



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MIGORI**

**ELC CASE NO. 147 OF 2017**

**(Formerly Kisii ELC case No 65 of 2014)**

**HENRY OCHIENG NANG'.....PLAINTIFF**

**VERSUS**

**KENNEDY ODHIAMBO ODIRA.....1<sup>ST</sup> DEFENDANT**

**POLYCAP ONYANGO ODIRA.....2<sup>ND</sup> DEFENDANT**

**ISAIAH OTIENO ODHIAMBO.....3<sup>RD</sup> DEFENDANT**

**WILKISTA ODERO ODHIAMBO.....4<sup>TH</sup> DEFENDANT**

**RUTH OCHIENG.....5<sup>TH</sup> DEFENDANT**

**RULING**

**A) INTRODUCTION**

1. The present ruling is in respect of a report reference number AWD/LND/15/2/VOL III (III) dated 5<sup>th</sup> November 2019, by the Assistant County Commissioner, Awendo Division and duly filed in this court (The report herein). Notably, the report contains a determination of the present dispute concerning the suit land, LR NO. North Sakwa/Kamasoga/1902 and another parcel of land, LR NO. North Sakwa/Kamasoga/1926 further to the proceedings conducted by the Assistant County Commissioner on 27<sup>th</sup> August,2019.

2. The report was pursuant to the consent of 13<sup>th</sup> March 2019 which reads, inter, alia;-

**“BY CONSENT of the parties represented by their respective counsel, it is hereby ordered that :-**

1) The Assistant County Commissioner, Awendo Division to arbitrate the matter and file a report before this court within the next sixty (60) days from the date hereof.

3. On 28<sup>th</sup> January 2020, Mr. Kwanga Mboya, learned counsel for the plaintiff, Henry Ochieng Nagi informed this court that the report was not contested hence, urged the court to adopt the same in terms of it's resolutions. Mr. Kisia holding brief for Mr. Odondi Awino learned counsel for the defendants namely Kennedy Odhiambo Odira and four (4) others, had no objection thereto. On that score, the report was adopted for hearing of the suit.

4. On 5<sup>th</sup> November,2020, the plaintiff's counsel told the court that all the parties had participated in the proceedings leading to the generation of the report. Mr. Adawo holding brief for Mr. Kwanga Mboya, learned counsel for the plaintiff prayed that;-

***“May the report be adopted as Judgment of this court”***

**(B). THE GIST OF THE PLAINTIFF'S CASE**

5. It is noteworthy that the instant suit was originated by way of a plaint dated 16<sup>th</sup> February 2014 duly lodged in court on 19<sup>th</sup> February 2014 seeking the reliefs infra:-

a) An order of permanent injunction restraining the defendants by themselves, servants and/or agents from entering into, trespassing into, alienating, selling and/or alienating, cultivating on, tilling on and/or otherwise interfering and/or dealing with all the piece and/or parcel of land known as title no. North Sakwa/Kamasoga/1902.

b) Cost of this suit and any other or further relief that this honourable court may deem fit and just to grant

6. Briefly, the plaintiff's case as per the plaint is that he is the registered owner of the suit land, LR, No. North Sakwa/Kamasoga/1902 measuring approximately one decimal eight hectares (1.8 Ha). That the same is a subdivision of the parent land, LR NO. North Sakwa/Kamasoga/1875 contained in Registry Map Sheet number 3 and located within Migori County. That in spite of the Judgment and order of eviction from the suit land against the defendants rendered in Awendo Land Dispute Tribunal land case number 173 of 2009 and Rongo SRM Misc. No. 48 of 2009, the defendants, have refused and or neglected to vacate the suit land. That the defendants have further encroached into the suit land purportedly claiming proprietary interest thereon without any justification.

7. The plaintiff laments that the defendants are excavating and cultivating the suit land therefore, denying him the opportunity to cultivate it. That the defendants are bound to alter the quality of the suit land and that the plaintiff is likely to suffer irreparable damage thereby. It thus, provoked the present suit.

### **(C). THE GIST OF THE DEFENDANTS' CASE**

8. By an amended Notice of motion, application dated 21<sup>st</sup> June 2017, the defendants'/applicants sought, inter alia, that ex-parte orders issued on 1<sup>st</sup> February, 2017, be vacated, set aside, varied and or reviewed and that the court do grant leave to the applicants to defend the application dated 18<sup>th</sup> July 2016. Consequently, this court set aside ex-parte orders of temporary injunction granted on 21<sup>st</sup> February 2017 and the leave sought was granted accordingly.

9. Be that as it may, the defendants duly served failed to file and serve any statement of defence or at all herein.

### **(D) ISSUES FOR DETERMINATION**

10. I have anxiously considered the plaint in its entirety, the report and the fact that no defence, comments or submission were duly filed and served herein. In that regard, has the report finally determined this suit and is the plaintiff entitled to the orders sought in the plaint?

### **(E) DISCUSSION AND DISPOSAL**

11. It is even ground that the parties agreed to resort to alternative dispute resolution (ADR) regarding this matter. It is so discernable from the court proceedings of 13<sup>th</sup> March 2019 and 27<sup>th</sup> June 2019 herein.

12. Further to the even ground and order of this court, the report in its resolution reads, inter alia;-

1) Lower courts and the High court have made orders that are binding leading to the sub-divisions and transfer of the very land to the plaintiff who now has a title deed,

2) The plaintiff has proven tangible evidence hereby attached unlike the defendants.

13. **Article 60 (g) of the Constitution of Kenya 2010**, sets out principles of land policy. The same include encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution. Indeed, the said report is one of such initiatives.

14. **Article 159 (2) (C)** of the same Constitution anchors Judicial authority principles inclusive of arbitration. I take into account the principles accordingly. Exhaustive doctrine forms part of the principles.

15. In **Geoffrey Muthiga Kabiru and 2 others –vs- Samwel Muiga Henry and 1756 others (2015) e KLR**, the Court of Appeal held that :-

*“..... courts ought to be fora of last resort and not the first port of call the moment a storm brews..... the Exhaustive doctrine is sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of diligent.....this accords with Article 159 of the constitution.....”*

16. Similarly, I approve the case of **Republic –vs- Independent Electoral and Boundaries Commission (IEBC) Ex-parted National Super Alliance (NASA) Kenya and 6 others (2017) eKLR** where it was opined thus;-

*“This doctrine (Exhaustion) is now esteemed in juridical lineage in Kenya....”*

17. The revelation in paragraphs 8 and 9 hereinabove is that the defendants were given an opportunity to exercise their rights **under Articles**

**48 and 50 (1) of the Constitution (supra)**. However, they neglected to make use of that opportunity. By the report, the present dispute was duly determined in favour of the plaintiff as disclosed in copies of several documents, among them, a decree issued on 7<sup>th</sup> June 2010 in Rongo Senior Resident Magistrate's court Misc. No. 48 of 2009.

18. So, the cardinal principal is that litigation has to come to an end; see **Halsbury's Laws of England 4<sup>th</sup> Edition volume 22 page 273**.

19. This court has the powers to grant the orders sought in the plaint under section 13 (7) (a) and 61 of the Environment and Land Court Act, 2015 (2011). Furthermore, the court is guided by the overriding objective under sections 1, 1A, 3 and 3B of the Civil Procedure Act Chapter 21 Laws of Kenya, authoritative pronouncements including **Giella-v- Cassman Brown and Company Limited (1973) EA 358, National Bank of Kenya Ltd -vs- Shimmers Plaza Ltd (2009) KLR 279 at 283 and Nguruman Ltd -vs- Jan Bonde Nielsen & 2 others (2014) e KLR**, on the grant of injunctive remedies.

20. Section **152 A of the Land Act, 2016 (2012)** prohibits unlawful occupation of private land. The report is in favour of the plaintiff and was adopted accordingly as noted in paragraph 4 hereinabove. It follows that the plaintiff is entitled to orders sought in the plaint.

21. To that end, it is the finding of this court that the plaintiff's claim against the defendants jointly and severally is unchallenged, steadfast and cogent. The plaintiff has thus, proved his case against them on a balance of probabilities as noted by the Court of Appeal in **Kirugi and another -vs- Kabiya and 3 others (1987) EA 347**.

22. A fortiori, Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally in terms of a permanent injunction and costs of the suit as sought in the plaint dated 10<sup>th</sup> February 2014 duly filed in court on 19<sup>th</sup> February 2014.

Orders accordingly.

**DATED SIGNED and DELIVERED in open Court at MIGORI this 25<sup>th</sup> day of November 2020.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Mr. D. Adawo learned counsel for the plaintiff

Mr. P. Ochwangi learned counsel holding brief for Odondi Awino learned counsel for the defendant

Tom Maurice- Court Assistant