



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 31 OF 2009**

**NAHASHON OCHIENG ONYANGO.....PLAINTIFF**

**VERSUS**

**FLORENCE MWANIKA ONYANGO..... 1<sup>ST</sup> DEFENDANT**

**HENRY OTIENO.....2<sup>ND</sup> DEFENDANT**

**BERNARD OSORE.....3<sup>RD</sup> DEFENDANT**

**BENJAMIN OSENGO.....4<sup>TH</sup> DEFENDANT**

**PHILIP OPIYO.....5<sup>TH</sup> DEFENDANT**

**PETER GATIMU.....6<sup>TH</sup> DEFENDANT**

**EVERLYNE WANYAMA.....7<sup>TH</sup> DEFENDANT**

**JOHN SIMIYU.....8<sup>TH</sup> DEFENDANT**

**HALLIN WANYAMA.....9<sup>TH</sup> DEFENDANT**

**MARY PETER.....10<sup>TH</sup> DEFENDANT**

**ALICE WANYONYI.....11<sup>TH</sup> DEFENDANT**

**EVERLYNE SIMIYU.....12<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of an application filed under certificate of urgency, dated 7/4/2017. It seeks a raft of orders. Prayers No. 1, 2, 3 and 5 are now overtaken by events. They remaining prayers seek the following:-

**(4) THAT the Honourable Court be pleased to make a declaration that the plaintiff has since complied with the consent order made on the 25<sup>th</sup> November, 2013:**

**(6) THAT an injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants either by**

themselves their servants or agents or otherwise howsoever, to remain, occupy and use the land more particularly referred to as LR. No. 30726/5 measuring 7.723 (Ha) or 19.099 acres represented by deed plan No. 404041 and not any other part of the land.

(7) THAT the Honourable Court be pleased to declare that the plaintiff is entitled to exclusive and unimpeded right of possession, use and occupation to properties more particularly known as

LR.30726/2; LR30726/7;LR.30726/8;

LR.30726/9;LR.30726/10;LR.30726/12;

LR.30726/13;LR.30726/14;LR.30726/15;

LR.3726/16;LR.30726/17;LR.30726/18;

LR.30726/19;LR.30726/20;LR.30726/21;

LR.30726/22;LR.30726/23;LR.30726/24;

LR.30726/25;LR.30726/26;LR.30726/27

LR.30726/2;LR.30726/29;LR.30726/30;

LR.30726/31;LR.30726/32;LR.30726/33;

LR.30726/34;LR.30726/35;LR.30726/24;

LR.30726/25;LR.30726/26;LR.30726/39;

LR.30726/40;LR.30726/41;LR.30726/42;

LR.30726/43;LR.30726/44;LR.30726/47;

LR.30726/46; LR.30726/47;LR.30726/48 (Hereinafter referred to as “the Suit Properties”)

(8) A declaration the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants, whether by themselves or their servants or agents or otherwise howsoever, are wrongly in occupation of the suit properties and are accordingly trespassers on the same.

(9) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, whether by themselves or their servants or agents or otherwise howsoever, are not entitled to remain on the suit properties and the Honourable Court be pleased to grant an order of injunction compelling the defendants, their servants or agents or otherwise howsoever who have already entered the suit properties to vacate the suit properties forthwith and in case of resistance be forcefully evicted by the OCS Kitale Police Station.

(10) The Honorable Court be pleased to grant an order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants, whether by themselves or their servants or agents or otherwise howsoever from re-entering the suit properties.

(11) The Honorable Court be pleased to grant an order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants, whether by themselves or their servants or agents or otherwise howsoever from interfering with the process of replacing beacons and further from

**interfering with the replaced beacons and the boundaries created thereto in whatsoever manner.**

**(12) THAT the court be pleased to grant an order of vacant possession of the suit properties.**

**(13) Any such other or further relief as this Court may deem appropriate.**

**(14) Costs of the application.**

2. The grounds upon which the application is made are stated at the foot of the application. The background to the application needs be restated here for clarity. By a plaint dated **26/2/2009** the plaintiff sued the defendants for the following orders:-

**(a) A permanent injunction restraining the defendants from trespassing onto Title No. IR 1323**

**(b) Costs of the suit.**

3. The 1st defendant is the plaintiff's 3<sup>rd</sup> wife. The 2nd - 4th defendants are the plaintiff's sons. The 5th - 12th defendants are described in the plaint as unlawful lessees on the land comprised in Grant No. 13623 of which the plaintiff was the absolute proprietor. The plaintiff avers that the 1st defendant leased to the 5th - 12th defendants part of the land he owns without his consent. He also avers that the 1st - 4th defendants have prevented the plaintiff from subdividing, cultivating and using the property, hence the suit for an injunction.

4. The 1st - 4th defendants filed a defence on 19/3/2009 in which they accused the plaintiff of material non-disclosure. They aver that the plaintiff subdivided his land in 1996 into 11 equal portions measuring 17.28 acres and allocated the portions thereof to his sons who include the 2nd, 3rd and 4th defendants and also his legal wife, the 1st defendant, which subdivision was consented to by the Land Control Board they also aver that the subdivision was also approved by the area DO, Chief and others. The 1st - 4th defendants avers that they have never known any other home but the suitland. The plaintiffs also aver that the plaintiff has remained with a portion of land of **30 acres** which lies fallow and unoccupied by him. They aver that they have been confining their activities in their portions of land which they have been working on with the full knowledge of the plaintiff. They deny ever having prevented the plaintiff from cultivating or utilizing his portion.

5. On **30/3/2009**, this court issued an order of temporary injunction against the 1st - 4th defendants and they filed a notice of appeal on **9/4/2009** intending to appeal against the said order. The appeal was filed and the court of appeal upon hearing the appeal gave its judgement on **18/9/2012**. The court partially allowed the appeal, to the extent that this court's order of **30/3/2009** was set aside and substituted with an order permitting the appellants to continue residing on and using the land only for growing their subsistence crops until the suit before the High Court is determined.

6. On the 25th November, 2013, a consent order was recorded between the parties as follows:-

**"(1) The plaintiff's suit is marked as withdrawn with no orders as to costs.**

**(2) That the plaintiff do have land known as IR 13623 surveyed and subdivided among his children and wives.**

**(3) That the plaintiff do allocate seven (7) acres forming part of the land to the 1st defendant Florence Mwanika Ochieng.**

**(4) The parties to be allocated the land to enjoy it without any interference".**

7. From the date of that consent order there was no other action taken till the instant application was filed.

8. In the instant application the plaintiff avers that he has since, in compliance with the consent order of **25/11/2013**, subdivided **IR No. 13623** among his wives and children and obtained deed plans for the resultant portions. Following that subdivision, the plaintiff says, each of the wives and their families can with clarity and precision identify the property given to them. The plaintiff does not object to the presence of the defendants on the land, but he insists they should now move to their identified portions.

9. The 1st - 5th defendants are, however, farming on the entire land in complete disregard to the plaintiff and other family members' rights to land and have refused to be shown the area allocated to them. They have also interfered with and uprooted the beacons and also allowed third parties to enter into the suit properties in the guise of not knowing the boundaries and the areas allocated to them and have continued to plough the properties.

10. According to the subdivision plan, the plaintiff says, the wives and children have been allocated land as follows:-

**(a) The late first wife, Hellen Akinyi's House - LR No. 30726/3. The relevant deed plan for that land deed plan No. 404039**

**(b) The second wife the late Machata Atieno's House - LR No. 30726/4. The relevant deed plan is No. 404040.**

**(c) The third wife Florence Mwanika - LR. No. 30726/5. The relevant deed plan number is 404041.**

**(d) The fourth wife shall live with the plaintiff on the parcel that the plaintiff has retained for himself.**

11. The plaintiff has stated that he believes that he has complied with the consent orders recorded on 2/11/2013, and has invited, though in vain, the 1st - 5th defendants to come and have their portions. The plaintiff avers that he lives on LR.No. 30726/6 with his 3rd wife (who is the 1st defendant) and his 4th wife - Diana Okisa which matrimonial home remains part of his estate and which can only be the subject of subdivision upon his demise.

12. On **10/4/2017** when the application came up *ex parte*, prayers No. **2** and **3** thereof were granted, after the application was certified urgent. The court ordered that the matter be listed for directions on 12/4/2017. On 12/4/2017, Mr. Atudo appeared for the plaintiff and Mr. Ingosi for the 1st - 4th defendants. On that day also the defendants were granted leave to file a response to the application and serve it upon the plaintiff within 14 days. The application was fixed for hearing on **3/7/2017**.

13. There is no indication of what transpired on 3/7/2017 but on **14/7/2017**, the plaintiff took a hearing date-**26th July, 2017** - for the application in the Registry. The court never sat on **26th July, 2017**, the date the plaintiff fixed the application for hearing. The court has established that by a notice by the Deputy Registrar the parties were informed that the matters scheduled for that day would be heard on **28/7/2017**. On 28/7/2017 Mr. Atudo was present for the plaintiff while Ms. Mweneke held brief for Mr. Ingosi. There was still no response to the application filed by the plaintiff. Mr. Atudo urged that the prayers be granted as prayed. Save prayers **1, 2** and **3** which had been granted in the interim. Ms. Mweneke however asked for an adjournment on behalf of Mr. Ingosi, saying that Mr. Ingosi had not filed a response in view of the orders requiring the parties to appear before the Chief of Grassland to be shown their parcel of land. She also claimed that Mr. Ingosi was held up at the Court of Appeal at Eldoret and that he was praying for a mention date. The court found these to be insufficient excuses for not complying with the order that the respondents should file a response.

14. Mr. Atudo responded that from 10<sup>th</sup> April 2017, a number of attempts had been made to have the 1st - 5th respondents/defendants attend the meeting at the Chief's but in vain; he urged that the application for adjournment by the respondents was only meant to further that disobedience. Mr. Atudo said he had learnt that the Court of Appeal at Eldoret would not be sitting on that day and that in any case, the counsel

was represented in this matter by Ms. Mwemeke.

15. The court declined the application for adjournment and after hearing the application, set the matter for a ruling on **24/8/2017**. The application stood unopposed. There is no proper ground given by Ms. Mwemeke for lack of a response to the application. Mr. Atudo submitted that the 1st - 5th defendants are not interested in responding to it.

16. In this court's view, the application is rather straightforward. By a consent dated **25/11/2009** the parties agreed to have the suit withdrawn and the land subdivided, whereupon the only order in the consent order relating to plot size is **Order No. 3** which said that the 1st defendant should be allocated **7 acres**.

17. I have looked at the supporting affidavit carefully and found that the land that the plaintiff has reserved for the 1st defendant and her 3 children is more than 7 acres. It amounts to **19.09** acres. According to the plaintiff the 1st defendant's share out of that is 7 acres while the rest is for her children who are the 2nd, 3rd, 4th and 5th defendants.

18. I find this is a good arrangement which, though it has not carved out a specific parcel of 7 acres for the 1<sup>st</sup> defendant, has catered for the needs of the 1st defendant and secured the bonds of her family by including her children in the same portion. This is not a new practice. The court takes judicial notice that it is the norm in succession proceedings to group a widow and her children under the same share when distributing a deceased's estate. It should not appear strange when a husband who is alive groups his wife together with her children while sharing out property while he is alive.

19. In any event, there is no good reason that has been presented to this court why the 1<sup>st</sup> defendant and her children should not be given a consolidated land parcel.

20. Besides, if the 1<sup>st</sup> defendant and her children desire to have the land subdivided so that she may have a share of seven acres to herself that is a decision they have to make as a family henceforth without the input of the plaintiff as the power to deal with the land has already been placed in their hands.

21. It is in the public interest that all litigation must come to an end in some way. The consent signed between the parties on **27/11/2009** was geared towards bringing this litigation to an end and it has been substantially respected by the plaintiff. It is the proper position that the letter and spirit of **Article 159(2) (b)** of the Constitution of Kenya requires that justice shall not be delayed. **Article 159(2) (c)** requires that in exercising judicial authority, this court shall be guided by the principle that alternative dispute resolution, including reconciliation, mediation and arbitration shall be promoted. It appears that attempts to have the defendants participate in an expeditious resolution of this dispute have been thwarted by recalcitrance on the part of the defendants. The court should not condone this conduct.

22. Given the history of this matter and in particular the consent order which was not ever set aside, and the readiness of the plaintiff to have the matter concluded, it would be contrary to the interests of justice if this court allowed any party herein to engage in conduct that is plainly aimed at stymying the march of these proceedings towards their denouement; I classify failure by the respondents to attend meetings with the Chief despite invitation, failure to file any response to the instant application as well as the application for an adjournment made by Ms. Mwemeke in the category of such conduct.

23. I therefore find that the plaintiff's application dated **7/4/2017** is for the greater part merited and I grant prayers Nos. **4, 6, 7, 8, 9, 10, 11** and **12**.

24. Each party will bear their own costs of this application.

Dated, signed and delivered at Kitale on this **24<sup>th</sup>** day of **August, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**24/8/2017**

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Ingosi for 1<sup>st</sup> – 4<sup>th</sup> Respondents

Ms. Oketch holding brief for Atundo for the Plaintiff/Applicant

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**24/8/2017**