REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal 160 of 1995

M/S GUSII MWALIMU INVESTMENT CO. LTD

M/S NICO AUCTIONEERS LTD.....APPELLANTS

M/S NAKURU COMPUTERS LTD.....INTERESTED PARTY

AND

M/S MWALIMU HOTEL KISII LTD.....RESPONDENT

(Being an appeal from a ruling of the High Court of Kenya at Kisii (Mbaluto, J.) dated 14th August, 1995

IN

H.C.C.C. NO. 260 OF 1995)

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JUDGMENT OF TUNOI, J.A.

This appeal is from the ruling of the High Court of Kenya sitting at Kisii (Mbaluto, J.) delivered on the 11th August, 1995. In the said ruling, the Court allowed an application by the respondent for an order of interim injunction restraining the appellants from interfering with the respondent's quiet possession and enjoyment of those leasehold premises situate on Kisii Town/Block III/214 (the suit premises) until the final determination of the suit. The Court further ordered the suit premises to be opened and the keys thereto handed over to the respondent forthwith.

The facts and the background of the appeal have been ably and fully set out in the judgments prepared by Shah and Lakha, JJ.A. and I will not repeat them.

In my view, the only issue in this appeal is whether or not the learned judge was right in granting the respondent's application for temporary injunction. Mr. Mogikoyo, for the appellants, has assailed the learned judge's ruling on a number of grounds. Firstly, that the learned judge erred in failing to find that the first appellant was merely exercising its rights under the lease agreement between it and the respondent to re-enter and take possession of the suit premises; secondly, that full provisions of the lease

agreement were not considered; thirdly, that the learned judge was wrong to hold that the appellants trespassed into the suit premises and in finding that there was no legal basis for distress for rent; and, finally, that the learned judge should have held that the interested party's occupation of the suit premises clearly terminated the tenancy between the first appellant and the respondent and that the application prosecuted before him had been overtaken by events. As can be seen, these are indeed weighty issues which can only be ventilated and determined by the superior court after a full consideration of all the available evidence as most of them hinge on the evidence, which unfortunately, could not be made available to the learned judge by the rival affidavits filed by the parties.

However, when a judge has to decide to grant or withhold an injunction, whether permanent or temporary, he invokes his judicial discretion and although the discretion is wide, it is exercised only on settled principles and "not according to private opinion, sympathy" or benevolence or capriciously see M. Sethat v P. Singh [1931] 13 K.L.R. 2. Where there has been a wrong exercise of discretion, it would be set aside. Such instances are where the Court misdirects itself, or acts on matters on which it ought not to act or fails to take into consideration.

The conditions for the grant of interlocutory injunction are laid down in Giella vs Cassman Brown & Co. Ltd [1973] EA 358 at page 360 and having been cited to the learned judge and expounded on them at length by submissions by counsel for the respective parties, the learned judge, in my view, correctly applied those principles in the determination of the application before him and I do not think that there is any justification to interfere with the exercise of his undoubted discretion. I am of the view that he was plainly right. I have had the advantage of reading in draft the judgment of Shah, J.A. and I agree with him. In the result this appeal is dismissed with costs.

Dated and delivered at Kisumu this 27th day of September, 1996.

P.K. TUNOI

…….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, SHAH & LAKHA JJ.A.)

CIVIL APPEAL NO. 160 OF 1995

BETWEEN

M/S GUSII MWALIMU INVESTMENT CO. LTD

M/S NICO AUCTIONEERS LTD.....
……...APPELLANTS

M/S NAKURU COMPUTERS LTD.....…….INTERESTED PARTY

AND

**M/S MWALIMU HOTEL KISII LTD.....
…….....RESPONDENT**

(Being an appeal from of ruling of the High Court of Kenya at Kisii (Mbaluto, J.) dated 14th August, 1995

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JUDGMENT OF SHAH J.A.

Hotel premises known as KISII MWALIMU HOTEL situate on plot known as KISII TOWN/BLOCK/III/214 was leased to the respondnt, Mwalimu Hotel Kisii Limited by the first appellant, Gusii Mwalimu Investment Limited. For a term of 5 years and 3 months commencing 1st day of July, 1989 at a monthly rental of Shs.22500/=. The lease which was unregistered was signed by both parties thereto.

The term granted per the said lease expired by effluxion of time on 30th September, 1994.

The lease provided for renewal of the term for a further term of 5 years and 3 months provided the lessee had given notice of one calendar year to the lessor of his (sic) intention to exercise such option to renew. The lease is silent as to the mode of exercising such option that is, by registered post, by ordinary post or by hand etc. I will revert to this aspect in due course.

Some proceedings were taken by the first appellant (hereinafter referred to as "the landlord") in the Business Premises Rent Tribunal, being Tribunal case No. 105 of 1994.

An application was filed in the said Tribunal on 1st June, 1994. It would appear that the application by the landlord was for leave to levy distress on the mistaken notion that he lease in question not being registered, created a tenancy controlled under the Landlord & Tenant (Shops, Hotel & Catering Establishments) Act. Cap 301 Laws of Kenya (The Shops Act). Both the landlord's and tenant's counsel, it would appear, laboured under the mistaken notion that the tenancy created by the said lease was controlled under The Shops Act.

The Chairman of the said Tribunal dismissed the said application, quite correctly in my view, on the basis that the tenancy created by the said lease was (despite no registration) not a controlled tenancy. This order was made on 19th day of May, 1995.

Thereafter the landlord moved at lightening speed. On 22nd May, 1995 the landlord caused a distress to be levied to recover rent (emphasis mine) in the sum of Shs.357,237/75 plus legal fees in the sum of Shs.40,000/-. Having levied such distress a Court Broker & Auctioneer, Mr. N.K. Nyariki of Nico Auctioneers Limited wrote to the respondent (on 23rd July, 1995) to the effect that the goods distrained would be released upon payment of Shs.297,237/95 plus the auctioneer's charges. There was no suggestion of returning the goods to the demised premises.

I note that Nico Auctioneers Limited was granted the authority to act as bailiff to levy distress on the very

day it levied the said distress.

I also note that on 22nd day of May, 1995, the very day on which distress was levied, the interested party (the third appellant before us) was informed by the landlord that the premises in question were ready for occupation by the interested party. The handing over agreement in respect of the premises in question was also signed between the landlord and the interested party on 22nd day of May, 1995. The lease between the landlord and the interested party was executed on 22nd day of April, 1994 some five months prior to the date the term of the lease between the landlord and the respondent was to expire.

In this state of affairs the respondent filed suit against the appellants in the superior court on 25th day of May, 1995 seeking (inter alia) a permanent injunction to restrain the landlord from trespassing on to the suit premises, an order for return of chattels distrained and damages. On the same day the respondent sought a temporary injunction restraining the landlord from interfering with its possession and enjoyment of the suit premises. The application was couched in terms as to seek restraining orders. However as a result of the orders made by the superior court (Mbaluto J.) the respondent's possession of the suit premises was restored and this court was informed from the bar that the respondent was still in possession of the suit premises. The order of Mbaluto J. therefore was a mandatory one and it appears that normal conditions for the making of a mandatory order were not considered. It would also appear that the first appellant did not (after the making of such order) seek any conditions. The granting of the order which referred to opening of the suit premises and return of the keys to the tenant was and is not fatal. A similar situation in the case of K.I.G. Bar Grocery & Restaurant Limited vs Gatabaki & Another [1972] E.A. 503 when the Court of Appeal for East Africa said this at page 504 pre Mustafa J.A.

"The order is curiously worded. Paragraph 1 of the order is couched in negative terms and appears to prevent the appellant from interfering with the respondents' possession of the premises. However in paragraph 2 there is mention of "repossession" by the respondents. It is common ground that what the order purported, inter alia, to do, and what in effect was done, was to order the appellant to vacate the premises it had re-possessed and to hand back possession thereof to the respondents. The order therefore was in fact a mandatory one, and it does not seem that the normal conditions for the making of a mandatory order were considered."

In other words that court did not say that the order made was invalid.

I have gone into the restraining and mandatory aspect of the injunction as the appellant says in his ground of appeal number 9 that "the learned judge erred in issued (sic) orders that were not prayed for." The learned judge was not specifically asked to make a mandatory order to place the tenant back in possession but the tenor of the application and the nature of the arguments before the learned judge turned on the issue of the tenant being put back into possession and it is now a fait accompli that the tenant is back into possession.

If the possession was taken lawfully by the landlord I would have had no hesitation is saying that an application for restrictive injunction cannot invite mandatory orders. But the position in this case is startlingly different. As I have pointed out the possession was obtained at lightening speed. In so doing, in my view, the landlord acted illegally.

The landlord's argument is that the tenant was a trespasser as from 1st October, 1994 and that a trespasser is not entitled to protection of a court of equity. If the tenant was a trespasser as from 1st October, 1994 the landlord could not have levied lawful distress, after 31st day of March, 1995. In this case the distress was levied on 22nd day of May, 1995. The very act of levying distress in this particular case shows the existence of tenancy.

Section 5 of the Distress For Rent Act says:

"5. Any person having rent in arrear an due upon a demise, lease or contract after the ending or determination of the demise, lease or contract, may distrain for the arrears after the ending or

determination in the same manner as he might have done if the demise, lease or contract had not been ended or determined:

Provided that distress under this section shall be made within the space of six months after the determination of the demise, lease or contract and during the continuance of the landlord's title or interest and during the possession of the tenant from whom the arrears became due."

