



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. 79 OF 2017**

**NZOMO KALELI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KAWEU MATHEKA .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KAMENE MATIVO .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**TITUS MUTISYA MATIVO ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. What is before court for ruling is the Plaintiff's/Applicant's notice of motion application dated 30<sup>th</sup> September, 2019 and filed in court on 03<sup>rd</sup> October, 2019. It is expressed to be brought under sections 17 and 18 of the Land Registration Act No.3 of 2012, sections 1A and 3A of the Civil Procedure Act and all enabling provisions of the law for orders: -

**1) Spent.**

**2) THAT this honourable court be pleased to order a re-survey of the subject parcel of land NZAUI/KILILI/20 and a report be prepared to that effect.**

**3) Costs be provided for.**

The application is predicated on the grounds on its face and is supported by the affidavit of Nzomo Kaleli, the Plaintiff/Applicant herein, sworn at Machakos on 30<sup>th</sup> September, 2019.

2. The Defendants/Respondents have opposed the application vide the replying affidavit sworn by Kaweu Matheka, the 1<sup>st</sup> Defendant/Respondent on 06<sup>th</sup> December, 2019 at Machakos and filed in court on 09<sup>th</sup> December, 2019.

3. The Plaintiff/Applicant has deposed in paragraphs 6, 7, 8, 9 and 11 of his affidavit that a boundary and encroachment into the suitland is the key issue which can best be addressed after resurvey and presentation of a current report on its status, that as such the County Surveyor was directed to resurvey the suitland, Nzau/Kilili/20, and prepare a current report to that effect, that the Plaintiff/Applicant paid the requisite fees and was issued with a letter dated 19<sup>th</sup> September, 2019 annexed as "NK-2" and "NK-3" requiring his presence on 16<sup>th</sup> October, 2019, and that no prejudice will be occasioned to the Defendants/Respondents should resurvey be carried out.

4. On the other hand, the 1<sup>st</sup> Defendant/Respondent has deposed in paragraphs 2, 4, 5, 6, 7, 8, 9 and 10 of his replying affidavit that he has been advised by his advocate on record which advise he verily believes to be true that the application is misconceived, unmeritorious, frivolous, vexatious, fatally defective and otherwise an abuse of the court process, that the application seeks to resurvey the Defendants'/Respondents' parcels of land which they are opposed to, that a survey was done back in the year 2016 by a competent Surveyor who made a report annexed as KM-1, that he is advised by his advocates on record that if the Plaintiff/Applicant is allowed to resurvey the portions of land again and a report is prepared which is contrary to the first report, then the Plaintiff/Applicant will produce contradictory reports in the same suit and, therefore, the court will be at a loss on what report to follow, that the said survey only indicated encroachment on land parcel number Nzau/Kilili/20 by land parcel Nzau/Kilili/22 and not the 1<sup>st</sup> Defendant's/Respondent's parcel number Nzau/Kilili/14, that it would be unfair to the 1<sup>st</sup> Defendant/Respondent to be subjected to the same event twice when sufficient reasons have not been given for the exercise to be carried out again, that the Plaintiff/Applicant when not favoured by the decision of a competent Surveyor calls for re-doing of the exercise so that he can try his luck to see if another survey can meet his desires and that the application should be struck out for being frivolous.

5. By the time of writing this ruling, it is only the Plaintiff's/Applicant's Counsel who had filed his submissions. His submissions were that

the Land Registrar who is the next witness in the Plaintiff's/Applicant's suit wants to visit the suitland to ascertain whether the earlier report that was prepared (*emphasis mine*) is correct. He added that the Land Registrar asked for fees of Kshs.30,000/= which was duly paid. It was further submitted that since the matter is already in court, the Applicant and the Land Registrar cannot move to the land while the Defendants/Respondents may not wish to attend unless the court so directs (*emphasis are mine*).

6. I have looked at the witness summons dated 21<sup>st</sup> August, 2019 annexed as NK-1. The summons shows that it was received by the office of the Land Registrar on the 04<sup>th</sup> September, 2019. Whereas the Plaintiff/Applicant states that the Land Registrar would want to visit the suitland before coming to court, the letter that is dated 19<sup>th</sup> September, 2019 and marked as annexure NK-2 is signed by one Gabriel M. Maingi on behalf of the District Surveyor. Nowhere in the letter has the author indicated that he wrote it under the instructions of the Land Registrar. The Plaintiff/Applicant has clearly deponed in paragraph 6 of his supporting affidavit that the key issue in dispute is boundary and encroachment into the suit property and this in my view would require the Land Registrar and not the Surveyor to look into the issue as is provided for under section 18 of the Land Registration Act number 3 of 2012. To purport to involve the Land Registrar in the site visit of the land in dispute while the actual intention of the Plaintiff/Applicant is to have the Surveyor to resurvey the same would not only cause annoyance but would also have no value. Suffice it to say, it would be vexatious and frivolous since the Plaintiff/Applicant wants to treat the Land Registrar as a bystander in the process that which the latter's office should handle.

7. The upshot of the foregoing is that the application has no merit and I hereby proceed to dismiss it with costs to the Defendants/Respondents.

Signed, dated and delivered at Makueni via email this 16<sup>th</sup> day of July, 2020.

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Ms. C. Nzioka