the sum of Ksh. 2,806,636/65 held by the appellant was a sum of money due and recoverable by the judgment debtor from the appellant. Could the judgment debtor claim this sum? The 2nd respondent submitted that this money was available in the course of business to

the judgment debtor. The appellant submitted that this money was for a specific purpose namely fuel and lubricant account and no other purpose. That money in the fuel and lubricant account was part of the security held by the appellant and subject to the right of set off or combination as provided in the charge instrument. Our evaluation of the relationship between the appellant and judgment debtor shows that the account was being operated for a specific purpose and not to satisfy the liabilities of the judgment debtor which were not related to fuel or lubricants. The monies held by the appellant in the fuel account is not a straight-forward attachment of debts under Order 22 of the Rules.

16.The other issue we have to address is whether the appellant had a right to combine and consolidate the accounts of the 2nd respondent after the garnishee order had been issued.

17.The appellant's appeal is anchored on the fact that it is not indebted to the 2nd respondent at all instead, it is the creditor of the 2nd respondent. On this issue, the appellant submitted that the trial judge erred in stating that it was the appellant who was indebted to the 2nd respondent. The trial judge erred by failure to consider that a loan account existed and when set off is done, the 2nd respondent is indebted to the appellant. The appeal is further grounded on the fact that a charge instrument exists giving the appellant the right to combine and consolidate accounts.

18.The following facts are not in dispute, that:-

The 2nd respondent is a customer to the appellant bank hence their relationship is contractual.

The 2nd respondent has two accounts with the appellant. One of the accounts is a fuel and lubricants account while the other is an ordinary loan account.

A duly registered charge instrument exists between the appellant bank and the 2nd respondent.

The charge instrument contains Clause 8 (g) giving the appellant bank the right to consolidate or combine accounts.

As at 10th May 2006, the date upon which the garnishee order nisi was issued, the statement of account in respect of the fuel and lubricants account stood in credit balance in the sum of Kshs 2,489,580.50 while the loan account had an outstanding debit balance in the sum of Kshs 740,679,04.89.

19.The question for this court to determine is whether the appellant bank had a right under ***clause 8 (g)*** of the charge instrument to combine the two accounts after the garnishee order nisi was issued. *Mr. Karanja* for the 1st respondents submitted that the appellant has never taken any positive steps to exercise its rights under ***clause 8(g)*** of the charge. He added that it was only upon "recall of securities" that the said clause will come into operation. The learned judge was in agreement with this position.

20.The question is "at what time does the provision of clause 8(g) of the charge instrument accrue or crystallize?" Is it a self activating provision or is action required to activate it? The condition precedent for clause 8(g) to be activated is discernible from the wordings of the clause. These are where there is issuance of a decree, order, warrant or process by which distress, attachment or execution may be levied against the judgment debtor's property.

21.A decree nisi operates as an order, warrant or process of execution. The rights in ***Clause 8 (g)*** of the charge instrument accrued when the charge was registered. A person obtains a legal right when the instrument creating that right is executed and registered. In the present case, when the decree nisi was issued, it activated the provisions of clause 8(g) of the charge. When the same decree nisi was served upon the appellant, it came to have notice and knowledge of the same. The judgment creditor acquires an equitable lien on funds owed by a third party to the judgment debtor from the time the third party receives service of the garnishee nisi order. The decree nisi was served upon the appellant bank on 12th May, 2006. From this date onwards, ***clause 8(g)*** of the charge ceased being contingent and hence the appellant's

rights under the charge were activated.

22.The conditions precedent to activate ***Clause 8 (g***) are well spelt out in the charge instrument. The clause is self activating whenever any of the conditions precedent have been fulfilled. No action on the part of the appellant bank is required to activate the provisions of the clause. The honourable judge erred in holding that the appellant was required under the charge to recall the security prior to ***Clause 8(g)*** becoming operational. It was a misdirection when the learned judge stated:-

"that by the time the garnishee order nisi was issued on the 10th of May, 2006 the provision of clause 8 of the charge instrument had not accrued and neither has it accrued to date because the garnishee has made no effort to realize the securities charged to it by the defendant/judgment debtor".

23.A reading of ***clause 8 (g)*** of the charge instrument does not contain a condition that the appellant bank has to realize the securities charged before the clause can accrue.

24.The 1st respondent argued that once the garnishee order nisi was served, the appellant was under obligation to pay monies held in credit over to the judgment debtor. In an ordinary bank/customer situation where there is no charge instrument, the garnishee third party may be liable for paying out funds in a manner inconsistent with the judgment creditor's lien. From the argument proffered by the respondent, the issue for us to consider is what are the rights of a judgment creditor vis-a-vis the garnisheeing creditor?

25.A judgment creditor has no greater rights in the judgment debtors assets held by the garnishee than the judgment debtor does. In the present case, the 1st respondent has no greater right than the judgment debtor (2nd respondent) had to the funds held by the appellant bank. The rights of the 1st respondent over the funds held by the appellant bank are co-extensive and limited to the exact rights that the judgment debtor had over the funds. What were the rights of the judgment debtor in relation to the accounts held by the appellant bank?

26.The rights of the judgment debtor are contractual rights that govern the relationship between the 2nd respondent and the appellant in their capacity of bank/customer relationship with the bank having security over liabilities of the 2nd respondent. The appellant bank was a secured creditor. A secured creditor with a perfected security interest in a deposit account has rights that are superior to a subsequent judgment (unsecured) creditor. The situation is different if the garnishee creditor is not secured. In such a case, the judgment creditor with a garnishee order would rank in priority. The 2nd respondent's rights to the funds held by the appellant bank were subject to the bank's security interest. Failure to exercise set-off or combination of accounts does not result in subordination of those rights to the rights of a judgment creditor.

27.Banks have the latitude to allow their indebted depositors to have a reasonable access to funds which may enable them to continue to operate and generate revenue that may be applied to their existing indebtedness. The failure to combine or set off an account does not permit a garnishing judgment creditor to assume senior status.

28.In the present case, the record shows that the appellant allowed the 2nd respondent to operate the account as a fuel and lubricant account. The funds in this account were subject to the bank's securities as perfected by the registered charge instrument. The rights of the 1st respondent as a judgment creditor was subject to the bank's security.

29.A security is not a separate and distinct transaction from the debt to which it relates. This was so held in ***BANK OF NEW ZEALAND V. HARRY M. MILLER & CO. LTD*** ***(1992) 26 N.S.W.L.R. 48***. We adopt this position. The loan account as well as the fuel and lubricant accounts held by the appellant are not distinct transaction. They are both covered by the charge instrument created by the judgment debtor, the 2nd respondent herein.

30.In the instant case, the normal bank/customer relationship ceased to exist between the appellant and the 2nd respondent after service of the decree nisi. From the expression of ***clause 8(g),*** service of the garnishee order nisi ended the banker/customer relationship subsequently converting it to a chargor/chargee relationship. The appellants rights under ***Clause 8 (g)*** of the charge accrued when the charge instrument was registered. The clause was activated when the decree nisi was issued. The clause crystallized when the decree nisi was served. In other words, ***Clause 8(g)*** is analogous to a floating charge and crystallizes when the decree nisi is served.

31.The evidence demonstrates that the 2nd respondent is indebted to the appellant and not vice versa. The learned Judge did not direct his mind to the fact that the relationship between the appellant and the 2nd respondent was a bank/customer relationship juxtaposed on a chargor/charge relationship.

32.The judge erred in failing to appreciate that the decree order nisi activated ***clause 8(g)*** of the charge instrument. The judge erred in failing to appreciate that the rights of a garnishing creditor are similar in nature and co-extensive to the rights of the judgment debtor over the funds held by the appellant bank. If the appellant had security over the funds in the account, then the judgment creditor's can only access the funds to the extent that the security interest of the bank is covered.

33.We note that the contractual documents underpinning the credit facilities to the 2nd respondent namely the charge expressly provided for the right of combination, consolidation and set-off by the bank. A good case in point is ***clause 18*** of the charge. Under that clause, the bank was given an express right to set-off or combine accounts without notice to the 2nd respondent. ***clause 18*** reads as follows:-

"The chargee may at any time and without notice to the chargor combine or consolidate all or any of the chargor's accounts with the chargee and set off or transfer any sum standing to the credit of any one or more of those accounts in or towards satisfaction of any moneys, obligations or liabilities of the chargor to the chargee whether those liabilities be present, future, actual, contingent, primary, collateral, joint or several and the chargor expressly waives, so far as is permitted by law, all rights of set off which it may now or hereafter have against the chargee."

34.At paragraph 29.16 of ***Pagets Law of Banking*****, 13th Edition**, it is stated that the banker may combine two current accounts at any time without notice to the customer even though the accounts are maintained at different branches.

35.We are also guided by the passage in ***Pagets Law of Banking, supra,*** **paragraph 29.13** where it is stated thus:

"Right of bankers of set-off which is right of combination or of consolidation of accounts is but the manifestation of a right analogous to the exercise of the banker's right of lien, a right which is of general application and not in principle limited to account or other similar accounts."

36.*This position is further buttressed by* ***paragraph 395 of the Halsbury's Laws of England 3rd Edition*** *which states as follows:-*

"unless precluded by agreement or course of business, a banker is entitled to combine all accounts kept in the same right by the customer, whether deposit or current, and whether at the same branch or different branches, and to exercise his lien or set off for the resulting balance."

37.Further, in **Sheldon's, Practice and Law of Banking**, it is stated that:-

"Before paying the balance to the judgment creditor or into court, as the case may be, the banker is entitled to deduct from the balance any debts due to him from the customer which existed as the date of the order, and for this purpose he can combine all the customer's accounts, which he previously could have set off without notice to the customer."

38.Thus, in circumstances where a bank has a loan account and also a current account in credit with the same customer and holds security for the ultimate balance, the banker is at liberty to combine and consolidate the accounts and set off the accounts. In the instant case, it is very clear that the 2nd respondent had given the right to the appellant to consolidate and set off any sum standing to the credit of any one or more of those accounts in or towards the satisfaction of any liabilities due to it.

39.The appellant's right to combine the fuel and lubricants account being held by the 2nd respondent together with the ordinary loan account and set off against any outstanding liability crystallized when the conditions precedent, in ***clause 8(g)*** being satisfied, namely issuance of the decree nisi.

40.Even if there exist an agreement not to combine, such a right ceases to be effective as soon as the relationship of banker and customer comes to an end. This is as per **Halsbury's 4th edition, para. 177**. This position was also considered extensively in the case of ***NATIONAL WESTMINSTER BANK LTD. VS HALESOWEN PRESSWORK & ASSEMBLIES LTD*** ***[1972] AC 785***, where one of the points for determination by the court was whether the bank had a right to combine the accounts of its customer which had gone into liquidation but which had a prior liability to the bank. It was held as follows:-

"The agreement had in any event, on its true construction, only been intended to be operative while the relationship of banker and customer existed and the company was a going concern; that, accordingly, it had come to an end when the winding up resolution had been passed; and that the bank had been entitled, ... to combine the accounts."

41. As we have stated above, the bank/ customer relationship ceased between the appellant and the 2nd respondent upon issuance and service of the garnishee order nisi and at that point, the right to combine accounts crystallized automatically.

42.We are also persuaded by **Pageat's Law of Banking, 6th edition at p. 115**, which says:-

"if at the date of the service of the order, the banker has any lien on or set off against the moneys attached, this should be represented to the Court and would certainly prevail against the garnishee order."

43.This therefore means that the bank's right under ***clause 18***, prevailed against the garnishee order nisi. We hold that the learned Judge erred in finding the appellant liable under the garnishee proceedings and there was no legal justification to issue the garnishee order absolute.

44.Counsel for the 1st respondent urged this Court to note that the appellant had other immovable properties secured by the charge. It was argued that if the garnishee order is satisfied, the appellant can recover the sum from the immovable properties which are secured. The general rule is that a secured creditor is not obliged to resort to his security. He can claim repayment by the debtor personally and leave the security alone. He can sell the charged securities or set off or combine accounts. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. This was so held in china and *SOUTH SEA BANK LTD V. TAN SOON GIN* (***alias George Tan***) ***1990 1 AC 536-545.*** We agree with this holding and hold that the appellant Bank is not obliged to abandon its set-off rights and realize the security over the immovable properties.

