

**IN THE REPUBLIC OF KENYA
IN A DOMESTIC ARBITRATION**

BETWEEN

**JARED OCHIENG' OKONG'O – CLAIMANT
AND
GEORGE AKELLO OKONG'O – RESPONDENT**

ARBITRATION AWARD

Juridical Seat: Nairobi, Kenya

Arbitrator: Isaac Aluochier, FCIArb

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The Parties

1. The Claimant, Jared Ochieng' Okong'o, is a resident of Kangeso Sub-Location, West Kamagambo Location, Rongo Sub-County, Migori County. The Respondent, George Akello Okong'o, is likewise a resident of Kangeso Sub-Location, West Kamagambo Location, Rongo Sub-County, Migori County. The Parties occupy neighbouring parcels of land.

Background To The Arbitration

2. The instant arbitration commenced on 8th February, 2024 upon the Claimant filing his Request for Arbitration with Aluochier Dispute Resolution, the arbitral institution administering this arbitration, and paying the requisite request for arbitration fees. It arises from land sale agreements entered into by the Parties on 22nd June, 2013 and on 4th March, 2016. Prior to the commencement of this arbitration, the dispute between the Parties had been placed before other dispute resolution forums for hearing and determination. 10
3. On 14th December, 2021 the Parties' dispute was heard and seemingly determined before the Kangeso Sub-Location Assistant Chief and his council of village elders, with a settlement entered into by the Parties, with the Respondent, in writing and appending his signature, agreeing to pay the Claimant the sum of Kshs 80,000/- on or before 25th February, 2022.
4. But before the agreed payment deadline date, on 3rd February, 2022 the Respondent instituted court proceedings in Rongo Magistrate's Court, ELC Case No. E003 of 2022, George Akello Okong'o v Jared Ochieng' Okong'o, seeking specific performance against the Claimant, seeking transfer of land parcels Kamagambo/Kanyamamba/2642 and 2644 20
amounting to approximately one and a quarter acres from the Claimant to the Respondent. By having instituted these court proceedings, the Respondent demonstrated that he would

- not honour the settlement dated 14th December, 2021 that he had entered into in writing before the Kangeso Sub-Location Assistant Chief and his council of village elders.
5. On 21st July, 2022, according to information posted on the Judiciary's Public Information Kiosk, at <https://efiling.court.go.ke/kiosks>, the case Rongo MCELC/E003/2022 was dismissed for lack of prosecution.
 6. On 13th July, 2023, after being moved by the Respondent, the court reconvened to consider the Respondent's Application for reinstatement of case Rongo MCELC/E003/2022. The court delivered its Ruling on the Application on 14th November, 2023, and dismissed the reinstatement Application.
 7. On 14th December, 2023 the court convened again to consider yet another Application from the Respondent, this time seeking a stay of execution of possible eviction from Kamagambo/Kanyamamba/2644. But, on 6th February, 2024, the court records that the last Application for stay was withdrawn. 10
 8. Two days later, with there being no formal dispute resolution proceedings in any dispute resolution forum, as between the Claimant and the Respondent, the Claimant instituted the instant arbitration proceedings.
 9. On 1st April, 2024 both parties were served with the notice of appointment of the arbitral tribunal, and also with hearing directions from the arbitral tribunal, with a virtual hearing scheduled for 15th April, 2024. The tribunal sought from the parties, at hearing, answers to the following matters: 20
 - 9.1. The registered proprietor of Kamagambo/Kanyamamba/33 at the time of the land sale agreement on 4th March, 2016.
 - 9.2. The status of any succession proceedings in court with respect to the estate of the registered proprietor of Kamagambo/Kanyamamba/33 as at 4th March, 2016.
 - 9.3. Whether any Land Control Board consents were obtained with respect to the land sale agreements of 22nd June, 2013 and 4th March, 2016, and if obtained, the details of the said Land Control Board consents.
 10. On 2nd April, 2024 the Respondent replied by stating that *"the case is in court and serve my advocate for the plans you may have."*
 11. On 3rd April, 2024 the Respondent's advocate, Juma Ouko, was served with both the notice of appointment of the arbitral tribunal, and the hearing notice. He had previously, on 15th February, 2024, been served with the Request for Arbitration, and so was seized of the 30

instant arbitration. The Respondent's advocate responded by stating: *"The issues you have raised herein are beyond the jurisdiction of arbitration. Allow them to be canvassed before the court of competent jurisdiction. Our client shall not be participating in the said arbitration meeting."* In response, the arbitral tribunal stated: *"Your response above will be recorded as your client's response. Thanks."* The Respondent's advocate concluded by stating: *"Very well"*.

