REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 49 OF 2011

ANNE NJERI MWANGI ………………………….……………. PLAINTIFF

VERSUS

MUZAFFER MUSAFEE ESSAJEE ………………………. 1ST DEFENDANT

HUSEINA MUZAFFER ESSAJEE ……………………… 2ND DEFENDANT

J U D G E M E N T

1. At the outset, the Court wishes to apologise to the parties for the considerable delay in the delivery of this Judgement. This has been brought about by undue pressure of work brought upon me, bearing in mind that 4 out of the 5 Commercial Division Judges have been involved in hearing and determining both Election Petitions and Criminal Appeals. However, by an Agreement for Sale dated 8th April 2010 (hereinafter "the Agreement"), the Plaintiff agreed to purchase L. R. No. 209/7755/19 Nairobi (hereinafter "the suit property") from the Defendants. The agreed purchase price of the suit property was Shs. 17,500,000.00 to be paid as to Shs. 1,750,000.00 (being 10% of the purchase price) upon the signing of the Agreement and the balance of the agreed purchase price being Shs. 15,750,000.00 was to be secured by way of a suitable professional undertaking from the advocates acting for the Plaintiff or her financiers on or before the completion date which was detailed as 60 days from the date of the execution of the Agreement. At clause 12 of the Agreement, time was to be of the essence so that the parties could by mutual consent in writing, vary or extend the completion period. It was a further term of the Agreement that the balance of the purchase price, secured by way of professional undertaking, would be released to the Defendants within 7 days of the registration of the Transfer and Charge in favour of the Plaintiff and her financiers respectively. The Agreement also provided that the Plaintiff would take possession of the suit property on the completion date.
2. The Plaint herein was dated 16th December 2010 and after reciting the details of the Agreement as aforesaid, it detailed that the Plaintiff had secured a loan from Cooperative Bank (Kenya) Ltd (hereinafter "the bank") for Shs. 13 million, the bank having given instructions to its advocates to issue an irrevocable professional undertaking dated 19th October 2010 undertaking to pay the said sum upon registration of the Transfer to the Plaintiff and the Charge to the bank. The Plaint went on to recount that on 4th November 2010, the Defendants' advocates had written to the Plaintiff's advocates threatening to rescind the Agreement in the event that the unsecured balance of the purchase price was not received within 21 days. Thereafter, the Plaintiff's advocate wrote on 18th November 2010 to the advocates for the Defendants paying to them the unsecured amount and requesting partial possession of the suit property in accordance with the Law Society Conditions of Sale awaiting what the advocate termed: "official hand over after registration". Both the unsecured balance of the purchase price as well as the professional undertaking were accepted by

the advocates for the Defendants who forwarded the Transfer instrument to the Plaintiff's advocate. The Plaintiff's position was that having accepted the professional undertaking from the advocates of the bank, the Defendants had confirmed a tripartite contract between the Defendants, the Plaintiff and the bank. The Plaint then recited the various steps towards the completion of the purchase of the suit property by the Plaintiff. The duly executed Transfer, Charge documentation, renewed Rates Clearance Certificate and the Stamp Duty cheque were all handed over to the advocates for the bank for them to proceed with the registration of the transfer documentation. The Plaint went on to say that on 14th December 2010 the Plaintiff's advocate telephoned the Defendants' advocates reiterating the request for partial possession of the suit premises prior to the completion of the registration of the transfer documentation. The Plaint then went on to record that the Defendants' advocate had been informed of a consignment of hardware merchandise ordered by the Plaintiff. The advocate had verbally consented to the storage of such consignment at the suit premises and a container was thereafter and unloaded at the suit premises on the afternoon of 14th December 2010 although the Plaintiff had not received a formal letter declining partial possession. Thereafter, the Plaint recorded that the Defendants' advocates wrote a letter dated 15th December 2010 rescinding the Agreement on account of the Plaintiff's actions of taking her consignment of hardware merchandise and depositing the same at the suit premises. The Plaintiff maintained that the rescission was null and void and contrary to law on various counts. The Plaint prayed for specific performance of the Agreement, a declaration that the rescission (letter) of 15th of December 2010 was null and void, general damages for wrongful rescission together with costs of the suit and interest.

3. The Defence and Counterclaim was dated 28th January 2011 and apart from admitting paragraphs, denied *in toto* the allegations of the Plaintiff that the Defendants had confirmed a tripartite contract between them, the Plaintiff and the bank. The Defendants averred that they did not at any time give instructions to either their advocates or indeed their daughter (as they were out of the country at the time) to allow the Plaintiff to store her hardware merchandise at the suit property or that she could be given partial possession pending the official handing over and completion. As far as they were concerned, the Plaintiff had proceeded to trespass onto the suit property by breaking in and storing the said hardware merchandise on the evening/night of 14th December 2010. The Defendants submitted having rescinded the conveyancing transaction by their advocates letter to the Plaintiff's advocates, copied to the advocates for the bank, dated 15th December 2010. That letter released the advocates for the bank from their professional undertaking and the Defendants noted that, at the material time, the said advocates had not lodged the transfer documentation for registration. The Defendants maintained that the deposit paid by the Plaintiff was forfeited on account of the cancellation or rescissions of the Agreement on the grounds of trespass. In their Counterclaim, the Defendants maintained that the Plaintiff had, in blatant breach of the Agreement, broken into the suit property, gained illegal entry thereto and stored goods before completion of the conveyancing transaction. Having been notified of the incident by their daughter, the Defendants instructed her to report the matter to Kilimani Police Station as well as to their advocates. They had given clear instructions on the morning of 15th December 2010 to their advocates to notify the Plaintiff's advocate as well as the bank's advocates that they had cancelled, rescinded and/or repudiated the conveyancing transaction.
4. The Defendants went on to maintain that despite such cancellation or rescission, the Plaintiff had proceeded to fraudulently effect the registration of the Transfer of and Charge over the suit property. They noted that the notice of cancellation and/or rescission of the conveyancing transaction had been notified to the Plaintiff through her advocate on 15th December 2010 but that the Plaintiff had deceitfully and dishonestly proceeded to transfer and deal otherwise with the title of the suit property. Further, by storing her hardware merchandise at the suit property, the Plaintiff, her servants or agents had trespassed onto the property. In further continuance of breach of the law and contempt of Court, the Plaintiff, her servants and/or her agents had, on 26th January 2011, trespassed onto the suit property and took illegal possession thereof. As a result, the Defendants prayed for judgement on their Counterclaim as against the Plaintiff in the following terms:

> **"(a) A mandatory injunction compelling the plaintiff, her servants or agents to vacate the defendants' property L.R. No. 209/7755/19 and hand-over vacant**

possession to the defendants.

(b) A permanent injunction restraining the plaintiff, her servants or agents from trespassing or in any way interfering or impeding with the defendants possession of property L.R. No. 209/7755/19.

(c) A declaration that the entry on transfer of title in favour of the plaintiff on the defendants property L.R. No. 209/7755/19 is invalid and void.

(d) A declaration that the registration of the charge in favour of the Co-operative Bank of Kenya Ltd. on the title to the defendants' property L.R. No. 209/7755/19 is invalid and void.

(e) An order for cancellation of the transfer in favour of the plaintiff registered on the title to the defendants' property L.R. No. 209/7755/19, with the concomitant rectification thereof.

(f) An order for the cancellation of the registration of the charge in favour of the Co-operative Bank of Kenya Ltd. on the title to the defendants' property L.R. No. 209/7755/19.

(g) An order for delivery or surrender by the plaintiff of the defendants' title to Property L.R. No. 209/7755/19.

(h) General Damages for trespass.

(i) Costs of and incidental to this suit.

(j) Interest on (h) and (i) at Court Rates.

(k) Any other relief that the Hon. Court may deem just and expedient".

5. At the same time as they filed their Defence and Counterclaim, the Defendants put before Court an Application under Certificate of Urgency, seeking to compel the Plaintiff, her servants and agents, to vacate the suit property and to surrender vacant possession thereof to the Defendants. That Application was ruled upon by Lady Justice Rawal (as she then was) on 10th May 2011. The salient part of her Ruling reads as follows:

"The Defendants/Applicants have shown prima facie, that the issue of registration of documents during the pendency of the suit seems to be in their favour. Similarly the act of dealing with the suit premises by taking the possession by the Plaintiff is an act which could be frowned upon. The Plaintiff seems to have shown disregard to the laws.

On the other hand, the Plaintiff has kind of fulfilled the conditions of payment of the purchase price and has stuck her head out by getting the finance. I am further much uncomfortable to see that the full facts as to how the bank lawyers went ahead with the registration of transfer and charge are not before the court.

Considering the above lacuna and the facts and circumstances of this case, although this court would like to handle the Plaintiff with firm hands, I would hesitate to do so as it shall be difficult for the court to place full blame on the Plaintiff specifically on the issue of how the registration proceeded despite the Bank lawyer agreeing not to proceed. Moreover, the particulars of fraud cannot be ascertained at this stage.

However, in order to give the just and expeditious determination to this application, which is expected to be dealt judiciously and equitably, I direct that pending the hearing and determination

of this case, the Plaintiff shall deposit the sum equivalent to market value of the suit premises with effect from February, 2011 either with the Court or in the interest earning joint Bank account of the two counsel. This order is made in pursuance to Article 159 (2) (d) of the Constitution and Sections 1A and 3A of the Civil Procedure Act.

The market value of the monthly rent be determined within 14 days from the date hereof".

6. In her evidence, the Plaintiff confirmed the said Agreement for Sale dated 8th April 2010 and agreed with counsel that there had been a considerable delay of up to 4 months and that she had not been able to bring the documents required from her until 1st October 2010 when they should have been brought by 8th June 2010. She confirmed that she had received a loan from the Cooperative Bank of Kenya Ltd of Shs. 13 million. Over and above the 10% deposit, the Plaintiff confirmed that she was to provide the difference between the loan monies and the deposit paid being Shs. 2,750,000/- from her own resources by 5th November 2010. This was by way of a 21 day notice to the Plaintiff by the Defendants for the completion of the transaction. The Plaintiff then confirmed that she had paid the said sum of Shs. 2,750,000/- by the given date. The Bank's advocates had provided the necessary undertaking to pay the loan monies of Shs. 13,000,000/- once the Transfer and Charge documents were registered as against the Title of the suit property. The Plaintiff maintained that by a letter dated 18th November 2010 her advocates had written to the advocates for the Defendants requesting to be granted possession of the property on 22nd November 2010 pending the registration of the said documents as she was already servicing the loan to the Bank. The Plaintiff then maintained that she had been informed by her advocate who had informed her that the Defendants' advocate had confirmed that she could move into the suit property and that there would be no problem. It was to be noted that the Defendants were out of the country at the time. It appears that the Plaintiff's goods arrived on 14th December 2010 and her agents broke into the suit property and unloaded the same into the front room thereof. Later, the Plaintiff had received telephone communication from the Defendant's son to the effect that she should not enter the suit premises as she had not paid for them. She learnt the next day that the Defendants, by a letter from their advocates, had cancelled the sale transaction despite the fact that she had moved her goods back out of the suit premises. The Court notes that when it came to cross examination before Rawal J (as she then was), the Plaintiff on two occasions was sufficiently unwell and not able to continue with the proceedings before Court and as a result, the evidence of PW 2, one Silas Nderitu Maina was taken before the Plaintiff's cross examination was complete.
7. PW 2 had sworn an affidavit on 30th September 2011 as to the events surrounding the conveyancing transaction as between the Plaintiff and the Defendants. PW 2 detailed that he was a partner in the firm of Sichangi & Co., Advocates who acted for the bank as regards thereto. The witness reiterated the contents of his said Affidavit noting that his firm had issued a professional undertaking for the payment of Shs. 13 million in exchange for the completion documents from the Plaintiff and the Defendants. The Undertaking promised to settle the said amount within 14 days of the registration of the Transfer in favour of the Purchaser and the Charge in favour of the bank. He noted that his firm had received the completion documents from the Defendants' advocates under cover of a letter dated 2nd December 2010. He went on to say that his firm had lodged the Transfer and Charge for stamping and registration purposes at the Lands Office on the 15th December 2010 which was also the date upon which his firm had received a letter from the Defendant's advocates purporting to unilaterally to terminate the terms of the professional undertaking and demanding the return of the completion documents on the grounds that the sale transaction between the Defendants and the Plaintiff had been terminated by the Defendants. PW 2 went on to say that in his considered view, the terms of his firm's accepted professional undertaking constituted a quasi-contract between his firm and the Defendants' advocates and could not be terminated unilaterally on the basis of some default by a third party who was not a party to the said contract. Having notified the Defendants' advocates of their position, PW 2 noted that his firm had received a further letter from the said advocates dated 17th December 2010 threatening to sue his firm if the original Title documents were not returned by close of business on 20th December 2010. However, in view of the legal position taken by his firm, it proceeded to pursue the registration of the documents at the Lands Office and this process was finalised on 22nd December 2010. Unfortunately, the Christmas holidays intervened and the registered

documents were only sent to the bank on 7th January 2011. Shortly thereafter, his firm had been advised by the bank that the undertaking amount had been forwarded to the Defendants' advocates who had rejected the same and refunded the bank. Thereafter, the undertaking amount was forwarded by way of banker's cheque on at least four occasions to the Defendants' advocates but each time, they had declined to accept the same. Under cross examination, PW 2 proved to be most elusive particularly when questioned as to his reaction at having received a letter from the Defendants' advocates dated 15th December 2010 cancelling the said Sale Agreement as between the Defendants and the Plaintiff. He admitted under cross-examination that both the Transfer and the Charge had been stamped on 21st December 2010 and that they were entered for presentation to the Registrar of Titles on 22nd December 2010. PW 2 thereafter admitted that the said documents were presented for registration against the title of the suit property on 22nd December 2010, seven days after the Defendants' advocates had notified his firm of the cancellation of the transaction and requested the return of the original documents. However, PW 2 finally agreed that the stamping of documents and the registration thereof were two separate parts of a conveyancing transaction. On a number of occasions during his cross-examination, PW 2 referred to the correspondence from the Defendants' advocates as to the cancellation of the sale of the suit property as "naive". After much prompting from the Defendants' counsel, PW 2 maintained that the acceptance of his firm's professional undertaking by the Defendants' advocates gave him an entitlement to disregard the instructions from their clients vis-a-vis rescission of sale of the suit property.

8. At the conclusion of PW 2's evidence, the Plaintiff was recalled to resume her cross examination, admitting to counsel for the Defendant that she had started servicing the loan from the bank only when the funds had been released. She denied that the suit premises had been broken into 14th December 2010 when her hardware goods had been unloaded thereat. However, she admitted that such goods were stored in the front room of the suit premises, not merely in the compound but that she had hired security guards in order to secure the same. She agreed that she had taken possession of the suit premises on the word of her advocate, who she trusted. She did however admit that there was nothing in the correspondence to indicate that the consent of the Defendants had been given in writing to her occupying the suit premises before completion. Unfortunately, the Plaintiff's cross examination was incomplete for a period of almost 18 months owing to changes in Judiciary personnel, the matter finally ending up before me on 22nd May 2013.
9. When the cross-examination of the Plaintiff recommenced before me, the Plaintiff agreed that her witness statement read that the Defendants' lawyer had agreed to the request for partial possession. She further agreed that on 16th December 2010, she had instructed her advocates to institute a suit for specific performance of the sale agreement. She agreed that the prayers in her Plaint further sought a declaration that the purported rescission of the sale agreement by the Defendants of 15th December 2010 was null and void as well as general damages for wrongful rescission. She confirmed that it was her view that the Defendants' advocates' letter of the 15th December 2010 was a wrongful rescission of the sale agreement. The Plaintiff also confirmed that she had brought a further suit before Court being HCCC No. 507 of 2012 to stop the bank from selling the suit property. Thereafter, the Plaintiff detailed that she had confirmed through her advocates, that the bank had paid over the balance of the purchase price by 11th January 2011. However she had been telephoned by the 1st Defendant to say that it had not been received. Upon re-examination, the Plaintiff confirmed that she had organised for 3 containers to go to the suit premises but she had not been allowed to take them to the suit premises. She had suffered damage and breakages plus payment of warehousing fees. She said that she had to do something. The sale agreement had stated clearly that she could take possession upon the completion date. She had not come back to Court for permission when she moved into the suit premises on 25th January 2011 for, as she stated, "it was time for me to move in". However, the Court in dealing with the Defendants' Notice of Motion dated`28th of January 2011 had allowed her to continue staying in the suit premises being not prepared to issue a mandatory injunction at that stage. The Plaintiff was aware of the allegations of fraud brought against her. Finally, the Plaintiff confirmed that she had rented out the suit premises with effect from 1st May 2013 at Shs. 120,000/-per month and that she had challenged the bank's action to try to realise the suit property.
10. The evidence-in-chief of the first Defendant has contained in a witness statement signed by him dated 1st September 2011. He recounted the saga of the agreement for sale dated 8th April 2010

and acknowledged that the Plaintiff had paid the 10% deposit of the agreed purchase price of Shs. 17,500,000/-to the Defendants' advocates. He noted that the Plaintiff was to borrow Shs. 13,000,000/-from her financiers which left an unsecured balance of Shs. 2,750,000/-. The Plaintiff had only managed to pay that unsecured amount on 18th November 2010. It was incorrect that the Defendants were the cause of the delay in the completion of the transaction. It was an express term of the said agreement that the suit property would be sold with vacant possession and that the Plaintiff would only take possession on the completion date and provided that the full purchase price had been paid. The witness went on to say that on the night of the 14th December 2010, while the Defendants were in the United Kingdom, a call had been received from their daughter Fatima detailing that the Plaintiff had trespassed onto the suit property, had broken in and stored her goods and merchandise therein. The first Defendant pointed out that neither himself nor his wife had, at any point, granted the Plaintiff any consent to take possession of the suit property before completion of the transaction. He maintained that some of his household items were still retained in the suit property and to date, he still paid the electricity and water accounts for the same. Under cross examination, the first Defendant maintained that documents contained in the letter from the Plaintiff's advocates dated 27th September 2010 were available for completion purposes at that date even though the said letter detailed the documents that were still awaited. The first Defendant confirmed that the 10% deposit amount was still held by his advocates along with the Shs. 2.75 million being the unsecured amount forwarded to his advocates around 18th November 2010. This was after the 21 day notice of completion given to the Plaintiff by the Defendants' advocates under cover of their letter dated 9th November 2010. The first Defendant agreed that by 18th November 2010, he and his wife had agreed to continue with the transaction. The Plaintiff was to take possession of the suit premises upon the completion of the sale agreement i.e. when the money was paid in full.

11. The first Defendant maintained that he had never received a telephone call from the Plaintiff requesting possession prior to the registration of the completion documents. He had been in England on vacation and his instructions to his said daughter were very clear – that possession would be given only upon receipt of the full purchase price. He maintained that taking partial possession of the property did not mean that one could break into the same and cause damage thereto. After he had received the telephone call from his daughter as to the Plaintiff breaking into the suit property, he had telephoned his advocates with instructions to rescind the sale agreement. He only learnt from his advocates on 24th December 2010 that suit had been filed against the Defendants and he had given instructions to defend the same. He confirmed that the rescission of the agreement was solely based on the trespass by the plaintiff on to the suit property. He was not aware of the modalities of rescission. The Plaintiff was very wrong in her belief that the Defendants had granted her any permission to break into the suit property. It was never his intention not to conclude the transaction and he had full intention to do so had it not been for the trespass. He was well aware that his advocates had rejected the undertaking monies offered, as these were his instructions in relation to the rescission. He had not been aware that 4 attempts had been made to get his advocates to accept the undertaking monies. However the first Defendant had been aware, as he detailed in re-examination, that his advocates had received a letter requesting the partial possession of the suit property. He had given instructions to his advocates that the question of allowing partial possession did not arise until all the conditions of the sale agreement had been complied with. The Defendants had suffered mental anguish as a result of the trespass and subsequent court action. However, there was no need to seek immediate medical treatment as a result of the incident but the second Defendant did require regular medical attention.

