



**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: LAKHA, BOSIRE & O'KUBASU, J.J.A.)**  
**CIVIL APPEAL NO. 321 OF 2000**

**BETWEEN**

**HANNAH WANJIRU WANGANGA .....APPELLANT**

**AND**

**BERCO AUTO SPARES LTD.....RESPONDENT**

**JUDGMENT OF THE COURT**

This is an interlocutory appeal. Hannah Wanjiru Wanganga, the appellant, is named defendant in Nairobi High Court Civil Case No. 1676 of 2000, in which, Berco Auto Spares Limited, the respondent, is the plaintiff. Two prayers are sought in the plaint. First, that an order be made compelling the parties to the suit to submit to arbitration an alleged dispute between them over rent. Second, that pending the outcome of the arbitral proceedings, an order be made compelling the appellant to accept Kshs.15,000/= per month as rent for her premises which she had let to the respondent way back on 19th October, 1995.

The appellant, as owner of premises known as Plot No. 209/136/53, let out a shop on the property to the respondent on 19th October, 1995, for a term of 5 years and two months, at an agreed rent of Kshs.10,000/= per month, with an option to renew the tenancy for a like term but for an amount of rent which would be agreed upon between the parties. The renewal clause was, in pertinent part, worded as follows:

"If the lessee shall at the expiration of the term hereby created be desirous of obtaining a further lease of the said premises and shall signify such desire to notice in writing delivered to the lessor Three Calendar Months at the least (which time shall be of the essence) before the expiration of the term hereby created and if the Lessee shall have duly paid the rent herein reserved and have duly performed and observed all the covenants and agreements herein contained or implied and on his part to be performed and observed then the lessor may on or before the expiration of the term hereby created at the cost of the Lessee, grant to the Lessee a new lease of the said premises for a further term of Five years and Two months to commence at the expiration of the term hereby created and the new monthly rent payable to be agreed between the parties and failing agreement, to be determined by arbitration of a qualified valuer or valuers ... The old rent to continue being applicable while arbitrators' decision is awaited ..."

The lease agreement is silent on who between the parties would refer the dispute over rent to arbitration in the event of a disagreement on the amount of rent to be paid. The dispute between the parties started when the respondent sought a renewal of the lease but the appellant declined to renew it. The lease was to expire on or about 19th October, 2000. By her letter dated 29th August, 2000, the appellant, in answer to the respondent's letter dated 25th July, 2000, advised the respondent that she did not intend to renew the lease as she personally intended to use the premises, the subject matter of the lease. The respondent admitted having received the letter soon thereafter, but it did not file its suit until 13th October, 2000, five or so days before the lease expired. Filed with the plaint was a Chamber Summons dated 13th October,

2000, seeking a temporary injunction to restrain the appellant by herself, her agents or employees from evicting it from the suit premises pending the final determination of the suit. The respondent alleged, both in its plaint and affidavit in support of the said Chamber Summons, that the appellant had, in contravention of the terms of the lease agreement between the parties, refused to renew the said lease unless she was paid Kshs. 1 million as goodwill. It also alleged that the appellant had refused to refer their dispute on the matter to arbitration.

The appellant filed a replying affidavit dated 23rd October, 2000, in which she denied, either directly or otherwise having demanded Kshs. 1 million or any other sum. She also averred that the respondent was not entitled to a renewal of the lease, firstly, because it had indicated it would vacate the suit premises at the end of the lease, and secondly, because its renewal notice was delivered to her on 29th August, 2000, in breach of the renewal clause in the lease agreement.

The Chamber Summons dated 23rd October, 2000, was heard by Ang'awa J. In her ruling dated 26th October, 2000 which is the subject matter of the present appeal, she held that the appellant's notice advising the respondent that she did not intend to renew the lease should have been given at least three months before the expiry of the lease, and having not been so given, the respondent had shown it had a prima facie case which entitled it to an injunction. She also held that the balance of convenience was in favour of the respondent. She then proceeded to grant the injunction in terms of the Chamber Summons and thus provoked the present appeal. Six grounds of appeal have been proffered, namely, that the learned Judge erred by entertaining an application founded on a defective plaint; that she erred when she departed from issues she had framed; that she erred when she held that the appellant was obliged to give notice of her intention not to renew the lease; that she erred in failing to find that the respondent had failed to seek a renewal of the lease in time; that she erred in failing to find that the respondent had not established a prima facie case and therefore did not deserve an interlocutory injunction.

