IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, SHAH & O'KUBASU, JJ.A
CIVIL APPLICATION NO. NAI. 165 OF 2001 (87/2001 UR)

BETWEEN

CHEMIL ENTERPRISES.....APPLICANT
AND

NEW THREE IN ONE COMPANY.....1ST RESPONDENT

TROEPS-PIONN-DOENNET COMPANY LTD.....2ND RESPONDENT

(Being an application for temporary injunction and stay of execution pending the hearing and determination of the Civil Appeal No. 38 of 2001 being Appeal from judgment and decree of the High Court of Kenya at Nairobi (Etyang, J) dated 1st December, 2000

in

H.C.C.S. NO. 1821 OF 1998)

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RULING OF THE COURT

This is an application brought under rule 5(2)(b) of the Rules of this Court, by ***Chemil Enterprises*** (a firm), by which application it seeks orders for a temporary injunction to restrain the two respondents, ***New Three In One Company*** (a firm) and ***Top-in-One Company Limited*** (a limited liability company), either by themselves, their servants and/or agents from executing the decree of the superior court dated 1st December, 2000 and issued on 21st February, 2001 pending the hearing and determination of ***Civil Appeal No. 38 of 2001*** . Although worded to seek a temporary injunction as well as stay of execution of the decree, what the applicant seeks is in reality a stay of execution of the decree of the superior court issued on 21st February, 2001 which decree arises as a result of judgment entered by the superior court (Etyang' J) on 1st December, 2000. For the sake of convenience we will refer to the applicant as **CHEMIL**, the first respondent as **THREE-IN-ONE** and the second respondent as **TOP-IN-ONE.**

On 19th April, 1999 **TOP-IN-ONE** filed a counterclaim against **CHEMIL** (the plaintiff in the superior court) claiming rent in arrears (Shs.30,000/=) and mesne profits at a monthly rate of Shs.60,000/= from 1st September, 1998 until the date **CHEMIL** gave up vacant possession to **TOP-IN-ONE**. The suit in the superior court has had a chequered history. CHEMIL filed suit against **TOP-IN-ONE** on or about 20th August, 1998 seeking orders to restrain **TOP-IN-ONE** from evicting **CHEMIL** from shop premises on plot L.R. NO. 209/525/35, Tsavo Road, Nairobi. **CHEMIL** also sought declarations to the effect that it was entitled to exercise its alleged right to renewal of a lease and that

TOP-IN-ONE having accepted rent for one month after expiry of the first lease had accepted **CHEMIL** as a holdingover Stiemnualntta.neously with the filing of the suit **CHEMIL** sought, by an application in the suit, orders to restrain **TOP-IN-ONE** from evicting, intimidating or in any other manner interfering with its quiet possession of the said premises, until the hearing and determination of the suit. Annexed to the affidavit sworn in support of that application by one James Gitung'u Chege on behalf of **CHEMIL** was a copy of the tenancy agreement made between CHEMIL and **THREE-IN-ONE** whereby **THREEIN- ONE** had demised the said premises to CHEMIL for a term of six years from 1st September, 1992. We have already pointed out the **TOP-IN-ONE** and **THREE-IN-ONE** are different entities, the former a company and the latter a firm.

For the purposes of this application it is necessary to give a brief history of the suit before the superior court. **CHEMIL'S** application for an interim injunction was dismissed by Etyang' J on 10th March, 1999 who held that **TOP-IN-ONE** had sufficiently demonstrated that it was the registered proprietor of the suit premises; that CHEMIL had not elected to renew the tenancy and that therefore the tenancy (the 6 year one) had come to end by effluxion of time; that **TOP-INONE** had leased, properly, the suit premises to **KOOME INVESTMENTS LIMITED** from 1st September, 1998 to 30th September, 2001 at a monthly rent of Shs.9,000/=; that **CHEMIL** had alternative premises to move to.

After the learned Judge delivered his ruling dated 10th March, 1999 an application was filed by **CHEMIL** on the same day, seeking orders similar to the one sought in dismissed application but this time limited to the time it could have its intended appeal heard and determined. Etyang' J dismissed that application on 25th March, 1999.

On 17th March, 1999 **TOP-IN-ONE** had lodged an application in the superior court seeking to set aside a temporary order made by Oguk, J on **CHEMIL**'S aforesaid application dated 10th March, 1999 and also seeking orders for vacant possession of the suit premises. On 16th April, 1999 **CHEMIL** filed an application seeking an order to the effect that the suit was compromised by an agreement between the parties that is to say that **CHEMIL** had been granted a new tenancy and that judgment be entered in terms of the compromise. The learned Judge was set to hear the last two mentioned applications on 21st April, 1999 on which day **CHEMIL** filed yet another application whereby it sought to bring in **THREE-IN-ONE** as a defendant in the suit as first defendant relegating **TOP-IN-ONE** as the second defendant. It was in this application that **CHEMIL** described **TOP-IN-ONE** as agent of **THREE-IN-ONE**. It was by this application that CHEMIL sought to bring in the real landlord (the proprietor of the property) as the proper defendant.

On 20th May, 1999 **CHEMIL** yet again filed an application under section 100 of the Civil Procedure Act and order **VI A** rules 3 & 4 of the Civil Procedure Rules seeking leave to further amend its already amended plaint. By the proposed further amended plaint **CHEMIL**, inter alia, averred that **THREEIN-ONE** had already granted to it a new lease of the suit premises and that it had accepted rent amounting to Shs.300,000/=, for 9 months for the period between September, 1998 and May, 1999. **CHEMIL** also averred that **TOP-IN-ONE** had no right to serve any quit notice to it as it **(TOP-IN-ONE)** was not the landlord.

On 25th October, 1999 the learned Judge allowed the application by TOP-IN-ONE dated 17th March, 1999 and ordered that **CHEMIL** do give up vacant possession of the suit property to **TOP-IN-ONE**; that **TOP-IN-ONE** do proceed to formally prove its damages as pleaded in its counterclaim lodged on 19th April, 1999. It is common ground that **CHEMIL** is no longer in possession of the suit property.

By his judgment dated 1st December, 2000 the learned judge assessed the damages (mesne profits) against **CHEMIL** in favour of **TOP-IN-ONE** at Shs.1,715,752/50. In assessing the mesne profits the learned Judge went by a report of a valuer called Paul Ngugi Njagi who put the monthly market rental of the suit property at Shs.49,500/-. How the valuer arrived at this figure is at this stage a matter of conjecture when in fact **KOOME INVESTMENTS LIMITED** were tenants of the property at the material time at a rental of Shs.9,000/= per month. But the learned judge did not stop there in assessing mesne profits. Having rounded up Mr. Ngugi's figure to Shs.50,000/= he assessed the market monthly rental value at Shs.60,000/= and then doubled it to Shs.120,000/= in accordance with the legal principles

of law as he understood them. What the learned judge did not appreciate was that double rent (not mesne profits) can only be claimed by a landlord when the tenant gives a notice to quit and then does not quit and that **double rent** is only for the period when the tenant keeps possession after expiry of his quit notice. (See section 14 of the **Distress for Rent Act** Cap 293, Laws of Kenya). The learned judge also failed to consider that **KOOME INVESTMENTS LIMITED** were occupying the suit premises at Shs.9,000/= per month. The method of calculating mesne profits as adopted by the learned judge appears to be incorrect and at this stage we can certainly say that that is an issue to be gone into by the Court at the hearing of the appeal.

But that is not all. The learned Judge was told of the fact that **TOP-IN-ONE** was not the registered proprietor of the land on which the suit premises are situate. The registered proprietors are partners of **THREE-IN-ONE. TOP-IN-ONE** has directors some of whom are partners in **THREE-IN-ONE**. It is certainly arguable that the decree sought to be challenged ought not to have been made in favour of **TOP-IN-ONE**. These are arguable points which **CHEMIL** is entitled to canvas in the appeal. We are satisfied that the intended appeal is not frivolous.

Would the success in the appeal be rendered nugatory if the stay order sought is not granted? If the decree is executed the moneys will go to a company whose worth is not known to us. **TOP-IN-ONE** was registered as a private company on 15th May, 1975. It has a share capital of Shs.1,000,000/=. It is not known how much thereof is the paid up value. Although **CHEMIL** has not, in so many words, said that **TOP-INONE** may not be able to repay the rather large sum it may have to pay to it, it cannot be denied that when the mesne profits go to a wrong party recovery thereof may be impossible. We are talking of a sum in the region of Shs.3,000,000/= including costs and interest. We cannot overlook the fact that **CHEMIL** is not a large business concern and will suffer irreparably if it is ordered to pay out a sum of Shs. 3,000,000/= to an entity who is not the landlord. In fact it may collapse as a business firm. The application succeeds and we grant the third prayer of the notice of motion before us dated 28th May, 2001. The costs of this application shall be costs in ***Civil Appeal No. 38 of 2001.***

Dated and delivered at Nairobi this 29th day of June, 2001.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.
DEPUTY REGISTRAR.