REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENTAL & LAND CASE 144 OF 2010

BENEDICT KARUTI RUKWARU.....1ST PLAINTIFF

NAFTALY MUNGATHIA.....2ND PLAINTIFF

VERSUS

JULIUS KABILO.....DEFENDANT

RULING

The application herein was filed by way of Chamber Summons dated 15th November, 2010. It sought orders:

1. THAT the application be certified extremely urgent, service thereof be dispensed with in the first instance and it be heard on priority basis.

2. THAT an interlocutory injunction be issued restraining the Defendant/Respondent, whether by himself or through his agents and/or servants and/or employees and/or representatives and/or anyone else claiming or acting for, and on behalf of or through him, from entering into, felling down trees growing on, and/or whatsoever interfering with the plaintiff's peaceful and actual possession, user and development of Land Parcel No. 9889 situate in Antuamburi Adjudication Section, pending interpartes hearing of the application.

3. THAT an interlocutory injunction be issued restraining the defendant/respondent, whether by himself or through his agents and/or servants and/or employees and/or representatives and/or anyone else claiming or acting for, on behalf of or through him, from entering into, felling down trees growing on, and or whatsoever interfering with the plaintiff's peaceful and actual possession, user and development of Land Parcel No. 9889 situate in Antuamburi Adjudication Section, pending hearing and determination of the suit.

4. The Plaintiffs/Applicants be awarded costs of this Application.

The Honourable Lady Justice J. Lesiit granted ex-parte interim orders on 18th November, 2010.

The application was heard interpartes on 17.12.2012. The Counsel for the plaintiffs/applicants relied on the grounds set out in the Chamber Summons and the documents and exhibits filed in Court. He

contended that the applicants had a prima facie case with, according to him, exceeding chances of success as they were the registered owners of the suit land. The said registration had not been impugned by the defendants. He explained that the applicants had been in possession of the suit land since 1986 to date to the utter exclusion of the defendant who did not offer any counterclaim in this case.

The Counsel contended that unless the injunction sought was granted, the applicants shall suffer profound damage not adequately atonable by a pecuniary award. He proferred that the applicants attached great sentimental value in the suit land, the same being their family's only ancestral land. That sentimental value was unquantifiable in terms of money. Furthermore the trees threatened to be felled and carted away had not been valued to ascertain their monetary value.

He argued that the balance of convenience tilted in favour of the applicants because they owned the suit land and had developed it to the exclusion of the respondent/defendant who had in any case not counterclaimed at all. He also wished to rely on the authorities he had adduced. Regarding the replying and further replying affidavit of the defendant, he argued that they did not demonstrate a scintila of either real or perceived right or interest in the suit land and the properties thereon and as such did not contain any valid answer to the applicants' claim for injunction.

Counsel for the applicants also wanted the Court to be persuaded to expunge from the record a purported affidavit sworn by one Muriuki M'ncebere Ndwara on 21st December, 2010 and which is annexed to the further replying affidavit by the respondent on the ground that the said Muriuki was not a party to this case and no specific leave had been obtained allowing him to swear an affidavit since he was a stranger in this case. He relied on Succession Cause No.313 of 2003 (Meru High Court) as his authority on this issue.

Counsel for the defendant opposed the application and relied upon the documents and annextures he had filed. He contended that there was a dispute relating to where the trees in dispute were standing on. He advanced the defendant's contention that the trees in question stood on another person's land. He further contended that in accordance with the principles enunciated in the case of **Giela V. Cassman Brown & Co. Ltd [1973] EA 358**, an injunction will not issue where damages are adequate. In this case, the Counsel pointed out that the plaintiff/applicant had already quantified his claim. Hence a monetary award, if necessary, could adequately compensate the plaintiff thereby obviating the need for an injunction to issue. He also contended that the application was fatally defective and should, therefore, be dismissed with costs as there was no consent from the Land Adjudication officer, attached to this suit as required by law. He therefore prayed that the application be dismissed with costs.

In rebuttal, counsel for the plaintiff's applicants pointed out as a matter of fact that the consent of the Land Adjudication Officer dated 6th October, 2010 had been filed together with the plaint in this suit on 15th November, 2010.

Regarding the adequacy of a monetary award, if found befitting, he contended that the plaintiff's main prayer was to be found at paragraph 16 sub-paragraph (a) of the plaint which is for a permanent injunction to stop trespass by the defendant. He argued that trespass cannot be quantified in monetary terms.

I have considered the submissions and the authorities proffered by the parties. I note that both parties sought to rely on the case of Giela V. Cassman Brown & Co. Ltd (supra). In this case, the Court, referring to the case of E. A. Industries V. Trufoods [1972] E. A. 420, said:

"**The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience."**

I find that the applicants/plaintiffs attach sentimental value, which is beyond monetary compensation, to the suit land. I also find that trespass would be difficult to be adequately compensated in monetary terms. The applicants have demonstrated a prima facie case with a probability of success. Having found that the first two tests in Giela vs Cassman Brown have been satisfied, I need not, ipso facto, consider the balance of convenience.

In view of the above findings, I hereby grant prayer 3 of the Chamber Summons filed herein on 15th November, 2010.

Costs hereof are awarded to the applicants/plaintiffs.

Orders accordingly.

DATED, AND DELIVERED AT MERU THIS 2ND DAY OF JANUARY, 2013.

P. M. NJOROGE

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

Waithaka for plaintiffs/applicants

Rimita for defendant/Respondent

ON 19TH FEBRUARY, 2013

P. M. NJOROGE

JUDGE