This section clearly stipulates that no distress can be levied six months after the end of the demise, lease or contract. Yet the landlord proceeded to levy distress some one month and 22 days after the expiry of the aforesaid period of six months. So if the landlord is correct in its stand it could not have lawfully levied distress. The landlord must stand or fall by its own averments and arguments. It cannot approbate and reprobate. On the landlord's own arguments I hold that the distress was illegally levied. But that is not all.

What is the effect of levying such distress? Levying of illegal distress does not place landlord in good standing in a court of equity. Whilst the landlord is not seeking an equitable remedy here I would say that the landlord's argument that the tenant was a trespasser as from 1st October, 1994 is of no avail to the landlord.

But was the tenant a trespasser? On landlord's own showing it is clear that it treated the tenant as a tenant after 1st October, 1994. Landlord's own rent books exhibited in superior court shows that the landlord charged rent (monthly) to the tenant as follows:

October, 1994 rent - debited on 31/10/94 - Shs.22,250/=

November, 1994 rent- debited on 30/11/94- Shs. 22,250/=

December, 1994 rent- debited on 31/12/94- Shs. 22,250/=

January, 1995 rent- debited on 31/1/95- Shs. 22,250/=

February, 1995 rent- debited on 28/2/95- Shs. 22,250/=

March, 1995 rent- debited on 31/3/95- Shs. 22,250/=

April, 1995 rent- debited on 30/4/95- Shs. 22,250/=

May, 1995 rent- debited on 1/5/95- Shs. 22,250/=

There is also evidence that the landlord accepted some payments of rent - as rent, until 14th March, 1995.

Having so charged rent for a period of eight months after the expiry of the lease the landlord cannot be heard to say that the tenant was a trespasser. It has been urged that the tenant has not pleaded its case on this basis. It is true that the plaint is not elaborate enough to state the tenant's case on the basis of the facts I have just gone into. But the factual evidence as I have adverted to was before the learned judge. Pleading are not yet closed, or so it appears, as there is no defence on record. Pleading can be amended and in my view it would be wrong not to grant a remedy which ought to be granted for want of a simple alternative pleading like:

"The defendant having expressly or impliedly assented to the plaintiff continuing in possession after expiry of lease cannot now be heard to say that the plaintiff is a trespasser."

Such a pleading can even come in the 'Reply to Defence'.

In any evenvt S.116 of the Transfer of Property Act or S.52 of the Registered land Act (in this case

section 52 of the Registered Land Act, Cap 300 Laws of Kenya is applicable) quite clearly states that a tenant holding over the expiry of the lease and landlord assenting thereto expressly or impliedly is not a trespasser. S.52 of the Registered Land Act says:

52(1) Where a person, having lawfully entered into occupation of any land as lessee, continues to occupy that land with the consent of the lessor after the determination of the lease, he shall, subject to any written law governing agricultural tenancies (we are not concerned with an agricultural tenancy here) and in the absence of any evidence to the contrary, be deemed to be a tenant holding the land on a periodic tenancy on the same conditions as those of the lease, so far as those conditions are appropriate to a periodic tenancy.

(2) For the purposes of this section, the acceptance of rent in respect of any period after the determination of the lease, shall, if the former tenant is still in occupation and subject to any agreement to the contrary, be taken as evidence of consent to the continued occupation of the land."

I would not succumb to the temptation of not granting an interlocutory equitable remedy merely for want of proper pleading. The plaint, as I have pointed out, can be amended, more so when there is evidence on record to justify such an amendment and here such evidence was provided by the landlord himself. I would not drive a party away from the judgment seat when the facts of the matter call out for obvious righting of a wrong.

To obtain possession by levying illegal distress is per se wrong. It is also wrong for a court bailiff (in this instance it was mischievous) to cart away the tenant's goods under the guise of such distress. That is what exactly happened here. Section 4 of the Distress for Rent Act reads:

"4(1) Where any goods or chattels are distrained for rent reserved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within 10 days after such distress has been made, and notice thereof (stating the cause of making of the distress) left on the premises charged with rent distrained for (underlining mine) pay the rent together with the costs of the distress, or replevy them, with sufficient security to be given to the bailiff according to law, the person distraining may lawfully sell on the premises (emphasis added) or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner.

This sub-section clearly envisages having goods at the premises in question for at least ten (10) days to enable the tenant either to pay the rent or replevy them. It does also envisage impounding of goods within a limited area of the premises. But this sub-section does not empower a bailiff to remove the goods or chattels for storage elsewhere the consent of the owner. The tenor of the whole section 4 of this Act is that the goods or chattels seized should remain in situ for 10 days.

In the old days chattels were either impounded on the premises or removed to a pound off the premises. In England Distress For Rent Act 1737 enacted the provision (inter alia) that goods may be impounded on the premises. Section 4 of our Distress for Rent Act so provides. Normal distresses are impounded on the premises unless the tenant otherwise request. There are not public pounds at all. There are exceptions to impounding off the premises but these are not relevant for the purposes of this appeal. The bailiff has to be careful and follow the strict letter of the law between seizure and sale. Alas! In Kenya to-day bailiffs (who are Court Brokers) seem to flout the law with impunity. Distresses are used to obtain possession when the same can never be used for such purposes.

The landlord effectively obtained possession by the said illegal distress. Obtaining of possession in this manner is clearly shown by the fact that on 22nd May, 1995, the landlord informed the interested party, in writing, that the suit premises were ready for occupation by the interested party. The tenant had no choice but to go to the superior court for remedy.

The landlord may also have acted illegally, that is, contrary to Section 90 of our Penal Code (Cap 63

Laws of Kenya) which reads

"90. Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or threats in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter upon the land or not (emphasis added) is guilty of the misdemeanor termed forcible entry:

Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry."

I have no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession.

I revert to the alleged exercise of option by the tenant. There is no written evidence of exercise of such an option. The tenant says it exercised such option. The landlord says it did not do so. That will be a matter for trial court. The option clause in the lease is inelegantly worded as follows:

"The lessee observing the obligations covenants herein reserved and his part to be observed he may obtain a further lease of the demised premises for a further terms of three (3) years on conditions to be agreed by the parties and provided that the lessee gives notice of one calender year to lessor of his intention to exercise his option to renew. The lessor to give the lessee a one year notice of intention to repossess the undeveloped plots."

It is one of those clauses which could well be void as it does not provide (inter alia) a formula for assessing rent in the event of a dispute. See Sands vs Mutual Benefits Ltd. (1971) E.A. 156. This is High Court decision which I would very much respect as it is based on sound principles and is well reasoned.

Even if I were to hold that the tenant was at the material times a trespasser and that it had not pleaded holding over I would not sanction a situation such as in this case, that is, obtaining possession without a court order. That factor alone justified the making of the orders the learned judge made.

There is a curious paragraph in the affidavit filed on behalf of the landlord. I refer to that sworn by Mr. Tinaga the General Manager of the landlord Company. He says:

"4. That paragraph 4 of the said affidavit is untrue. The applicant conspired with our previous advocates to sabotage our endeavour to collect rent from them-."

I see no proof of such a serious allegation. However if the landlord's counsel conspired with the tenant to harm the landlord, the landlord's remedy, if any, lies against the advocate. Non-payment of rent, or irregular payment of rent (the latter method appears to have been acquiesced into by the landlord) does not entitle a landlord to take possession by distress. He must follow the procedure for such remedy as laid down in law; that is to issue a tenancy notice in case of protected tenancy, or to file proceedings in case of unprotected tenancies.

To put the record straight I must point out that the tenant's advocate had put forth the following points to the learned judge:

1. That the landlord trespassed by levying illegal distress.

2. The landlord removed tenant's goods from the premises and dispossessed the tenant and also handed over possession to a third party.

3. The landlord's acts were unlawful.

4. Rent was paid up-to date. This argument brings out the issue of debiting of rent upto May, 1995.

There was certainly an issue before the learned judge raised by Mr. Mogikoyo for the landlord that distress was not under S.4 of the Distress for Rent Act and that it was under S.5 of the said Act. If Mr. Mogikoyo's argument was right (and it was not) the landlord could not have even levied distress. The rent cards were placed before the learned judge by the landlord itself. It cannot therefore be heard to say that it considered the tenant as a trespasser, having debited rent after expiry of lease. Mr. Mogikoyo also argued that rent was due upto 22nd May, 1995. This argument clearly enforces the issue of holding over. His argument that the landlord took possession in accordance with the lease is totally misdirected. The facts relating to taking of possession have been already gone into by me.

Finally I say that the learned judge exercised his discretion (which he undoubtedly had) judicially and properly. I would not interfere with the exercise of such discretion as I do not see that the judge has made an error which amounts to misjustice. The judge restored the lawful status quo that is the possession in the tenant. Had he not done so there would in fact have been misjustice. I would respectfully adopt (by parity of reasoning) the words of Hancox J.A. (as he then was) in the case of KIBIY Arap YEGO VS EMILY & ANOTHER, (Civil Appeal Number 73 of 1985) (unreported); at page 2 of his judgment he says:

"Each party seeks to maintain status quo, but they differ as to what the status quo was at the material time. Did the appellant forcibly enter the land as Emily described, or was he entitled to be there as a registered proprietor, notwithstanding the allegation that the transfer was procured by fraud as alleged in the defence and counterclaim? As was stated in THOMPSON V PARK [1944] 2 All E.R. 477, a litigant cannot wrongfully and illegally bring about a state of affairs and then apply to court to preserve that state of affairs as the status quo by way of an injunction. In that case GODDARD L.J. (as he then was) said at p.479:-

"The status quo that could be preserved was the status quo before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injuction."

The converse can also be true. Can a court of equity allow a litigant who takes unlawful and improper steps to evict a tenant to say that the tenant's application ought to be dismissed as the litigant has already put some one else in possession thereby improperly and illegally changing the status quo.

It will be remembered that this court in the case of Kamau Mucuha vs The Ripples Ltd. (Civil Application number NAI 186 OF 1992) (unreported) followed what was illustrated by GODDARD L.J. in THOMPSON V PARK(supra), that is to say it is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the status quo which must be maintained. In this case if I were to allow the appeal I would be giving my assent to occupation of the premises by a third party and assist the landlord to perpetuate what it did illegally. My equity conscience does not allow that.

I would dismiss this appeal with costs payable by all respondents jointly and severally.

Dated at Kisumu this 27th day of September, 1996.

A.B. SHAH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: TUNOI, SHAH & LAKHA JJ.A.)

CIVIL APPEAL NO. 160 OF 1995

BETWEEN

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…….....RESPONDENT

(Being an appeal from a ruling of the High Court of Kenya at Kisii (Mr. Justice Tom Mbaluto) dated 14th August, 1995

IN

H.C.C.C. NO. 260 OF 1995)

****

JUDGMENT OF LAKHA, J.A.

This is an appeal by the unsuccessful defendants and an interested party against the decision of the superior court (Mbaluto, J.) given on August 14, 1995 whereby he issued a temporary injunction restraining the appellants from interfering with the respondent's quiet possession and enjoyment of the leasehold premises on L.R. No. Kisii Town/Block111/214 (the suit property) until the final determination of the suit and further ordered the premises to be opened and the keys thereto handed over by the second appellant to the respondent forthwith.

By a Lease dated September 11, 1989 the respondent became the lessee and the first appellant the lessor of the suit property for a term of 5 years and 3 months commencing on April 1, 1989 at a monthly rental of Shs.22,500/=. The lease was duly executed by both parties but remained unregistered. The term of the lease expired by effluxion of time on September 30, 1994. The said lease provided, inter alia, as follows"-

"1(p) Upon the expiration or sooner determination of the said terms to deliver up the said premises to the Lessor with all locks, keys fastenings;

4. PROVIDED FURTHER AND IT IS HEREBY AGREED AND DECLARED THAT:-

The lessee observing the obligations covenants herein reserved and his part to be observed he may obtain a further lease of the demised premises for a further five and three months (5) years on conditions to be agreed by the parties and provided that the Lessee gives notice of one calendar year to the Lessor of his intentions to exercise his option to renew."

It is not in dispute that on May 13, 1994 the first appellant wrote a letter to the respondent in the following terms:

"Kisii Mwalimu Hotel

P.O. BOX 2427

KISII

Dear Sir/Madam,

RE: LEASE AGREEMENT

We wish to bring to your attention the above lease agreement clause (4). Please if you had any intention of continuing with the above lease, you should have given us a notice as per that clause.

We therefore regret to inform you that the premises have been leased to somebody else who is making arrangements to take over.

Please make arrangements to replace the lost/damaged property as per our earlier letter to you immediately as you make arrangements to vacate the place. Also our rent arrears due amounting to KShs.178,000.00 should be paid up immediately.

Thank you.

Yours faithfully,

ABEL NYAKUNDI

CHAIRMAN"

On May 22, 1995 the first appellant caused a distress to be levied against the suit property by the second appellant. This provoked the suit giving rise to the present appeal. In the plaint (paragraph 5) the plaintiff alleged that it had exercised the option to renew as provided for in the lease and the plaintiff was still the lessee in respect of the suit premises. The plaintiff further alleged (paragraph 9) that the distress amounted to an illegal eviction of the plaintiff contrary to the provisions of the lease and amounted to an interference to the plaintiff's right to quiet enjoyment of the leasehold property for which it claimed general damages. Finally, the plaintiff also claimed (paragraph 11) against all the appellants jointly and severally a permanent injunction restraining them from further trespassing on the suit property and an order compelling the return to the respondent all chattels as per an inventory made by the second appellant and dated May 22, 1995.

On the same day the plaintiff also filed an application for an interlocutory restraining injunction as aforesaid pending the determination of the suit. The application was supported by an affidavit of a

director of the respondent. The General Manager of the first appellant also filed a replying affidavit in opposition to which a director of the second appellant also filed a replying affidavit. The hearing before the superior court was confined to the sole issue whether the respondent was, in the circumstances entitled to n interlocutory injunction as prayed. The learned judge made for fundamental findings; first, that the argument about the non-existence of the tenancy between the first appellant and the respondent lacked substance; secondly, that there was some type of tenancy as otherwise there would have been no need for the first appellant to refer the matter to the Business Premises Rent Tribunal (Tribunal) if the relationship of landlord and tenant did not exist between the parties; thirdly, that the act of distress was a trespass to secure the determination of the tenancy through legal process and, finally, that the respondent had established a prima facie case of trespass with a probability of success. It as urged upon us by Mr. Mogikoyo for the appellants that the learned judge erred in each of the aforesaid four findings and in granting the injunctions ordered by him.

I will now proceed to examine each of these findings of the learned judge. First, it is not in dispute that the tenancy of the respondent under the lease terminated on September 30, 1994. The respondent's case was based solely on the ground that it had exercised the option to renew as provided for in the lease and that the plaintiff was still a lessee in the suit property. No evidence, however, was produced before the superior court as to the alleged exercise of the option. Assuming, without deciding, that the option could have been exercised verbally there is nothing deponed to that effect in the supporting affidavit of the application for the interlocutory injunction. The finding of the learned judge that some type of tenancy must have existed is a finding of an unspecified tenancy which was neither pleaded nor urged before the superior court. As was said by Scrutton, L.J. in Blay v. Pollard and Morris (1930) 1 K.B. 682:-

"Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course."

This passage was cited with approval in Captain Harry Gandy v. Caspair Air Charters Limited (1956) 23 EACA 139.

On appeal, Mr. Mainye for the respondent in support of the learned judge's finding submitted that after the determination of the lease on September 30, 1994 the respondent continued to be a tenant. I cannot accept this submission as it was not properly or at all pleaded nor fully canvassed in the superior court. There is a long line of decided cases that reliefs cannot be granted on the basis of issues which were not pleaded or urged before the superior court. I recognise, of course, that pleadings may be amended but it is of mild interest to note that there was no amendment made or sought. Nor can a new point be taken on appeal if the point had not been properly pleaded in the court below. I have reminded myself as to the principles applicable to objections of this nature, in the light of cases decided by this court's predecessor. These are in chronological order:

1. Vidyarthi v Ram Rakha [1957] EA 527, in which it was held that a plaintiff who had relied in his pleadings exclusively on a resulting trust in his favour could not on appeal be heard to allege an express trust, especially as the whole conduct of the proceedings below made it clear that only a resulting trust was in issue.

2. Tanganyika Farmers Association Ltd v. Unyamwezi Development Corporation Ltd [1960] EA 620, in which it was held that although an appellate court has a discretion to allow an appellant to take a new point on appeal it will not do so if the matter had not been properly pleaded or if all the facts bearing on the new point have not been elicited in the court below. The court cited with approval and followed three English authorities to the same effect, Ex parte Firth (1882) 19 Ch Div 419, North Staffordshire Railway Co v Edge [1920] AC 254, and The Tasmania (1990) 15 AC 223.

3. Saggaf v Algeredi [1961] EA 767, in which it was held that a new point which had not been pleaded or canvassed should not be allowed to be taken on appeal.

4. Warehousing and Forwarding Co v. Jafferali [1963 EA 385. This was an appeal to the Privy Council

from a decision of the Court of Appeal for East African which had allowed an appellant to raise a new point of law for the first time on appeal. Lord Guest delivering the opinion of the Board said that there would have been no objection if the facts had been fully investigated and would have supported the new case, but as the question was never investigated, the new point should not have been allowed to be argued. Lord Guest did however cite n extract from the speech of Lord Watson in Connecticut Fire Insurance Co. v. Kavanagh (1892) AC 473 to the effect that if the question is one of law turning on the construction of a document if may be not only competent but expedient to entertain the plea, but only if the facts, if fully investigated, would have supported the new plea. This proposition was accepted and followed by this court in Madhavdi v Sardrilal Civil Appeal 5 of 1976.

5. Visram v Bhatt [1965] EA 789, in which the former Court of Appeal held that where an issue, which has not been pleaded or canvassed, is raised for the first time on appeal, it should not be allowed to be argued unless the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the plea of the party seeking to raise the new issue.

6. Thomas Joseph Openda v. Peter Martin Ahn [1982-88] 1 KAR 294 where this Court held that the appellant's wife's joint interest was neither pleaded nor mentioned in the High Court action and could not be considered on appeal.

Nor did the learned judge in the absence of proper pleading make any finding on this issue in his judgment. As was said by Lord Birkenhead, L.C. in North Staffortshire Railway Company v. Edge (1920) A.C. 254 at page 263:-

"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods.....The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below, To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below."

Secondly, the reference by the first appellant to the Tribunal was not to secure the termination of the respondent's tenancy which had determined by effluxion of time but for leave to levy distress in the mistaken belief that the lease in question, not being registered, created a tenancy controlled under the Landlord and Tenancy (Shops, Hotels and Catering Establishments) Act, Cap 301. Both the landlord's and tenant's counsel, it would appear, laboured under the mistake that the tenancy created by the said lease was controlled under the said Act. The Chairman of the said Tribunal dismissed the said application, in my view correctly, on the basis that the tenancy created by the said lease was (despite non registration) not a controlled tenancy. This order was made on May 19, 1995.

Thirdly, I do not agree that the act of distress was intended to secure the determination of the tenancy. With respect, this cannot be correct. The tenancy of the respondent had come to an end as at September 30, 1994 by effluxion of time. No case was pleased or urged on the basis that the respondent's tenancy was any other created in any other way. If there was any, none was pleased or urged and for the reasons set out in the above paragraphs and the case law therein cited this argument cannot be entertained and fails. It may perhaps be helpful, at this stage, if a distinction was made and appreciated. The landlord may take possession of his property which determines or defeats some right or title in the person against whom it is exercised. Or, on the other hand, a landlord may take possession of his property as a mere exercise of his existing right of property and it does not in any way defeat or determine any estate, interest, or title of the person against whom it is exercised. Lord Greene, M.R. who was one of the most accomplished and distinguished intellect of his time - with a First in Greats at Oxford and a Fellow of All Souls, made that distinction clearer by taking a typical example of each case. He said in Butcher v. Poole Corporation [1943] 1 KB 48 at p. 54:-

"A right of re-entry under the lease for breach of covenant is one the exercise of which determines the existing interest of the tenant whereas a person who merely goes into possession of property of which he is the absolute owner is not determining or defeating anybody's title."

The respondent after September 30, 1994 had no right to remain on the suit property and, in my judgment, there can be no question of the first appellant's act amounting to any trespass. This Court in John Gitonga Kihara and 4 Others v. Kasigau Ranching (D.A) Ltd in Civil Appeal No. 134 of 1994 (unreported) stated as follows:-

"Prima facie the plaintiff is entitled to an injunction to restrain trespass on its land. The defendants had been granted a licence which had expired and there was no evidence of any renewal of such licence. Upon the plaintiff withholding his consent the defendants were clearly trespassers. The law is, we believe, quite properly laid down in the passage in SALMOND ON TORTS 17th end. at p. 74.

Under a bare licence no interest in property passes: the licence is simply not a trespasser. A licence of this kind may be either gratuituous or contained in a contract for valuable consideration: in either case at common law it was revocable at the will of the licensor and was therefore no justification for any act done in exercise of it after revocation. This was laid down in WOOD V. LEADBITTER and emphatically reaffirmed by the Court of Appeal in THOMPSON V. PARK.....If, however, the licensee insists, notwithstanding the revocation of his licence (even though it is thus premature and wrongful), in entering or remaining on the land or in otherwise exercising his licence, he becomes at common law trespasser or other wrongdoer.....A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term."

Finally, the learned judge erred for the foregoing reasons in holding that the respondent had shown a prima facie case for an injunction within the principles set out in the rule making decision of Giela v. Cassman Brown & Co. Ltd 1973 EA 358. The learned judge's finding was that a case of trespass had been made out. For the case of trespass the plaintiff had specially claimed in its plaint the remedy of general damages vide paragraph 12 of the plaint as above stated and no claim for an injunction was pleaded on that account. The plaintiff claimed an injunction on the basis that its eviction was contrary to the provisions of the lease as pleaded in paragraph 9 of the plaint for which it claimed general damages. There was nothing left of the lease to create any intest in favour of the respondent after it determined by effluxion of time. Nor was any interest pleaded or urged in the Court below. No prima facie case could be found.

At this point, it may be convenient to dispose of the issue of arrears of rent. No claim for tenancy of the suit property on the basis of rent allegedly accepted by the first appellant is pleaded by the respondent in its plaint. Nor was one urged before the superior court. Indeed, the learned judge did not made any firm finding if there was any rent in arrears. What is more, the alleged illegal distress was not pleaded as the basis of any claim for injunction but was alleged to amount to illegal eviction of the plaintiff contrary to the provisions of the lease (Emphasis supplied) and not that there was any other type of tenancy. Finally, the plaintiff has claimed only general damages for trespass presumably arising from an alleged illegal distress which claim is pending and open to the plaintiff to pursue.

That leaves me to deal with the relief granted by the learned judge. To deal with the mandatory injunction first, I acknowledge that the court does have jurisdiction to grant a mandatory injunction even on an interlocutory application. In the case of CANADIAN PACIFIC RAILWAY VS. GAUD (1949) 2KB 239, Cohen L.J. put the matter beyond doubt when the said at page 249"-

"Mr. Collard's fourth point raises the question whether interlocutory relief should be granted. I entirely agree with what he said at the end of his argument, that the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted."

Secondly, I must deal with the question of the test which is to be applied in the case of mandatory injunction. In may judgment, this is correctly stated in 24 Halsbury's Laws (4th Edition) para 948 in a passage headed "Mandatory injunctions on interlocutory applications." That passage reads:-

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one

which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application."

One of the cases cited in support of that passage is the decision of Megarry J. in SHEPHARD HOMES LTD. VS. SANDHAM (1970) 2 ALL ER 402: in the course of his judgment, Megarry J. said (1970) 3 ALL ER 402 at 312, (1971) Ch 340 at 351"-

"Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must inter alia feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

Indeed, this court itself approved the grant of an interlocutory mandatory injunction" see KAMAU MUCUHA -VS- THE RIPPLES Civil Application No. NAI. 186 OF 1992 (unreported). But that is not to say that it must be granted. Each case depends on its own facts.

I do not find that there is anything to justify the grant of a mandatory injunction on the interlocutory application that was before the learned judge. I do not feel assured having regard to the material before the court that at the trial it will appear that the injunction was rightly granted. Secondly and, more importantly, there was no prayer for a mandatory injunction in the application before the learned judge. The application was filed on May 25, 1995 well after the possession of the suit property had been handed over to the first appellant. There is no explanation why a mandatory injunction could not have been prayed for. Indeed neither the plaint nor the application seeks a mandatory injunction. In granting it, therefore, it appears to me that the learned judge gave relief which was neither sought nor urged before him. That, in my judgment, he was not, with respect, entitled to do.

As for the interlocutory restraining injunction, I have already held that there was no right or interest in the respondent insofar as the suit property was concerned and on a careful consideration of the material before me I am satisfied that any court properly directing itself would have found no prima facie case for an injunction made out with any probability of success. If there was any basis of a tenancy other than a claim under the lease it was fundamental to the respondent's case and it could and should have been pleaded and taken at the hearing before the learned judge. It is perfectly clear to me that there was no real substance in the tenant being able to sustain such a case. There is, however, an additional reason why the restraining injunction was not available to the respondent. The application for a restraining interlocutory injunction was filed on May 25, 1995 well after possession had been taken by the first appellant. It was, therefore, a past event in respect of which a restraining order could not be made. For it is perfectly clear to me that one cannot seek to restrain that which has already occurred. An application for injunction invokes the equitable jurisdiction of the court. As was said by this Court comprising of 5 judges of Appeal in Eric V.J. Makokha & 4 Others v. Lawrence Sagini & 2 Others C.A. No. NAI 20 of 1994 (unreported):-

"So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. It will be impossible to comply with the injunction sought, the Court will decline to grant it.....

In this case, even at the date of the filing of the plaint on the 13th April, 1993, the action which the applicants sought to prevent by an injunction had already taken place. It took place on the 6th April 1993. When in October 1993, the applicants repeated their application for interim injunction to restrain the Corporation from compulsory retiring them and evicting them from their residences, the Court's attention was drawn to how pointless the granting of a temporary injunction would be at that date. The Court itself recorded that Counsel for the Corporation submitted that:..... by the time, the applicants went to law, their retirement had already taken effect.

The Court rejected that submission. The upshot of this was that the highest court of the land, on the 8th October, 1993, solemnly granted a temporary order of injunction to restrain an action which took place as long ago as April 6 1993. It is plain to us that a Court of Equity would regard this order as a pious farce."

And this is in spite of the fact that the taking of possession by the first appellant of the suit premises was at a time when the respondent had no interest whatsoever in it.

I have said enough to reach the conclusion that the grant of this injunction was not in accordance with the law. No court of law properly directing itself can allow any person to continue in possession of a property in which he has no interest whatsoever. In the present case the respondent had surrendered possession of the suit property to the first appellant who, therefore, did not require any order of any court to obtain that possession. It has been observed more than once that this court is well aware that in landlord and tenant cases the machinery of the courts is often invoked by a tenant merely to delay the inevitable with consequent great financial loss to the landlord. To protect the respondent by injunction having to give up possession of premises to which it had no interest or title as was sought to be done in this case, and under such circumstances as were here present, must open the door to delaying tactics by tenants struggling to retain possession. I for one would neither condone it nor give a nod of my approval.

In reaching the conclusion I have, I am not unmindful that I am interfering with the exercise of a discretion by the superior court. Since the grant of the injunction is discretionary this court would not normally interfere with the exercise of that discretion. The circumstances in which this court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa, in the case of MBOGO VS SHAH [1968] E.A. 93. In his judgment Sir Clement de Lestang V.P. said at page 94:-

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Applying these principles to the present case, I am satisfied that this is one of those cases where, with the greatest of respect, I have no hesitation in interfering with the exercise of the discretion of the learned judge.

Accordingly and, for the reasons above stated, I would allow the appeal and set aside the order made by the superior court dated August 14, 1995. It also follows that the respondent's application to the superior court dated May 25, 1995 must be, as it hereby is, dismissed with costs. I would order that the respondent shall forthwith hand over vacant possession of the suit property to the first appellant.

The respondent shall pay to the appellants the costs of this appeal.

Dated and delivered at Kisumu this 27th day of September, 1996.

A.A. LAKHA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR