IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA,MWILU & AZANGALALA, JJA)

CIVIL APPLICATION NO. NAI 91 OF 2015

BETWEEN

HIGH PREFERENCE PROPERTIES LIMITED…….1ST APPLICANT

FLEXITANK SYSTEMS KENYA LIMITED……..2ND APPLICANT

AND

STEPHEN MAINA MUTURI……..RESPONDENT

(An application for injunction and/or stay of execution under Rule 5(2)(b) of the Court of Appeal Rules pending appeal against the Ruling and Orders of the ELC at Nairobi (Hon. Lady Gitumbi) given on 13th March, 2015 in ELC CASE NO. 20 OF 2015

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RULING OF THE COURT

The application before us was filed by **M/s High Preference Properties Limited** and **M/s Flexitank Systems Kenya Limited** (hereinafter **"the applicants")** under **Sections 3, 3A** and **3B** of the **Appellate Jurisdiction Act, Cap 9** of the Laws of Kenya, **Rule 5 (2)(b)** of this Court's Rules and all other enabling provisions of the Law, seeking an order of injunction restraining **Stephen Maina Muturi** (hereinafter **"the respondent")** from terminating their leases or evicting them from **LR No. 209/1820,** River Road Nairobi (hereinafter **"the demised premises"**) or interfering with their quiet and peaceful enjoyment of the premises pending the hearing and determination of an intended appeal from the order of the lower Court in **ELC Case No. 20 of 2015** dated 13th March, 2015.

The order referred to was made by **Hon. Mary M. Gitumbi J.,** on an application for orders of temporary injunction restraining the respondent, who was the defendant in that court, from terminating the applicants' lease agreements or evicting them from the demised premises pending the hearing and determination of the application and the said suit. The learned Judge dismissed the applicants' application. We may briefly relate how the matter landed before the lower Court.

The applicants executed two separate lease agreements both dated 5thNovember, 2009 with one **Gitari Muturi Maina**, the respondent's deceased father, with respect to the demised premises. The leases were for a term of five (5) years and three (3) months with effect from 5th November, 2009 with the option to renew. The pertinent covenants which were contentious related to the user of the premises, restriction on transferring, subletting and parting with possession and renewal.

The user clause provided as follows:-

> 3**…….**
>
> ***To use the premises solely for the purposes of a shop and for no other purposes without prior written consent of the landlord."***

Clause (3)(o) of the said leases limited the user clause as follows:-

> **"3……**
>
> ***Not to permit any part of the premises to be used by other third parties without the prior written consent of the landlord."***

And clause 3(n) limited possession in the following terms:-

> **"3…….**

- ***Not to transfer sublet or part any further with the possession of any part of the premises without the prior written consent of the landlord and (if the same is required) of any chargee having a security over land and the building first had and obtained AND IT IS EXPRESSLY AGREED AND DECLARED that upon any breach of the tenants of this covenant the landlord may re-enter upon the premises without notice and thereupon the term shall determine absolutely. If the landlord gives consent the instrument of transfer or sub-letting shall be registered within two months of the date of the consent with the landlord's Advocates and registration fee shall be paid to such advocates by the Tenant for the service rendered in connection with any transfer or subletting pursuant to the provisions of this sub-clause. Any agreement of subletting shall contain an unqualified covenant by the sub-leasee in the same terms as this sub-clause. For the purposes of this sub-clause if the Tenant is a private limited liability Company or unlimited Company the transfer of the beneficial interest of more than fifty per centum of its issued share capital shall be deemed to be a transfer and shall require the consent of the landlord and (if the case so requires) also of any such chargee accordingly."***

The option to renew clause was in the following terms:-

> "7. ***That at the expiration of the lease herein the Tenant shall have an option to renew the lease and the rents reserved herein shall be reviewed or increased by such amount which shall not be below the prevailing market rates and/or by not less than the rent contained herein whichever is the higher PROVIDED that the Tenant expresses its intention to renew the lease three (3) months preceding the termination period."***

By their letters dated 20th May, 2014 and 17th June, 2014 respectively the applicants informed the respondents' agents, **Prime Zone Property Consultants Agencies,** inter alia, as follows:-

> ***"Consequently, this letter is to notify you that:-***

a. ***As the tenants occupying the aforesaid portion of the said premises, we hereby exercise the option to renew the lease for a further term of five(5) years and three (3) months or such longer period as the landlord may wish to grant;"***

The respondent was not of the same mind. Through **M/s Harit Sheth** Advocates, in their letter dated 19th August, 2014, the respondent informed the applicants that their leases would not be renewed. He proferred one reason for his decision not to renew the lease. The Advocates wrote:

> ***"We are informed that you have in total and blatant breach of the said condition [3n] sub-let the said leased premises to various parties to (sic) whom you are collecting rent from without first***

obtaining our client's consent. The lease has therefore automatically determine[d) and our client is at liberty at any time to re-enter premises.

However, on a strictly without prejudice basis our client is willing to allow you to finish the term of the current lease. You are now required to arrange to hand over the premises in such tenantable condition and state as provided in the said lease on or before the 5th of February 2015."

In the ultimate paragraph the advocates stated:-

"For the avoidance of doubt our client WILL NOT be renewing the lease in your favour for reasons enumerated herein above."

Apprehensive that they would be evicted, the applicants filed suit before the Land & Environment Court (L&EC) seeking a declaration that they validly exercised their option to renew their leases and an injunction restraining the respondent from terminating the said leases.

Appurtenant to the plaint the applicants lodged the aforesaid application by way of Notice of Motion seeking the orders stated. The principal ground for the application was that they had not sublet the demised premises but had merely used them as "exhibition halls" with the knowledge of the respondent's predecessors and that having exercised their option to renew as required under their lease agreements, the respondent was obliged in law to recognize them as his tenants subject to agreement on revised rent.

The respondent resisted the Notice of Motion on the main grounds that he had notified the applicants of his desire not to renew the lease; that there had been no agreement on the terms of renewal and that the applicants were, in any event, in breach of clause (3) (n) of their leases restricting sub-letting of the demised premises.

The learned Judge of the Land & Environment Court heard the application and in a reserved ruling delivered on 13th March, 2015, dismissed it, concluding as follows:-

"My finding at this interlocutory state is that the option to renew the lease contained in Clause 7 of the Lease Agreements is void for uncertainty. Accordingly, it seems to me that this so-called option was entirely being void for uncertainty. I therefore conclude that the plaintiffs do not have a genuine and arguable case and have therefore not shown that they have a prima facie case with high chances of success at the main trial Since the plaintiffs have failed to prove the first ground in the grounds set down in the celebrated case of Giella versus Cassman Brown, this honourable Court need not venture into the other grounds."

The applicants were aggrieved and lodged a Notice of Appeal on 13th March, 2015. They then, under a certificate of urgency, filed the present Notice of Motion.

The application is based on the main grounds that unless the order sought is granted, they will be evicted from the demised premises and yet their intended appeal has high chances of success, which success will be rendered nugatory if the relief sought is not granted. The application is supported by two affidavits sworn by **Ann Kajuju** and **Susan Mukami** who do not describe their status in the applicant companies. The affidavits elaborate the grounds of the application. There is a draft memorandum of appeal annexed to the affidavits. The application is opposed on the basis of a replying affidavit sworn by the respondent. Annexed to the affidavit are numerous exhibits supporting the averments in the affidavit. Learned Counsel, **Mr. Mbabu,** argued the application on behalf of the applicants and learned counsel, **Mr. Koech**, responded on behalf of the respondent. Both counsel addressed us at length on the merits and demerits of the application.

The principles upon which this Court exercises its original and unfettered discretion in applications for an injunction or for stay of execution or for stay of proceedings pending an intended appeal or an appeal, if already filed, are well settled. The applicant is required to satisfy the court both that the appeal or

intended appeal is arguable and further that unless the order sought is granted, the success of the intended appeal or appeal would be rendered nugatory by the refusal to grant the order. See ***Reliance Bank Ltd*** *(in liquidation) vs* ***Norlake Investments Ltd [2002] 1 EA 227, Githunguri vs Jimba Credit Corporation Ltd (No.2) [1988] KLR 838*** *and* ***J.K. Industries Ltd. vs Kenya Commercial Bank Ltd. [1982-88]1 KAR 1088.***

The principles will however be applied to particular facts and circumstances of each case.

The applicants contend that their intended appeal is indeed arguable and have, as already observed, attached to the application the proposed memorandum of appeal containing nine grounds of appeal. Mr. Mbabu stated from the bar at the hearing of the application that the applicants have indeed filed Civil Appeal No. 123 of 2015. It is apparent to us that the applicants will be contending in the appeal, among other things, that having exercised their option to renew their leases, the respondent was bound to grant them a new lease at a rent which could be determined by the parties, the court or by arbitration and that the learned Judge of the Environment & Land Court had failed to apply the principles crystallized in the case of ***Giella - v – Cassman Brown [1973] EA 358*** and those of interpretation of contracts.

Now that the appeal has been lodged, it is, in our view inappropriate and indeed pre emptory to discuss in some detail the merits of the appeal. We however are alive to the fact that the learned Judge in refusing the applicants' application for an interim injunction was exercising her unfettered discretion. There is no dispute about the principles which apply in considering an appeal against the lower court's exercise of such discretion.

Sir Clement De Lestang VP, in **Mbogoh & Another –v- Shah [1968] EA 93,** stated:

> ***"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have taken into consideration and in doing so arrived at a wrong conclusion."***

In the same case, **Sir Charles Newbold P**, stated as follows, on the same issue:

> ***"For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

As stated earlier the Environment & Land Court considered the relevant principles for the grant of an interim prohibitory injunction as crystallized in ***Giella -v- Cassman Brown & Another (supra)*** and came to the conclusion that the applicants had failed to demonstrate a *prima facie* case with a probability of success at the trial. The learned Judge appreciated what a *prima facie* case is and received guidance from the case of ***Mrao -v-First American Bank of Kenya Limited & 2 Others [2003] KLR 125.*** In our view, notwithstanding that the learned Judge used the words "high chances of success", instead of probability of success with reference to a *prima facie* case, we have no doubt in our minds that she had the right principles in mind in considering the applicants' application.

The learned Judge considered the principle in ***Sands -v- Mutual Benefits Ltd [1971]EA 156,*** that in the absence of agreement or a method of securing agreement on new rent, there could not be any effective renewal of lease and concluded that the principles applied to the position of the parties herein. In the learned Judge's view, the option to renew the applicants' leases was void for uncertainty.

Mr. Mbabu argued that the learned Judge was not bound to follow the decision in ***Sands -v- Mutual Benefits Ltd. (supra)*** since it was a High Court decision. Mr. Mbabu was plainly right that the said decision was only of persuasive value. Indeed the English decision in ***Corson and Others -v- Rhuddlan Borough Council [1990] I.E.G.L.R. 255 (C.A.)*** Civil Division, discredited the principle in ***Sands -v-***

Mutual Benefits Ltd. In the ***Corson and Others -v- Rhuddlan Borough Council*** case, the court confirmed the decision in ***Foley -v- Classique Coaches Ltd. [1934] 2 KB1*** that "the presence of the words "*to be agreed by the parties"* was not fatal to the existence of an enforceable contract if it is otherwise clear that there was a contractual intention by the parties to be bound by the clause."

Mr. Mbabu's argument would have been unassailable but for the following factor. Enforcement of the option to renew was still subject to there being no subsisting breach of any of the applicants' obligations under their leases.

As we have already stated, our jurisdiction is original and discretionary.

The respondent declined to renew the applicants' leases on the principle ground that the applicants were in breach of clause (3) (n) aforesaid of the lease agreements. He contended that the applicants had sublet the demised premises to various third parties without his consent or that of his predecessor in title. In the replying affidavit he swore in opposition to this Notice of Motion, he contended that some of the third parties were, at the time of making the affidavit, still in occupation of the demised premises and were in such occupation without any contractual or legal obligation to him. He further annexed a copy of an affidavit sworn by the Property Manager of his agent, one **Dishon Wanjohi Ndonga**, in **Nairobi High Court ELC Case Number 20 of 2015**. Annexed to that affidavit are various receipts issued to third parties allegedly occupying the demised premises. The payments appear to be in respect of rent. Some of the receipts bear the stamp of "**JANE & SUSAN STALLS MERALUX PLAZA"**.

The averments and annextures to the replying affidavit would suggest that third parties are indeed in the demised premises on some kind of monthly tenancies created by the applicants. The disclosures made before us in the replying affidavit of the respondent have not been rebutted by a subsequent affidavit of the applicants in response thereto. The disclosures are rather disturbing as they portray the applicants as lacking in candour. They would appear to have given out parts of the demised premises to third parties on what would appear to be monthly tenancies, yet they persist before us as they did before the Environment & Land Court that *"there are no permanent exhibitionists. They come and go on daily basis. They do not control any space within the suit premises. All control is retained by the shop owners (Plaintiffs)."*

At this stage, the applicants do not seem to have any answer to the charge by the respondent that they have, in breach of clause (3) (n) of the lease agreements, sublet the premises to various third parties without his consent.

The applicants made heavy weather of the words **"any further"** and **"other third parties"** appearing in clauses (3)(n) and (3)(o) of the lease agreements. They contended that the said words suggest that the respondent and his predecessors in title acknowledged third party exhibitors in the demised premises. The respondent did not agree. In our view, there was no doubt as to what the user of the demised premises was as the same was provided in clause (3)(p) of the lease agreements reproduced above.

If the parties were unanimous that the premises would be used for the purposes of exhibition stalls, nothing would have stopped them from expressly stating so in the lease agreements. The applicants have contended that their previous landlords acknowledged that user. Unfortunately lease agreements executed between them and the former owners of the premises **M/s APA Insurance Company Ltd**. were not exhibited by the applicants. Nor did they exhibit a single letter from them acknowledging that at the time the premises were first let out to them, exhibition stalls were in place.

Given our view of the matter our conclusion is that the respondent would appear to have had reason to decline to renew the lease. In the end, in the circumstances of this case, we express our doubt whether the appeal is arguable. It follows that we would not be inclined to grant the prayer sought since the applicants do not surmount the first test. We however observe that if we had found for the applicants on the issue, we would have proceeded to find that the appeal would be rendered nugatory if the order sought is not granted. But in view of our doubt as to whether the appeal is arguable, the issue is of no consequence.

In the result the application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2015.

P. KIHARA KARIUKI

……..……

PRESIDENT, COURT OF APPEAL

P.M. MWILU

…….……..

JUDGE OF APPEAL

F. AZANGALALA

……...…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR