



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 435 OF 2016**

**JAMES KINENE MURAGURI.....CLAIMANT**

**VERSUS**

**RAFFIA BAGS (EAST AFRICA) LIMITED.....DEFENDANT (JUDGMENT DEBTOR)**

**AND**

**DIAMONT TRUST BANK KENYA LIMITED.....OBJECTOR**

(Before Hon. Justice Byram Ongaya on Friday 01<sup>st</sup> April, 2022)

**RULING**

The objector Diamond Trust Bank Kenya Limited filed an application by way of a notice of motion through Madhani Advocates LLP. The application was under Order 22 rule 51 (2) and 52 of the Civil Procedure Rules, sections 1A & 3A of the Civil Procedure Act and all enabling provisions of the law. The objector prayed for orders:

- 1) .... (spent).
- 2) .... (spent)
- 3) That the Honourable Court be pleased to raise the proclamation or attachment of the respondent or judgment debtor's movable property proclaimed by Messrs. Kinyua & Company Auctioneers in execution of the decree herein.
- 4) That the Honourable Court be pleased to order that the attached goods more particularly described in Schedule 1 be surrendered to the objector.
- 5) That costs of the application be awarded to the objector.

The application was based on the annexed supporting affidavit of Tarminder Umesh, the further affidavit of Tarminder Umesh filed on 18.06.2021, and the further affidavit of the same Tarminder Umesh filed on 16.02.2022. The said Tarminder Umesh was examined and cross-examined on her affidavits. The application was based on the following grounds:

- a) Pursuant to the terms of various letters of offer dated 02.12.2011, 11.04. 2012, 02.04.2014, 12.02.2015, 29.06.2015 and 21.09.2016 the objector advanced various banking facilities to the defendant, judgment debtor, to enable the judgment debtor meet its working capital requirements from time to time.
- b) As security for the said banking facilities, the judgment debtor and the objector executed a debenture and a supplemental debenture over all present and future assets of the judgment debtor which were registered on 14.03.2012 and 30.12.2013. Upon that registration, both debentures created a floating charge over the judgment debtor's present and future assets ranking in priority against all other creditors.
- c) On 06.05.2021 the claimant as the decree holder through the auctioneers herein proclaimed and thereafter attached movable property more particularly described in Schedule 1 herein which has been secured by the debentures. The attached goods constitute part of the objector's security and accordingly the objector has an inalienable legal and equitable right to the attached assets.

d) Additionally, the objector's legal right and equitable rights rank above the decree holder's rights.

e) The attachment of the secured assets has greatly prejudiced the objector as the objector is at risk of losing its lawful security in event that the attached assets are sold. The decree holder intends to proceed with the attachment and sale of the proclaimed assets. The proclamation and attachment should therefore be raised to prevent the objector from having its security compromised.

f) Such other grounds and reasons to be adduced at the hearing hereof.

The claimant opposed the application by filing the grounds of opposition on 07.06.2021 through Stephen (aka Suleiman) Macharia Kimani Advocate. The grounds of opposition are summarised as follows:

a) The application and debentures exhibited for the objector are founded on an illegality and cannot be the basis of seeking court's intervention by way of an order to stay or ultimately raise the execution herein.

b) The application is deceitful, an abuse of the process the court and contrary to statute law, including sections 2 and 112 of the Evidence Act and the Companies Act (now repealed).

c) The judgment debtor or Polycem Bags Limited (PBL) or the objector will not be prejudiced if the attachment and sale of assets which all belong to the judgment debtor and not the first borrower.

d) There is no legal basis disclosed for raising or staying the execution process herein.

The claimant also filed his replying affidavit on 07.06.2021. It was urged that the judgment debtor and PBL are different companies per the decision of the Court (Radido J) in **Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp and Packaging Industries (KUPLIPUPA) –Versus- Raffle Bags (EA) Limited [2014]eKLR** the Court found that PBL reportedly changed its name to Raffia Bags (East Africa) Limited and a certificate of change of name was issued on 15.12.2011. Thus PBL could not have made or entered into a valid and binding debenture arrangement with the objector on 12.03.2012 as it not exist in its original form and name. Further, the claimant had been employed by Raffia Bags Kenya Limited (RBKL) on 01.03.2010 until 15.03.2012 when he was orally employed by a director named Diamond Ralji as a Production Shift Manager in the defendant company until the impugned termination notice of 15.03.2012. Further, assets of RBKL were reportedly acquired by the defendant according to the claimant's termination letter dated 15.03.2012 and RBKL nor the defendant now the judgment debtor never disclosed the existence of PBL in the said assets sale or acquisition. Thus the assets attached belonging to the defendant have never belonged to PBL with whom the objector purported to conclude the debenture on 15.12.2011. Further the objector has failed to establish rights, equitable or legal, accruing or accrued to it to institute and prosecute the objection proceedings as envisaged in Order 22 rule 51 (1) of the Civil Procedure Rules.

The claimant also filed his further replying affidavit on 16.02.2022 and as per leave granted by Court on 16.02.2022. The affidavit exhibited the judgment in **Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp and Packaging Industries (KUPLIPUPA) –Versus- Raffle Bags (EA) Limited [2014]eKLR** and Radido J stated thus, "15. However, one thing has disturbed the Court regarding the relationship between these three entities. Polycem Bags Ltd changed its name to Raffia Bags (East Africa) Ltd legally on 15.12.2011, but a Taxpayer Registration Certificate issued to Raffia Bags (East Africa) Ltd by Kenya Revenue Authority and exhibited by the Respondent is dated 28 October 2011. It appears the Taxpayer Registration Certificate was issued before the respondent was legally in existence under the name of Raffia Bags (East Africa) Ltd."

The claimant has also exhibited official search at the Companies registry as at 29.11.2021 showing that as at that date the judgment debtor's encumbrance was the variation of debenture instrument dated 09.06.2017 whose secured amount was Kshs.0.0. The claimant has also exhibited gazette notice No. 19065 of 19.11.2012 where in exercise of the powers conferred upon the Competition Authority by section 46(6) (a) (ii) of the Competition Act, the Competition Authority authorised the proposed acquisition of certain selected assets of Raffia Bags Kenya Limited by Polycem Bags Limited.

The judgment debtor did not file a replying affidavit or submissions or in any other manner participate in the objection proceedings. The judgment creditor, the claimant, and the objector filed their respective submissions. The Court has considered all the material on record including the oral testimony of Tarminder Umesh. The Court makes findings as follows:

**First**, there is no dispute that the judgment debtor owes the judgment creditor a sum of Kshs.1, 423, 725.60 by reason of the judgment in the instant suit.

Second, the evidence is that the initial debenture was between PBL and the objector on 12.03.2012 and registered on 16.03.2012 and the supplemental debenture was entered into on 23.12.2013 between the judgment debtor and the objector. The further evidence is that as at 12.03.2012 when the initial debenture was entered into, PBL had changed its name to the judgment debtor (Raffia Bags (East Africa) Limited) on 15.12.2011. The Court therefore returns that as submitted for the judgment creditor, the initial debenture was incapable of creating rights, equitable or legal, accruing or accrued to it to institute and prosecute the objection proceedings as envisaged in Order 22 rule 51 (1) of the Civil Procedure Rules. Further, as submitted for the judgment creditor, the supplemental debenture was fallacious in so far as it was standing on a misconceived existence of a non-existent initial debenture between the objector and the judgment debtor. As submitted for the judgment creditor, the initial debenture was clearly ultra vires the judgment debtor's borrowing capacity and the Court finds that as further submitted, the supplemental debenture could not stand – as was held in **Craig –Versus- Kansen (1943) 1All ER 108** and in **Mcfoy –Versus- United Africa Company (1961)3 All ER 1169 at 1172**, one cannot build something on nothing. Upon those findings, the Court returns that the application must fail, especially the evidence being that the objector failed to exercise due diligence in concluding the initial debenture.

**Second**, the Court finds that the judgment debtor will not suffer prejudice because as at 29.11.2021 the search at the companies' registry

showed that as at that date the judgment debtor's encumbrance was the variation of debenture instrument dated 09.06.2017 whose secured amount was Kshs.0.0. Further, the initial debenture having been shown not to have been over the judgment debtor's property for want of due diligence on the part of the objector, it cannot be said that the objector or the judgment debtor will suffer prejudice in view of the initiated execution by way of proclamation or attachment of the judgment debtor's property.

**Third**, the parties submitted extensively on whether the floating security or securities in favour of the objector had crystallised (became fixed) by reason of the execution proceedings. There was no dispute that a floating charge or security crystallized on appointment of a receiver, under a power donated to the debenture holder in the debenture or by court; or, a winding up commencing, and a liquidator is appointed; or the company ceasing business. But those are situations outside the instant case. The objector submitted that the debenture dated 12.03.2012 stated that the principal moneys and interest and other moneys and liabilities hereby secured shall immediately become payable and fall due to be discharged without demand, if any judgment or order is made against the company or any of its subsidiaries and is not complied with within seven (7) days or if any execution, distress, sequestration or other process is levied or enforced upon or sued against any of the property, assets or revenue of the company. It was submitted for the objector that the only time the claimant's interest as a judgment creditor would supersede the objector's claim to the proclaimed goods would be if the execution process is completed before the debentures crystallised and by reason of that provision in the initial debenture, the floating charge herein had crystallised. The objector cited **Mackenzie (Kenya) Ltd –Versus- Pharmica Ltd [1976] eKLR** where it was held that a floating charge is valid as against execution creditors, save that if the execution creditor takes property in execution, e.g. by seizure and sale by the sheriff, or obtains a garnishee order absolute (but not a garnishee order nisi) before the charge crystallizes he obtains priority. The Court finds that the objector appears to have relied on the cited provision of the debenture but which the Court has already found to be inapplicable as it is invalid to create right on the part of the objector in the judgment debtor's property. In that case the Court will not delve into interpretation of the debenture's provisions as conferring priority over an execution creditor as appears to have been relied upon in **Menengai Rolling Mills & Another –Versus- Blue Nile Wire Production [2019]eKLR** as cited for the objector. The Court further considers that as submitted for the claimant, the opinion on the matter is that in absence of a specific provision in the debenture instrument conferring such priority as submitted for the objector, then the holding in **Savuchem Africa Limited –Versus- General Printers Limited [2019]eKLR** (Kasango J) will apply thus, **“The Court having found that the debenture created a floating charge is of the view that the objector, having not intervened in regard to that debenture cannot now come at the execution stage of the attached goods. Cases in point are Kahiga V Kencity Clothing Ltd [1982] KLR 465 and Diversity Lever East Africa Ltd V Mohanson Foods Distributors Ltd and Another [2004] 1 EA 43 where it was held: Where there was a floating charge over the movable property of an execution debtor created by a debenture, the floating charge crystallize on the date of the appointment of the receiver. As no receiver has 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 has been put in motion by an execution creditor, then the execution creditor has priority over the debenture holder whose charge has not crystallized.”**

In view of the findings, the application is liable to dismissal with costs.

In conclusion, the objector's application by the notice of motion dated 02.06.2021 and filed on 03.06.2021 is hereby dismissed with costs in favour of the claimant, the judgment creditor.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01ST APRIL, 2022.**

**BYRAM ONGAYA**

**JUDGE**