REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 340 OF 2017

JOSEPH KILATYA.....PLAINTIFF

VERSUS

PHILIPH MUSANGO MUTISYA..... 1ST DEFENDANT

THE LANDS REGISTRAR MAKUENI COUNTY..... 2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1) What is before me for ruling is the notice of motion application dated 21st September, 2017 and filed in court on even date. The Applicant prays;

1. **Spent**

2. **Spent**

3. **The court be pleased to grant an injunctive order against the Defendants from further encroaching, grazing, planting, cutting wood/timber, burning charcoal or alienating, selling or transferring the suit property by themselves, their agents and/or servants on the Plaintiff's property being Plot Number 71 situated at Kaumoni Registration section in Makueni County pending the hearing and determination on this suit.**

4. **That the court be pleased to grant an order from the court directing/compelling the 2nd Respondent to conduct a survey of the suit property to establish the true boundaries in regards of the suit property and deposit the report in this honourable court.**

5. **That the honourable court, if it so deems fit, be obliged to visit the suit property for the purposes of ascertaining the velocity of the encroachment.**

6. **Any other orders that the court may deem fit to grant in the circumstances.**

7. **The costs of this application be provided for**.

2) The application is predicated on the grounds on its face and supported by the affidavit of Joseph Kilatya, the Applicant herein, sworn at Nairobi on the 21st September, 2017.

3) The first Applicant has opposed the application vide his replying affidavit sworn at Machakos on the 9th May, 2018 and filed in court on the 10th May,2018.

4) The second and the third Respondents filed their grounds of opposition to the application on the 14th December, 2017 the same being dated 29th November, 2017. The grounds are;

1. That the application is brought mala fides.

2. That the Applicant has not demonstrated that he referred the matter to the Land Registrar Makueni to resolve the

boundary dispute and that he failed to do so in accordance with section 19 of the Land Registration Act.

3. That the application is unmeritorious as the threshold for the grant of the orders sought has not yet been met.

4. That the application has filed in premature, a non-starter and an abuse of the court process.

5) Directions were given that the application be disposed off by way of written submissions. It is only the Applicant and the first Respondent who filed their submissions. Both are in agreement that the orders sought by the Applicant can only be granted if the Applicant has satisfied the three principles set out in **Giella V Cassman Brown and Company Ltd [1973] EA 358**. I need not repeat those principles herein.

6) In his submissions, the Applicant's counsel started by addressing the second and the third Respondent's grounds of opposition. Regarding the allegation that the application is mala fides, the counsel defined the difference between mala fides and bona fide purchasers. He however did not indicate his source of the definition of the term mala fides. He submitted that the application is not mala fides. And on the allegation that the Applicant has not demonstrated that he referred the matter to the Land Registrar Makueni to resolve the boundary dispute and that he failed to do so in accordance with section 19 of the Land Registration Act, the Applicant's Counsel submissions were that a reading of the said section 19 will show that it is not mandatory to seek indulgence of the Registry before filing a suit in court. Section 19 of the Land Registration Act provides as follows:-

" 19. (1) if the Registrar considers it desirable to indicate on a field plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel of any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section."

7) The counsel submitted that the application is not mala fides.

8) On the issue of whether or not the Applicant has shown a prima facie case with probability of success, the Applicant's counsel submitted that the Applicant in his supporting affidavit and grounds on which his application is predicated stated that he and his family members live and derive their livelihoods from the suit land. The counsel added that the Applicant and his family have been on the land since the post independence era and that he seeks to have his proprietary interest in the land safeguarded.

9) On the other hand, the first Respondent submitted that the Applicant has not demonstrated how the Respondent has infringed on his rights and pointed out that the Applicant has not annexed a surveyor's report as proof of encroachment. The Respondent termed the application as one that is unmerited.

10) Regarding the principle of whether the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, the Applicant's counsel submitted that the Applicant and his family have no other place to call home and as such, he will suffer irreparable loss should he be evicted from the suit land by the Respondent.

11) The first Respondent termed the depositions by the Applicant as lacking in material since there is nothing to suggest that he has encroached onto the Applicant's land or committed acts of wasting the suit property. The first Respondent submitted that whatever developments the Applicant has carried out on the suit land, he can be compensated by an award in damages.

12) On the principle of if the court is in doubt, it will decide an application on the balance of convenience, the Applicant's counsel submitted that the same tilts in his favour and it would be naïve and fanciful to allege that the Applicant has no prima facie case. The counsel was of the view that status quo be granted so that the Applicant remains in possession pending the determination of this suit.

13) The first Respondent submitted that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong. The first Respondent cited the case of ***Jane Wambui, Weru Vs Overseas Private Investment Corporation [2012]*** which authority he did not provide to the court. He concluded by submitting that the balance of convenience tilts in his favour.

14) Having read the application, the replying affidavit and the submissions filed, it seems to me that this is basically a boundary dispute. As was pointed out by the first Respondent, there is no surveyor's report to show the encroachment, if any, by the first Respondent. Given those circumstances, and guided by practice direction number 32 of the Environment and Land Court Practice Directions, the most appropriate order to grant at this would be status quo as at the time of filing this suit. In the circumstance, therefore, I hereby issue an order of status quo.

SIGNED, DATED and **DELIVERED** at **MAKUENI this 4TH day of DECEMBER, 2018.**

MBOGO C.G

JUDGE

IN THE PRESENCE OF;

Ms Kyalo for Mr Munyasia for the Plaintiff/Applicant

The Defendant/Respondent Absent

Court Assistant - Kwemboi

MBOGO C.G, JUDGE

4/12/2018