REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 567 OF 2004

SHITAL BIMAL SHAH……1ST PLAINTIFF

ANJLI BHARAT SHAH……2ND PLAINTIFF

SARUPA SHAH……3RD PLAINTIFF

VERSUS

AKIBA BANK LIMITED……1ST DEFENDANT

ANIL LAXMICHAND SHAH……2ND DEFENDANT

PARAS VINOD SHAH……3RD DEFENDANT

PONANGIPALLI V. RAO……4TH DEFENDANT

KOLLURI V.S.K. SASTRY……5TH DEFENDANT

R U L I N G

By an application dated 18.10.2004 and lodged in Court on 19.10.2004, the Plaintiffs/Applicants seek orders **THAT**:

(a) a temporary injunction do issue to restrain the Defendants, whether by themselves or by their servants and/or agents or otherwise howsoever from doing the following acts or any of them, that is to say, from in any way acquiring, collecting appropriating or in any other way interfering with the income from LR No. 209/2607 and from selling alienating or transferring whether by public auction or by private treaty or in any manner whatsoever disposing of interfering or dealing with L.R. No. 209/2607 pending the hearing and determination of this suit.

(b) The income from L.R. No. 209/2607 be paid into account Number 102- 010-4906-001 with Prime Bank Ltd Biashara Street Branch in the joint names of the estate of Vinod Laxmichand Shah (deceased)

and the 2nd Defendant pending the hearing and determination of the suit filed herein,

(c) Costs of this application be borne by the Defendants,

(d) Any further orders the Court may deem fit to make.

The application is supported by the Affidavit of Anjli Bharat Shah, the 2nd Plaintiff which is declared to be made on behalf of the 1st and 3rd Defendants and is therefore binding upon them. The application is also based on the grounds that:-

(a) the charge created on the suit property dated 28.04.2000 in favour of the 1st Defendant is null and void,

(b) a charge which is null and void cannot confer a power to appoint a receiver or receivers,

(c) the 1st Defendant on 25th August 2004 purported to appoint the 4th and 5th Defendants receivers of all the income from LR 209/2607,

(d) the 1st Defendant has appropriated all the income from LR No. 209/2607,

(e) the estate of Vinod Laxmichand Shah and the 2nd Defendant are the beneficiaries of L.R. No. 209/1607,

(f) unless the orders sought are granted, the Plaintiffs stand to suffer irreparable loss and damage.

Before embarking upon the consideration of the submissions by the respective parties Counsel, it is necessary to understand who the parties are in this matter.

Firstly, the Plaintiffs are three sisters. The applicants are the said sisters. The 3rd Defendant is their brother. The 2nd Defendant is a brother to their deceased father, (Vinod Laxmichand Shah), or in the English nomenclature the 2nd Defendant is their uncle.

Without complicating the relationship I would put it this way. One Laxmichand Kahavji Shah was the father of Vinod Laxmidhand Shah (deceased) and also Anil Laxmichand Shah (2nd Defendant), and as deponed by Anja Bharat Shah was the grandfather of the Plaintiffs/Applicants.

The property known as L.R. No. 209/2607 (hereafter referred to as “the suit property”) was owned or registered in the names of the grandfather (Laxmichand Keshavji Shah), and his two sons, Vinod Laxmichand Shah – the father of the Plaintiffs/Applicants and the surviving son, Anil Laxmichand Shah, the 2nd Defendant herein.

Now Laxmichand Keshavji Shah was both an organized father and well advised from a legal point of view. Before he passed on to after life, he had made a will in which he declared that his executors would be his wife, Shantaben and his two sons, Laxmichand Keshavji Shah (Keshavji), and Anil Laxminchand Shah (the 2nd Defendant herein). The Plaintiffs/Applicants aver on oath (per Anjli Bharat Shah), and upon legal advice, that upon the demise of Shantaben, the property of Keshavji devolved in equal shares upon his two sons, Laxmichand Kashavji Shah and his brother Anil Laxminchand Shah.

So when Keshavji saw that he was to follow the path of his ancestors, he too made his will and in that Will he declared his brother Anil Laxmichand Shah, and his son Vinod Paras Shah the 2nd and 3rd

Defendants to be the executors of his will. According to that will, the Plaintiffs would each receive a sum of Shs. 500,000/= from the estate. Thereafter the trustee would, after calling in and converting the deceased's real and personal estate, invest the proceeds, and after paying the debts and expenses of the estate and after the death of the deceased's widow, 70% of the estate would go to the 3rd Defendant (his son), and 30% (or 10%) would go to each of the Plaintiffs.

