



REPUBLIC OF KENYA



M/S Express General Insurance Brokers v Telkom Kenya Limited & another (Environment and Land Appeal E004 of 2021) [2024] KEELC 825 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E004 OF 2021
MC OUNDO, J
FEBRUARY 22, 2024**

BETWEEN

M/S EXPRESS GENERAL INSURANCE BROKERS APPELLANT

AND

TELKOM KENYA LIMITED 1ST RESPONDENT

PAUL WAIHAKA T/A ARVIN PARK AUCTIONEERS 2ND RESPONDENT

(Being an Appeal against the decision of Hon. Gakuhi Chege, Vice Chairperson of the Business Premises Rent Tribunal in his Ruling dated the 12th October, 2021 in Nakuru Business Premises Rent Tribunal Case No. 25 of 2021)

JUDGMENT

1. What is before me for determination on Appeal is a matter which was heard by Hon. Gakuhi Chege, the Vice Chairperson of the Business Premises Rent Tribunal in Nakuru Business Premises Rent Tribunal Case No. 25 of 2021, where in his ruling dated 12th October, 2021, upon considering the evidence of both parties, he had dismissed the Applicant/Appellant's Application dated 25th February 2021 with costs stating that the Tenant/Applicant was not entitled to an interlocutory injunction against the landlord/1st Respondent since the said Tenant/Appellant owed the landlord/1st Respondent rent there being no evidence that the said rent owed had been paid.
1. The Appellant, being dissatisfied with the Ruling of the said Vice Chairperson filed the present Appeal based on the following grounds in its Memorandum of Appeal:
 - i. That the learned Vice Chairperson of the Business Premises Rent Tribunal erred in fact and in law in issuing a lopsided incomplete and hurried ruling that failed to address itself to the relevant law and material evidence on record.



- ii. That the ruling of the learned Vice Chairperson of the Business Premises Rent Tribunal failed to consider the arguments on law submitted by counsel for the appellant (tenant/Applicant) and the Respondents (landlord and auctioneers).
 - iii. That the ruling is otherwise not supported by the authorities cited and submitted to the learned Vice Chairperson of the Business Premises Rent Tribunal.
 - iv. That the learned Vice Chairperson of the Business Premises Rent Tribunal erred in fact and in law by totally disregarding the submissions of the Appellants (tenants/Applicants) in the absence of a rebuttal by the Respondents (landlord and auctioneer) and in the absence of any other contradicting evidence.
 - v. That the learned Vice Chairperson of the Business Premises Rent Tribunal erred and misdirected himself in fact and in law in dismissing the Appellant's claim against the Respondents'.
3. The Appellant thus sought that the Appeal be allowed and the orders /ruling of the Vice Chairperson of the Business Premises Rent Tribunal be set aside and to be granted costs of the Appeal.
 4. The Appeal, which was to be disposed of by way of written submissions was admitted on 27th September, 2023.

Appellant's submission

5. The Appellant's submission in support of its Appeal on the first ground as to whether the Vice Chairman had erred in issuing a lopsided, incomplete and hurried ruling was to the effect that the said ruling had failed to meet the standard of being well-reasoned, exhaustive and impartial as it had neglected pertinent legal issues and failed to accord due consideration to the material evidence on record. That the departure from the principles of just adjudication had contradicted the fundamental tenet that decisions must be grounded in both law and evidence and that the Tribunal carried the onus of discerning the facts presented and applying the law judicially.
6. On the second ground as to whether the impugned ruling overlooked the legal arguments proffered by both the Counsel for the Appellant and the Respondents, the Appellant asserted that in legal proceedings, parties were afforded the opportunity to expound on their legal positions hence the Tribunal was duty-bound to duly deliberate upon the parties' arguments and provide cogent reasons for its conclusions as failure to do so undermined the principles of natural justice and procedural equity. That the Tribunal was enjoined to entertain all arguments presented before it, irrespective of the originating party thus the Tribunal's failure to consider the Appellant's legal arguments on the non-existence of a lease agreement, the rent payable and the costs associated with construction and developments undertaken on the premises had represented a stark departure from the principles of fairness and natural justice.
7. The Appellant's submission on ground three as to whether the ruling lacked the requisite support from the legal authorities cited and presented during the proceedings was that the ruling's omission of the legal authorities presented bespoke a lacuna in the legal basis of the judgement. That the reliance on erroneous or inapplicable authorities may have led to a miscarriage of justice.
8. On the fourth ground as to whether the Vice Chairperson of the Tribunal disregarded the Appellant's submissions, the Appellant submitted that the said Vice Chairperson erred in both fact and law by dismissing the Appellant's claim against the 1st Respondent without due consideration since the impugned ruling had failed to present concrete evidence to substantiate the claim that the Appellant



