



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 130 OF 2012

KENYA CHEMICAL & ALLIED WORKERS UNIONCLAIMANTS

VERSUS

PACKAGING MANUFACTURERS [1976] LTDRESPONDENT

RULING

INTRODUCTION

1. On 4/9/2014, the objector filed objection proceedings by way of a Notice of Motion dated 3/9/2014. The motion seeks the lifting attachment of the respondent's properties described in the proclamation of attachment dated 28/8/2014. It also seeks the setting aside of the said execution. The ground upon which the Motion is brought are set out in the body of the Motion and the supporting affidavit sworn by Paul Ngetich on 3/9/2014. The basis of the objection is that the objector holds a fixed charge over all the movable and immovable assets of the respondent by dint of the Debenture dated 19/5/2014. According to the objector, the fixed charge created by the debenture enjoys priority over the decree of this court because the objector is a secure creditor.
2. The Motion is opposed by the claimant vide the replying affidavit by Were Dibo Ogutu sworn on 17/9/2014. The gist of the claimants reply is that the alleged charge over the respondent's assets by the objector is a collusion between the two parties to the charge meant to frustrate and delay the settlement of the judgment debt. According to the claimant, the respondent executed a consent order on 2/10/2013 to pay the decretal sum by installments of ksh.5,000,000/ per month but defaulted and has engaged in all forms and sorts of evading payment of the judgment debt.
3. The respondent has supported the objectors Motion vide the replying affidavit sworn by Abubakar Laving on 29/10/2014. The gist of the respondent's reply is that there exists a fixed charge over all her assets in favour of the objector by dint of a debenture executed between her and the objector for a loan advanced on 2/9/2013. According to the respondent the reason for the financial difficult in which she has found herself is because of tax burden levied on imported raw materials.
4. The Motion was heard on 4/11/2014 when counsel for the objector and the claimant made their Oral submissions.

OBJECTOR'S CASE

5. Mr. Nooran, learned Counsel for the objector submitted that by dint of the Debenture executed in her favour by the respondent Judgment Debtor (JD) , a fixed charge was created over all movable and immovable assets of the JD including all motor vehicle, plant machinery, tools and chattels held by the JD from time to time. He cited DIVERSEY LEVER EAST AFRICA LTD vs MOHANSON FOOD DISTRIBUTOR LTD & ANOTHER [2004] E.A 43 CCK where Mutungi J, quoted KAHAGI vs KENCITY CLOTHING LTD [1982] KLR 464 where the court allegedly held that if a fixed charge is created by a debenture before execution of a decree commences, the fixed charge has priority over the execution.

6. In breach of the foregoing legal principle, the objector's counsel submitted that the Auctioneer herein has attached various machines and motor vehicles which are listed in the proclamation (exh.PN1). According to the objector, the said attachment has put her to the risk of losing the loan advanced to the JD. She denied any collusion with the JD to delay settlement of the decree as alluded to by the claimant. According to the objector the debenture was for a loan of USD 400,000 plus over draft of ksh.1.5 million.

CLAIMANT'S REPLY

7. Mr. Nyambena, learned counsel for the claimant opposed the application and relied on the replying affidavit of Mr. Ogutu and all the annexures thereto. The counsel submitted that the objector did not prove any interest in the attached properties. According to the claimant, the objector only proved a conspiracy between the JD and herself to delay justice. He submitted that the alleged charge and debenture was never registered and a certificate issued by the Registrar of Companies. The counsel further submitted that the debenture only bars the JD from parting with the assets but it does not oust the execution by the court or third parties claim over the assets. He contended that the DIVERSAY CASE decision corroborated the claimants case that execution of a decree takes a precedent over debenture. According to the counsel, the execution has already been done on the movable assets of the JD after verifying that they belong to the JD and were free from any encumbrance. He further contended that the objector will not suffer any prejudice because the charged land remains intact. He pleaded that the objection be dismissed to pave way to conclusion of the case which is fairly old and affecting 161 grievants. He concluded by urging that any costs ordered for the auctioneer should be met by the JD.

REPLY BY THE JUDGMENT DEBTOR

8. Mr. Makhokha, learned counsel for the JD supported the Motion by agreeing that the objector had interest in the movable assets of the JD by dint of the debenture which was registered in may 2014. He submitted that unless the objectioin is allowed, the JD will have to close business and jeopardize the current employers. He maintained that the JD's financial problems resulted from amendment of the VAT Act.

AUCTIONEER'S RESPONSE

9. Mr. Njoroge, learned counsel for the Auctioneer submitted that the auctioneer did proper proclamation and prayed for costs if the objection is allowed.

OBJECTOR'S REJOINDER

10. Mr. Nooran referred to Section 2 of the Chattels Transfer Act Cap 28 to submit that a charge created under the Companies Act is excluded from the application of the Chattels Transfer Act. He further referred to Section 96(2) of the Companies Act to submit that, fixed charges over machines are not to be registered. As regards the DIVERSAY CASE, Mr. Nooran submitted that the reason why the court gave priority to the execution over the charge was because in that case, the debenture had created a floating charge and not a fixed charge. He maintained that in the present case, the charge should take precedence because it is fixed in nature and it was created before the execution. In conclusion the counsel agreed with the claimants counsel that the

auctioneers costs should be born by either the JD or the objector depending on the outcome of the objection proceedings.

ANALYSIS AND DETERMINATION

11. Upon carefully going through the objection proceedings and replies filed, and upon considering the submissions by all the learned counsel for parties involved, there is no doubt that there exists an outstanding consent judgment in favour of the claimant and against the JD. It is also common knowledge the machinery for execution of the decree herein has been initiated by proclamation of attachment by the auctioneer appointed by the court. There is further no dispute that the proclaimed assets are all movable assets which belong to the JD. It is not in dispute that the objector alleges priority right over the executing creditor by dint of a fixed charge created vide debenture dated 19/5/2014. Lastly it is a fact that the said debenture and the charge created thereby was never delivered or received for registration by the Registrar of Companies within 42 days of its creation.

12. The issues for determination are whether there is a valid fixed and floating charge over all the JD's assets in favour of the objector and whether such charge, if any, takes precedence over the execution of this court's decree. Lastly the court must determine whether the orders sought should issue.

VALID CHARGE OVER JUDGMENT DEBTOR'S MOVABLE ASSETS

13. The basis of the objection is the Debenture dated 19/5/2014 securing a debt of USD 400000 in favour of the objector as against the JD. Under clause 3.1.1, the debenture creates a fixed charge over the JD's land, all stock shares, bonds, debenture loan capital, goodwill and uncalled capital now and in future, trade names, brand names and unregistered trade marks and industrial secrets, computer programs and source codes, all motor vehicle, plant machinery, tools and chattels now and in future among others. The said charge was never registered with the registrar of companies. The reason for such default was that a fixed charge is not one of the charges upon which Section 96 of the Companies Act applies. Likewise the charge over the chattels was not registered under the Chattels Transfer Act because the charge is created vide a debenture.

14. Under the Companies Act a charge created by a debenture cannot validly exist against third parties without the instrument creating it not being registered with the Registrar of the Companies. The reasons for the foregoing view is that charges exists not only to assure the creditor of payment of his dues but also for information to other potential creditors. For the said reasons, and especially other creditors, Section 96 of the Companies Act provides that every charge created by a company registered in Kenya to which Section 96 *supra* applies shall be void against the liquidator and any creditor of the company unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced are delivered to or received by the Registrar for registration within 42 days after the date of its creation.

15. Section 96(2) of the Act lists down the charges upon which the Section applies including

“(a) A charge for the purpose of securing any issue of debenture;

(b) A charge on uncalled share capital of the company;

(c) A charge created or evidenced by an instrument which, if executed by an individual, would require registration as an instrument under the Chattels Transfer Act;

(e) A charge on book debts of the company;

(f) a floating charge on the undertaking or property of the company;

(g) A charge on calls made but not paid;

(h) A charge on a ship or any share in a ship,

(I) A charge on goodwill, on a patent or licence under patent, on a trade mark on a copyright or licence under a copyright.”

All the above assets are charged in favour of the objector under the debenture executed 19/5/2014 which was never or any particulars of the charge created delivered to or received by the Registrar of Companies for purposes of registration within 42 days after its creation or at all. According to the Objector the fixed charge was excluded from registration under Section 96(2) of the Act and as such no evidence of compliance with Section 96 of the Act was produced either by the JD or the Objector. Consequently, the court finds and holds that the said charge is void as against the executing creditor herein. It is trite that although a debenture need not be registered, a charge must be lodged for registration by Registrar of Companies within 42 days of its creation. If the legislature intended to exclude fixed charges created in respect of the items listed under Section 96(2) (a) to (i), nothing was difficult in expressly stating so. The obligation to cause the registration of the charges and the issue of debenture is on the company but the chargor is entitled to do so subject to recovery of the costs for the registration from the company. In view of the finding above that the fixed charge is void, the court will not proceed to deal with the question of priority between the charge and the execution of the decree of the court. The court will also not determine which of the orders sought should issue.

DISPOSITION

For the reasons stated above, the objection proceedings, generally and the Notice of Motion dated 3/9/2014 specifically shall stand dismissed with costs and the interim stay order lifted.

Orders accordingly.

Dated, Signed and delivered this 5th December 2014.

O. N. Makau

Judge