REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE NO. 49 OF 2011

ANNE NJERI MWANGI .....PLAINTIFF

VERSUS

MUZAFFER MUSAJEE ESSAJEE .....1ST DEFENDANT/APPLICANT

HUSEEINA MUZAFFER ESSAJEE.....2ND DEFENDANT/APPLICANT

RULING

Before the court is a Notice of Motion dated 28th January, 2011 expressed to be brought under Sections 3, 3A and 63 (e) of the Civil Procedure Act (Cap 21) Sec. 3 of "The Judicature Act' (Cap 8) and Order 6, 7, 10 Rule 2 and 57 of Civil Procedure Rules 2010
Mainly it seek two orders:-

(1) The Defendants be granted leave to file statement of Defence and Counter Claim before the service of Summons are effected without the accompanying documents as required under Order 7 Rule 5 (b), (c) and (d) of Civil Procedure Rules 2010 and

(2) The Plaintiff, her servants and agent be compelled by a mandatory injunction to vacate the Defendants' property LR No. 209/7755/19 (referred to as 'the suit premises') pending the hearing and determination of this suit as well as restraining them from interfering with the possession of the suit premises pending the hearing and determination of the suit.

The application is supported by grounds set forth on the face of the motion and supporting affidavit sworn on 28th January, 2011 as well as supplementary affidavit sworn on 4th February, 2011.

The first prayer was dealt with by the court on 8th March, 2011 by giving requisite directions and thus the pleadings are complete. The Plaintiff has, also by consent, undertaken not to assign or alienate the suit

premises till further orders of the court.
Thus what is remaining before the court, in nutshell, is whether the Defendants/Applicants be granted the mandatory injunction as prayed in prayer no.5 (f) and (g) of the motion.

The application is opposed and the Plaintiff has sworn and filed a replying affidavit on 3rd February, 2011.

The legal tenets, applicable and to be adopted in the cases of mandatory injunction, have been very well established in the case of ***Locabail International Finance Ltd. –vs- Agro Export and Another (1986) 1 AII ER***. It is as under:-

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before grating a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

The similar observations have been adopted with appropriate further observations in many cases.
It is trite that the mandatory injunction would be granted sparingly and only in exceptional circumstances such as where the Applicant's case was very strong and straight forward. The standard of proof required in mandatory injunctions is much higher than that expected in prohibitive injunction ***(Showind Industries –vs- Guardian Bank Ltd. And Another (2002)*** 1 EA 284.

It may be appropriate to buttress the aforesaid observation with what is stated in *Halsbury's Laws (4th Edition) paragraph 948* – viz

"….. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the dependant attempted to steal a march on the Plaintiff … a mandatory injunction will be granted on an interlocutory application"

With the above introductory observations on the principles of mandatory injunction, I shall deal with the facts of this case which, in my humble view, are unique in many ways.

The suit commenced by the Plaintiff filing this suit praying for orders of specific performance of the Agreement of Sale dated 8th April, 2010, for a declaration that the purported rescission of 15th December 2010 is null and void as well as for payment of general damages and costs.
Upon service of the application, the Defendant filed a Notice of Motion dated 21st January, 2011 seeking orders to refer the dispute to arbitration and to prohibit transfer or any dealing with the Defendant's title to the suit premises.

Due to developments in the matter, the Defendants had to file the present application which is dated 28th January, 2011. The pleadings in the matter were filed in the Commercial Division of the High Court and thereafter the suit was transferred to the Civil Division and hence the same fell on my hands.

The motion has set forth eight grounds, namely that the Defendants/Applicants Advocates cancelled or rescinded the Sale Agreement on account of Plaintiff's trespass on the suit premises on the night of 14th December, 2010, that on receipt of the said notice, the Plaintiff filed the present suit seeking specific performance, that after the cancellation/rescission of the Agreement the Plaintiff fraudulently proceeded to effect the registration of transfer and charge on the suit premises, that the Plaintiff did so despite the pendency of the present suit which is contentious, that the Plaintiff has not paid the balance which the

Defendants could not accept after cancellation or rescission of the agreement, that the Plaintiff committed breaches of law by trespassing on the suit premises on 26th January, 2010 and taking over possession of the suit property stationing guards to bar the entry therein by the Defendants and that this court has jurisdiction to restore status quo prevailing prior to the institution of the suit.

The facts of the motion and to that effect those of the suit are mostly undisputed.

The parties entered into an agreement of sale of the suit premises dated 8th April, 2010. The Plaintiff deposited 10% of the purchase price agreed at Kshs.17,500,000/=.

As per clause 2 (ii) of the agreement, the balance of the purchase price was to be served by way of a suitable professional undertaking from the advocates acting for the purchaser and her financiers on or before the completion date in exchange for the completion documents set out in Clause 11of the Agreement.

The completion date was agreed to be 10 days from the execution but the date could be brought back or further as the parties may agree in writing and the completion was to be taken place at the vendor's office. (see clause 9 of the Agreement).

The property was to be sold in vacant possession and purchaser was to take possession of the property on the completion date provided the full purchase price shall have been paid to the vendors.
The Plaintiff could organize for the loan only for Kshs.13,000,000/= and the balance of the said purchase price was paid in cash to the Defendants' advocate.

The letter of 25th November, 2010 from the Defendant's advocate is to be noted. It confirms on one hand the receipt of unsecured balance of the purchase price and acceptance of professional undertaking from M/s Sichangi Advocate, and on the other hand, also make it clear and I quote:-

"In the meantime, we await formal instructions from the vendors on the issue of granting the purchaser possession of the premises prior to registration of the transfer" *(See Ex 4 to Replying Affidavit page 12).*

It is also clear from the letter of 13th December, 2010 from the Plaintiff's Advocate addressed to the Defendant's Advocate, that the payment of stamp duty was given to the financier's Advocate on 10th December, 2010 and it reiterated the request for consideration of partial possession to the Plaintiff. It was further stated that in exchange of such concession, the Plaintiff shall have no objection to the unsecured funds being released to the Defendants pending registration when the bank lawyers will give secured amounts (Ex 5 Replying affidavit page 14)

It is averred by the Defendants/Applicants that while the above requested permission was awaited the Plaintiff broke into the suit premises on the night of 14th December, 2010 and took possession of the premises.

Thereupon, the Defendants' advocates wrote a letter dated 15th December, 2010 to the Plaintiff's Advocate that the Defendants have cancelled the transactions with immediate effect (Exhibit 7 of replying affidavit page 16)

It is further on record that the Plaintiff is not denying the incident of trespass as alleged by the Defendant (Exhibit 8 replying affidavit pages 17 – 18).
It is also on record that prior to this development the Defendants had, vide their advocate's letter of 8th November, 2010, given 21 days notice of recission when the Plaintiff was unable to pay the unsecured balance of the purchase price (See. Exhibit 8 of replying affidavit page 19).
It is sufficiently on record that the counsel for the bank were also given notice of such cancellation and that they had, as per Defendants' advocate's letter of 15th December, 2010 addressed to them, stopped the presentation of documents for registration.

The suit was then filed by the Plaintiff as stated hereinbefore challenging the validity of the said rescission and asking for specific performance.

It is thus crystal clear that the Notice of rescission of the agreement of sale was in issue brought forth by the Plaintiff herself and she wanted intervention of the court to obtain the order of specific performance. The notice of rescission thus was before the court being contested by the Plaitniff. The Plaintiff has not explained the process of registration of title and charge despite the same being challenged by the Defendants/Applicants. She simply stated that now she has the registration and so be it.

The Defendants have challenged this act as being invalid in terms of Sec. 52 of the Transfer of Property Act (An Indian Act which is applicable to Kenya) and it stipulates:-

"During the active prosecution in any court having authority in British India or established beyond the limits of British India by the Governor General in Council of a contentious suit or proceedings in which any rights to immovable property is directly and specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to effect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose." *(emphasis mine)*

Mr. Ngugi, learned counsel for the Defendants/Applicants, contended that the Plaintiff has, in total disregard of the said provisions of law, transferred the suit premises while the issue of validity of rescission was actively in contentions in the present suit.
The facts of this case obviously are unique as I have stated earlier, in that, here is a Plaintiff who has come before the court to seek specific performance and, while the suit and applications from both sides are pending, got the transfer and charge registered despite the notice of rescission having been challenged by her.

The letter of 15th December, 2010 addressed to the bank lawyers and copied to the Plaintiff's advocate from the Defendants/Applicants 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 Bank lawyers proceeded to finalise the registration formalities!!! The Plaintiff's contention that the Registrar of Land finalized 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. See letters of 25th January, 2011 and 27th January, 2011 (pages 25 and 31 of the replying affidavit).
It is further submitted by Mr. Simiyu, the learned counsel for the Plaintiff, that the Defendants/Applicants have not satisfied the court the conditions for interlocutory injunctions as stipulated in the famous case of ***Giella –vs- Cassman Brown & Co. Ltd. (1973) EA 358.*** The conditions are by now trite, however, I would reiterate:

(1) The application must show a prima facie case with a probability of success,

(2) An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, and

(3) When the court is in doubt it will decide the application on the balance of convenience.

I would also add that the probabilities and circumstances do vary in each case, and the court would be expected to consider those along with the above conditions including the conduct of the parties.

Mr. Simiyu relied on the conditions stipulated in the agreement of sale and stressed on clauses 14 and 15 thereof which stipulates the process of giving notice of termination. Accordingly, it is submitted that the instantious notice vide letter of 15th December, 2010 is illegal. Moreover, the undertaking being a solemn contract and, in addition it being irrevocable one, the rescission is improper and illegal. Furthermore even if there is a breach of undertaking the remedy is in damages.

Balance of convenience also is on the side of the Plaintiff who according to Mr. Simiyu having paid deposit and unsecured balance as well as having arranged the finance.

The case of ***Kenya Shell Ltd. –vs- Elizabeth Wangui Nganga (HC Civil Appeal No. 22 of 2003)*** was relied to stress the point that the notice to terminate the contract should be as per the terms of the contract.

Lastly, Mr. Simiyu stated, very curiously, that though he appeared before the court on 20th December, 2010 the Defendants were served only on 17th January, 2011 and thus upto that time there was no active suit and that as at 22nd December, 2010 Plaintiff has averred right to property in the suit which was obtained on registration of transfer.

Mr. Ngugi thereupon relied on condition 18.2 which stipulates that the rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law. The trespass by the Plaintiff is both civil wrong and criminal offence and the Defendants have rescinded due to the trespass committed by the Plaintiff.

These are in short the facts and submissions before the court. I must say that the issues raised are intrigue and need careful consideration.
First of all, I do note the plaint, along with an application under certificate of urgency, was filed and the application was also certified as urgent on 17th December, 2010 interparte hearing on 20th December 2010 was ordered.

The Defendants' advocates did appear as interested party on the said date but the two Defendants were not served. Mr. Simiyu then, despite the urgency of matter applied for a date in the month of January 2011 term and not during the vacation as it ought to be.

In meantime, the documents were registered which are now being challenged.

As regards the interpretation of Sec. 52 of Transfer of Property Act, consideration of the case of ***Manyi – vs- U.S International University and another (1976-80) I KLR 229*** is indispensable for any judicial dispensation.

In the judgment, Justice Madan (as then he was) has put the provisions of Sec. 52 in its right perception by his legendary lucid and profound language.
After considering the application on substantial points as regards prima facie case, the Hon. Judge stated as under:-

"I ought to end here but I do not think I can do so sensibly. I must consider the plaintiff's alternative application for an order under Section 52 of the Transfer of Property Act. If the Court of Appeal were to say I am wrong in holding that the caveat can remain on the register on the strength of the various

substantial points which I have set out and which I think exist in this case in favour of the plaintiff, then the caveat will disappear unless the plaintiff is able to satisfy the Court of Appeal that he is entitled to hold on to the caveat independently of these substantial points by virtue of Section 52. If the Court of Appeal were to say that the caveat ought not to continue to remain on the register in such event, the plaintiff's caveat would have collapsed without this Court having considered his alternative application under section 52 which enacts:

During the active prosecution in any court having authority (in Kenya) of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

Thereafter in rejecting the plea of limited interpretation of provisions of Sec. 52, the court relied on the following passage at page 250 from the English case of ***Bellamy –vs- Saline (1857) 1 De G&J 566 at 584***, namely:-

"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."

Lastly, I shall cite the pertinent passage at page 251.

"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 Saibe (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."

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 provisions of Sec. 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 so, 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 that at the moment, the Defendant is a Plaintiff in their counterclaim.

I then have to deal with the issue of mandatory injunction which the Defendants/Applicants are claiming in this application considering all the facts before the court.

It is well established that while granting the interlocutory injunctions, the guiding principles are as observed in ***Giella's case*** *(Supra),* whether it is of restraining nature, or mandatory nature of course the standard of proof for the two remedies shall be different.

The principles to be granted in mandatory injunction are as stated in the earlier part of this Ruling. Moreover, I have to consider, in addition, that the grant of mandatory injunction shall alter the status quo existing on ground as of to-date and thus I shall have to proceed with extreme caution and diligence.

I have been referred to the case of ***Gusii Mwalimu Investments Co. Limited 2 Others –vs- Mwalimu Hotel Kisii Limited (Court of Appeal Civil Appeal No. 160 of 1995 U.R)*** Justice of Appeal Mr. Shah in very strong words, has observed as under:-

"The converse can also be true. Can a court of equity allow a litigant who takes unlawful and improper steps to evict a tenant to say that the tenant's application ought to be dismissed as the litigant has already put someone else in possession thereby improperly changing the status quo ……. It fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of the premises is the status quo which must be maintained. In this case, if I were to allow the appeal, I would be giving an assent to occupation of the premises by a third party and assist the landlord to perpetuate what is did illegally. My equity conscience does not allow that."

These are the facts and principles of laws. What shall be the equitable remedies which can be granted to the parties?

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, 2011either 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 Secs. 1A and 3A of the Civil Procedure Act.

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

This is the alternative equitable remedy, failing which I shall be compelled to grant sterner orders.
I shall mention the matter on 4th May, 2011 for further directions.

The costs in the cause.

Orders accordingly.

Dated, delivered and **signed** at Nairobi this **12th** day of **April, 2011**.

K. H. RAWAL

JUDGE

12th April, 2011