REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.3 OF 2012

BROGMAG INVESTMENT CO.LTD.....PLAINTIFF

VERSUS

JOSHUA KIPNGETICH.....DEFENDANT

RULING

This is a ruling on an application – **A NOTICE OF MOTION** – filed contemporaneously with the suit on 16/1/2012. The application is dated 15/1/2012. DITTO the suit.

The application was brought under a certificate of urgency. It is anchored on Order 40 Rules 1 (a) of Civil Procedure Rules and Sections 1A, B,3A and 63(e) of Civil Procedure Act.

Essentially, what is sought is a temporary injunction to restrain the defendant, his employees, workers, agents or whomsoever else from trespassing, encroaching, cutting down trees or any vegetation, constructing, fencing, selling, disposing, alienating, charging, stepping on, advertising, dealing or interfering with the plaintiff's land parcel L.R. 934L/372B pending hearing and determination of the suit.

Costs are also sought to be provided for. It is stipulated in the grounds advanced that the plaintiff is the only registered owner of the land; that the defendant and his workers trespassed into the plaintiff's land and started cutting trees;and that the plaintiff is willing to pay damages if need be and is willing to abide by any conditions the court may give.

There is a supporting affidavit sworn by the director of the plaintiff which states, inter alia, that the plaintiff is the owner of the land (Suit land hereafter), which contains a plantation of mature trees planted way back in 1980.

The defendant first trespassed into the land on 16/11/2010 and started cutting down trees but was challenged and he stopped. He however resumed in December 2011 and that led to institution of this suit.

The defendant filed his replying affidavit on 14/3/2013. He said the land is his own and described it as ***UNS. RESIDENTIAL PLOT 'A'*** **MASENO TOWNSHIP**.

He was alloted the same, he said, on 25/3/1999 by the Commissioner of Lands. He also expressed lack of awareness of the plaintiff's suit parcel LR No.9341/372B. He admitted cutting down a tree but said it was his and on his land. Also pointed out was that the plaintiff's claim is based on fraudulent documents.

The Court heard the application interpartes on 14/3/13 and Odeny for Plaintiff reiterated much that is already contained in the application. In brief, Odeny asserted the plaintiff has the better documents of

ownership. He observed that what the defendant has is a letter of allotment without certainty that the sums of monies stated on the face of it were paid and expressly also absolving the government from liability.

He also pointed out that the cutting of trees amounts to environmental degradation, hence the inadequacy of damages as a remedy. The balance of convenience, Odeny said , tilts in plaintiff's favour and the plaintiff has, in addition, established a prima facie case.

Kowino for defendant said the defendant was the lawful allotee of the land where he is said to have cut down the trees. That land is however unsurveyed. He faulted the plaintiff documents of ownership saying, inter alia, that they are incomplete, The defendants plot is described as N.161/98/02 and is confirmed not only by the document of allotment but also by the letter from Forest office authorizing the defendant to cut the tree.

The Court has looked at what has been put at its disposal by both sides. Injunctive reliefs are governed by the principles laid down in the decided case of ***GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA 358.***

Simply put, the applicant must show a prima facie case with a probability of success. An injunction will not be granted too unless the applicant might otherwise suffer irreparable injury and, finally, when the Court is in doubt, it will decide the application on the balance of convenience.

In order to know whether a prima facie case is established, the Court will look at the suit as filed, then at the defence if one is available, the application and the response, and finally the arguments and contra-arguments availed.

In this case, no defence is filed. That gives the plaintiff an advantage. The Court has looked at the application. The defendants plot is unsurveyed. Any unsurveyed area has uncertainties of boundaries and claims of ownership are always doubtful. It becomes difficult to know the extent or correct size of the area and it is unconvincing to assert ownership. The plaintiff's claim of ownership is not affected by such problem. If anything, the plaintiff is clear that it planted the trees while the defendant only found the tree and cut it alleging it was on his land. He is said to have cut other trees later.

It is therefore clear, looking at the arguments advanced by the plaintiff, the application itself, and the suit that is not countered by any defence, that the plaintiff has easily established a prima facie case.

And the defendants exercise of cutting trees is environmentally reproachable. No damages would immediately replace a destroyed environment particularly one that involves the cutting down of mature trees.

The Court thinks that this is a proper case deserving of restraining orders. Accordingly, the prayer for restraining order as stated at the beginning of the ruling is granted and the defendant is condemned to pay the costs of this application.

A.K. KANIARU – JUDGE

26/6/13

AKK/va