These Plaintiffs have anticipated this to have been done since the demise of their father, and in particular after the confirmation of the Grant of Probate on 17th March 2000 but have been told to wait indefinitely. Worse still for these Plaintiffs, they discovered and without reference to them, that the 2nd Defendant (in his capacity as personal representative of the Estate of the late Laxmichand Keshavji Shah) and together with the 3rd Defendant, Paras Vinod Shah in their capacity as personal representatives of the estate of the late Vinod Laxmichand Keshavji Shah and the 2nd Defendant (in his personal capacity) have charged the suit property also known as the "Laxmi Plaza" to the 1st Defendant, Akiba Bank Ltd to secure a maximum sum of KShs. 55 million to be applied in terms of the 1st Defendant's (the Lender's) letter of offer referred to as ABL/OFFER/KS/497 dated 6.03.2000 as follows:-

(i) Laxmichand Keshavji & Sons Ltd Kshs. 30 million,

(ii) Fisatex (K) Ltd Kshs. 10 million,

(iii) Laxmi Keshavji & others known Laxmi Plaza – Biashara Street – Kshs. 15 million.

The Plaintiffs representative Anjli Bharat Shah has cried foul and in a Supplementary Affidavit sworn and filed on 16.11.2004 avers that their father the late Vinod Laxminchand Shah was not personally indebted to City Finance Bank Ltd to whom the sum of Kshs. 29 million was paid to clear the debts of Laxmichand Keshavji & Sons (K) Ltd, and not those of Vinon Laxmichand Shah personally.

The Plaintiffs' learned lead Counsel, A.B. Shah retired Judge of Appeal who appeared with Miss Mucheru urged the Court that the 2nd and 3rd Defendants breached their trust in granting a charge over the estate property, and that such charge was null and void, and a Chargee of such a charge has no statutory right to appoint a Receiver or Receivers over the suit property. He urged that for these reasons the Plaintiffs be granted the prayers they seek under the application.

The 1st Defendant and its appointees, the joint receivers have through their Counsel, Nazima Malik instructed by Kaplan and Stratton strenuously objected to the application. In the grounds of opposition dated and filed on 8.11.2004, these Defendants say that:-

(a) the Plaintiffs have failed to establish a prima facie case with a probability of success;

(b) the Plaintiffs have failed to disclose material facts to the Court,

(c) the Plaintiffs have not come to Court with clean hands,

(d) the Plaintiffs have no locus standi to bring the action against the 1st, 4th and 5th Defendants

(e) the Plaintiffs have failed to offer an undertaking as to damages,

(f) the executors of the Estate are empowered to pay existing debts and liabilities of the deceased,

(g) the application is bad in law and an abuse of the process of Court.

In addition to these grounds of opposition the 1st Defendant's Legal Officer, one Sekou Owino filed a Replying Affidavit sworn and lodged in Court on 8.11.2004, and a Further Affidavit on behalf of the First Defendant sworn and lodged in Court on 18.11.2004. In the Replying Affidavit, the 1st Defendant's Legal Officer depones inter alia that:-

(1) Vinod Laxmichand Keshavji Shah was named as a borrower in the City Finance Charge document and that his debt to City Finance Ltd was transferred to the First Defendant (para. 12),

(2) the executors of the estate being the second and third Defendants were empowered to execute the charge as it was created to pay a debt owed by the late Vinod Laxmichand Keshavji Shah during his life time and was still owing at the time of his death (para. 14),

In the Further Affidavit of the First Defendant's Legal Officer, (Sekou Owino), to which this deponent attaches, a) a Personal Guarantee by Vinod Laxmichand Shah and Anil Laxmichand Shah, (b) a copy of the Plaint n H.C.C.C. No. 494 of 1999 between inter alia, the 2nd and 3rd Defendants herein, and Sunita Vinod Shah (the wife of Vinod Laxmichand Shah), and (c) a letter of settlement from M/s Oraro & Co. Advocates to the Statutory Manager of City Finance Bank Ltd in which the Plaintiffs as aforesaid consented to an order to pay the sum of shs. 37,821,818.70 due to City Finance Bank Ltd as at 31.12.1999. That deponent concludes that the Charge dated 28.04.2000 was for the benefit of the estate of Vinod Laxmichand Keshvji Shah and the funds borrowed were utilized to pay off the amounts owed by the deceased Vinod Laxmichand Keshvji Shah and his estate to City Finance Bank Ltd.

Mr. A. B. Shah Esq. Learned Counsel for the Plaintiffs and former Judge of Appeal as stated above urged the Court (as already stated above) that the 2nd and 3rd Defendants as executors of the will of the late Vinod Laxmichand Keshavji Shah had no authority in law to mortgage or Charge the suit property which was part of the estate to pay off the debts of third parties and in particular:-

(i) Laxmichand Keshavji & Sons (Kenya) Ltd,

(ii) Fisatex (Kenya) Ltd,

The real question or issue is what meaning is to be given to the powers of the executors under the will of the late Vinod Laxmichand Shah. The first place to look is what power if any was granted to the executors. Secondly, what do the applicable statutes say and in light thereof, what do the authorities if any say on the matter. I shall consider each of the matters in turn.

Firstly the will of the late Vinod Laxmichand Shah provided as follows in paragraph 6 of his will executed on 29.09.1995 –

> **"6. I devise and bequeath the residue of my real and personal estate whatsoever and wheresoever not hereby or by any codical hereto otherwise specifically devised or bequeathed including any real or personal property over which I have power to dispose by Will unto my trustee UPON TRUST to sell call in convert the same into money with power in their discretion to postpone such sale calling in and conversion and after payment thereout of my debts and funeral and testamentary expenses and estate duty to invest the net proceeds thereof in any investments authorized by law for the investment of trust – funds …….. (underlining mine)**

The first obligation of the trustees, that is the 2nd and 3rd Defendants was to pay out the deceased's debts and funeral and testamentary expenses.

After making the above payments the executors were constituted into trustees with the express power upon the trust to sell call in convert the same into money with power in their discretion to postpone such sale calling in and conversion and after paying thereout the debts funeral and testamentary expenses, and estate duty, to invest the nett proceeds in authorized securities.

This matter was urged with passion and animation on both sides. For the Plaintiffs/Applicants, Mr. A.B. Shah learned Counsel and retired Court of Appeal Judge, (whom I shall hereinafter refer to as Senior Counsel), urged on behalf of the Plaintiffs that the Trustees or Personal Representatives of the late Vinod Laxmichand Shah (whom I shall hereafter also refer to as Vinod) had no authority to mortgage or charge the suit property also referred to as **"Laxmi Plaza"** a Valuable Property situate in Nairobi's Biashara Street. Senior Counsel contended that **Laxmi Plaza** constituted part of Vinod's "free property" in terms of the definition set out in Section 2 of the Succession Act (Cap. 160, Laws of Kenya) **(the Succession Act")**. Under the said Act, the term **"free property"** means:-

> **"in relation to a deceased person, the property of which that person was legally competent freely to dispose during his life time, and in respect of which his interest has not been terminated by his death" and "estate" means "free property of a deceased person".**

"Laxmi Plaza" was variously owned by Vinod at 50% and Anil 50%, at one time and at the time of Vinod's death interest was said to be one third. Although this 1/3 was part of Vindo's free property, it constituted part of the Charge to City Finance Bank Ltd to secure a facility of Kshs. 75,000.000/= (per the Charge registered as No. I.R. 209/2607/30 on 17.09.1996.Although that portion was encumbered to the extent of the Charge it was still available to Vinod, both in the form of his equity of redemption, (depending on the terms of the Charge – redeem all, or part), or he could also dispose of that portion during his life time. To that extent, I agree with Senior Counsel that the expression "free estate" as used in Section 2 of the Succession Act is not synonymous with the expression "unencumbered" in the sense of being subject to a charge or lien, or other encumbrance.

Senior Counsel also contended that Vinod's debt was so miniscule, a paltry sum estimated at Shs. 1.3 million only (as per the Supplementary Affidavit Anjili Bharat Shah sworn and filed on 10.11.2004) that it did not entitle or warrant his trustees to charge Vinod's estate (however small) in the property whose estimate value was well over shs. 55 million.

In any event the Plaintiffs further contended per the Further Supplemental Affidavit of the 2nd Plaintiff (the said Anjli Bharat Shah) (sworn on 24.11.2004) that Vindo's debt of Shs. 1,364,839.08 was allegedly set off against the Bearer Certificates and Deposits held by City Finance Bank Ltd, some of which Certificates of Deposits were said to be in the deceased's (Vinod's) control. The sum of Kshs. 29 million paid by the First Defendant to City Finance Bank Ltd could not therefore have been paid to repay the deceased Vinod's debts. The total sum borrowed from the First Defendant was applied to pay off debts owed by third parties namely:-

(1) Laxmichand Keshvji & Sons (K) Ltd and

(2) Fisatex Ltd who between them appeared to owe over 80 million to City Finance Bank Ltd, and not was not paid out in payment of Vinod's debt.

Senior Counsel for the Plaintiffs also urged the Court that the creation of the Charge over a deceased's property is not allowed by Section 46 of the Registration of Titles Act (Chapter 281, Laws of Kenya, (the R.T.A.)) as the personal representatives (PRS) are not owners of the property. They are just Trustees. Counsel also urged that Section 45 of the Succession Act (Cap. 160 Laws of Kenya) (the Succession Act) prohibits dealing in any free property of a deceased person. Senior Counsel submitted that the PRS could have proceeded in terms of Section 83 (f) and (g) of the Succession Act.The 2nd and 3rd Defendants flouted these provisions.

On the alleged guarantee by Vinod, ounsel submitted that the guarantee was itself unstamped, and undated, and was never called upon for payment by City Finance Bank Ltd. And was not per se a debt. In conclusion on this aspect of his submission Senior Counsel submitted that what transpired between City Finance Bank Ltd and the Laxmichand Group was totally irrelevant to the arguments in this suit.

Whichever way one looks at this matter, **"the sixty four million dollar"** question in the words of Senior is this, did the personal representatives as trustees of the estate of Vinod Laxmichand Shah have power to mortgage or charge Laxmi Plaza (the suit property) to secure the debts of (1) Laxmichand Keshavji & Sons (K) Ltd and (2) Fisatex (Kenya) and the so-called L.K. Group to raise the sum of Kshs. 55 million when the Plaintiffs were to eventually (upon the death of Vinod's widow) own 15% of the suit property.

Associated with this question are three cognate questions firstly whether the Plaintiffs benefited from the Charge, secondly whether (Akiba Bank Ltd), the first Defendant has a valid charge and thirdly whether the Bank and the personal representatives intermeddled with the estate, contrary to Section 45 of the Succession Act.

The answers to these questions, and indeed the sixty four million dollars question must in my view, depend upon the ultimate interpretation of the powers (if any) conferred upon personal representatives and trustees by a host of quite complex statutes, namely, the Succession Act, the Registration of Titles Act (R.T.A), the Trusts for Land Act. (Chapter 290, Laws of Kenya), the case law or judicial authorities and of course the views of the respective parties Counsel on these matters.

I have already stated in the foregoing passages of this Ruling that Vinod was halfowner of the suit property during his life-time and his estate did become such half-owner upon his Vinod's) death. It is also common ground that the 1st Defendant was aware of Vinod's Will to the effect that upon Vinod's death, the Plaintiffs were to become 15% owners of the suit property. This is also clear from the Confirmation of the Grant that the Plaintiffs would become 15% owners of the property upon the death of their mother.

The Succession Act, by Section 45, declares as follows:-

> **"45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person."**

Section 45(2) declares that any person who contravenes the provisions of Section 45(1) commits an offence, and is liable to a fine not excluding Kshs. 10,000/= and also to account to the rightful executor or administrator to the extent of the assets which he has intermeddled after deducting any payments made in the due course of administration.

The first point to note from the provisions of Section 45(2) of the Succession Act is that reference in Section 45(1) of the Act to "intermeddle" with the free property of a deceased person is by a person or persons not authorized by grant of representation. It does not apply to acts of personal representatives under a grant of probate. I am therefore unable to accept the contention by Senior Counsel that the 2nd and 3rd Defendants intermeddled with Vinod's free property.

Senior Counsel also made reference to Section 46 of the R.T.A which reads:-

"46(1) whenever any land is intended to be charged or made security in favour of any person other than by way of deposit of documents of title as provided by Section 66, the proprietor or ….. or, if the proprietor or lessee is of unsound mind, the guardian or other person appointed by the Court to act on his behalf in the matter shall execute a charge in form J(1) or J(2) in the first Schedule, which must be registered as hereinafter provided.

(2) The charge when registered shall (subject to any provision to the contrary therein contained) render the property comprised therein subject to the same security, and to the same powers and remedies on the part of the chargee as are the case under a legal mortgage of land which is not registered under this Act."

Senior Counsel contended that the Charge herein was not made in terms of the R.T.A and that by this reason alone, the Charge was invalid, and was null and void.

The other ground advanced by Senior Counsel was that a charge being a contract concerning land, by the provisions of Section 3(3) of the Law of Contract Act (Cap. 23, Laws of Kenya), an (amendment brought by the Statute Law (Miscellaneous Amendments) Act (No. 2 of 202)) required to be in writing and be signed by all the parties thereto. Counsel submitted that signature of the charge by the Chargor alone was inadequate to create a valid instrument of Charge.

Whereas Counsel is certainly correct in his submission in relation to other contracts concerning land, for instance contracts to purchase or lease land and similar contracts concerning land, a charge under the R.T.A. is a speciality contract the creation and execution of which is expressly prescribed by Section 46 of that Act. It requires the signature of or by the Chargor only. First Schedule Form J(1) says:-

"I……being registered as proprietor/lessee……Of that piece of land……in consideration of the sum of Kshs…… lent to me by ……. the receipt whereof I hereby acknowledge do hereby agree…….. Firstly Secondly Thirdly I hereby charge the land …… In witness whereof I have hereinto signed by my name this day of……20….Signed by the above named) In the presence of……)

The Charge in issue is therefore an unilateral instrument by the Chargor to the lender acknowledging debt, securing the repayment thereof by charging the land, and executing or signing the same. It is desirable for the chargee to sign it also, but that it is not legally under the R.T.A., mandatory to do so. In the instant case there is no challenge that the charge is invalid because it was only executed by the Chargor. In my view therefore the charge as executed did not offend the provisions of Section 46 of the R.T.A.

As noted above, Vinod's will provided in paragraph 6 thereof **inter alia** that I bequeathe **my real and personal estate** over which I have power to dispose by Will unto any trustee **UPON TRUST "to sell, call in convert the same into money."**

The provisions of Section 55 of the Succession Act provide that no grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a nett estate, or to make any conversion of property unless and until the grant has been confirmed as provided by Section 71 of the Act.

The Grant herein was confirmed on 17th March 2000, and the specific legacies were duly provided for in the sums of Kshs. 500,000/= for each of the Plaintiff, and the 3rd Defendant, all the shares in Laxmichand Keshavji & Sons (K) Ltd Fisatex (Kenya) Ltd, Laxmideep Holdings Ltd and Silco Holdings Ltd. The Residue of the Estate would be held in trust to pay the reasonable expenses of Vinod's wife (Sumita Vinod Shah) during her life and thereafter to accumulate 70% of the income less expenses incurred for Vinod's wife and 30% for the son (Payas Vinod Shah). After Sumita's death, 70 of the residuary estate would go to Paras Vinod Shah and 10% each to each of the Plaintiffs, that is the deceased Vinod's daughters.

Senior Counsel had submitted that the PRS had flouted the provisions of Section 83(f) and (g). The duties of personal representatives are set out under the provisions of Section 83 (f) and (g), in these terms:-

"S. 83. Personal representatives shall have the following duties –

> **(a) – (e)**
>
> **(f) subject to Section 55, distribute or retain on trust (as the case may require) all assets remaining after payments of expenses and debts as provided by the proceeding paragraphs of this section and the income therefrom, according to the respective beneficial interest therein under the will or on intestacy, as the case may be;**
>
> **(g) within six months from the date of the grant, or such longer period as the Court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the Court a full and accurate account of the completed administration.**
>
> **(h) to produce to the Court, if required by the Court, either of its own motion, or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased therewith upto the date of the account ,**
>
> **(i) to complete the administration of the estate in respect of all matters other than the continuing trusts and if required by the Court, either of its own motion or on the application of any interested party in the estate to produce to the Court a full and accurate account of the completed administration."**

These provisions impose upon the personal representatives duties whether arising under intestacy or upon probate, and these are specific statutory duties, and not derived from the common law powers as

executors. To the extent that the specific legacies may, in particular in the case of the three Plaintiffs, not have been paid out, the 2nd Defendant and Anil Laxmichand Shah (the administrators) are now trustees to the beneficiaries under the will, not only of the specific legacies, but also of the residuary estate under Vinod's Will. That in my view, is the total effect of Section 84 of the Succession Act which provides –

> **"84. Where the administration of the estate of a deceased person involves any continuing trusts whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall unless other trustees have been appointed by the trust, be the trustees thereof,**
>
> **PROVIDED that where valid polygamous marriages of the deceased person have resulted in the creation of more than one house, the Court may at any time of the continuance of the grant appoint separate trustees of the property to each or any of those houses as provided by Section40"**

There is of course no case here of a polygamous marriage. The point being made here is that upon the confirmation of the Grant, the personal representatives having not been paid out the specific legacies constituted themselves into trustees for those legacies in the case of the Plaintiffs, and indeed of the 2nd Defendant for those who may claim under him in the event of his own demise.

Apart from the specific legacies, the personal representatives upon the confirmation of the Grant, became trustees of the residuary estate constituted by the **"Laxmi Plaza"**

The executors and trustees of Vinod's Will having become trustees of the Laxmin Plaza, subject to the Trusts of Land Act, Chapter 290, Laws of Kenya (the Trusts of Land Act).

> **Section 56 of this Act applies to personal representatives, and Section 56, provides The provisions of this Act relating to trustees for sale of land to personal representatives holding land upon trust for sale, but without prejudice to their rights and powers for purposes of administration."**

My understanding of this provision is that in addition to the powers and duties under Sections 82 and 83 of the Succession Act, the trustees or the personal representatives are bound by the duties and powers that devolve upon trustees of trusts of land under the Trusts for Land Act.

Under Section 10 of the said Act Laxmi Plaza became settled land by virtue of the Will of Vinod and thereby bound by its provisions which also conferred upon the said Trustees the statutory powers set out in the said Act. Without setting out those powers in extenso, I would say that the said **powers are set out in Part IV Powers of Trustees for Sale**. Section 17, 25, 30 – 32, 34, are strictly relevant. The said provisions empower the trustees for sale of land as follows:-

> **(1) the Trustee for sale of land may sell the land or any part or exchange any part thereof or any easement, right or privilege of any land, but for best consideration (S. 17(a) (b))**

(2) compromise, compound, abandon any claims, submit to arbitration or otherwise any claims, dispute or question whatsoever relating to land ……..(S. 25(1).

(3) Where there is an encumbrance affecting any part of the land held upon trust for sale (whether capable of being over-reached on the exercise by the trustees for sale of their powers under this Act or not) the trustees for sale, with the consent of the encumbrancer, may on any part of the land, or on all or any part of the capital money or securities representing capital money subject, or to become subject, to the same trust for sale, whether already charged therewith or not, in exoneration of the first mentioned part, and by a legal mortgage, charge, or otherwise, make provision accordingly (S. 30)

(4) Where the encumbrance affects any part of the land held upon trust for sale, trustees for sale may, with the consent of the encumbrancer, vary the rate of interest charged and any other provisions of the instrument, if any, creating the encumbrance and with the same consent charge the encumbrance on any part of the land, whether charged already thereunder or not, or on all or any part of the capital money or securities representing capital money subject or become subject to the same trusts for sale, by way of additional security or of consolidation of securities, and by a mortgage, charge or otherwise, make provision accordingly (S. 31(1)

(5) Under S. 32(1) where money is required for any of the following purposes –

(a) discharging an encumbrance on the land held upon trust for sale or part thereof,

(b)

(c) the trustees may raise the money so required, on the security of the land or any part thereof, by mortagage or charge, and the money so raised shall be capital money for the purpose, and may be paid or applied accordingly.

“ An encumbrance” in this section unlike in S. 31(1) does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

(6) the trustees are enjoined to complete any transaction on land held on trust for sale by deed in writing (S. 34(1)).

(7) Such deed in writing has to the effect in which it is expressed or intended to operate and can operate under the Act, the effect of passing the land conveyed or transferred, or the casements, rights, privileges or other interests created, discharged from all the limitations, powers, powers, and provisions of the instrument, if any, creating the trust for sale, and from all estates, interests and charges subsisting or to arise thereunder, that subject to, and exception of –

(a) all rights, titles, and interests of whatsoever nature or kind having priority to the beneficial interests in the capital money arising by exercise of the trust for sale and the income thereof, and

(b) all mortgages, charges, and liens which have been created or taken effect for securing money actually raised at the date of such deed or writing, and

(c) all leases, all grants of easements and all rights or privileges subsisting before the date of the deed or writing granted or made for value in money or moneys worth, or agreed to be, by the trustees for sale, or are at that date otherwise binding on the successors in title of the trustee for sale. (S. 34 (1) & (2).

(8) the Court by order may also authorize any transaction affecting or concerning land held on trust for sale, including charge or mortgage (S. 36)

The only limitation about the application of these cited provisions that is to say, the power of the trustees for sale, to charge or mortgage the land subject to trusts for sale, is where the instrument creating the trust for sale, has expressed a contrary intention (S. 37(1)). Paragraph 6 of Vinod's Will did not create any limitation to the powers of the trustees for sale, and that the powers of the trustees set out above, apply to that instrument.

In any event any such provision in any such instrument purporting to limit the powers of the trustees under the Trusts for Land Act would to the extent of such limitation be void (S. 54(1). I have set out these provisions in extenso to show that the trustees upon land held on trust for sale have unfettered power and authority to raise money by charge or mortgage to pay off another such mortgage with the consent of the first encumbrancer, in this case, City Finance Bank Ltd whose charge was discharged upon the grant of the charge to the 1st Defendant herein.

Senior Counsel for the Plaintiffs cited to me several cases commencing with that of **OBURA VS. KOOME [1001] 1 EA 173 (CAK).** The decision in that case was that a person who is an admitted advocate but does not have a current Practising Certificate is not qualified to sign a memorandum of appeal, and if he does so that memorandum is incompetent and the appeal will be struck out. This was however not the reason for Senior Counsel's citation of this case.

This case was cited for the proposition that the High Court, the Court of Appeal and all Subordinate Courts are by Section 3 of the Judicature Act (Cap. 8(Laws of Kenya enjoined to exercise their jurisdiction in conformity with:-

(a) the Constitution;

(b) Subject thereto i.e. the Constitution), all other written laws, including Acts of Parliament of the United Kingdom cited in Part X of the Schedule to this Act, modified in accordance with Part XX of that Schedule;

(c) Subject thereto so far as those laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897 and the procedure and practice observed in Courts of justice in England at that date.

but the common law, doctrines of equity and statutes of general application shall apply so far as the circumstances of Kenya and its inhabitants permit and subject to such quantifications as

those circumstances may render necessary.

Senior Counsel invoked this provision in response to various submissions by Miss Malik learned Counsel for the 1st Respondent, and in particular the citation by Miss Malik from **Williams and ……. Executors, Administrators and Probate** (15th Edn.) regarding the executors power to mortgage – where at p. 617, the said learned authors say –

Power to Mortgage – Common Law

"Even at common law, unless the will peremptorily required an absolute sale, the executor could raise money required for administration purposes by partial sale or mortgage of the assets vested in him. The mortgage might have been either of legal or equitable assets, or a mere chose in action, it might have been by actual assignment or by deposit, and might properly have given the mortgagee a power of sale. Again the executor might pledge a part of the assets to enable him administer the estate."

Now, what I understood, Miss Malik to have been saying by reference to this paragraph is that the personal representatives of Vinod's Will have even without reference to the statute, power to mortgage the trust property in whichever way, for purposes of the estate.I did not understand her to say that the common law or other doctrines of equity are applicable to this transaction.

Learned Senior Counsel also referred to the case of **MANCHESTER OUTFITTERS SUITING DIVISION LIMITED, Now called KING WOOLLEN MILLS LTD VS. STANDARD CHARTERED FINANCIAL SERVICES LTD, a decision of Tunoi, Lakha & Owuor JJ.A).**

In that suit the Plaintiff Appellant made similar claims as in this suit and the application herein:-

(i)……..

(ii) an injunction against the Receiver to restrain them from acting as receivers and managers of the Plaintiff Companies,

(iv) …….

(v) an account of all moneys of the Plaintiff Companies received while purporting to act as receivers.

(vi) …… damages.

The decision on the above claims turned upon the single issue whether the Debenture of 5th April 1982 upon which the Respondent Bank had appointed the Receivers was valid and therefore had legal effect. Subsequent upon the registration of that debenture, the agreements upon which it was based were changed and were replaced by entirely new and local arrangements, and although the new agreements also required a new debenture to be granted by the Borrower Company no such debenture was actually executed.

The appellant therefore argued that there being no debenture, the Respondent Bank could not appoint

a Receiver pursuant to the Debenture of 5th April 1982 which, too, had been superseded by the local arrangements. Reviewing the High Court's decision, the Court of Appeal said that in the absence of either the old debenture, and a new one being executed, the Respondent Bank had no authority to appoint a Receiver, and that their application was therefore null and void and proceeded to assess and award damages against the Respondent Bank.

The situation in the case at hand is quite different, and neither this authority, and that of **Obura vs. Koome** (supra) are applicable. The issue in this case is whether the 2nd and 3rd Defendants had authority to mortgage the suit property or **"Laxima Plaza"** situate along Biashara Street Nairobi.

Having analysed at length the applicable provisions of the Succession Act (Cap. 160, Laws of Kenya), and in particular SS. 82 and 83 thereof and the Law of Contract Act (Cap 23, Laws of Kenya) and the Registration of Titles Act, (Cap 281 Laws of Kenya), I am satisfied that the 2nd and 3rd Defendants were, as Trustees of the residuary estate of the late Vinod, entitled in law, to mortgage the suit property. It does not count in my opinion, that the debt of Vinod was miniscule, or that it could have been paid out from other sources.

I may add that so far as the Plaintiffs were entitled to an unencumbered share of "Laxmi Plaza" it was also in their interest that the property was mortgaged to pay off the first encumbrances, City Finance Bank and it did not matter that a surplus of mortgage money was applied as working capital for the benefit of the estate of which the Plaintiffs as beneficiaries were and are interested. Learned Counsel for the 1st, 4th & 5th Defendants made reference to the case of **Ebrahim vs. Westbourne Galleries Ltd and Others [1972] 2 ALL E.R 429 (H.L.** which is not really relevant to the matter at hand. The issue there was whether a minority shareholder could petition the Court for Winding Up of a company on the **"just and equitable**" provision under Section 222(f) of the English Companies Act 1948, which is similar to our Section 219(f) of the Companies Act (Cap 486), Laws of Kenya) which says –

S. 219 "A Company may be wound up by the Court if –

(a) – (e)

(f) the Court is of the opinion that it is just and equitable that the Company should be wound up"

Plowman J. who first heard the matter held inter alia that the Respondents/Defendants (N & G) had done the appellant a wrong in that it had been an abuse of power and a breach of faith which partners owed each other to exclude one of them from all participation in the business on which they had embarked on the basis that all could participate in its management, and that accordingly the appellant had made out a case for a winding up order under Section 222(f) of the Companies Act 1948 of England.

The Court of Appeal reversed this Order, on an appeal by the Respondents holding that in the case of a quasi-partnership company, the exercise of a majority in general meeting of the power under the articles and Section 184 of the Act of 1948 (which is similar to Section ……. of the Companies Act to remove a director from office and consequently to exclude him from participation in the management and conduct of the business did not form a ground for holding that it was just and equitable that the company should be wound up unless it was shown that the power had not been exercised bona fide in the interests of the company, and that, on the facts, the appellant had failed to show that his removal had not been justified and in the best interests of the company or that no man could have thought so.

On appeal to the House of Lords, the Judicial Committee of the Privy Council, allowed the appeal,

restored the judgement of Ploman J. and held that a limited company was more than a legal entity and the rights, expectations and delegations of the individuals behind it **inter** se were not necessarily merged in the structure and that while the **"just and equitable"** provision did not entitle a party to disregard the obligation which he assumed by entering a company, it enables the Court to subject the exercise of legal rights to equitable considerations which might make it inequitable to insist on legal rights or to exercise them in a particular way, that in the present case, the appellant had joined in the formation of the company on the basis that the character of the association, viz inter alia, that:-

> **(i) the appellant was entitled to participate in the management, would as a matter of personal relation and good faith remain the same,**
>
> **(ii) N & G having in effect repudiated that relationship and the appellant having lost his right to share in the profits and being in that respect at the mercy of N & G and being unable to dispose of this interest without their consent, the proper course was to dissolve the association by winding up the company.**

Learned Counsel for the 1st, 4th and 5th Defendants also made reference to **Palmer's Company Law** Vol. I, where the authors of that classic work on the company law discusses the occasions of piercing the veil work and looking behind the company's persona. Whereas I agree with learned Senior counsel for the Plaintiffs that the principles enunciated in the case of Salomon vs. Salomon & Co. Ltd [1897] A.C. 22 that the shareholder is separate entity from his judicial creation, the limited company, what I understand Miss Malik, learned Counsel for 1st, 4th and 5th Defendants to mean by reference to this passage and the case of Ebrahim vs. westbourne Galleries Ltd (supra) is that without breaching the principles of Salomon vs. Salomon & Co., it is desirable to look at the circumstances of a case as a whole, and in this particular case like the Ibrahim vs. Westbourne Gallaries the personal relationship among the shareholders before, and respective expectations upon incorporation and decide accordingly.

In this particular suit and application it is desirable to look at the kinship of the persona involved and visualise the goings-on among the ultimate beneficiaries, whether in Laxmichand Keshavji & Sons (K) Ltd, Fisatex (Kenya) Ltd Laximideep Holdings Ltd and Silco Holdings Ltd without making a specific finding on the matter.

In this regard Miss Malik Learned Counsel for the 1st, 4th and 5th Defendants made reference to collusion between the Plaintiffs and the 2nd and 3rd Defendant in bringing this action to defeat the 1st Defendant Charge over the suit property and the appointment of the 4th and 5th Defendants as Receivers under the Charge. This argument was however pressed by the said learned Counsel for the 1st, 4th and 5th Defendants and I propose to express no findings on it except to say that it raises more than mere curiosity to observe that the 2nd and 3rd Defendants have to date chosen not to take part in these proceedings and have left it to the 1st Defendant to fight out with the Plaintiffs who are nieces to the 2nd Defendant, and sisters to the 3rd Defendant.

The principles upon which temporary injunctive relief may be granted are summarised in the well-known and often cited case of Giella vs. Cassman Brown & Co. Ltd [1973] EA 358, that an applicant must make out a prima facie case with a high probability of success, that damages would not be adequate remedy or that the 1st Defendant would not be able to pay such damages if it be ultimately found that the creation of the Charge was unlawful and is therefore null and void and consequently the appointment of the 4th and 5th Defendants was unlawful as was the case in Manchester Outfitters

Suiting Division Ltd/Woollen Kings Ltd vs. Standard Financial Services Ltd (supra), and that when in doubt, the Court should decide the matter on the balance of convenience.

Keeping the above principles in mind, and having considered at length this application and the issues raised in it, namely that the trustees of Vinod Will had no authority to mortgage Vinod's residuary estate, I am satisfied that the trustees of the said estate, that is to say, the 2nd and 3rd Defendants had statutory right and capacity to do so. In my opinion therefore the Plaintiffs have not satisfied the three cardinal principles for grant of temporary injunction. I cannot say that they have established a prima facie case with a high probability of success, nor can I say that they established a case that the 1st Defendant is a shell outfit with no assets to meet any damages and costs should the Plaintiffs be ultimately successful in their suit. Being of this view, there is no case for considering the principle of balance of convenience.

In the result therefore I decline to grant the orders sought herein. The Plaintiff's application dated 15th October 2004 is therefore dismissed with costs.

Dated and delivered at Nairobi this 4th day of May 2005.

ANYARA EMUKULE

JUDGE