



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL CASE NO 763 OF 1992**

**KARIM LALJI .....PLAINTIFF**

**VERSUS**

**JACARANDA HOTEL (MOMBASA) LIMITED.....RESPONDENT**

**RULING**

This is the application by the plaintiff Karim Lalji against Jacaranda Hotel (Mombasa) Ltd under the Civil Procedure Rules, order XXXIX rules 1, 3 and 9 seeking an order of temporary injunction to issue to restrain the defendant or its agents from alienating or demising the gift shop at the Indian Ocean Beach Club to itself or to any other party before the suit is disposed of. Both counsel were in agreement that the application of this sort must be governed by the principles which were enunciated in the case of *Giella v Casman Brown & Co Ltd* [1973] EA 358 which, as was recently stated by Hancox CJ in the case of *Kanji Prenji Gangji and Another v Revan Kunvah Nauchand Savadia* Civil Appeal No 6 of 1991, “is now accepted as the leading authority on this subject.” It is also settled law that the granting of an injunction under the rules stated in this application is purely within this Court’s discretion. This discretion, however, has to be exercised judicially and that is why it behoves the person who seeks a temporary injunction to satisfy the Court with the conditions which are stipulated in the *Giella* case (*Supra*).

The first issue to be ascertained and determined is whether on construing the defendant’s letter dated 23rd September 1992 (alleged herein as the “offer”) and the plaintiff’s 2 letters on 28th September, 1992 and 1st October 1992 (alleged by the applicant as constituting his acceptance of the offer) it can be said that a contract was concluded by the parties. Whereas Mr Pandya, counsel for the defendant rightly concedes that an enforceable contract can be concluded by parties by exchanging a series of correspondence, he contended no such contract exists in the revealed circumstances of this case. It is not in dispute that a contract is made when an offer is unconditionally accepted by the person to whom it is directed. Mr Pandya has contended that the position between the parties herein is that the plaintiff’s letter of 28th September 1992 did not constitute such acceptance but made counter-offers, which were in the nature of rejection of the defendant’s letter of 23rd September 1992. In plaintiff’s letter of 28th September 1992 the plaintiff had, in part, said:

“I also refer to our discussion on the contents of your letter dated 23rd September 1992 and in principal (sic) we agree to the terms and conditions outlined therein.”

It would appear from Mr Pandya’s submission that he would have conceded that this passage constituted an acceptance of the offer. But in the plaintiff’s said letter he appended five requests.

According to Mr Pandya those requests were counter-offers which effectively cancelled the purported

acceptance of the defendant's offers. Mr Pandya further alleges in para 3 of the statement of defence that as the term regarding the rent increase after 1994 was left to be either 10% or 15% and that as the design and range of productions had not yet been agreed, there was never a concluded contract between the parties.

Firstly, it is evident that the plaintiff sought to clarify his letter of 28th September 1992 by his letter of 1st October 1992 which so far as relevant reads as follows:

"I refer to our conversation of yesterday on the above subject wherein you mentioned that TOBC would like to be paid by money in one full in payment. In acceptance of this and acceptance of your letter of offer dated 23rd September 1992 enclosed please find my cheque of Shs 550,000/= being full and final payment of key money. I would also take this opportunity to clarify the following:

1. The issues raised in my letter dated 28th September 1992 and addressed are not intended to be issues of contention or non-acceptance of the terms and condition listed in your letter dated 23rd September 1992. Rather, they are issues raised for your consideration as we believe they are of mutual benefit to yourselves, ourselves and our clients (your guests).
2. We are very keen to take up the gift shop concession. This keenness is attested to by the fact that we have spend a great deal of time and incurred substantial costs in retaining and having paid an interior designer to draw up plans for the shop, discussing and amending the same with Mr Holden advertising for staff, etc.... We hope that the above is to your satisfaction and will hasten the process of drawing up the lease leading to a successful and mutually beneficial partnership."

Mr Kassim Shah contended that even if the plaintiff's letter of 28th September 1992 were considered to have amounted to a counter-offer, it is an offer, which thus was withdrawn and substituted with the plaintiff's unconditional acceptance of the defendant's offer of 23rd September 1992. In support of this argument he referred me to the following passage in *Hill and Redman's Law of Landlord and Tenant* 7th Edition Vol 1 at p 105:

"New terms may be added to an offer or the offer may be withdrawn at any time, as long as it has not been accepted. On the other hand, as long as an offer remains open, the other party may withdraw any term which he sought to introduce and accept the offer unconditionally."

I therefore accept as valid Mr Kassim Shah's submission that if the plaintiff's first letter had introduced counter-offers as alleged by Mr Pandya, his second letter of 1st October 1992 withdrew those counter offers and unconditionally accepted the defendant's offer which had not yet been withdrawn. It follows as the minds of the parties were then at one on matters which are crucial to every agreement, namely:

- (a) Identification of the lessor and lessee,
- (b) The premises to be leased,
- (c) The commencement and duration of the term and
- (d) The rent or other consideration such as the key money to be paid) and on all the other matters which were particular to this particular bargain, it must be held herein that there was concluded an agreement for a lease which is binding on both parties.

I still need to consider, for a moment the plaintiff's letter of 28th September 1992. It is a letter in which the plaintiff accepted the offer in principle. He therefore made requests, which according to Mr Pandya, amounted to a rejection of the offer. The learned authors of *Chitty on Contracts* 25th Edn Vol 1 dealt with a situation of this sort as follows:

“It is submitted that an acceptance which asks for some indulgence to the offeree is nevertheless effective, so long as it is clear that the offeree is prepared to perform even if the indulgence is not granted.”

I do not doubt at all that the plaintiff in the present application was prepared to lease the premises even if the requests in his letter of 28th September were rejected by the defendants.

Secondly, the issue is whether the term as to the rent increase was so uncertain as to show that the parties did not conclude a contract. I see no element of uncertainty in contract of this kind. The figure might later be in dispute, but a Court or an arbitrator would have no difficulty in deciding whether an increase of 10% or 15% would be justifiable depending on the prevailing economic circumstances.

Mr Pandya in his submissions additionally argued that the author of the letter of 23rd September 1992 had, after all, no authority whatsoever to enter into dealings or agreements, which could bind the defendant. Mr Kassim Shah replied that this aspect is not pleaded anywhere in the defence statement and in an affidavit, that the cardinal principle is that a party is bound by his pleading and so a litigant cannot be entitled a court order on an issue, which had not been raised or disclosed in any of his pleadings. I agree with Mr Kassim-Shah’s submissions. The Court’s decision can only be based on the facts and on the points of law, which have been procedurally presented or raised before it.

Overall, therefore, the plaintiff has, in this application, demonstrated a *prima facie* case with probability of success.

In the case of *Banhill Investments v Pan Africa Bank Ltd and others* Civil Appeal No 68 of 1986 generally it is a great hardship to lose immovable property and that damages are not usually a suitable relief. In *Kanji Premji Gangji & Another v Nanchand Savadia* Civil Appeal No 6 of 1991 Hancox CJ accepted that view. In paras 8, 9 and 10 of the plaintiff’s affidavit filed to support this application the plaintiff not only shows that he has already invested enormously in the project but also contends that he will suffer irreparable damage if he lost the premises. Although the loss to be suffered is primarily an economic one it is one, which is clearly impossible to quantify because it involves huge profits depending on the influx of tourists who are the targeted customers. It is also important to remember the plaintiff’s main prayer in the plaint is an order of specific performance. The plaintiff has averred in para 11 of his affidavit, and this was not contravened at all, that the defendant’s reason for repudiating the agreement is because the majority share-holder wished the suit premises to be leased to his relative. It may be said that the majority shareholder is being callous in the extreme. Such defendant’s convenience should not be a factor to be considered favorably is an application for injunction which is a discretionary remedy. I am also of the considered view that the refusal to grant the injunction pending the trial will render it totally futile for the applicant to try to establish his case for specific performance as the premises may in the intervening period be leased to another person. On the other hand the defendant would lose virtually nothing as it can still recover the unpaid rents. The balance of convenience thus clearly requires the preservation of the *status quo* until the suit is tried and disposed of.

For all the foregoing reasons, I grant the injunction sought in the chamber summons. Costs of the application to be in the cause.

Dated and delivered at Mombasa this 26th day of January 1992.

**I.C.C WAMBILYANGAH**

**JUDGE**