



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 443 OF 2004**

**NAIROBI INSTITUTE OF BUSINESS STUDIES LTD ::::::::::::::::::::PLAINTIFF**

**VERSUS**

**THE CO-OPERATIVE BANK OF KENYA ::::::::::::::::::::DEFENDANT**

**RULING**

This is an application to restrain the Defendant from evicting the Plaintiff from Co-operative House or in any other way from, interfering with the Plaintiff's business at the said building pending the final determination of this suit. The application is expressed to be brought under Order 39 rules 1,2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all enabling provisions of the Law.

The application is supported by the affidavit of one Lizzie Muthoni Wanyoike a Director of the Plaintiff Company sworn on 5th August 2004. In opposition to the application the Defendant has filed Grounds of Opposition. A brief history of this case is relevant at this stage. The Defendant owns a house christened Co-operative House. By a lease dated 4th July 2003 the Defendant leased 2 floors of the said building to the Plaintiff for a term of 6 years. The rent payable was agreed for the entire term of 6 years. The date of commencement of the lease was given as 1st May 2003. The Plaintiff uses the premises as a Training Institution. On 18th May 2004 the Defendant through its Counsels wrote to the Plaintiff that the said lease would terminate at the expiry of three (3) months from the date of the letter. The letter asked the Plaintiff to vacate the premises at the expiry of the period given failing which the Defendant would take steps to enter the premises without any further notice. This letter was expressed to have been written pursuant to Section 111(h) of the Transfer of Property Act 1882 of India as amended. In professional language this was a Notice to quit under the said Section. It is therefore not surprising that the Plaintiff received this notice with shock. The notice provoked these proceedings.

The facts as given by the Plaintiff are admitted by the Defendant. There is no allegation of breach or default by the Plaintiff under the lease. The Defendant is saying that the Law allows it to give a notice to quit. It has given the notice. The Defendant cannot understand what the Plaintiff is fretting about. It has no cause of action.

At this interlocutory state, I should be guided by the well known principles laid down in **GIELLA – v – CASSMAN BROWN & CO. LTD (1973) E.A. 358**. These are that first the applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly, that if the Court is in doubt as to the existence or otherwise of a prima facie case, it should decide the application on a balance of convenience. I also remind myself that at this interlocutory stage I am not called upon to make definitive findings of fact and law and particularly on conflicting and contentious propositions of Law.

The position the Defendant has taken is quite clear and simple. It is this. That notwithstanding the

Lease dated 4th July 2003 which lease was for 6 years from 1st May 2003 and notwithstanding that the Plaintiff is not in breach of any of its terms, the Law gives it the right to terminate the Lease and it has exercised that right. It should have possession.

The Plaintiff's position is this. That its relationship with the Defendant is governed by the Lease dated 4th July, 2003. It has fully complied with the terms in the same and is entitled to the balance of the term of the Lease. It cannot therefore comply with the notice to quit given by the Defendant. In the Plaintiff's view, this case is unassailable. It has therefore met the first condition set in the case of GIELLA –V- CASSMAN BROWN & CO. LTD (supra).

As regards whether the Plaintiff would suffer irreparable loss and injury unless the injunction sought is granted it was submitted that the Plaintiff has carried out partition of the premises to suit its requirements and incurred expenditure of upwards of 17 million. It has borrowed Kshs 16 million from a financier for its operations. It has about 1500 students who have currently registered for various courses ranging from a few months to 4 years. The effect of the notice will be to interrupt the Learning process which cannot be compensated in damages. The Plaintiff has over 70 members of staff whose livelihoods depend on the smooth operation of the Plaintiff's institution. It has contracts with other parties such as advertisers which contracts stand to come to an end if the Defendant's notice is effected. In short the Plaintiff's case is that no amount of damages can adequately compensate it.

As regards balance of convenience it was argued forcefully that, the same obviously tilts in favour of granting the temporary injunction.

I have now considered the affidavit evidence presented by the Plaintiff and the Grounds of opposition the authorities cited and the submissions by Counsel. Being guided by the Principals I set out earlier in this ruling, I have taken the following view of the matter. The Lease dated 4th July, 2003 between the Defendant and the Plaintiff is not challenged at all. This lease is for a 6 year term and the last date is expressed to be 30th April, 2009. There is no allegation of breach or default by the Plaintiff under the Lease. I have read the said Lease carefully. In the preamble at paragraph (b) the parties have expressed themselves as follows:-

*(b) The Landlord has agreed to grant to the Tenant and the Tenant has agreed to take a lease of the premises hereinafter described for the term and subject to the covenants agreements conditions restrictions stipulations and provisions, hereinafter contained (emphasis mine)*

AND clause 4(g) provides as follows:-

*4. The Landlord covenants and agrees with the Tenant: -*

*(a) (b) (c) (d) (e) (f)...*

*(g) That the Tenant paying the rent hereby reserved and performing and observing the covenants herein contained and on the part of the Tenant to be performed and observed shall subject to the provisions of sub clause (k) (l) and (b) of clause 2 hereof be entitled peaceably to hold and enjoy the premises during the continuance of the term without any interruption from or by the Landlord or any person rightfully claiming under it. (emphasis mine).*

On the basis of the extracts I have referred to above, the Plaintiff was entitled to believe that as long as it kept its part of the bargain, it would enjoy the lease for the entire term. The Defendant had given the Plaintiff the assurance through the Lease. The Plaintiff would not expect that notwithstanding the Defendants assurance it would turn round and use the provisions of a statute to make nonsense of the lease freely, executed by the parties herein. This will be the case of the Plaintiff at the trial. At this stage I do not have to decide whether the Plaintiff will succeed. I am persuaded however, that the Plaintiff has a prima facie case with a probability of success.

As regards whether the Plaintiff would suffer irreparable loss and injury unless the injunction sought is

granted, I have no doubt that it would. The Plaintiff has shown that no amount of damages can compensate it if the Defendant takes possession before the expiry of the term. The Defendant would not seriously challenge this fact. The Plaintiff runs a training institution and now has a population of 1500 students at various stages of learning and tuition. The premises are an approved Examination Centre for various examinations. It has a large staff population and specialized equipment on the premises. There are ongoing negotiations regarding collaborations and affiliations with various universities and colleges. Interruption at this stage would result in injury that cannot be compensated in damages.

Having found that the Plaintiff has satisfied the first two conditions for the grant of injunction it is not necessary to consider the balance of convenience. However, if I was to decide this application on the balance of convenience I would have found for the Plaintiff. An immediate termination would cause substantial inconvenience to the Plaintiff. For instance, the Learning of third parties would come to a stop. Examinations prepared in the meantime would not be taken. A sizeable group of staff would find themselves jobless. Creditors will descend on the Plaintiff in droves.

In the result, I grant the Applicant orders in terms of prayer 2 of the Chamber Summons dated 5th August, 2004. This is conditional on the Plaintiff filing a written undertaking as to damages within 7 days of today. Costs shall be in the cause. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2004.**

**F. AZANGALALA**

**AG. JUDGE**

**Read in the presence :-**