12. On 10th April, 2024 the Claimant furnished a land mutation form, serial number 04469306, signed, dated and stamped by the County Surveyor of Migori on 8th August, 2019, for Kamagambo/Kanyamamba/33, subdividing it into two parcels, being Kamagambo/Kanyamamba/2511 and 2512, each measuring 1.50 hectares, with the parcel then registered in the names of Thomas Ngutu Okong'o and Jared Ochieng' Okong'o, the latter being the Claimant in the instant arbitration. 10

13. In Gazette Notice No. 2889 dated 3rd April, 2014 and signed by Z J Nyakundi, District Registrar, Rongo, and published in the *Kenya Gazette* on 25th April, 2014, notice was given that an application had been made in the Principal Magistrate's Court at Rongo to the following effect:

CAUSE NO. 147 OF 2014

By (1) Thomas Ngutu Okongo and (2) Jared Ochieng Okongo, for a grant of letters of administration intestate to the estate of Odhiany Ngutu, who died at Kangeso Sub-Location on 2nd May, 1996. 20

The Court will proceed to issue the same unless cause be shown to the contrary and appearance in this respect entered within thirty (30) days from the date of publication of this notice in the Kenya Gazette.

14. The Claimant has also furnished the arbitral tribunal with a hearing notice dated 21st March, 2024 stating that Migori ELC Miscellaneous Application No. 2 of 2024 between George Akello Okong'o and Jared Ochieng' Okong'o has been fixed for hearing on 2nd May, 2024 before Hon. Justice Sila Munyao at Kisii High Court. The said Application is dated 16th February, 2024, the day after the Respondent's advocate was served with the instant Request for Arbitration, and was filed in Migori Environment and Land Court on 19th February, 2024. The Application seeks the following orders: 30

- 14.1. *THAT this matter be certified urgent and service be dispensed with in the first instance.*

- 14.2. *THAT the Honourable Court be pleased to enlarge time and admit the filing of this appeal out of time.*
- 14.3. *THAT this Honourable Court do deem the annexed Memorandum of Appeal herein as duly filed upon payment of the requisite court fees.*
- 14.4. *THAT costs of this application be provided for.*
15. The Respondent's memorandum of appeal, dated 16th February, 2024, states:
*“The Appellant above-named being dissatisfied and aggrieved with the entire ruling and order of the Principal Magistrate Hon. CNC Oruo delivered on 14th November, 2023 at the Principal Magistrate's Court at Rongo in **Environment and Land Case Number E03 of 2022: George Akello Okongo versus Jared Ochieng Okongo** hereby appeal to the High Court of Kenya at Migori on the following **GROUND**s inter alia, namely:-*
- 1. The learned Magistrate erred in fact and in law in finding that 'no reasons had been given occasioning the delay' in filing the reinstatement application.*
 - 2. The learned Magistrate erred in law and fact in failing to appreciate sufficiently or at all the reasons advanced in the impugned application.*
 - 3. The learned Magistrate erred in law and fact in failing to appreciate sufficiently sections 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 51(1) and Article 159(2) of the 2010 Constitution.*
 - 4. The learned Magistrate erred in law and fact by failing to take into account that the Applicant together with his family have been residing on the suit land since sometime in 2013 and that by dismissing the suit, the court handed the Respondent fertile ground to forcefully evict the Applicant.*
 - 5. The learned Magistrate erred in law and fact by failing to appreciate that the Applicant was an innocent party who had been disappointed by the previous advocate on record.*
 - 6. The learned Magistrate erred in law and fact by failing to appreciate that the mistakes of a counsel on record should not be visited upon the innocent litigant.*
- It is proposed to ask the Court **FOR ORDERS THAT:***
- a. This appeal be allowed and the Court does set aside the ruling and orders entered in favour of the Respondent on 14th November, 2023 and in place allow the Applicant's application dated 14th December, 2023.*
 - b. That having allowed the appeal the Court does order that this matter be placed*

for trial before the Court at Rongo Principal Magistrate's Court.

c. The costs of this appeal and the applications in the subordinate Court be granted to the Appellant against the Respondent.

d. That the Honourable Court does issue any other relief it deems just in the circumstances of this appeal.”

16. No additional information came to the attention of the arbitral tribunal.

Claimant's Case

17. The Sale of Land Agreement entered into between the Claimant and the Respondent on 4th March, 2016, before the then Assistant Chief of Kangeso Sub-Location, one Zam Charles Ayieko, stated:

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I, Jared Ochieng' Okong'o, ID No 28247455, being owner of land No Kamagambo/Kanyamamba/33, West Kamagambo Location, I have agreed without any alteration whatsoever to sell approximately 0.1 hectares of the aforesaid land to George Akelo Okong'o, ID No 22669092 buyer forever. The cost of the land is Kshs FIFTY THOUSAND SHILLINGS ONLY (Kshs 50,000/-) at cost of shillings FIFTY THOUSAND SHILLINGS ONLY (Kshs 50,000/-) per 0.1 hectares. I have already received Kshs THIRTY TWO THOUSAND SHILLINGS (Kshs 32,000/-) in advance. The remaining amount of Kshs EIGHTEEN THOUSAND SHILLINGS (Kshs 18,000/-) shall be paid by the following instalments.

| INSTALMENT | AMOUNT | I.D. No | SIGNATURE |
|----------------------------------|----------------------|-----------------|------------------------------------|
| <i>1st Instalment</i> | <i>Kshs 32,000/-</i> | <i>28247455</i> | <i>LTP (Left Thumb Print)</i> |
| <i>2nd Instalment</i> | <i>Kshs 18,000/-</i> | <i>28247455</i> | <i>No thumb print or signature</i> |

3rd Instalment

The agreement was signed, by way of thumb prints, by both the Seller and the Buyer, was witnessed by one witness for the Seller, but none for the Buyer, and was also signed by the Assistant Chief, before whom the agreement was made.

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With a different pen print, presumably recorded on 6th May, 2016, the writings pertaining to the 2nd instalment payment were made, and also signed by the Assistant Chief, with the phrase “Payment cleared on 6/05/016”, but was not signed or thumb printed by the Seller!

18. It is the Claimant's position that the outstanding Kshs 18,000/- was never paid to

him, and that explains why neither his signature nor his thumb print is shown against the alleged 2nd instalment payment of Kshs 18,000/-.

19. On account that the resolution of this dispute has dragged on for years, with the Respondent not honouring the settlement dated 14th December, 2021, and instead took him to court contrary to the settlement terms, the Claimant no longer seeks any outstanding payment from the Respondent, but requests that the Respondent vacates his property, Kamagambo/Kanyamamba/2644 as soon as practically possible, and pays the costs of this arbitration.

Service Of Arbitration Documents Upon Respondent

20. The Respondent, despite being served by the arbitral institution by WhatsApp on 19th February, 2024 at 10:05 hours, with WhatsApp confirming delivery to have taken place on 20th February, 2024 at 09:34 hours and that the message was “seen”, with service also effected upon his advocate in Rongo Magistrate's Court ELC Case E003 of 2022 on 15th February, 2024 at 17:14 hours, did not submit any Response to the Request for Arbitration, save for his brief communication on 2nd April, 2024, already referred to above. The arbitration proceedings are therefore proceeding *ex-parte* – without his active participation, with the arbitral tribunal having satisfied itself that the Respondent was indeed duly served, is therefore aware of the arbitration proceedings and has elected not to participate in the said proceedings.

Respondent's Case

21. Notwithstanding that the Respondent has not participated in the instant arbitration, his Complaint in Rongo Magistrate's Court Case ELC No. E003 of 2022 captures his side of the dispute between himself and the Claimant herein. In his Complaint he demonstrates that he purchased, as confirmed by a land sale agreement dated 22nd June, 2013, 1 acre from the Claimant, being a portion of land parcel Kamagambo/Kanyamamba/33, for the price of Kshs 87,000/-, and that he paid for it in full and final settlement by 6th April, 2014. On 4th March, 2016 he purchased another 0.1 hectares, making a total of 1.25 acres, for the additional price of Kshs 50,000/-, which he says he paid for in full. He stated that at the time of the two

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purchases, the land was still in the Claimant's father's name, and that the Claimant had promised to carry out the succession process to facilitate transfer of the said purchased lands to the Respondent.

22. In the interim, the Respondent was allowed to move into the property, establish a home and cultivate the land. The Claimant eventually succeeded to the subject property, subdivided it and registered it in his own name, with the parcels subdivided being Kamagambo/Kanyamamba/2642 and 2644. The Respondent has sought that the said parcels be transferred to him, but the Claimant has refused to do so.

23. The 22nd June, 2013 land sale agreement reads:

REPUBLIC OF KENYA

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*IN THE MATTER OF REGISTRATION LAND ACT (CAP300) LAW OF KENYA AND IN
THE MATTER OF LAND SALE AGREEMENT AND IN THE MATTER OF LAND
PARCEL NUMBER: KAMAGAMBO/KANYAMAMBA/33 W/KAM. LOCATION*

BETWEEN

JARED OCHIENG OKONGO (ODHIANY) SELLER/VENDOR

AND

GEORGE AKELLO OKONGO BUYER/PURCHASER

This land sale agreement is made on this 22nd day of June 2013 between Jared Ochieng Okongo (Odhiany) ID NO. 28247455 P O BOX 202 Rongo herein after referred to as the seller/vendor on one part (which expression shall include his heirs, legal representative administrator and all those claims any interest from him) and George Akello Okongo ID NO. 22669092 P O BOX 202 Rongo (which expression shall include his heirs, legal representative administrator and all those claims any interest from him) within the republic of Kenya herein after referred to as the buyer/purchaser on the other part.

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NOW THIS AGREEMENT IS WITNESSED AS FOLLOWS

- 1. That the seller has agreed to sell his portion of land otherwise known as land parcel number Kamagambo/Kanyamamba/33 West Kamagambo location measuring 1 acre to the buyer at a considering price of Ksh.87,000 (Eighty seven thousand shillings only)*
- 2. That the buyer had already paid a total Ksh.50,000 (Fifty thousand shillings only) to the seller which the seller has acknowledges receipt of the same amounts.*

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| Aluochier Dispute Resolution Arbitration Award | <i>J O Okong'o v G A Okong'o</i> | <i>Page 8</i> <i>22nd April, 2024</i> |
|---|----------------------------------|---|

3. This agreement is made without any force, cohesion, undue influence or any misrepresentation.

4. No party shall change his mind and any party breaches any provision of this agreement, the party in breach shall compensate the party not in breach.

5. If the agreement is breached by any of the party, the party who is in breach shall refund all the monies already paid to them with interest of 30%

6. This agreement is issued by both parties and their witnesses as follows

The second payment of Ksh.37,000 (thirty seven thousand only) which remains to clear the debt is paid where the seller has acknowledged receipt of the same amount on 6/4/2014.

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I the seller JARED OCHIENG OKONGO (ODHIANY) ID NO. 28247455 have received all my payments of Ksh.87,000 (Eighty seven thousand) from the purchaser, GEORGE AKELO OKONGO ID NO. 22669092.

Signature 28247455

Signature 22669092

WITNESSES

| NAME | ID NO. | SIGN | DATE |
|--------------------|----------|-----------|--------------|
| MERKLYN BOKE MWITA | 23130504 | Signature | 6 – 4 – 2014 |
| KENEDY OTIENO M | 31196468 | Signature | 6 – 4 – 2014 |
| JUSTUS OCHIENG | 20283399 | Signature | 6 – 4 – 2014 |
| JOSEPH ARINA OGOLA | 20105666 | Signature | 6 – 4 – 2014 |

Issues For Consideration

24. Having considered the respective cases of the Parties, I frame the issues for resolution as follows:

24.1. Does the arbitral tribunal possess jurisdiction to resolve this dispute?

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24.2. If so, what are the rights of the Parties?

24.3. What orders appropriately lend themselves in light of the rights of the Parties?

Jurisdiction Of The Arbitral Tribunal

25. Article 1(1) of the Constitution provides that all sovereign power belongs to the

people of Kenya and shall be exercised only in accordance with this Constitution. Article 1(3)(c) provides that sovereign power under this Constitution is delegated to State organs that shall perform their functions in accordance with this Constitution, and include the Judiciary and independent tribunals. Article 159(1) provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. Article 50(1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. It is therefore evident that non-court independent and impartial tribunals possess judicial authority, as delegated to them by the people, and that they **possess the jurisdiction to resolve any dispute capable of resolution by the application of law** – unless it is inappropriate in law for them to resolve a particular dispute. 10

26. The instant arbitral tribunal is an independent and impartial tribunal pursuant to Article 50(1) of the Constitution, and the provisions of the Arbitration Act, 1995 – construed to conform to the Constitution, pursuant to section 7(1) of the Sixth Schedule of the Constitution, that provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. As the Constitution is the supreme law of Kenya, and binds all persons and all State organs at both levels of government, as provided for in Article 2(1), where there are any conflicts of provisions as 20 between the Constitution and the Arbitration Act, 1995, it is the provisions of the Constitution that prevail, with those of the Arbitration Act, 1995 construed to conform to the Constitution. 30

Arbitration Under Authority Of Law

27. Section 3(1) of the Arbitration Act, 1995 provides that “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Section 3(2) provides, in part, that an arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya. Section 2 provides that except as provided in a particular case the provisions of this Act shall apply 30

to domestic arbitration and international arbitration.

28. The Arbitration Act, 1995 conceives of arbitrations arising on account of arbitration agreements – except as provided for in a particular case, as provided for in section 2 of the said Act. Section 2(1) of the Limitation of Actions Act provides that “arbitration” means an arbitration on a submission or under a written law. In other words, not all arbitrations arise from submissions or arbitration agreements, with written law also making provision for arbitration.

Article 50(1) Of The Constitution Right To Arbitration

29. The supreme law of Kenya makes provision for arbitration at Article 50(1) of the Constitution, providing that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Arbitral tribunals are independent and impartial tribunals. Consequently, unless shown that it is not appropriate in a particular case, arbitral tribunals have the jurisdiction to hear and determine **any dispute** that can be resolved by the application of law. 10

Disputes Excluded From Arbitral Jurisdiction

30. The provisions of Article 50(2)(d) of the Constitution, and Articles 163(3)(a) and 140(1) demonstrate that it is only criminal proceedings and presidential election petitions pursuant to a declaration of a President-elect, that are excluded by the Constitution from the jurisdiction of independent and impartial tribunals, these categories of disputes being in the exclusive jurisdictions of courts and the Supreme Court respectively. As Article 50(1) provides that any dispute capable of resolution by the application of law can be determined by an independent and impartial tribunal, then apart from criminal proceedings and presidential election petitions, all other disputes that can be resolved by the application of law are within the judicial jurisdiction of non-court independent and impartial tribunals, including arbitral tribunals. Consequently, this arbitral tribunal has the jurisdiction to resolve the instant dispute between the Parties, as it can be resolved by the application of law, and does not fall under the two excluded categories of disputes. 20

31. Article 162(2) of the Constitution provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to – (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2). Article 60(1)(g) provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and **in accordance with the principle of encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.** Article 67(2)(f) provides that the functions of the National Land Commission include **to encourage the application of traditional dispute resolution mechanisms in land conflicts.** Article 159(2)(c) provides that in exercising judicial authority, the courts and tribunals shall be guided by principles including alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). Article 159(3) provides that traditional dispute resolution mechanisms shall not be used in a way that – (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law. 10
32. It is therefore the constitutional position that dispute resolution of land matters is NOT an exclusive matter for the courts, but includes tribunals, local community initiatives, and alternative dispute resolution (ADR) mechanisms, including traditional dispute resolution mechanisms. 20
33. Section 20(1) of the Environment and Land Court Act, 2011 (ELC Act) provides that nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.
34. It should therefore be clear that jurisdiction over land disputes is not exclusive to any particular dispute resolution forum, with the law providing for resolution of such disputes in a number of dispute resolution forums. This arbitral tribunal is therefore confident that it is a tribunal of competent jurisdiction with respect to the instant dispute. 30

The Parties' Dispute Presently Before Both Arbitration And Court

35. The circumstances of the Parties dispute brings to light another matter for consideration under the main issue of jurisdiction of the arbitral tribunal. The Parties dispute is presently before two different dispute resolution forums – this arbitral tribunal, and Migori Environment and Land Court in ELC Miscellaneous Application No. 2 of 2024. Should the two dispute resolution proceedings over the same dispute proceed together in parallel, or should one give way to the other?

Which Proceeding Should Give Way To The Other?

36. As at 8th February, 2024, the date the instant arbitral proceedings were instituted, the Parties' dispute was not before any other forum. For two days earlier, on 6th February, 2024, Rongo Case No. MCELC/E003/2022 was noted on the Judiciary's Public Information Kiosk at <https://efiling.court.go.ke/kiosks> as “*matter withdrawn*” under Case Activities. Therefore, when the Claimant filed the instant arbitration claim, these arbitration proceedings were the only dispute resolution proceedings with respect to the Parties' dispute. 10

Rongo MCELC/E003/2022 Not Determined On Merits

37. It is noted that Rongo Case No. MCELC/E003/2022 was not heard and determined on its merits. The presently filed Application dated 16th February, 2024 and filed on 19th February, 2024 is Migori ELC Miscellaneous Case No. 2 of 2024. It is essentially an application seeking enlargement of time to file an appeal out of time, that seeks to reopen MCELC/E003/2022 for hearing and determination on merit. It seems that, upon being served with the instant arbitration commencement proceedings, the Respondent quickly moved to the Environment and Land Court to lodge its Application dated 16th February, 2024. 20

Every Person's Right To Select Dispute Resolution Forum

38. Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing

before a court or, if appropriate, another independent and impartial tribunal or body. The Respondent, in asserting this right, had on 3rd February, 2022 lodged his Complaint – Rongo MCELC/E003/2022, doing so before a court. Once there were no proceedings before any dispute resolution forum, the Claimant, in asserting this right, on 8th February, 2024 lodged his request for arbitration in the instant proceedings. The Respondent then on 19th February, 2024 sought leave before Migori Environment and Land Court to be allowed to again lodge his Complaint Rongo MCELC/E003/2022 for merit hearing and determination. As the Respondent's Migori ELC's application for leave has not been heard and determined, there is really no live dispute lodged for resolution by the Respondent before any dispute resolution forum. Meaning that the only live dispute lodged for resolution before a dispute resolution forum as concerns the Parties' dispute is the instant dispute before this arbitral tribunal. 10

Mandatory Guidance To Promote ADR Mechanisms

39. Even if the Respondent's Migori ELC Application for leave to reinstate Rongo MCELC/E003/2022 is deemed to be a live dispute before court, the provisions of Article 159(2)(c) of the Constitution must be considered. They provide that in exercising judicial authority, the courts and tribunals **shall** be guided by principles including alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms **shall** be promoted, subject to clause (3). The mandatory constitutional guidance to the courts and tribunals is the mandatory promotion of ADR mechanisms, including arbitration. Consequently, where a court is faced with a choice of 20 itself proceeding with the resolution of a dispute, and **the same dispute** is also before an ADR mechanism, in compliance with Article 159(2)(c), the court should promote the resolution of the dispute by the ADR mechanism. Therefore, in the instant circumstance, the dispute between the Parties should be resolved by the instant ADR mechanism of arbitration, rather than be resolved in court.

Mandatory Guidance Not To Delay Justice

40. The mandatory guidance principle in Article 159(2)(b) of the Constitution should also be considered. It provides that in exercising judicial authority, the courts and tribunals

shall be guided by principles including justice shall not be delayed. The Respondent's motion before Migori ELC is set for hearing on 2nd May, 2024, with a ruling to follow in due course. On the presumption that the said application succeeds, then proceedings in Rongo MCELC/E003/2022 will then commence in due course. It is expected that hearing and determination of the same would then take at least 6 months – being optimistic. And allowing for at least 3 months in Migori ELC, the best one can expect of a determination in Rongo MCELC/E003/2022 is a determination within 9 months of 2nd May, 2024 – that is around February 2025.

Circumstances Favour Arbitration Over Court

41. Comparing this with the instant arbitration, the arbitration award is set for release shortly after the ongoing award writing is complete – say by 22nd April, 2024. Meaning that there will have been a resolution of the Parties' dispute even before the Respondent's application for leave comes up for hearing on 2nd May, 2024. It will then be for the Environment and Land Court (ELC) to assess the propriety of proceeding with a motion for the determination of a dispute that has already been determined in an ADR forum, taking into consideration the mandatory guidance principles in Article 159(2)(b) and (c) of the Constitution. While the decision is for the court to make, it seems to me that the most prudent course of action to take would be for the court to acknowledge that the Parties' dispute has been resolved by the instant arbitration, with the parties at liberty to assess their rights in relation to the instant arbitration award. 10
42. Seeing that the circumstances of the two different modes of dispute resolution chosen by the Parties, in the exercise of their own dispute resolution rights at Article 50(1) of the Constitution, favours the instant arbitration as selected by the Claimant, rather than the court proceedings as selected by the Respondent, it seems to me that the instant arbitration proceedings should proceed to award delivery in the shortest possible time, and thereby honour the mandatory guidance principles in Article 159(2)(b) and (c). This arbitral tribunal indeed possesses the jurisdiction to proceed with the instant arbitration, even in the face of the Respondent's application for leave to reinstate Rongo MCELC/E003/2022 that is pending before Migori ELC. 20

The Parties' Rights

43. The next issue for consideration is to ascertain the rights of the Parties before the arbitral tribunal in the context of their dispute.

Kamagambo/Kanyamamba/33 Owned By Claimant's Deceased Father

44. Going by the records submitted to the arbitral tribunal, as at 22nd June, 2013 and later as at 4th March, 2016, when the Parties entered into their different sale of land agreements, the subject land, Kamagambo/Kanyamamba/33, was registered in the name of the Claimant's deceased father – Odhiany Ngutu, and not in the name of the Claimant. Succession proceedings, that eventually resulted in the transmission of the said property into the name of the Claimant and another person, commenced in 2014 in Rongo Principal Magistrate's Court Succession Cause No. 147 of 2014. 10
45. While it is possible that grant of letters of administration in the Estate of Odhiany Ngutu (Deceased) may have been issued in 2014, shortly after the Gazette Notice No. 2889 dated 3rd April, 2014 and published in the *Kenya Gazette* dated 25th April, 2014, no evidence was tendered to the arbitral tribunal demonstrating the same. Additionally, no evidence was tendered to the arbitral tribunal demonstrating the date that the said grant was confirmed in the names of Thomas Ngutu Okong'o and Jared Ochieng' Okong'o. Evidence tendered indicates that as at the dates of the land sale agreements, title to Kamagambo/Kanyamamba/33 was in the name of Odhiany Ngutu. It is only around 8th August, 2019 that title to Kamagambo/Kanyamamba/33 had been registered to Thomas 20 Ngutu Okong'o and Jared Ochieng' Okong'o, implying that by 8th August, 2019 the grant of representation in Rongo Magistrates Court Succession Cause No. 147 of 2014 had been confirmed to these two persons, with the same two persons being the beneficiaries.

Disputed Land Subject To The Law Of Succession Act

46. Section 2(1) of the Law of Succession Act (LSA) provides that except as otherwise expressly provided in this Act or any other written law, **the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to**, all cases of intestate or testamentary succession to the estates of deceased persons dying after

the commencement of this Act and to **the administration of estates of those persons**. Section 2(2) of the said Act provides that the estates of those persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless **the administration of their estates shall commence or proceed so far as possible in accordance with this Act**. Therefore, irrespective of whether or not a person died prior to or after the commencement of the LSA, which commencement took place on 1st July, 1981, the administration of the estate of such a person must be in accordance with the LSA.

47. Section 45(1) of the LSA provides that except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, **no person shall, for any purpose, take possession and dispose of, or otherwise intermeddle with, any free property of a deceased person**. As at 22nd June, 2013 and 4th March, 2016, when the Sale of Land Agreements were entered into by the Parties, the registered owner of Kamagambo/Kanyamamba/33 was a deceased person – the Claimant's father, Odhiany Ngutu. As at the earlier date, succession proceedings had not yet commenced, and so there was no grant of representation under the LSA. As at the latter date, while succession proceedings in Rongo Magistrates Court Succession Cause No. 147 of 2014 had commenced, no evidence was tendered before this arbitral tribunal that a grant of representation made in favour of Thomas Ngutu Okong'o and Jared Ochieng' Okong'o had been confirmed, with the arbitral tribunal only being certain that confirmation of grant had taken place as at 8th August, 2019 – as per the evidence of Mutation Form No. 04469306. Meaning that none of the Parties herein had any authority, for whatever purpose, for taking possession, disposing of, or otherwise intermeddling with Kamagambo/Kanyamamba/33 before issue of the grant of representation – as the said property belonged to a deceased person, the Claimant's father, Odhiany Ngutu. 10 20
48. Section 55(1) of the LSA provides that **no grant of representation**, whether or not limited in its terms, **shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71**. Section 71(1) provides that after the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets. 30

Sale Agreement Dated 22nd June, 2013 Unlawful

49. As none of the Parties herein had any jurisdiction to dispose of a deceased person's property, being Kamagambo/Kanyamamba/33, the Sale of Land Agreement entered into on 22nd June, 2013, before any grant of representation had been issued in Rongo Magistrates Court Succession Cause No. 147 of 2014, was an unlawful and void agreement.

Was Sale Agreement Dated 4th March, 2016 Lawful?

50. While succession proceedings in the Estate of Odhiany Ngutu (Deceased) commenced in 2014 in Rongo Magistrates Court Succession Cause No. 147 of 2014, it is not clear the precise dates that the grant of representation and confirmation of grant in favour of Thomas Ngutu Okong'o and Jared Ochieng' Okong'o were made. The arbitral tribunal is therefore not certain whether or not the court had issued these documents as at 4th March, 2016 – when the latter land sale agreement was executed between the parties herein. But what is clear from the evidence on record, from the Mutation Form No. 04469306, is that as at 8th August, 2019 Kamagambo/Kanyamamba/33 was still an undivided parcel, and was then registered in the names of Thomas Ngutu Okong'o and Jared Ochieng' Okong'o. 10
51. Section 91(1) of the Land Registration Act, 2012 (LRA) provides that in this Act, **co-tenancy** means the ownership of land by two or more persons and includes joint tenancy or tenancy in common. Section 91(2) provides that except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares. Consequently, the ownership of Kamagambo/Kanyamamba/33 in the names of Thomas Ngutu Okong'o and Jared Ochieng' Okong'o is presumed to have been in common in equal shares. 20
52. Section 91(5) of the LRA provides that if any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate. Section 91(6) provides that **no tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the**

remaining tenants, but such consent shall not be unreasonably withheld.

