



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 55 of 2004**

**DUBAI BANK KENYA LTD.....PLAINTIFF**

**VERSUS**

**INSURANCE COMPANY OF EAST AFRICA LIMITED.....DEFENDANT**

**RULING**

The Applicant in this case is a bank trading in name and style of Dubai Bank Kenya Limited. It has brought this notice of motion application dated 29<sup>th</sup> June 2007 expressed to be brought under Section 3A of Civil Procedure Rules, OL.r1 of the Civil Procedure Rules and inherent powers of the court and all enabling provisions of law. There are five prayers. However, prayer 1, 2 and 3 are moot. In prayer 4 and 5 the Applicant seeks:

4. That pending the determination of the appeal against the Ruling and Order given on 20<sup>th</sup> June 2007 an injunction do issue to the Defendant by itself, servants and/or agents from terminating or purporting to terminate the Plaintiff's tenancy in the suit premises on the basis of the purported notice dated 13<sup>th</sup> January 2004 or in any other manner whatsoever otherwise than in accordance with the provisions of section 4 of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya

That the costs of this application do abide the result of the said appeal.

There are six grounds cited for this application on the face of it as follows: -

1. The applicant has filed an appeal against the Ruling of Honourable Mr. Justice Ibrahim delivered on the 20<sup>th</sup> day of June 2007 dismissing the Plaintiff's application for an interlocutory injunction.
2. The said appeal is not frivolous. It has high probability of success.
3. If an injunction is not granted the appeal by the applicant will if successful, be rendered nugatory.
4. The respondent will not suffer greater hardship if an injunction pending appeal is granted.
5. On a balance of convenience it is fair and just to preserve the status quo pending the determination of the appeal.
6. **The applicant is ready and willing to give an undertaking as to damages and to comply with**

**such other or further conditions as this Honourable Court may impose.**

The application is also supported by the affidavit sworn by **NICODEMUS KIKOLYA** dated 29<sup>th</sup> June 2007.

The application is opposed. The Respondent has filed grounds of opposition in which 14 grounds are raised.

A little background into this application is necessary at this point. The applicant, Dubai Bank Kenya Limited, herein referred to as the Bank, filed this suit against the defendant, Insurance Company of East Africa hereinafter referred to as the Company, in which it sought *inter alia*, a permanent injunction against the company restraining it from terminating or purporting to terminate the Plaintiff's tenancy on the basis of a notice dated 13<sup>th</sup> January 2004 and secondly a declaration that the Plaintiff's tenancy is a controlled tenancy within the meaning of the provisions of the **Landlord and Tenants (Shops, Hotel and Catering Establishments) Act**.

The Bank also filed an application on 29<sup>th</sup> January 2004, under certificate of urgency by way of chamber summons in which it sought a temporary injunction restraining the company from terminating or purporting to terminate the Bank's tenancy. That application was argued before my brother, **Ibrahim, J.** on 13<sup>th</sup> May, 2004. the learned Judge dismissed the application on the 11<sup>th</sup> June, 2007.

The Bank now seeks an injunction to issue against the company pending the hearing of its appeal against **Justice Ibrahim's** ruling and order thereto. A copy of the memorandum of appeal filed as CA No. 114 of 2007 (Nrb), is annexed to the supporting affidavit and is found at page 70 of the exhibits "NKI".

Also annexed is a copy of the notice of appeal at page 30 of the same exhibits. Mr. Kiplagat, who argued this application on behalf of the applicant, submitted that this court has jurisdiction to grant an injunction pending the appeal, in order to preserve the status quo, and to prevent the appeal being rendered nugatory. He relied on the English case of **ERINFORD PROPERTIES LTD vs. CHESIRE COUNTY COUNCIL (1974) 2 All E.R. page 448**. That court held:

***"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 reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would 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 a holding that an injunction should be granted pending an appeal against the decision to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quod granting an injunction at all."***

***Therefore, in principle, there is no bar to my granting an injunction pending appeal."***

The counsel for the company, Ms. Kirimi, did not contest this court's power or jurisdiction to grant an injunction pending appeal even where a similar prayer was dismissed at an interlocutory stage. I will therefore not belabour the point except state that this court has the jurisdiction to entertain the application.

There seems to be agreement between the parties that the Applicant should show that it has an arguable appeal with a probability of success. The case cited by Mr. Kiplagat gives a proposition of when an application for an injunction pending appeal may be wrong to grant; for instance where the appeal is frivolous or where to grant an injunction would inflict greater hardship than it would avoid.

The Bank relies on the memorandum of appeal. Mr. Kiplagat submitted that there were 3 important issues which make the appeal arguable. Learned counsel submitted that the first issue is that if **Ibrahim J.** had considered Section 21 of **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301**, he could have come to the conclusion that on a *prima facie* basis, the Applicant had shown that its tenancy was a Control Tenancy, having established that it had not been reduced into writing. Counsel

submitted that tenancy between the parties arose by the operation of the law due to the company's conduct in accepting rent from the Bank and allowing it into possession without the existence of tenancy in writing. Counsel submitted that **Ibrahim, J.** found that an estoppel had arisen against the Applicant and argued that it would rely on section 106 of the ITPA to argue that estoppel could not override the said provision of the ITPA nor hoist a statutory tenancy recognized under section 2 of the Landlord and Tenant Act Cap 301. Counsel relied on the case of **ROGAN-KAMPER V LORD GROSVENOR (NO. 2) [1977] KLR 123.** He also relied on the **CA No. 116 of 1998 PWANI DEVELOPMENT LTD. V. LOTUS CINEMA LTD.**

Miss Kirimi for the Respondent did not think that the appeal was arguable. Learned counsel urged the Court to find that no material was placed before the Court, to demonstrate that there was an understanding between the parties to create a controlled tenancy. Counsel also submitted that the Bank had entered into the suit premises as an assignee, but once in, refused to sign the assignment agreement; in the circumstances, Miss Kirimi submitted, the Bank lacks any basis to claim that it was a protected tenant.

None of the cases relied upon by Mr. Kiplagat deal with the circumstances similar to those of the instant case; that is, none deal with the effect of an assignee tenant failure to execute an assignment of lease after the intended assignee has taken possession of the tenancy premises; and further where the Landlord acquiesces and accepts payment of rent. That point is one which I believe should be taken up in the Court of Appeal for its determination.

I have considered the two cases cited by Mr. Kiplagat i.e. **Rogan-Kamper case**, supra, and **Pwani Developments Case**, supra. In each of these cases, the issue of the tenancy created where no lease agreement is executed between the parties is not an easy one to tackle and the Justices of Appeal did not come up with a common view on it. However, it would appear that the Courts of Appeal are inclined to allow injunctive relief to enable the issue to be ventilated fully on appeal, and in their words, in order not to '***render the appeal nugatory***'. Of special consideration in the **PWANI DEVELOPMENT CASE**, supra, was the special nature of the business carried out by the tenant in that case, the Court of Appeal observed as follows:

***“Loss of a tenancy, especially in the case of a cinema hall, can cause very substantial damage. It is not as simple as, say, moving to another shop, when the tenancy in respect of the shop ends. The respondent was in actual possession of the suit premises at the time it sought the injunction. It would be prudent to maintain the status quo as then existing.”***

The position then seems to be that where the Applicant establishes that it has an arguable appeal, and further, that where the issue is simply the right to possess on a statutory tenancy, the rights of the Applicant ought to be preserved pending the determination of the application, by an order of injunction. Ms. Kirimi's argument that the principles in **GIELLA VS CASSMAN BROWN 1973 E. A.**, must be proved before injunction is granted, do not in my view apply to an application for injunction pending appeal. The principles are well enunciated in the various cases. I have quoted, as cited by the Applicant's counsel. Further, the case of **ALGHUSSEIN ESTABLISHMENT VS ETON COLLEGE [1988]1 WLR 587** is easily distinguishable since the issue before the court in the cited case was the actual appeal in which the court dismissed an appeal on the grounds the party cannot benefit from its own wrong. That case can best be cited before the Court of Appeal

On a ***prima facie*** basis, I agree with Mr. Kiplagat that the Applicant's appeal is not frivolous, and further that due to the nature of the business carried out by the Bank, it is necessary to preserve the status quo pending appeal. Having come to the conclusion I have in this matter, I will allow the application on the following terms.

- 1) Injunction be and is hereby issued pending the hearing and determination of the appeal filed against the ruling and order of this court on 20<sup>th</sup> June, 2007 by the Court of Appeal, or pending further orders of this court, in terms of prayer 4 of this application.
- 2) The injunction in order (1) above is subject to the Applicant paying the Respondent all the rent due

in respect of the suit premises, and on condition it continues doing so pending the disposal of the pending appeal, or until further orders of the court.

- 3) The Applicant should undertake to prosecute the intended appeal with speed and diligence.
- 4) Either party has leave to apply.
- 5) Cost of the application be to the Respondent.

**Dated at Nairobi this 19<sup>th</sup> day of October, 2007.**

**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of:-

Kiplagat for Applicant

Ms. Okumu for Respondent

**LESIIT, J.**

**JUDGE**