REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 512 OF 1976

BABER A MAWJI……..….. PLAINTIFF

VERSUS

UNITED STATES INTERNATIONAL UNIVERSITY

WARREN W HAMILTON……....……..…. DEFENDANT

JUDGMENT

The plaintiff on 15th November 1975 lodged a caveat against the first defendant's property plot land reference No 2951/109, title No I R 24208, Nairobi, claiming a chargee's interest to secure to the plaintiff the repayment of Shs 2,856,000, the equivalent of US $350,000, said to be money lent and advanced by the plaintiff to the first defendant (all references to currency hereafter are to United States dollars). The plaintiff having been served (at the instance of the first defendant) with a notice by the Registrar of Titles under section 57(6) of the Registration of Titles Act to withdraw his caveat within twenty-eight days, failing which it would be removed by the registrar unless the caveat is extended by an order of this Court, has made this application under section 57(8) of the Act for continuance of the caveat until further order of this Court; alternatively, an order under section 52 of the Transfer of Property Act 1882, prohibiting the first defendant from transferring or otherwise dealing with the property, except on the authority of the court. Section 57(8) provides: The caveator may, either before or after receiving such notice from the registrar, apply by summons to the Court for an order to extend the time beyond twenty-eight days mentioned in such notice, and such summons may be served at the address given in the application of the caveatee, and it shall be lawful for the Court, upon proof that the caveatee has been summoned and upon such evidence as the Court may require, to make such order in the premises, either *ex parte* or otherwise, as the Court thinks fit.

A long plaint and a long joint written statement of defence have been filed by the plaintiff and defendants respectively. A somewhat long narration of the circumstances stated giving rise to this litigation between the parties seems necessary. I will try my hand at précis-writing.

The plaintiff's case (numbered paragraphs (1) to 12) below) is that: (1) the first defendant, the United States International University, is a foreign company incorporated in the State of California, United States of America, which has an established place of business in Kenya known as Nairobi International School, on plot land reference No 2951/109, Nairobi, and that the second defendant is the chief administrator and director of the school and is a duly authorized agent of the first defendant (see the plaint, paragraphs 2 and 3). (2) On 2nd November 1974, the second defendant orally represented to the plaintiff that he (ie the second defendant) was the duly authorized agent of the first defendant which urgently required a loan of $350,000 for only a very short period which the first defendant, a well-established and reputable

organization, would repay promptly on the due date; and that on 12th January 1975 the first defendant anticipated receiving $3,000,000 out of which sum it would lend to the plaintiff $1,000,000 free of interest repayable by $100,000 monthly, in consideration of the plaintiff's agreeing to lend $350,000 to the first defendant (see the plaint, paragraph 4).(3) The plaintiff, believing and relying upon the representations and in consideration of the undertaking and offer of the interest-free loan of $1,000,000, which offer he accepted, agreed to lend $350,000 to the first defendant see the (plaint, paragraph 5). The plaintiff has produced a letter dated 28th November 1974 which is claimed to be written to him by the second defendant for and on behalf of the first defendant, to confirm the agreement. This letter reads:

> "United States International University,
>
> East Africa Campus,
>
> Nairobi, Kenya
>
> 28th November 1974
>
> Dear Mr Mawji [ie the plaintiff],
>
> This is authorisation for you to deal directly with Dean F Rempel, in regard to the money worth Kenya Shs 2,400,000 which will be repaid to you by Wednesday of next week.
>
> We will have US dollars one million ($1,000,000) as of 12th January 1975. Your repayment to us should be made in instalments $100,000 per day (per month) as of 12th January 1975. I will contact you in regard to this at a later date.
>
> Sincerely Yours
>
> (sgd) W Hamilton
>
> Dr W Hamilton Director"

(4)In pursuance of the agreement and at the request of the second defendant, the plaintiff on 4th November 1974 instructed his agent, i.e. his bank in Brussels, first, to remit by telex transfer $83,750 to the Bank of America, San Diego, for the credit of the first defendant (the receipt of this sum was acknowledged to the plaintiff's agent by Robert Dunn, the vice-president, who together with William Rust, the president of the first defendant, was advised of the transfer of this money by the plaintiff's agent); secondly, to pay to the second defendant personally in Brussels $350,000, advanced by way of an accommodation loan for the use of the first defendant, was acknowledged by a letter dated 2nd December 1974, which the plaintiff has produced together with the receipt dated 5th December 1974, which the plaintiff has produced together with the receipt dated 5th December 1974, which also states that the accommodation loan of $275,000 had to be repaid not later than Thursday, 11th December 1974. The letter of 2nd December also stated that the defendants' bank would acknowledge receipt of the money) (see the plaint, paragraph 6).

(5)It was agreed between the parties that the loan would be repaid to the plaintiff on 2nd December 1974, but at the request of the second defendant, the plaintiff orally agreed to extend the time for repayment first until 4th December, and then to 9th December, in consideration of the offer made by the second defendant (on behalf of the first defendant) to pay $3,500 per day compensation to the plaintiff for every day after 9th December that the repayment was delayed. The plaintiff is now claiming $3,500 per month as reasonable compensation instead of this daily sum (see the plaint, paragraph 7). The agreement to pay $3,500 per day appears in the letter dated 2nd December.

(6)The plaintiff at the request of the second defendant subsequently further extended the time for repayment to 11th December, then to 19th December, then again to a date in the first week of January 1975, as a result (it is said) of certain false and fraudulent statements knowingly or

recklessly made to him by the second defendant. On 19th December, when the loan was not repaid, the second defendant gave the plaintiff his personal cheque for $275,000 but requested the plaintiff not to present it. The second defendant also informed the plaintiff on the same day that the first defendant had already drawn a cheque in favour of the plaintiff for $83,750 and requested that when received shortly this cheque also should not be presented but treated as security only for this amount; that the first defendant had arranged for the total amount of the loan and the amount due by way of compensation for the delay, at the stated daily rate, to be paid in cash in Brussels in the first week of January 1975, when the plaintiff would return the cheques of each defendant. These statements by the second defendant on behalf of the first defendant and/or himself were said to have been made knowingly, fraudulently and falsely (or recklessly) with intent to induce and did induce the plaintiff to agree to delay further the repayment of the plaintiff's loan. The plaintiff produced the second defendant's dishonoured cheque for $275,000 which he caused to be presented on 23rd May 1975. The plaintiff says that the second defendant had notice of dishonour of this cheque (see the plaint, paragraphs 8, 9 and 15).

(7)The plaintiff had still not received payment of his loan on 15th January 1975 or the cheque for $83,750 from the first defendant which the second defendant (it is said) then fraudulently and falsely (or recklessly) informed the plaintiff had already been dispatched to induce and did induce the plaintiff to agree to give further time for repayment until 15th February 1975 (see the plaint, paragraph 10).

(8)It was orally agreed between the plaintiff and second defendant on 15th January 1975 that the total sum lent by the plaintiff to the first defendant amounted to $358,750 instead of $350,000, including bank charges and other expenses incurred by the plaintiff, which were agreed at $1,250. The second defendant therefore gave the plaintiff a cheque for $10,000 in satisfaction of the additional amount and expenses which was duly met when credited by the plaintiff in his banking account in Brussels, thus leaving the balance of the loan at $350,000 (see the plaint, paragraph 11).

(9)The defendants (or either of them) in breach of the loan agreement failed to make available to the plaintiff on 15th January 1975 or on any subsequent date the interest-free loan of $1,000,000 whereby the plaintiff has suffered damage by way of loss of income estimated at $82,500, and the consideration for the plaintiff's loan to the first defendant has wholly failed; that no part of the plaintiff's loan was repaid on 15th February or on 15th March 1975, as later promised by the second defendant (see the plaint, paragraph 12 and 13).

(10)On 15th March it was orally agreed between the plaintiff and the second defendant that in consideration of the loan and of the plaintiff's agreeing to give extended time for its repayment, the second defendant would deposit with the plaintiff title deeds of the first defendant's property being plot 2951/109, Nairobi, and would execute a legal charge on the property in favour of the plaintiff when called upon to do so, as security for all the moneys, together with interest, due to the plaintiff (see the plaint, paragraph 13).

(11) On 19th March, pursuant to the agreement stated in the preceding paragraph, the second defendant gave to the plaintiff a list of the assets of the Nairobi International School prepared by him; but in breach of the agreement the second defendant did not deposit, and has never deposited, with the plaintiff the title deeds and has failed to provide any security for the loan. A photocopy of the list of assets is exhibited to the plaintiff's affidavit sworn on 6th April 1976 which is claimed to have been handed to the plaintiff personally by the second defendant who informed him that it was in the second defendant's own handwriting (see the plaint, paragraph 14).

(12)In addition to asking for judgment for money, a prayer is included in the plaint for an order that the first defendant should execute a legal charge over its described real property, or, alternatively, give such other and reasonable security in favour of the plaintiff until payment in full of all moneys due to the plaintiff.

In their joint written statement the defendants

(a) admit that the first defendant carries on business in Kenya under the business name Nairobi

International School; that the second defendant bears the title of chief administrator and director of Nairobi International School (which is equivalent to headmaster);

(b) deny that the second defendant is a director or officer or a duly authorized agent of the first defendant;

(c) deny that the second defendant either met with or talked to the plaintiff on 2nd November 1974, or on that or any other date, made any of the representations alleged to have been made by him to the plaintiff;

(d) deny paragraph 5 of the plaint or that the plaintiff ever lent or agreed to lend $350,000 or any other sum of money to first defendant;

(e) state that the plaintiff was never offered a loan of $1,000,000 or any other sum by or on behalf of the first defendant;

(f) state that the letter of 28th November 1974 was not written by the second defendant as agent, nor was he authorized to write such letter which did not relate to any of the allegations made in the plaint;

(g) state that the plaintiff did not act in pursuance of the agreement alleged in the plaint by remitting $83,750 for the credit of the first defendant; however, the defendants admit that the sum of $83,750 was received by the first defendant from Dean F Rempel through the Banque de Bruxelles (which is the plaintiffs' Bank in Brussels) on or about 4th November 1974; this payment did not relate to any of the allegations made in the plaint, and was not received from the plaintiff;

(h) deny that any payment of $275,000 was made to either defendant, and the second defendant was not in Brussels on 22nd November 1974;

(i) state that the second defendant had no authority to sign the documents dated 2nd and 5th December 1974, on behalf of the first defendant, and these documents did not relate to the allegation made in the plaint;

(j) deny that any requests were made to the plaintiff for an extension of the time to pay any sums of money or to pay any sums as compensation; that in any event the sum of $3,500 per day was excessive, harsh and unconscionable;

(k) admit that the second defendant gave his post-dated personal cheque for $275,000 to the plaintiff on 2nd December 1974, but it did not relate to any of the allegations made in the plaint, and it was not given on behalf of or with the knowledge of the first defendant;

(l) deny that the second defendant made any representations that the first defendant had drawn (or would give, or had, or would dispatch) a cheque to the plaintiff for $83,750 and that the second defendant made any representations that the first defendant had arranged for the payment of any sum of money; if any such statements were made they were not made with the knowledge of the first defendant;

(m) state that there was no agreement or statement made on behalf of the first defendant on 15th January 1975 that the first defendant owed $358,750 or about the bank charges and expenses;

(n) admit that the second defendant gave his personal cheque for $10,000 to the plaintiff dated 16th January 1975 but that such payment did not relate to any of the allegations made in the plaint; and the payment of $10,000 was not made on behalf, or with the knowledge, of the first defendant;

(o) deny that the second defendant ever agreed to deposit the title deeds of the first defendant's property with or to charge them to the plaintiff. In arguments before the Court, Mr Le Pelley for the defendants said that paragraph 13 of the plaint revealed no cause of action (this was the paragraph which set out the agreement to charge the first defendant's land in favour of the plaintiff);

(p) deny that any meeting took place between the plaintiff and second defendant on 15th March 1975;

(q) admit that the second defendant's cheque for $275,000 was dishonoured on presentment; and

(r) state that at all material times the plaintiff was carrying on the business of a moneylender without a licence.

In order to be able to register and maintain a caveat against the title of land under our law it is essential for a caveator to have a right to obtain an interest in the land capable of creation by an instrument registrable under the Act as required by section 57(1) of the Registration of Titles Act which provides: Any person claiming the right, whether contractual or otherwise, to obtain an interest in any land, that is to say, some defined interest in such land capable of creation by an instrument registrable under this Act, and of any person in whose favour a debenture has been executed by a company within the meaning of the Companies Act or by a company to which part X of that Act applies creating a floating charge over land (hereinafter called 'the caveator') may lodge a caveat with the registrar of the registration district within which such land is situated forbidding the registration of any dealing with such land either absolutely or unless such dealing shall be expressed to be subject to the claim of the caveator as may be required in such caveat, or to any condition conformable to law expressed therein. A "legal charge" is a defined interest in land which is capable of creation by an instrument registrable under section 46 of the Act.

Secondly, the caveator must also be able to satisfy the requirement laid down by section 3(3) of the Law of Contract Act, that is: No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it. Provided that ... The plaintiff relies on the list of assets supplied to him by the second defendant on 19th March 1975 as constituting a memorandum or not in writing to satisfy section 3(3) of the Law of Contract Act. The question is: is it sufficient to sustain the caveat registered by the plaintiff in this case, which states that the plaintiff claims a chargee's interest over the first defendant's property land reference No 2951/109 pursuant to an agreement made at Nairobi on 15th March 1975 between the first defendant (the registered owner of the property) and the plaintiff, whereby the first defendant undertook to create a charge on the property in the plaintiff's favour to secure to the plaintiff a sum in Kenya currency equivalent to $350,000 being moneys lent and advanced by the plaintiff to the first defendant?

The relevant part of the list of assets is in the following:

2951/109-[one unreadable word]

East Africa Campus-USIU

(1) 134 plus acres – plot numbers

L R /2951/1/2

L R /2951/1/3

(2) Title Number

I R 22372/1/2

Grant I R 24208

The list then goes on to enumerate and state the costs of “expenditures” which include development charges and items such as vehicles, audiovisual equipment, typewriters, copy machines, filing cabinets, washing machines, refrigerators, books, landscaping, etc. The plaintiff has produced the first page of the list of assets which was given to him by the second defendant. The defendants have produced the full two pages of it. The second page, after mentioning three items of costs of new construction, the value of land and costs of site preparation, roads and fields, carries notes relating to the value of the assets. I would go out of the way here and now refer to the untenable argument made by Mr Le Pelley that the order for continuance of the caveat ought not to be made because it is being asked for against the title of plot land reference No 2951/109 while the list of assets, if it is a memorandum at all, refers to the two plots described above. There is no merit in this argument. The list of assets refers to plot 2951/109 and grant I R 24208.

The plaintiff also has deponed that the first defendant’s property now known as land reference No 2951/109 originally comprised the abovementioned two plots; land reference No 2951/109 is one and the same property as the two plots of land described in the list of assets. If the list of assets is not the agreement or a memorandum or note thereof, upon which the suit is founded, or if it is not signed by the party to be charged or by some person authorized by him to sign it, then in either case it is the end of the matter and we need look no further. Both these pre-requisites laid down by statute must be satisfied before life can be breathed into a caveat to keep it alive.

It has not been denied that the list of assets is in the handwriting of the second defendant, and assuming for the moment in favour of the plaintiff only for the purposes of this argument, it can only be an assumption at this stage and the Court may make commonsense assumptions for the proper dispensation of justice, that the second defendant was and is the duly authorized agent of the first defendant, I would hold that the list of assets satisfies the requirement in subsection (3) that the memorandum or note must be signed by the party to be charged. I would hold that a document, thought it does not actually bear the signature of the party to be charged or the signature of some person authorised by him to sign it, can constitute a valid agreement or a memorandum or note thereof to satisfy subsection (3).

In this case the list of assets is connectable with the first defendant through the second defendant whose handwriting in which it is written is his signature and therefore, on the basis I have stated, the signature of the first defendant. In this way, it is signed by some person authorised by the party to be charged to sign it. The making of this list of assets could in certain circumstances amount to a signature. It does so in this instance. It would be wrong to reject it out on hand because it does so in this instance.

It would be wrong to reject it out of hand because although otherwise wholly in the handwriting of a duly authorised agent of the party to be charged, it does not bear a formal signature at the end of it. In each case, it is a question of the surrounding circumstances under which a party writes out a document in his own handwriting whether the absence of his signature on the document will be binding upon him or not. When deliberating on interlocutory application the Court ought to accept the *prima facie* evidence of the handwriting of the party to be charged as constituting the intention to be charged, until it is displaced by other evidence at the trial or otherwise. A document written in the own handwriting of the party to be charged may be construed as signed by him although actually it is not. The list of assets therefore satisfies the second part of subsection (3). In coming to this conclusion I have kept in mind Mr Le Pelley’s arguments that there is no evidence of actual authority, or that the second defendant held himself out as the first defendant’s agent, that the plaintiff is alleging agreement with a person who is not shown to be an agent and the writing is not that of the first defendant.

Does the list of assets meet the first part of the requirement laid down in sub-section (3)? In other words, is it the agreement upon which the suit is founded, or some written memorandum or note thereof! Such an agreement or a memorandum or note thereof need not be signed by both parties to it. It need not be signed by the party seeking to enforce it provided that it is signed by the party to be charged. I do not think it

would matter if the agreement was made between the parties before or if the written document was produced to the plaintiff after the agreement was made between the parties; if it is signed only by or on behalf of one party to it and not signed by or not presented to the other party (in this case the plaintiff) for his signature, provided that it is otherwise an agreement or a sufficient memorandum or note thereof, it is enforceable against the party by whom it is signed even though it is one-sided only. It will be sufficient for the purposes of subsection (3) if it carries only the signature of the party to be charged. It need not state that it is to be signed by both parties only. It also need not be prepared as a memorandum or note for a simple mortgage. It need not be in any particular form, as long as it is otherwise sufficient to satisfy subsection (3). In the case of a limited liability company, it would suffice if it *prima facie* seeks to bind it; whether it actually does so, or is capable of doing so, could be a matter for evidence. In this paragraph I have tried to answer some of the arguments lodged by Mr Le Pelley.

The plaintiff claims that the list of assets was given to him in connection with the agreement to execute a charged on the first defendant's property in favour of plaintiff when called upon to do so, as security for all the moneys together with interests due to the plaintiff. Although the list of assets is held to be signed by the second defendant as a person authorized by the party to be charged, the first defendant under conditions outlined by me, the question still remains whether it constitutes an agreement or a memorandum or note thereof to satisfy the second requirement contained in subsection (3). Clearly a list of assets has been provided in this case. In addition to the land to be charged, it includes many items of moveable assets. It is not fatal that it does so, whether or not there was an agreement also to give a chattel mortgage in respect of the moveable assets. It is enough if the land is decisively identifiable and can be separated clearly from the rest of the assets, which it is in this case.

There is no recognition or admission in the list of assets of the existence of a contract or agreement to charge the land in favour of the plaintiff. If the list of assets is the only agreement upon which the suit is founded it is not an agreement at all. It does not state the terms of the contract, not even by a flitting reference, not even vaguely, leave alone with certainty.

As an agreement or a memorandum or note thereof for the purposes of subsection (3) it is indefinite and deficient. A deficient memorandum is no memorandum at all. It has been said that a memorandum should contain all the terms of the contract which have been expressly agreed. A memorandum which specifies only the parties, the property with an indication that it is to be charged may not be enough. In this instance, the only relevant item in the list of assets is the land registration number of the plots to be charged and the numbers of the grants comprising them. Otherwise the list of assets is completely bald. Standing by itself the land is merely plot numbers with nothing to indicate for what purpose it is included, apart from as an item of assets. Mr Le Pelley has correctly pointed out that the list does not state the interest to be charged, or the period of the mortgage loan. However, his argument that the terms of the mortgage are not stated (even in the plaint which merely states that there was an agreement to charge the land) does not carry much conviction. This is another matter. The memorandum may still be sufficient. The defects of a plaint may be cured by amendment.

The list of assets does not state the terms of the agreement to charge the first defendant's land. It is open at least to three constructions: (1) an agreement for sale of an interest in land; (2) an agreement to demise the land; and (3) an agreement to charge the land. It may even be a list of assets to be handed over to the auditor, as suggested by Mr Le Pelley. It is open to abuse by an unscrupulous and perjurious plaintiff. It is common sense that this is exactly the kind of mischief which subsection (3) is aimed at avoiding.

Mr Salter has argued that, if one can link a document (in this case the list of assets) to a contract which has been pleaded, then that document comprises a sufficient memorandum in writing to satisfy the statute. With respect, Mr Salter has overlooked the true meaning of subsection (3). It is not the plaintiff who has to link a document with a contract which has been pleaded. Any plaintiff could do that by saying exactly what Mr Salter has said: What the statute requires is a document signed by the party to be charged or by some person authorized by him to sign it. Some vagueness in the memorandum or not which satisfies the requirement of signature may be filled in by parol evidence. Before that stage is reached, it must be a signed document [as stated] and contain [also as stated] all the essential terms which have been expressly agreed between the parties. An agreement unavoidably imports the notion of terms agreed. Mr Salter

submitted that the statute must be pleaded as a bar to the relief being sought by the plaintiff, which has not been done in this case. True it is not pleaded; it was referred to in arguments by Mr Le Pelley. It may be the English law that the statute must be pleaded. I do not understand such to be the law in Kenya. I understand that a point of law, unless expressly required to be pleaded by statute which subsection (3) does not, maybe raised at the trial. A courteous advocate would no doubt give previous notice of the intention to do so to the other side. If this were all I would make an order for immediate removal of the caveat from the title of the first defendant's property. There is more to be considered, pondered, decided. Mr Le Pelley said that if the caveat does not (perhaps I should say, in this case if it cannot) claim an interest in immoveable property, it must go. He said that if it does, this one is struck down by subsection (3). As I understand it, if either of these two situations exist, the Court does not necessarily become helpless and break off. The Court will ensure that justice does not become inoperative because of legal impediments if the caveator has, in the words of Lord Denning M R, a substantial point in his favour. In *Tiverton Estates Ltd v Wearwell Ltd* [1974] 1 WLR 176, 185 Lord Denning said:

In some circumstances it would not be right to vacate the caution. For instance, if the cautioner had a substantial point in his favour and it would be unfair to him to vacate it, the Court might then try to protect both sides by telling the cautioner: 'You may keep the caution on the register if you undertake to pay the owner any damages caused by its presence if it is afterwards held that it was wrongly entered. But, if you are not ready to give such an undertaking, then the caution must be vacated.' An alternative would be to do what Templeman J did in *Clearbrook Property Holdings Ltd v Verrier* [1974] 1 WLR 243. Stamp L J expressed a similar opinion, at page 195:

The defendants are only entitled to leave their caution on the register if they have an interest in the land, which is the very question which falls to be determined. It may be that a memorandum to satisfy the statute will be disclosed on discovery. And, I suppose, it is theoretically possible that the plaintiffs will not plead the statute. But the Court has to deal with the matter on the evidence before it. In doing so, it is no doubt right to take probabilities into account; but it seems to me rather improbable that a memorandum will come to light on discovery and almost inconceivable that the statute will not be pleaded. As would be the positions if there was no registration and the defendants were applying for an interlocutory injunction to restrain the plaintiffs from dealing with the land until trial, the Court must, I think, in determining whether to grant the relief sought, from a view, on the facts before it, whether the party seeking the interlocutory relief has made out a *prima facie* case, and, if he has, must consider whether in the circumstances to grant or withhold the relief sought.

Where the Court grants an interlocutory injunction it exacts, as of course, a cross-undertaking in damages. And if the defendants here had made out a *prima facie* case, I would have thought the convenient course to adopt would be either to order the entry on the register to be vacated unless the defendant's gave an undertaking in damage or to adopt the course adopted by Templeman J in *Clearbook Property Holdings Ltd v Verrier* [1974] 1 WLR 243. There he gave the purchasers the opportunity of moving for an interlocutory injunction so that the vendor would have the advantage of the undertaking in respect of the damage he might suffer from being unable to deal with his land until the trial. In this suit the plaintiff has made out several substantial points. It must be remembered that, at this stage, the Court can only look at the various matters for their apparent substance, theoretically, and for their *prima facie* value for the suit has not proceeded to trial yet. What are the several substantial points made out by the plaintiff (some of which are admitted in the defence; others are denied)? Save for the points which are indisputable on the pleadings, in an attempted substantiation (which is all that the plaintiff can do at this stage) of the averments in paragraphs 4, 5 and 6 of the plaint, although the exact scope of the second defendant's authority has yet to be determined, the plaintiff has shown that the second defendant acted as agent for the first defendant. In addition, the defendants themselves admit that the second defendant is the chief administrator and director of the first defendant's Nairobi International School, which must mean he must run this institution for and on behalf of the first defendant; for this purpose he must operate the first defendant's banking account unless someone else whose identity has not been revealed does it on behalf of the first defendant. The second defendant must order goods, engage and dismiss servants, and (accepting for this moment only

Mr Le Pelley's suggested interpretation) the second defendant deals with the assets of the first defendant

by preparing an inventory or list of assets together with explanatory notes for auditors. What the plaintiff has shown and what the defendants admit together first ostensibly and then clearly dresses up the second defendant as a duly authorised agent of the first defendant.

Secondly, the plaintiff has shown by production of bank documents dated 5th November 1974, written in Brussels by the Banque de Bruxelles, that $83,750 was transferred by telex on the order of the plaintiff to the home of the first defendant in San Diego, USA. The receipt of this payment is admitted by the first defendant. It is stated in the defence that $83,750 was received by the first defendant from Rempel through Banque de Bruxelles in Brussels on or about 4th November 1974. At this stage let it be said that the defence makes the further non-committal statement that this payment did not relate to any of the allegations made in the plaint and was not received from the plaintiff; perhaps the defendants are not bound to say any more because it may be a case for further and better particulars. But let us look at this last statement in the light of the sworn statement by Dunn in his affidavit dated 30th April 1976. He has sworn (see paragraph 11) that, on 7th November 1974, the first defendant received a notification from the defendant's bank that a sum of $83,750 had been received from Brussels. He has further sworn (see paragraph 13) that in July 1975 the first defendant became aware, for the first time, of the second defendant's dealings with the plaintiff when it called the second defendant to San Diego to explain all his dealings with the plaintiff. Here then is an admission of knowledge of dealing between the plaintiff and second defendant which is otherwise vehemently denied. To carry on, what did the first defendant do about this sum of $83,750? Has it paid it back to anyone (including Rempel) from whom it is said to have been received? No such assertion is made. The second defendant's own affidavit dated 22nd April 1976 shows that he was dealing with the plaintiff in regard to $83,750 (see paragraphs 11, 12, 13 and 14). He admits, discounting for the moment the contents of Rempel's affidavit to which I refer later, that the plaintiff placed a telephone call from the second defendant's office to a Mr Nazir Sheriff in Brussels and told Sheriff that the plaintiff wanted $83,750 sent to San Diego at once. In paragraph 15 of his affidavit, the second defendant states that on 7th November 1974 he received a telegram from the first defendant in San Diego informing him that the moneys had been received. The first defendant admittedly received this money. It is still in pocket of the first defendant. To top it off, Mr Rempel swore an affidavit on 10th May 1976 in which he deponed (see paragraph 10) that, at the beginning of November 1974, he took the plaintiff to meet the second defendant who told the plaintiff that the first defendant required a loan of Shs 2,400,000 for a very short period; that a sum in the region of $3,000,000 was expected from America; and offered to lend the plaintiff $1,000,000 if the plaintiff would assist the first defendant with a shortterm loan immediately; and that the second defendant asked for $83,750 to be remitted to the first defendant and the balance to be paid to the second defendant either in Kenya or outside within a few days. Rempel has further deponed that subsequently, after consultation with Rempel (see paragraph 11), both the plaintiff and Rempel went back and the plaintiff told the second defendant that the plaintiff would instruct his agent in Brussels to remit $83,750 from the plaintiff in San Diego, and he would ask for the balance to be paid to the second defendant in Brussels. Rempel's affidavit continues (see paragraph 12) that the second defendant later confirmed to him that the first defendant had received $83,750 from the plaintiff in San Diego. In paragraph 19 of his affidavit, Rempel has sworn that $83,750 was remitted by the plaintiff's agent in Brussels to the first defendant on account of the plaintiff, and that Rempel personally had nothing to do with it. In paragraph 20 also, Rempel states that he had nothing to do with this remittance, nor was he involved in the transaction.

Thirdly, the plaintiff has shown that there was a transaction between the plaintiff and second defendant involving the sum of $275,000. The plaintiff says that it was paid in cash in Brussels to the second defendant who acknowledged it as an accommodation loan by his stamped receipt dated 5th December 1974, with a promise to repay it on "Thursday" as part of a total loan of $350,000 which he also mentioned in his letter to the plaintiff dated 2nd December 1974. The second defendant issued his cheque, which was dishonoured, for the exact sum of $275,000 in favour of the plaintiff. While it is denied in the defence that any payment of $275,000 was made to the first or second defendant (see paragraph 13), the defendants admit (see paragraph 18) that the second defendant gave his post-dated personal cheque for $275,000 to the plaintiff on or about 2nd December 1975, but they say it does not relate to any of the allegations made in the plaint. What it does relate to, the defendants do not say. Again, perhaps the defendants are not obliged to say any more at this stage; nevertheless *prima facie* (now really more than *prima facie*), the plaintiff and the second defendant are linked in a transaction involving $275,000 for

which sum the second defendant drew his cheque (subsequently dishonoured) in favour of the plaintiff. I have also already referred to some of the contents of Rempel's affidavit in this connection: specifically he swears (in paragraph 30 of his affidavit) that the cheque for $275,000 was given in his presence to the plaintiff by the second defendant to be held by the plaintiff as security.

Fourthly, there is a reference to $1,000,000 in the second defendant's letter dated 28th November. Rempel refers to it in his affidavit. The second defendant's letter speaks by a clearly indicated implication about a loan of $1,000,000 when it expressly states that repayment by the plaintiff is to be made in instalments of $100,000 per month. Paragraph 9 of the defence denies the plaintiff was ever offered a loan of $1,000,000 on behalf of the first defendant. We must wait to learn from the evidence, if adduced, what all this talk concerning $1,000,000 is about. In the meantime, the Court cannot remain insensitive to the obvious: that there was some talk, some discussion, for some purpose not fully revealed, between the plaintiff and second defendant concerning $1,000,000. The defendants have not thought fit to reveal the purpose of it to the Court. It may be that they will do so later at the trial. In the meantime, they can blame no-one if the Court takes not of the proposed loan of $1,000,000.

Fifthly, it is indicated that there were talks between the plaintiff and the second defendant about repayment and extension of time for repayment. The second defendant's letter of 2nd December reveals this. He talks about paying a penalty if repayment is delayed beyond the day named by him. The second defendant's letter, dated 15th January 1975, also addressed to the plaintiff, confirms this. He talks about a discussion he had with the plaintiff earlier that day and the letter is written to confirm his comments. He talks about replacement of the two US dollar cheques in question. Which cheques, whose cheques? These two cheques must be his own cheque for $275,000 and, according to the plaintiff, the first defendant's promised cheque for $83,750 (which never arrived). If the defendant's *bona fides* are not to be doubted (this court is always slow to doubt the *bona fides* of any party to litigation at the interlocutory stage), why not tell the Court why the second defendant's cheque for $275,000 was issued in favour of the plaintiff? We are not dealing with peanuts. There are serious issues at stake here.

Sixthly, the second defendant admittedly gave his personal cheque to the plaintiff for $10,000, according to the plaintiff, to cover the extra sum spent by the plaintiff over the amount of the agreed loan of $350,000. The defendants admit this payment but deny that it was related to any of the allegations made in the plaint. They do not state to what it is related. Once again, perhaps they are not bound to reveal it at this stage. They do not tell us why the second defendant paid the plaintiff $10,000. In the meantime this payment lends noticeable support to the allegations made in the plaint even when treated as mere allegations at this stage.

Seventhly, why did the second defendant give to the plaintiff a copy of the list of assets of the first defendant? Surely, not to fan himself with in tropical heat! Surely not for any advice by the plaintiff on it, for no such averment is made; if for advice or opinion or information of the plaintiff, what connection did he have with it? In the words of Mr Salter for the plaintiff, why did the second defendant give the plaintiff a copy of the first defendant's list of assets if it was not for the very purpose stated by the plaintiff (which of course he will have to prove)? The defendants deny that the second defendant gave the plaintiff a copy of the list of assets (see paragraph 37 of the defence). The plaintiff has a copy of the list of assets. Where did he get it from? The plaintiff has sworn the second defendant gave him a copy of the list on 19th March in the presence of Rempel (see paragraph 23 of plaintiff's affidavit sworn on 20th May (1976). Rempel confirms this in paragraph 37 of his affidavit. Eighthly, in July 1975, on Dunn's admission, the first defendant knew that the sum of $83,750 was the plaintiff's money. The first defendant kept the money and made no reference to it at all in so far as the plaintiff was concerned until its defence was filed on 8th April 1976. If this amounts to ratification by conduct it is another substantial point produced by the plaintiff. Mr Le Pelley said that if it does amount to ratification by conduct, there is still nothing in writing to satisfy the statute. I am not dealing with the matter on that basis. My present basis of deliberating this issue is taken from the judgment of Lord Denning M R and Stamp LJ previously quoted.

All these matters which I have mentioned indicate to the Court that there were some dealings between the plaintiff and the second defendant acting on behalf of the first defendant. What else if they were not of the nature referred to in the plaint? Nevertheless, transactions, dealings and discussions took place between

them; in the meantime, or at this moment, the question is, bare and unadorned by evidence though it is yet, does the balance of probabilities show that the giving of the list of assets is consistent with the contract alleged by the plaintiff? The Court is not in a position to give an answer to this question yet, but there is also nothing shown against such a probability. Until the Court is able to determine the issue both justice and the equities in the case, demand that the status quo be preserved so that, if the plaintiff succeeds, he will not be left with an empty victory, the just fruits of which he cannot realise; and justice would be defeated.

I am therefore of the opinion that it would not be right to vacate the caveat; it ought to remain registered against the title of the first defendant's property where it is lodged now subject to some such safeguard as stated by Lord Denning MR and Stamp LJ. I would not give the plaintiff an opportunity of moving the Court for an interlocutory injunction which Stamp LJ says was done by Templeman J in *Clearbrook Property Holdings Ltd v Verrier* [1974] 1 WLR 243, so that the vendor would have the advantage of the undertaking in respect of the damage he might suffer from being unable to deal with his land until the trial. What I would do is this. I would treat the caveat as an interlocutory injunction. I think a caveat is in many respects in the nature of an interlocutory injunction. I would allow the plaintiff's caveat to stand against the title subject to the plaintiff depositing in Court Shs 100,000 within thirty days, together with an additional satisfactory bond in writing by the plaintiff in the sum of Shs 100,000 to meet any damage which may be suffered by the first defendant and which may be caused by the presence of the caveat on the register if it is afterwards decided that it was wrongly entered. The sum of Shs 100,000 if paid into Court shall be deposited upon interest with a financing institution pending the absolutely final outcome of this litigation. I make the order in this nature because, to adopt Templeman J's words in the *Clearbrook* case [1974] 1 WLR 243, 246 in the present circumstances I am unwilling to make it impossible for the plaintiff to recover his money should he succeed in this action. I am also unwilling that the first defendant should be put to loss by reason of the actions of the plaintiff without being able to recover from him. The deposit of Shs 100,000 in Court by the plaintiff and his bond for Shs 100,000 shall be a guarantee of good faith on his part, a proof of his *bona fides*; and the cash deposit will reinforce it with tangible proof.

We know now that the plaintiff is claiming a chargee's interest in the land concerned arising under the agreement reached between him and the second defendant that, in consideration of the plaintiff's loan and of the plaintiff's agreeing to give extended time for its repayment, the second defendant would deposit with the plaintiff the title deeds of the first defendant's property and could execute a legal charge on this property in favour of the plaintiff when called upon to do so, as security for all moneys together with interest due to the plaintiff.

To do less than what I have ordered would be to allow the statute to become an engine of fraud. The Court would have hopelessly failed in its function of administering justice if the plaintiff, having succeeded in his action, cannot realise the fruits of his decree as a result of the first defendant disposing of his property about which there is already some talk.

To do less than what I have ordered in the circumstances of this case would be tantamount to accepting a defeat that the Court with all its traditional, inherent and statutory powers is unable to protect interests, rights and claims which have been put forward upon reasonable hypothesis, logically and which seem possibly provable.

In the words of Roskill, L J in *Losinska v Civil and Public Services Association* [1976] I CR 473, the present orders are interlocutory, which does not necessarily mean that the plaintiff would ultimately succeed at the trial.

I ought to end here but I do not think I can do so sensibly. I must consider the plaintiff's alternative application for an order under section 52 of the Transfer of Property Act. If the Court of Appeal were to say I am wrong in holding that the caveat can remain on the register on the strength of the various substantial points which I have set out and which I think exist in this case in favour of the plaintiff, then the caveat will disappear unless the plaintiff is able to satisfy the Court of Appeal that he is entitled to hold on to the caveat independently of these substantial points by virtue of section 52. If the Court of Appeal were to say that the caveat ought not to continue to remain on the register in such event, the

plaintiff's caveat would have collapsed without this Court having considered his alternative application under section 52 which enacts:

During the active prosecution in any court having authority (in Kenya) of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

If I understood it right, Mr Le Pelley's argument is that this section has no application in this case; that under it there is no prohibition on the transfer of the property, only the leave of the court has to be obtained to do so when the Court may impose conditions; until an application is made to the Court for leave to transfer the property the Court has no power to impose any restrictions.

There appear to be cases decided in India under the Indian Transfer of Property Act in relation to this section which seem to say that transfer of an interest in land which was involved in litigation took place without leave of the Court and which were the subject-matter of challenge later in court. It may be in those cases the transferee willfully risked a gamble or accepted transfer of an interest inland in ignorance of *lis pendens*.

A corollary that flows from Mr Le Pelley's argument, or so I think, is that at least in Kenya there can never be a protectable interest in land until section 3(3) of the Law of Contract Act has been first satisfied. I have held in this ruling that a claim of an interest in land may be protected, notwithstanding the provisions of section 3(3) in circumstances outlined by me.

I do not accept the situation argued by Mr Le Pelley. I do not accept such limited interpretation of the provisions of section 52. If it is correct, the section is, in words spoken recently in Court of Appeal, largely an exercise in futility.

We are unburdened by trammellings obtainable or operable in India upon the conditions of which country the Transfer of Property Act is, I say it respectfully, in many respects archaically based. I think the situation in Kenya is, or it ought to be, this: the Court has power to prevent a breach of the provisions of section 52 in proceedings before it in which any right to immoveable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings, except under the authority of the court and upon such terms as it may impose. This is to ensure that which Turner L J had in mind does not happen. He said in *Bellamy v Sabine* (1857) 1 De G & J 566, 584, a case quoted by Mr Salter to further his argument:

It is … a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding.

This passage is enthusiastically quoted by both Mulla and Gour in their treatises on the *Indian Transfer of Property Act*: Mulla (5th Edn) page 245; and Gour (7th Edn) volume 1, page 579. With respect, Turner LJ's words are prudent. Gour also says (at page 579) that story explains the same rule from another stand point:

Every man is presumed to be attentive to what passes in the Courts of justice of the State or Sovereignty where he resides. Therefore, purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit.

Only a foolhardy purchaser, or a fraudulent purchaser, would purchase a property which is actually the subject-matter of litigation. Why should the defendants worry about a prohibitory order being imposed?

They say or would wish to say, that they are both honest persons. In any event it is only an interim order and, recalling the words of Roskill L J in *Losinska v Civil and Public Services Association* [1976] I CR 743, no guarantee that the plaintiff would succeed in the suit.

It would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party. The Court therefore must protect the status quo Lord Cranworth LC said in *Bellamy v Sabine* (1 De G & J at page 578) the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Now I have reached a stage where I can state my opinion shortly on the basis that the various substantial points which I have mentioned are also incorporated herein by deeming the same to be repeated now, also on a balance of probabilities, and taking into account the equities in the case that a Court of justice will not allow anyone to be cheated out of his just dues, and all *prima facie* for the time being without causing or meaning to cause prejudice to either party in the final trial, I would have granted the plaintiff a prohibitory order as prayed under section 52, subject to the condition of a cash deposit of Shs 100,000 and further a bond for Shs 100,000 as already stated. I accept Mr Salter's argument that the Court is widely empowered to make a just and effective order of this nature under section 58(7). It would be fair if the costs of this application are made in the cause.

Order accordingly.

Dated at Nairobi this 7th day of July 1976

C.B. MADAN

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JUDGE