REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 17 OF 2020

PETER KILONZO KAVILA.....PLAINTIFF/APPLICANT

-VERSUS-

MAKUENI COUNTY GOVERNMENT.....DEFENDANT/RESPONDENT

RULING

1. What is before court for ruling is the Plaintiff's/Applicant's Notice of Motion application expressed to be brought under Sections 1A, 1B, 3A and Section 63(e) of the Civil Procedure Acts, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and all enabling provisions of the Laws for orders: -

i. Spent.

ii. Spent.

iii. That a temporary order of injunction be issued restraining the Defendant/Respondent, it's agents, servants or anyone acting or claiming through it from entering trespassing, demolishing and or in any other manner interfering with the Plaintiffs residential properties developed on land registration PLOT NO. MAKUENI/MASONGALENI SCHEME/352 pending the hearing and determination of the suit herein.

iv. That the costs be borne by the Defendant in any event.

2. The application is predicted on the grounds on its face and is supported by the supporting affidavit of Peter KilonzoKavila, the Plaintiff/Applicant herein,sworn at Makueni on 16th July, 2020.

3. The application is dated 16th July, 2020 and was filed in court on even date. The Defendant/Respondent has opposed the application vide the replying affidavit of Paul WainainaGicheru, its Sub County Surveyor Kilome, sworn at Nairobi on 2nd November, 2020 and filed in court on 4th November, 2020.

4. The application was canvassed by way of written submissions. The Plaintiff/Applicant has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of his supporting affidavit that he acquired property from the Ministry of Lands and Settlement via a letter of offer dated 26th January, 1994 (PKK -2), that the Plaintiff/Applicant have already developed the land extensively by building a permanent residential house therein, that there is no known existing road reserve within the Plaintiff's/Applicant's parcel of land that he had built within the beacons laid by the government surveyor in the year 1994, that there are no registered easements on the Plaintiff's/Applicant's title, that the developments on the suit property have not encroached into the access roads at all, that on 15th July, 2020, the Plaintiff/Applicant was served with a notice from the Defendant/Respondent dated 8th July, 2020 for demolition of his structures which are alleged to have encroached into road reserve, that the Defendant/Respondent has given an ultimatum of seven (7) days from 8th July, 2020 for the intended demolition, that the Plaintiff/Applicant has not encroached into the road as alleged by the Defendant/Respondent and the intended demolition is therefore illegal and unwarranted and ought to be stopped by n order of this court and that in any event the Plaintiff/Applicant has not been invited to participate in any survey exercise to establish whether he has constructed on a road reserve.

5. On the other hand, Paul WainainaGicheru has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of his replying affidavitthat from the onset he wishes to strongly contend and urge the court to find that the case and application before court is premised upon mere allegations, suppositions, belief and speculations as opposed to facts and evidence and accordingly, the same is incompetent and unsubstantiated and therefore, liable to be struck off for want of merit, that as respects the Applicants assertions, that during the Makueni Land Conference and Land Clinics, the residents of Masongaleni ward, by way of a public petition, raised claims over prevalent encroachment by private land owners into road reserves thereby impeding access to essential services including access to rivers and health care facilities, that consequently the Respondent commissioned a survey exercise for purposes of opening and eventually, grading entire road work within the said area and prior to the exercise, notices were issued notifying all plot owners,

including the Applicant, on the same, that subsequently, survey was carried out between the 25th to 29th of May, 2020 in the presence of respective land owners, Assistant County Commissioner, area chiefs and Assistant chiefs, Ward Development Officers, elected representative and Surveyors including himself, that in conducting the survey, the Respondent placed full reliance upon official government records including the Registry Index Map (R.I.M) for Masongaleni Settlement Scheme which was used as datum for measurements, that in pursuance thereof, the team visited the Applicants property, Plot No. 352 and measurements were taken, in the presence of the Applicant, and upon review of the R.I.M, it was established that the chain link fence on Applicant's property had encroached into the Kathiani-Mwanyani 15m road reserve, that the Applicant disputed and rejected the findings alleging on one part that the width of the road ought to have been 28ft (8.5m) against the 15m provided on the R.I.M and on the other part that the Plaintiff had been bribed and therefore the Applicant did not have trust in his findings, that accordingly, the Applicant demanded a repeat and on the 7th of July, 2020, at the instance of the Respondent, another team of Surveyors including County Surveyor Makueni and Sub-County Surveyor Kibwezi (both from National Government) and the Respondent's Sub County Surveyor for Makueni visited the site and a survey exercise was carried out with full and active participation of a private Surveyor provided for by the Applicant and in the presence of the said Applicant, that the team established, similarly, that the Applicant had fenced more land than provided in the Registration Maps and had therefore constructed his fence beyond the surveyed boundaries of his property, that it was further established that the Applicant had also partially encroached into a section of the 15m road leading to Nthange River by fencing and completely blocked a 10m road passing through his land, that the Applicant was shown the extent of encroachment and proper marks laid on site with the intention that he would remove the offending structures voluntarily, that the Applicant's contention therefore that he was not invited to participate in the survey exercise is a misrepresentation of facts and the court ought to frown upon the same, that the Applicant has to date, never contested these survey findings or produced before court any material to controvert the same. Accordingly, in the absence of material to the contrary those findings remain and must be held as unassailable evidence of the fact of encroachment on the Applicant's part, that it is curious why the Applicant failed to disclose to court the findings of the survey of 7th July, 2020 in which his independent surveyor participated and concurred on the results thereof, that in the premises the claim and application before court is merely a fishing expedition and an attempt by the Applicant at a second bite of the cherry having failed to validate his claim vide the survey process and accordingly, the claim and application is an abuse of the court process, that the he was advised by the Respondent's advocates herein which he verily believes to be true that a party cannot anchor a case upon mere and bare allegations and averments without substantive and cogent evidence upon which proof of the same may be lain, that further the Applicant is liable for concealment of material facts including the survey findings above and misrepresentations including the false averments that he has never been invited to participate in the survey exercise and therefore, the Plaintiff has come to court with unclean hands and does not deserve equitable reliefs, that it is instructive to note that the roads subject herein were surveyed and demarcated before any allocations for Masongaleni Scheme were done, including the allocation of Plot No. 352 to the Applicant and the said roads are well shown in the maps, that those roads constitute public property and accordingly, the said land could not have been allocated and was not available for allocation or alienation to the Applicant as the same had already been set aside for public utility, that the Applicant therefore cannot hold a claim of right over the said portions of land as the same had been existing, as roads, even before allocation of plot 352 to the Applicant and therefore the claim and application is liable for dismissal as it seeks to make legal that which is illegal and null and void *ab initio*, that the applicant has failed to produce any deed plans or survey plans to demonstrate to the court the extent, dimensions and boundaries of his property or even beacon certificates to demonstrate the coordinates and the bearing of his plot and cannot therefore be heard to claim he has not encroached on road reserve on the basis of bare averments, that it is in the public interest that the roads be opened to allow free access to essential services, health care *et al* for the members of public whose rights have been unjustifiably curtailed and movement impeded without any lawful cause, that the he was advised by the Respondent's Advocates on record, advice he verily believe to be true that public interest supersedes private claims of an individual and he urge the court to find as such, thatthe offending structures that would be subject of destruction constitutes merely a chain link fence and the Applicant has not demonstrated that he shall suffer irreparable damage incapable of compensation by way of damages were the claim to be found in his favour and that accordingly, the balance of convenience tilts in favour of the Respondent.

6. It is common ground from the parties' submissions that the principles for the grant of an interlocutory injunction are as enunciated in the case of **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358.**

7. Regarding the principle that an Applicant must show a *prima facie* case with probability of success, the counsel for the Plaintiff/Applicant cited Section 26(1) of the Land Registration Act No. 3 of 2021 which provides;

> ***"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –***
>
> ***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***
>
> ***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."***

8. Arising from the above, the counsel submitted that the Plaintiff/Applicant is the registered owner of the suit property and has annexed a copy of a title deed and pointed out that the applicant has satisfied the aforementioned principle.

9. On the other hand, the counsel for the Defendant/Respondent submissions were that apart from the title document which the Plaintiff/Applicant has presented as prove of ownership of plot number 352 (suit property), he has not presented any other material that would help the court establish the actual extent of the said suit property. The counsel pointed out that the Plaintiff/Applicant has instead turned the case to one of ownership of plot number 352, an issue which is not under contest rather confirming his arguments and evidence to the issue of encroachment. The counsel further submitted that while the title deed may prove ownership, it is not sufficient round/material/evidence to prove the question of boundaries or encroachment and added that the Plaintiff/Applicant did not produce deed plans, survey plans, beacon certificates to show the bearings and coordinates of his land thus the latter's allegations that he had not encroached onto public land remain mere allegations.

10. It was further submitted that it is an uncontroverted fact that the road reserve into which the Plaintiff/Applicant has encroached long existed before the grant of the land to him and accordingly, even if an error might have occurred in the survey and marking of the boundaries of plot 352 (which is not the case here) liability for such errors cannot, as provided under Section 21 of the Survey Act and Section 85 of the

Land Registration Act 2021, attach to the government.

11. The counsel went on to submit that the Respondent has placed on record documentation including Registry Index Map (RIM), survey reports and illustrative diagrams to demonstrate that indeed the Plaintiff/Applicant has encroached into public road reserves and that he participated and even hired his own surveyor to participate in a repeat exercise whose findings tallied with the initial survey report that he had rejected.

12. The counsel also submitted that the Plaintiff/Applicant cannot explain how as observed by the Defendant/Respondent, the width of the road from the upper sections of KathianiMwanyani road is 15 metres as clearly provided in the Registry Index Map, but the same narrows down to 8.5 meters at the Petitioner's property and his neighbour, then widens to 15 meters on the rest of the road. The counsel added that the boundaries of the suit property have encroached onto the road reserve by a margin in excess of 6 metres and, therefore, such an encroachment is an illegally that the court cannot and ought not to protect.

13. The counsel was of the view that the Plaintiff/Applicant has not demonstrated that he has a *prima facie* case with probability of success.

14. On the principle of 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, the counsel submitted that the Plaintiff/Applicant had demonstrated that if the Defendant/Respondent is not restrained from demolishing his residential structures, the main suit will be rendered nugatory. The counsel added that the Plaintiff/Applicant stands to suffer irreparable loss that cannot be sufficiently compensated in damages.

15. The counsel for the Defendant/Respondent submitted that the Plaintiff/Applicant will not suffer substantial loss that cannot be adequately compensated by an award of damages for the following reasons;

> ***a) The fact of encroachment has been adequately established and therefore the Applicant cannot suffer harm for loss of that which he has no right of claim over in the first place.***
>
> ***b) That the Plaintiff's occupation of the land is an illegality and hence a harm cannot arise from redressing a violation.***
>
> ***c) The offending structure is merely a chain link fence whose value is capable of monetary valuation and hence damages would be sufficient remedy were the matter to be determined in his favour at last.***
>
> ***d) The Applicant has openly pleaded at paragraph 11 of the plaint in such a way as to suggest that he would be open to compensation for the disputed sections of the land if the same were required for road and if the same were to be found to belong to him.***

16. Regarding the principle of if the court is in doubt, it will decide on a balance of convenience, the Plaintiff's/Applicant's counsel submissions were that the same tilts in favour of the applicant who has lived on the land with no easements registered. The counsel pointed out that there is no access road reserve adjacent to the Plaintiff's/Applicant's land.

17. On the other hand, the counsel for the Defendants/Respondents submitted that the Defendant/Respondent has deposed that the ongoing process was initiated owing to public protest on the closure or blockage of roads through encroachment by individuals. The counsel went on to submit that it is not hard to find that if the injunction is granted, it will inflict greater hardship on the Defendant/Respondent because the public in whose interest the Defendant/Respondent acts shall continue to be impended in their movement and access to services.

18. I have carefully read the application, the replying affidavit and the rival submissions by the counsel on record for the parties herein and I do note that on the issue of whether the Plaintiff/Applicant has established a prima facie case with a probability of success, from the affidavit evidence and the annextures placed before me, the suit property measuring 18.0 hectares was allocated to the Plaintiff/Applicant by the Director of Land Adjudication and Settlement in January, 1994. On the 29th February, 2016, the Plaintiff/Applicant was issued with a title deed by the Land Registrar Makueni in respect of the suit land. On the other hand, the Defendant/Respondent has produced a Registry Index Map (RIM) which suggests that there ought to be a 10 meter wide road traversing the suit property to join the large 15 meter wide road that heads to Thange river, an issue the Plaintiff/Applicant has contested.

19. Section 24 (a) of the Land Registration Acts No. 3 of 2012 provides as follows: -

> ***"Subject to this Act – as the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant hereto; and ……"***

20. The title deed for land parcel number Makueni/Masongaleni scheme/352 that has been annexed as PKK – 1 to paragraph 2 of the Plaintiff's/Applicant's supporting affidavit does not show the existence of an access easement, being the 10 meter wide road claimed by the Defendant/Respondent on the easement section of paragraph A of the register. The omission on the title deed of the suit property would therefore vitiate the contention by the Defendant/Respondent that the Plaintiff/Applicant has encroached onto a road reserve which is within his own registered title. I hasten to add that I am alive that this is an issue that will have to await substantive hearing of the main suit save to say that the Plaintiff/Applicant holds all property rights within the suit property with a high probability of success against the Defendants/Respondents opposition.

21. As for the principle that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damages, I do note that the Defendant/Respondent has submitted that the chain link will be damaged since it is only the offending structure that the Plaintiff/Applicant has used to fence off in excess of his boundaries and that the injury can be remedied in monetary terms. Whereas I agree with the Defendant/Respondent on this limb, the

existence of a public road within private title which is not a registered easement is very disconcerting and I am inclined to hold the Plaintiff/Applicant has satisfied this limb as well. I say so because the creation of an access easement will no doubt alter the character of the suit property and in my view this cannot adequately be compensated in damages.

22. As for the principle that if the court is in doubt, it will decide an application on the balance of circumstance, I am of the view that the same must at all times tilt towards safeguarding the property rights of a legally registered owner. Whereas there may be encroachment on the boundaries of the suit property and the 15 meter wide roads, the balance of convenience tilts in favour of the Plaintiff/Applicant.

23. The upshot of the foregoing is that I am satisfied that the application is meritorious and I will proceed to allow it as hereunder;

> - ***That a temporary order of injunction be issued restraining the Defendant/Respondent, it's agents, servants or anyone acting or claiming through it from entering trespassing, demolishing and or in any other manner interfering with the Plaintiffs residential properties developed on land registration PLOT NO. MAKUENI/MASONGALENI SCHEME/352 pending the hearing and determination of the suit herein.***

24. Owing to the public interest in this matter, the interlocutory injunction granted hereinabove shall lapse within a period of twelve months from the date of this order unless for any sufficient reason the court orders otherwise as is provided for under Order 40 Rule 6 of the Civil Procedure Rules.

25. Costs of the application shall abide the outcome of the main suit.

Signed, dated and delivered at Makueni via email this 19th day of February, 2021.

MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi