



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 59 OF 2020**

**IN THE MATTER OF NYALENDA/PANDPIERI/KISUMU PRISON**

**FARM/BLOCK NO. 10/102 NYALENDA MEASURIGN 64 ACRES**

BEN O. OKWENGU.....1<sup>ST</sup> PLAINTIFF  
OWIRA MESHARK OCHUODHO.....2<sup>ND</sup> PLAINTIFF  
SYLAS OKWENGU.....3<sup>RD</sup> PLAINTIFF  
MAURICE ODHIAMBO.....4<sup>TH</sup> PLAINTIFF  
AZAEL WIGWA.....5<sup>TH</sup> PLAINTIFF  
LILIAN ATIENO AOKO.....6<sup>TH</sup> PLAINTIFF  
MICAHERBERT MAGAJIA.....7<sup>TH</sup> PLAINTIFF  
ONDITI DAVID OMONDI.....8<sup>TH</sup> PLAINTIFF

(Suing for themselves and on behalf of the  
entire Nyalenda A, B and Pandpieri Community)

**VERSUS**

KENYA PRISON SERVICE.....1<sup>ST</sup> DEFENDANT  
NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR- KISUMU.....3<sup>RD</sup> DEFENDANT

**RULING**

The Hon. Attorney General on behalf of the 1<sup>st</sup> Defendant has come to court seeking orders that this court allows the 1<sup>st</sup> Defendant to fence the suit property while taking into account the overriding interest of justice to the 1<sup>st</sup> Defendant. The application is based on grounds that the 1<sup>st</sup> Defendant/Applicant received funds from the exchequer in Nairobi to enable it fence the suit property. In the event that they are not utilized, the funds are to be remitted back to the exchequer for the purpose of accountability.

The funds meant to construct a perimeter fence on the suit property is about to be remitted back to the exchequer and accessing it would be futile since the financial year 2020/2021 is ending on 31<sup>st</sup> June 2021.

The 1<sup>st</sup> Defendant/Applicant had begun rehabilitating the parcel through planting of vegetables for inmates' ration consumption. However, unabated invasion and trespass into the parcel, theft of farm produce and grazing cattle by the local villagers has led to destruction of farm produce and losses to the 1<sup>st</sup> Defendant/Applicant.

There is therefore the need for this Honourable Court to intervene and allow the 1<sup>st</sup> Defendant/Applicant to utilize the funds in fencing the property, taking into account the possible futility of attempting to access the funds once they are remitted back to the exchequer in Nairobi

The 1<sup>st</sup> Defendant/Applicant appreciates the consent of the parties on 26<sup>th</sup> October 2020 to maintain the status quo of the suit property and the just effort of this Honourable Court to ensure that both parties meet equitable end of justice. However, with the same status quo, the Plaintiff/Respondents will eminently experience an irreparable loss.

The Plaintiffs/Respondents shall suffer no loss if this Honourable Court allows this Application.

It is only desirable, fair and just that this Honourable Court grant the orders sought and allow this Application.

In the supporting affidavit, Edward K. Schei the Officer in charge Kisumu medium prison and an employee of the 1<sup>st</sup> defendant states that there is therefore the need for this Honourable Court to intervene and allow the 1<sup>st</sup> defendant/Applicant to utilize the funds in fencing the suit property, taking into account the possible futility of attempting to access the funds once they are remitted back to the exchequer in Nairobi.

That the 1<sup>st</sup> Defendant/Applicant appreciates the consent of the parties on 26<sup>th</sup> October 2020 to maintain the status quo of the suit property, and the just effort of this Honourable Court to ensure that both parties meet equitable end of justice. However, with the same status quo, the 1<sup>st</sup> Defendant/Applicant will eminently experience an irreparable loss.

That the Plaintiffs/Respondents shall suffer no loss if this Honourable court allows this Application. That it is only desirable, fair and just that this Honourable court grant the orders sought and allow this Application.

In the replying affidavit, the Respondent/Plaintiffs through Ben O. Okwengu states that the orders would amount to a constructive dismissal of the suit and declaration that the suit belongs to the defendants and that it would amount to supporting trespass.

I have considered the application and the nature of this case which is of utmost public interest. I do order that in the interest of justice the matter be reviewed for hearing on a daily basis from the 12<sup>th</sup> of July 2021. Pending the hearing and determination of the suit the 1<sup>st</sup> defendant to be allowed to fence the areas not inhabited by the plaintiffs and the said fencing should not amount to eviction of any party or demolition of any structure. The fencing should not affect the settlement areas which amounts to 26 acres but should be restricted to the 38 unsettled acres that is farms and grazing grounds. There be liberty to apply.

**DATED AT KISUMU THIS 22<sup>ND</sup> DAY OF APRIL, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.**

**ANTONY OMBWAYO**

**JUDGE**