REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 81 OF 2017

NEKEKI (N.G.O.)…….PLAINTIFF

VERSUS

TRANSMATRESSES LIMITED……..……DEFENDANT

R U L I N G

1. The application dated **25/4/2017** seeks an order of temporary injunction restraining the defendant from interfering with land parcel **Kitale Municipality Block 12/223** pending the hearing and determination of the suit.

THE APPLICANT'S CASE

2. The plaintiff who is the applicant has based his application on several grounds: that the respondent has instructed a surveyor to completely alter the boundaries between their land and consequently it has encroached on the plaintiff's land; that the respondent intends to fence off an access road, and that the respondent has threatened to demolish the applicant's buildings following the resurvey.

3. It is alleged that the applicant bought the suit property in the year 2001 and survey and establishment of boundaries was done in the same year, which boundaries have been respected by all parties till the year 2017 when the respondent alleged encroachment.

4. The respondent then wrote a letter through its lawyers alleging interference with the boundary and the applicant agreed to a resurvey believing that the subdivision plan of the year 2001 was to be used in the exercise; however on 13/4/2017 the respondent came with his surveyor who conducted a survey which totally disrupted the existing status by placing a beacon inside the applicant's land parcel, indicating that an access road was part of the respondent's plot.

5. It is alleged that the respondent has already damaged the applicant's fence and that it intends to uproot the applicant's signposts and then erect a wall along the access road, thus rendering the applicant landlocked. By reason of these activities the applicant alleges it would suffer substantial loss and damage if the prayers sought are not granted.

THE RESPONDENT'S DEFENCE

6. The respondent filed two replying affidavits, one sworn by Kishor Patani on 2/6/2017 and another one by Boniface Wanyama on the same date. Kishor Patani is a director of the respondent and Boniface Wanyama identifies himself as the surveyor. What comes out of their depositions in summary is that: upon enquiry from the Land Registrar, Trans-Nzoia County, the advocates for the respondent were informed that Parcel No. **Kitale Municipality Block 12/223** is not registered and the Land Registry does

not have records of the same; that there is no evidence that the plaintiff is the registered owner of **Plot No. 223**, and it is not therefore entitled to the orders sought; that the agreement exhibited by the applicant is in respect of **LR. No. 2116/906/VII** and not **Plot No. 223**; that **Florence Kapten**, the alleged seller had no authority to deal with **L.R No. 2116/906/VII, Kitale Municipality**; that the respondent is the registered owner of **Plot Nos. 12/222** and **12/224**; that the survey that established the boundaries was carried out in year 2003 and not year 2001 and beacons were fixed in the year 2003; that those beacons remained in place till the applicant recently interfered with them; that it is upon such interference that the surveyor was summoned whereupon he re-established the beacons after establishing that the applicant had interfered with the beacons; that Plot No. 223 is not landlocked as alleged by the applicant and is served by three roads and that therefore the application is an abuse of the court process and it should be dismissed.

ISSUES FOR DETERMINATION

7. The issues arising for determination by this court in the instant application are:-

> ***(a) Whether the plaintiff has established a prima facie case with probability of success.***
>
> ***(b) Whether the plaintiff has demonstrated that it would suffer irreparable injury if the orders sought are not granted.***
>
> ***(c) Who should bear the costs of the application?***

DETERMINATION

> **(a)** ***Whether the plaintiff has established a prima facie case***

8. A look at the plaint shows that the **prayer (a)** reads as follows:-

> **"(a) an order that the subdivision plan of 29th November, 2001 is valid and ought to be used to establish the boundaries".**

The copy of plan dated 29/11/2001 which the plaintiff relies on is attached as Annexture **"MMW2"** in the affidavit sworn on 25/4/2017. It shows that there was proposed subdivision of **Parcel LR. No. 2116/906** into 5 portions A –E. It has the hallmarks of having been received by the District Physical Planning Officer, Trans-Nzoia and certified on 25/1/2001. It is not denied that the applicant has been in occupation of the land, including the disputed portion for a long period of time.

It is not indicated by the respondent when the interference with the boundaries was allegedly committed by the applicant the deponent of the replying affidavit merely states at **para 9** as follows:-

> **"That the beacons defining the boundaries of the said parcel of land were put in place in the year 2003 and have been respected until recently when the plaintiff interfered with them."**

9. In my view this is not a clear indication that the applicant recently interfered with the beacons and boundaries. The plan attached to the affidavit of Boniface Wanyama sworn on 2/6/2017 and marked as **"BW2"** shows that it was received for registration on 23/9/2002. Though it includes the parcel said to be occupied by the applicant, it does not in any way indicate that it supersedes the earlier plan produced by the applicant hereinabove. For this reason I find the mere production of that plan by the respondent to be insufficient, at least for now, to establish that the applicant encroached on the respondent's land.

10. When this court is faced with two rival plans, and each party claims that the other has encroached on their land, it is necessary to apply caution while determining an application for injunction to avoid, firstly, issuing orders that may amount to a determination of the issue in the main dispute without hearing the evidence from the parties and secondly issuing orders in the nature of mandatory injunction which may go beyond the desired object of an interlocutory application of this nature. I find that the applicant has

established a prima facie case with probability of success.

11. This court is aware that the respondent has exhibited title documents to the land adjacent to the applicant's land. However, it is not the respondent's titles that are disputed but the extent of the boundaries and the placement of the beacons on the ground in a manner that may be prejudicial to the applicant.

12. It is observed that the absence of registered title the name of the applicant has been emphasized to support the claim that the plaintiff is not entitled to bring the suit and is not therefore entitled to the orders sought in the motion. The respondent has cited the case of **Wilson Kiptoo Leitich –vs- Eric Muchai (2015) eKLR** in this regard.

13. However it is vital to note the dearth of evidence in the Wilson Kiptoo Leitich case in that the judge observed therein that the only items exhibited by the applicant were a "*map of the area, which of course, does not indicate who is the owner of the suit land, but only demonstrates its location*."

14. In this case it is noted that besides the applicant's actual occupation of the suit premises, it has exhibited a copy of a letter of allotment, an agreement and a part development plan apparently approved by the then local authority, the predecessor to the current County Government of Trans-Nzoia.

15. It is trite that title documents are usually preceded by development plans. The veracity of the plans produced by way of exhibition in affidavits will be verified at the hearing of the main suit.

16. Again, I reiterate that the plan produced by the respondent does not on its face show that it superseded the plan produced by the applicant; proof that it does so may be an issue at the main hearing. In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** the Court Of Appeal, confronted with the issue of priority of documents stated as follows

> "**There is no doubt that both the appellant and the 1st respondent produced various documents in support of their respective claims. The appellant's documents show that he had attempted to register his interest well before the 1st respondent sought to register his interest. Additionally, there is nothing to show that the appellant's allocation was ever withdrawn or cancelled by the 2nd respondent. Bearing this in mind, we consider that it was incumbent upon the learned judge to discern on a balance of probabilities, whether, based on the documents that were before the court, the appellant had established a prima facie case with a probability of success.**
>
> **In our view, there was sufficient documentation to show that (the) appellant maintained a claim in respect of the suit property, which claim was valid and continued to subsist until otherwise determined. In saying so, we find that the appellant has established a prima facie case with chances of success."**

17. All that this court looks out for at this interlocutory stage is the presence of a prima facie case.

18. Considering the circumstances of this case, I make a finding that the applicant has made out a prima facie case with a probability of success, sufficient to persuade this court to grant the application.

(b). *Whether the Applicant Will Suffer Irreparable Damage*

19. In this particular case the applicant is the one in possession of the disputed portions. There is an allegation that the applicant's portion is not landlocked. That this statement comes from the respondent - instead of a denial of encroachment of the existing road - appears to me to be an implicit admission that the alleged re-establishment of the beacons will either greatly affect or render an existing access road that has hitherto served the applicant closed. This would of necessity affect the applicant's movements into and out of the property before the determination of this suit.

20. If the boundaries are moved before the hearing of the suit and the structures in use by the applicant for many years are affected they may suffer injury.

21. As I have found that that the applicant has established a prima facie case and that it would suffer injury if orders were not granted, I grant **prayer No. 2** of the application dated **25/4/2017**. The costs of the application shall be in the cause.

Dated, signed and delivered at Kitale on this **19th** day of **October, 2017.**

MWANGI NJOROGE

JUDGE

19/10/2017

CORAM

Before Mwangi Njoroge - Judge

Court Assistant – Isabellah

Ms. Sitati holding brief for Ms. Arunga for the applicant

Ms. Mwemeke holding brief for Analo the respondent

COURT

Ruling read in open court in the presence of counsel for the parties.

MWANGI NJOROGE

JUDGE

19/10/2017