REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 89 OF 2012

JAMES K. NDERITU

MARGARET W. NDERITU…….....……...…PLAINTIFFS

VERSUS

PRILSCOT COMPANY LIMITED …….....……DEFENDANT

RULING

The application before me for determination is a Notice of Motion dated 21st February 2012, brought by the Plaintiffs under Order 40 Rules 2 and 4 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiffs are seeking an order that the Defendant, its agents, directors, employees or anyone acting on its behalf be restrained from interfering with the Plaintiffs' peaceful occupation of house no. 199 - Elan Park Estate Mombasa Road on LR no. 7149/54, disposing or alienating/interfering with the title pending the hearing and determination of this suit.

The application is supported by the affidavit of James K. Nderitu deponed to on 21st February 2012. The sale agreement with the Defendant for the purchase of the suit property at Kshs 4,500,000/-. The sale agreement and payment receipts number 014, 021 and 022 for Kshs 1,000,000 each, issued by the Defendant in acknowledgement of the deposit paid by the Plaintiffs are annexed and marked JKN in the bundle of documents. It is the Plaintiffs case that although the balance of Kshs 1,500,000/- was payable on the completion date upon delivery of the completion documents, there was delay in completing the transaction and the Plaintiffs received a letter dated 7th December 2009 from the Defendant's director proposing a revision of the purchase price to Kshs 5,800,000/-. The Plaintiffs have contended that despite their advocates objections to the said increment, they were advised by the chargee that since the project had stalled, the chargee had to re-finance the project at a higher cost and consequent to re-valuation, the Plaintiffs further paid Kshs 2,500,000/- making the total sum paid Kshs 5,500,000/-

The Plaintiffs have averred that having completed and overpaid the purchase price by Kshs 1,000,000/-, they took possession of the house between January-March 2011 and that they have not received the completion documents from the vendor's advocates despite several requests. The Plaintiffs have alleged that the Defendant's director demanded more money from them and is threatening to evict the Plaintiffs despite there being no variation deed executed to reflect any price variance.

In a supplementary affidavit sworn by James K. Nderitu on 19th March 2012, the Plaintiffs have stated that the duty to disclose the existence of charge over the suit property at the time of entering the sale agreement lay upon the Defendant who failed to make such disclosure in the agreement, and therefore cannot rely on the same to defeat or escape from his contractual obligations. The Plaintiffs maintained that the payment of Kshs 2,500,000/- into the account of the Defendant at Housing Finance Company of Kenya(HFCK) was in compliance with clause 4.2 of the agreement as well as a letter from HFCK dated 26th February 2009 stating that the said company was then dealing with individual purchasers.

It is the Plaintiffs' case that the Defendant has not explained why they failed to furnish a deed of variation as demanded by the Plaintiffs and further, that the Defendant has not exhibited any completion notice or rescission notice in compliance with the sale agreement. The Plaintiffs aver that the Defendant cannot contend that the sale agreement was null and void and at the same time allege that it was rescinded on 23rd May 2010 while at the same time stating that it was capable of being varied without entering a fresh agreement.

The Plaintiffs in submissions dated 26th April 2013 submitted that this is a clear and straightforward case for the grant of the orders sought as the Defendant did not rebutt the Plaintiffs' evidence and did not file any documentation in support of its claim of rescinding the contract or calling for any variation/or a deed of variation. Counsel submitted that the actions of the Defendant are in breach of the sale agreement dated 30th July 2008 and relied on the cases of **Kimotho -vs- Mathenge(1991) KLR 87**, **Mangi -vs- Munyiri & anor(1991)KLR432**, **Kenya Breweries -vs- Kiambu Geneal Transport Agency Ltd(2000)KLR 337** and **Giella -vs- Cassman Brown (1973)EA 358**

The Defendant responded to the application in a replying affidavit sworn by its managing director, Luka Kipkorir Kigen on 23rd March 2012 The Defendant admitted to having entered into a sale agreement with the Plaintiffs on 30th July 2008 in respect of maisonette number 199 erected on LR No. 7149/54. Further, the Defendant stated that at the time of the execution of the agreement, the house had not been constructed and the Defendant had charged the land to Housing Finance Company of Kenya(HFCK) through a charge registered on 20th June 2007 as entry number IR 94345/3.

According to the Defendant, the Plaintiffs have acknowledged that the land was charged to a 3rd party and therefore, that the Defendant could not deal with the land without prior consent from the chargee. The Defendant has contended that the sale agreement is null and void for lack of the mandatory consent from the chargee since the registered charge provides that the Defendant cannot sell the land or a portion thereof without prior written consent of HFCK and the Defendant has annexed a copy of the title as evidence.

It is the Defendant's case that upon realizing that the Defendant had entered into a sale agreement with the Plaintiffs and other purchasers in respect of houses which were to be constructed on the land without its consent, HFCK threatened to dispose off the land in exercise of its statutory power of sale under the charge. The Defendant allege that following a meeting with HFCK, the sale agreements were reviewed since the total sales proceeds could not offset the loan together with interest. The Defendant has contended that a further meeting involving the buyers, the Defendant and HFCK was held at the construction site where it was unanimously agreed that the agreements between the Defendant and the buyers were null and void since it was not possible to complete the agreements as they were and further, that there was no change of user had been obtained prior to the signing of the agreement for the land which was agricultural and not residential. The Defendant has stated that the change of user subsequently obtained changed the land reference number from LR No. 7149/54 indicated in the sale agreement to LR No. 7149/141. According to the Defendant, a variation of the purchase price was discussed and agreed upon by the buyers, the Defendant and HFCK at a compromise price of Kshs 5,500,000/- and the Defendant has annexed as evidence a letter dated 7th December 2009 notifying the purchasers of the price revision as well as a deed of variation to the said effect.

The Defendant however alleges that the Plaintiffs refused to sign the deed of variation and that the failure to sign was construed by the Defendant and HFCK to mean that the Plaintiffs were no longer interested

and willing to accept the agreed terms of completing the sale transaction. It is the Defendants case that by a letter dated 28th May 2010, the Plaintiffs were notified of the rescission of the sale agreement with an indication that monies paid by the Plaintiffs would be refunded without any interest after the house was sold. The Defendant has averred that the alleged payment of Kshs 2,500,000/- by the Plaintiffs to HFCK was in breach of clause 4.2 of the sale agreement which provided that the balance of the purchase price was to be paid to the vendor's advocate. According to the Defendant, the Plaintiff's claim for refund of Kshs 1,000,000/- does not arise since the sum was never paid to the Defendant and that the claim, if any, lies against HFCK who allegedly received the money.

The Defendant aver that the Plaintiffs do not deserve an equitable order of injunction as they approached the court with unclean hands since they took possession of the property unlawfully forcefully breaking into the property. The Defendant contends that she reported the matter to Embakasi Police Station vide OB number 43/23/05/2011 for further investigation and criminal prosecution against the Plaintiffs. Further, the Defendant contends that the Plaintiffs have no prima facie case with probability of success since the land upon which the house is constructed was lawfully charged to HFCK whose consent was not sought and who is not a party to these proceedings. It is the Defendants case that the applicants are not entitled to the equitable relief sought since equity follows the law and LR No. 7149/54 does not currently exist and the court cannot issue orders in vain.

In a further affidavit sworn by Luka Kipkorir Kigen on19th March 2012, the Defendant avers that the sale agreement between the Defendant and the Plaintiff was never consented to by HFCK and that the purpose of the deed of variation was to validate what was null and void initially. The Defendant reiterated that the Plaintiffs obtained possession by illegally and unlawfully breaking into the house.

The Defendant filed submissions dated 22nd May 2013, and submits that the Plaintiffs had not demonstrated a prima facie with probability of success as stipulated in the case of **Giella -vs- Cassman Brown (1973)EA 358**. Counsel argued that the Plaintiffs are not likely to succeed in the suit when they are finally heard since the sale agreement dated 30th July 2008 is null and void for lack of the mandatory consent from the chargee and therefore, that an order for specific performance cannot be granted. The Defendant relied on the case of **Timber Manufacturers & Dealers Ltd -vs- Joseph Kiarie Mbugua & Consolidated Bank of Kenya, Nairobi HCCC No. 1048 of 1994** where the court refused to grant the prayer for specific performance where the suit property was lawfully mortgaged to Home Savings and Mortgages Ltd.

Counsel contended that the prayers for specific performance and injunction sought in the Plaint are equitable remedies and equity follows the law. It was submitted for the Defendant that the property is lawfully charged to HFCK which has a legal interest in the property and no orders have been sought against HFCK. Counsel for the Defendant stated that the injunction sought is in respect of LR No. 7149/54 which does not exist.

In respect to damages likely to be suffered by the Plaintiffs if an order for injunction is not granted, the Defendant argued that the Plaintiffs did not adduce evidence to prove that an award of damages cannot adequately compensate them for the loss of the property. Counsel for the Defendant stated that the damages suffered by the Plaintiffs can be quantified and therefore they cannot suffer irreparable harm that cannot be compensated by an award of damages.

The Defendant submitted that the balance of convenience need not be considered since the second limb had not been satisfied. The Defendant stated that the Plaintiffs were undeserving of the equitable order of a temporary injunction having approached the court with unclean hands since they unlawfully took possession of the house. Lastly the Defendant submitted that the matter is res judicata since the orders sought had previously been sought in Nairobi **ELC No. 191 of 2011(OS) James K. Nderitu & anor -vs- Prilscot Company Ltd** where the court, in a ruling delivered on 17th February 2012 refused to grant the orders sought.

I now turn to consider and determine whether the Plaintiffs have established a prima facie case with a

probability of success to entitle them to an order of injunction.

The Plaintiffs have adduced evidence of the existence of a sale agreement for the purchase of the suit property. The Plaintiffs have exhibited proof of payment of Kshs 3,000,000/- towards the purchase price of Kshs 4,500,000/-This evidence has been admitted to by the Defendant. The Plaintiffs have demonstrated that they made a further payment of Kshs 2,500,000/- on account of the Defendant, through Housing Finance Company of Kenya in respect to a charge over the property in favour of HFCK the existence of which the defendant had not disclosed to the Plaintiffs at the time of executing the sale agreement. Clause 6.1 of the agreement states that the property was being sold free from all encumbrances while the Defendant had actually charged the property to HFCK. The Defendant has made an issue of the fact that the consent of the HFCK as chargee was not obtained at the time of executing the Agreement for sale. There was no reason or such consent if the sale was to be on a free of encumbrance basis as expressed in the Agreement. The obligation remained with the Defendant to deliver an unencumbered title of the subject property to the plaintiffs and besides a chargee can consent to a transaction at any stage. In the circumstances as exist in this matter the chargee ordinarily would consent to the transfer and issue a partial discharge of the charge as regards the specific Maisonette or plot provided any agreed proceeds of sale are accounted to the chargee by the vendor in respect of the plot. I therefore hold that the failure of the HFCK to consent to the sale at the time the parties executed the sale agreement cannot vitiate the sale. At any rate the subsequent dealings with the HCK following the execution of the sale agreement point to the fact that the HFCK was ready and willing to sanction the transaction and it is on that account they accepted the deposit of Kshs. 2,500,000/= from the plaintiffs against the account of the defendant.

The plaintiff and the defendant appear to be in agreement that following consultations with HFCK the later agreed that the purchase price of the units be adjusted to Kshs. 5,500,000/= and appropriate notice was given to the purchasers, the plaintiffs included. The plaintiff for their part have paid a total of Kshs. 5,500,000/= towards the purchase price which would satisfy the compromise amount agreed with the HFCK. In my view the plaintiffs have demonstrated that they have been ready and willing to complete the sale transaction. There is no evidence that the plaintiffs are in breach of any of the terms of the agreement for sale dated 30th July, 2008 and having virtually paid the entire purchase price it is my view that the plaintiffs have demonstrated they have a prima facie case with a probability of success.

The defendant has taken issue with the manner the plaintiff may have gained access to the premises where they now remain in occupation and possession. The account by the plaintiffs differs with the account by the Defendant but as per the Agreement for Sale the purchasers were entitled to possession of the suit premises upon full payment of the purchase. The plaintiff contend they were granted possession after they paid the Kshs. 2,500,000/= to the HFCK which they claim in addition to Kshs. 3,000,000/= exceeded the purchase price of Kshs. 4,500,000/= by Kshs. 1,000,000/=

In her ruling delivered on 8th July 2011,(attached to the supporting affidavit) Lady Justice Okwengu found in favour of the Plaintiffs and allowed the prayer for temporary injunction in **ELC No. 191 of 2011(OS) James K. Nderitu & anor -vs- Prilscot Company**. Although none of the parties have attached the proceedings of the said case, the Plaintiffs have stated that the Originating Summons were struck out during hearing for reasons that the claim should have been lodged by way of Plaint, which allegations have not been rebutted by the Defendant. That being the case the present suit cannot be said to be resjudicata as the issues were not finally canvassed and determined in the said suit.

As to whether the plaintiffs are likely to suffer irreparable loss if the injunction is refused the Plaintiffs have stated that they took possession of the suit premises between January- March 2011 and that they constructed a security wall and a gate around the premises. Damages will not be adequate to compensate the Plaintiffs who are in occupation of the suit premises. The Plaintiff are using the premises as their residential home and in my view, the balance of convenience tilts in favour of the Plaintiffs who will suffer irreparable damage were the suit property to be sold before the determination of the suit as they would stand the risk of being evicted from the premises and yet they have invested considerably to acquire a home.

In the premises I find and hold the plaintiff's application to be meritorious and I grant an injunction in terms of prayer No. 2 of the Notice of Motion pending the hearing and determination of the suit.

Given the circumstances of this suit I direct that each party bears their own costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

……..……. for the Plaintiffs

…….…….. for the Defendant