12. DW 2 was the Defendants' said daughter – Fatema who submitted her witness statement as her evidence in chief. She clearly remembered that on the night of 14th December 2010, the Plaintiff, without authorisation from the Defendants, and through her servants or agents, broke into the suit property, gaining illegal entry thereto and stored thereon some of her goods and merchandise. DW 2 had been aware that the Plaintiff was the intended purchaser of the suit property but that the transaction had not been completed. There remained in the suit property some of her parents' household articles. That night she had called her parents in the United Kingdom, who had advised her to report the matter to the police and to involve the advocates acting for the Defendants. In cross-examination, DW 2 detailed that she had received a text message from the Plaintiff on 14th December 2010 at about 5:30 p.m., to say that her trucks were on the way. She had immediately

telephoned her parents who had given her instructions not to permit the Plaintiff access to the suit premises until the transaction was completed. The Defendants' items of property remaining on the suit premises included the refrigerator, light fittings and her father's trophies. She confirmed that it was Mr. Patrick Rugo who had locked up the house on that particular day.

13. Indeed, the Defendants called the said Mr. Patrick Rugo as DW 3, and who relied upon his witness statement dated 15th September 2011 as his evidence-in-chief herein. Mr. Rugo had been the advocate acting for the Defendants in the conveyancing transaction as between them and the Plaintiff. The first part of his witness statement went into details of the sale agreement dated 8th April 2010. At paragraph 6, the witness recalled that the Plaintiff did request to have possession of the suit premises prior to the registration of the Transfer in her favour but that the Defendants did not at any point in the transaction, grant the same. He had never been instructed by the Defendants to grant such possession prior to the said registration of the documentation. In his view, the parties were to stick to the terms of the sale agreement. DW 3 became aware of what he termed the act of trespass by the Plaintiff on the night of 14th December 2010. He confirmed that he had received instructions from the Defendants, through their said daughter, to cancel, rescind or repudiate the conveyancing transaction for breach of contract by the Plaintiff. He noted that he had, on 15th December 2010, prepared and served a notice for rescission or cancellation of the conveyancing transaction both on the advocates for the Plaintiff as well as the advocates for the bank. He had telephoned the advocates acting for the bank and had been informed by a lady called "Karen" (who later turned out to be a pupil with the advocates' firm) that the Transfer and the Charge documentation had not been lodged for registration and that the firm would recall its clerk from the Lands Registry in order to stop the presentation of the documents for registration. DW 3 requested for the documents to be returned to him as the advocate for the Defendants. Further, he had addressed letters to the Chief Lands Registrar as well as the Company Secretary of the bank, dated 16th December 2010, notifying them of the rescission of the transaction.

14. On 24th December 2010, the Defendants had arrived back from the United Kingdom and DW 3 had advised them of this suit brought by the Plaintiff seeking specific performance of the sale agreement. DW 3 went on to say that it came as a considerable surprise to him to learn of the registration of the Transfer and Charge documents, in light of the various notifications that he had made to the parties as detailed above. In his view, the documents should not have been registered as the suit property was already subject to litigation. He maintained that the registration of the Transfer and the Charge could only have proceeded through deceit on the part of the Plaintiff and collusion with the various players in the transaction. As a result of the cancellation of the transaction, the Defendants could not accept the balance of the purchase price being the subject matter of the undertaking given by the bank's advocates. Such undertaking had been released by the Defendants under cover of DW 3's letter to the bank's advocates dated 15th December 2010. DW 3 detailed that he had visited the property sometime on 16th December 2010, together with DW 2, and noted that the Plaintiff had proceeded to remove the goods and merchandise that she had stored at the suit property. However, in further continuing breach and without any regard to the Defendants' movable properties stored on the suit premises, the Plaintiff again trespassed onto the suit property on 26th January 2011, took illegal possession of the same and posted security guards thereat to keep away the Defendants.

15. Under cross-examination, DW 3 was taken through the process of the agreement for sale including the payment of the initial 10% deposit and the unsecured amount of Shs. 2.75 million which he maintained was paid around 24th November 2010. He then went on to say that to the best of his recollection, the Plaintiff's advocate had telephoned him on or about 13th December 2010 asking for possession prior to registration. The Defendants were out of the country and possession had not been authorised at that time. DW 3 recalled a letter dated 2nd December 2010 from the Plaintiff's advocates to the bank's advocates copied to DW 3. At the bottom of that letter was a reminder to the witness to respond to the granting of possession prior to registration. DW 3 confirmed that as between 2nd December and 14th December 2010, his firm had not specifically responded to the possession request but had taken their clients instructions. He did not agree that the action taken by the Defendants or indeed himself, as their advocate, amounted to a failure to comply with the sale agreement. DW 3 was extensively cross examined as to the contents of the letters that he had written to the Chief Land Registrar on 16th December 2010, (in which the Defendants had put that official on notice detailing that the sale agreement had been rescinded)

and 15th December 2010 to the bank's advocates. He was not aware however, whether the two letters may have led to the Plaintiff taking the matter to court. DW 3 confirmed that both the Plaintiff and her financier, the bank, had been put on notice that the sale agreement had been terminated. The bank's advocates had gone further and undertaken not to present the Transfer and the Charge for registration but they subsequently did so. He further confirmed that when he spoke to the said Karen at the bank's advocates' office on 15th December 2010, she had said to him that the only thing that the advocates had done was to set a date for a valuation of the property by the Government valuer for Stamp Duty purposes. She confirmed that she had sent her firm's clerk to the Land Registry to proceed with the payment of Stamp Duty as assessed. She had assured DW 3 that she would recall the conveyancing clerk to arrange for the return of documents from the said Registry.

16. In DW 3's view, the Plaintiff had broken into the Defendants' property and was aware that the transaction had been terminated. For her to notify her bankers of the Defendants' account details was deceitful although he was not personally aware whether the Plaintiff had interfered with the registration process. DW 3 expressed his opinion that both sets of advocates were entitled to their own position as regards the sale agreement and both of them had put such opinions in writing. DW 3 was aware that the bank's advocates had taken a different interpretation of the sale agreement and the professional undertaking. He was also aware that the documents had been registered on 22nd December 2010 as per the letter dated 10th January 2011 from the Plaintiff's advocates to the Defendants' advocates. He noted that the Defendants' advocates had disclosed to the Plaintiff's advocates the details of the bank account to which the balance of the sale monies was to be paid. Such had been revealed to the bank's advocates under cover of the Plaintiff's advocates' letter dated 11th of January 2011. DW 3 noted that the professional undertaking provided by the bank's advocates prescribed the release of the secured balance of the purchase price within 14 days of the registration of the Transfer documents. Registration of the documents had been on 21st December 2010 while notification of registration was only made on 10th January 2011 which was outside the 14 day period specified in the undertaking. Upon further questioning, DW 3 did not agree that the refusal of the Defendants to accept the balance of the purchase price was to frustrate the Plaintiff from taking possession of the suit property. He became aware that the Plaintiff had taken possession of the suit property on the 26th January 2011 but he was not aware of her reasons for doing so. Finally under cross-examination, DW 3 stated that he had not been aware of what information the Plaintiff had received as regards the question of possession on 14th December 2010 as he had never dealt with her. The Defendants had issued a notice to vacate which initially the Plaintiff had ignored but later she did so getting her advocates to write a letter dated 16th December 2010 apologising for the break-in and agreeing to remove her goods from the suit premises.

17. The Plaintiff filed her submissions herein on 4th September 2013. Her position was that she had acted within the sale agreement provisions in taking possession. If there had been any breach of the professional undertaking issued by the advocates for the bank the Plaintiff was not privy to it. As regards contravention of section 52 of the Indian Transfer of Property Act, the Plaintiff submitted that although the section prohibits the transfer of the suit property to a third party during the act of prosecution of a contentious suit, upon the date when the transfer documents were registered being 22nd December 2010, the Defendants had not been served with the court process in respect of this suit and hence it was not contentious on that date and, as a result, did not contravene the *lis pendens* doctrine. The Plaintiff confirmed that she had requested for partial possession of the suit property prior to registration of the conveyancing documents. She maintained that at no time did the Defendants, their advocates or daughter directly decline the request expressly or by implication and, as a result, this caused the Plaintiff to believe that her request had been granted. Because of her belief, she had taken her hardware merchandise to the suit premises on 14th December 2010. When she had been informed that no such permission had been given, she voluntarily remove her merchandise from the suit premises on 16th December 2010. As regards whether the defendants' rescission 15th December 2010 was valid in law, the Plaintiff submitted that clauses 14 and 15 of the sale agreement gave her the right to institute a case for specific performance and/or damages against the Defendants for wrongful rescission and any other breach of the agreement for sale. The Plaintiff referred to the cases of **Kilimanjaro Construction v. East African Power & Lighting Co Ltd (1985) KLR 201** and **Rajwani v**

Roden (1990) KLR 4.

18. As to whether the Plaintiff had wrongly taken possession of the suit premises on 26th of January 2011, the Plaintiff submitted that the Defendants' advocates had accepted the details of the Professional Undertaking provided by the advocates for the bank by their letter dated 25th November 2010. This had shifted the obligation to pay the financed balance from the Plaintiff to the bank and its advocates. The bank's advocates by letter dated 11th January 2011 wrote to both the Defendants' and the Plaintiff's advocates informing them of the registration of the transfer documentation as well as payment of the balance of the purchase price of Shs. 13 million. The Plaintiff thereupon relied on this letter to invoke clause 4 of the sale agreement and wrote a letter on 25th January 2011 informing the Defendants that she would be taking possession of the suit premises. Turning to whether the irrevocable professional undertaking given by the bank's advocates was discharged by the rescission letter dated 15th December 2010, the Plaintiff noted that it had been irrevocable which the Plaintiff understood stood to mean that the undertaking could not be discharged unilaterally by either party. In the Plaintiff's view, it was naive of the Defendants' advocate to purport, rescind or cancel the undertaking unilaterally and his letter dated 15th December 2010 was misconceived in law and null and void. Finally, as regards to whether the Defendants were entitled to the relief sought in their Counterclaim, the Plaintiff pointed to clause 17 of the sale agreement which required any such disputes to be referred and resolved by an arbitrator. It was the Plaintiff's position that this Court lacks jurisdiction to hear and determine the relief sought by the Defence save for the prayer for damages for trespass. The Plaintiff went on to say that if she was guilty of any breach of the sale agreement such could be re-dressed by an award in damages. Rescission of the sale agreement would be harsh and draconian.
19. The Defendants' submissions were filed herein on 11th September 2013. They opened by setting out the factual background and then referred to firstly, the pleadings of the suit and secondly, to the Statement of Agreed Issues dated 4th October 2011. Such detailed as follows:

> **"1. Did the defendants breach the Sale Agreement dated 8th April 2010 by releasing the completion documents to the plaintiff on the 1st October 2010?**
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> **2. Did the plaintiff author or contribute to the breach of the Sale Agreement by change of financiers from Diamond Trust Bank to Co-operative Bank Limited?**
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> **3. Did the defendants by accepting the undertaking from the financier's Advocate confirm a Tripartite Contract among the vendor, the purchaser and the bank and or any contract between the vendor and the financing bank?**
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> **4. Did the defendants allow the plaintiff to store her hardware merchandise in the property or give partial possession pending official hand-over and completion?**
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> **5. Is the defendants rescission of the conveyance transaction by their Advocates letter dated of 15th December 2010 proper in law?**
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> **6. Was the rescission of the conveyance transaction by the defendants in accordance with the terms of the Agreement for sale?**
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> **7. Was the defendant's Advocates letter of 15th December 2010 to Sichangi Advocates, sufficient to release them from their Professional Undertaking?**
>
> **8. Did the defendant act unreasonably and mischievously?**
>
> **9. Is the plaintiff entitled to the reliefs sought in the Plaint?**
>
> **10. Did the plaintiff, her agents or servants trespass to the defendants property on the night of 14.12.2010 by breaking into the property, gaining illegal entry and storing some goods before completion the conveyance?**

11. Did the plaintiff fraudulently effect registration of the Transfer and Charge on the defendants property as alleged at paragraph 20 of the Statement of Defence and Counter-claim?

12. Has the charge been wrongfully registered to secure money that has not been paid to the defendants?

13. Was the plaintiff acting in continuing breach of the law, and contempt of Court by taking possession of the property on 26th January 2011?

14. Are the defendant entitled to the prayers sought in the Counter-claim?"

Thereafter, the Defendants addressed each and every issue with reference to the evidence before this Court referring variously to authorities in relation to individual issues. Such cases quoted included **Peter N. Muiruri v Credit Bank & Anor. Civil Appeal No. 263 of 1998 (unreported), Naphtali Paul Radier v David Njogu HCCC No. 582 of 2003 (O. S.), M'Mukanya v M' Mbijiwe (984) KLR 761, Kenya Hotel Properties Ltd v Willesden Investments Ltd (2009) KLR 229** as well as **Festus Ogada v Hans Mollin (2009) KLR 620**.

20. As the parties had agreed upon a Statement of Agreed Issues, as above, dated 4th October 2011, it would appear to this Court that such should be considered more or less in the order detailed by the parties by way of determination of the dispute between them. The Agreement for the sale of the suit property dated 8th April 2010 detailed a completion date in paragraph 9 thereof as:

"Ninety (90) days from the date of the execution of this Agreement or such other earlier or later date as the parties may agree in writing,"

It is quite clear from the evidence brought before Court, that the Plaintiff did not have or get her financing in place and consequently the anticipated completion date of the 7th July 2010 was unattainable. Indeed, the letter dated 27th September 2010 addressed by the Plaintiff's advocates to the Defendants' advocates asked for copies of the completion documents to be supplied for inspection so that they could be passed on to the Plaintiff's financiers, the Cooperative Bank of Kenya Ltd:

"for appropriate instructions on the Professional Undertaking".

The response to that letter was dated 1st October 2010 in which the Defendants' advocates enclosed copies of completion documents as listed in the Schedule to that letter. In my view therefore, the Defendants were in a position to complete the transaction by the 1st October 2010. By that date, the parties would seem to have agreed upon an extension of the completion date. As a result, I do not find that the Defendants were in breach of the sale agreement as at 1st October 2010. In my view, the Plaintiff would have been in a position to complete the transaction at an earlier date if she had not changed her financiers from Diamond Trust Bank to Cooperative Bank Ltd. but in doing so, could she be said to have been in breach of the sale agreement? In my opinion, the parties having agreed upon extension of the completion date, the Plaintiff did not author or contribute to a breach of the sale agreement as regards the said extension.

21. It was the strong submission of the Plaintiff that the Defendants, by accepting the undertaking from the bank's advocates, created a tripartite contract as between the Defendants as vendors, the Plaintiff as purchaser and the Cooperative Bank Ltd. I don't think that this is the case at all. The said sale agreement was very clear at paragraph 11 thereof which reads:

"On or before sixty (60) days from the date of signing the agreement, the Vendors' Advocates shall release all completion documents set out hereunder to the Advocates acting for the Purchaser and her Financiers in exchange for a suitable professional undertaking to the Vendors' Advocates to secure the payment of the balance of the purchase price as per clause 2 (ii) above." (Underlining mine).

It must be remembered that at that stage, it was anticipated that the Plaintiff's advocates would also be acting as advocates for her proposed financier – Diamond Trust Bank Ltd. However, the fact that the Plaintiff changed financiers did not, in my view, affect the sale agreement in any way apart from the fact that the advocates for the bank would be different. So to conclude on this point, I do not find that there was any contract between the Defendants as vendors and the financing bank.

22. The provisions of paragraph 4 of the sale agreement are clear. Such reads:

"The property is sold with vacant possession and the Purchaser shall take possession of the property on the completion date provided the full purchase price shall have been paid to the Vendors." (Underlining mine).

However, it is clear from the evidence that by letter dated 18th November 2010, the Plaintiff's said advocates made a request for their clients to be granted possession of the suit property on the 22nd November 2010 pending registration of the transfer documents. That letter was responded to by the Defendants' advocates by their letter dated 25th November 2010 addressed to the Plaintiff's advocates in the last paragraph thereof which read:

"In the meantime, we are waiting for instructions from the Vendors on the issue of granting the Purchaser possession of the premises prior to registration of the Transfer."

Again, by letter dated 2nd December 2010 addressed to the bank's advocates but copied to the Defendants' advocates, the Plaintiff's advocates noted that they awaited the response in respect of possession being granted to the Plaintiff prior to registration:

"in light of the special circumstances".

I must confess that reading the correspondence passing between the parties' advocates, I was not aware of any such "special circumstances". I note, however, that in the letter dated 13th December 2010 addressed by the Plaintiff's advocates to the Defendant's advocates that there was a specific request for the consideration of partial possession to be given to the Plaintiff for the reason that her goods had arrived in containers and that she requested to store them on the suit premises rather than renting a go-down. It was interesting to note that in 2010, the 13th December was a public holiday and thus it was unlikely that the letter would have arrived in the hands of the Defendant's advocates until the next day. Taking into account that evidence, I am inclined to believe that the Defendants, who were abroad at the time, did not give any permission to the Plaintiff on the grant of possession before registration of the transfer documents. Further, much was made by the Plaintiff's advocates that DW 3 had more or less consented to such prior possession. Such was purposefully denied by DW 3 and in this regard he was unshaken in cross-examination. As a result, I find that the Defendants did not allow the Plaintiff to store her hardware merchandise in the suit property or give partial possession pending official hand-over and completion. I am bolstered in this conclusion by the fact that in their letter dated 15th December 2010 addressed to the Defendant's advocates, the Plaintiff's advocates detailed in the last paragraph on the first page thereof:

"Whereas we regret and apologise for the events of last night the same were occasioned by the fact that the vendors' daughter in her text to purchaser pegged possession pending registration to payment of stamp duty which the purchaser had already done on 10th December 2010. It was a desperate measure as the carrier and/or transporter was threatening to off load and abandon our client consignment on the road." (Underlining mine).

This latter seems a much more relevant explanation as to what transpired on 14th December, 2010 and it was interesting for this Court to note that DW 2 was never cross examined as regards her SMS in relation to Stamp Duty. Thus to conclude on this issue, I do not find that the Defendants allowed the Plaintiff to store her hardware merchandise in the suit premises.

23. The next issue was whether the Defendants' rescission of the conveyancing transaction by their

advocates' letter dated 15th December 2010 was proper in law. This is really the nub of this matter alongside issue no. 6 as to whether the rescission of the conveyancing transaction by the Defendants was in accordance with the terms of the sale agreement. As pointed out by the Defendants' submissions, the said letter as above from the Plaintiff's advocates dated 15th December 2010 went on further to state:

"We humbly submit that the said breakage can be addressed by an award of damages but not Rescission of the whole transaction and forfeiture of the 10% deposit. The purchaser has so far fulfilled all her obligations under the Sale Agreement and is entitled to Specific Performance."

However, were the Plaintiff's advocates right in their contention that the Defendants were not entitled to rescind the whole transaction? One needs to remember that the matter before this Court involves an application by the Plaintiff for specific performance of the sale agreement dated 8th April 2010. In this regard, I received some comfort and guidance from the case of **Gurdev Singh Birdi & Anor as trustees of the Ramgharia Institute of Mombasa v Madhbuti** **(1997) eKLR** as per the judgement of **Gicheru JA** (as he then was) as follows:

"It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract: 'must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and are considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation. Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim.' The latter was the position taken by Lord Esher, M. R. in Coatsworth v Johnson (1886) 54 L. T. 520 at page 523 when he said that:

'Of the moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract,……….. The court of equity will refuse to grant specific performance and would leave the parties to their other rights. Then if the court of equity would not grant specific performance, we are not to consider specific performance is granted. Then the case is at an end."

Whether the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice. Hence, although the learned trial judge dismissed the appellants' claim for specific performance under the erroneous premise that was of the essence of the agreement, had he properly directed himself on the law in the matter before him, he would nonetheless have dismissed the said claim. It is therefore not without cause that the respondent has sought to have the decision of the superior court affirmed in the circumstances set out earlier in this judgement."

The principle governing the grant of specific performance was also considered by the Court of Appeal in the case of **Mangi v Munyiri & Anor** **(1991) eKLR** wherein the court found:

"It is well established law that a claim for specific performance is not granted as a matter of course. Being an equitable remedy, the Court has to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant is entitled to equitable relief."

24. With the above in mind, I consider it necessary to review the actions of the Plaintiff as regards this matter. Again I consider it necessary to revisit what my learned sister **Rawal J.** (as she then was) had to say when she considered the Notice of Motion brought by the Defendants dated 28th January 2011. It is to be remembered that the Defendants were seeking leave to file a statement of Defence and Counterclaim in the first place but were also seeking a mandatory injunction to compel the Plaintiff to vacate the suit property. At page 10 of her Ruling, the learned Judge detailed:

"The facts of this case obviously are unique as I stated earlier, in that, here is a Plaintiff who has come before the court to seek specific performance, while the suit and applications from both sides are pending, got the transfer and charge registered despite the notice of this having been challenged by her.

The letter of 15th of December, 2010 addressed to the bank lawyers and copied to the Plaintiff's advocate from the Defendant/Applicant's lawyer is annexed as (Exhibit 7 page 16 in replying affidavit). It states inter-alia that:-

'We acknowledge your confirmation that the transfer and charge have not been presented for registration, and that, on request you have recalled your clerks from the Lands Registry, stopping the presentation of the documents for registration.'

This letter having been annexed by the Plaintiff, I do not have any explanation how then the Bank lawyers proceeded to finalise the registration formalities!!! The Plaintiff's contention that the Registrar of Lands finalised the process, does not pass the test of normality. Moreover, despite the pendency of the suit, the Plaintiff took over the possession of the suit premises by giving one day's notice."

Thereafter, the learned Judge, having reviewed the authorities submitted to Court by the parties, more particularly as regards the interpretation of the provisions of **section 52** of the *Transfer of Property Act*, concluded her remarks on the Affidavit evidence before her by stating:

"In summing up, I shall state that the Plaintiff having initiated this process, cannot first of all proceed further in the direction of registration of transfer and charge which has happened in this matter.

It is also not in dispute that the Plaintiff committed an act of trespass before the completion of the agreement on 14th December, 2010 which act necessitated the notice of rescission. Moreover, that was not only a breach of agreement but an unlawful act which could be covered under the legal rights and remedies stipulated in clause 18.2 of the agreement specified hereinbefore. The Plaintiff in the background of these facts has taken possession of the suit premises registration whereof is challenged by the Defendants/Applicants.

The suit filed by the Plaintiff was in active prosecution and which has not been withdrawn even at the time of prosecution of this application. The Plaintiff not only registered the suit premises in her name but dealt with the same by taking possession thereof despite the pendency of the suit and in full glare of the knowledge that she was the one who brought this suit before the court.

The actions of the Plaintiff, in my considered view, at this stage may fall within the provision of Section 52 of the Transfer of Property Act. She is guilty of two unlawful actions in sequence and I do find so at this stage. I am stating thus, being absolutely aware that there is no guarantee that the Defendants shall succeed eventually in their defence. I am only reiterating that, if successful, the Defendants shall have to litigate again to restore the *status quo ante* either in the same suit or by a fresh suit or by amending the defence and counterclaim. I may not suggest any better option at this stage. I also may state at the moment, the Defendant is a Plaintiff in their Counterclaim."

25. One of the questions asked by both parties herein was whether the registration of the Transfer in

favour of the Plaintiff and the Charge in favour of the bank contravened the provisions of section 52 of the Transfer of Property Act. That section with relevance to the *lis pendens* doctrine prohibits the transfer of a suit property to a third party during the active prosecution of a contentious suit where the ownership rights to the suit property are in question so as not to alter the substratum of the suit to the disadvantage of the parties. In order to demonstrate a breach of **section 52**, a party must show (a) that there is a contentious suit in active prosecution, (b) that the right to ownership is directly in issue and (c) the prohibited dealings of those effected during the pendency of the suit, so as to defeat the rights of the parties to the litigation. The classic authority in relation to the doctrine of *lis pendens* is the case of **Mawji v United States International University & Anor. (1976-80) 1 KLR 229** to which I was referred to by both parties. The relevant finding of the Court of Appeal is at page 250 which reads as follows:

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

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

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

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

Only a foolhardy purchaser, or a fraudulent purchaser, would purchase a property which is actually the subject-matter of litigation. Why should the defendants worry about a prohibitory order being imposed? They say or would wish to say, that they are both honest persons. In any event it is only an interim order and, recalling the words of Roskill L J in *Losinska v Civil and Public Services Association* [1976] 1 CR 743, no guarantee that that plaintiff would succeed in the suit.

It would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party. The Court therefore must protect the status quo Lord Cranworth LC said in *Bellamy v Sabine* (1 De g & J at page 578) the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

Of course, **Rawal J.** at page 16 of her Ruling dated 12th April 2011 picked up on the authorities cited to her in relation to section 52 of the Transfer of Property Act and, quite rightly, stopped the Plaintiff,

having initiated the Court process, from proceeding further in the direction of the registration of the Transfer and the Charge which had already occurred. In my view, it was indeed foolhardy of the Consolidated Bank of Kenya Ltd, through its advocates or otherwise, to have taken security of a Charge as against the title to the suit property, its advocates having been made aware of these proceedings initiated by the Plaintiff 16th December 2010, always bearing in mind that the said Transfer and Charge were not registered until six days later – 22nd December 2010. Further, I do not accept the Plaintiff's submission that the litigation she undertook on 16th December 2010 was not contentious by the date of registration of the Transfer and the Charge. The Plaintiff knew or ought to have known that by filing suit seeking specific performance of the sale agreement in the face of the Defendants having rescinded the same, such was bound to be contentious.

26. On my part, I find myself on all fours with the learned Judge's findings of fact as regards the Affidavit evidence before her. As regards the *viva voce* evidence before this Court at the hearing, I have learnt nothing new from the witnesses. In my opinion, the Plaintiff did commit an act of trespass 14th December, 2010 before the completion of the sale agreement. As a result, the answer to Issue No. 10 of the Statement of Agreed Issues is in the affirmative. To my mind, that act of the Plaintiff fully entitled the Defendants to rescind the sale agreement as a consequence of which, I would answer Issues Nos. 5 and 6 in the affirmative. I find that the Plaintiff was in breach of clause 4 and contravened the sale agreement having entered into possession of the suit property without the full purchase price having been paid. My view is not only confined to the Plaintiff's actions of trespass on the night of the 14th December 2011 but also her forcibly taking possession of the suit property on the 26th January 2011 without the said purchase price having been paid, even despite the same having been tendered. In my view, the Defendants' advocates were perfectly within their rights to refuse to accept the professional undertaking amount of Shs. 13 million. Further, I hold no store by the Plaintiff's Advocates' submission that the Defendants having accepted the professional undertaking, that the same could not be discharged by letter but by only the registration of the said Transfer and Charge. I do not concur that there was any separate contract as between the Defendants and the bank which superseded the sale agreement. In this I am supported by the authority of **Naphtali Paul Radier** case (supra) where at page 11 of his Ruling dated 4th February 2004, **Mohammed Ibrahim J.** (as he then was) detailed:

"I refer to Halsbury Laws of England at p. 223:-

> **'…… Nevertheless, an undertaking will be enforced against the solicitor even though after it is given the client dies, or instruct the solicitor not to perform it, or changes his solicitor………'**

> **This shows the gravity of undertakings. Even where his client dies the solicitor is not discharged from his liability under an undertaking. This is also so, where there is a change of advocates. It follows that the only way an undertaking ceases to be enforceable is where it is discharged/performed or where the beneficiary waives it totally."** (Underlining mine).

In my view, the letters addressed by the Defendants' advocates both to the Purchaser's advocates and particularly to Sichangi Advocates acting for the bank and dated 15th December 2010 were quite clear as to the waiver by the Defendants of the advocates' professional undertaking.

27. I also do not agree with the Plaintiff's said advocates that the rescission was contrary to the sale agreement in so far as a 21 day notice was given. Under clause 14 of the sale agreement, the 21 day notice only came into play where, for any reason, the Plaintiff had failed to complete the transaction. In any event, the Defendants under cover of their advocates' letter dated 9th November 2010 had already issued the Plaintiff with the 21 days' notice of the requirement to complete. In my opinion, the rescission of the sale agreement by the Defendants (although such would arise by the Plaintiff's breach of clause 4 thereof), was directly as a result of the Plaintiff's illegal act of trespass upon the suit property and, as such, the Defendants were perfectly entitled to rescind the sale agreement in law.

28. As regards Issue No. 7 and at the risk of repeating myself, I have carefully perused the

Defendants' advocates' letter to the bank's advocates, Sichangi, Advocates dated 15th December 2010 along with the letter being bearing even date therewith addressed by the Defendants' said Advocates to the Plaintiff's advocates. Both those letters quite clearly set out the position so far as the Defendants were concerned following upon the trespass and break-in of the Plaintiff in relation to the suit property on the night of the 14th December 2010. In my view, not only were the Defendants perfectly within their rights to terminate the sale agreement but also I consider that the said letter addressed to Sichangi, Advocates amounted to a good release of that firm's professional undertaking given under cover of their letter dated 19th October, 2010. **Rawal J.** in her said Ruling of 10th May 2011 expressed surprise that faced with the above two letters, Sichangi Advocates proceeded to register the Transfer in favour of the Plaintiff and the Charge in favour of their clients, the Cooperative Bank of Kenya Ltd. That firm, in my view, compounded its actions by advising and having their client tender the Shs. 13 million loan monies directly to the Defendants' advocates' account of which they had been previously advised. Despite the protestations of PW 2, in cross-examination, that it was his viewpoint that his firm's professional undertaking had not been cancelled, I find that his firm's actions to be unfounded and smacked of collusion with the Plaintiff and/or her advocates. However, as regards Issue No. 11, I found no evidence that the Plaintiff fraudulently effected the registration of the said Transfer and Charge as against the title of the suit property. What is certain is that the Plaintiff was determined to purchase the suit property and acted with impropriety particularly as regards obtaining possession thereof. Further and with regard to Issue No. 12, I do not find that the Charge had been wrongfully registered to secure money that had not been paid to the Defendants. As stated above, I believe that both the Transfer and the said Charge were wrongly registered against the title to the suit property in view of the fact that the Defendants had rescinded the sale agreement.

29. Going back somewhat and as regards Issue No. 8, in view of what I have detailed above, I do not find that the Defendants herein acted unreasonably or mischievously. Further, and in answer to Issue No. 9 of the Statement of Agreed Issues, I do not find the Plaintiff entitled to an Order for specific performance as per prayer A. in the Plaint nor to a declaration that the rescission of the sale agreement dated 8th April 2010 was null and void as per prayer B. Neither is the Plaintiff entitled to general damages nor the costs of the suit. In fact, I dismiss the Plaintiff's suit as against the Defendants in its entirety.
30. That leaves Issue No. 14 as to whether the Defendants are entitled to the prayers sought in their Counterclaim. Having held that I have found the Defendants' rescission of the sale agreement valid and binding in law, I have no doubt that they are entitled to a mandatory injunction compelling the Plaintiff, her servants or agents and lessees to vacate the suit property being L. R. No. 209/7755/19 and hand over vacant possession to the Defendants. The Court appreciates that as far as the Plaintiff's lessees are concerned, there may be a notice period necessary before the Defendants can obtain vacant possession thereof. Any rent due and payable by those tenants until vacant possession can be obtained by the Defendants will be for the benefit of the Defendants as from the date hereof. Further, I find that the Defendants are entitled to a declaration that the entry on Transfer of title in favour of the Plaintiff on the suit property is invalid and void. I also find that the Defendants are entitled to a declaration that the registration of the Charge in favour of the Cooperative Bank of Kenya Ltd over the title to the suit property is invalid and void. Further, I order the cancellation of the Transfer dated 10th December 2010 in favour of the Plaintiff registered as against the title of the suit property with immediate effect as well as an order for the cancellation of the registration of the Charge (presumably also dated 10th December 2010) in favour of the Cooperative Bank of Kenya Ltd. I also order the said bank and/or the Plaintiff to deliver and/or surrender the Defendants' Title to the suit property to them within 7 days from today.
31. By her Ruling dated 12th April 2011, **Lady Justice Rawal** ordered that the plaintiff would deposit the sum equivalent to market value of the monthly rent of the suit premises with effect from February 2011. What is not clear is whether that Order was ever complied with by the Plaintiff and monies paid monthly into an interest earning bank account in the joint names of the advocates for the Plaintiff and the advocates for the Defendants. Further, there was no evidence put before this Court as to what the market value of the monthly rent amounted to. It would seem that the said Order by the Judge was superseded by the Consent Order dated 13th May 2011 wherein the Plaintiff was required to deposit the said sum of Shs. 13 million in a joint interest earning account

with a reputable financial institution pending the hearing and determination of her appeal (which does not seem to have materialised) and/or the determination of this suit whichever was the earlier. The second part of that Consent Order detailed that the interest earned on the deposit sum would be considered as security to the successful party. As I have found that the Defendants are the successful party herein, I order that they be entitled to the interest earned on the deposited sum. However, the Shs. 13 million will be reimbursed to the Plaintiff as well as the unsecured sum (outside the deposit of 10%) being Shs. 2,750,000/- currently held by the advocates for the Defendants. That leaves the 10% deposit paid by the Plaintiff being Shs. 1,750,000/-. Again, the Court presumes that the Defendants' advocates held this sum on deposit, earning interest. Under clause 14 of the sale agreement, if the Defendants had rescinded the same under the provisions of that clause, then the 10% deposit paid by the Plaintiff would be forfeited. However, the Defendants did not rescind the sale agreement under the provisions of that clause and, as a result I do not consider that the Defendants are entitled to hang onto the said 10% deposit. Accordingly, I order that both the sum of Shs. 1,750,000/- and the sum of Shs. 2,750,000/- as above, will be refunded to the Plaintiff. However and bearing in mind the authorities quoted to me as regards general damages for trespass (**M. Mukanya v M'Mbijiwe** and **Kenya Hotel Properties Ltd v Wilson Investments Ltd** both supra), the Defendants will be entitled to any interest earned on both those amounts by way of general damages for trespass as prayed for in paragraph 25 (h) of the Defendants' Defence and Counterclaim dated 28th January 2011.

32. As I have indicated above, the Defendants will also be entitled to the costs of and incidental to this suit. They will also be entitled to interest on the amounts that I have awarded to them as above as well as interest on costs, from the date hereof until payment in full at Court rates. Orders accordingly.

DATED and delivered at Nairobi this 25th day of March, 2014.

J. B. HAVELOCK

JUDGE