



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KWACH & PALL, JJ.A. & BOSIRE, AG. J.A.)**

**CIVIL APPLICATION NO. NAI. 9 OF 1997 (5/97 UR)**

**BETWEEN**

**NIXO GARMENTS LIMITED.....APPLICANT**

**AND**

**MINAZ SHABANALI MOHAMED JAVER.....1ST RESPONDENT**

**ADIL SHABANALI MOHAMED JAVER.....2ND RESPONDENT**

**(Application for an injunction pending the lodging and hearing of an intended**

**Appeal from the Ruling of the High Court of Kenya at Nairobi)**

**Honourable Mr. Justice Mbogholi Msagha**

**dated 16th day of January 1997**

**in**

**H.C.C.C. NO. 2546 OF 1996)**

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**RULING OF THE COURT**

Before us is a Notice of Motion expressed to be brought under rule 5 (2) (b) of the Rules of this Court. The applicant Nixo Garments Limited (under, the applicant) names in that application Minaz Shabanali Mohamed Javer and Adil Shabanali Mohamed Javer (under, the respondents) as respondents. The applicant seeks an order of injunction against the respondents to restrain them, by themselves or by their agents or servants, from evicting the applicant from premises on a plot of land known as L.R. NO. 209/2627, Njugu Lane, Nairobi until the final determination of an intended appeal against a decision of the superior court (Mbogholi Msagha, J.) dated 16th January, 1997, in Nairobi High Court Civil Case No. 2546 of 1996.

The jurisdiction of the Court under rule 5 (2) (b), above, is discretionary and wide. To succeed an applicant is obligated to show, firstly that he has an arguable appeal. Secondly, that unless the order sought is granted his appeal or intended appeal, if successful, may be rendered nugatory. (See Visram Ravji Halai & Another -v- Thornton Turpin (1963) Ltd. Civil Appeal. NO. NAI. 15 of 1990 (UR)).

The background facts are undisputed and brief. The applicant got possession of the suit premises in or about 2nd August, 1991, on the basis of a written tenancy agreement executed between Messrs. Jubilee Tyres Ltd, as owners, through their advocates Messrs. Esmail & Esmail, and the applicant. The tenancy was expressed to be for a term of 5 years and 3 months, effective from 1st August 1991, and at an agreed rent of Kshs.5,500/= per month, and a certain percentage of the annual site value rates and ground rent. The tenancy having been for over one year, was supposed to but was not registered, as required by the provisions of section 99 of The Government Lands Act, Cap 280 Laws of Kenya, under which the property was registered.

The tenancy ran its full term, but the applicant held over contending that non-compliance with the provisions of section 99, above, created a protected tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya, terminable in

accordance with the relevant provisions of that Act, which were not complied with. We have evidence before us to show that the respondents as the assignees of the suit premises, prior to the expiry of the term, served upon the applicant a notice, by letter dated 13th May, 1996, notifying it that the tenancy would not be renewed upon expiry. Additionally, the applicant was told to vacate and deliver vacant possession of the suit premises on 1st November, 1996, which, according to the tenancy agreement, would be the last day of the tenancy.

The applicant received that notice but did nothing about it until October, 1996, when it filed an action by plaint in the superior court to wit High Court Civil Case No. 2546 of 1996, seeking, principally, two reliefs; firstly, a declaration that its tenancy in the suit premises fell under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, and secondly, an injunction restraining the respondents from evicting it from the suit premises. Filed with the plaint was a Chamber summons under Order XXXIX rules 2 and 3 Civil Procedure Rules, praying for an interlocutory injunction on terms similar to the second prayer in the plaint. For the first time the applicant raised the provisions of section 100 of the Government Lands Act, which prohibits courts from receiving in evidence certain unregistered instruments passing an interest in land and, also, that its tenancy was protected under the provisions of the Landlord and Tenant (Shops and Catering Establishments) Act.

The Chamber Summons, was heard by Mbogholi Msagha, J. who, applying the decision of this court in the case of Batchelor's Bakery Ltd. - v- Westlands Securities Ltd (Civil Appeal No. 2 of 1978), held that the tenancy agreement was valid inter partes notwithstanding that it was unregistered. Further, that the applicant having had the full benefit of the term of the tenancy which it freely negotiated could not properly make an aboutface and seek to challenge its validity. He therefore declined to grant the interlocutory injunction. That provoked the applicant to lodge a notice of appeal in terms of rule 74 of the Rules of this Court announcing its intention of appealing against that ruling and, thereafter, brought the present application.

The applicant contends that absence of registration invalidated the subject tenancy and creates a bar to the adduction in evidence before any court the tenancy instrument. Consequently, its relationship with the respondents may only be regarded as a month to month tenancy terminable as provided under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The applicant also raised for the first time before us the issue with regard to the effect of the assignment of the suit premises to the respondents over the tenancy, but we think that the issue having not been pleaded does not arise before us for consideration. Moreover, it was not raised in the superior court when the injunction application was canvassed there.

Mrs. Rawal who urged the application before us on behalf of the applicant submitted, inter alia, that the Batchelor's Bakery Case (Supra) does not apply to this matter on the ground that it was based on the provisions of section 32 of the Registration of Titles Act, Cap 281 Laws of Kenya (under, RTA). In her view, also section 2 (3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, does not cover section 99 as read with section 100 of the Government Lands Act, in as much as the Act does not have the equivalent of section 32 (2) of RTA.

On the other hand counsel for the respondents, Mr. Mohammed Nyaoga, submitted, that the tenancy agreement is a contract inter partes. Consequently the instrument thereof is receivable in evidence. Additionally, he submitted that the applicant had the full benefit of the tenancy and that its intention in bringing the action, is mainly to delay the giving up and delivery of vacant possession of the suit premises. In his view no question of law is raised in the suit as would entitle the applicant to the injunction prayed for.

The starting point in the determination of this application is the case of Batchelor's Bakery -v- Westlands Securities Ltd (Supra). The applicant's case is that the application of the case does not extend to unregistered registrable land transactions under the Government Lands Act. It is trite law that the substantive law governing transactions under the Government Lands Act, as also the RTA and Land Titles Act Cap 282 Laws of Kenya, is The Transfer of Property Act under, TPA. Section 107 of the Act, makes it mandatory for leases for a period exceeding one year, as the one under consideration here, to be registered; otherwise they would not be legally recognised. That provision in a way reechoes the provisions of section 99 GLA. There is an equivalent provision under RTA to wit section 32. As at the time the Batchelor's Bakery Case (Supra) was decided, section 32 (2) RTA, had not been enacted. So the decision was arrived at on the basis of the law as it stood before that sub-section was enacted. So when the court in Batchelor's Bakery Case (Supra) held that an unregistered tenancy would be regarded as a contract inter partes, it had in mind not just the provisions of section 32 of RTA but also the other provisions of the law requiring registration. In his judgment, Madan J.A. (as he then was) said:

"In my opinion section 106 (TPA) is intended to regulate the giving of notice prior to determination of the lease by parties who have not themselves provided for it. It has no application to the period of the lease which is agreed by the parties in the agreement and therefore prevails. I agree that such a contract is valid inter partes even in the absence of registration, but it gives no protection against the rights of third parties, Grosvenor -v- Rogan Kamper (1974) EA 446. In this case there was a specifically enforceable tenancy agreement in writing for a lease for a term exceeding five years. The Act [Landlord and Tenant (Shops, Hotels and Catering Establishments) Act] recognizes the validity of an agreement for a lease in the definition of tenancy" ...."

Later, he (Madan J.A.) said:

"If the Legislature had intended that section 107 or section 32 of the Registration of Titles, Act, (Cap 281), should still apply, first, it would not have gone to the trouble of enacting the definition "controlled tenancy" and "tenancy" in the form in which it did; secondly it would have been the easiest of things to have said so."

Both sections 107 TPA and 32 RTA would not have been stated disjunctively if the court intended that its decision would be confined to RTA. They have been so stated to show that the court's reasoning applied not only to section 32 RTA but also to provisions of other laws to which section 107 TPA applied. That would include GLA.

In view of the foregoing the applicant's intended appeal raises no arguable issue as would entitle it to an injunction. Moreover, it presented its case both to the superior court and to this Court in such a slanted manner as showed lack of candour. For instance, the affidavit in support of the injunction application to the superior court deliberately excluded important documents like the tenancy instrument which it alleged was invalid. We expected it to be annexed to the supporting affidavit, if only for court's inspection. The other documents are the deed of

assignment, which we think would have shown the circumstances and events which led to the respondents becoming owners of the suit premises, and documents, if any, showing the applicant's reaction upon receipt of the notice requiring it to quit and deliver vacant possession of the suit premises at the expiry of the subject tenancy. The applicant did no better in the application before us. Having sought a discretionary and equitable relief both in the superior court and before us the applicant was obliged to, but did not, show utmost candour in this application, with the result that we do not think it is deserving of the relief sought. The application fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 31st day of January, 1997.

**R. O. KWACH**

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**JUDGE OF APPEAL**

**G. S. PALL**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**AG. JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.