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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 4 OF 2011

TOBIAS ACHOLA OSINDI & 13 OTHERS.....PLAINTIFFS

VERSUS

CYPRIANUS OTIENO OGALO & 6 OTHERS.....DEFENDANT

JUDGMENT

1. This suit pits the members of two clans who are residing in Amoyo Sub-location, West Kadem Location, Nyatike District within Migori County against each other. The Plaintiffs belong to Joka-Mwai clan while the defendants belong to Joka-Osuga clan. During the hearing of this case there was difference in opinion whether the two clans are related or not. According to the evidence of PW1, Joka-Mwai clan is not related to Joka-Osuga clan in any way; they only happen to share a sub-location. On the other hand, the defendants' witness, DW1,

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testified that the two clans are related in that they share an ancestor called Adem. The dispute between the two clans relates to the ownership of several parcels of land which are situated within Amoyo Sub-location within Kakelo-Kakoth Adjudication Section. The Plaintiffs claim that they are the registered proprietors of all those parcels of land known as **West Kadem/ Kakelo-Kakoth/ 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 1284 and 1561** respectively (hereinafter referred to as "**the suit properties**" where the context so admits). The Plaintiffs claim that they inherited the suit properties from their parents who had also inherited the same from their great grandfather known as Mwai. The Plaintiffs claim that the suit properties belonged to Joka-Mwai clan prior to the adjudication process which is still on-going. The Plaintiffs claim that prior to the land adjudication process in Amoyo sub-location where the

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suit properties are situated, the defendants who hails from Joka-Osuga clan invaded the area where the suit properties are situated and commenced farming activities thereon. The Plaintiffs claim further that during the adjudication process, the Plaintiffs successfully objected to the defendants' claim to the suit properties through the dispute resolution machinery provided for under the Adjudication Act, Cap. 284 Laws of Kenya. The Plaintiffs claim that the defendants did not prefer

an appeal to the Minister against the outcome of the said objection proceedings which are now binding upon them. The Plaintiffs claim that despite the fact that the suit properties are now registered in the names of the Plaintiffs, the defendants have refused and/or declined to vacate the same and to hand over possession to the Plaintiffs. The Plaintiffs claim that in view of this development, the District Land Adjudication Officer for Migori/Nyatike Districts granted the Plaintiffs leave on 1st

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October, 2010 to institute these proceedings. The Plaintiffs are seeking as against the defendants; a declaration that they are the lawful proprietors of the suit properties and that, the occupation of the suit properties by the defendants by themselves or through their next of kin or clansmen constitutes trespass or forcible detainer, an order of eviction, mesne profits or profits a prendre, and a permanent injunction to restrain the defendants from re-entry into, cultivating, working on or in any other way dealing with the suit properties. The Plaintiffs have also claimed costs and interest. The Plaintiffs authorized the 1st Plaintiff to appear, plead and act for them in this suit pursuant to the provisions of Order 1 rule 13 of the Civil Procure Rules. The 1st Plaintiff recorded a detailed witness statement on 6th January, 2011 which was filed herein on 17th January, 2011. The Plaintiffs also filed a list and a supplementary list of documents to which the Plaintiffs attached several documents

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that they intended to rely on at the trial as exhibits.

2. The defendants entered appearance and filed a joint statement of defence on 28th February, 2011. The defendants denied that the Plaintiffs are the registered proprietors of the suit properties as alleged in the Plaint. In the alternative, the defendants contended that if at all the suit properties were registered in the names of the Plaintiffs, such registration was irregular, unlawful and fraudulent for the reason that the adjudication process carried out and/or conducted at Kakoth Adjudication Section that gave rise to the suit properties neither captured nor covered the ground on which the suit properties more particularly, West Kadem/ Kakelo-Kakoth/ 2215-2230 (hereinafter referred to as "**Plot Nos. 2215-2230**") are situated. The defendants contended that the ground or area where Plot Nos. 2215-2230 is situated is the subject of fresh adjudication under, **Kakelo-Kakoth "B" Adjudication Section**.

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The defendants claimed that the area or ground where Plot Nos. 2215-2230 is situated was swampy, bushy and uninhabited and as such the same was not and could not have been adjudicated during the adjudication process at Kakelo-Kakoth Adjudication Section. In the circumstances, the defendants contended that the Plaintiffs could only have obtained their alleged titles to Plot Nos. 2215-2230 through fraud and misrepresentation the particulars of which were set out in the defence. The defendants contended that due to the fraudulent and irregular manner in which the ground on which Plot Nos. 2215-2230 was demarcated during the adjudication process at Kakelo-Kakoth Adjudication section, the adjudication process in relation to the particular ground was nullified and the area declared a new adjudication section under, Kakelo-Kakoth "B" Adjudication Section. The defendants contended that the area covered under Kakelo-Kakoth "B" section includes the ground

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on which Plot Nos. 2215-2230 are situated. With regard to land parcel numbers, West Kadem/ Kakoth/ 1284 (hereinafter referred to as “**Plot No. 1284**”), the defendants while admitting that the same was properly adjudicated under Kakelo-Kakoth Adjudication section contended that one, Michael Oligi Ochola had filed an appeal with the Minister for Lands & Settlement against the outcome of the objection proceedings under which the said parcel of land was awarded to Mwai Omiti. The defendants contended that the said appeal to the Minister is still pending hearing and determination. With regard to the parcel of land known as West Kadem/ Kakoth/ 1561, the defendants admitted that the same was lawfully adjudicated and registered in the names of one, John Amoka Ogalo, deceased. The defendants contended however that the Plaintiffs have no legal right to lodge a claim with respect to the said property in which they have no proprietary interest

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whatsoever. On the consent granted to the Plaintiffs herein by the Land Adjudication Officer, Migori/Nyatike Districts to bring this suit, the defendants termed the same as erroneous and contradictory. The defendants contested the jurisdiction of this court to determine the issue of the ownership of Plot No. 1284 and 1561 which according to the defendants are the subject of an appeal to the Minister. The defendants contended further that the Plaintiffs suit is misconceived, bad in law and legally untenable for being; contrary to the provisions of the Land Adjudication Act, Cap. 284, Laws of Kenya, time barred under the provisions of the Limitation of Actions Act, Cap. 22 laws of Kenya and for being barred under the Law of Succession Act, Cap. 160, Laws of Kenya. The defendants filed in court on 28th February, 2011, a detailed witness statement signed by one, Romanus Jaoko Amoka on 24th February, 2011. The defendants also filed in court on the same date a bundle of documents that

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they wished to rely on at the trial.

3. The suit was heard on 11th December, 2012 and 7th February, 2013. The parties thereafter agreed to put in written submissions. The parties called one witness each who to a large extent relied on their respective written witness statements in their evidence in chief. In his written witness statement and oral evidence, the 1st Plaintiff, Tobias Achola Osindi who was the Plaintiff's sole witness, stated that the suit properties were acquired by the Plaintiffs' great grandfather, Mwai Oganga. At the time, the land in the area was virgin and Mwai Oganga (hereinafter referred to as “**Mwai**”) who had migrated from Nyabogi had to clear the forest before he settled in the area. Once he settled in the area, Mwai invited his brothers, namely, Bwore, Adem and Omwanda to join him. They heeded the call and came and occupied the land neighboring the area that had been occupied by Mwai. During this migration, Mwai and his

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brothers occupied all the lowland that formed the delta of river Kuja. Due to regular flooding in the area, Mwai moved his homestead from the delta and settled at a place known as Tolo which is on a higher ground and which is about 1 kilometer from the delta. Mwai passed on and bequeathed his land at the Kuja river delta to his sons who also passed the ownership of the same through generations to the current Plaintiffs who are the great grand-children of Mwai and who refer to

themselves as I have mentioned above as Joka-Mwai. The 1st Plaintiff stated further that during the adjudication process in Kakelo-Kakoth Adjudication Section, the suit properties were demarcated and registered in the names of the Plaintiffs. The 1st Plaintiff stated further that the defendants are from the Osuga clan who also reside in Amoyo area where the suit properties are situated. The 1st Plaintiff stated that during the adjudication process at Kakelo-Kakoth Adjudication Section, one of the suit properties

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was demarcated and registered in the name of one, Amoka who hails from Osuga clan. The Plaintiffs through Daudi Osumo Osindi challenged this demarcation before the Adjudication Committee. The adjudication committee ordered the said property to be divided into two whereby Daudi Osumo Osindi from Joka-Mwai clan got parcel No. 12845 while Michael Oligi Ochola from Osuga clan got parcel No. 1561. Michael Oligi Ochola appealed this decision to the Land Adjudication Arbitration Board which overturned the decision of the Adjudication Committee and ordered the original land parcel to be demarcated wholly in the name of Michael Oligi Ochola and Raphael Odera Amoka. Daudi Osumo Osindi filed objection to this decision by the Land Adjudication Arbitration Board to the Objection Board. The objection was upheld and it was ordered that the whole parcel be registered in the name of Mwai Omiti. The 1st Plaintiff stated that Michael Oligi Ochola and Raphael

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Odera Amoka did not appeal to the Minister for Lands against the said decision. The 1st Plaintiff stated that despite the fact that the defendants did not challenge the Plaintiffs ownership of the suit properties as aforesaid; the defendants have refused to vacate the same and have continued with cultivation thereon which commenced during the adjudication process. It is for this reason that the Plaintiffs obtained consent from the District Land Adjudication Officer to bring this suit to have the defendants evicted from the suit properties. In cross-examination, the 1st Plaintiff stated that both Joka-Mwai and Joka-Osuga clans reside at Amoyo sub-location and that they were so residing when the adjudication process commenced within Kakelo-Kakoth Adjudication section. The 1st Plaintiff stated that during the adjudication process the entire parcel of land falling within Kakelo-Kakoth Adjudication section including the swampy areas which flood during the rainy

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season were adjudicated. He stated that Plot No. 1284 was first registered in the names of Raphael Mwai and Amoka Ogalo jointly. The two are deceased and the Plot is currently registered in the name of Raphael Mwai alone. He admitted that the Plaintiffs had not obtained any letters of administration with respect to the estate of Raphael Mwai. The 1st Plaintiff denied knowledge of any appeal that had been lodged by Joka-Osuga clan against the decision that awarded Raphael Mwai Plot No. 1284. He maintained that he made inquiries at the Land Adjudication office and was informed that no appeal had been filed with respect to Plot Nos. 1284 and 1561. He stated that Plot No. 1561 is in the name of Elkana Osindi Okong'o and Daudi Osumo Osindi. He stated that Elkana Osindi Okong'o is deceased and as such is not one of the Plaintiffs. He confirmed that the Plaintiffs had not obtained letters of administration with respect to the estate of Elkana Osindi Okong'o. He

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confirmed that Plot No. 1561 arose out of Plot No. 1284 and that it had been demarcated in the name of John Amoka Ogalo but was later on awarded to Daudi Osindi through objection proceedings. He reiterated that he was not aware of any appeal lodged against the Objection Board's decision with respect to Plot Nos. 1284 and 1561 and that if such an appeal existed it could have been brought only through irregular means. The 1st Plaintiff maintained that although the suit properties belong to the clan, the ownership was individual. Asked for any document to prove that the suit properties were registered in their names, the 1st Plaintiff claimed that each of the Plaintiffs' had "pieces of paper" as evidence of title as title deeds have not been issued. He did not however produce any such paper. He claimed that the Plaintiffs left the same at home when they came to court. The 1st Plaintiff admitted that Plot Nos. 2215-2230 are situated in an area which normally get swampy and that the said parcels

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of land fall within what has been described as Kakelo-Kakoth "B" Adjudication Section. The 1st Plaintiff denied that no adjudication was done in the area and that the adjudication process was not declared for the area until the year 2010. The 1st Plaintiff admitted that Plot Nos. 2215-2230 are occupied by Joka-Osuga clan. He stated that the members of the said clan are not residing thereon but are cultivating the same. In re-examination, the 1st Plaintiff claimed that Joka-Osuga clan started cultivation on Plot Nos. 2215 -2230 after the adjudication process and that prior to that date, the said parcels of land were being cultivated by Joka-Mwai clan and that it was with a view to averting a clan fight over the said parcels of land that the Land Adjudication Officer granted consent to the Plaintiffs to file this suit.

4. The defendants also called one witness, Romanus Jaoko Amoka. In his written witness statement and oral evidence given in

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court, Romanus Jaoko Amoka stated as follows; his great-grand father, one, Osuga Mariwa ("Osuga") who hailed from Karungu, Luanda Konyango, in Nyatike District moved to Tolo area and occupied the suit properties long before the advent of the adjudication process in the area. Osuga cultivated the entire area along the banks of river Kuja. Osuga passed on and bequeathed the suit properties to his son, one, Ogalo Osuga("Ogalo"). Ogalo also passed on and bequeathed the suit properties to his son, one, John Amoka Ogalo and his 17 brothers who occupy the suit properties to date. The area was declared an adjudication section in 1975 under Kakelo-Kakoth Adjudication Section and the parcels of land therein were demarcated and registered in the names of individuals. There was however a portion of the land in the area that was swampy and bushy that was not adjudicated under Kakelo-Kakoth Adjudication Section because of that reason. This portion of

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land that was not adjudicated has been declared an adjudication section of its own namely, Kakelo-Kakoth "B" Adjudication Section. Plot Nos. 2215-2230 claimed by the Plaintiffs herein are within that portion of land that was not adjudicated. The same now falls within Kakelo-Kakoth "B" Adjudication Section. The Plaintiffs have never been in occupation of Plot Nos. 2215-2230 which have all along been under cultivation by Joka-Osuga clan to which the defendants belong. In the

year 2000, Joka-Osuga clan discovered that the Plaintiffs had misled the land adjudication officers to include the area where Plot No. 2215-2230 are situated under Kakelo-Kakoth Adjudication Section and caused the land therein to be irregularly demarcated in their favour. Joka-Osuga clan lodged a complaint against this irregular demarcation and this is what led to the declaration of the land within Kakelo-Kakoth area that had not been adjudicated as Kakelo-Kakoth “B”

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Adjudication Section. This declaration was made after it was discovered that the inclusion of the area where Plot Nos. 2215-2230 are situated within Kakelo-Kakoth Adjudication Section was irregular. Following this declaration, the purported adjudication and demarcation of Plot Nos. 2215-2230 in the names of the Plaintiffs was rescinded and nullified. The Plaintiffs’ claim to Plot Nos. 2215-2230 is therefore baseless as they are not the registered owners thereof. Plot Nos. 1284 and 1561 rightly fell within Kakelo-Kakoth Adjudication Section and were duly adjudicated during the adjudication process in the area. Plot No. 1284 is registered in the name of Mwai Omiti (deceased) but there is an appeal to the Minister for Lands pending determination. Plot No. 1561 is however registered in the name of John Amoko Ogalo (deceased) who is the lawful owner thereof. The Plaintiffs are neither the registered owners of this parcel of land nor the occupants thereof. This suit is an

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attempt by the Plaintiffs to defeat and/or obstruct the adjudication process that has been declared under Kakelo-Kakoth “B” Adjudication Section.

5. In cross-examination, Romanus Jaoko Amoka (hereinafter referred to only as “**DW1**”) stated that Plot Nos. 2215-2230 were recorded during the adjudication process in the names of Joka-Mwai clan and that the same are presently registered in the names of the members of Joka-Mwai clan although they have objected to the adjudication process. He stated further that Joka-Osuga and Joka-Mwai migrated together and settled at Kakoth but whereas Joka-Osuga clan settled at Tulusiko, Joka-Mwai clan settled at Othora. Plot Nos. 2215-2230 is about ½ a mile from Tulusiko where Joka-Osuga reside. Joka-Mwai resides 3 miles away from these parcels of land. DW1 stated further that the adjudication process under which Joka-Mwai clan got registered as the proprietors of Plot Nos. 2215-2230

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was carried out secretly without any notice to the area residents. As soon as they discovered that Plot Nos.2215-2230 had been registered in the names of the Plaintiffs, Joka-Osuga clan lodged an objection. It is Joka-Osuga clan who are cultivating Plot Nos. 2215-2230 even though the same are registered in the names of the Plaintiffs. He stated that after their complaint about the secret adjudication process aforesaid, the Director of Land Adjudication ordered a new adjudication to be carried out. DW1 confirmed that Daudi Osindi and Michael Ochola had a dispute over Plot No. 1284 which was resolved by the Land Adjudication Committee. The committee ordered the land to be divided into two with Daudi Osindi who was representing Joka-Mwai clan in the dispute having one portion that retained the original parcel No. 1284 and John Amoka who represented Joka-Osuga clan the portion that was given a new number namely, No. 1561. He denied any

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knowledge of an objection that was filed by Joka-Mwai against the award of Plot No. 1561 to John Amoka in which an order was made that the land reverts back to Daudi Osindi of Joka-Mwai clan. In re-examination however, he confirmed that in fact, there was an objection against the award of Plot No. 1561 to John Amoka that led to an order being made that the said parcel of land do revert back to Daudi Osindi. DW1 maintained however that Joka-Osuga clan filed an appeal against the said decision which is pending hearing and determination by the Minister for Lands and Settlement. He maintained that Plot No. 1561 remains registered in the name of John Amoka. DW1 maintained that since the new adjudication that had been ordered by the Director of Adjudication had not been carried out, the Plaintiffs had no right to claim Plot Nos. 2215-2230.

6. The parties closed their respective cases with the foregoing evidence and agreed to file written submissions. The

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defendants filed their written submissions on 18th February, 2013 while the Plaintiffs filed their submissions on 8th May, 2013. I have considered the pleadings filed herein, the evidence tendered by both parties and the respective submissions by the advocates for the parties. The parties in their written submissions agreed on a total of 6 issues for determination by the court namely;

- i. **Whether the Plaintiffs have locus standi to institute and maintain this suit.**
- ii. **Whether the court has jurisdiction to entertain this suit.**
- iii. **Whether the Plaintiffs are the registered and lawful owners of the suit properties.**
- iv. **Whether this suit discloses any reasonable cause of action.**
- v. **Whether this suit is time barred.**
- vi. **Whether the Plaintiffs are entitled to the reliefs sought.**

7. I set out herein below my determination and/or findings on the

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aforesaid issues agreed upon by the parties;

Issue No. I;

The Plaintiffs have described themselves in paragraph 3 of the Plaint as follows, **“The Plaintiffs are the registered proprietors under the land adjudication process of ALL THOSE PIECES of land situated in Kakelo-Kakoth Adjudication Section known as Land Parcel Nos. “West Kadem/Kakelo-Kakoth/2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 1284 and 1561 respectively which parcels of land are inherited from the land acquired by the Plaintiffs great grandfather called Mwai hence the lands belong to Jokamwai clan.”** The Plaintiffs *locus standi* to bring this suit has been challenged by the defendants with regard to the Plaintiffs’ claim to Plot Nos. 1284 and 1561. The Plaintiffs have averred in paragraph 5 of the Plaint that Plot Nos. 1284 and 1561 are registered in the adjudication

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register for Kakelo-Kakoth Adjudication Section as belonging to Mwai Omiti. According to the 1st

Plaintiff's evidence in chief, the two parcels of land were registered in the name of Mwai Omiti pursuant to successful objections (No. 153/99 and No. 154/99) which were mounted by the 4th Plaintiff, Daudi Osumo Osindi against Michael Oligi Ochola and Raphael Odera Amoka. The proceedings and decision made in objection case No. 153 of 1999 on 15th October, 1999 that were produced in evidence by consent of the parties show that Plot No. 1284 was awarded to Mwai Omiti while Plot No. 1561 was awarded to John Amoka Ogalo. The proceedings and decision made in objection case No. 154 of 1999 shows that Plot No. 1561 that had hitherto been registered in the name of John Amoka Ogalo was ultimately awarded to Mwai Omiti. There is a dispute as to whether or not an appeal has been preferred to the Minister for Lands against the outcome of the said objection cases. Whereas the defendants have contended that they

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did prefer an appeal to the Minister, the Plaintiffs have contended to the contrary. There is however sufficient evidence on record that one, Michael Oligi Ochola preferred an appeal to the Minister for Lands against the decision that was made with regard to Plot No. 1284. This is clear from a copy of the Memorandum of Appeal dated 18th November, 1999, a copy of the receipt dated 18th November, 1999 and a copy of the letter dated 18th February, 2011 from the District Land Adjudication /Settlement Officer, Migori/Nyatike District that were produced as exhibits by the defendants. It is clear from the foregoing that as at the conclusion of the objection proceedings relating to Plot Nos. 1284 and 1561, the two parcels of land were held to be owned by Mwai Omiti who was being represented in the objection proceedings by the 4th Plaintiff. I don't agree with the defendant's submission that Plot No. 1561 is registered in the name of John Amoka Ogalo(deceased). That was the position prior to the determination

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of objection case No. 154 of 1999. As I have mentioned above, the decision in objection case No. 154 of 1999 gave back Plot No. 1561 to Mwai Omiti. There is no adequate and convincing evidence that an appeal was preferred against the decision in objection case No. 154 of 1999 that related to Plot No. 1561. The letter from the Land Adjudication/Settlement officer dated 18th February, 2011 that I have mentioned herein above refers to appeal relating to Plot No. 156I having been filed vide receipt No. 4457121 dated 6th February, 2006. The said receipt was not exhibited and in any event, the appeal was supposed to be filed within 60 days from the date of the decision. The decision in objection case No. 154/1999 having been made in 1999, the appeal if filed in the year 2006 was out of time. Even if it is assumed that an appeal was actually filed and that it was within time, the adjudication register that was compiled on the basis of the decision that was the subject of the said appeal could not be altered until the appeal

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was heard and determined and only if the determination was in favour of the appellant. See section 29 (3) (a) of the Land Adjudication Act, Cap. 284, Laws of Kenya. I do not see therefore how Plot No. 1561 can be said to be registered in the name of John Amoka Ogalo. Having settled the issue as to the ownership of Plot Nos. 1284 and 1561, it is now an opportune time to go back to the objection raised by the defendants against the Plaintiffs claim over the two properties. The defendants have submitted that since Mwai Omiti (deceased) is registered in the adjudication register as the proprietor of Plot No. 1284, the Plaintiffs who have not taken out letters of administration with respect to the estate of Mwai Omiti have no *locus standi* to institute this suit as concerns Plot No. 1284. The same objection has been raised with respect to Plot No. 1561 which the defendants claim to belong to John Amoka Ogalo (deceased)

but which as I have held herein above is owned by Mwai Omiti subject to the outcome of any appeal that

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may have been filed against the decision in which the said parcel of land was awarded to him. There is no dispute that Mwai Omiti is deceased. The 1st Plaintiff admitted this fact in his cross-examination. The 1st Plaintiff admitted further that none of the Plaintiffs has taken out letters of administration with respect to the estate of Mwai Omiti. In response to the defendants' submission that the Plaintiffs have no *locus standi* to maintain this suit as concerns Plot Nos. 1284 and 1561, the Plaintiff's advocates submitted that the submission is misconceived. The Plaintiffs' advocate contended that the Law of succession Act, Cap. 160 Laws of Kenya is not applicable in the circumstances. The Plaintiffs' advocate submitted that the Plaintiffs are not claiming Plot Nos. 1284 and 1561 but are merely seeking a declaration that whoever is registered as the owner thereof should remain so registered. I must say that I am unable to follow the Plaintiff's argument. As I have stated above the Plaintiffs have claimed in the Plaintiff that

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they are the registered proprietors of the suit properties which includes Plot No. 1284 and 1561. The Plaintiffs have proceeded to seek a declaration they are the lawful proprietors of the suit properties and that the defendants should be evicted therefrom. These reliefs can only be granted to the registered owners of the suit properties. The court cannot declare the Plaintiffs or any of them as proprietors of Plot Nos. 1284 and 1561 if they are not such owners, neither can the court order the eviction of the defendants from the said properties at the instance of the Plaintiffs if they have no interest recognized in law in the two properties. I have noted from the proceedings of objection case No. 153 of 1999 and objection case No. 154 of 1999 that the interest of Mwai Omiti deceased was pursued by the 4th Plaintiff. The Plaintiffs advocates have submitted that since the 4th Plaintiff is a party to this suit, the Plaintiff's claim with respect to Plot Nos. 1284 and 1561 is properly before the court. Again, I am unable to

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agree with the Plaintiffs on this line of submission. A claim for an interest in land made under the Land Adjudication Act, Cap. 284, Laws of Kenya (hereinafter referred to only as "**the Act**") following the declaration of an area as an Adjudication Area or an Adjudication Section cannot be equated to a claim before this court. A claim under the Act pursuant to section 13 thereof can be made by "**every person who considers that he has an interest in land within an adjudication section**". A claim under section 13 of the Act can be made by successors of a deceased person and not necessarily the deceased's legal representatives. See, section 13 (5) of the Act. The purpose of a claim under the Act is to aid in the ascertainment of the rights and interest of persons in the land within an adjudication area. That is not the role of this court and that is not what the Plaintiffs are seeking before this court. The Plaintiffs' case is that their rights and interests over the suit properties have been ascertained and confirmed through the

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adjudication process and their purpose of coming before this court is to protect and safeguard those

rights and interests. The persons seeking the protection of the court must be those whose rights and interests over the land with respect to which they seek protection have been ascertained. Plot Nos. 1284 and 1561 have been ascertained through the adjudication process to belong to Mwai Omiti and have been entered in the Adjudication register as such. In my view the role of the 4th plaintiff ended with the determination of the objection proceedings and the registration of the two plots in the name of Mwai Omiti. The interest of Mwai Omiti outside the said proceedings under the Act can only be pursued by Mwai Omiti's legal representatives. For this court to be able to make a declaration that Mwai Omiti is the lawful proprietor of Plot Nos. 1284 and 1561, a suit must be maintained by the legal representative of Mwai Omiti. I am therefore in agreement with the submission by the defendants' advocates that

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the Plaintiffs have no *locus standi* to maintain this suit as concerns Plot Nos. 1284 and 1561. The provisions of the Law of Succession Act, Cap. 160 Laws of Kenya and the High Court cases of, **Bernard Otieno Okore vs. Rusanael Akeyo Oinga & Another, Kisii, HCCC No. 548 of 2012(unreported)** and **Law Society of Kenya vs. Commissioner of Lands & 2 Others (2001) KLR 706** cited by the defendants' advocates support this finding.

Issues No. II and III;

The principal reliefs sought by the Plaintiffs in this suit against the defendants are; a declaration that the Plaintiffs are the lawful proprietors of the suit properties, an order of eviction and a permanent injunction to restrain the defendants from entering, cultivating or in any other manner dealing with the suit properties. The suit properties are situated in an adjudication area which was declared as such under the Land Adjudication Act,

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Cap. 284, Laws of Kenya (**the Act**). The preamble to the Act is set out as follows; "**An Act of Parliament to provide for the ascertainment and recording of rights and interests in trust land, and for purposes connected therewith and purposes incidental thereto**". The Act has an elaborate framework for ascertaining rights and interests in land that had previously not been registered. The Act also has a detailed mechanism for resolving disputes that arises during the process of ascertainment of the said rights and interests in land. The process of ascertainment of rights under the Act is concluded when the finalized adjudication register is handed over to the Chief Land Registrar by the Director of Land Adjudication under sections 27 and 28 of the Act for the ascertained interests to be registered. Previously, such registration was being undertaken under section 11 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) (hereinafter referred to as "**RLA**"). The registration is now

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undertaken under sections 6 and 7 of the Land Registration Act, 2012. It is that registration that vests upon a proprietor of land absolute ownership of the land together with all rights and privileges belonging thereto. See sections 27 and 28 of the RLA and sections 24 and 25 of the Land Registration Act, 2012. The whole process leading up to the registration of a person as a proprietor of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act. It is for this reason that, there is injunction under section 30 of the Act to any civil suit being instituted over an interest in

land in an adjudication area save with leave of the Land Adjudication Officer. The Act has given full

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power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist

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in the process of ascertainment of the said rights and interests in land. Due to the foregoing, a consent issued by the Land Adjudication Officer under section 30 of the Act does not entitle any party who has an interest in land within an adjudication area to bring up to court for determination issues which should be determined by the adjudication officer or through the dispute resolution machinery laid out in the Act. As I have stated above, the process of ascertainment of rights and interests in land is completed with the registration of such interests. That process had not been completed when this suit was brought. The Plaintiffs herein who are subject to the said process are now asking this court to declare them as the lawful proprietors of the suit properties which are still under adjudication. I don't think that this court can do that. Title to land within an adjudication area is obtained by operation of law after the completion of the adjudication process as I have stated above. In my view, it would

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not be appropriate for the court to declare the Plaintiffs as the lawful proprietors of the suit properties before the completion of the adjudication process and the registration of the Plaintiffs as the proprietors of the suit properties under the Land Registration Act, 2012. On the evidence placed before this court, there is a dispute as to whether or not Plot Nos. 2215-2230 were properly adjudicated under Kakelo-Kakoth Adjudication Section. In cross-examination, the 1st Plaintiff had testified as follows concerning Plot Nos. 2215-2230;

“These parcels of land are in an area which becomes swampy during the rainy season. These parcels of land were adjudicated after the other parcels, Plot Nos. 1284 and 1561. These parcels ran along river Kuja course up to the plot of Owach Otaya. The other person who has a plot nearby is Davidson Odhiambo. The other neighbor is Danson Okota.”

The defendants produced in evidence as an exhibit a notice by the

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District Land Adjudication and Settlement Officer, Migori/Nyatike Districts dated 26th May, 2010 by which the said officer established, **Kakelo-Kakoth “B” Sub-location Adjudication section.** The

boundaries of the said adjudication section was given in the said notice as,

“commencing from the old river Kuja course, following through the new river Kuja course boarding the plots of Owach Otaya, Davidson Odhiambo homestead, Danson Okota Odego towards Alfonse Omoja Okelo, Francis Opiyo Bunde, Kasmiel Opiyo among others ending at the old river Kuja course near plots of Oyier Agutu”.

This description of the boundaries of Kakelo-Kakoth “B” Sub-location Adjudication Section leaves no doubt that the area where the suit properties are situated fall within this adjudication section. In a letter dated 13th May, 2010 that was addressed to The Assistant Chief Amoyo Sub-location prior to this declaration which

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was also produced in evidence by the defendants, the Land Adjudication and Settlement Officer, Migori/Nyatike District had indicated that this declaration was necessitated by the fact that part of the land that fell within Kakelo-Kakoth Adjudication section was not demarcated during the demarcation exercise. Although the 1st Plaintiff admitted in his evidence that Plot Nos. 2215-2230 fell within Kakelo-Kakoth “B” Adjudication section, he denied any knowledge of the notice dated 26th May, 2010 referred to herein above through which the said adjudication section was established. The 1st Plaintiff also insisted that the area where Plot Nos. 2215-2230 are situated was adjudicated in the year 2000 and not in the year 2010 when the area seems to have been established as an adjudication section. On the other hand, DW1 maintained that Plot Nos. 2215-2230 fell within Kakelo-Kakoth “B” Adjudication Section that was declared on 26th May, 2010 and that the purported adjudication of the same under Kakelo-Kakoth

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Adjudication Section was irregular. Having regard to the 1st Plaintiff’s testimony as concerns the ground location of Plot Nos. 2215-2230, the letter dated 13th May, 2010 by the Land Adjudication & Settlement Officer ,Migori/Nyatike Districts and the notice dated 26th May, 2010 by the said officer under which he established Kakelo-Kakoth “B” Adjudication Section, I am persuaded that the area where Plot Nos. 2215-2230 are situated is still under adjudication. It seems that neither the adjudication process at Kakelo-Kakoth Adjudication Section nor that at Kakelo-Kakoth “B” Adjudication Section have been concluded. Whereas this court has the jurisdiction to entertain the Plaintiffs suit following the consent that the Plaintiffs obtained from the Land Adjudication Officer pursuant to section 30 of the Act, this court cannot grant the reliefs sought by the Plaintiffs. As I have stated above, it is not the duty of this court to ascertain rights and interests in land in an adjudication section. That jurisdiction rests

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with the Land Adjudication officer and other officers and bodies set up under the Act. The Act has machinery for resolving any disputes that may arise in the process of adjudication. In this case, the Plaintiffs are seeking to be declared as the lawful owners of Plot Nos. 2215-2230. These properties are situated in an area which is still under adjudication. The adjudication process itself is contested. The Plaintiffs are claiming that Plot Nos. 2215-2230 were demarcated under Kakelo-Kakoth Adjudication Section while the defendants maintain that the properties fall within Kakelo-Kakoth “B” Adjudication which is yet to be demarcated. The issues as to whether Plot Nos. 2215-2230 were properly demarcated under Kakelo-Kakoth Adjudication section or not and whether Kakelo-Kakoth “B” Adjudication section

was properly established are not before this court for determination. These are issues which fall within the jurisdiction of the Land Adjudication officer of the area concerned. The issues will in fact resolve

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themselves once the adjudication process is concluded and whoever are entitled to these properties are registered as the owners thereof. I am of the view that if this court was to declare the Plaintiffs as the lawful owners of the suit properties such declaration would be prejudicial to the ongoing adjudication process. The land Adjudication Officer should be left alone to discharge his mandate under the Act by concluding the adjudication process in the area. I am therefore unable to issue the declaration sought by the Plaintiffs. The evidence placed before this court by both parties shows that the defendants are the ones in possession of Plot Nos. 2215-2230. Although the Plaintiffs' claim to be the owners of these parcels of land, the interest of the Plaintiffs are yet to be registered under the Land Registration Act, 2012 which registration would as I have mentioned above vest the Plaintiffs with absolute proprietary interest on the suit properties. The Plaintiffs' interest in Plot Nos. 2215-2230 is contested by the

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defendants. The defendants have claimed that these parcels of land were irregularly demarcated and recorded in the names of the Plaintiffs. There is evidence that the Land Adjudication Officer has established a new Adjudication section that may affect the adjudication and demarcation of Plot Nos. 2215-2230 in favour of the Plaintiffs. In the circumstances, this court cannot order the eviction of the defendants from Plot Nos. 2215-2230 until the Plaintiffs right and interest over these parcels of land are crystallized by the registration of the Plaintiffs as the proprietors of the same under the Registration of Land Act, 2012 after the conclusion of the adjudication process. For the avoidance of doubt, I am in no way saying that the Plaintiffs have no right over Plot Nos. 2215-2230. What I am saying is that in view of the dispute that has arisen over the adjudication process touching on these parcels of land, it would be prejudicial to the ongoing adjudication process for the court to declare either of the parties

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herein as the lawful owners of the said parcels of land and that whoever will be registered as the proprietor of these parcels of land after the conclusion of the adjudication process would be the lawful owner of the same subject to the provisions of the Land Registration Act, 2012. I would wish to add as correctly submitted by the advocate's for the defendants that the Plaintiffs placed no evidence of whatsoever nature before the court in support of their claim to ownership of the suit properties. When asked in cross-examination if he had any document in support of the Plaintiffs claim, the 1st Plaintiff responded that the Plaintiffs had some pieces of paper. As I have observed herein earlier the said "pieces of paper" were not produced in court. The Plaintiffs' claim over the suit properties was therefore not supported by any documentary evidence of title. This is due to the fact that the adjudication process is incomplete and as such the Plaintiffs have not been issued with titles. It will be worthwhile in the

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circumstances for the Plaintiffs to wait for the completion of the adjudication process before they can maintain any meaningful claim.

Issues Nos. IV and V;

In view of the conclusions that I have reached on the foregoing three (3) issues, I am of the view that it is not necessary to consider these two issues dealing with the question as to whether the Plaintiffs had a reasonable cause of action against the defendants and whether or not the Plaintiffs' claims against the defendants is time barred under the Limitation of Actions Act, Cap. 22 Laws of Kenya.

Issue No. VI.

Conclusion;

I am not satisfied that the Plaintiffs have proved their case against the defendants on a balance of probability. I am in agreement with

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the submission by the defendants' advocates that the Plaintiffs' suit was brought prematurely. The Plaintiffs should have waited until the conclusion of the adjudication process before bringing the present suit. The Plaintiffs are not entitled to the orders sought at this stage. They would be at liberty to move the court at the conclusion of the adjudication process. Due to the foregoing, I find no merit in the Plaintiffs' claim herein against the defendants. The same is hereby dismissed. Each party shall bear its own costs.

Signed, dated and delivered at KISII this 27th day of September, 2013

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. G.S. Okoth for the Plaintiffs

Mr. Ochwangi for the Defendants

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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