IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 64 OF 2009

BETWEEN

WESTLANDS TRIANGLE PROPERTIES LTD ……………… APPLICANT

AND

WESTLANDS SUNDRIES LTD ……………………… 1ST RESPONDENT

MEAT MASTERS LTD……………………………… 2ND RESPONDENT

DO IT YOURSELF LTD …………………………… 3RD RESPONDENT

(An application for stay of the Ruling and Orders of High Court of Kenya at Nairobi (Sitati J.) delivered on the 28th November, 2008

in

H.C.C.C. NO.112 OF 2008)

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RULING OF THE COURT

This is an application under **rule 5(2)(b)** of the Court of Appeal Rules, for an order of stay of the orders of the superior court made on 28th November 2008 and 10th December, 2008, in High Court **Civil Case No. 112 of 2008**. By those orders the superior court granted, firstly a mandatory injunction to compel **Westlands Triangle Properties Limited**, the applicant herein, to reinstate forthwith, **Westlands Sundries Limited**, **Meat Masters Limited**, and **Do it Yourself Limited**, the 1st, 2nd and 3rd respondents in the application, into premises on L.R. No. 209/6368/4, and secondly, a temporary injunction restraining the applicant from letting, transferring, charging, leasing, pledging or in any other way alienating the shop space occupied by the respondents' herein, or from interfering with their occupation thereof. There were other orders, but they are not relevant in the application before us. The orders were to remain in force pending the hearing and determination of the suit. The applicant herein was aggrieved and intends to appeal against those orders, and has duly filed a notice of appeal to declare that intention. In the application before us it seeks an order staying the execution of those orders pending the filing, hearing and determination of its intended appeal.

The principles which guide the court in applications of this nature are now well settled. The applicant has to demonstrate to the Court, firstly, that its appeal or intended appeal is arguable or that it is not a frivolous one. Secondly, and in addition, that unless it is granted a stay or injunction, as the case may be, the success of its intended appeal or appeal will be rendered nugatory (see **Reliance Bank** (in liquidation)**v. Norlake Investments** [2002] 1 EA 227). It is enough if an applicant is able to show at least one arguable point in its appeal or intended appeal.

The background facts are straightforward, and as far as we can make out they are not in dispute. The applicant is the registered owner of the suit premises. It had one Rosemary Wanja Njau as head lessee with the respondents herein as sub-lessees. The respondents had been in possession of separate parts of the premises, respectively, since 1971, 1979 and 1976, with the knowledge of the previous owners of the premises. When the applicant became the owner, the respondents were in possession and therefore it inherited the lessee and sub-lessees of the suit premises.

This dispute started when Rosemary Wanja Njau surrendered the lease to the applicant, which as a result demanded that the sub-lessees also vacate the premises, in their view, because their sub-leases had not been approved or consented to by them. The respondents resisted their eviction by filing complaints before the Business Premises Rent Tribunal pursuant to the provisions of **section 12(1)** of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 of the Laws of Kenya. While the complaints were pending for hearing the applicant evicted the respondents and thus provoked an application by them in the aforesaid suit for, among other orders, a mandatory injunction to reinstate them into the suit premises.

In the meantime the applicant, who was the defendant, moved the superior court for an order of injunction restraining the respondents, their servants or agents or otherwise from entering, using or remaining in the suit premises pending determination of its suit. There was a further prayer that the proceedings the respondents had commenced before the Business Premises Tribunal be stayed pending the determination of the suit. That application was heard by Ang'awa J. who in a reserved ruling dated 30th April 2008, declined to grant the orders sought on the ground that the superior court lacked jurisdiction to grant those orders. Accordingly she stayed the proceedings in the suit, pending determination of the respondents' complaints before the Business Premises Rent Tribunal.

The issues in the proceedings before the Business Premises Rent Tribunal, were twofold. First, the respondents wanted the tribunal to order the applicant to accept rent for the suit premises which it had declined to accept. Second, the respondents wanted the tribunal to restrain the applicant from evicting them or interfering with their quiet enjoyment of the suit premises.

On 14th November, 2008, the tribunal, by a ruling of that date given by its Chairman, upheld an objection which was raised by the applicant herein that the premises in question did not fall within the tribunal's jurisdiction, and consequently dismissed the respondents' complaints. That ruling prompted the respondents to move the superior court for, among other orders, a mandatory injunction to compel the applicant to reinstate them. The applicant had by then evicted the respondents.

The respondents' application was heard by Sitati J, who, in a ruling against which an appeal is intended, granted orders compelling the applicant to reinstate the respondents.

In the motion before us the applicant contends, among other things, that as soon as the respondents were evicted, new tenants took over after executing tenancy agreements with the applicants, and it will therefore be difficult to reinstate the respondents. It has also contended that the respondents should not have applied for a mandatory injunction but should have appealed against the decision of the tribunal. Consequently, it was its counsel's submission before us that Sitati J. lacked the jurisdiction to grant the orders she gave, moreso because Ang'awa J. a Judge of equal jurisdiction had held that, the High Court had no jurisdiction to deal with the matter. Learned counsel for the applicant, Mr. Mwenesi, also submitted that it is arguable whether an injunction could be issued at interlocutory stage, otherwise than under Order 39 of the Civil Procedure Rules as happened in this case.

It is to be noted that the respondents' application for a mandatory injunction was expressed to be brought under **sections 3A** and **62** of the Civil Procedure Act and **Order L rule 1** of the Civil Procedure Rules. Mr. Issa for the respondents does not think there is anything wrong with bringing the application under those provisions. He does not think the applicant's intended appeal is arguable. Besides, it is his view that the applicant should have complied with the High Court order first before coming to this Court for assistance.

The dispute between the parties relates to the question whether the respondents were protected tenants under The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The respondents had been in possession of the suit premises for upwards of over 29 years each. They were sub-tenants of Rosemary Wanja Njau before the applicant became owner. These are the persons the applicant calls trespassers. It contends that because they did not enter into any tenancy agreement with it, then their presence in the premises is wrongful and unlawful. It is our view that the applicant did not issue any notice of termination of their existing tenancy with Rosemary Wanja Njau who had surrendered her lease to the applicant as head landlord. In view of the provisions of **sections 5(1)** of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, as read with **section 15** of the same Act, it is doubtful whether this Court had the jurisdiction to entertain this application.

The order by Ang'awa J. dated 30th April 2008 has not been vacated. Whether or not the applicant could evict the respondents without recourse to the High Court is doubtful. The High Court did not dismiss the applicant's suit but merely stayed further proceedings. When the tribunal held that the respondents were not tenants within the meaning of the Act it meant that the parties were obligated to go back to the superior court to continue with the applicant's pending suit.

We note that in its prayers in the plaint in that suit the applicant had, among other things, prayed for possession of the suit property. The applicant, instead of re-activating its suit decided to evict the respondents otherwise than through the process of the court.

In the result whether one views the matter as falling within the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, or as being an ordinary civil case, we are not satisfied the first condition for the grant of an order of stay has been satisfied. Having come to that conclusion, there is no need of considering the nugatory aspect. The applicant is under a duty to establish both grounds. A failure to establish one, as here is sufficient to disentitle an applicant to orders under **rule 5(2) (b);** aforesaid. It was argued that there are third parties already in possession and who are likely to be adversely affected without a hearing should the mandatory order of injunction be enforced. It is clear from what we have stated above that the applicant was stopped by an order of the court from evicting the respondents pending the determination of the complaints they had filed before the tribunal. There was no determination of the applicant's suit by the High Court. Nor could there be a determination by the tribunal of the question whether the respondents were trespassers, it, having ruled that there was no relationship of landlord and tenant within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Such a ruling did not preclude the existence of an uncontrolled tenancy relationship in which case the matter would have reverted back to the High Court. Instead of returning to the High Court to pursue its suit the applicant evicted the respondents. It created a situation for which if there is anyone to blame for it, it should blame itself. (see **Kamau Mucuha v. The Rippples Ltd**. – Civil Application No. NAI. 186 of 1992). As was categorically stated in the **Kamau Mucuha case** (supra) a party, ought not, as far as possible, be allowed to retain a position of advantage that he has obtained through a planned and blatantly unlawful act. At the moment we eschew any attempt at determining whether or not the decision of the superior court to grant a mandatory injunction was proper or otherwise, as that will be the function of the bench that will eventually hear the applicant's appeal. Until then, we have no basis for granting the orders of stay sought in the application before us.

In the result we dismiss the applicant's motion dated 10th March 2009, with costs to the respondents.

Dated and delivered at Nairobi this 16th day of July 2010

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR