REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(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 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)
****

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. Setha 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