Mr. Mutua for the appellant submitted before us that the respondent's plaint is defective as it breaches Order VII rule 1(e) of the Civil Procedure Rules. That in his view, being the case, the learned Judge of the court below should not have proceeded to grant an injunction as she did. We have perused the record of appeal, and it is clear to us that the learned Judge's decision on the matter was not given in the ruling appealed from, but in a ruling which was given a day earlier. The appellant having not filed a notice of appeal against that decision it is not open to her or her counsel to raise the issue before us.

It is true that Ang'awa J. framed two issues, the first one being "whether the plaintiff was entitled to compel the defendant to renew his(sic)lease", and the second whether the respondent could be compensated in damages. Whether or not the order appealed from was based on those or other issues is neither here nor there. What was before the learned Judge, was an application for a temporary injunction. The principles which guide the court in dealing with such an application are well settled, and are clearly spelt out in the often cited case of *Giella v. Cassman Brown & Co. Ltd* 1973 EA 358, which, was one of the cases cited to the court below. The applicant must first show he has a prima facie case with the probability of success upon trial. Secondly, he must show that in the event that he is refused an injunction and he were eventually to succeed, that damages would not adequately compensate him for any loss which he would have suffered. Thirdly, that if the court is in doubt on either of the two principles above, then it should consider the application on the balance of convenience. In the result nothing turns on the appellant's complaint in her second ground of appeal. We may only add that by framing the issues as she did the learned Judge ended up confusing herself and did not handle the application in the manner set out in *Giella v. Cassman Brown* (supra). Instead, after setting out the facts, she first dealt with the balance of convenience before considering whether the respondent had shown it had a prima facie case with the probability of success upon trial.

*Giella v. Cassman Brown*, not only sets out the principles to guide the court in applications for temporary injunctions, but also the sequence with which those principles must be considered. We think that it is improper to consider the last principle first as the learned Judge in the court below did. We have however decided to ignore that anomaly and to consider the appeal on the basis of the material which was placed before the learned Judge. The respondent's case was that on 25th July, 2000, it notified the appellant that it wished to renew the lease for a further term of 5 years and two months, and that the appellant's son, one

James Gichuhi Nganga had agreed to the renewal on condition that the respondent paid goodwill of Kshs.1 million. However, when it refused to pay the money, the appellant also refused to renew the lease.

The appellant, as we stated earlier, denied she had demanded such money. It was her case that she declined to renew the lease because she personally wanted to occupy the suit premises. The learned Judge of the court below did not consider the appellant's assertion that she received the renewal notice on 29th August, 2000. If the lease was to expire on 19th October, 200, then the notice would appear to have been delivered late. The respondent did not controvert what the appellant said regarding the date she received the renewal notice. The renewal clause made the date of delivery of the notice of the essence. The dispute between the parties centred on the question whether the respondent had sought a renewal of its lease on time. The appellant's statement was categorical that she received the renewal notice on 29th August 2000, which by ordinary computation was about 10 days out of time. In absence of any controverting evidence it cannot be said that the respondent did make out a prima facie case. Besides Ang'awa J. having not dealt with the issue, she thereby erred in principle. Besides, she based her decision on the alleged failure by the appellant to deliver to the respondent in time a notice of intention to renew the lease. Whether or not the renewal clause imposed a duty on the lessor to also give a three months notice to the lessee if she did not wish to renew the lease, is doubtful. The issue was not raised by either party. Consequently that was an extraneous factor. The learned Judge thus erred in principle. In the result, we come to the conclusion that, on the material which was placed before the court below the respondent did not show it had a prima facie case with the probability of success upon trial. It was therefore improperly granted an injunction. The order that therefore commends itself to us is that the appeal succeeds, the order of the superior court dated 26th October, 2000, in its civil suit No.1676 of 2000, be and is hereby set aside, and in lieu thereof, we order that the respondent's application dated 13th October, 2000 be and is hereby dismissed with costs. The appellant shall also have the costs of the present appeal.

Dated and delivered at Nairobi this 29th day of January 2002.

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR.**