REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 186 of 2004

JOSEPH KIAI CHEROTICH……PLAINTIFF

VERSUS

TIMSALES LIMITED……DEFENDANT

R U L I N G

The applicant filed an application dated 23rd June, 2004 praying for a temporary injunction to restrain the respondent by itself, its agents and or servants from cutting down trees, felling logs and trees remaining into or dealing in whatever manner with the applicant's parcel of land known as NAKURU/MARIASHONI/719.

The applicant swore an affidavit in support of his application and deposed that he was the registered absolute proprietor of the whole parcel of land as aforesaid measuring 4.2 Hectares and he annexed a copy of his title deed which was issued to him on July 2nd, 1998. He further deposed that sometimes in May, 2004 a group of people acting upon the instructions of the Defendant entered into his aforesaid property and started cutting down trees thereon indiscriminately. When he tried to stop them from cutting down trees in his property the following day they came with other people armed with guns to provide security as they cut down more trees and they continued to do so until the applicant obtained temporary restraining orders from this court.

The applicant lamented that the respondent's acts amounted to trespass and malicious damage to his property and so urged the court to grant the orders as sought.

The respondent defended the said application and filed a replying affidavit through one Mr. Walter Ogada, the Operations Manager at Elburgon forestry Division. He deposed that the respondent was a limited liability company whose main objective was the harvesting of forest products with a view to making wooden products and that it did not own the suit land or any land in the area complained of by the applicant but depended entirely on harvesting Government forest products upon an agreement to pay to the Government the requisite royalties. He annexed documents which showed that the respondent had paid to the forest Department of the Ministry of Environment, National Resources and Wildlife Kshs.500,000/- as licence fees for harvesting forest products. The respondent annexed a letter dated 7th November, 2003, exhibit WO2 addressed to Mr. N. Mehta, General Manager of Comply Industries Ltd by the Permanent Secretary of the aforesaid Ministry showing that the said company had been allowed to harvest forest products at Mariashoni Station and Bahati Station. The relationship between the said company and Timsales Limited (the Defendant) was not explained. However, the said letter showed that Comply Industries Limited had been granted permission to harvest forest products

from 3 different locations of Mariashoni Station, the same being Mariashoni 11B measuring 16.0 Hectares, Mariashoni 11D measuring 34.0 Hectares and Mariashoni 11 E measuring 31.0 Hectares.

Mr. Ogada further deposed that as far as the Defendant was concerned all that land comprised in Mariashoni Station and Bahati Station was Government land and not belonging to anyone. The respondent said that it did not know that anybody had been allocated private land in Mariashoni area and it was unable to state with particularity where the plaintiff's land was located and that it should have been the duty of the Plaintiff to fix clear beacons defining his land. The deponent further deposed that the Defendant had no interest in the suit land whatsoever other than exercising its right to harvest forest products and stated that the plaintiff's recourse was as against the Government. The respondent contended that it had paid royalties to the Government in respect of the trees in the aforesaid land parcels and so it was entitled to harvest all the trees therein without any interference whatsoever. Mr. Ogada also deposed that if the injunction was granted as prayed, the Defendant stood to suffer irreparably as the factory risked being ground to a halt while it had to pay its workers totaling to 1,500/-.

In his submissions, Mr. Karanja for the applicant stated that the land in question belonged to the Plaintiff and not the Government of Kenya and the respondent was interfering with private property. He further submitted that the Plaintiff stood to suffer irreparable loss unless the orders sought were granted because the trees on the land would be destroyed and further, the applicant had sentimental attachment to the land with its trees. Counsel also submitted that the balance of convenience was in favour of the Plaintiff as the Respondent could cut down trees in other areas.

Mrs. Odhiambo for the respondent submitted that the applicant had not shown how he acquired the land saying that the title had not been acquired procedurally. She contended that the title deed was only prima facie evidence of ownership of the land and submitted that the applicant should have joined to the suit other defendants like the Commissioner of Lands and the Attorney General. Counsel further contended that no prima facie case had been shown against the respondent and the applicant had not shown that he stood to suffer irreparable loss if the orders sought were not granted. I have considered all the issues raised by the parties as well as the submissions by counsel. It is not in dispute that the plaintiff is the registered absolute proprietor of the suit premises and the Title Deed was issued to him on 2nd July, 1998. The definition of land includes trees which may be growing on the land. All the documents relating to payment of royalties and permission to harvest the forest products which the respondent annexed to its replying affidavit were issued sometimes in 2004 long after the plaintiff acquired his title to the suit premises. The respondent does not have the capacity to question the manner in which the applicant acquired his Title Deed to the land in question and the validity of the applicant's Title Deed is not in issue. The applicant had a right to protect the trees on his land from being destroyed by the respondent. I believe that the applicant knows the extent of his land which is 4.2 Hectares. It is easy to show out the boundaries thereof and determine whether it falls within the area on which the respondent was licenced to carry out its activities of harvesting forest products. In the event that it does, the Forest Department would have acted improperly in including the same because it had no power to interfere with private property.

The applicant has established a prima facie case with a likelihood of success as against the Defendant and I am in agreement with the applicant that unless the orders sought are granted the applicant will suffer irreparable loss as all the tree on his land will be cut down and ferried away by the respondent. The applicant has therefore satisfied the first two tests for grant of interlocutory injunctions as per the celebrated decision of GIELLA VS CASSMAN BROWN & CO. LTD [1973] E.A. 358.

I do not need to consider the balance of convenience as I have no doubt that the applicant has satisfied the above two tests. However, if I were to consider the application on that issue, I would hold

that the balance of convenience tilts in favour of the applicant whose land stands to be destroyed irreparably whereas the respondent can continue to harvest forest products in the other areas excluding on the 4.2 Hectares owned by the applicant.

In conclusion, I grant the orders as sought by the applicant and direct him to mark out the boundaries of his land if the same are not clear so that the respondent may exclude it from its operations. The costs of this application are awarded to the applicant.

DANIEL MUSINGA

AG. JUDGE

19/10/2004