IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & LAKHA, JJ A)

CIVIL APPLICATION NO NAI 242 OF 1994

BETWEEN

SUPERDRUG COSMETIC (K) LTD …….APPLICANT

AND

HILTON INTERNATIONAL (K) LTD…….RESPONDENT

Application for stay of eviction / execution of the Order for possession of the premises made by the High Court of Kenya

in

H.C.C.C. NO 5590 OF 1992)

RULING

This is an application under Rule 5 (2) (b) of the Court of Appeal Rules seeking an order for a stay of execution of the order of the superior Court (Bosire J.) dated August 31, 1994, and ordering the applicant to vacate the suit premises, pending the hearing and determination of the intended appeal.

The applicant is a limited liability company in occupation of a shop in the respondent's complex in Nairobi. By an agreement dated September 23, 1986, the respondent agreed to sub-let the suit premises to the applicant for a period of six years from October 15, 1986 expiring on October 15, 1992. By its letter of March 28, 1991, the respondent offered to the applicant a new sub-lease for the same premises for a term of six years but the applicant did not accept the offer as requested and instead sought and received an explanation as to the reason for the new offer. Notwithstanding this, the applicant did not sign a letter of intent nor did it accept the offer but continued to occupy the suit premises; the respondent had contended in the superior court and before us that this could only have been by virtue of the 1986 agreement. On June 28, 1992, the respondent gave to the applicant a notice to vacate the premises on October 15, 1992 when its tenancy would expire by effluxion of time. The applicant filed a suit before t he expiry date seeking an injunction to restrain the respondent from taking possession of the suit premises.

The applicant claims to be entitled to remain in the suit premises on the ground that it was offered a further lease which it accepted, but on the material before us, it seems that the applicant never accepted the offer and this was not in dispute as it was freely and frankly and, in our view, very properly conceded by the advocate for the applicant. It was, however, contended that the offer not having been accepted there arose a month to month tenancy protected under and by virtue of the provision of the Landlord and

Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301). We doubt the correctness of this submission as we do not see how such a tenancy could arise. It seems to us that the only basis on which the applicant continued to remain in possession of the suit premises was the earlier agreement which having created a tenancy for a term exceeding five years was not a controlled tenancy within the meaning and purview of the provision of the said Act. Shields J. in an earlier ruling in the injunction application held that the offer had not been accepted, and although it was obiter, Bosire J. in his ruling of August 1, 1994 reached the same conclusion.

In the result, we are of the opinion that the applicant has not shown to us that it has an arguable appeal. One further point was raised that the respondent did not have the capacity to grant the original lease. This was not raised by the applicant in its plaint and the learned judge thought there was no, or no sufficient evidence that the respondent's head lease had a term less than five years. No such document was tendered in support of this fact and the learned Judge in the superior court may well have been correct in rejecting that contention. We note that the applicant had acted on the sub-lease granted to it by taking possession under it and enjoyed the full term under it. the issue of rescission of the agreement by the applicant seems to us to be equally doubtful.

As far as this court is concerned, the principles which govern the exercise of our discretion, under the jurisdiction conferred upon the Court under Rule 5 (2) (b) of our rules are now well settled. See Stanley Munga Githunguri –vs- Jimba Credit Corporation (Civil Application No NAI 161 of 1988), and J.K. Industries Ltd – vs- Kenya Commercial Bank Ltd & East African Development Bank (1982-88) I KAR 1088. In the former case the Court said:

> "There is a great deal of learning on the principles on which we should base our unfettered discretion and we were referred to a number of decided cases. No two cases are exactly alike and we do not intend to obsfucate the real questions posed for decision in this matter by analysis of the reported cases cited to us on wholly different set of facts. The guiding principles which emerge and are discernible from case law on this subject, are first, the appeal should not be frivolous or as is otherwise put, the applicant must show that he has an arguable appeal and second, this Court should ensure that the appeal, if successful, should not nugatory,"

Having given the whole matter most anxious and careful consideration, we are far from persuaded that the intended appeal is an arguable one and we are not satisfied that the applicant has satisfied the first test required for the granting of stay of execution pending appeal. In the exercise of our discretion we are not satisfied that this is a fit and proper case for the grant of a stay.

Accordingly and, for the reasons above stated, the application is dismissed with costs.

Dated and delivered at Nairobi this February 15, 1995

R.S.C OMOLO

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL