



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.373 OF 2018

FOCUS HOMES LIMITED.....1ST PLAINTIFF

JITAN SHANTILAL DHANANI.....2ND PLAINTIFF

SHEIKH MURATAB ALI.....3RD PLAINTIFF

VERSUS

SPIRE BANK LIMITED.....DEFENDANT

R U L I N G

Before the Court is the Notice of Motion dated **6th September 2018** by which the Plaintiff/Applicants seek the following Orders:-

“(1) SPENT

(2) SPENT

(3) THAT pending the hearing and determination of this application, the Defendant/Respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or under its mandate and/or instructions be restrained from alienating, advertising for sale, offering for sale, selling, taking possession of, or leasing, appointing a receiver, transferring, charging or otherwise in any manner whatsoever interfering with L.R. NO.37/369 and registered as Grant Number L.R. 6957811 and any of the 1st Plaintiffs title documents in the Defendant’s possession.

(4) THAT pending hearing and determination of this suit, the Defendant/Respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or any other person whatsoever acting on its behalf and/or under its mandate and/or instructions be restrained from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, changing or otherwise in any manner whatsoever interfering with LR.NO.371/369 and registered as Grant Number LL 69578/11 and registered as Grant Number I.R 695781/11 and any of the 1st Plaintiffs title document in the Defendant’s possession.

(5) THAT the costs of this Application be provided for.”

The application which was premised upon **Sections 89, 90, 96, 103, 104, 105 and 106 of the Land Act, 2012, Order 40 Rules 1, 2, 3, 4, 9 and 10 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63e** of the Civil Procedure Act and all other enabling provisions of the law, was support by the affidavit of **JITAN SHANTILAL DHANANI**, a Director of the 1st Plaintiff Company, sworn on **6th September 2018** as well as the Further Supporting Affidavit sworn on **29th October 2018** by **SHEIKH MURATAB ALI** (3rd Plaintiff herein).

SPIRE BANK LIMITED (hereinafter referred to as the “**Defendant Bank**”)opposed the application through the Replying Affidavit dated **26th September 2018**, sworn by **JOHN WAGECHE** the Senior Legal officer of the Bank. Upon directions given by this Court the application was disposed of by of written submissions. The Applicants filed their written submissions on **2nd November 2018** whilst the Defendant Bank filed their own submissions on **12th November 2018**.

BACKGROUND

There is no contention between the parties that on or about **27th June 2013** the applicant received a facility of **Kshs.200,000, 000/=** from the

Defendant Bank which was actually a takeover of a facility initially granted to the Applicants by **Bank of Baroda**. The said facility was utilized by the Applicants for the development of 35 unit apartments in the Upper Hill area of Nairobi.

The agreement was that upon the sale of the flats, monies would be remitted to the Defendant bank to offset this facility. The Applicants avers that it did observe its obligation under the facility. However they contend that from the year 2016 the Defendant Bank was taken over by new management who began to manipulate the Applicants loan account in several ways. Firstly the 1st Plaintiff's current account was converted into an overdraft facility without the consent and/or authority of the Applicant. Secondly, changing the interest rate from the agreed rate of 18%. The Applicants also complained of various unexplained debits and credits of huge sums in the Applicants account which they allege defy accounting principles and which completely distorted the status of said account.

The Applicants further contention was that despite their making several requests, the Defendant Bank declined to furnish them with a copy of the original legal charge dated **3rd January 2010**. Instead on **25th July 2018** the Defendant Bank issued a notice of Statutory Sale under **Section 90** of the **Land Act 2012**, threatening to sell by auction the suit property. It was only upon receipt of the charge document that the Applicants discovered that the same was fraught with fraud and forgeries. They assert that Page 16 of the charge document was a forgery and an insert to the original document.

The Applicants deny that the charge document shown to them is the same one they executed and insist that the said document cannot form the basis of a valid charge.

In response to the Applicants submissions the Defendant Bank conceded that the sum of **Kshs.200, 000,000/=** was indeed advanced to the Applicant to be utilized for the development of apartment limits. The Bank avers that the Applicant later sought to amend the letter of offer to have the two loans of **Kshs.120 Million** to **Kshs.80 Million** over 12 and 8 apartments respectively as security.

The Defendant Bank contends that the Applicant defaulted on the loan repayment whereupon they issued a demand letter. Thereafter the Bank issued a statutory notice dated **19th April 2018**, which notice was sent to the Applicant by registered post through their last known postal address. The Defendant Bank deponed that the charge document which was sent to the Applicant was the charge registered pursuant to the variation of the offer. They claim that the Applicants had refused and/or declined to sign this charge document necessitating the registration of a caution on the property.

In their Further Supporting Affidavit dated **29th October 2018** the Applicant introduces a forensic report prepared by a Document Examiner indicating that the signatures on the charge document were forgeries. The Applicants insist that the order obtained in **Misc 799 of 2018** is inaccurate and was falsely obtained.

ANALYSIS AND DETERMINATION

I have carefully considered the submissions of both counsels, the relevant law as well as the cases cited before this court. The main and only issue for determination at this point is whether on the evidence and material available, the court ought to issue the interlocutory injunction being sought by the Applicant.

The principles upon which an order of stay may be granted were set out in the case of **GIELLA –VS- CASMAN BROWN [1973] E.A. 358** wherein it was held:-

“First an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

The definition of a prima facie case was set out in **MIRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125** as follows:-

“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicants case upon trial.”

The Applicants have attacked the charge document which is the basis of the foundation of the dealings between itself and the Defendant Bank. A defective charge obviously cannot give rise to any obligations in law. Allegations of fraud and forgery have been raised. These cannot be determined in a summary manner. They would require a hearing upon which evidence can be adduced to prove or disapprove such allegations.

In **MUSA ANGIRA –VS- INDUSTRIAL and COMMERCIAL DEVELOPMENT CORPORATION [2015] eKLR**, it was held:-

“It is my view that at this interim stage such proof of fraud cannot be established on the basis of affidavit evidence and the annexures and that a party needs to speak to it viva voce so that he/she can be cross- examined. That in the circumstances of this case, the issues of the alleged fraud can be ventilated at the trial where viva voce evidence will be adduced.”

The allegations raised by the Applicants are grave and can only be determined upon a full hearing at which viva voce evidence is adduced. The allegations do go to the root of the contract between the two parties being validity of the Charge document. There are matters which cannot be determined on the basis of affidavit evidence.

On the whole, I am satisfied that the Applicants have established a prima facie case. Accordingly, I do grant an interim injunction in terms of prayer (4) of the Notice of Motion dated **6th September 2018** conditional upon the Applicants settling the auctioneers costs and fees by end of business on Friday **23rd November 2018**.

Costs of this application to be in the cause.

Dated in Nairobi this 16th day of November 2018.

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Justice Maureen A. Odero