REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 371 OF 2003

GOLDLINE LIMITED ……..……..……..……..PLAINTIFF

V E R S U S

GIATHINWA FARMERS COMMPANY LIMITED…..….1ST DEFENDANT

PATROSE AGENCIES LIMITED ……2ND DEFENDANT

R U L I N G

This is application by way of Chamber Summons dated 23.4.2003 made under Order 39 Rule 1,2,3 & 9 of Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21; For Orders that: -

> "The first and second Defendants by themselves, their servants, and or agents be restrained from Levying Distress, entering or interfering with quiet possession of the suit premises occupied by the Plaintiff on plot No. L.R. No. 209/7249 Cross Road Nairobi."

The Supporting Affidavit by PRAVINLAL BHAGWANJI SHAH sworn on 23.4.2003 states that the tenancy is a controlled one and cannot be terminated outside the provisions of Landlord & Tenant (Shop Hotels and Catering Establishments) Act Chapter 301 and that rent has been paid and there is no arrears and that the Defendant does not issue receipts when rent is paid to him yet the 2nd Defendant has notwithstanding proclaimed Plaintiff's goods with a view to Levying Distress on them and the same is illegal. He claims that the Defendant through affidavit of I.E. Ngamu Paul of 10.6.2003 says Plaintiff actually owes rent in the amount of Kshs.1,120,000/- as at 8.4.2003, but in his Further Affidavit Pravinlal Bhagwaji Shah sworn on 9.6.2003 denies owing any rent and has given our details of his payment.

Distress is the right of the landlord as soon as rent is due and unpaid to enter the premises by himself, his servants or Court Bailiff on his behalf and impound any Chattels found therein for the value of rent due so long as they are not privileged. But a relationship of Landlord and Tenant must exist, that exists here. It is illegal distress where rent is not due or where it is irregular and or excessive.

In this case, the relationship of Landlord and Tenant exists and what is alleged is none payment of rent, but the Tenant has tabulated his payments. It must be noted that the rent when paid ought to have been shown in a rent book supplied by the Landlord. There is no such evidence. Besides, the Landlord is Levying Distress for rent which was due since 2000 and one wonders why it was not done earlier when the law is that it should be done as soon as the rent is due.

Now the Principle of GIELLA vs. CASSMAN BROWN & COMPANY LIMITED (1978) EA 358 states the law of application that is that Applicant must show a prima-facie case with probability of success, and

or that the injury to be caused if injunction is denied would be irreparable and cannot be adequately compensated by award of damages but if the Court is in doubt, to decide the case on balance of convenience.

I think there is prima-facie case shown here with probability of success because as the Defendant has prima-facie shown payment if this is proved the distress will be illegal.

Mr. Khamati said that the levy had already been carried out, but he did not specify how and this may be relevant because in order to Levy Distress there need not be an actual seizure. It is enough when there has been a proclamation. But when there has been no removal, and eventually, sale injunction Order still should be effective.

Lastly, I do not see why a Landlord can start to Levy illegal Distress and say it has been done but assume that injunction should not issue. One cannot draw equity from his own wrong. In that case, then mandatory injunctions can be used to facilitate equitable redress.

I think there is a prima-facie case, with probability of success made out, if not so, balance of convenience favour granting of injunction. Damages may be considered but in this regard, the amount is so much that Defendant's ability to pay would have to be established.

I grant the application with costs.

DATED this 26th day of September 2003.

A.I. HAYANGA

JUDGE

Read to Mr. Khamati

And Mr. Sharma