REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 476 OF 2015

RAVASAM DEVELOPMENT

COMPANY LIMITED…….PLAINTIFF

VERSUS

EQUATORIAL COMMERCIAL

BANK LIMITED……..…....….1ST DEFENDANT

PONANGIPALLI VENKATA RAMANA RAO

T/A TACT CONSULTANCY SERVICES……..2ND DEFENDANT

RULING

1. The filing of this suit was largely precipitated by the appointment of the 2nd Defendant by the 1st Defendant as Receiver Manager over LR. No. 2/186 Nairobi – Elysee Plaza (The suit property). This happened on 25th September 2015.

2. Simultaneously with the filing of the suit, the Plaintiff filed a Notice of Motion dated 1st October 2015 for the following prayers:-

> **4. THAT the Defendants whether by themselves, servants or agents, or advocates or auctioneers or any of them or otherwise be restrained by a temporary injunction from doing the following acts or any of them, that is to say from interfering with the Plaintiff's rights of possession, advertising for sale, disposing of, selling by public auction otherwise howsoever at time or completing by conveyance or Transfer any sale conducted by auction or private treaty, leasing, letting, collecting any rent, otherwise howsoever interfering with ownership of , title to and /or interest in ALL THAT piece of land known as L.R No 2/186 (Elysee Plaza) Nairobi pending the hearing and determination of this suit.**
>
> **5. THAT the 2nd Defendant be restrained by himself his agents or servants or otherwise howsoever from acting and/or purporting to act as a Receiver and/or manager of the Plaintiff and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of all its land, and collecting any rent from L.R NOS. 2/186 (ELYSEE PLAZA) and further inferring with the Plaintiff's Bank accounts, properties offices, motor vehicles, and general day to day running of the Plaintiff's affairs and the running / management of the Plaintiff's**

Bank accounts do remain with or revert to the Plaintiff pending the hearing and determination of this suit.

6. THAT this Honourable Court do make an order that proper accounts be taken and furnished by the First Defendant and that all necessary inquiries involving accounts be made as follows:-

i) The actual amounts lent

ii) The actual interest charged

iii) The actual penalties charged

iv) The actual Bank charges incurred and debited to the various accounts.

v) Actual interest rate(s) used

vi) The actual interest on interest charged

vii) The actual legal fees incurred and debited to the account

viii) Valuation and Receivership charges

ix) The actual interest on arrears charged

7. THAT the First Defendant be ordered to furnish the Plaintiff with a complete set of Bank Statements, account opening forms, mandate forms, all letters of offers, from the inception of their Banker, customer / relationship to date, showing the actual make up of the purported debt from zero to its current figures.

8. THAT an order be made under the doctrine of *lis pendens* and Section 106 of the Land Registration Act, previously enshrined under Section 52 of the Indian Transfer Property Act (1959) (repealed) that during the pendency of this suit pending its final determination in accordance with the law, ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest I the charged properties with any land registry, Government department and all other registering authorities is hereby prohibited in ALL THAT piece of land known as land reference No. 2/186 (Elysee Plaza) Nairobi.

9. THAT in the alternative and without prejudice to the foregoing a specific period injunction do issue for 15 months restraining the Defendants from interfering with the Plaintiff's Business, and L.R. NO. 2/186 (Elysee Plaza) pending full settlement of any sums found due upon taking accounts.

10. THAT the Plaintiff be at liberty to apply for such further or other orders and / or directions as this Honourable Court be deem fit and just to grant.

11 THAT costs of and occasioned by this application be taxed and paid by the Defendants to the Plaintiff.

3. The evidence presented to Court in the supporting affidavit of Philip Yambok and the Replying Affidavit of Susan Ndung'u reveals that on 17th November 2011, the Plaintiff and the 1st Defendant Bank entered into a Credit Agreement which was a culmination of an exchange of Letters of Offer and intent between the parties. It was a term of the Agreement that the 1st Defendant would offer a facility of Ksh. 180,000,000/= to the Plaintiff and which amount was to be secured through a mortgage over the suit

property. Subsequently a mortgage dated 31st September 2011 was registered.The purpose of the facility was to finance the completion of construction of Commercial premises on the suit land.

4. On 26th June, 2013,the 1st Defendant granted a term loan facility of Khs.156,300,000 to Vakkep Building Contractors Ltd(Vakkep). Vakkep were the Contractors of the Building project. The Plaintiff guaranteed the repayment of the loan that was advanced to the Contractors.

5. On 28th August 2014 the Plaintiff sought for restructuring of the loan and undertook to effect payments from Rental income it would receive from the property. It is the 1st Defendants' case that it released monies to the Plaintiff for payment of certificates issued by the Architect indicating what had been done and the sum due under the Construction Contract. The 1st Defendant asserts that the Plaintiff has defaulted in the repayments of the loan.

6. On the other hand the Plaintiff's position is that on or about March 2013 when the project was substantially completed (90% completed) the Plaintiff revaluated the viability of the project and decided to dispose it off to a buyer who had expressed interest in the property. It is deponed by Mr. Nyambok that this decision was not well received by the Bank who issued a Demand on 25th April 2013 recalling all outstanding amount within 14 days.

7. It is said that the Plaintiff express its disappointment the Bank conduct and maintain that it would pay the amounts outstanding after it had sold the property. At the request of the Plaintiff the 1st Defendant on 8th May 2013 informed the Plaintiff that the total exposure on the loan facility was Kshs. 233,713,427.35.

8. Following the decision by the Plaintiff to sell the property it engaged into some discussion with a potential buyer, Amana Capital Limited. It is the position of the Plaintiff that the sale fell through as it was frustrated by the 1st Defendant Bank.

9. On 4th August 2015 the Plaintiff received an Offer for the purchase of the property by one Nahashon Maina for Kshs. 1,500,000,000/=. That once again the Bank frustrated the sale of the property by refusing to provide the exact amount that the Plaintiff owed or to provide an assurance that it would discharge the mortgage if it received the money claimed.

10. The Plaintiff complains that the 1st Defendant appointed a Receiver over the Plaintiff's property not withstanding that by a letter dated 21st September 2015, the Plaintiff had sought an extension on the repayment period to enable it complete the sale of property to one Osman Adan Kala. It is the belief of the Plaintiff that the appointment of the Receiver was made in bad faith, is unlawful, oppressive and premature. Further that the Bank has unilaterally altered the terms of the contract and levied unconscionable and illegal charges, penalties and interests thereby clogging the Plaintiff's equity of redemption. In paragraph 36 of the Affidavit of Mr. Nyambok are reasons why the Plaintiff sees the appointment of the Receiver as premature and unlawful. These shall be discussed as the Court renders its decision.

11. The 1st Defendant asserts that the Plaintiff was in default of its obligation and the appointment of the Receiver is justified. In this respect the 1st Defendant states that upon the restructing of the Debt, the Plaintiff had earlier on 11th May 2015 executed a Deed of Assignment of Rent and a variation of the Charge was to secure an aggregate sum of Kshs.556,68,101.25. Further that on 17th August 2015 the Plaintiff wrote to the 1st Defendant offering to pay the sum of Khs.650,060,000/= million owed to the 1st Defendant in respect of the Plaintiff's loan facility as well as that of Vakkep.

12. The Application before Court seeks 4 distinct prayers and I start with what the Court deems as straightforward to be dealt with at once.

13. Prayer 6 to the Application is for an order that proper accounts be taken and furnished by the

1st Defendant. Although not announced, the Application for an Account would be brought under Order 20 Rule 1 of The Civil Procedure Rules which states:-

> **"Where a plaint prays for an account, or where the relief sought or the plaint involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made".**

The Application for an Account is brought by way of Chamber Summons (Order 20 Rule 3).

14. Explicit from the Rule is that an application for an order for Accounts can only be requested where a party to a suit seeks for an account or where the relief sought involves the taking of an account. And this would have to be substantive prayers in the suit. This Court has studied the Plaint filed herein. It seeks two prayers only in the following terms;-

> **a) A permanent injunction against the Defendants whether by themselves, servants or agents, or Advocates or auctioneers or any of them or otherwise be restrained from doing the following acts or any of them, that is to say form interfering with the Plaintiff's rights of possession, advertising for sale, disposing of , selling by Public Auction or otherwise howsoever at any other time completing by conveyance or transfer of any sale conducted by auction or private treaty, leasing, letting otherwise howsoever interfering with the ownership of title to, occupation of and management of ALL THAT piece of land known as LR. No.2/186 (Elysee Plaza).**
>
> **b) An order of permanent injunction restraining the 2nd Defendant be either by himself, his agents or servants from acting and/or purporting to act and continuing to act as Receiver and/or manager of the Plaintiff and from interfering in any manner with the Plaintiff's quit possession and enjoyment of all its land towit L.R NO.2/186(Elysee Plaza) its Bank accounts, properties equipment, and enjoyment of all offices, motor vehicles, assets and general day to day running of the Plaintiff's affairs and the running/management of the Plaintiff's properties and accounts do revert to the Plaintiff.**

Neither of these prays for an account or involves the taking of account. There is therefore a disconnect between the substantive reliefs sought in the Plaint and and the prayers for Account sought at the interlocutory stage. I decline to grant the prayer.

15. Prayer 7 is for the following orders:-

> **"THAT the First Defendant be ordered to furnish the Plaintiff with a complete set of Bank Statements, account opening forms, mandate forms, all letters of offers, from the inception of their Banker, customer / relationship to date, showing the actual make up of the purported debt from zero to its current figures.**

That prayer was not opposedby the Defendants and Mr. Muchiri for the Defendants told Court that the Statements of Accounts had been furnished in the Replying Affidavit of Susan Ndungu. Prayer 7 sought more than the said Bank Statements and as the request is not unreasonable it is allowed as prayed.

16. There is then prayer 8 which raises the issue of lis pendens. Prayer bespeaks:-

> **"THAT an order be made under the doctrine of *lis pendens* and Section 106 of the Land Registration Act, previously enshrined under Section 52 of the Indian Transfer Property Act (1959) (repealed) that during the pendency of this suit pending its final determination in accordance with the law, ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest I the charged properties with any land registry, Government**

department and all other registering authorities is hereby prohibited in ALL THAT piece of land known as land reference No. 2/186 (Elysee Plaza) Nairobi".

17. This Court is contented with the manner in which Justice J.L Onguto on 21st April 2017 dealt with a similar matter in HRC No.316 of 2016 **(Cieni Plains Company Limited & 2 others Vs. Ecobank Kenya Ltd**.)

18. After observing that the Court of Appeal in **Naftali Ruthi Kinyua Vs. Patrick Thuita Gachure& another** [2015] eKLR did not advocate for 'a carte blance' application of the Doctrine to post 2012 matters the good judge reasoned:-

"68. As to the applicability of the doctrine to the instant proceedings which involves the contest as to whether a charge may exercise his Statutory Power of Sale and dispose of the subject property, I must point out that there is now a clear paradigm when it comes to purchasers of charged property. The statute affords them protection. Section 99 of the Land Act shields the purchaser almost absolutely save where he has participated in fraud. Instead, the purchaser is not to be robbed of any acquisition simply because the sale was irregular or improper or out of dishonest conduct, which is what the doctrine of *lispendens* seeks to fight. Indeed, section 99 proceeds to state that the party prejudiced by the sale is to be compensated through damages. I do not at this stage see how the doctrine may override a statutory provision. Prima facie consequently, I would hold for now that the doctrine has no place to the current circumstances or to properties sold by a charge.

69. The totality of the circumstances of this case placed along the set principles for the issuance (or denial) of an injunction is what ought to dictate whether the applicant is entitled to the interlocutory orders sought. It should not be a simple reason that there is a pending suit concerning the subject property."

19. I entirely agree!In addition the motion herein the main, is for an injunctive order to restrain the 1st Defendant Bank from exercising its statutory remedies as a chargee. Whether or not that order is deserving must be considered against the usual principles of grant of an injunction. One remedy available to the Bank is the right to the sell of the charged property. If the Court thinks the order worth of grant then the Bank will be restrained from, inter alia, selling or disposing of the suit property. To allow the Doctrine of *lispendes* to govern this dispute will be to give the Plaintiffs the benefit of restraining the Bank from exercising its power of sale as a matter of course without requiring it to persuade the court that there is merit in stopping the Bank for enjoying a right which had been conferred to it by a contract and statute.The doctrine of *les pendes* could be used by Chargors to get a free ride to Restraining Orders and then placing the Chargee in a position where it was required to seek authority of the Court to enforce its Statutory Right.

20. The more involved prayer would be that of a Temporary Injunction. The principles in **GIELLA VS. CASSMAN BROWN**[1973] EA 358 that set out the approach to be taken in considering an Application of this nature are well known, being:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenient.

21. The Respondent reminds Court that the relief of a Temporary Injunction is equitable in nature and that in the scheme of things the application must be adjudged against the other principles of equity. One being that he who comes to equity must come with clean hands.

22.There is really no contest that the Plaintiff has benefited from a considerable facility advanced to it by the Bank for purposes of completing the construction of Elysee Plaza which stands on the suit land. Part of that facility was a term loan for Kshs. 156,300.000/= granted to Vakkep, the Contractor for the Plaintiff and which facility was guaranteed by the Plaintiff. And the evidence is that overtime the facility was restructed and eventually, as part of security for the facility, a variation of the charge over the suit property was taken to secure an aggregate amount of Khs. 556,628,101.25/=

23. Although the Plaintiff complains of levy of unlawful interest rates and charges, it acknowledges that some money is justly owed by it to the 1st Defendant Bank. On its part the Bank had on 15th June 2015 sent out a Statutory Demand Notice demanding a sum of Ksh. 680,033,318/= as being the amount due to it as at 12th June 2015. There is then a letter of 17th August 2015 from the Plaintiff in which it requests of the 1st Defendant Bank, partly,

> ***"We therefore pray that the Bank considers waiving such over and above(sic) interest on (Kshs.650,000,000/=) six hundred and fifty million Kenya shillings interest accrued as a result of delay payment to allow us conclude the long overdue mortgage settlement".***

At that time there was not complaint of unlawfull, or wrongful charges and interest.

24.Whilst the Trial Court will have to determine whether or not the amount demanded by the 1st Defendant is justly due, this Court would observe that as of now the Plaintiff does not dispute that it owes some money to the 1st Defendant Bank.

25.In arguing its case the Plaintiff had made heavy weather of the legality of the charge dated 13th September 2011. It is first argued by the Plaintiff that contrary to clause 22 of its Articles of Association, there was not resolution authorizing the Company's officers to create the charge instrument. Secondly, that the charge was executed by one Lorenzo Makonhen who was neither a Director, Secretary of the Company or someone authorized to act for the Company at the material time.

26.It was also submitted for the Plaintiff that the charge violates Section 69A of the ITPA. That repealed statute provides:-

> **'(1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-**
>
> **a) Notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after service; or**
>
> **b) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or**
>
> **c) There has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon.**

27. The violation is seen in Clause 10.1 of the Charge dated 13th September 2011 provides:-

> **"The powers of sale and appointment of receiver conferred by Section 69 and 69G inclusive of the Act shall apply to this Mortgage and such powers may be exercised at any time after the occurrence of any of the events specified in Clause 9 without further notice (and without the restrictions contained in section 69A of the Act)".**

28. An argument was made that the clause was a fetter to the Plaintiff's right to redeem the property by excluding the express and mandatory provisions of Section 69A.

29.When a Court considers an application for temporary injunction, it must keep one eye on the Pleadings before it because the viability of an application for injunction is, partly, predicated on the prospects of the Plaintiffs case and so the suitor of the interlocutory relief must state a case that is consistent with his/her Substantial cause of action. And to be fair to the Plaintiff, the issues of defect and illegality of the charge documents are taken up in the Plaint. Curiously, though, the Plaintiff does not seek for a declaration that the Mortgage and variation of charge be declared invalid and for the suit property to be discharged.

30. Anyhow, as observed by Counsel for the 1st Defendant Bank, if there are flaws to the execution of the charge, then theyare of the Plaintiffs own making and the Plaintiff should not be allowed to benefit from its own mistake. There is no doubt that the Plaintiff has drawn a benefit from money advanced to it by the 1st Defendant. And this was done on the promise that the facility would be properly secured.The Trial Court will have to determine whether the Plaintiff can simply walk out of the Charge on the basis of defects that it may have contributed to.

31. In this regard the holding in **Bank of Cyprus Vs. Melanou** [2015] UKS C 66 which was cited by the Plaintiff's Counsel may not be without some force. There the Supreme Court of the United Kingdom was of the view that, to allow a Party to retain a house whose purchase had been financed by a Bank while nullifying a Charge in respect thereto would deprive the Bank of a recourse for the repayment and would amount to unjust enrichment of the Party who had not provided any consideration for the purchase of the house.

32. As to the effect of Clause 10.1, even if the Court was to accept the argument that it contravenes section 69A of the ITPA, it will have to be demonstrated that the Defendant attempted to enforce the terms of the charge in violation with the statutory provisions. There is evidence, which was not controverted by the Plaintiff, that prior to the appointment of the Receiver, the 1st Defendant had on 15th June 2015 served on the Plaintiff a three (3) months Statutory Notice in terms of section 90 of The Land Act, 2012. This would have also been in substantial compliance with section 69A of the ITPA. The Plaintiff may have to do more to persuade the Trial Court that any violation of the Law in Clause 10.1 renders the entire Charge defective even when the 1st Defendant in exercising its powers as a Chargee has given regard to the provisions of Section 69A.

33. How was the Receiver appointed? Through an undated Deed of Appointment, the 2nd Defendant appointed the 1st Defendant as the Receiver Manager of all income and rental from the suit land. This was expressly stated to be in pursuance of rights and powers reserved for and conferred upon the Bank under the charge and The Transfer of Properties Act (1882). The Bank points to clause 10.1 of the Mortgage of 13th September 2011 which reads:-

> **"The powers of sale and appointment of receiver conferred by Section 69 and 69G inclusive of the Act shall apply to this Mortgage and such powers may be exercised at any time after the occurrence of any of the events specified in Clause 9 without further notice (and without the restrictions contained in section 69A of the Act)".**

34. Prior to Amendment made vide Act No. 28 of 2016, Section 78(1) of the Land Act read as follows:-

> **"This part (part VII) applies to all charges on Land including any charge made before the coming into effect of this Act and in effect at that, any other specifically reference to its any section in this part".**

Part VII of The Act are the General provisions on Charges.

35. The Mortgage is a pre-2012 document and was made before the Land Act commenced on 2nd May 2012.

36. Although there has been divided opinion as to whether part VII of the Land Act, prior to the Amendment introduced by Act No.28 of 2016, should apply retrospectively to a Charge (read also

Mortgage) made before the coming into force of The Land Act, this Court has no difficulty finding that it is applicable to the securities taken herein. After the Mortgage of 13th September 2011, a Deed of Variation of Charge was created by the Instrument of Variation made on 11th May 2015. One intention of Deed was to make the Charge supplemental to the Mortgage of 13th September 2011. In that sense the securities taken would astride the pre and post Land Act era. In some respects the Land Act has expanded the Chargors Equity of Redemption (eg. the need for additional notice under sections 92(2), 94(1) and 96(2) and in my view that benefit should go to the Chargor. And it must have been in acknowledgement of this that the three (3) months Statutory Notice issued by the Bank on 15th June 2013 was issued pursuant to section 90 of the Land Act 2012 and not the ITPA.

37. In paragraph 30 of The Plaint, the Plaintiff points out some of the particulars of bad faith, unlawfulness, oppression and premature action:-

> **b) The first Defendant has not issued any notice to the Plaintiff informing it of any default in payment as provided for under section 90(1) of the Land Act.**
>
> **c) The first Defendant has stipulated that its Receiver shall take control of the property from the date of the letter. This is unlawful as it contravenes section 90(2) of the Land Act which stipulates that appointment of a Receiver can only be done two (2) months after notice of default has been issued.**

38. Section 90 (1) and 90 (2) of The Land Act provides:-

> **(1) If a Chargor is in default of any obligation, fails to pay interest or any otherperiodic payment or any part thereof due under any charge or in the performanceor observation of any covenant, express or implied, in any charge, and continuesto be default for one month, the Chargee may serve on the Chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as thecase may be.**
>
> **(2) The notice required by subsection (1) shall adequately inform the recipientof the following matters—**
>
> > **(a) the nature and extent of the default by the Chargor;**
> >
> > **(b) <u>if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;</u>**
> >
> > **(c) if the default consists of the failure to perform or observe anycovenant, express or implied, in the charge, the thing the charger must do or desist from doing so as to rectify the default and thetime, being not less than two months, by the end of which thedefault must have been rectified;**
> >
> > **(d) the consequence that if the default is not rectified within the timespecified in the notice, the Chargee will proceed to exercise any ofthe remedies referred to in this section in accordance with theprocedures provided for in this sub-part; and**
> >
> > **(e) the right of the Chargor in respect of certain remedies to apply to thecourt for relief against those remedies.***(my emphasis)*

39. There is no controversy that the Bank alleges that there is a default consisting of non-payment of money under the charge. The Notice period under section 90(2) would be three months. The Notice dated 15th June 2013 gave the Plaintiff three months to rectify the default. The rectification does not seem to have happened and on 24th September 2015 a Receiver over the Rental Income of the Charged property was appointed. And given the definition of the word 'month'(see the Court of Appeal in <u>Henry</u>

Mukhwana Kwemuli vs. Joseph Musungu Ngachi[1988] eKLR), the appointment of the Receiver happened after the expiry of the three (3) months Notice.

40. Yet the Bank may have failed in one respect. After issuing the Notice under Section 90 of The Act, the 1st Defendant Bank elected to appoint a Receiver of the Income of the Charged Land. Having made that election section 92 (2) of The Act obliged the Chargee to issue a further Notice of thirty (30) days. This is what section 92(1) and (2) provides:-

> **(1) It shall be an implied condition in every charge that the chargee shall have the power to appoint a receiver of the income of the charged land.**
>
> **(2) Before appointing a receiver under this section, the Chargee shall serve a notice in the prescribed form on the Chargor and shall not proceed with theappointment until a period of thirty days, from the date of the service of that notice, has elapsed.**

41. There is no evidence that the Notice required under Section 92(2) of The Act was issued. And even if issued, the Receiver was appointed before the end of 30 days. There is therefore contravention of Statute. And this non-compliance is of significance as it is a curtailment of the Plaintiff's Right over and to its property. To that extent the Plaintiffs have made out a prima facie case with a probability of success.

42.Although an interlocutory injunction will not normally be granted where the loss that may be suffered by the Applicant can be adequately compensated by an award of damages, it may be deserved where the Respondent is in fragrant breach of a statutory duty or obligation and where the breach infringes on a right of the Applicant. The 1st Respondent Bank has not explained why it did not issue the second notice. Was it deliberate or an oversight? In the circumstances I would hold that there was an unexplained breach whose continuation should be checked by an order of Injunction. It is not good enough for a Respondent to fail to offer an explanation on the basis that it would, anyway, pay damages if found to be liable.

43. That said, the Court is not just as yet ready to grant the Order before considering two other matters.

44.There is a compelling duty of an applicant suiting for orders exparte to make a full and fair disclosure of all matter facts (see **Rex Vs. Kensignton Income Commissioner, Ex parte Princess Edmond De Polignac** [1917]IKB 486).Where a party fails in this duty then he/she should, normally, be disentitled to the relief he/she asks the Court. And in respect to an Interlocutory injunction such a failure will be ablot on the conduct of the Applicant. Nevertheless there will be occasion when, notwithstanding proof of material non-disclosure, the Court will grant a merited relief and look to other ways of censuring the Applicant eg. Grant of an Order on terms or payment of costs for the Application (Bahadurali Ebrahim Shamji v. Noor Jamal & 2 others Civil Appeal No. 210 of 1997).

45.This Court is urged by the Defendant to find that the Plaintiffis guilty of material non-disclosure. Alongside filing the Plaint and the Notice of Motion, the Plaintiff filed two Bundle of documents dated 1st October 2015. The Court has looked at the Pleadings, Application and Documents and makes the following observations.

46.In ground (9) to the application the Plaintiff states that the Defendant has never issued the 3 month statutory notice contemplated by The Land Act. But in the Replying affidavit of Susan Ndungu a copy of a statutory Notice dated 15th June 2015 addressed to the Plaintiff is displayed. It would have been expected that the Plaintiff would say something about it. No explanation for failing to make reference to this letter or to include it in its documents has been made by the Plaintiff. I can only take this to be material non-disclosure.

47. Although the Plaintiff also left out the letter of 17th August 2015 in which it was seeking that it settles the entire debt at Kshs.650 million, the Plaintiff was candid enough to display the letter of 13th August

2015 from Gichuki Kingara& Co. Advocates in which it was stated,

> **"At the outset, an as communicated to you by the writer, the said property is charged to Equitorial Commercial Bank Ltd to the tune of at least Kshs.600,000,000/= which amount will require to be paid before the release of title".**

The effect of non-disclosure of the letter of 17th August 2015 is in a way minimized.

48. The Plaintiffis also faulted for failing to disclose that it executed a Deed of Assignment of Rent. Further it failed to display a copy of it. Nowhere in its documents does the Plaintiff make reference to the Deed of Assignment dated 11th May 2015. And the same can be said of the Deed of Variation of Charge dated 11th May 2015. Again, when confronted with these through the Replying Affidavit of Susan Ndungu, the Plaintiff does not react by way of affidavit evidence it neither accepts nor refutes their existence. Further no explanation is given for their non-disclosure. The non-disclosure is material because the dispute revolves around the securities taken for the facilities offered to the Plaintiff and the manner in which the Defendant Bank sought to enforce its rights under those securities.

49.This Court comes to a finding that the non-closure of material facts by the Plaintiff was not insubstantial. However,this Court must still consider whether these are factors that could sway it to grant the order sought. I can think of three. First, the Judge entertaining the exparte Application did not issue the orders sought with the result that the Applicant's non-disclosure has not yielded it any advantage this far. Secondly, this Court has come to a conclusion that there is prima facie evidence that there has been a statutory breach on the part of the 1st Defendant which has compromised the Plaintiff's right to its property. Lastly, the Court can show its displeasure towards the Plaintiff's conduct by an order of costs against it.

50. The final matter for this Court to consider is Mr. Muchiri's argument that to grant the order as sought would be to grant an order for mandatory injunction. It is true that if this Court were to oblige to the request by the Applicant then its effect will be to discontinue the Receivership of the Rental Income. But the orders that this Court proposes to make will not bar the 1st Defendant Bank from re-appointing a Receiver during the pendency of the suit. Thereinliesthe difference between the order that this Court will make now and the order that the Trial Court could make after main hearing. One of the substantive prayers in the Plaint is that the 1st Defendant be barred from ever appointing a Receiver or/Manager of the suit property!

51. This Court has made two important findings. That there is prima facie evidence of a breach of a statutory provision by the 1st Defendant. On the other hand, there is prima facie evidence that the Plaintiff has defaulted in repayment of the facilities advanced to it by the 1st Defendant. The evidence, this far, suggests that the default is for a substantial amount of money and the Plaintiff has at some point requested that it be discounted to Kshs.650 million. It would therefore seem unjust that for the 1st Defendant to be stopped indefinitely from enforcing one of the remedies that may be available to it under Contract and statute only because of its current infraction. For this reason the court, while restraining the 1st Defendant appointed Receiver from continuing to act as a Receiver of Rental Income over the Charged property,grants the 1st Defendant liberty to comply with the provisions of section 92(2) of The Act and in the event of continued default to exercise the Remedies available to it under Statute and the contract. The 1st Defendant need not re-issue a Notice under section 90 of the Act.

52.These are my orders:-

> **52.1 Prayers 4 and 5 of the Notice of Motion dated 1st October 2015 is hereby allowed but only to the extent that the 2nd Defendant or any other Receiver for the time being appointed by the 1st Defendant is hereby restrained from continuing to manage, collect rent or in any other way interfere with LR 2/186(Elysee Plaza).**

52.2 Notwithstanding order 52.1 above the 1st Defendant is at liberty to issue Notice under Section 92(2) of The Land Act when after it shall be at liberty to appoint a Receiver of Rental Income.

52.3 Prayers 6,8, and 9 of The Notice of Motion is disallowed.

52.4 Prayer 7 of the Motion is allowed.

52.5 As a censure for material non-disclosure at the ex parte stage, the Plaintiff shall pay costs of the Application in any event and which costs must be agreed or taxed and paid within 90 days hereof.

Dated, Signed and Delivered in Court at Nairobi this 11th Day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Njenga for Plaintiff

Muchiri for Defendants

Alex - Court clerk