45.*Mr. Karanja* for the 1st respondents submitted that the appellant had never taken any steps to realize its security under the charge. This position was also adopted by the learned Judge in his Ruling. This is an erroneous of fact as evinced from the appellant's letter dated 17th March, 2006. The said letter reads in part:-

"We are disappointed to note that you have failed to honour the repayment of your outstanding liabilities with us.....it is therefore our view that one of the appropriate options available to you would be for you to voluntarily dispose of the property in order to redeem your account with us. A voluntary sale would avoid additional legal proceedings, associated legal costs and may achieve a higher sale

price than a forced sale. If you are of the view that this course of action would be acceptable to you, we are prepared to consider working with you to pursue the same on an entirely without prejudice basis as to the bank's rights under the charge. To facilitate this, we would need to be provided with details of your estate agents, together with your written authority to deal directly with them."

46.In our considered view, the contents of this letter are very clear. Even though the decree nisi was yet to be served, this constituted taking steps to realize the securities under the charge. It is therefore incorrect to state, that the appellant had never taken any steps to realize the securities under the charge instrument.

47.It is trite law that parties are bound by their commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. In ***NATIONAL BANK OF KENYA LTD VS PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER (2001) KLR 112***the Court of Appeal at page 118 held:-

"...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

48.*See* ***MORRIS & COMPANY VS KENYA COMMERCIAL BANK [2003] 2 E A 605****. Needless to point out, the 2nd respondent did understand the purport of the provisions of the entire charge document after which it willingly accepted their application and invocation which it appended its signature thereon and hence was bound by the same.*

49.*It is worth noting that the 1st respondents despite not being party to the charge instrument are bound by its contents. The charge is registered under the Registered Lands Act (now repealed) and is maintained in a public register by the lands registry pursuant to* ***Section 112(1)*** *of the said Act. In light of* ***Section 79(1) (b)*** *of the Evidence Act the same constitutes a public document and every person is deemed to have knowledge of its existence.*

50.In part of his submissions before court, *Mr. Karanja,* for the 1st respondent argued that there was serious collusion between the appellant and the 2nd respondent on grounds that the charge instrument was faxed from the offices of the 2nd respondent to the appellant. From the time it was registered, the charge instrument has been in existence and it is the document that underpinned the relationship between the appellant and the 2nd respondent. The mere act of faxing the charge did not affect its validity. It is trite law that the validity of a charge is pegged on its registration. This argument by the 1st respondent must therefore fail.

51.The evidence demonstrates that the 2nd respondent is indebted to the appellant and not vice versa. The honourable judge did not direct his mind to the fact that the relationship between the appellant and the 2nd respondent was a bank/customer relationship juxtaposed onto a chargor/chargee relationship. The judge erred in failing to appreciate that the decree order nisi activated clause ***8 (g)*** of the charge instrument. The judge erred in failing to appreciate that the rights of a garnishing creditor are similar in nature and co-extensive to the rights of the judgment debtor over the funds held by the appellant bank. If the appellant had security over the funds in the account, then the judgment creditor's can only access the funds to the extent that the security interest of the bank is covered. This therefore means that the bank's right under clause 18, prevailed against the garnishee order nisi. We hold that the learned Judge erred in finding the appellant liable under the garnishee proceedings and there was no legal justification to issue the garnishee order absolute.

52.For the above reasons, we allow the appeal, and set aside the garnishee order absolute of the learned Judge made on 1st December, 2006, and substitute it with an order dismissing with costs the 1st respondents' application filed on 10th May, 2006. We award costs of this appeal to the appellant.

Dated and delivered at Nakuru this 12th day of APRIL, 2013.

ASIKE MAKHANDIA
……
JUDGE OF APPEAL

J. OTIENO ODEK
……
JUDGE OF APPEAL

SANKALE ole KANTAI
……
JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR