REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 162 of 2009

SEMFEB LIMITED T/A

CINNAMON TREE:.....APPELLANT/APPLICANT

VERSUS

DHIREN HAIR DESIGNER LIMITED.....RESPONDENT/ APPLICANT

(In second Application)

RULING

The Appellant/applicant filed a memorandum of appeal dated 1st April 2009 and filed the same date. The appeal arises because the appellant was dissatisfied with the decision of the Business premises tribunal delivered on the 27th day of March 2009.

Simultaneously with the filing of the memorandum of appeal, was filed an application by way of notice of motion dated and filed the same 1st day of April 2009. It is brought under section 3A of the CPA, order XLI rule 4(1) (b) and order L rule 1 of the CPR (revised rules and all other enabling provisions of the law. 8 prayers are sought namely:-

1. *Spent*

2. *Spent*

3. *That the landlord Respondent be restrained from letting, alienating, selling and or in any way parting with possession of the suit property pending the hearing and disposal of this application.*

4. *That the appellant be immediately reinstated to the suit premises.*

5. *That there be a temporary stay of execution pending the hearing of this application.*

6. *That there be a stay of execution pending appeal.*

7. *That the officer commanding –spring valley police station do ensure the enforcement of this courts', orders.*

8. *That the costs of this application be costs in the appeal.*

The application first came before this court, on 2/4/2009 when interim measures in terms of prayer 2,3,4,5 and 7 were granted as an interim reprieve. The application was ordered served and responses filed and parties heard interparties hence this ruling.

The grounds in support are set out in the body of the application, supporting affidavit, written skeleton arguments, oral highlights, a replying affidavit by one Shrikesh Gheewala sworn on the 9th day of April 2009 and case law. The salient features of the same are as follows:-

-The appellant/applicant was a tenant in the premises that was subject of BPRT 571/08.

-The said proceedings were decided against the appellant on 27/3/2009, whereby the tribunal ordered the termination of the tenancy.

- On the same date of 27/3/2009 the tribunal ordered the suspension of the tribunals order and gave the appellant reprieve to stay in the premises for 30 days.

-The appellant being aggrieved with those orders, moved to exercise his right of appeal and filed an appeal promptly and sought stay of the tribunals orders pending the determination of the appeal.

-The appellant was on the same date of the judgement evicted out of the premises unlawfully and a new tenant put in instead.

-The opposing papers demonstrate that even as at the time the tribunal proceedings were going on, the respondent and a 3rd party had already executed a lease on 20/3/2009, evidenced that they were not going to respect the tribunal orders if the same were going to be issued against them.

-Concede that the applicant went back to the lower court, and attempted to agitate an application for reinstatement. Where upon the respondent raised a preliminary objection that the tribunal was functus officio.

-The applicant then moved to this court, to enforce his rights, because upon suspension of the operation of the tribunal orders for 30 days, it meant that the provisions of cap 301 laws of Kenya were restored and the protected status of the applicants tenancy were to hold till after 30 days.

-The court, is urged to allow the application because the appeal is arguable and if not allowed, the substratum of the proceedings shall have been removed and the appeal will thus be rendered nugatory.

-The court, is urged not to protect the respondents assertion that they have leased out the premises as the same was done in disobedience to the tribunals orders granting reprieve for 30 days, which reprieve has now been swallowed up by the intervening orders of this court.

-Contend further that the alleged lease cannot be protected as the respondent lacked capacity to enter into the same.

In opposition, the respondent put in an application by way of notice of motion dated 6th day of April 2001, and filed the same date. It is brought under order L rule 1 of the CR section 3,3A and 6 of the CPA cap 21 laws of Kenya, and all other enabling provisions of the law. Five prayers are sought namely:-

1. *"Spent*

2. *That there be a stay of execution of the exparte orders issued by this Honourabe court, on 3rd April pending interpartes hearing and determination of this application.*

3. *That the said exparte orders be set aside.*

4. *That there be a stay of proceedings herein pending the hearing and determination of the appellants pending application dated 30th March 2009 filed in the Business premises Rent tribunal case NO 571 of 2008."*

The grounds in support are set out in the body of the application, supporting affidavit, oral highlights in court, a replying affidavit sworn by Dhiren Kumar on the 15th day of April 2009, as well as case law and the salient features of the same are as follows:-

- That indeed disputants herein have been litigating in BPRT 571/2008, which was decided in favour of the Respondent on the 27th day of March 2009.

- By the time the judgement was granted, the Respondent had already entered into a lease with a 3rd party on the 20th

day of March 2009.

- That on 30th day of March 2009, the appellant/applicant filed an application in the BPRT seeking to be reinstated in the premises, to which the Respondent raised a preliminary objection to the effect that the tribunal was functus officio which was argued and a ruling reserved for 17/4/2009. But before reserving the ruling, the respondent's counsel informed the Hon tribunal that a new tenant had been installed in the premises where upon the tribunal ordered a status quo to be maintained meaning that the new tenant was to remain in the premises pending the delivery of the said ruling on the 17/4/2009.

- That in disobedience of the said orders, the appellant/applicant moved to this court, and filed an application on 2/4/2006 and obtained exparte orders reversing the situation.

- It is their stand that had this court, been informed of the existence of the status quo orders, it would not have granted the said exparte orders reversing the situation.

- Contend that the appellant/applicant is guilty of non disclosure of material particulars and is therefore disentitled to the relief sought herein.

- Contend that unless if the orders sought to be upset herein are upset, the Respondent and the 3rd party are bound to suffer greatly.

- That the appellant/applicant has abused the process of the court, by filing similar applications in this court, and the tribunal and as such this application should be dismissed with costs to them.

- Further that the application before the tribunal is still pending.

In response to that submission, the appellants' counsel reiterated the earlier submission and then stressed the following.

- The Landlord's application seeks to entitle the landlord to benefit from his wrongful act of disobeying the tribunal's orders.

- Concedes that they made an application before the tribunal but the same was objected to on the grounds that the tribunals was functus officio.

- Concedes that indeed the tribunal ordered status quo but did not clarify the same. To them the status quo was that the premises were vacant.

- The alleged breached orders have not been shown to this court.

- They rightly moved to this court, to seek the intervention of this court, as they could not sit back and allow the landlord to benefit from his own wrong committed in complete contempt of the tribunal orders.

- Existence of the lease relied upon is evidence that the landlord had no intention of obeying the tribunals orders should they be against them.

- Deny being guilty of non disclosure of material particulars.

- The court, is urged to maintain the status quo in place before the tribunals orders were flagrantly breached in order to avoid rendering the appeal nugatory.

- Contend their appeal is arguable and it has high chances of success, more so when there is no argument by the respondent that the appeal is without merit.

On the law and case law, the court, was referred to the case of **LUGANDA VERSUS SERVICE HOTELS LIMITED (1969) 2A ER 692** where it was held interalia that: "*the plaintiff being given security of tenure by the Act, although he was not in occupation, he was entitled to be reinstated since (……) if he had still been in occupation the court, would have granted an injunction to prevent the defendant from locking him out …….. The defendants having not complied with section 77 of the Act, they could not revoke the contractual right which they had granted and the plaintiff was not restricted to a claim in damages.*

The case of **HADKINSON VERSUS HADKINSON (1952) ALLER 567,** where it was held interalia that " *it was*

the plain and un qualified obligation of every person against or in respect of whom an order was made by a court, of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would as a general rule, result in the person disobeying it being incontempt and punishable by committal or attachment and in an application to the court, by him not being entertained until he had purged his contempt"

The case of the **COACH SAFARIS LIMITED VERSUS SHARIFF HUSSEN NAIROBI HCCC NO 370 OF 1995** decided on the 14th day of February 1996, where Waki J as he then was (now JA) held interalia that:- " *a person who shows he is entitled to a mandatory injunction must not be compelled to take damages in lieu. Nor must a wrong doer be permitted to benefit, however remotely from his wrong doing. More so when the wrong is blatant or where the act or the wrong done is contrary to law. In cases where conduct of the defendant is contrary to the law, the court, has no discretion"*

The case of **RAMZAN EBRAHIM AND ANOTHER VERSUS REVEREND MARGARET WANJIRU NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 462 OF 2000** decided by Onyango Otieno J as he then was (now JA) on the 30th day of May 2000. At page 15 of the ruling, the learned judge had this to say:-

"*In my humble opinion, an order for stay of execution will lead to the applicant reaping the benefit of what may be her own wrong. I do again with respect agree with Bosire J, in the Belle Maison case where he says*