was in rent arrears. That whereas the onus laid with the landlord/1st Respondent to furnish credible evidence validating the alleged rent arrears, the absence of proper documentation substantiating the rent arrears was at odds with the imperative to establish claims on the basis of evidence thus the deficiency of the vital evidence warranted a re-evaluation of the claim.

9. The Appellant also contended that the lease was conditional, commencing only upon the completion of construction work and the execution of a lease agreement and that the Appellant underscored the conditional nature of the lease and understood that rent was to be offset against construction cost. That the principles of contract law dictated that conditions precedent in a lease agreement must be satisfied before the lease becomes operational. That in the instant case, the lease agreement between the tenant/Appellant and the landlord/1st Respondent had not been executed. That whilst a lease proposal may exist, the parties herein failed to arrive at an agreement or formally sign a lease document hence the tenant/Appellant merited consideration as a protected tenant, given the absence of a valid lease agreement.
10. That the crux of any landlord-tenant relationship rested upon the lease agreement, typically stipulating the terms of rent, commencement date and other crucial particulars thus the absence of a legally binding lease agreement rendered it arduous to determine rent arrears. Further that it was mutually agreed that rent would be deducted from the costs of construction that the tenant/Appellant undertook after securing authorization from the County Government of Kericho.
11. The Appellant reliance was hinged on the decided case of Washington Jalango Okumu v Boffar Limited [2008] eKLR, where it had been held that in the absence of legal documentation defining the rights of the tenant and landlord, there was no basis for drastic measures such as levying of distress for rent until such a time that a judicial process could intervene to determine the rights of the parties. Reliance was also placed on the decision in the case of Maina (As the Estate administrator of Eliud Wanjohi Maina (Deceased) v Mwangi (Environment & Land Case E032 of 2021) [2023] KEELC 19965 (KLR) (20 September 2023) (Judgement) to submit that in the absence of a legally enforceable lease agreement, there existed no contractual foundation for the landlord to enforce its terms or pursue remedies such as distress for rent or eviction.
12. The Appellant apprised the Tribunal of the agreement between the parties to the effect that the Appellant would initiate construction of the occupied building space with construction costs to be deducted from the rent payable. However, the necessary approvals and permits for the said construction were delayed due to the absence of the building plans hence the failure to expeditiously secure requisite approvals and permits for construction constituted a legitimate reason for the delay in the initiation of the lease. That nonetheless, the said approvals were eventually obtained, and the Appellant embarked on the construction at its own expense, which expense were to be deducted from the rent as agreed vide a letter dated 17th March, 2015.
13. It was the Appellant's further submissions that it had tendered evidence indicating that rent payment for the first two quarters had been intended for construction purposes which reflected a mutual understanding between the parties. That the existence of an agreement specifying the utilization of rent payments for construction had been of paramount significance as the said agreement explicitly dictated that rent payments would be allocated to the construction endeavors thus it had been imperative to honor the agreement and therefore the Landlord's assertion of rent arrears warranted scrutiny.
14. Regarding the periodic tenancy, it was the Appellant's submissions that the ruling acknowledged the expiration of the lease and continuation of the tenant's occupancy, thereby establishing a periodic tenancy. That the said acknowledgement had underscored the ongoing nature of the tenancy and raised



- queries regarding the justification for the Landlord's assertion of rent arrears. The Appellant wondered why the landlord permitted the tenancy to persist without eviction if the tenant had indeed in default.
15. The Appellant maintained that the right to be heard and have one's arguments duly considered stood as a fundamental tenet of natural justice. That the Vice Chairperson, categorical dismissal of the Appellant's claim, unaccompanied by rebuttal from the Respondents or contradictory evidence, provoked reservations about the comprehensive evaluation of the case as the Appellant had not been afforded a fair opportunity to have its case heard and deliberated upon.
 16. On Ground five as to whether the dismissal of the Appellant's claim was erroneous, the Appellant submitted that the Vice Chairperson of the Business Premises Rent Tribunal erred and misdirected himself in both fact and law by summarily dismissing the Appellant's claim against the Respondents. That it was imperative for the Tribunal to meticulously appraise the evidence presented and accurately apply the law thus dismissing a claim without diligent analysis and substantiated reasoning constituted a dereliction of the said duty. That judicial and administrative Tribunals bore the obligation to furnish comprehensive rationale for their decisions and to ensure that the law had been judiciously applied. Subsequently, the summary dismissal of the Appellant's claim in the ruling evoked concerns about the appropriate application of the law and the equitable assessment of the evidence and the said miscarriage of justice necessitated redress.
 17. From the foregoing, the Appellant implored the court to allow the instant Appeal and set aside the Ruling of the Vice Chairperson of the Business Premises Rent Tribunal dated 12th October, 2021. Further that the cost of the instant Appeal be granted to the Appellant.

Respondents' submissions

18. The Respondents, in opposing the Appeal and after giving a brief history of the matter in question coalesce the ground of Appeal into four as follows;
 - i. The allegation that the learned Vice Chairperson of the Tribunal issued a lopsided, incomplete and hurried ruling (Ground No. i).
 - ii. The Tribunal failed to consider arguments submitted by the counsel for the Appellant (Grounds ii and iv)
 - iii. The Tribunal misdirected itself in law and in fact in dismissing the Appellant's claim against the Respondents (Ground v)
 - iv. The ruling was not supported by any authorities cited (Ground iii)
19. On Ground number i, the Respondents submitted that whilst the Appellant had laid mere allegations that the Tribunal issued a lopsided, incomplete and hurried ruling, it had not produced any evidence to substantiate their allegation. That the Appellant had not dispensed its burden of proof as the he had not demonstrated how the "complete" ruling should have been, a clear demonstration that the instant ground of Appeal had been unfounded.
20. The Respondents submitted on Grounds number ii and iv together to the effect that whereas the Appellant had faulted the Tribunal for failing to consider the evidence and arguments of law submitted by its Counsel, that it never filed its submissions. That the failure to file its submissions had been noted at paragraph 26 of the impugned ruling of the Tribunal at pages 5-9 of the Record of Appeal. That the Appellant herein had attempted to cover up the fact that it did not file its submissions by filing a record of Appeal which contained a copy of its submissions that had allegedly been filed alongside the payment receipt appearing on pages 59-62 of the Record of Appeal. That it was regrettable for the



Appellant to imagine that both the Counsel and the court would not realize that the receipt attached as proof of payment of filing fees had related to a different case number, that is, BPRT 304 of 2021 confirming that indeed submissions had never been filed hence the Tribunal had no submissions to consider on the part of the Appellant.

21. Regarding ground number v as to whether the Tribunal misdirected itself in law and fact in dismissing the Appellant's claim against the Respondents, it was the Respondents' submissions that the Application had been dismissed upon careful consideration of the Application, responses and submissions that had been filed. That the claim had primarily been dismissed because the Appellant had admitted being in occupation of the demised premises but had failed to prove that it had been paying rent. That the said finding had been valid and the fate of the Appellant had been sealed for the reason that the Appellant had approached a court of equity with unclean hands. The Respondents thus submitted that from the reading of the impugned decision, there had been nothing which pointed to a misdirection by the Tribunal on either facts or law as the dismissal of the Appellant's Application had been well founded.
22. Regarding the issue that the ruling was not supported by any authorities cited, the Respondents' submission was to the effect that there was no written or unwritten rule that a Court was bound to cite and rely on all the decisions provided by parties in their respective submissions. That in the instant matter, the Tribunal had the discretion to decide whether to cite the authorities relied upon in the Respondents' submissions or to rely on other decided authorities with a similar principle.
23. It was the Respondents' further submission that contrary to the unsubstantiated arguments made by the Appellant, the court had been guided and relied on the decisions cited by the Respondents in its submissions which included the locus classicus case of *Giella vs Cassman Brown* hence proving that the Tribunal had read and considered the pleadings filed before rendering its ruling.
24. In conclusion, the Respondents submitted that whereas the conditions to be imposed by a court in setting aside a ruling of a court or Tribunal was an exercise of discretion, such discretion must be based on fixed principles and not on private opinions, sentiments and sympathy and that a court of law could only interfere with the exercise of a Tribunal's discretion only if it was satisfied that the decision reached by the Tribunal had not been made judiciously.
25. That the instant Appeal had been instituted in bad faith and as a shield to protect the Appellant from meeting its obligations of paying rent to the Respondents. That since the Appellant had failed to demonstrate merits of the grounds relied upon in the instant Appeal, the entire Appeal should be dismissed with costs. That the Appeal lacked merit as the Appellant had not demonstrated the manner in which the decision by the Tribunal had departed from the law. Further that the Appellant had failed to prove its allegation that the Tribunal had failed to consider the relevant considerations and evidence. The Respondents thus submitted that the instant Appeal lacked merit, was bad in law and a ploy to defeat the ends of justice thus it was fair, just and in the interest of justice that the entire Appeal be dismissed with costs.

Determination.

26. I have considered the tenor and import of the reference before the Business Premises Rent Tribunal, I note that this Appeal arises from an application dated the 24th February 2021 wherein the Applicant/Appellant had sought for orders compelling the 1st Respondents to allow him access into its premises on land parcel No. Kericho Municipality Block 1/69 and thereafter restrain the 1st Respondents from interfering with his quiet possession of the said premises.



27. A response by the 1st Respondent sworn on the 27th May 2021 was to the effect that the Appellant had taken possession of the premises as a tenant in the year 2015 and had defaulted in meeting its obligations under the letter of offer and had continuously defaulted to pay rent and wherein his rent arrears stood at Ksh. four million eight hundred and seventy six thousand, four hundred and twenty six and seventy three cents (Ksh. 4,876,426.73/=) as at 5th February 2019.
28. The said application had been disposed of through written submissions pursuant to which vide a ruling dated the 12th October 2021, the Vice Chair of the Business Premises Rent Tribunal, Hon Gakuhi Chege had dismissed it with costs. The Appellant being dissatisfied with the said decision has now filed the present Appeal.
29. I have also considered the grounds of Appeal in this Appeal, and the parties' respective submissions to the same. I have also considered the relevant legal framework and jurisprudence on the key issue in this Appeal.
30. This being a first Appeal, the court is required to re-evaluate the evidence tendered and make its own findings and conclusions. Exercise of that appellate jurisdiction is guided by well-established principles. The appellate court will ordinarily not interfere with the trial court's findings of fact unless it is demonstrated that the findings are based on no evidence or on a misapprehension of evidence or the trial court acted on wrong principles in reaching the findings. See *Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu* (1982) IKAR 278.
31. I have considered the grounds of the Memorandum of Appeal, the Ruling of the Business Premises Rent Tribunal and the written submissions. The Business Premises Rent Tribunal Vice Chairperson has been faulted for failing to address himself on the relevant law and material evidence on record and therefore failing to consider the arguments submitted thereto by the parties. That the Vice Chairperson of the Business Premises Rent Tribunal had disregarded the Appellant's submissions in the absence of any other contradicting evidence wherein his ruling had not been supported by any authorities. That in this regard, the Vice Chairperson of the Business Premises Rent Tribunal erred and misdirected himself in fact and in law in dismissing the Appellant's claim against the Respondents.
32. In support of his application dated the 24th February 2021, the Appellant, through one of its Directors Mr. Martin Maurice Odhiambo, had deponed in the supporting affidavit sworn on an equal date, that the 1st Respondent was the landlord to the premises in issue situated on Kericho Municipality Block 1/69. That although they did not have any written lease agreement over the said premises the Appellant had sought to lease the premises from the 1st Respondent. That in so leasing it, the Appellant sought to modify the premises by constructing a front office block extension. That parties had then agreed that upon completion of the construction and signing of the lease agreement, the lease would then commence. That the cost of the construction would be deducted from the rent upon its completion.
33. That through an e-mail dated 21st January 2015, the 1st Respondent had allowed them access into the premises to start constructing after acquiring the relevant authority from the engineer of the County Government of Kericho. That the authority had arrived on the 9th February 2017 with condition to avail the drawings approval given to the 1st Respondent for the said construction. The said drawings and approval was never received and therefore, the construction was not completed.
34. That a final lease agreement was also not received from the 1st Respondent despite the Appellant having signed a draft lease agreement and forwarded it to the first 1st Respondent for preparation of a final agreement.



35. Subsequently the Appellant had been locked out of premises without notice. The Appellant thus sought that being a protected tenant that they be allowed to gain access into the business premises.
36. In rebuttal the 1st Respondent vide their Replying Affidavit sworn on the 27th May 2021 had deponed that indeed they had offered to let office space to the Appellant in the year 2014 for a period of six years where the Appellant had made an initial security deposit of Ksh. 191,000/= on 10th January 2015 which was the same day that the letter of offer had been executed by both parties.
37. That at clause 6, the annual rent was Ksh. 611,520/= per annum excluding VAT for the first year and thereafter the rent was to be reviewed at a rate of 5% per year. The 1st Respondent had also confirmed that the Appellant herein had sought for and had been granted permission to construct a front office extension on the space it had occupied. There had been approvals of the said renovation by the County Engineer.
38. That the Appellant's proposal vide a letter dated the 18th September 2014 to undertake the construction and that the costs to be deducted from the rent payable was not accepted by the management. However the Appellant continued to occupy the premises without paying any rent until the six years term under the letter of offer expired in February 2020 automatically terminating the engagement. That despite service of notice, as at the 5th February 2019, the Appellant owed the 1st Respondent a rent arrears of Ksh. 4,876,425.73/= wherein the 1st Respondent had levied distress for rent
39. That the Appellant's application had been seeking mandatory injunctive orders and restraining orders in the nature of a prohibitory injunction which orders were final in nature and could not be determined at a preliminary stage. That the Appellant had not established the principles set down in the *Giella vs. Cassman Brown* case for grant of injunctive orders and further that although he had sought for the equitable remedy, he had not come to equity with clean hands. That if the orders were granted as prayed the 1st Respondents' effort of recovering rent would be defeated.
40. In rejoinder and in a further affidavit sworn on 8th June 2021, the Appellant's Director had denied the issues raised in the Replying Affidavit deponing that the letter of offer had been accepted but with condition that the date of commencement could not be 1st February 2014 before they had taken possession, that they would start construction as soon as they had received the relevant authority from the County Government of Kericho and the lease would then commence after the construction had been completed and the lease agreement signed.
41. That indeed they had received the letter from the property manager one Mr. Francis Wambugu who had confirmed that the cost of the construction would be deducted from the payable rent of the 1st two quarters and the lease would commence on 1st March 2015.
42. With a summary of the matter in question, and considering the submissions herein filed for and against the Appeal, I find that the issue herein arising for determination as follows:-
 - i. Whether the Appellant's Appeal is merited.
43. On this issue for determination, it is to be noted that on the 2nd June 2021, parties had agreed by consent to dispose of the Application dated the 24th February 2021 by way of written submissions wherein they had been allocated time within which to file and exchange their respective written submissions. It is evident that whereas the Respondents had complied and filed their written submissions on the 29th June 2021, the Appellant herein did not comply and therefore cannot be heard to castigate the Hon vice Chair for having not considered its non-existent submissions.



44. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court/Tribunal in this case, on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an Applicant who fails to file his/her submissions on an application as ordered by the Court/Tribunal is deemed as a party who has failed to prosecute his/her application and therefore that application is liable for dismissal. The filing of submissions having been ordered as a mode for the hearing and determination of the application and there having been no compliance by the Appellant herein as noted also at paragraph 26 of the impugned ruling, the failure by the Appellant to exercise the leave granted to them to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on the Appellant's part in the prosecution of the matter. The Appellant had been afforded an opportunity to be heard by way of written submissions which it did not take up.
45. Indeed the right to a fair opportunity to be heard, whether orally or in writing, is an important constitutional value and principle. So too is the principle that justice shall not be delayed. (see the Court of Appeal holding in *Synergy Industrial Credit Ltd vs. Cape Holdings Ltd* [2020] eKLR)
46. The Court of Appeal in *Rowlands Ndegwa and 4 Others vs County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties)* [2020] eKLR, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai vs Attorney General & 3 others* [2016] eKLR, had also observed as follows:
- “With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity....”
47. The mode of hearing having been elected by consent and the same having been adopted by the Business Premises Rent Tribunal, and there having been no compliance by the Applicant/Appellant therein, the Vice Chair of the Business, Premises Rent Tribunal ought to have dismissed the said Application in the first instance.
48. Secondly, it is evident and as rightly put by the Respondents that the Appellant herein having noted that it had not filed its submissions as directed filed its record of Appeal which contained a copy of its submissions dated the 14th July 2021 which had not been received by the Business, Premises Rent Tribunal and which had been allegedly been filed alongside the payment receipt as proof of payment of filing fees and which receipt related to a different case number, being BPRT 304 of 2021.
49. The Appellant in flagrant disobedience of the order of Vice Chair of the Business Premises Rent Tribunal now comes to this Court sitting as an appellate court for temporary dispensation. I find that he should not be allowed to use the process of the court for such a patently mischievous purpose.
50. The often cited case of *Giella –vs- Cassman Brown & Company Ltd* (1973) EA 358 is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and third in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.



51. In the present case there is no dispute that the Appellant had approached the Business Premises Rent Tribunal seeking mandatory injunctive orders and restraining orders in the nature of a prohibitory injunction against the Respondents seeking that they be restrained from interfering with its quiet possession of the premises. Indeed it had been submitted by the Respondents herein and also held by the Business Premises Rent Tribunal that at the Appellant herein had been in occupation of the suit premises from the year 2015 to the year 2019 without paying rent which had accumulated to Ksh. 4,876,426.73/= as at 5th February 2019 when the Respondents distressed for rent.
52. It was held by Ringera, J (as he then was) in *Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001*:
- “The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the Applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”
53. Further in *JM vs. SMK & 4 others [2022] eKLR* Justice G.V. Odunga as he then was had this to say,
- “Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.”
54. And finally, the Court of Appeal in *Kenya Breweries Limited & another vs. Washington O. Okeyo [2002] eKLR* had held as follows:
- “It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party. In the circumstances, we think that there was nothing to justify the grant of a mandatory injunction on the interlocutory application that fell for consideration before the learned Judge and in that respect the learned Judge erred in granting it.”
55. It is abundantly clear that the Appellant is hopelessly in rent arrears to date and has not remedied the situation but is now blaming the situation on the absence of an allegedly legally enforceable lease agreement, substantiating the rent arrears. Quite clearly it is not possible to make a final determination at this interlocutory stage that the said arrears charges were unlawful, illegal or unreasonable, it would



be presumptuous of the Appellant to make such presumptions. The mere fact that the Appellant is in arrears of the rent due to the Respondents is sufficient to lead the court to hold that the Appellant has not established a prima facie case.

56. I therefore need not consider the other two conditions for the grant of temporary injunction as established in the *Giella –vs- cassman Brown Ltd* case (supra) as the conditions are sequential such that when the first condition fails, then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86* cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya vs. David Kitu & Another (2014) eKLR* observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

57. I find that since injunctive orders are an equitable remedy and that he who seeks equity must come with clean hands, the Appellant having approached a court of equity with unclean hands, I find that its conduct does not meet the approval of the Court of equity and is therefore undeserving of equitable remedy. The Appeal herein is dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 22ND DAY OF FEBRUARY 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

