

DECIDED
13 December 2010

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1. That may the Honourable Court be pleased to investigate the claim by the Applicant/ Objector that the;rd Respondent/Judgment Debtor's bank accounts Nos.015000091 and 0150000792 maintained by the Applicant and the properties namely, Quick Binder QB 200G with serial No. 07QD 000~ Polar 78x, Speed master 74-4+L0 Speed maste0 GTO 46-1/ Polar 115 EM4 Stahfolder T152/ Ctp/ Prosetter 74 and motor vehicles namely T.643 ADY Toyota Corolla-EE102/ T.461 AXA Toyota Carina/ T.581 BBP Toyota RA1I, have encumbrances in that the same are charged to the Applicant by way of denture covering all assets of the said Company as security for the overdraft Letter of CrediC Bank Guarantee and Term Loan Facility ('the Credit Facilities'? all amounting to Tshs.700/000/000/= plus interests and other charges thereon advanced to the ;rd Respondent/Judgment Debtor by the Applicant and thus not liable to attachment.
2. That may the Honourable Court deems fit to lift the said attachment of the bank accounts and properties aforesaid and issue a permanent and perpetual injunctive orde0 retraining the 1st and Id Respondents from auctioning them. In the alternative:

3. That in the event the Honourable Court deems fit to continue with the attachment and ultimate auction of the suit premises/ the same to continue subject to the Applicant's order.
4. Costs of the application to be borne by the 1st Respondent
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5. Any other reliefs that the Honourable Court deems fit to grant. The application by consent of Counsel for the parties was disposed of orally by Mr. Malimi from the firm of KISARIKA, MALIMI & MLOLA (ADVOCATES) for the Applicant/Objector, Mr. Chipeta from HALLMARK ATTORNEYS for the 1st Respondent/DecreeHolder, and Mr. Pardhan from M.G. PARDHAN AND COMPANY ADVOCATES for the 2nd Respondent/Judgment Debtor. The application before this Court is for investigation by this Court of claims to and objections to attachment of attached property of the properties of the 2nd Respondent by the 1st Respondent and the 3rd Respondent pursuant to the execution order of this Court issued on 18/12/2009. The Applicant/Objector was not a party to the suit which gave rise to the execution proceedings which gave rise to the attachment of the properties of the 2nd Respondent the Applicant/Objector now seeks to lift. The nature of the application before this Court however, is such that a brief background is apposite. The dispute which gave rise to the execution proceedings was between HEILDEBERG EAST AFRICA LIMITED, the 1st Respondent herein, and PRINT FACTORY LIMITED, the 2nd Respondent/Judgment Debtor herein. The said dispute was determined in full before an Arbitral forum appointed jointly by the 1st Respondent and the 2nd Respondent. The Arbitral Award from the Arbitration was duly filed and registered in this Court as Miscellaneous Commercial Case No.18 of 2009 vide the Ruling of this Court dated 28th July 2009 by Hon. Werema, J. (as he then was). The 1st Respondent lodged an application for objection in this Court against the Award being registered and enforced as a Decree of the Court, which on the 28th July 2009 this Court declined it and ordered the Award to be enforced as a Decree of this Court, save for adjustment of rate of interest and mode of calculating interest. Through the Decree of this Court dated 28th July 2009 which was extracted on 25th November 2009 emanating from the Ruling of the Court dated 28th July 2009, it was ordered that the Decree be enforced. On the 11/12/2009 upon application for execution by the 2nd Respondent, this Court ordered execution to issue. The application has been preferred under Rule 57(1) of Order XXI of the Civil Procedure Code, [Cap.33 R.E. 2002] which provides as follows: "57(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit: Provided that no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed." The main ground for objection proceedings under Rule 57(1) of Order XXI cited above, is that the property attached in execution of a decree is not liable to such attachment. In the present application, the Applicant/Objector contends

that the accounts of the 2nd Respondent, which the 1st Respondent/Decree Holder attached, and the properties of the 2nd Respondent, which the 1st Respondent attached through the 3rd Respondent to satisfy the decree, are not liable to attachment. The main reason for the Applicant/Objector to claim so is that the said properties of the 2nd Respondent are charged through debenture emanating from the credit facilities the Applicant/Objector Bank advanced to the 2nd Respondent/J. Debtor amounting to Tshs.700,000,000/- and as of 31/12/2009 the outstanding amount from the 2nd Respondent/J Debtor stood at Tshs.302,243,970.41 and US 112,167.16 respectively as per Exhibit "KAM-31i" to the Applicant's affidavit. The general principle underlying attachment of properties and sale in execution of decree under section 48(1) of the Civil Procedure Code are only those belonging to the judgment debtor over which he has a disposing power, the Applicant/Objector's Counsel, Mr. Malimi pointed out. Section 48(1) of the Civil Procedure Code, which Mr. Malimi has relied on in his submission concerns what type of property is liable to attachment and sale in execution of decree. It stipulates as follows: "48.(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheque, bills of exchange, promissory notes, Government securities, bonds or other securities for money debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf: It was the further submission of Mr. Malimi that by virtue of the encumbrances emanating from the said properties of the 2nd Respondent being charged through debenture resulting from the credit facilities the Applicant/Objector Bank advanced to the 2nd Respondent, the 1st Respondent has no such powers unless the charge is disencumbered. It is a legal requirement under Rule 58 of Order XXI of the Civil Procedure Code that a claimant or objector "must adduce evidence to show that at the date of the attachment he had some interest in or was possessed of, the property attached. "In terms of Rule 59 of Order XXI of the Civil Procedure Code, if the court upon investigation, is satisfied that such property when attached was not in the possession of the judgment debtor, the court has an option either to release of property wholly or to such extent as it thinks fit from attachment. Alternatively, in terms of Rule 61 of Order XXI, the court if satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge. " Mr. Malimi insisted that the Applicant/Objector is a secured creditor and as such the Applicant/Objector ranks first among the creditors of the 2nd Respondent/Judgment Debtor. If the properties of the 2nd Respondent are to be attached and auctioned by the 1st Respondent, the debenture created in favour of the Applicant/Objector will be rendered of no effect and consequently make the Applicant/Objector suffer irreparably, Mr. Malimi maintained. In the alternative, Mr. Malimi submitted further, in terms of Rule 61 of Order XXI of the Civil Procedure Code, in the event this Court deems it fit to continue with the attachment and sale, then it should be subject to the debenture, that all the outstanding amounts/credit facilities advanced by

the Applicant/Objector to the 2nd Respondent have to be satisfied first. Reiterating his prayers in the application, Mr. Malimi prayed that this Court deems it fit to lift the attachment of the properties of the 2nd Respondent/Judgment Debtor and if pleased to issue a perpetual injunctive order or in the alternative if the attachment and sale proceeds it should be subject to the debenture. In reply, Mr. Chipeta flagged off his submissions by taking issue with the second prayer in the application on perpetual injunction by submitting that it cannot emanate from an interlocutory application but a suit filed under the current provisions of the Civil Procedure Code. Mr. Chipeta submitted further that the remedy for any application under Order XXI Rules 56, 58, 59 of the Civil Procedure Code is contained in the same provisions. I am at one with Mr. Chipeta that the prayer for perpetual injunction is misplaced. It cannot be availed in an interlocutory application. It is available in a suit and upon properly filed application. In his reply submissions Mr. Chipeta seems to have also laid blame on the Applicant/Objector for sitting helplessly without exercising its powers under Clause 6.0 l(b) and (g) of the Debenture by not taking any steps to protect its interests including the appointment of a Receiver. The Applicant/Objector should not therefore be allowed to come to this Court by way of objection proceedings, Mr. Chipeta reiterated. Instead the Applicant/Objector should have taken advantage of the provisions of section 280 of the Companies Act [Cap.212 R.E. 2002], Mr. Chipeta insisted. In rejoinder on this particular point, Mr. Malimi submitted that the most sensible thing for the Applicant/Objector was not to circumvent the process by appointing a receiver since this would have complicated the matter but to come to this Court to assert its position as a lender in terms of Order XXI Rule 57. I have carefully examined the provisions of section 7.01 of the Debenture [Exhibit K&M-2(a)] on the appointment of receiver. It stipulates as follows: "Section 7.01: Appointment of Receiver: The Debenture Holder may at any time after the Facility, interest and other charges hereby secured shall have become payable, appoint in writing any person or persons whether an officer or officers of the Debenture Holder or not, to be a Receiver and/or Manager or joint Receivers and/or Managers (hereinafter the expression "Receivers and/or Managers shall refer to a Receiver and/or Manager or if joint Receivers and/or Managers are appointed by the Debenture Holder then to each joint Receivers and/or Managers) of the charged assets upon such terms as to remuneration and otherwise as the Debenture Holder shall think fit and may from time to time in writing remove any Receiver and/or Manager so appointed and appoint another as aforesaid in his stead." (the emphasis is of this Court.) In terms of section 7.01 of the Debenture, the powers of the Applicant to appoint a Receiver and/or Manager of the charged assets are discretionary not mandatory. I have also examined section 6.01(b) & (g) of the Debenture which stipulates as follows: "Section 6.01: Events of Default: Notwithstanding anything herein contained to the contrary, the Debenture Holder will not be obliged to make any advance or further advance on the Facility, and the Facility shall on demand be immediately and fully repayable/ if any of the following Events of Default occur:-

- (b) if distress/ execution or other process is levied or issued against any property or assets of the Company or any surety or subsidiary of the Company and is not withdrawn or discharged within seven (7) days.
- (g) If the Company is unable to pay its debts within the meaning of section 280 of the Companies Act 2002 or any statutory modification or re-enactment thereof. N The provisions of section 280 of the Companies Act [Cap.212 R.E. 2002] to which reference is made by Section 6.01(g) of the Debenture and to which Mr. Chipeta has proposed that the Applicant/ Objector should have utilized instead of coming to this Court as an objector to execution proceedings, defines what it means by "inability of a company to pay debts." Inability to pay debts is a longer version of insolvency if it is in relation to a legal person or bankruptcy if it relates to a natural person. When a company is unable to pay its debts it can either be put under administrator to rescue it or otherwise be put under a Receiver and/or Manager for purposes of winding it up or managing its affairs. An insolvent company is finally to be dissolved by a court order. Section 280 of the Companies Act [Cap.212 R.E. 2002] falls in Chapter 11 of the Act, titled "WINDING UP BY THE COURT." The said Chapter 11 of the Companies Act provides for among other things the jurisdiction of the High Court in winding up proceedings. In terms of section 280 of the Companies Act, if a Company among other things is "unable to pay its debts," the Company 9 can either appoint a RECEIVER to take possession (in conjunction with the Holders of a specified proportion of the issued Debentures) or "apply to the Court for an Order." In my view, whether the Applicant/Objector chose to appoint a Receiver and/or Manager in terms of Clause 6.01(g) in the Debenture which in the opinion of Mr. Chipeta this should have been the proper recourse by the Applicant/Objector, or if the Applicant/Objector elected to come to this Court under the provisions of Rule 57 of Order XXI of the Civil Procedure Code as indeed he has done, the 2nd Respondent/J. Debtor still would be liable to settle its liabilities to its creditors including the 1st Respondent and its secured creditors including the Applicant/Objector who would rank first. In my view, the legislature saw wisdom in vesting the court with discretionary powers under Rule 61 of Order XXI of the Civil Procedure Code if satisfied that the attached property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment to do so subject to such mortgage or charge. I do not therefore, and with due respect to Mr. Chipeta, see any reason why the Applicant/Objector cannot pursue its rights under Rule 57 of Order XXI of the Civil Procedure Code, which as Mr. Malimi rightly pointed out is far less cumbersome than invoking section 280 of the Companies Act. In any event there is nothing in the law which makes it mandatory for the Applicant Bank as a secured creditor to pursue its rights only under the Companies Act and not any other available statute. In any event, execution involving the charged properties is one of the signals of the occurrence of "Events of Default" in terms of section 6.01(b) of the Debenture, which would have provided a ground for the Applicant/Objector to invoke section 280 of the Companies Act to protect its interests including the appointment of a Receiver. In any event considering that in terms of the credit facility dated 22/09/2009, the Applicant has extended a Term Loan (existing) of USD 104,250.00 (USD One Hundred and

Four Thousand Two Hundred and Fifty) for Financing Fixed Assets with a tenor of 36 months which will expire on 30th December 2010, and a Short Term Loan (New Loan from reduction of Overdraft) of TZS 100,000,000.00 (TZS One Hundred Million) for conversion of part Overdraft facility to Term Loan with a tenor of 18 months with expiry date of 31st March 2011, it is not in the best interest of the Applicant the 2nd Respondent be wound up. Mr. Chipeta, learned Counsel for the 1st Respondent, in his submissions came come up with an argument that there is a Legal Mortgage over property No.372/2/1 in the name of SHANEABBAS MOHAMED ABDALLAH KHIMJI, and in terms of paragraph 3.4 of his counter affidavit, the Applicant has deliberately failed to attach this property to recover its loan. According to Mr. Chipeta's counter affidavit this property as per its valuation report of 2007 is valued at above USD 1 million, which is 200% more than the alleged outstanding sum. As per paragraph 3 of the Applicant's affidavit, as at 31st September 2009, outstanding credit facilities advanced to the 2nd Respondent/J. Debtor stand at Tshs.302,243,970.41 and USD 112,167.16 [Exhibit K&M-3] and that the borrower continues to service the same. In terms of paragraph 3.5 of his counter affidavit, Mr. Chipeta does not think that the Applicant/Objector is in any way affected by the ongoing execution process since it has security which is the said Legal Mortgage over the landed property. According to paragraph 3.7 of Mr. Chipeta's counter affidavit, the Applicant/Objector despite being under obligation to do so by virtue of express term in the facility letter, he has failed to act prudently by realizing the Legal Mortgage on Plot No.372/2/1. Mr. Chipeta seems to suggest foul play on the part of the Applicant by stating in paragraph 3.8 of his counter affidavit that the Applicant seeks" to shield the property of the judgment debtor and pre-empt the process of la~ while aware that it is in default of the terms of the Agreement and holding security far in excess of the outstanding sum, if at all." Mr. Chipeta strongly opposed the argument by Mr. Malimi that if the execution is carried out the Applicant/Objector would suffer irreparable loss. Mr. Chipeta in rejoinder submitted that these allegations are not supported by any tangible evidence. Repeating what he has stated in his counter affidavit on the fact that the Applicant/Objector holds a legal mortgage in one of the most prime areas of Tanzania, Oysterbay in the name of SHANEABBAS M.A. KHIMJI, the Director of the Applicant's Company, Mr. Chipeta argued that the Bank has a fallback position since that property does not form part of the execution in the 2nd Respondent case. Mr. Chipeta submitted further the Applicant failed to disclose the existence of the legal mortgage on Plot No.372/2 Oysterbay Area in Dar es Salaam and its value for comparison against the outstanding loan amount st but only admits its existence when it was mentioned by the 1 Respondent. In the Applicant's Rejoinder to the Counter affidavit of Walter Chipeta dated 8th January 2010, Mr. Malimi learned Counsel for the Applicant deponed at paragraph 7 that the security for the facility granted to the 2nd Respondent include a legal mortgage over landed property in Oysterbay, Dar es Salaam over the property on Plot No.372/2/1 in the name of SHANEABBAS MOHAMED ABDALLAH KHIMJI. In his rejoinder submissions, Mr. Malimi readily conceded to the fact that of the existence of the legal mortgage relating to the credit facilities extended by the Applicant but argued that this is a Third Party mortgage who is not a party in the proceedings before this Court and the mortgagor is not the Company. The 2nd Respondent has admitted on Oath

that it has defaulted on the payment terms for the loan facility. There is express term in the facility letter empowering the Applicant to proceed by way of distress or execution either by virtue of or any Court Order, Decree or process is levied upon any part of the Assets of the BORROWER. Mr. Chipeta submitted that the Applicant has failed to attach the Legal Mortgage whose value is over 200% of the outstanding sum. Mr. Malimi insisted that the proceedings for the enforcement of the debenture is different from the mortgage offered by a Third Party and contended that if the Applicant is to bring action for the enforcement of the mortgage by the Third Party it is enjoined to follow a different route altogether apart from these proceedings, and that it is not necessarily that automatically the Applicant can recover what is due to it. It is stated at paragraph 12 of the Applicant's rejoinder affidavit that the legal mortgage is not subject of these proceedings and thus any references to the same is untenable. As correctly submitted by Mr. Malimi, the legal mortgage is not part of these proceedings. The Applicant/Objector however, can enforce its rights over the legal mortgage against the 2nd Respondent who has admittedly defaulted on payment. In any event the value of the legal mortgage is substantial. The argument of the Applicant's Counsel about suffering irreparable loss if the execution proceeds is therefore untenable. The legal mortgage not being the subject of the present proceedings, the Applicant can still pursue its enforcement through appropriate mechanism as suggested by Mr. Malimi and therefore there is no justification for this Court exercising its discretion to grant the prayer under Rule 61 of Order XXI of the Civil Procedure Code as prayed in the application. In his reply submissions, Mr. Chipeta also took issue with the Applicant's rejoinder affidavit sworn by Mr. SEMI SONGWE MALIMI arguing that it was taken by the Applicant's Counsel instead of Mr. RAVIKUMAR DEVAREDDY, the Managing Director of the Applicant/Objector. The application is supported by the affidavit of RAVIKUMAR DEVAREDDY and the rejoinder affidavit sworn by Mr. SEMI SONGWE MALIMI. Mr. Malimi in his rejoinder submissions argued that there is no law cited by Mr. Chipeta to substantiate his argument that the rejoinder affidavit of Mr. Malimi ought to have come from someone else. I am at one with Mr. Malimi in his rejoinder submissions that there is no law which bars Advocates from taking an oath to depone in reply to a counter affidavit. As rightly submitted by Mr. Malimi, advocates for the parties being well briefed to take up the matter, are capable of swearing a rejoinder by virtue of their office and by instruction from the client. In any event as rightly submitted by Mr. Malimi, there is no much difference between the counter affidavit sworn by Mr. Chipeta and filed in this Court on 08/01/2010 and the Applicant's rejoinder affidavit filed in this Court on 18/01/2010 which Mr. Malimi swore to the Counter Affidavit of Mr. Chipeta as all are affidavits of Counsel to the parties in this proceedings. As correctly submitted by Mr. Malimi, it is a practice that Advocates upon being briefed can depone or sign pleadings. It is by virtue of the knowledge as advocate that the verification is based. In any event and for the foregoing reasons the strong opposition taken by Mr. Chipeta against the applicant's rejoinder affidavit sworn by Mr. Malimi is misconceived. In terms of paragraph 2 of the Applicant's Affidavit on the 11th day of September 2007, the Applicant/Objector granted the 2nd Respondent/J. Debtor, PRINT FACTORY LTO., an overdraft facility of Tshs.300,000,000.00 and a Term Loan of TshsAOO,OOO,OOO.OO. Subsequently, the

debenture was renewed with modifications in the type of facilities/amounts in the years 2008 & 2009 as evidenced by Letter of Offer dated 11/09/2007, 15/08/2008 & 22/09/09/2009 (Exhibit K&M 1). As security for the said facilities the 2nd Respondent charged to the Applicant by way of Debenture, all its property fixed and floating as per the copy of the Debenture dated 27/09/2007 [Exhibit K&M 2(a)] and Certificate of Registration of a Charge issued by BRELAon 27/09/2007 [Exhibit K&M-2(b)] evidencing creation and approval by the Registrar of Companies to create the charge over the assets of the 2nd Respondent. Furthermore, in terms of paragraph 6 (erroneously numbered as 6 instead of 5) of the Applicant's Affidavit, in so far as the Garnishee Order dated 28th day of July 2009 is concerned [Exhibit K&M-4(a)], the 2nd Respondent's Bank accounts maintained by the Applicant are in debit balance and hence remitting any money to the court and/or decree holder pursuant to the Garnishee Order is not possible. In terms of paragraph 9 of the Applicant's Affidavit, the 2nd Respondent's properties attached by the garnishee order and the attachment by the 3rd Respondent are the only substantive assets of the 3rd Respondent and owing to the amount involved in the decretal sum/ the same are not likely to satisfy the decree let alone the fact that the same are charged to the secured creditor, the Applicant/ Objector. In his reply submissions, Mr. Chipeta took note of the charge by way of debenture registered on 27/12/2007 as evidenced by Exhibit KAM-2(b), which is correctly stamped. However, by the date of registration of the said debenture on the 27/09/2007, there was only one credit facility agreement between the Applicant and the 2nd Respondent, Mr. Chipeta contended. The charge of 27/09/2007 could not therefore accommodate the subsequent loan facilities unless they were varied or stamped in accordance with the law, which does not seem to be the case, Mr. Chipeta further contended. The debenture submitted in this Court is therefore invalid on the ground that the charges indicated therein have not been validated or varied legally, Mr. Chipeta surmised rather confidently. Amplifying further on the invalidity of the subsequent loan facilities, Mr. Chipeta submitted that in terms of section 96(1) and 97(1) of the Companies Act [No.12 of 2002], it is mandatory for charges to be registered within 42 days of their creation. Mr. Chipeta submitted further that in terms of section 96(1) of the Companies Act, an instrument modifying terms of a mortgage/charge is to be registered together with the instrument. The Deed of Variation of the debenture created by the Applicant/Objector varying the terms in the Debenture instrument was also required to be properly stamped in order to make the debenture continue to have charge on the varied terms, Mr. Chipeta further submitted. In terms of the Stamp Duty Act [Cap.189 R.E. 2002] which governs matters relating to stamp duties, chargeable instruments which include facility letters fall under the mandatory requirement in section 25 of the Act requiring such instruments to be stamped within 30 days of their creation, Mr. Chipeta reiterated. It was the further contention of Mr. Chipeta that while the first debenture created on 27/09/2007 was validly registered within 30 days, the subsequent facilities were neither registered nor submitted for registration nor stamped under the Stamp Duty despite the fact that they form part of the debenture instrument and despite the fact that they altered the terms of the charge. Mr. Chipeta surmised that equally, the instruments which are held to make these facilities are up to 17 the moment not properly stamped or registered as

required under the law. Admittedly, on the Applicant's own admission, the debenture created on 27/09/2007 has been altered and this does not warrant this Court to exercise its discretion since there is contravention of the law, Mr. Chipeta surmised. In rejoinder Mr. Malimi submitted that page 4 of the Debenture stipulates the aggregate amount to be secured at Section 2.01 as being Tshs.700,000,000.00 plus interest and other costs. This is the amount for which the Debenture was registered and that it was registered with the Registrar of Companies and a Certificate of Charge issued thus making it a public matter and it forms part of public records accessible by any person, Mr. Malimi submitted. The Debenture is valid to this date and has not been discharged and remains that of Tshs.700,000,000/= Mr. Malimi further argued. Mr. Malimi submitted further that what is evidenced in Annexrure KAM-1 is the amount taken by the 2nd Respondent at that time, which is Tshs.200,000,000.00 and the tenor of the facility remains to be three. The facilities dated 18/08/2008, 31/12/2009 and the Letter of Credit of 2009 and the overdraft, are covered by the Debenture, Mr. Malimi reiterated. The amount the Debenture secures is of Tshs.700,000,000.00 and it is valid and has not been discharged. What is registered for stamp duty purposes is not the Facility Letter but the mortgage or the debenture instrument, Mr. Malimi further submitted. The Facility Letter explains the amount taken by the borrower from time to time and eventually they crystallized to be either under a debenture or mortgage, Mr. Malimi further submitted. The issue of variation or stamp duty could not arise as the total amount does not exceed the debenture amount which is the maximum amount determining the chargeability of the mortgage and debenture and that the debenture was not altered and/or varied in the sense that the amount secured was not exceeded, Mr. Malimi surmised. The Counsel for the parties are not in disagreement over the fact that Debenture which the 2nd Respondent/J. Debtor created in favour of the Applicant/Objector on 27/09/2007 was properly registered and stamped. The only controversy is over which amount as between that of Tshs.700,000,000.00 and that of Tshs.200,000,000.00 should be reckoned as being the maximum amount of the Debenture. Mr. Malimi on his part has throughout his submissions maintained strongly that so long as the maximum availment of Tshs.700,000,000.00 which in his opinion determines the chargeability of the mortgage and debenture was not exceeded, the issue of variation of the debenture by the subsequent Facility Letters, registration and stamp duty do not therefore arise. Mr. Chipeta on his part argued that the Deed of Variation of the debenture which varied its terms was to have properly been stamped and registered so that the debenture will continue to have charge on the varied terms. Mr. Chipeta in his Counter Affidavit at paragraph 3.6 stated that the alleged facility, if any, is limited to an overdraft of Tshs.200,000,000.00 given that the maximum availment of Tshs.700,000,000/- expired since 31st December 2007 as per the terms of the facility dated 11th September 2007. The alleged subsequent banking facilities constitute a mere rescheduling of old facilities, based on the same securities, Mr. Malimi argued but Mr. Chipeta maintained that in so far as the subsequent facilities altered the terms of the debenture instrument created on 27/09/2007, which was validly registered within 30 days, they were neither registered, nor submitted for registration nor stamped, and therefore invalid. The learned Counsel for the parties seem

clearly to have parted company over whether the subsequent facilities which varied the Debenture dated 27/09/2007 ought also to have been properly registered and stamped so as to make them valid and so as to make the Debenture continue having charge over the assets of the 2nd Respondent. In support of his contention regarding the need for the subsequent facilities being registered Mr. Chipeta summoned to his assistance the provisions of section 96(1) and 97(1) of the Companies Act and the Stamp Duty [Cap.189 R.E. 2002]. Section 96(1) of the Companies Act [Cap.212 of 2002] provides as follows: "96.-(1) Subject to the provisions of this Part, every charge created by a company registered in Tanzania and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator or administrator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced are delivered to or received by the Registrar for registration in the manner required by this Part within forty two days after the date of its creation." The provisions of section 96(1) of the Companies Act makes it void against the liquidator or administrator and any creditor of the company, a charge created by a company registered in Tanzania conferring security on the company's property or undertaking unless its particulars together with the instrument by which the charge is created or evidenced are delivered to or received by the Registrar of Companies for registration within forty two days after the date of its creation. The provisions of section 97(1) of the Companies Act on the other hand enumerates the kind of charges to which section 96(1) of the Act applies, including but not limited to a charge for the purpose of securing any issue of debentures. In terms of section 2 of the Companies Act a "debenture" includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not. Simply stated a Debenture is an instrument executed under the Seal of a Company charging the whole or a portion of its property or undertaking in favour of the Debenture Holder to secure a certain sum, and providing for the payment of interest at a specified rate until the principal is repaid. The charge may be contained in the Debenture itself or in a Deed, to the benefit whereof the Debenture Holder is declared to be entitled, or each instrument may contain a charge independently of the other. Debentures are usually made to form part of a series of a specified number, each for securing a like sum and all being expressed to rank *pari passu* in point of charge. The charge may be either "fixed" or "floating", or a combination of the two. A fixed charge is frequently given on landed property or other assets of a permanent nature with the object of preventing the Company from disposing of such property and thus depreciating the value of the Debenture Holders' security, but any assets subject to a floating charge may be sold, mortgaged, or otherwise dealt with by the Company as may be necessary. Stock-in-trade and other assets which fluctuate from day to day should, of course, only be subjected to a floating charge. The indispensability of debentures to the commercial community cannot be overstated. The commercial community knows how indispensable it is to many a trading concern such as THE PRINT COMPANY LIMITED that it should be able to borrow readily. Without such facility thousands of businesses, among which would be found many sound and prosperous undertakings, would collapse. Herbert W. Jordan a notable authority on the

law on dentures as early as 1913 observed in his treatise titled DEBENTURES AND OTHER CHARGES, Third Edition, LONDON JORDAN & SONS LIMITED that: " ... certainly the maxim "Who goes a-borrowing goes a-sorrowing, " and the advice "Neither a borrower nor a lender be, " do not apply to traders generally or to Companies in particular. " Companies are peculiarly favoured, for, besides being able to create mortgages or other charges on specific assets, they may, as has been already observed, create Debentures conferring a "floating charge" on their property or undertaking. A money lender such as BANK M (TANZANIA) LIMITED can therefore lend money on the security of a Debenture issued or re-issued. The Applicant/Objector has come to this Court to object to the attachment of the properties of the 2nd Respondent by the 1st Respondent and through the 3rd Respondent in pursuance to an order of this Court. Controversy has erupted over the attached properties. The Applicant claims that at the time of the attachment the attached properties were charged as security under Debenture the 2nd Respondent created on 27/09/2007 in favour of the Applicant/Objector to secure a loan facility which the Applicant/Objector advanced to the 2nd Respondent with a maximum avialment of TZS 700,000,000.00. In the present application the Applicant/Objector claims that as a lender it extended a loan facility to the 2nd Respondent, the Borrower, who created a debenture and charged all its assets to secure certain sums of money. Among the securities in the Debenture instrument dated 27/09/2007, which the 2nd Respondent created in favour of the Applicant for the loan facility include a legal mortgage otherwise known as "floating charge." This comes out very clearly in paragraph 3 of the Affidavit, where it is stated that as security for the said credit facilities, THE PRINT FACTORY LIMITED, the 2nd Respondent/J. Debtor charged to the Applicant by way of Debenture, all its property fixed and floating for payment of the said credit facilities as evidenced by a copy of the Debenture dated 27/09/2007 [Exhibit K&M-2(a) and Certificate of Registration of a Charge issued by BRELAon 27/009/2007 as evidenced by Exhibit K&M-2(b) evidencing creation and approval by the Company Registrar to create the charge over the assets of the 2nd Respondent/J. Debtor. In terms of paragraph 6 of the Applicant's affidavit the other charged properties include Quickbinder QB 200g with serial number 07QD 0005, Polar 78x, Speed Master 74- 4+LF, Speed Master GTO 46-1, Polar 115 EMC, Stahlfolder T152, Ctp, Prosetter 74 and motor vehicles namely T.643 ADY Toyota corolla-EEI 02, T.461 AXA Toyota Carina, and T.581 SSP Toyota RAIL: As regards the maximum amount it is stated in paragraph 2 of the Applicant's Affidavit that on the 11th day of September 2007, PRINT FACTORY LTD, the 2nd Respondent herein, was granted overdraft facility of Tshs.300,000,000I = and a Term Loan of Tshs.400,000,000I = (Credit Facilities) for purposes of working capital. The said credit facilities granted to the 2nd Respondent/J. Debtor were subsequently renewed with modifications in the type of facilities/amounts in the years 2008 & 2009. The last such renewal granted was for an overdraft, Letter of Credit, Sank Guarantee and Term Loan Facility in USDand Tanzanian shillings currencies all amounting to Tshs.S40,000,000/- [Exhibit K & M-1 copies of Letter of Offer dated 11/09/2007, 15/08/2008 and 22/09/2009 collectively]. In paragraph 3 it is stated that up to now the said credit facilities advanced to the 2nd RespondentJ. Debtor stands at Tshs.302,243,970.41 and USD 112,167.16 the borrower continues to service the same [see

copy of Applicant's Bank summary statement Exhibit K&M -3]. Paragraph 6 of the Applicant's Affidavit states that while the Applicant's credit facilities to the 2nd Respondent/J. Debtor are secured by the 2nd Respondent's assets, it has come to the attention of the Applicant that the Bank accounts No.015000791 and 0150000792 maintained by the Applicant and the properties namely Quick binder QS 200g with serial number 07QD 0005, Polar 78x, Speed Master 74-4+LF, Speed Master 74-2p' GTO 46-1, Polar 115 EMe, Stahlfolder Ti 52, Ctp, Prosetter 74 and motor vehicles namely T.643 ADY Toyota corolla- ££102, T.461 AXA Toyota Carina, and T.581 SSP Toyota RAV have been attached in the process of execution of the court decree by way of Garnishee Order and attachment by Court Broker [Exhibit K&M-4(a) and

- (b) which are copies of Garnishee Order dated 10/12/2009 and Notice of Attachment issued by the 3rd Respondent respectively, all issued by this Court in pursuance of the execution of the said decree. In paragraph 9 of the Applicant's Affidavit it is stated that the attached properties are the only substantive assets of the 2nd Respondent/J. Debtor and that owing to the amount involved in the decretal sum, the same are not likely to satisfy the decree let alone that the fact the same are charged to the secured creditor, the Applicant. Paragraph 10 of the Applicant's Affidavit states that the attachment and subsequent appropriation and/or auction will make the Applicant being the secured creditor to suffer irreparably as the same will wipe out and/or liquidate the 2nd Respondent. As per the application for execution which the 1st Respondent filed in this Court on the 18/12/2009, the decretal amount is for Tshs.2,084,458,529 being the principal plus interest at 110/0 per annum as from 31st August 2007 to 6th November 2009 [Euro 1,055,422.04 at exchange rate of Tshs.1,975.00. In paragraph 11 of the Applicant's Affidavit it is stated that the Applicant being a secured creditor of the 2nd Respondent/J. Debtor has a priority over any subsequent creditor or decree holder over the assets of the 2nd Respondent/J. Debtor so charged to the Applicant and thus the same cannot be appropriated and/or auctioned without regard to the Applicant's charge which existed before the attachment by the 1st and 3rd Respondent. In the present application clearly there is controversy over whether the alleged facility is limited to an overdraft of Tshs.200,000,000/= as Mr. Chipeta contends or to the maximum availment of Tshs.700,000,000/- as maintained by Mr. Malimi, and which he claims determine the chargeability of the mortgage and debenture. The gist of the argument by Mr. Malimi is that to the extent that this maximum availment of Tshs.700,000,000.00 was not exceeded then it was not altered or varied by the subsequent banking facilities, which in his opinion only take to form a series of particulars of the date and the amount issued after the original registration of the Debenture created on 27/09/2007. Mr. Chipeta stated in his counter affidavit at paragraph 3.6 that the alleged subsequent facility if any is limited to an overdraft of Tshs.200,000,000.00, since the maximum availment of Tshs.700,000,000.00 expired since 31st December 2007 as per the terms of the facility dated 11/09/2007. Mr. Malimi countered this argument in paragraph 10 of the Applicant's rejoinder to the counter affidavit of Mr. Chipeta that it was only the overdraft facility that would be reduced to Tshs.200,000,000/= after 31.12.2007 while the term loan tenor remained as provided in the

facility. Mr. Malimi submitted further that in terms of paragraph 11 of the Applicant's rejoinder affidavit it is stated that pursuant to the Debenture instrument created on 27/09/2007 by the 2nd Respondent, the amount secured in favour of the Applicant without limitation, is unspecified amount and includes " ...such indebtedness arises from the Facility, Interest, commission and all other charges on such Facility, or from or in connection with any other banking facility extended to the Company by the Debenture Holder from time to time." The general underlying principle with regard to registration of debentures is that if the subsequent facilities come within either of the descriptions under section 96(1) of the Companies Act [Cap.212 R.E. 2002] and the Company is incorporated in Tanzania, registration must be effected within forty-two days after the first execution of any of the instruments as provided under section 97(1) of the Companies Act, [Cap.212 R.E. 2002]. The issue is whether the subsequent Facility Letters created a new charge over the securities and thus to be amenable to registration as separate charges in terms of section 96(1) of the Companies Act. As per the letter with reference number BANKM/CIB/456/2007 dated 11th September 2007 titled "RE: BANKING FACILITIES - Working Capital and Fixed asset Financing" [Exhibit K&M-I collectively] from BANK M (TANZANIA) LIMITED, the Applicant/Objector herein to THE PRINT FACTORY LIMITED, the 2nd Respondent herein, BANK M (TANZANIA) LIMITED, the Applicant herein, indicated its willingness to avail the required credit facilities to the 2nd Respondent under the following terms and conditions among others:

1. Facility 1 - Overdraft of the amount of Tshs.300,000,000j-for the purpose of working capital. The tenor - repayable on demand, reviewed every 12 months. Facility 2 - LC/Term Loan of the amount of Tshs.400,000,000j-for purchase of printing machines and the tenor was 3 years. 27 The following words are inscribed therein: Please note that the maximum availment under the above facilities taken together shall be restricted to TZS 700 million up to 31.12.2007. Thereafter0 the overdraft facility will be reduced to TZS200 million.
2. Security/Support
 1. First Legal Mortgage on property located on Plot No.372/2/1 Oysterbay Area with CT 18073/1 registered in the name of ShaneabbasMohamedAbdallah Khimji.
 2. Fixed and floating charge by way of Debenture over fixed and floating assets of the compan~ present and future.
 3. Personal Guarantee of the Directors/ that is/ Shaneabbas Mohamed M.A. Khimji & Mrs. Husna S.A. Khimji.
 4. Personal guarantee of the owner of the properf:Jt,that is/ Shane Abbas Mohamed M.A. Khimji The company shall perform/ execute and deliver such further acts and documents as the Bank may require to implement and perfect the securities for the facilities stipulated in this letter. 7 Validity - The validity will be as per the following terms:
 1. The facility shall be valid for 12 months and the term loan for 36 months

2. The Bank however has the right to call for the repayment of the full outstanding amount and interest therein anytime during the term of the facility. In the Annexure to the Facility Letter on the aspect of availability it is written as follows: liThe facility shall be reviewed annually and the next such Review shall be done in the month of September of 2008. While it is the intention of the Bank that the facJ"litiesshould remain available to the Borrower until the review date and notwithstanding any other provision in this letter, Bank reserves the right to terminate the facilities and make demand for all sums outstanding under this facility at anytime. " 9 Discharge - Upon full payment of the facilities extended to the Borrower under this Letter of Offer together with interest / commissions and other bank charges and all other costs and expenses/ the borrower shall at any time thereafter stand discharged and released from its obligations under this Letter of Offer. The Bank shall convey such discharge by a specific Letter of Discharge which will be received and acknowledged by the borrower. On the 15th day of August 2008, Bank M (Tanzania) Ltd, the Applicant herein wrote a letter with ref. No. BANKMjCIBj1095j2008 to the PRINT FACTORY LIMITED with the title RE: BANKING FACILITIES (Exhibit K&M-1 collectively) with the following information: "We refer to our discussions on the banking requirements of your company and take the pleasure in advising you that the management of Bank M (Tanzania) Limited (hereinafter called the Bank) is willing to provide credit facilities (hereinafter called the Facility) to The Print Factory Limited (hereinafter called the Borrower) under the terms and conditions outlined below: Facility 1: Overdraft Amount: TZS300/000/000.00 (TZS Three Hundred Million) Purpose: For working capital requirements Tenor: 12 months Facility 2: Medium Term loan (Existing Term Loans) Amount: USD 153,378.00 (USD One Hundred and Fifty Three Thousand Three Hundred Seventy Eight Only) (Equivalent to TZS 184,053,600.00) Purpose: To finance fixed assets Tenor: 36 months; final expiry date being 3dh December 2010 Facility 3: Letter of Credit (LC)/Bank Guarantee (BG)/Short Term Loans (STL) Amount: TZS 115,946,400.00 (TZS One Hundred Fifteen Million Nine Hundred Forty Six ThousandFour Hundred Only. Purpose: For undertaking different projects and financing maturing Letter of Credits Tenor: BG is 12 months/ LC is Sight or Ussanceand STL is 90 days maximum. Ussance LC is not eligible for conversion into STL. Only sight LC is eligible for conversion to STL. TOTAL Please note that the maximum availment under the above facilities taken together will be restricted to an amount of TZS 600,000,000.00 1 Security/ Support
1. First Legal Mortgage over Land and Building on Plot No.372/2/1/ Oysterba~ with Certificate of Title No.186036/228. The property is registered in the name of ShaneabbasMohamedAbdallah
2. Debenture charge on Fixed and Floating assets as per management account dated 3dh June 2007
3. Personal Guarantee of the directors of the compan~ vi~ Mr. Shane Abbas Khimji and Mrs. Husna S.A. Khimji In Annexure I the follOWing condition appears: 3 Availability .. The facility shall be reviewed annually and the next such Review shall be done in the month 31st

August 2009... N On the 22nd September 2009, BANK M (TANZANIA) LIMITED, the Applicant herein, wrote another letter with Ref. No. BANKM/CIB/1595/2009 to the PRINT FACTORY LIMITED, the 2nd Respondent, herein titled RE: BANKING FACILITIES (Exhibit K&M-1 collectively) stating as follows: Further to our previous letter of offer with reference BANM/CIB/1095/200B dated 15th August 2008 and as per our discussions on the banking requirements of your company we take the pleasure in advising you that the management of Bank M (Tanzania) Limited (hereinafter called the Bank) is willing to provide credit facilities (hereinafter called facility) to The Print Factory Limited (hereinafter called the Borrower) under the terms and conditions outlined below: Facility 1: Term Loan (existing) Amount: USD 104,250.00 (USD One Hundred and Four Thousand Two Hundred and Fifty) Purpose: For Financing Fixed Assets Tenor: 36 months Expiry: 31st December 2010 Facility 2: Letter of Credit/Bank Guarantee (Existing) Amount: TZS 102,390,000.00 (TZS One Hundred and Two Million Three Hundred and Ninety Thousand Only) Purpose: For undertaking different projects and financing maturing Letter of Credits Tenor: BG is 12 months and LC is Sight or Ussance Expiry: 31st August 2010 Facility 3: Overdraft (Renewal and Reduction from TZS 300.00 million) Amount: TZS 200,000,000.00 (TZS Two Hundred Million Only) Purpose: For working capital requirements Tenor: 12 months Expiry: 31st August 2010 Facility 4: Short Term Loan (New Loan from reduction of Overdraft) Amount: TZS 100,000,000.00 (TZS One Hundred Million) Purpose: Conversion of part Overdraft facility to Term Loan Tenor: 18 months Expiry: 31st March 2011 TOTAL Please note that the maximum availment under the above facilities taken together will be restricted to an amount of TZS 402,390,000.00 and USD 104,250.00 1 Security ISupport

1. First Legal Mortgage over Land and Building on Plot No.372/2/1, Oysterbay, with Certificate of Title No.186036/228. The property is registered in the name of Shaneabbas Mohamed Abdallah.
2. Debenture charge on Fixed and Floating assets of the company.
3. Personal Guarantee of the directors of the company, viz, Mr. Shane Abbas Khimji and Mrs. Husna S.A. Khimji In Annexure I the following condition is stated: 3 Availability "... The Facility shall be reviewed annually and the next such Review shall be done in the month of 31st August of 2010. " Apart from the specific terms and conditions which I have outlined above, the other terms and conditions in the Facility Letters dated 11th September 2007, 15th day of August 2008, 22nd September 2009 are more or less similar with very minor modifications. In order to have a full picture of the current status of the Debenture let us examine some of its terms and conditions in the Debenture created on 27/09/2007. In the copy of the Debenture dated 21st of September 2007 [Exhibit K&M-2(a)] issued by The PRINT FACTORY LIMITED, the 2nd Respondent herein to BANK M (TANZANIA) LIMITED, the Applicant/Objector, is inscribed with the following words: "BEING SECURITY FOR CREDIT FACILITIES EXTENDED TO THE PRINT FACTORY LIMITED SUCH FACILITIES BEING OVERDRAFT FACILITY OF UP TO TANZANIAN SHILLINGS THREE HUNDRED MILLION ONLY (TSHS.300,000,000.00) AND TERM LOAN FACILITY OF TANZANIAN SHILLINGS

FOI=UR HUNDRED MILLION ONLY (TSHS.400,000,000.OO) TOGETHER WITH INTEREST AND OTHER CHARGES THEREON BUT TO BE STAMPED TO SECURE UNSPECIFIED AMOUNT." The Debenture which was created on 27/09/2007 makes reference to the letter with reference number BANKM/CIB/456/2007 dated 11th September 2007 titled "RE: BANKING FACILITIES - Working Capital and Fixed asset Financing." In the Debenture definition section 1.01 it is stated as follows: "Debenture Amount" shall mean the amount of TSHS. 700,000,000.00 but charged to secure UnspecifiedAmount indebtedness of the Company from time to time to the Debenture Holder which is meant to be secured by this Debenture, whether such indebtedness arises from the Facility, interest, commission and all other charges on such Facility, or from or in connection with any other banking facility extended to the company by the Debenture Holder from time to time. In Section Two titled "DEBENTURE AMOUNT" it is stated as follows: "Section 2.01: Debenture Amount: This Debenture secures an aggregate amount of TSHS. 700, 000,000. 00 plus interest and other costs thereon but to be charged to secure Unspecified Amount ... " In section Four on SECURITY CLAUSE" it is stated as follows: Section 4.01: As security for the repayment of the Facilities, interest and all the moneys and liabilities intended to be hereby secured, (whether direct or contingent and howsoever arising) the Company as beneficial owner HEREBYCREATESCHARGESin favour of the Debenture Holder over all assets (together referred to as "the charged assets" hereinafter), the said charges being:-

- i. A first fixed charge over all the Company's fixed assets both movable and immovable, present and future, wheresoever and howsoever including but not limited to plant, machinery, office furniture, and eqUipment, and ii. A first floating charge over all current assets of the Company both present and future, wheresoeverand howsoever, including but not limited to stocks, goods represented by documents, goods in transit or about to be shipped, work in progress, book debts, cash and bank balances. " Section 5.02: Negative Covenants: The Company HEREBYFURTHER COVENANTSwith the Debenture Holder that during the continuance of this security the Company shall NOT:-
- (a) Have power to create, nor allow to be created, any mortgage or charge on the charged assets
- 34 (b) Pursuant to the Debenture being registered a Certificate of Registration of a Charge [Exhibit K&M-2(b)] was duly issued by the Registrar of Companies on the 2ih day of September 2007. The Certificate of Registration of a Charge [Exhibit K&M-2(b)] not only is evidence of the creation and approval by the Company Registrar to create the charge over the assets of the 2nd Respondent/J. Debtor but also conclusive evidence that the requirements as to registration have been complied with. In terms of subsection (3) of section 100 of the Companies Act, however, the validity of a Debenture is not affected by an omission to comply with the registration requirement. The Company and the officers knowingly in default however, will be liable to a default fine. In terms of section 105 of the Companies Act, on the application of the Company or any other person the court may extend the period of registration of a charge. The alleged subsequent banking facilities in my view constitute a mere rescheduling of old facilities, based on the same securities charged in the Debenture created on 27/09/2007. As correctly submitted by Mr. Malimi the

subsequent facilities crystallized to be either under a debenture or mortgage which are the only instruments required to be registered and subject to stamp duty. Let us glean over the facility letters on record. In my view and with due respect to Mr. Chipeta, the subsequent facilities are not Deeds of Variation although they may have been required by law to be impressed with a stamp duty. In any event in the eyes of the law failure to register any instrument requiring registration will only render it void against the Liquidator and any creditor of the Company so far as any security on the Company's property or undertaking is thereby conferred. But this is without prejudice to any contract or obligation for repayment of the money secured, which becomes immediately payable. In this regard the 2nd Respondent cannot escape from its liability to repay the loan by hiding behind the failure by the Applicant/Objector to register the subsequent facilities. The record shows that there is only one Debenture as is evidenced by Exhibit K&M-2(a) for which only one Certificate of Registration of a Charge as evidenced by Exhibit K&M-2(b) was duly issued by the Registrar of Company as required under the law. It was not in my view, envisaged that the alleged subsequent facilities would create separate charges over the assets of the 2nd Respondent which had already been charged in the Debenture created on 27/09/2007. In terms of section 102(2) of the Companies Act, the Registrar of Companies is required to keep a register "in such a form as he thinks fit for each company of charges on property of the company", which is open to the public for inspection as correctly submitted by Mr. Malimi. In terms of section 104(1)(a) and (b) of the Companies Act, on the discharge of any registered Debentures or Mortgage or Charge a Memorandum of Satisfaction, impressed with a fee stamp, should be filed. Registration of the Memorandum of Satisfaction, although not compulsory, is desirable in order to place on record the reduction in the indebtedness. This stage has not yet reached since the 2nd Respondent has not discharged the debenture. I shall turn now to consider the statement by Mr. Chipeta in his counter affidavit at paragraph 3.6 and his submissions that the alleged subsequent facility if any is limited to an overdraft of Tshs.200,000,000.00, since the maximum availment of Tshs.700,000,000.00 expired since 31st December 2007 as per the terms of the facility dated 11/09/2007. It seems that Mr. Chipeta in coming up with this argument most probably relied on the facility letter with Ref. No. BANKM/CIB/1595/2009 dated the 22nd day of September 2009, which BANK M (TANZANIA) LIMITED, the Applicant herein, wrote to the PRINT FACTORY LIMITED, the 2nd Respondent, herein titled RE: BANKING FACILITIES (Exhibit K&M-1 collectively) which made reference the Bank's previous letter of offer with reference BANM/CIB/1095/2008 dated 15th August 2008 [Exhibit K&M-1 collectively). In its facility letter dated 22/09/2009, the Applicant bank informed the 2nd Respondent the management of BANK M (TANZANIA) LIMITED, "is willing to provide credit facilities to THE PRINT FACTORY LIMITED." Among the terms and conditions outlined in the facility was that of providing a Term Loan (existing) of USD 104,250.00 (USD One Hundred and Four Thousand Two Hundred and Fifty) for Financing Fixed Assets with a tenor of 36 months which will expire on 30th December 2010; Letter of Credit/Bank Guarantee (Existing) of TZS 102,390,000.00 (TZS One Hundred and Two Million Three Hundred and Ninety Thousand Only) for purpose of undertaking different projects and financing maturing Letter of Credits with a tenor of 12 months for the BG and "Sight or

Ussance' for the LC with an expiry date as 31st of August 2010; Overdraft (Renewal and Reduction from TZS 300.00 million) of TZS 200,000,000.00 (TZS Two Hundred Million Only) for working capital requirements with a tenor of 12 months with expired date of 31st August 2010; and Short Term Loan (New Loan from reduction of Overdraft) of TZS 100,000,000.00 (TZS One Hundred Million) for conversion of part Overdraft facility to Term Loan with a tenor of 18 months with expiry date of 31st March 2011. In total the maximum availment under the said facilities taken together was restricted to an amount of TZS 402,390,000.00 and USD 104,250.00 respectively. The subsequent facilities in my view abided by the right the Debenture Holder reserved to itself of reviewing periodically the terms and conditions in the Debenture dated 27/09/2007. Otherwise in all the other subsequent reviewed credit facilities the terms and conditions with regard to the charged assets as stipulated in the Debenture created on 27/09/2007 remained largely unaltered. The facility letter dated 22/09/2009 was for "Overdraft Renewal and Reduction from TZS 300.00 million" of TZS 200,000,000.00 (TZS Two Hundred Million Only). The Applicant cannot continue laying claim that the maximum availment of Tshs.700,000,000.00 is still valid particularly taking into consideration the Facility Letter dated 22/09/2009 which had an effect on the overdraft by renewing and reducing it from TZS300,000,000/- as indicated in the Debenture dated 27/09/2007 to TZS 200,000,000.00. The aggregate amount of Tshs.700,000,000/- constituting the "Debenture Amount" as stipulated in Section 2.01 has therefore been altered by the subsequent facility letter dated 22/09/2009. The Applicant has allayed our fears by stating that as at 31st December 2009, the Summary Statement of Outstanding on the Overdraft Accounts stood at TZS 191,195,359.52; on the Term Loan Accounts at TZS 94,444,444.44; and on the Bank Guarantee at TZS 16,604,166.45 totalling TZS 302,243,970.41; and USD 33,645.59 on the Overdraft Accounts and USD 78,521.47 on the Term Loan Accounts totalling USD 112,167.16 as per Exhibit K&M-3. The Garnishee Order issued by this Court on 28th day of July 2009 was for Tshs.2,084,458,529.00. The Applicant has not established that if the execution is allowed to proceed it will suffer irreparable damage given that the Legal Mortgage over the charged property of SHANEABBASM.A. KHIMJI has a much higher value than the outstanding sums, which as at 31st December 2009 stood at TZS 302,243,970.41 and USD 112,167.16 respectively as per Exhibit K&M-3, compared to the amount of the Garnishee Order issued by this Court 28th day of July 2009, which is for Tshs.2,084,458,529.00. In this regard if anything should the execution process not proceed, it is 1st Respondent who stands to suffer irreparable loss not the Applicant. In my view, the Applicant should not try to worry on behalf of the 1st Respondent that the attached properties are the only substantive assets of the Z'd Respondent/J. Debtor and that owing to the amount involved in the decretal sum, the same are not likely to satisfy the decree. I shall now turn to consider the controversy surrounding one of the attached properties, namely the Speed Master CD 74-4-LX which is mentioned in paragraph 2 of the Applicant affidavit. Mr. Chipeta contended that the said Speed Master machine has a reservation of title in favour of the Decree Holder, the 1st Respondent herein, and it does therefore not belong to the 2nd Respondent/Judgment Debtor. Mr. Chipeta submitted further that these reservations form part of the Arbitration Award filed in this Court by the Claimant, the 1st Respondent/D. Holder herein. Mr. Chipeta

submitted further that the property could not be charged by way of a debenture to a Third Party such as the Applicant/Objector. Mr. Chipeta submitted further that it is exhibition of malice on the part of the 2nd Judgment Debtor which act could not pass title or charge on this specific property to the Applicant/Objector. In rejoinder Mr. Malimi submitted that although the Speed Master CD 74-4-LX whose title as Mr. Chipeta claims does not belong to the 2nd Respondent, however it has been attached by the 1st Respondent through the 3rd Respondent. Mr. Malimi kept wondering if the Speed Master CD 74-4-LX belongs to the 1st Respondent as Mr. Chipeta maintains why then did the 1st Respondent attach it. Mr. Malimi was prompted into reasoning that if the Speed Master CD 74-4-LX has been attached by the 3rd Respondent then it does not belong to the 1st Respondent since the debenture created by the 2nd Respondent in favour of the Applicant covers only properties of the 2nd Respondent and as such the Speed Master CD 74-4-LX cannot form part of the debenture charged. I have carefully followed the rather tricky and tempting submissions of Counsel on the issue of the Speed Master or Heilderberg Speed master Four Colour Offset Printer with coating system (60x74) Model CD 74-4+LX-F. The sale of this machine was a subject of the dispute which was referred to arbitration by the Claimant, the 1st Respondent herein in whose favour the Arbitral Award was given in Misc. Commercial Case st No.18 of 2009 between the Claimant, the 1 Respondent herein, and the nd Respondent/Petitioner, the 2nd Respondent herein. The attempt by the 2 Respondent to have the Award set aside failed, save only as to the issue of adjustment of interest payable. It belies common sense and logic that indeed if there was reservation of title over the Speed Master or Heilderberg Speedmaster Four Colour Offset Printer with coating system (60x74) Model CD 74-4+LX-F as the 1st Respondent's Counsel claims, then the 1st Respondent could not, through the 3rd Respondent, go ahead and include the said machine as part of the assets of the 2nd Respondent liable for attachment. Considering the fact that the 1st Respondent has reservation of title over the Heilderberg Speedmaster Four Colour Offset Printer with coating system (60x74) Model CD 74-4+LX-F (Speed Master CD74-4+LX-F) then this could not have been a valid subject of a charge under the Debenture and cannot therefore form part of the attached properties since it does not belong to the 2nd Respondent. Mr. Chipeta took issue with the behaviour of the Applicant towards the bank accounts of the 2nd Respondent after the Garnishee Order was issued by this Court on 18/12/2009. Mr Chipeta contends that the Bank refused to comply with the Garnishee Order of 18/12/2009 which was served on it the same day. Looking at the Bank summary statement filed in Court, transactions took place on 18/12/2009; 21/12/2009 and 22/12/2009; 15/01/2010, thus making the Applicant not to qualify for equity as its hands are not clean, Mr. Chipeta amplified citing the case of ARIZONA SAFARIS LTD VS ULC CD LTD Civil Revision No.232/2001 (High Court) (Dsm)(unreported). In the Applicant's rejoinder to the counter affidavit of Mr. Chipeta, it is admitted that indeed except for the entry of 21st December 2009 in respect of an amount of Tshs.8,643,500.00 which the Applicant has rectified and barred from any kind of outward payment transactions whatsoever, the Applicant has investigated on the entry of 22/12/2009 in respect of an amount of USD 31,589.96 and found that it was an electronic standing order to pay an outstanding Letter of Credit established long before the garnishee order, which the

directive failed to capture. In the Applicant's Rejoinder affidavit it is stated at paragraph 16(e) that the alleged default and/or contempt are vehemently denied in that the 2nd Respondent's accounts up to the material date when the order was issued were all nil and/or negative and the Applicant had no any incentive to disobey the lawful order of the court by continuing to operate them. It is further stated in paragraph 18 that the purpose of attaching the temporary statement was to evidence the funds available in those accounts from the date the Garnishee Order was issued to the date the printout was done. In the summary bank statement attached to the Applicant's rejoinder affidavit as Exhibit K&M-6 with respect to Account No.0150000791 operated by THE PRINT FACTORY LTD, the 2nd Respondent herein, at the Applicant's Bank, covering the 01-Dec.2009 through 15 Jan. 2010 it is shown that the opening balance to be Tshs.- 228,318,823.42 and the closing account to be Tshs.-246,985,170.91. As for Account No.0150000792, for the same period the opening balance is shown as standing at 0.00 and the closing balance to be Tshs.820.79. This Court is satisfied that there are no contemptuous acts committed by the Applicant with regard to the Garnishee Order of this Court dated 28th day of July 2009 with respect to the two bank accounts namely, Account No.0150000791 and Account No.0150000792 operated by THE PRINT FACTORY LIMITED at the Applicant's Bank. In the event and for the foregoing reasons, this application succeeds and fails to the extent indicated herein above. The execution shall proceed as ordered by this Court subject to the charge over the assets of 2nd Respondent. I shall make no order as to costs. Each party shall bear its own costs in this application. It is accordingly ordered. R.V. MAKARAMBA JUDGE 13/12/2010 Ruling delivered this 13th day of December 2010 in the presence of Mr. Simpemba for Malimi, Advocate for the Applicant/Objector, Mr. Lyimo for Mr. Chipeta, Advocate for the 1st Respondent, Mr. Pardhan, Advocate for the 2nd Respondent: and Mr. Lyimo for Mr. Chipeta, Advocate for the 3rd Respondent. ...~ .i':::J..~ .. R.V. MAKARAMBA JUDGE 13/12/2010 Words count: 11,130

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