"*Nor must a wrong doer be permitted to benefit, however remotely from his wrong doing" I do believe that the courts, have a duty to discourage as much as possible any action that ignores the legal requirements in this country. As judge Bosire says, the court, shutting its eyes to the act, the court, will in effect be indirectly sanctioning it. In my opinion whether the applicant has excellent reasons to believe the respondent being unnecessary obstinate in giving him physical possession of his property, she should not have ignored the legal process of approaching the issues. She should not have taken the law into her own hands. On my part such an action cannot be condoned by a court, of law, and I cannot allow any party doing so to enjoy the fruits of such an action even for a single day nor can I permit the victim to suffer any more even for a single day. Our law must be respected and people must rely on laws when seeking all remedies"*

The case of **BELLE MAISON LIMITED VERSUS YAYA TOWERS LIMITED** decided by Bosire J as he then was (now JA) (1992) LLR 1702 (HCR). At page 1 of the ruling, it is observed that *the status quo to be restored is the one before the illegal act or the wrongful act complained about. Where there is a right to an injunction, whether or not the damages are adequate is irrelevant. A plaintiff will not be compelled to take damages in lieu."* At page 3 paragraph 1, the learned judge as he then was (now JA) went on:-

"*It offends public policy to flagrantly disobey the law, if it can be shown that such is the case. On the evidence before me, it is clear that the applicant was evicted in total disregard of the clear provisions of the law. This is therefore a case in which a mandatory injunction must issue to protect the right of the applicant".* Paragraph 2, that:- "*nor must a wrong doer be permitted to benefit however remotely from his wrong doing more so when the wrong is blatant or where the act of the wrong doer is contrary to law. In cases where conduct of the defendant is contrary to law, the court, has no discretion. By shutting its eyes to the act, the court, will in effect be in directly sanctioning it"* paragraph 3: "*The defendant having set in motion circumstances which are likely to affect third parties, the remedy of the 3rd party is against it. Moreover the defendant and indeed the 3rd party were restrained from using the suit premises"*

The case of the **RIPPLES LIMITED VERSUS KAMAU MUCUHA NAIROBI HCCC NO 4522 OF 1992** decided by Mwera J in 1992. At page 2 of the ruling, the learned judge made observation that "*a mandatory injunction had been prayed for to compel the defendant/Respondent to reinstate the plaintiff/applicant with all his property. If it was not returned in its original condition, defendant/Respondent was to be ordered to pay for its value"*

At page 7 2nd paragraph, the learned judge went on:-

"*It is not out of the way to say that the defendant/Respondent's actions are not justified or excusable so that a mandatory injunction is refused. Indeed the situation is compounded further by his conduct in putting another tenant in the premises. Distress and eviction took place on or about 29/7/92. On the same date, another tenant was put in possession at a rent of Kshs. 17,000.per month a whooping Kshs. 7,000 over and above what the plaintiff/applicant had been paying. As if that was not enough that tenants was non other than another tenant on the building, one called Charles Munge t/a case Balaika his business in shop No. 1 was called M/S Unit trade printers limited. It was claimed in plaintiff/applicants affidavit and not denied by the defendant/Respondent, that in fact the said Charles Munge used his transport to move plaintiffs' property from the premises. He was thus aiding the defendant in his unlawful act in order to benefit his own business interests. Accordingly it cannot be said that by being the "new" tenant he will be adversely affected for no act of his own at all.*

(At page 8 paragraph 1) in any case where installing the new tenant after an unlawful act by the defendant is in circumstances as these, then, that new tenant's rights should be left to him to sort out with his landlord when a mandatory injunction to reinstate the old tenant is issued"

The Respondent on the other hand referred the court, to the case of **BAO INVESTMENTS AND OFFICE MANAGEMENT SERVICES LIMITED VERSUS HOUSING FINANACE LIMITED** decided by Mwera J on the 29/5/2006, at Kisumu. At page 5 paragraph 2, on non disclosure, the learned judge had this to say:-

"*Non disclosure. The plaintiff always knew of the existence of his case 324/2000 which it withdrew on the day this suit was filed. It had a bearing and relevance here, and it ought to have been so averred in accord with order 7 rule 1 (e) civil procedure Rules. It was not done. This court, is left with the impression that the commission was deliberate, to hide relevant proceedings. Thus whatever the merit of the present case if any, the plaintiff has acted in a manner to disentitle it to the orders sought."*

On the same page 5, the learned judge quoted with approval Omollo JA in the case of **UHURU HIGHWAY DEVELOPMENT LIMITED VERSUS C.B.K. AND 2 OTHERS NAI C.A. 140/05 (CA)** thus:- "*The applicant went before Githinji J (as he then was (now JA) on 6th January 1995 pleadings urgently. It obtained an exparte injunction order 39 rule 3 (1`) of the CPR Rules, revised permits the granting of an ex-parte injunction, but it must clearly be understood that a party who goes to a judge in the absence of another side, assumes a heavy burden and must put before the judge, all relevant materials including material which is against him. It is a universal rule of natural justice that court, orders, ought to be made only after hearing or giving all the parties an opportunity to be heard. Exparte orders whether they are injunctions or whatever forms. An exception to this rule, and for a party to benefit from the exception there must be a good and compelling reason for it……The learned judge was satisfied as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicants application any further, for the courts, must be able to protect themselves from the parties who are prepared to deceive whatever their mature for doing so may be and whatever the merits of the case might be……...if the case is meritorious there can be no reason to conceal some parts of it from the court"*

The case of **REPUBLIC VERSUS COMMISSIONER OF POLICE AND 2 OTHERS EXPARTE JACOB JUMA (2005) EKLR** decided by Nyamu J as he then was (now JA) on the 13th day of May 2005. The centrol theme in it is that, "*the court, has jurisdiction to set aside its own exparte order where it can be demonstrated that the exparte orders, granted by it were based on non disclosure of material particulars"*

The case of **ANDREW OUKO VERSUS KENYA COMMERCIAL BANK LIMITED KENYA AIDS NGO** Consotium, partrick Kamunyu and James Njuguna Nairobi Milimani HCCC No 558 of 2001 decided by F. Azangalala J on the 30th day of May 2005. At page 1 the learned judge observed that:-

"*The plaintiffs' conduct has caused me grave concern. He joined the 2nd defendant without leave of the court. He obtained an exparte interlocutory injunction without disclosing that under the limited grant issued on 28th September 2004, he had been appointed administrator of the estate of the chargor together with one David Scott Ongosi. He did not also disclose that the said David Scott Ongosi, together with 2 other persons, had instituted Nairobi HCCC No. 143 of 1996 seeking an injunction against sale of the suit property. He further did not disclose that the same David Scott Ongosi, together with the public trustee and 2 others had instituted Nairobi HCCC No. 9444 of 2004 seeking an order nullifying, canceling the sale of the suit property to other parties"*

At page 12 the learned judge went on to state thus:- "*In my view the above were material non disclosure and if the same had been disclosed at the exparte stage of these proceedings, the plaintiff would not have been granted the interlocutory exparte injunction " On my part even if I had found that the plaintiff had shown a prima facie case with a probability of success, these non disclosure would have disentitled the plaintiff to the equitable relief of injunction.……"*

On the same page 12 the learned judge quoted with approval the decision of **KING VERSUS THE GENERAL COMMISSIONER** for **the purposes of the income tax Acts for the District of Kensington (1917) IKB 486**, where the learned chief justice vis count as he then was had this to say:-

"*Where an exparte application has been made to this court, for a rule nisi or other process, if the court, comes to the conclusion that the affidavit in support of the application was not candid and did not faily state the facts but stated them in such away as to mislead the court, as to the true facts, the court, ought for its own protection, and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court, that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicants affidavit, and everything will be heard that can be urged to influence the view of the court, when*

it reads the affidavit and knows the true facts. But if the results of these examinations is to leave no doubt that the court, has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.

And lord Warrington L.J "*the court will not allow a plaintiff to obtain any advantage from an exparte injunction which he has improperly obtained. Lord Scrutton L.J….. The court, is supposed to know the law. But it knows nothing about facts and the applicant must state fully and fairly the facts and the penalty by which the court, enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court, will set aside any action it has taken on the facts of imperfects…..*

A plaintiff applying exparte, comes as it has been expressed under a contract with the court, if he fails to do that and the court, finds when the other party applies, to dissolve the injunction, that any material fact has been suppressed, or not properly brought forward, the plaintiff is told that the court, will not decide on the merits and that as he has broken faith with the court, the injunction must go"

The case of **BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED VERSUS SUN PRODUCE EXPORTERS LIMITED AND 3 OTHERS NAIROBI HCCC NO. 3154 OF 1989** decided on the 22nd day of March 2002 by K.H. Rawal. Where at page 2, the learned judge made observations that the applicant had come to court, without disclosing material particulars namely:-

- *The result of the public auction of his property.*

- *He had come at the 11th hour despite earlier notification.*

- *Notice was published in the news paper on 21st February 2002.*

- *He had filed an earlier application of 14th December 1999 to stop the sale of the property which culminated in the consent order extracted on 9th March 2000.*

- *Payments as per the consent order had not been made hence the public auction..*

- *Settlement of the terms of sale of the property had been made by the court itself.*

- *The applicant had been aware of all these previous proceedings"*

Then the learned judge went on "*All these material facts are not disclosed in this application. As per the dictal of caltex oil case, it is clear that the applicant who seeks to get an exparte order has to disclose all the relevant facts to entitlement of an equitable remedy. The court, shall not grant an equitable remedy to the applicant who does not disclose those facts and looses that right, despite the fact that he could have been successful in the final event"*

KENYA ASSEMBLIES OF GOD AND REVEREND PETER NJIRI VERSUS KENYA POWER AND LIGHTING COMPANY LIMITED MOMBASA HCCC NO 68 OF 2004 decided by Khaminwa J on the 19th day of November 2004. At page 3, 2nd paragraph the learned judge observed thus:- "*It is the duty of counsels to disclose material facts when the other side is not represented. It was material here for advocate to disclose not only that a certain suit has been filed in another court, but to disclose the nature of orders given if the same were material to the present issues……where a party is guilty of non disclosure of material facts, the court, is obliged to discharge any orders granted in those circumstances. The practices of hoping from one court, to another seeking favourable judgement is to be discouraged."*

The case of **MUIGAI AND OTHERS VERSUS JOHN WAINAINA AND 2 OTHERS NAIROBI HCCC NO 346 OF 2002** decided by Kihara Kariuki J on the 16th day of April 2004. At page 2 the learned judge observed thus:-

"*The defendant having failed to discharge their paramount duty to make a full and fair disclosure of all the material facts, pertaining to their application (RV. Kensington income tax commissioners, princes Edmond de PO Lignac (1917) 86 LJKB 257)- the defendants are not entitled to the discretionary injunction sought"*

On the courts', assessment of the Rival arguments herein, it has found the following facts to be forming common ground in that- they are not disputed namely:-

1. That the disputants herein have been litigating in the Business premises Rent tribunal vide case No. BPRT

571/2008, with the appellant applicant being the applicant, the tenant and the current respondent being the respondent landlord.

2. That the said proceedings culminated in orders being issued in favour of the landlord on the 27th day of March 2009. The extracted order has been annexed by the applicant to his supporting affidavit to the application as annexture EG2. It was issued and extracted the same date. There are 3 items stated there in namely:-

1. The notice is allowed and the tenancy is terminated.

2. The tenant to vacate the premises within one month from the date hereof.

3. Costs to the landlord.

3. As at the time the applicant moved to this court, on 2/4/2009 the one month reprieve granted by the tribunal had not lapsed.

(4) It is not disputed that the applicant sought reprieve from this court, because he had allegedly been unlawful evicted from the premises during the pendence of the one month reprieve given by the tribunal.

(5) There is no dispute that before coming to this court, the applicant had moved to the same tribunal to seek protective orders namely reinstatement to the premises from which they had illegally been unlawfully evicted.

(6) There is no dispute that the respondent herein raised a preliminary objection before the tribunal raising issue of lack of jurisdiction by the tribunal in that the same had become funtus officio by reason of having delivered final orders in the said proceedings, and by the time the applicant moved to this court, a ruling on the same had not been delivered.

(7) It is common ground that both sides agreed that indeed the tribunal was informed that a new tenant had been installed in the premises, as per the version of the landlord, and that the premises were still vacant as per the version of the tenant. It is then alleged that the tribunal made a pronouncement that status quo to be maintained. According to the applicant, the status quo to be maintained was not clarified. Whereas the stand of the landlord is that this was clarified in that, the new tenant in place had to remain in the premises.

(8) It is common ground that neither party has annexed the tribunals proceedings of 30/3/2009 to enable this court, peruse the same and then determine the correct position. As such all that this court, has before it on this issue is nothing but representations from the bar by both sides.

(9) There is no dispute that the respondent landlord has annexed to his supporting affidavit of their application for setting aside the exparte order, a sub lease made on the 20th day of March 2009, in respect of the same premises that were subject of the tribunal's proceedings which were leased out to a 3rd party during the pendence of those proceedings. Infact vide paragraph 5 of the replying affidavit of Dhiren Kumar, the 3rd party had taken possession of the premises on the 20th day of March 2009.

(10) There is no mention that it was brought to the attention of the Hon tribunal before making the orders of 27/3/2009 that a 3rd party tenant had already been installed in the premises.

(11) There is no dispute that the respondent landlord does not dispute the tribunals extracted orders.

(12) There is no dispute that the major reasons as to why the applicant seeks the intervention of court is because he alleges that:-

(a) The tribunals' orders are valid orders.

(b) They enjoy the same privileges as any other orders in that the addressee is supposed to obey them.

(c) That though the orders were infavour of the landlord, they also favoured the applicant in that they were given one month within which to vacate the premises.

(d) That the tenant had a statutory right in that if aggrieved, he had 30 days within which to prefer an appeal.

(e) That the landlord did not only breach the order, but also the statutory obligation by unlawfully evicting him.

(f) That the tenant applicant has already exercised its right of appeal, and there is an appeal in place, and as such it is proper to preserve the status quo pending the hearing of the appeal, because if the status quo is disturbed their appeal which has high chances of success will be rendered nugatory.

(g) That they are not guilty of non disclosure of any material particulars by not disclosing that they had sought the same orders from the tribunal because they realized that they had gone to a wrong forum in the first instance, and secondly that the landlord raised a preliminary objection against the said application.

(h) Though they agree that indeed the tribunal made a pronouncement of maintenance of a status quo, but the same was not clarified, neither is there proof of the same.

(i) They were entitled to move in the manner moved to protect their interests.

(j) The landlord is un derserving of this courts', discretion because in doing so the court will be sanctioning an illegality.

(13)There is no dispute that the only ground put forward by the respondent landlord as a ground of disallowing the orders granted to the applicant and allowing their application, is because the applicants tenants are disentitled to the reliefs being sought because they are guilty of non-disclosure of material particulars, in that they failed to disclose that they had sought similar prayers from the tribunal, and that a status quo had been granted pending delivery of a ruling on that application.

(14) There is no dispute that the appellant/applicant has already filed an appeal to this court.

Having set out the agreed common facts, the court, has to set out the agreed principles of law applicable. These are:-

1. A mandatory injunction only issues where the facts of the case are clear and straight forward.

2. An applicant seeking stay of execution has to satisfy the applicable ingredients.

3. A party who has benefited from exparte orders granted on the basis of the non disclosure of material facts, risks loosing the said earned orders, once disclosed that material particulars were not disclosed.

4. It is the duty of the addressee of court, orders to obey the same even if he does not believe in their legality. The call to obedience last until the said orders are upset.

5. A court of law, should not allow a litigant to benefit from his own wrong or blatant disrespect of the law.

This court, has given due consideration to said rival arguments in the light of the agreed common background, information and applied the applicable principles of law, and the court, proceeds to make the following findings.

1. That there existed a landlord and tenant relationship between the disputants, which culminated in the tribunals' proceedings in BPRT 571/2008.

2. Indeed orders were pronounced in respect of the said proceedings adjudging the landlord as the victor.

3. The tenant was adjudged the looser, but was given 30 days within which to vacate the premises. This being the case, it is safe to state that as at 27/3/2009 when the tribunal made its orders the tenant was still in the premises and that is why he was given 30 days within which to vacate the premises. Otherwise the court, does not see how the tribunal could have made such an order if it was aware that the premises were vacant.

4. By reason of the said orders, it is correctly submitted by the plaintiffs' counsel, that the plaintiff was entitled to have a reprieve for 30 days meaning that he was to have possession of the said premises for those days.

5. This being the case, it means that the lease entered into between the landlord and the 3rd party in anticipation of the outcome of the tribunal decisions was nothing but a manifestation as asserted by the applicant that they would not obey the tribunals' orders if made against them.

6. The court, believes the assertion of the applicant that the tenant was in the premises as at the time of the pronouncement of those orders. Otherwise the court, does not see how the tribunal could have given time within which to vacate if the premises were already vacant.

7. The respondent landlord does not deny that as at the time the tenant moved to the tribunal on 30/3/2009 and to this court, on 2/4/2009 the 3rd party had been installed in the premises. But does not disclose when this 3rd party was installed in the premises. In the absence of such an explanation the only reasonable conclusion that can be drawn by this court, is that an unlawful eviction took place.

8. Having ruled that an unlawful eviction took place, it means that the landlord acted in total disregard of not only of the tribunal orders, but of the law as well because this court, has judicial notice of the fact that under the parent Act, there is a reprieve period of 30 days within which to appeal.

(ii) The court also has judicial notice of the fact that, in order for the landlord to fruitify the said tribunal orders, in his favour, he was required to extract the orders, have then a adopted in the relevant statutorily mandated court, for enforcement. In the absence of following this laid down procedure, the landlord flauted the law and lawful procedure to gain access to his premises and as such they are undeserving of the court's protection.

9. By reason of what has been stated in number 8 above, the tenant was entitled to seek intervention of the courts', protection in the manner done, and the court, rightly intervened in the first instance because lawful procedures had been breached.

10. When deciding whether the applicant is guilty of non disclosure of material particulars or not, it is imperative for the court, to determine the circumstances under which those state of affairs arose, whether there was deliberate intention to deceive, and gain an unfair advantage over the other. From the scanty facts displayed herein, as well as the application presented to the tribunal by the applicant, exhibited by the landlord/respondent, the tenant made a move in blindness, assuming that the tribunal had enforcement powers. They were no doubt awakened by the about turn by the preliminary objection from the landlord which drove them back to the right forum the tribunal being functus officio could not have bestowed any benefits to any party. Its deliberations were an exercise in futility as it was ultra vire, the mandate it is clothed with by the parent Act having ceased upon it granting final orders. The fore going finding not withstanding, the court, agrees that indeed these should have been disclosed.

11. But the failure to so disclose as above will not be construed against the applicant, first because, the move was null and void and was a non starter, and in the second instance, if this court, were to protect it, it will amount to the sanctioning of disobedience of the tribunals order, as well as flauting of the law, relating to enforcement of the tribunals orders.

12. When the applicant moved to this court, in the first instance, he sought two reliefs namely:

(a) A temporary order of stay pending hearing and determination of the application, and then an injunctive relief. It is noted that the injunctive relief was sought to restore the tenant in the premises, which was accomplished. What is left is determination of stay pending appeal. This being the case all that the applicant has to do is to demonstrate the existence of the ingredients for granting the same namely:

(a) That if stay is not granted, the applicant will suffer substantial loss. From the content of the papers presented by both sides, monetary loss is not stated. What is to be lost is the tenancy. The applicant's argument, is that, due to the special relationship between a landlord and tenant, once the situation is reversed, then the substratum of the appeal will be gone and the appeal will be rendered nugatory.

(b) The second ingredient is that security has been offered. No security has been offered by the applicant, but this court, has judicial notice of the fact that the court, has jurisdiction to attach conditions to an order for stay pending appeal.

In this courts', opinion, since the appeal is already in place, and the applicant has been restored into the premises, It is only just and fair that they be heard on their appeal before they can be told to vacate the premises. The court, has however to ensure that the appellant/applicant does not use the orders granted both as a shield and sword against the respondent at the same time. It is therefore necessary to attach conditions to the stay orders in the interests of justice to both sides.

For the reasons given in the assessment, the court, proceeds to make the following orders:-

1. The landlord's/Respondents application dated 6th day of April 2009 and filed the same date has been disallowed for the following reasons:-

(a) Granting prayer 2 and 3 of the said application, will amount to sanctioning the landlord's disobedience of the tribunals order in the first instance and in the second instance, it will be sanctioning a deliberate flauting of the legal procedures in enforcement of tribunals orders. It is trite that such orders were to allow for a 30 days reprieve and

thereafter the orders have to be adopted by a court of law duly mandated by the law to be adopted as a court order before its enforcement can be commenced.

(b) Prayer 4 cannot be granted because granting the same will be an exercise in futility in that the application presented to the tribunal, was a non starter as the tribunal has no mandate to entertain enforcement procedures.

2. Prayer 6 of the appellant/applicants' application dated 1st day of April 2009 and filed the same date, is allowed pending hearing and determination of the appeal, on condition that the applicant proceeds to ready the appeal for hearing and determination within 90 days from the date of the reading of this ruling.

3. Since the appellant/applicant had a genuine complaint to seek the courts', intervention in a situation where the landlord can be said to have acted in a high handed, oppressive and in utter disrespect of the legal procedures, the applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE