



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 583 OF 1974**

**JAMES JOB KIHORI KAHAGI .....APPELLANT**

**VERSUS**

**KENCITY CLOTHING LTD.....RESPONDENT**

**RULING**

The execution creditor herein obtained in this court judgment for Kshs 23,809.85 together with interest thereon and costs and interest at Bank rates. Armed with that decree, he proceeded to execute it against the execution debtor; Kencity Clothing Ltd (hereinafter referred to as “Kencity”) by way of attachment and sale by public auction of all stock-in-trade, furniture and all other movable and attachable goods belonging to the execution debtor to the extent of the decretal amount interest and subsequential costs.

The judgment was delivered on March 16, 1976 and the warrant of attachment was issued by this court on July 21, 1976.

The Court Broker attached and made an inventory of the goods he had attached on July 28, 1976, whereupon the Objector herein, Grindlays Bank International (K) Ltd and its appointed Receiver and Manager of Kencity, gave notice of objection to the attachment under Order XXI rule 5 of the Civil Procedure (Amendment) Rules. The Objector estimated the value of the attached goods to be approximately Kshs 130,000.

The execution creditor having been duly notified of the objection, filed his notice of his intention to proceed wholly with the attachment and sale of the attached goods, whereupon the objector took out this Chamber Summons under Order XXI rules 56 and 57 of the Civil Procedure Rules for orders that:

1. Service of this application in the judgment debtor be dispensed with. For determination
  - a) whether or not objectors are entitled to or have a legal or equitable interest in the whole of the attached property, and
  - b) whether or not the execution Creditor is entitled to proceed with the attachment and sale of the attached property and
  - c) which party should bear the costs of these proceedings.

The execution creditor had successfully sued Kencity to recover the balance of a loan he had obtained from another Bank for and on behalf of Kencity. In order to obtain the loan for Kencity in which he was a shareholder, he mortgaged with that Bank his piece of land. The proceeds of the loan were applied wholly in Kencity and there was no dispute about this. The execution Creditor did not get satisfaction of his judgment with the result that the balance of the loan remained unpaid. The Bank has now advertised for

sale the execution creditor's mortgaged land.

While the suit was pending before this court, Kencity requested and was granted overdraft facilities by the objector Bank which overdraft facilities were secured by a debenture dated October 28, 1975. The value of the overdraft facilities secured by the debenture was to the maximum of Kshs 120,000.

Under the terms of the said debenture, Kencity charged in favour of the objector bank, jointly and severally, all its undertaking, goodwill assets, books, debts and property both present and future. The charge was stipulated to rank as a first charge on all the property charged and to priority.

There can never be any doubt the objector Bank had a floating charge over Kencity's movable property including assets and stock in trade as well as a fixed charge over immovable property.

The execution creditor attached the movable attached goods through an appointed court broker while the floating charge in favour of the objector bank subsisted. This was on July 28, 1976.

The objector Bank appointed Receiver and Manager of Kencity on August 7, 1976 after the goods had been attached and while in the court broker's possession. At the time of this appointment, Kencity was indebted to the Bank in the sum of Kshs 79,827.75 with further interest at 12% pa from that date. Because of this secured indebtedness under a debenture which created a floating charge, the objector bank made this application for a declaration as to whether the objector has a legal or equitable interest over the attached goods to entitle it to an order to stop the sale of the said attached goods on the ground that the objector has priority over the goods or proceeds thereof over the execution creditor. Let us see.

No issue was raised on the validity of the debenture and I will proceed on the basis that it was duly registered as required under the Company's Act.

Mr Itoka, who appeared on behalf of the objector Bank, submitted that the execution creditor does not have priority over the debenture-holders, the objector Bank notwithstanding that the goods were attached before the Receiver and Manager were appointed. He says that since the Receiver was appointed before the goods were sold, the debenture-holders have an interest, legal or equitable over the goods or proceeds thereof or priority over the execution creditor.

The effect of writs of execution is provided for under Section 27 of the Sale of Goods Act (Cap 31). The section provides as follows:

“27.(1) A writ of *feri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better record that time, the sheriff shall, without fee, upon the receipt of the writ endorse upon the back thereof the hour, day, month and year when he received it: Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless that person had at the time when he acquired his title notice that that writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.”

In *Colonial Blankets v National and Grindlays Bank Ltd* [1962] EA p 537 - Edmonds J held that:

“The purpose of Section 27(1) is not to dispense with actual seizure. It is to provide for the contingency where before actual seizure can be effected after receipt by the sheriff of a warrant, the title to the goods passes without good faith or at a time when the person obtaining the title is aware of the existence of the writ in the sheriffs' hands.”

In this case, although the debenture-holders had a floating charge over the assets of Kencity at the time when the goods were attached, the property in the attached goods was bound in Kencity, the execution debtor. There is no dispute that this was so when the physical attachment has been levied on Kencity's assets, appointed the Receiver and Manager of Kencity. The issue therefore is whether the property in the

attached goods passed to the debenture-holders as from the date of the appointment of the Receiver. Under Section 27 of the Sales of Goods Act, the property in the attached goods was bound in the execution debtor, Kencity. Did this position change after the attachment and before the sale upon the objectors appointing the Receiver with the result that the objector has priority over the attached goods? This would defeat the all-purpose of the execution. The property in the attached goods did not pass to the objector bank upon the appointment of the Receiver.

However, it has been fully established that where there is a floating charge over the movable property of an execution debtor created by a debenture, the floating charge crystallises on the date of the appointment of the Receiver. The charge becomes a fixed charge over all movable property of the execution debtor. What happened in the appointment of Receiver was to crystallise the floating charge which then became a fixed charge.

It has been established through a list of decided cases that the debenture holder has a floating charge over the assets of the execution debtor and this floating charge confers upon the debenture holder only equitable interest over the assets. That the execution creditor attaches the assets which are subject to the debenture holder's equitable interest. Upon the appointment of the Receiver, the floating charge crystallises and becomes a fixed charge. The property in the attached goods remains bound in the execution debtor subject to the debenture holder's equitable interest.

I am of the opinion that a distinction should be drawn between the goods which have been attached after the appointment of the Receiver and those attached before such appointment. In the former case there appears to be no difficulty because the debenture holder's charge crystallises before the attachment with the result that the debenture holder has interest in priority over the execution creditor who attaches the assets subsequent to the appointment of the Receiver. In such a case, the debenture holder would be entitled to an order stopping the sale or proceeds of the execution creditor.

However, there is a point of considerable difficulty with regard to those goods which are attached before the appointment of the Receiver.

The property in the attached goods under the warrant of *feri facias* is bound in the execution debtor and the goods remain in the custody of the law in the hands of the court broker. Before the appointment of the receiver, the machinery of execution by attachment and sale has been put in motion and technically, the execution creditor should have priority over the debenture holder whose charge has not yet crystallised. As at that date the property in the attached goods is subject to various interests, mainly those of execution creditor, those of the debenture holder as well as under the protection of the law. If the attached goods are subsequently sold before appointment of the Receiver although subject to debenture holders, equitable interest, the execution Creditor has priority and is entitled to the proceeds thereof. This is so because the debenture holder's floating charge has not crystallised and he cannot single out a single asset out of the many assets of a going concern. In addition, the debenture does not cover the proceeds of such sale with the result that the execution creditor is entitled to the money.

Once the writ of *feri facias* has commenced before the appointment of the receiver, the execution creditor should have priority. Is this priority lost on the appointment of the receiver before the goods are sold? The warrant of *feri facias* is for attachment and sale of assets of the execution debtor. It is one court process for execution by attachment and sale.

If the warrant of *feri facias* is extended, upon execution on the debtor's assets, the machinery of execution by attachment and sale has commenced. As from that moment, the interests of the parties become paralysed at that point. I say paralysed because this is the point where priority or otherwise of interested parties should be determined process of the court has intervened as the guiding factor. The following general statements appear to be in accord with this proposition.

A note in *Annual Practice* (1976) vol 1 page 248 provides:

“debenture usually creates a floating charge on a company's assets, and only where the charge has

been crystallised eg by completion of an execution by seizure and sale do the rights of debenture holders have priority over those of the execution creditor”

In *Palmer's Company Law* 21st Ed at p 404 a note provided:

“A floating charge is valid as against execution creditor takes property in execution e.g. by seizure and sale by sheriff or obtains a garnishee order absolute (but not a garnishee order nisi) before the charge crystallises, he obtains priority”

I am of the opinion that the criterion is the date on which the debenture holder's charge crystallises. If the debenture holder's charge crystallises, before seizure and sale of the attached goods, then the debenture holder has priority.

On the two quotations (above) it would appear that the debenture would rank in priority only if the charge crystallises before the actual seizure. Once the actual seizure has taken place before the charge crystallises, then the execution creditor has priority over the debenture holder.

This appears to be in accordance with the situation where the garnishee order *nisi* is made absolute before the charge crystallises. Once the garnishee order is made absolute, the debenture holder cannot claim priority and the execution creditor is entitled to the money.

Similarly upon the court issuing the writ of *feri facias* which is subsequently executed by attachment of the execution debtor's assets before the charge crystallises, the execution creditor has priority over the debenture holder. This priority should not be lost by the fact that the receiver is appointed before the actual sale of the goods. I am of the opinion that execution by way of attachment and sale should not be treated as two separate matters. Once the writ of *feri facias* has issued and executed, the process has commenced and should not be interrupted by the fact that a receiver has been appointed and that the floating charge has crystallised after the actual seizure and before the sale of the goods takes place. Just in this same way the debenture holder cannot have priority over the proceeds of sale of attached goods, sold before the appointment of the receiver, he should not have priority over attached goods, which have been seized before the floating charge crystallises on the appointment of receiver but before the sale. In this instant, the execution creditor has already obtained priority which should not be taken away in the course of execution.

If the receiver is appointed after the sale of the goods, the debenture holders have no priority over the proceeds of the sale (see *Heaton and Dugard Ltd v Cutting Brothers Ltd* [1925] 1 KB 655).

In that case, the sheriff went into possession under a writ of *feri facias* and in order to avoid a sale, judgment debt was paid and costs. Debenture holders appointed the receiver before the money was paid to the execution creditors and claimed the money in the hands of the sheriff. It was held that the money was a debt owing by the defendants to the execution creditors who were entitled to keep it as against the receiver.

If the debenture holders were not entitled to the proceeds of the sale which took place before their charge crystallised then it would appear to me to be logical that after the attachment and before the sale the execution creditor's priority should not be upset by the appointment of the receiver after the attachment and before the sale.

In *Evans v Rival Grawike Quarries Ltd* [1910] 2 KB 979 where there was a garnishee order *nisi* before the appointment of a receiver, the order nisi was made absolute by court.

In the instant case, there was an order for attachment and sale before the appointment of receiver and I am of the opinion that once seizure took place and the property in the attached goods bound in the execution debtor and under the custody by operation of law, the execution creditor had priority over goods. Once that priority had been vested in him by operation of laws it would not be extinguished by subsequent appointment of a receiver by the debenture holders who had from that time equitable interest over the

goods subject to execution creditors interest with vested priority.

I derive solace in the decision in *Robinson v Burnell's Vienna Bakery Co Ltd* [1904] 2 KB 624 the facts of which were that the goods of the judgment debtor were seized in consequence of which payments were made to avoid a sale. No receiver having been appointed, the execution creditors were entitled to the money.

In this case, suppose the execution debtor paid the money before the appointment of the receiver to avoid the sale, the execution creditor would have been entitled to the money as against the debenture holders.

I would go further and hold that if the execution debtor paid the judgment debt after the appointment of the receiver to avoid a sale, the execution creditor would have been entitled to the money as a debt owing by the judgment debtor to the execution creditor. The debenture holders' interest would be a fixed charge over the goods whose property would then have been redeemed by the execution debtors and subject only to debenture holder's equitable interest with priority by virtue of a fixed charge created by the appointment of a receiver.

I am mindful of what Channel J said in *Robinson's* case:

“The debenture holders were the holders of a floating security over the assets of the company and no doubt when the company's goods were taken on execution by the sheriff they were only seized subject to the equities attached to them and the title of the debenture holders would have prevailed had it been perfected in time.”

The question is what time should the debenture holder's titled purported to avail the priority. I am of the opinion that the time would be before the issue and execution of writ of *fieri facias*. If the time be after this then the debenture holders should have been entitled to the money as against the execution creditor.

In *Heaton and Dugard Ltd v Cutting Brothers Ltd* [1925] 1 KB 655, approving *Robinson's* case, Salter J found that money paid to avoid a sale was property due to the execution creditors who were entitled to it as against the debenture holders.

In both these cases the debenture holders retained that equities or interests by virtue of fixed charges over the goods which had then been redeemed by the judgment debtors upon payment of the money. The debenture holder's priority over the goods was then unassailable.

Salter J did not express an opinion on the point

“Where at the time the floating charge was made effective the sheriff is in possession of the chattels of the judgment debtor, but has not yet sold them, these chattels are in the custody of the law and in these circumstances the receiver for the debenture holders has priority over the execution creditor.”

With respect this is the issue in this case but the learned judge did not express an opinion on it.

Mr Justice Simpson had the task of dealing with an exactly similar point in *Mackenzie (Kenya) Ltd v Pharmico Ltd* HCCC No 2688 of 1975 (unreported) in which brother Simpson J came to the conclusion that

“When a debenture has created a floating charge over the whole movable property of a company which is a going concern it attaches to that property as it varies from time to time. If any of the company's property is subsequently attached in execution, that property although in the custody of the court broker, remains the property of the company and therefore subject to the floating charge. On the appointment of a receiver the charge crystallises, that it becomes a fixed charge over the movable property of the company as at that date including any attached property which has not yet been sold. Any such property however sold ceases to be the property of the company and thus no

longer subject to the charge created by the debenture. The rights of execution creditors accordingly have priority over those of the debenture holders only where execution has been completed by sale of the attached property before the charge crystallises.”

With greatest respect, I am in agreement with most of my learned brother's conclusions and statement of law to be deduced from the above quoted cases. However, I feel most restrained, with the greatest respect, to differ with my learned brother on one statement namely, that “on the appointment of a receiver, the charge crystallises ... that is it becomes a fixed charge over movable property of the company as at that date including any attached property which has not yet been sold” (underlining is mine).

As I have attempted to show, the attached goods subject to a floating charge which has not crystallised becomes subject to various interests from the moment the warrant of attachment issues and is executed. Those attached goods as from the time of the seizure are bound in the judgment debtor but subject to custody and protection of the law. If, at that time the debenture holder's charge has not crystallised, the execution creditor's interest has priority over the debenture holder. That priority should continue unimpaired until the execution is completed. If the debenture holder's charge crystallises in the course of execution the debenture holder's interest does not suddenly deprive the execution creditors of the already vested priority by operation of law. To the extent of the attached goods the debenture holder's interest ranks next in priority with the result that should these goods be redeemed on payment, the execution creditor is entitled to the money. The debenture holder then has a fixed charge over the attached goods in the same way as those unattached goods without any rivaling interests over the goods.

If the execution creditor's priority so gained by operation of law before debenture holder's charge crystallises were to be upset by subsequent crystallisation of debenture holder's charge, then the whole purpose of execution by way of attachment and sale would in many cases be rendered meaningless with the execution creditor suffering unrecoverable expenses incurred through the whole process of execution.

I do not claim to be correct in this respect. The point is complex and although I have differed with my brother Simpson J on this point, I with respect concur with his profound reasoning in his judgment from which I have derived considerable assistance and guidance.

I am informed that the execution creditor company is a going concern under the management of the objectors. No doubt any goods lying in the company's premises are subject to debenture holders' fixed charge and the debenture holders have priority over those goods.

The execution creditor has no means of satisfying his judgment except of course by way of sale of the attached goods. He will then be in a position to pay off the bank which loaned him the money for the sole benefit of the judgment debtor's company it will be most inequitable that his *shamba* should be sold to pay the debt which technically may, for all intents and purposes, be regarded as that of the judgment debtor's.

I am now able to answer the issues as follows:

2. a) The objectors have equitable interest over the attached goods but that interest ranks next in priority to that of the execution creditor.
- b) The execution creditor is entitled to proceed with the attachment and sale of the attached property.
- c) The costs of these proceedings shall be borne by the judgment debtor and to be paid in addition to the judgment debt as far as execution creditor's costs are concerned.

I may add here by way of alternative relief that the objectors may pay the execution creditor the judgment debt plus costs in which case the objectors shall be subject to a fixed charge along with other goods of the company which have not been attached.

**Dated and delivered at Nairobi at 25th day of January, 1977.**

**M.G MULI**

**JUDGE**