

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 819 OF 2003**

AKIBA BANK LIMITED.....PLAINTIFF

VERSUS

INDIGO (EPZ) LIMITED

(IN RECEIVERSHIP).....DEFENDANT

J U D G E M E N T

In this suit the Plaintiff, **AKIBA BANK LIMITED**, seeks the following reliefs against the Defendant, **INDIGO (EPZ) LIMITED**, which is in receivership:-

- 1. A declaration that the Plaintiff has a registrable interest in land parcel LR. No.29/6/2.**
- 2. An order that the Defendant through its receivers or interim liquidator do execute a charge in favour of the Plaintiff, which charge shall not take preference over the interests of the East African Development Bank, the PTA Bank and Laxmichand Keshavji and Sons (K) Ltd.**
- 3. Costs of the suit.**

The Plaintiff's case as set out in the plaint dated 18th December, 2003 (as amended on the day of hearing, 05.10.2004) is that by a debenture dated 25th November, 1999 a company called INDIGO GARMENTS (EPZ) LIMITED charged to the Plaintiff by way of a fixed charge all its then present and future properties, including all estates in freehold or leasehold; that it was an express term of the debenture that INDIGO GARMENTS (EPZ) LIMITED was to immediately notify the Plaintiff of any contract for the acquisition of any freehold and leasehold property by itself, and forthwith after any such acquisition, to supply the Plaintiff with full details of the future property and deposit with the Plaintiff any documents which the Plaintiff may require as security; that on or about 3rd May, 2001 INDIGO GARMENTS (EPZ) LIMITED became seized of an estate in fee simple of a parcel of land known as L.R. No.29/6/2; that in breach of express terms of the debenture INDIGO GARMENTS (EPZ) LIMITED failed to notify the Plaintiff of the acquisition of L.R. No.29/6/2 and further failed to deposit any documents with it; that it was also an express term of the debenture that INDIGO GARMENTS (EPZ) LIMITED would not convey L.R. No. 29/6/2 to the Defendant on 10th August, 2001; that therefore the Plaintiff has an equitable security over the said land which arises out of the debenture; that in the alternative and without prejudice, the named directors of INDIGO GARMENTS (EPZ) LIMITED fraudulently conveyed L.R.No.29/6/2 to the Defendant as more particularly set out in paragraph 10 of the plaint; that upon discovery of the above breaches of the debenture and the directors' fraud the Plaintiff impressed upon the Defendant's directors to execute a charge in favour of the Plaintiff, but the Defendant was placed in receivership before the same could be finalized; and that in all these circumstances the Plaintiff has a registrable interest arising out of equitable security and as a result a charge should be registered in favour of the Plaintiff, which charge will not rank in preference over any other charges registered in favour of some three named third parties, which prior charges the Plaintiff is aware of.

The Defendant was duly served with summons to enter appearance and copy of the Plaint. It neither entered appearance nor filed defence. The Plaintiff therefore proceeded **ex parte**. It called one witness, SEKOU OWINO (PW1), who is an advocate of this court and the Legal Officer of the Plaintiff. PW1 produced in evidence the articles and memorandum of association of the Defendant (Exhibit P1); its certificate of change of name from INDIGO LIMITED to INDIGO EPZ LIMITED (Exhibit P2); the articles and memorandum of association of INDIGO GARMENTS EXPORT PROCESSING ZONE

LIMITED (Exhibit P3); debenture dated 25th November, 1999 (Exhibit P5); certificate of registration of mortgage dated 26th November, 1999 (Exhibit P4); conveyance of L.R. No. 29/6/2 by INDIGO GARMENTS (EPZ) LIMITED to the Defendant dated 10th August, 2001 (Exhibit P6); various correspondences between the Plaintiff and the Defendant (Exhibit P7); appointment of Defendant's receiver/manager (Exhibit P8); and letter of offer (Exhibit P9) by which the Plaintiff advanced some money to the Defendant.

I am satisfied upon the uncontroverted testimony of PW1 and the documents he produced that INDIGO GARMENTS (EPZ) LIMITED indeed acquired land parcel L.R. No. 29/6/2 and later transferred it to the Defendant. All this was done without disclosure to the Plaintiff and without fulfilling other obligations under the debenture dated 25th November, 1999. I am further satisfied that the Defendant subsequently acknowledged the Plaintiff's registrable interest in the aforesaid land but was placed in receivership before the formalities could be completed.

The Plaintiff has thus proved its case on a balance of probabilities. I will grant it judgement as prayed in the plaint with costs. Order accordingly.

DATED SIGNED AND PRONOUNCED IN OPEN COURT THIS 5th DAY OF NOVEMBER, 2004.

H.P.G. WAWERU

JUDGE