

IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 734 OF 2002

HARRY E. ATENGPLAINTIFF

V E R S U S

GIMCO LIMITED..... 1ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA LTD. ...2ND DEFENDANT

R U L I N G

This is Chamber Summons application dated 3.5.2002 wherein Plaintiff is asking for interlocutory injunction under Order 39 of the Civil Procedure Rules for an order to restrain the Defendant from evicting him from the suit premises or in any other manner whatsoever from interfering with his quiet possession of the Plot LR No. 37/646. The Applicant is son to the deceased Gibson Oseyo Ateng who died on 8.7.90 but at his death he had charged the suit premises to the 2nd Defendant for a loan of Kshs.55,120 on 27.10.1972.

The Applicant lives in his Late father's home and says that he paid at one time what he considered to be outstanding balance of the loan after his father's death but the Defendant has failed to discharge the charge and has instead continued to accumulate interest. The 2nd Defendant has now appointed 1st Defendant as Receiver and same now threatens to evict him. The Applicant says the 1st Defendant ought to take letters of administration first. But the Defendant opposes the application relying on affidavit of 2nd Defendant of 27.9.2002 that the deceased's account fell into arrears so the 2nd Defendant appointed a Receiver of rent and profit on 28.2.2002.

Miss Kariuki for him has emphatically submitted that the Applicant has no locus standi as he is only an occupant and that he is not in the absence of letters of administration be an agent of the deceased's estate. The chargee gave notice to the deceased on 22.10.2001 of his intention to appoint a Receiver. At that time, according to Applicant, the deceased had died in July 1990, eleven years ago. The last payment was by a cheque dated 5.12.86 for Kshs.49,513/80 in purported final settlement. If this money was not final settlement, one wonders why mortgagee never acted on arrears from 1986 to 2001, and still why now after the death of the chargor. The delay here of about 16 years lends credence to the claim by the Applicant that the loan had been liquidated and if that be so then the case has high probability of success.

If the Receiver was being appointed because there had been arrears it should be shown when the arrears occurred. A mortgagee has statutory power to appoint a Receiver among other things, when the mortgage money is due. When it is not due, there is no power on the mortgagee to appoint a Receiver.

I think GIELLA vs. CASSMAN BROWN & CO. LIMITED 1978 EA 358 is fully vindicated. Damages is not appropriate where the Plaintiffs have lived on the property for so long raising expectations of permanency. If for example they have lived in the premises for all that time, his right over it by way of adverse possession may arise.

To refuse injunction and leave Defendant to evict the Plaintiff will cost the Defendant more devastating loss than allowing the injunction and cause the Defendant merely to wait for the outcome of the case because if the Defendant wins, he will have the home.

I feel constrained to allow this application which I do with costs to the Applicant.

DATED at Nairobi this 23rd day of May 2003.

A. I. HAYANGA

JUDGE

Read to -

Mr. Ateng Plaintiff in person

No appearance for Defendant