IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, AKIWUMI & LAKHA JJ A)

CIVIL APPLICATION NO NAI 129 OF 1995 (57/95)

BETWEEN

NYALS (KENYA) LIMITED.....APPELLANT

AND

UNITED HOUSING ESTATE LIMITED .....RESONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Reg Sampson, Commissioner of Assize) dated 14th December, in 1993 in HCCC No 2137 of 1983)

RULING

In this Notice of Motion made under rule 5 (2) (b) of the Rules of this Court, the applicant has sought a stay of execution of the decree in the Nairobi High Court Civil Case No 2137 of 1983 pending the hearing and final disposal of its intended appeal or until further orders of this Court. The applicant's application in this regard is supported by the affidavit of its Managing Director, Bikhubhai Shah, together with the annextures thereto.

By an instrument of lease made between the respondent herein and the applicant on 1st September, 1977 and registered in the Land Titles Registry on 12th November, 1977, the respondent demised unto the applicant Shop Number VI which was drawn and delineated on the plan of Land Reference Number 209/5812 measuring 0.0732 of a hectare or thereabouts situated in the city of Nairobi, in the Nairobi Area leased to the respondent and registered as Title Number IR 26273/1. That shop had been registered in the Registry of Documents at Nairobi in Volume D2 Folio 149/271. The applicant was to hold the demised premises for a period of five (5) years and one (1) month from 1st March, 1977 on advance payment of a monthly rent of Kshs 6,700/= on the first day of each calendar month commencing on 1st March, 1977.

Principally, the applicant's application turns on clause 4(e) of the instrument of lease referred to above. That clause stipulated as follows:-

"4 (e) That the lessee at any time during the term hereby granted shall have no objection whatsoever if the lessor shall wish to carry out a scheme of re-developing part or the whole of the said premises provided the lessor gives the lessee not less than six (6) months' notice of its intention to do so and provided further that no undue inconvenience is caused to the lessee's business or alternatively the lessor will offer to the lessee a suitable alternative accommodation for the purpose aforesaid".

For the purpose of that application, section 2 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya, hereinafter referred to as the Act, provides, where relevant, that:-

"2. (1) For the purpose of this Act, except where the context otherwise requires-

"controlled tenancy" means a tenancy of a shop, hotel or catering establishment-

(a) which has not been reduced into writing;

(b) which has been reduced into writing and which-

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof".

In relation to clause 4 (e) of the lease mentioned above, the learned Commissioner of Assize in his judgment delivered on 14th December, 1993 in the suit referred to at the beginning of this ruling had this to say: -

"There has, so far as I am aware, been no decision to date on whether such a clause is a break clause or not.

I have carefully considered the clause and I find that it is not such a break clause sufficient to bring the tenancy within the provisions of the Shops Act. The clause does not contain provisions for terminating the lease otherwise than for breach of covenant as required by section 2 of the Shops Act.

All the clause does is to allow the lessor to redevelop the whole or part of the demised premises, provided he complies with the conditions in the clause. The question as to whether the lessor has complied with these conditions can be decided by the Court. The clause does not *per se* allow the lessor to terminate the lease."

At the hearing of this motion on 6th July, 1995, Mr Nagpal for the applicant submitted *inter alia* that the issue relating to clause 4 (e) of the lease above mentioned was wide open for determination by this Court on appeal *vis-a-vis* the provisions of section 2 (1) (b) (ii) of the Act as are set out above. The applicant's intended appeal was therefore, according to him, not frivolous. If the applicant was to succeed on appeal to this Court that this clause constituted a break clause in terms of the aforementioned section, then its tenancy of the suit premises was controlled under the Act and the termination of the tenancy could not have been otherwise than as is provided for by the Act. That success would be rendered nugatory if the stay sought by the applicant is not granted, he concluded.

Mr Gautama for the respondent, however, contended that the applicant's lease expired in 1982 and since the event contemplated by clause 4 (e) of that lease did not occur, the said clause was of no application. It did not therefore, according to him, constitute a break clause under section 2(1)(b) (ii) of the Act. In any event, Mr Gautama continued, if the stay sought was to be granted, the same ought to be upon conditions that the applicant do deposit the sum of Kshs 2,104,650/= in an interest bearing account being mesne profits in respect of the suit premises up to and including 30th June, 1995 and thereafter deposit in the same account the sum of Kshs 15,000/= per month with effect from 1st July, 1995 until the hearing and final disposal of the intended appeal.

As was readily conceded by the learned Commissioner of Assize, so far as he was aware, there had been no decision as at the date of his judgment - 14th December, 1993 - whether or not a clause such as clause 4 (e) as is set out above constituted a break clause in terms of section 2 (1) (b) (ii) of

the Act and no relevant authority in this regard was brought to our attention at the hearing of this motion. Whether or not this clause *per se* allowed the termination of the applicant's lease in terms of the aforesaid section is primarily a question of construction of the said clause and the correctness or otherwise of the construction put to it by the learned Commissioner of Assize is plainly a grave matter for submission to this Court at the hearing of the applicant's intended appeal. That appeal, we agree with Mr Nagpal, is therefore not frivolous. If the construction of this clause by the learned Commissioner of Assize is held to be incorrect on appeal to this Court, then, as was rightly pointed out by Mr Nagpal, it would mean that the applicant's tenancy of the suit premises was controlled under the Act and its termination could only be in accordance with that Act.

At this juncture, it is instructive to note the observation of the Court of Appeal for Eastern Africa in the case of *Ismail Mohamed Chogley v Jagat Singh Bains*, Civil Appeal No 57 of 1952 (unreported) in a matter similar to what is now before us. That Court had this to say:-

> ".....as this Court has more than once observed we are well aware that in rent restriction cases, the machinery of appeal is often invoked by a tenant merely to delay the inevitable, with consequent great financial loss to the landlord. Yet in such cases, where the subject matter is simply the right to possess on a statutory tenancy, it is difficult to see how this can be preserved, unless the status quo is maintained pending the determination of the appeal. Certainly we know of no local case of this nature where a stay pending appeal has been refused. ... but our discretion must be exercised on a judicial basis so that where as in the instant case, we are satisfied that without a stay there is no practical means of safeguarding the applicant against substantial loss, should he win his appeal, it is our duty to grant a stay although we do so with reluctance. It must be borne in mind that the essence of the applicant's case is that by statute he has a right to continue to pursue a lucrative business undisturbed in the suit premises for as long as the law allows. .....
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> If the applicant is disturbed now and their Lordships of the Privy Council subsequently hold that by law he should not have been disturbed, he will have lost something quite irrecoverable."

Put simply in the circumstances of the motion before us, if we were to refuse a stay of execution of the decree in the Nairobi High Court Civil Case No 2137 of 1983, the applicant's power to possess the suit premises may be removed beyond recall with the result that its intended appeal will, if successful, be rendered nugatory. To avoid such an eventuality, we think that the applicant's application in this motion should be granted. Accordingly, the decree in the Nairobi High Court Civil Case No 2137 of 1983 is stayed pending the hearing and final determination of the applicant's intended appeal or until further orders of this court on condition that the applicant pay to the respondent all the rent due in respect of the suit premises and to continue doing so pending the disposal of its intended appeal or until further orders of this court and that it undertakes to lodge and prosecute the intended appeal with speed and diligence. The costs occasioned by this motion shall be in the intended appeal.

Dated and deliverecd at Nairobi this 14th day of July 1995

J.E GICHERU

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JUDGE OF APPEAL

A.M AKIWUMI

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL