



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION – MILIMANI**  
**CIVIL CASE NO. 508 OF 2010**

**RICCATI BUSINESS COLLEGE OF EAST AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**KYANZAVI FARMERS COMPANY LTD.....DEFENDANT**

**RULING**

On 14<sup>th</sup> October, 2010, this court delivered a ruling dismissing the Plaintiffs application for an order of injunction to restrain the Defendant and its agents, servants or employees from proceeding with the distress for rent levied against the plaintiff on 14<sup>th</sup> July, 2010, in purported recovering of rent areas amounting to Kshs 7,003,531.00. Being aggrieved and dissatisfied with the decision, the Plaintiff filed a notice of appeal on 18<sup>th</sup> October, 2010, and followed that notice with an application for an injunction pending appeal.

The said application is made by a Notice of Motion dated 22<sup>nd</sup> October, 2010, and is brought under Sections 1A, 3A and 63 (e) of the Civil Procedure Act; and order XLI Rule 4 of the Civil Procedure Rules. The applicant thereby moves this court to grant an injunction restraining the Defendant its agents and/or servants from proceeding with the distress for rent levied against the Plaintiff on 14<sup>th</sup> June, 2010, pending the hearing and determination of the Plaintiff's appeal. The application is supported by the annexed Affidavit of Michael Ndemange Mutuku, the Plaintiff's Managing Director, and is based on the grounds that –

- a) The Plaintiff is desirous of filing an appeal against this court's ruling delivered on 14<sup>th</sup> October, 2010 and has lodged and served a Notice of Appeal.**
  
- b) Unless an injunction is granted pending the hearing and determination of the appeal, the success of the intended appeal will be rendered nugatory.**
  
- c) The Plaintiff's intended appeal is arguable and has high chances of success.**

**d) The Plaintiff continues to pay rent to the Defendant and the grant of injunction sought will not prejudice the Defendant in any way.**

**e) The Plaintiff stands to suffer irreparable loss if the distress for rent is not stopped.**

The application is opposed through the replying affidavit sworn by on 25<sup>th</sup> October, 2006, by James Mwema Muiya, the Chairman of the Defendant's Board of Directors, mainly on the grounds that the Plaintiff's application is incompetent, made in bad faith, tainted with falsehood and calculated to mislead the court and must fail in the interests of justice. It is also their contention that the applicant wants this court to sit as a Court of Appeal and decide an issue it has already decided. For that reason, they further content that this court is *functus officio* and has no jurisdiction to hear this application which must therefore be dismissed summarily.

At the hearing of the application, Mr Amuga for the Applicant submitted that there were special circumstances warranting the grant of an injunction pending appeal. He urged the court to grant the injunction so that if the Plaintiffs succeeded on appeal, such success may not be rendered nugatory. He referred the court to **ERINFORD PROPERTIES LTD v CHESHIRE COUNTY COUNCIL** [1974] 2 All ER 448, and also **BUTT v RENT RESTRICTION TRIBUNAL** [1982] KLR 417.

Opposing the application, Mrs Mutua for the Respondent relied on the Replying Affidavit of James Mwema Muiya wherein the deponent swore that the application was incompetent and ought to be dismissed in the interests of justice. She added that this application has been brought maliciously by alleging that they had paid the rent until July this year whereas the rent for July to October has not been paid, and therefore the Plaintiff is abusing the process of the court while the Defendant bears the prejudice.

Having considered the rival pleadings and submissions of counsel, I find that shorn of all its side issues, the main issue for determination in this application is whether the court which has declined to give an order of injunction can proceed to grant an injunction pending the hearing of an appeal against its order. As a matter of law and principle, it can do so. It is possible that the Court of Appeal may take a different view from that taken by this court and thereupon reverse the finding of this court. If that happens, unless the Plaintiff is given an interlocutory injunction at this stage, there is a possibility that the Plaintiff's appeal could be rendered nugatory. In **ERINFORD PROPERTIES LTD v CHESHIRE COUNTY COUNCIL** (supra), Megarry, J. observed at page 454

**“...where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an Appeal. One of the important factors in making such a decision... is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusion; and that the other extreme a Judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for Judges. A Judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be revised, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the Judge becomes *functus officio* quoad granting any injunction at all.”**

From these words it is clear that this court is competent to grant the injunction sought. Being of that persuasion, I find that in the event the Court of Appeal allows the Plaintiff's appeal and upsets the decision not to grant an injunction, there is a risk that the Appellant/Applicant might be prejudiced in that its appeal could thereby be rendered nugatory. In order to preempt such an undesirable consequence, I

find it fair and proper to grant an injunction pending appeal.

In the circumstances, I accordingly grant an injunction in terms of prayer 3 of the application by Notice of Motion dated 22<sup>nd</sup> October, 2010.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 18<sup>th</sup> day of November 2010.

**L NJAGI**

**JUDGE**