



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 706 OF 2003**

**INDIGO GARMENTS (E.P.Z.) LIMITED.....
.....PLAINTIFF**

- V E R S U S -

APEX APPARELS (E.P.Z.) LIMITED.....DEFENDANT

R U L I N G

This application is brought by way of a chamber summons dated 11th November, 2003, under S.3A of the Civil Procedure Act, O.XXXIX Rules 1,2 and 3 of the Civil Procedure Rules, and all enabling provisions of the Law. It seeks from the Court the following orders-

1. THAT the application be heard ex-parte in the first instance.
2. THAT the defendant be restrained from using, damaging, destroying or otherwise interfering with the plaintiff's machinery which is more clearly defined below and in the annexure to the agreement between the plaintiff and the defendant dated 10th September, 2003.
3. THAT the defendant delivers up forthwith to the plaintiff or its Receivers Messrs Kieran Day and Mairo Jullienne the machinery which is defined in annexure A to the agreement dated 10th September, 2003 and which comprises of the following:
 - (a) Lectra machine (complete) 1 unit
 - (b) Velcro machine (Brother)BAS-326E-1 1 unit
 - (c) Belt Loop attaching M/c BROTHER BAS-705 1 unit
 - (d) Packet Hem M/c BROTHER TCB 260 1 unit
 - (e) Snap Attaching (Auto) IN HYUN SG-555-H 3 units
 - (f) Eyelet Button Hole BROTHER DH4-B980-01 1 unit

- (g) Bartack Brother LK3-B430E 5 units
- (h) Bartack Juki LK 1900HS 3 units
- (i) Snap Attaching (Normal) NS-45 15 units
- (j) Flat lock M/c BROTHER FD4-B271 1 unit
- (k) Joker tag attaching M/c Avery Dennison 1 unit
- (l) Double Needle chain stitch JUKI MH380 6 units
- (m) Double Needle chain stitch BROTHER 1 unit
- (n) Single Needle Chain Stitch BROTHER DT4-
B261-012-0 1 unit
- (o) Feed off the Arm JUKI MS/1261 8 units
- (p) LAMINATING Machine IBICO 1 unit

4. THAT the costs of this application be awarded to the plaintiff in any event.

The application is predicated on the grounds that-

1. The agreement dated 10th September, 2003, by which the defendant purportedly leased machinery from the plaintiff is fraudulent.
2. The agreement dated 10th September, 2003 was in contravention of a debenture dated 25th November, 1999
3. The defendant failed to pay any consideration to the plaintiff pursuant to the agreement dated 10th September, 2003
4. The defendant has no title over the machinery or right over the same in law, or fact, and the same should be returned to the plaintiff forthwith.
5. The plaintiff seeks an interlocutory mandatory injunction pursuant to S.3A of the Civil Procedure Act as it has received orders from customers for the manufacture of garments and unless the machinery in possession of the defendant is returned to the plaintiff, it (will) not be in a position to complete its orders or take on any new orders and thereby suffer irreparable harm and damage.
6. The plaintiff seeks an interlocutory injunction pursuant to O.XXXIX of the Civil Procedure Rules to restrain the defendant from damaging or otherwise interfering with the machinery pending the hearing and determination of this application.

The application is also supported by the annexed affidavit of KIERAN DAY, one of the Receivers and Managers of the plaintiff/applicant herein sworn on 11th November, 2003, and a second affidavit sworn on the same date by the same deponent, and a further affidavit by the same deponent sworn on 17th March, 2004.

The application is opposed. In his replying affidavit sworn on 20th November, 2003, Mr. DEEPAK

BHONJWANI, a director of the defendant herein, avers that the appointment of Kieran Day and Mario Julianne as receivers and managers of the plaintiff is null and void and contrary to law, and that Mr. Day's affidavit is defective as it depones to matters with respect to which he has no knowledge and/or without stating the source of his knowledge. He also states that the assets leased to the defendant are not the same as those comprised in the debenture, and further that Form 214 annexed to Mr. Day's affidavit does not contain any list of assets subject matter of the same form. Mr. Bhojwani adds that the machines listed in the annexure to the rental agreement of 10th September, 2003, had not been acquired by the plaintiff company as at the date of the debenture and therefore none of them form part of the assets charged to Akiba Bank Ltd. under the said debenture. He then states that the plaintiff should not question the rental agreement because it was the plaintiff itself which entered into the said agreement while being well aware of the debenture between it and Akiba Bank Ltd., and the plaintiff is duly bound by that agreement. The deponent also avers that the defendant paid the full amount of the rental under the agreement in the sum of US\$180,000.00 for a period of 10 years and referred to a receipt thereof marked as "DB 2". With regard to references to the debenture by Mr. Day, Mr. Bhojwani says that the defendant is a stranger thereto, and that the defendant entered into the rental agreement with the plaintiff in good faith. The defendant was not aware that the machinery set out under the rental agreement were charged to Akiba Bank Ltd., and in any event they were not so charged. There was no copy of the debenture at the Companies' Registry and therefore the same cannot be said to be a public document. The machinery in the defendant's possession is properly in its possession and the defendant is entitled to have it.

Mr. Bhojwani further depones that there is no evidence that the plaintiff has a large order for garments and that the plaintiff is experiencing difficulties in continuing its business because of the defendant having possession of the machinery leased to it. On the contrary, he says, the plaintiff has continued with its business after the defendant took possession of the machinery in question without interruption, and therefore the plaintiff is not entitled to any of the reliefs sought. Finally, the deponent avers that in any event, the machines in the defendant's possession are very few in number compared to all the machines listed in schedule 2 of the debenture, and it is therefore not clear why the plaintiff would be unable to continue with its business using all the machines that are not in the defendant's possession. Mr. Bhojwani also refers to an annexed affidavit of Mr. RAJESH NATHAN, the defendant's General Manager, in which Mr. Nathan states that he was inside the plaintiff's business premises in late September, 2003, and saw that there were over 500 machines in the said premises and that the plaintiff was at the time employing a task force in excess of 600 people. He also avers that to his knowledge the plaintiff has in its possession other machines of the same type as the ones which were leased to the defendant and, in his view, it would be incorrect to say that the plaintiff cannot continue in business by reason of the defendant being in possession of the machines leased to it under the said agreement.

During the oral canvassing of this application, Ms. Malik appeared for the plaintiff/applicant while Mr. Kariuki appeared for the defendant/respondent. Each counsel submitted at length and cited numerous authorities. In a nutshell, Ms. Malik submitted that a receiver can, on behalf of a company and in the company's name, bring an application of this nature to acquire delivery of assets and referred to KERR on the Law and Practice of Receivers. The assets that were charged to Akiba Bank Ltd. by the plaintiff are defined in the debenture document. The security includes a fixed charge on plant and machinery and future plant and machinery. The debenture also contains a negative pledge barring the plaintiff from conveying, assigning or transferring the whole or any part of the charged property. In his affidavit Mr. Day states that Akiba Bank served a demand notice on the plaintiff on 22nd August, 2003 demanding repayment of all the outstanding amounts, and this was followed by the appointment of the receiver on 23rd September, 2003. On 10th September, 2003, the plaintiff purportedly entered into this rental agreement with the defendant, whereby the plaintiff purported to lease or rent to the defendant company a host of machinery, a list of which is annexed to that agreement. By that agreement, the defendant agreed to borrow machinery at US\$18,000.00 per annum for 10 years and there is no mention as to how this figure was arrived at. The lender agreed never to require the return of the machines until after 10 years, and the agreement does not contain a termination clause. Instead, in the last clause the lender undertakes to indemnify the borrower against any action taken by the lender's banks or any other institutions leading to the acquisition of the lender's assets and in such event the provisions of the agreement would take precedence. Counsel also referred to the payment made by the defendant and said that the entire rent for 10 years in the sum of US\$180,000.00 was allegedly paid upfront, but the receipt was not dated, and

therefore gave no indication as to when the payment was made. She submitted that such a payment resembles more a sale than a rental agreement. As the consent of the bank was not obtained, the machines remained part of the debenture. Furthermore, counsel submitted that given the number of anomalies in this so-called agreement, there was clear dishonesty if not fraud on the part of the defendant company. Ms. Malik then referred to Vol. 4 of Halsbury's Laws of England, p.362 and submitted that as long as there is an element of dishonesty, actual deceit need not be proved, and that the rental agreement herein reeks of dishonesty

Counsel for the applicant also posed the question whether the defendant/respondent was an innocent purchaser for valuable consideration without notice. She referred to Mr. Day's affidavit in which he avers that he has looked through the plaintiff company's bank statements and financial records and can see no evidence whatsoever of the amount of US\$180,000.00 ever being paid to the plaintiff company, and this notwithstanding that Mr. Bhojwani, the defendant's director, had told him that he paid the money directly to Mr. Chadidas, the plaintiff's managing director. Counsel thereupon submitted that payment to Mr. Chadidas was not payment to the plaintiff company. In his replying affidavit, Mr. Bhojwani does not attach any bank statement showing that money was transferred to the plaintiff company, or a copy of the cheque as evidence thereof. The only evidence of the alleged payment is the so-called receipt which seems to have been faxed in a hurry, is not dated, and does not comply with the requirements of the Stamp Duty Act. Looking at the agreement, the fact that it was entered into merely a few days before the Receivers were appointed, and the inclusion of clause 7 thereof shows that the defendant company was aware that the machinery was subject to a debenture. Counsel then submitted that the defendant had actual knowledge that the machinery was subject to a debenture, and if it had no actual knowledge, it had constructive knowledge. She referred the court to **WILSON v. KELLAND**[1910] Ch.D.306 for the proposition that once Form 214 is registered and filed, it is notice to the whole world.

Ms. Malik further submitted that the agreement which is the subject matter of this suit was not sealed and therefore cannot bind the plaintiff company. She referred the court to Halsbury's Laws of England, 3rd Edn, Vol. 9, paragraph 168 at p.82. In her final point, counsel submitted that it is competent for the court to grant a mandatory injunction in an interlocutory application and enumerated the special circumstances that militate for the grant of that injunction in this matter. These include, inter alia, the fact that the contract in issue was entered into less than a fortnight before the appointment of the Receivers; the defendant had notice that the machinery was subject to a debenture; the inclusion of clause 7 in the agreement which seeks to defeat the rights of the lender's banks, and the alleged fact that there is no evidence of the alleged payment to the plaintiff. She then referred to **ESSO PETROLEUM CO. LTD. v. KINGSWOOD MOTORS LTD.**, [1973] 3 ALL E.R. 1057 as authority for the proposition that a mandatory injunction will issue where it can be established that there is a strong probability that at the trial, the applicant will succeed. She also referred to **LUGANDA v. SERVICE HOTELS LTD.**, [1969] 2 ALL E.R. 692 to demonstrate that where the defendant has committed a wrongful act, it cannot obtain favours from the court, and that all the plaintiff has to show is prima facie that a wrongful act has been committed and the plaintiff's rights trodden. She then submitted that a very strong prima facie case has been made to show that the defendant is in wrongful possession of the plaintiff's property and a mandatory injunction should issue. Counsel also cited a host of local cases, starting with **BELLE MAISON LTD v. YAYA TOWERS LTD.**, civil Case No. 2225 of 1992 in the plaintiff/applicant's further list of authorities to **MAHICAN INVESTMENTS LTD. v. WATAMU WATERWAYS LTD** [2001] LLR 4512 (HCK) and **THE COACH SAFARIS LTD. v. SHARIF HUSSEIN**, HCCCC. NO. 3702 of 1995 (unreported), all in which a mandatory injunction was granted. Counsel then concluded by submitting that the plaintiff had established a strong prima facie case, that damages are absolutely no remedy, and that the balance of convenience tilts firmly in favour of the plaintiff. She asked the court to grant the mandatory interlocutory injunction as prayed.

In his response, Mr. Kariuki for the respondent submitted that the debenture document shows clearly that the defendant is not a party thereto, and that the covenants and conditions therein are matters between the plaintiff and the debenture holder, Akiba Bank Ltd. who have not been made parties to this suit. He also argued that the plaintiff had not shown that it had no other machinery of similar nature to enable it carry out its business. He further contended that Ms. Malik's contention that the agreement was suspect on the ground that it was made a few days before the plaintiff company was placed under receivership and after

a demand had been sent to the plaintiff company, presumably by or on behalf of Akiba Bank Ltd., could not be sustained as there was no copy of any such demand attached to the affidavit of Kieran Day. Counsel then added that if it be accepted that the Receiver is an agent of the plaintiff company, and is acting as the plaintiff company, it would be grossly unjust on one hand to allow the plaintiff to enter into a rental agreement, and then through another officer take away rights conferred by that agreement. The plaintiff cannot blow hot and cold. Counsel then posed a rhetorical question – if the person aggrieved is Akiba Bank Ltd., why isn't it fighting this suit? In answer to Ms. Malik's argument that the company seal is not fixed to the agreement, Mr. Kariuki referred to ss.34 and 38 of the Companies Act and submitted that absence of a seal does not invalidate the document, or even make it suspect. And since the defendant has obtained possession of the machines in question for value, there would be no justice in allowing the plaintiff, through these proceedings, to repossess the machinery.

Mr. Kariuki further argued that the number of machines rented is only 50 which is negligible compared to the plaintiff's more than 500 machines, and that in any event the rented ones are not even part of the 500. If the plaintiff is in possession of more machines than needed, the prudent thing to do is to rent them away and make money. Clause 5 of the agreement is clear and the defendant is not going to jeopardise the machines. As for the lack of a termination clause, Mr. Kariuki submitted that there was nothing strange about that, especially as all the rent was paid in advance. The size of the agreement is irrelevant and, as for the receipt, the same was issued by the plaintiff, and there is no justice for the plaintiff to attack it. He then submitted that the validity of that agreement or receipt cannot be determined at this interlocutory stage, and that the court will need to hear evidence at a full hearing by the makers of the documents.

Counsel also referred to Black's Law Dictionary for the definition of "Receipt", and submitted that the invalidity or otherwise of that receipt is a matter between the debenture holder, Akiba Bank Ltd., and the defendant. Referring to lack of a revenue stamp on the receipt, Mr. Kairuki submitted that the plaintiff is governed by the Export Processing Zones Act, which exempts the plaintiff from stamp duty. Whether the payment is reflected in the plaintiff's documents is nothing to do with the defendants, and the defendant's position vis-à-vis constructive notice of the debenture is that there is no copy of the debenture at the Company's Registry, and Form 214 does not list out the machinery that is leased, nor does it contain clause 10 of the debenture. Even if the disposal of the machines was fraudulent, it is the plaintiff who is to blame, and the whole matter is between the plaintiff and the debenture-holder. Mr. Kariuki also submitted that it was for the plaintiff to prove its case and the defendant should not be asked to produce copies of cheques or bank statements. He further submitted that there was nothing in clause 7 of the agreement to show that the defendant had any knowledge of the debenture.

Coming to mandatory injunctions, Mr. Kairuki submitted that the applicants must show that they are entitled to certain orders, and that the plaintiff had not come anywhere near to showing that it was entitled to such an order. There is no evidence to show that the plaintiffs have received any orders for making garments which they cannot meet, or that they are not operational. The available evidence is to the contrary. Counsel then referred to the affidavit of Rajesh Nathan, "DB 4", which he called an eyewitness account. The person aggrieved is the bank, and not the plaintiff company, and there is nothing to suggest that the loss can't be quantified in damages. Machinery can also be costed and depreciation provided for. He further submitted that the balance of convenience tilts in favour of the defendant who is in possession of the machines and paid for them.

Mr. Kariuki at this point sought to distinguish all the authorities relied on by the plaintiff's counsel, and then submitted that this case is not the clearest of cases to warrant the grant of a mandatory injunction, and that the plaintiff has no locus standi to file the suit and the proper party to file the same would have been Akiba Bank Ltd. Counsel stated that the general principles for the grant of injunctions are stated in **GIELLA v. CASSMAN BROWN & CO. LTD.** [1973]E.A. 358 but quickly added that in addition to being entitled to an injunction, an applicant should also satisfy the court that an injunction ought to issue. He thereupon referred to **MARGARET ANYANGO v. NATIONAL BANK OF KENYA, HCCC NO.2533 of 1992 as an authority on that point. Citing J.K. INDUSTRIES v. KENYA COMMERCIAL BANK LTD. & ANOR.** [1987] K.L.R. 506, counsel also submitted that greater hardship will be caused if the application is granted. He then added that there is a multitude of authorities to show that interlocutory mandatory injunctions should not be granted in the absence of

special circumstances, and submitted that there are no special circumstances herein. His reasons were that the plaintiff itself entered into the lease agreement with the defendant; the defendant paid rental which was duly acknowledged by the plaintiff; the defendant was put in possession of the machinery pursuant to the rental agreement; and the Receiver as the company's agent is estopped from reneging on the contract with the defendant. He asked the court to dismiss the applicant's application in its entirety with costs.

In her reply, Ms. Malik submitted that there was no authority cited for the proposition that the proper plaintiff was Akiba Bank Ltd. She reiterated that there were special circumstances to warrant the grant of a mandatory interlocutory injunction and urged the court to issue the injunction.

After hearing the rival submissions of both counsel, it strikes me as abundantly clear that neither the facts nor the law in this matter are in dispute. What is at stake is the interpretation given to those facts and to the law by the respective parties.

The facts of this matter are briefly that by a debenture dated 25th November, 1999 the plaintiff acknowledged indebtedness to Akiba Bank Limited, and in that debenture the plaintiff also charged its property with repayment of the debt. By way of a first fixed charge by a of legal mortgage, the plaintiff charged to the bank the scheduled property and all rights relating to the scheduled property in existence at the date of the debenture. A short description of the scheduled property is set out in schedule 1 to the said debenture. The plaintiff further charged, by way of a first fixed charge, the plant and machinery set out in schedule 2 to the debenture as well as the future plant and machinery. Under clause 10 of the debenture, the plaintiff was precluded from conveying, assigning, transferring or agreeing to convey, assign or transfer the whole or any part of the charged property, and from doing, causing or permitting to be done anything which may depreciate, jeopardise or prejudice the value to the Bank of the charged property.

By an agreement dated 10th September, 2003, the plaintiff leased some 50 machines to the defendant, 8 of which are admittedly included in schedule 2 to the debenture. Under the terms and conditions of that agreement, the plaintiff agreed to loan to the defendant the machines as mentioned in annexure "A" to the agreement, and the defendant agreed to borrow the machines at a rental amount of US\$180,000.00 per annum for a period of 10 years from 15th September, 2003 and ending at August 15th, 2013. By an undated receipt, the plaintiff's managing director, one Gautam Chadidas, acknowledged on behalf of the plaintiff receipt of US\$180,000.00 from the defendant on account of the rental of the machines for a period of 10 years commencing September 15,2003 and ending September, 14th, 2013.

The plaintiff's case is that his agreement is void as it contravenes the express terms of the debenture, and that leasing the machinery for a continuous period of 10 years would depreciate, jeopardise or otherwise prejudice the value to the Bank of the charged assets and also amounts to a variation of the Bank's rights over the assets. The plaintiff also maintains that the agreement was fraudulent in that the defendant knew or ought to have known that the machinery it was leasing was charged to Akiba Bank pursuant to a debenture. It also states that no consideration was paid. The defendant denies the allegations of fraud and takes the position that the plaintiff entered into the contract voluntarily and is estopped from denying that the rental was paid.

In this application, the plaintiff seeks, inter alia, an interlocutory mandatory injunction for the return of the leased machinery under S.3A of the Civil Procedure Act. The law governing the grant of mandatory injunctions has been stated and re-stated in many authorities. In Vol. 24 of Halsbury's Laws of England, 4th edition, at page 534 paragraph 948, it is stated as follows-

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application."

Echoing these words in LOCABAIL INTERNATIONAL FINANCE LTD. v. AGROEXPORT & ORS [198 6], ALL E.R. 901 at 901, it was stated-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

These words were adopted by the Court of Appeal in KENYA BREWERIES LTD. v. OKEYO, [2002] 1 E.A. 109 (CAK) in which it was held that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases. So it was also held in SHOWIND INDUSTRIES LTD. v. GUARDIAN BANK LTD & ANOR, [2002]1 E.A. 284 in which it was reiterated that an interlocutory mandatory injunction would be granted sparingly and only in exceptional circumstances as where the applicant’s case is very strong and straightforward. In the case of SHEPHERD HOMES LTD. v. SANDHAM [1971] 1 ch.340, Megarry J., as he then was, said-

“At the end of the action the court will, of course grant such injunction as justice of the case require, but at the interlocutory state, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted even if sought to enforce a contracted obligation.”

These sentiments found favour with the Court of Appeal in DIAMOND TRUST BANK KENYA LIMITED v. JAWSINDER SIGNH ENTERPRISES, Civil Appeal No. 285 of 1998 in which Owuor, JA. said-

“I wholly agree with Megarry J.’s view that in the cases of mandatory injunction indeed a higher standard is required by way of establishing certain special circumstances before the same is granted.”

In ESSO PETROLEUM CO. LTD. v. KINGSWOOD MOTORS LTD. & ORS it was held that in an application for a mandatory injunction, the applicant has to persuade the court that there is at least a strong probability that at the trial, when the matter can finally be determined, the applicant will succeed and the defendant will fail in their arguments.

From the above authorities and a host of others cited by both counsel, the law relating to the grant of interlocutory mandatory injunctions is as clear as daylight.

Coming back to the facts of this case, although a lot time was taken by counsel on the issue of the number of machines taken by the defendant, and whether the plaintiff can continue operating with the number of machines currently in its possession, that, to me, is sidestepping the real issue. Even if the machine leased was only one, the situation should not, in law, stand in any different light than if the machines were 500. In my view, the crux of the matter is whether the defendant is entitled to the possession of the leased machines, the number thereof notwithstanding. The answer to that question is to be found in the answer to the further question as to whether the agreement dated 10th September, 2003 is valid or not. The legal standing of that agreement ought to be looked at from two perspectives – (a) the agreement *per se*, and (b) the agreement in relation to the debenture.

As for the agreement itself, counsel for the plaintiff submitted that such an agreement is not binding unless it is sealed. She referred to Halsbury’s Laws of England, 3rd Edition, Volume 9, paragraph 168 at p.82 wherein it is stated-

“Contracts entered into by a corporation aggregate, with certain exceptions, must be made under

seal otherwise they cannot be enforced either by or against the corporations, nor will it be bound by the mere signing of such contract by all the members of a corporation, or by a mere resolution by a corporate assembly. The seal of the corporation, when affixed, is equivalent to signature by a natural person, and places the corporation in a similar position..."

Counsel for the defendant submitted that it is not necessary that contracts by companies should be under seal, and in this regard he referred to sections 34 and 38 of the Companies Act. Section 38 is not strictly relevant as it relates to authentication of documents. But while the requirement for sealing of contracts by a company is the general rule, much also depends on a particular company's articles of association, which may prescribe a particular mode of entering into contracts by a company. The articles of association of the plaintiff company were not availed to the court, and that makes it difficult for the court to say with any certainty whether or not it was necessary for the contract to be sealed.

Two issues arose out of the contract but in relation to the debenture. The first was whether the machines which were leased to the defendant were covered in the debenture and the second whether the defendant had knowledge, actual or constructive, of the debenture. On the defendant's own admission, only 8 machines out of the 50 which it leased were included in schedule 2 of the debenture. The other 42 were not and included, in the defendant's contention, they were obtained by the plaintiff long after the debenture deed was signed. This is another way of saying that those 42 other machines were not subject to the charge in the debenture. With respect, such an argument is untenable. Clause 6 of the debenture deed, which deals with security, is crystal clear. Both the plant machinery and the future plant and machinery are thereunder charged by way of a first fixed charge. The phrase "future plant and machinery" is defined in clause 1.1 of the debenture deed as follows-

"Future plant and machinery" means all plant and machinery, equipment, fittings, installations, apparatus, tools, motor vehicles and all other such assets (other than fixtures) whatsoever, wherever situate, which become the property of the borrower after the date of this debenture."

The 42 machines became the property of the plaintiff after the date of the debenture and clearly fall into the category of future plant and machinery. They are therefore part and parcel of the plant and machinery covered by the charge.

The second issue is whether the defendant had knowledge of the debenture. Clause 7 of the agreement dated 10th September, 2003 provides as follows-

"The lender undertakes to indemnify the borrower against any action taken by the lender's banks/any institutions, whether liquidation, placing receiver managers or any other act of acquisition of the lender's assets and in such an event the provisions of this agreement with the lender will take precedence."

Ms. Malik construed this clause to mean that the same was meant to defeat the rights of the lender's banks, and its inclusion alone shows that the defendant company must have known that the machinery was subject to a debenture. Knowledge of the existence of the debenture could be either actual or constructive. In either event, the consequences are the same. The defendant has tried to wriggle out of the situation by asserting that a search at the Companies' Registry did not yield evidence of any debenture. That may be the case, and if so, the defendant cannot be said to have had actual notice of the debenture. However, the same cannot be said of constructive notice. There is evidence on record that the debenture herein and the particulars of the charge created by the company were registered on 26th November, 1999. On the appropriate Form No.214 is a column for the date and description of the instrument creating or evidencing the mortgage or charge. These are given as "Fixed and Floating Debenture dated 25th November 1999." It further reads "see overleaf". The third column requests short particulars of the property mortgaged or charged, and these are given overleaf as follows:-

"All the machinery and movables detailed in the schedule to the said debenture and all its undertaking, goodwill, assets, book debts and property whatsoever..."

