

KENYAN REGULATIONS ON DISCLOSURE OF CLIENT BANKING INFORMATION, DEBENTURES AND PRIORITY IN THE EVENT OF DEFAULT BY A CHARGE

The Credit Reference Bureau Regulations, 2013 provides that:-

(1) A Bureau shall protect the confidentiality of customer information received in terms of these Regulations and shall only report or release such customer information-

- (a) to the customer concerned;
- (b) to the Central Bank;
- (c) to a requesting subscriber;
- (d) to a third party as authorized by the customer concerned; or
- (e) as required by law.

(2) Except as is otherwise provided for under sub-regulation (1), a director, member, officer or other employee or agent employed in the business of a Bureau or a subscriber shall not disclose any information to any person and this obligation shall continue to apply even after termination of tenure, employment or relationship with the Bureau or subscriber.

(3) A director, member, officer or other employee or agent of a Bureau or subscriber who unlawfully or without the authority of the Bureau discloses any credit information to an unauthorised person commits an offence and shall be liable, upon conviction, to imprisonment for a term of two years or to a fine of five hundred thousand shillings, or to both

The origin and the basis of the banks duty of confidentiality are attributed to common law case of **Foster v. Bank of London**.

It is an implied term of the contract between a banker and his customers that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it.

The leading authority on this subject is the case of: **Tournier v. National Provincial and Union Bank of England** [1923] All ER 550. Banker LJ stated as follows:

*“The case of the Banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence.”*

It is an implied legal duty arising from the contract. The bank has a qualified obligation with its customer to abstain from disclosing information as to the customer’s affairs without his consent. But there is no privilege from disclosure:

- (a) Where disclosure is under compulsion by law;
- (b) Where there is a duty to the public to disclose;
- (c) Where the interests of the bank require disclosure.
- (d) Where the disclosure is made by the express or implied consent of the customer

The exemptions above to disclose customers’ information are explained below:

## **1. Disclosure under Compulsion of Law**

### **a) Court Order**

The following scenarios can lead to disclosure under compulsion of law.

- Order to inspect entries in the Banker's books
- To assist police with their enquiries
- Evidence for foreign trials

### **b) Request from an authorised officer of the government**

For instance the Kenya Revenue Authority may request for confidential information of customers of a bank.

### **c) Bank liable to prosecution if information is not revealed**

This refers to information in the course of professional business or employment. The person's bank must suspect or have reasonable grounds for suspecting that person is engaged in money laundering. The disclosure is made as soon as practicable after the Bank receives the information.

### **d) Where the law compels the bank to disclose information and it is an offence not to do so**

It is an offence to fail to report a person's engagement in any kind of illegal money laundering when the information is acquired in the course of business if the defendant has knowledge or suspicion or reasonable grounds or suspicion

No offence is committed if the information is disclosed as soon as is reasonably practicable after the information come to the person's knowledge or there was a reasonable excuse for non-disclosure. It is also a defence for legal advisers if the information arose in privileged circumstances.

## **2. Disclosure in the Bank's Interest**

Reason for dishonouring cheques due to say, insufficient funds or signing mandate.

Another instance is when the Bank discloses information to a spouse for good course.

*(Sunderland v Barclays Bank Ltd (1938))*

## **3. Disclosure with the Customer's Consent**

It is now common for banks to request customers for permission to give a reference

In this regard therefore, a bank can only disclose the loan situation of a client to a third party after obtaining consent from the client.

## **2. Status and recovery of the Loan facility of a client**

Clause 14 of the Fixed and floating debenture gives instances where the floating charge of a client may automatically crystallize and attach by way of a fixed charge to all the assets comprised in the fixed and floating Debenture.

For example, clause 14(h) states that crystallization the charge will occur when the client fails to pay any sums payable by it from time to time to the lender on the due date.

The Companies Act 2015 defines a debenture as including debenture stock, bonds and any other securities of the company, whether constituting a charge on the assets of the company or not. A debenture is a document given by a company as evidence of a debt to the holder usually arising out of a loan and most commonly secured by a charge. Debentures are usually issued by a resolution of the Board of Directors under powers conferred by the company's articles of association.

Whether any company offers debentures to the general public for subscription or purchase, it must execute a debenture trust deed in respect of the offer and the trust deed must be executed between the company and the trustee for the debenture though not a subscriber, is the person recognized by law as the legal owner of the entire issue, and he is the one that represents all the debenture holders while he holds the legal interest to the debenture and the investors are the beneficiaries.

### **Debenture Holder**

Debenture holders are those to whom the company issues debenture; they are creditors to the company. They may be secured or unsecured. A fixed rate of interest is paid to them by the company at fixed intervals.

Where some interest of a lender is identified by means of a floating charge, the minute the company goes into receivership, the debenture crystallizes. The debenture holder will appoint a receiver where there is a specific provision in the debenture that gives power for the appointment of receiver. The receiver has to notify the registrar of

companies about his appointment so that the registrar can indicate this in the register. The receiver must notify the registrar to notify the general public that anybody dealing with that company is deemed to have notice that the company is under receivership. As a receiver appointed by a debenture holder, he becomes the agent of the debenture holders and the debenture holders are liable as principals to whatever contract the receiver gets into.

Debenture holders will be considered creditors in the event the borrower company is declared insolvent. It has been established through a list of decided cases that the debenture holder has a floating charge over the assets of the debtor and this floating charge confers upon the debenture holder only equitable interest over the assets. Upon the appointment of the Receiver, the floating charge crystallizes and becomes a fixed charge. The property in the attached goods remains bound in the debtor subject to the debenture holder's equitable interest.

It is worth noting that debenture holders can only deal with the property and assets of the company that are the subject of the debentures. If the debenture trustees are of the opinion that the assets of the company are insufficient to discharge the principal amount, they shall file a petition before court and the court may after hearing the parties pass such orders as is necessary in the interests of the debenture holders.

### 3. Priority

A mortgage in general terms, ranks in the order of its creation, so without a trust deed, in an issue to the public, the holder of the first certificate to be issued would rank in front of the second and so on. Holder number one would be entitled to payment from the client's/ company's assets in full before the second certificate holder gets anything.

Where a client issues series of debentures which is secured by charge, benefit of which will be available to all debenture holders *pari passu* (equally), the client shall file the prescribed particulars with the Registrar of Companies for registration of charge.

The issue of priority was considered and emphasized by the Plaintiff by reference to the well-known textbook of **Bank Security Documents** by **J. R. Lingard** at paragraph 9.11 on page 159 in which the learned author had detailed:

*“Unless a debenture contains an express prohibition against the creation of subsequent charges ranking in priority to or pari passu with the floating charge and the subsequent chargee has notice of the restriction (see ch 1), any later fixed legal or equitable charge created by the company – even in favour of a person who has actual notice of the floating charge – will rank in priority unless the floating charge had crystallized and the later chargee had notice of crystallization before the later charge was created (para 9.28). All properly-drawn modern debentures do contain such a prohibition, for without it, the floating charge is virtually worthless.”*

*Paget’s Law of Banking* (10 ed) 1989 at pages 524 to 525 says that “where a mortgage or charge is taken without notice of a prior encumbrance, the priorities between competing mortgages and charges over book debts appear to be governed by the date on which notice of the mortgage or charge is given to the debtor”.

In the case of *Robert Stephenson and Co. limited In re Poole v the Company* [1913] 2 Ch 201 the question that arose was the priority of competing debentures. The first debenture had restrictive clauses which prevented the company from creating subsequent debentures that would rank *pari passu* or in priority to the first debenture. Upon crystallization of the first security constituted by the first deed the question of priorities arose. It was held that the security of the debenture stockholders under the second deed was postponed to that of the stock holders secured by the first deed. This was also the case in *Security Trust Co. v The Royal Bank of Canada* [1976] 1 All ER 381.

Clause 5 of the Fixed and Floating Debenture executed by Allied East Africa Limited and yourself states that,

*“The charges created by this Debenture shall rank as first charges on all the assets hereby charged as regards all other property hereby charged shall constitute a floating security but so that the Company is not to be at liberty to create any mortgage or charge or other encumbrance upon any of the assets hereby charged to rank either in priority to or pari passu with or subsequent to the charge hereby created (without the prior written consent of the Lender) it being the intention that the company shall have no power without the consent of the Lender to part with, dispose off, or alienate any part of the assets hereby charged except by way of sale in the ordinary course of business and that the proceeds of any and all such sales shall be paid to the company’s account or with the Lender.”*

## CONCLUSION

Banks may serve a notice on the Chargor and the Borrower in accordance with Section 90 of the Land Act demanding payment of the monies secured by this Charge and if the Chargor and /or the Borrower does not comply with the notice served under Section 90 of the Land Act the Bank may:-

- (a) sue the Chargor and /or the Borrower for any monies due and owing under this Charge;
- (b) appoint a receiver of the income of the Charged Property;
- (c) lease or sub-lease the Charged Property;
- (d) enter into possession of the Charged Property; or
- (e) sell the Charged Property;