**Diversey Lever East Africa Ltd v Mohanson Food Distributors Ltd and**

**another**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 20 January 2004

**Case Number:** 1693/01

**Before:** Mutungi J

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Civil procedure – Execution – Attachment of motor vehicles subject of a debenture – Whether*

*debenture holder can obtain stay by execution – Order XXI, rules 56 and 58 – Civil Procedure Rules.*

*[2] Company – Debenture – Attachment of motor vehicles in execution – Motor vehicles subject of a*

*floating charge created under a debenture – Receiver – No receiver appointed as at time of attachment –*

*Whether debenture had crystallised – Whether debenture holder has priority over execution creditor if*

*receiver not appointed at time of execution.*

**RULING**

**Mutungi J:** This is an application dated 16 July 2003, by way of a chamber summons, under Order XXI, rules 56 and 57 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Chapter 21), Laws of Kenya seeking orders that: “1. The attachment of the Defendants’ goods be lifted. 2. C osts of this application and the attachment be awarded to the Objector”. The application is supported by an affidavit of one Paul Judo, the Relationship Manager of the Objector/Applicant of even date. The facts from which these objection proceedings arise are briefly as follows. On 18 March 2002, the Plaintiff obtained judgment on admission against the First Defendant for KShs 16 284 295,55 plus costs at KShs 356 029 on 11 July 2002. The judgment debtor – First Defendant in this case – never paid the decretal amount and on 28 April 2003, this Court made an order for the attachment of the First Defendant’s six motor vehicles, which attachment was done on 19 June 2003 by Tip Top Auctioneers, in an effort to satisfy the above judgment and decree. There is no dispute that the vehicles belong to the judgment debtor. The vehicles, though, were on hire-purchase agreements between the First Defendant/judgment debtor and Kenya Commercial Finance Company Limited, and not the Objector/Kenya Commercial Bank Limited. Clause 18.1 of each of the hire-purchase agreements, states that the hire-purchase agreements shall automatically terminate upon a levy of execution against the hirer – the First Defendant – upon which event the hirer’s liability is to pay its indebtedness to the owner – the Objector. In other words, the Objector’s relief lies in a claim for the amount owed to it by the judgment debtor/First Defendant. As at the time of this application, no receiver had been appointed and the debenture has not, accordingly, crystallised. The Applicant/Objector’s case is simply that since it had a debenture in its favour over the goods of the judgment debtor, the attachment of the goods by the decree holder is bad in law, as the debenture has a priority over the rights of the executing judgment debtor. The decree holder – judgment creditor – holds the opposite view. The success or failure of the Objector’s application revolves around this simple, but critical question of law: “Who has priority over the goods of a judgment debtor? The debenture holder, or the execution creditor (the decree holder in our case?)”. Before answering the above question, the following needs to be kept in mind, if for nothing else, as a reminder of the applicable law. First, the concept and import of a debenture. A debenture creates a floating charge over the assets of the execution debtor, and such floating charge confers upon the debenture holder only equitable interest over the assets. Further, where there is a floating charge over the movable property of an execution debtor (as is the case here) created by a debenture, the floating charge crystallises on the date of the appointment of the receiver. As a matter of fact, and as stated earlier on, no receiver had been or has been appointed by the debenture holder (the Objector) in this case, at least as at the time of filing this application. Should a receiver have been appointed by the debenture holder after the execution by attachment complained of has been put in motion, the law is very clear. In the case of *Kahagi v Kencity Clothing Limited* [1982] KLR 464, it was held, at 465: “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 yet crystallised”. At 466 of the same authority, there is no doubt that the execution creditor’s interest in the attached goods has a priority, and that priority is not lost if a receiver is appointed before the attached goods are sold, provided that the machinery of execution by attachment and sale preceded the appointment of the receiver. The above seems, in my view, to firmly seal the case in favour of the Plaintiff – execution creditor – and against the Applicant/Objector. All in all, therefore, the application fails and the Court holds that the Plaintiff/decree holder is entitled to the attached goods. The application is hereby dismissed with costs to the Plaintiff and against the Objector/Applicant.

For the Plaintiff: *Information not available*

For the Respondent:

*Information not available*