A receipt for the payment of the registration fees in respect of these particulars was issued on the said 26th November, 1999. The registration of these particulars under s.96 of the Companies Act amounted to constructive notice of the charge affecting the property and thereafter no one can be heard to say that they were not aware of the existence of the debenture. **WILSON v. KELLAND** [7910] Ch.D.306 is adequate authority for that proposition. The defendants were put on inquiry by the registration of the particulars in form No.214, and were therefore constructively aware that the machinery they were leasing had upon it a fixed charge in favour of the bank. They knew, therefore, that their action was retrograde to the interests of the bank. Would that explain the genesis of clause 7 in the agreement? Only the defendants know. But one cannot help but think that clause 7 was clearly meant and intended to defeat and frustrate the debenture holder.

The receipt which was issued in acknowledgement of the rental has generated a lot of suspicion. It is not dated and it has no serial number. It is also computer printed. It states that the rental of the machines is for a period of ten years commencing September 15th, 2003 and ending September 14th 2013. This contradicts clause 3 of the agreement which gives the 10 year period as commencing from September 15th, 2003 and ending on August 15th 2013. This receipt leaves a lot to be desired.

Although the agreement provides for rental per annum, the defendant's case is that the whole amount was paid upfront, and yet there is no indication as to when it was paid. In his further affidavit sworn on 17th March, 2004, paragraphs 3,4,5, and 6 the Receiver depones as follows-

“3. THAT as the Receiver Manager of the plaintiff appointed by Akiba Bank Limited, I have access to all documents pertaining to the debenture dated 25th November, 1999 as well as the plaintiff's records including bank statements.

4. THAT I have searched for the receipt annexed to Mr. Bhojwani's affidavit and marked “DB 2” but I am unable to find the same among the documents I found at the plaintiff's premises.

5. THAT I have looked through the plaintiff's bank statements and I am unable to find an entry showing that the amount of US\$180,000 was transferred into a any of the plaintiff's bank accounts as payment for the purported rental for the machines.

6. THAT I verily believe that the amount of US\$180,000 was never paid to the plaintiff.”

These are very strong words to which one would have expected a reaction from the defendant. There was no such reaction. With the receiver deponing that he believes that the defendant never paid anything, and yet the sum involved is in excess of Ksh.14 million, the defendant ought to have tendered some evidence of payment quite independent of the receipts. But this was not done. Counsel for the defendant argued that the defendant had no opportunity to respond, but I think that if the court had been so requested, it would have readily stood over the matter to give the defendant an opportunity to respond. The receiver's belief passes by default. And if there is no proof of payment, then there is no consideration to the agreement dated 10th September, 2003, and the same cannot stand. This establishes a strong prima facie case within the formula laid down in **GIELLA v. CASSMAN BROWN & Co.LTD.**, [1973]E.A. 358.

This application is brought, inter alia, under s.3A of the Civil Procedure Act which invokes the unlimited jurisdiction of the court. The court is being asked to grant an interlocutory mandatory order, which can only be granted where special circumstances obtain and then only in clear cases. The plaintiff/applicant is already under receivership. It says that it needs all its machines in order to maximise production and get itself out of receivership. If it goes under, the injury that it will suffer cannot be estimated and sufficiently compensated for in damages.

The future of 600 employees will also be at stake. It is, indeed, exceptional to grant, before trial of the action, an interlocutory injunction which gives substantially the relief claimed in the action, and in particular to make a mandatory order. But every case must be decided on its own facts and circumstances. In the totality of the circumstances surrounding the agreement made on 10th September,

2003, the observations on the Receipt tendered by the defendant, and the uncontroverted averment of the receiver that the sum of US\$180,000 was never paid to the plaintiff, I think there are compelling circumstances and a dire need for this matter to be decided at once. In the further context of the plaintiff being under receivership, my opinion is that the defendant has no right to keep the machines in dispute. I accordingly grant to the plaintiff the interlocutory mandatory injunction sought in order No.3 as prayed, with costs to the plaintiff.

Dated and delivered at Nairobi this 30th day of November 2004.

L. NJAGI

JUDGE