53. With respect to Kamagambo/Kanyamamba/33 as at 4th March, 2016, even if the grant of representation in favour of both Thomas Ngutu Okong'o and Jared Ochieng' Okong'o had been issued and confirmed by then, the property would still have been co-owned by these two persons. Meaning that, pursuant to section 91(6) of the LRA, the Claimant was prohibited in law from dealing with his undivided share in this property in favour of any person other than Thomas Ngutu Okong'o – the other co-owner or tenant in common, unless the latter had given the Claimant consent in writing for such dealing. That the Claimant purported to enter into a sale agreement dated 4th March, 2016 with a person other than the other tenant in common – the other person being the Respondent herein, and without written consent from the other tenant in common, prior to the subdivision or partitioning of the property, was an exercise in futility – as the said sale of land agreement was voided by section 91(6) of the LRA! 10

Both Sale Of Land Agreements Were Void

54. To recap: the sale of land agreement dated 22nd June, 2013 was voided by section 45(1) of the LSA, on account that Kamagambo/Kanyamamba/33 was then registered to the late Odhiany Ngutu, yet there was no grant of representation for his estate, as succession proceedings had not yet commenced by that date. Succession proceedings commenced in 2014 in Rongo Principal Magistrate's Court Succession Cause No. 147 of 2014, with grant of representation to be made to Thomas Ngutu Okong'o and Jared Ochieng' Okong'o. If the grant to these two persons had not been confirmed by 4th March, 2016, then the sale of land agreement dated 4th March, 2016 was voided by section 55(1) of the LSA, prohibiting the disposition of capital assets or property prior to confirmation of grant of representation. And had the grant of representation been confirmed by this date, as Kamagambo/Kanyamamba/33 would then have been co-owned in a tenancy in common by Thomas Ngutu Okong'o and Jared Ochieng' Okong'o, the sale of land agreement dated 4th March, 2016 would have been voided by section 91(5) and (6) of the LRA, prohibiting the sale of an undivided share in a co-owned property to any person other than another tenant in common, without the written consent of the other tenants in common. 20

Property Protection Rights Do Not Extend To Unlawfully Acquired Property

55. Article 40 of the Constitution is concerned with protection to the right to property. Article 40(1) provides that subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property – (a) of any description; and (b) in any part of Kenya. Article 40(6) provides that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

56. As the purported acquisition of Kamagambo/Kanyamamba/33 was unlawful, on account of it being the property of a deceased person as at 22nd June, 2013 and possibly also as at 4th March, 2016, or alternatively being co-owned property not disposed off in a manner in compliance with section 91(5) and (6) of the LRA as at 4th March, 2016 – with these dates being those of the Sale of Land Agreements, the Respondent's right to the said property cannot be protected, pursuant to Article 40(6) of the Constitution. Meaning that the purchaser – the Respondent herein, has no legally valid property rights over any portion of what was Kamagambo/Kanyamamba/33! 10

Land Transactions Subject To The Land Control Act

57. Section 6(1)(a) of the Land Control Act provides that **the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.** 20

Application For Land Control Board Consent

58. Section 8(1) of the Land Control Act provides that **an application for consent** in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board **within six months of the making of the agreement** for the controlled transaction by any party thereto. Consequently, pursuant to the Sale of Land Agreements between the Parties dated 22nd June, 2013 and 4th March, 2016, applications to the appropriate land control board should have been made by 22nd December, 2013 and 4th September, 2016 respectively. No evidence has been provided by the Claimant in this

regard, nor is any contained in the Respondent's pleadings in Rongo Magistrate's Court ELC Case No. E003 of 2022. It is therefore the presumption of this arbitral tribunal, in the absence of this evidence, that no such land control board application was made by 22nd December, 2013 and 4th September, 2016 respectively. Therefore, on account of failure to make these necessary applications, and doing so in a timely manner, the Sale of Land Agreements dated 22nd June, 2013 and 4th March, 2016 were void for all purposes, pursuant to section 6 of this Act.

Recovery Of Consideration In Void Transactions

59. Section 7 of the Land Control Act provides that if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22. 10

Dispossession In Void Transactions

60. Section 22 of the Land Control Act provides that where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person – (a) pays or receives any money; or (b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment. 20

Remedy Where There Is An Unlawful Transaction

61. In the instant dispute, the Sale of Land Agreements dated 22nd June, 2013 and 4th March, 2016 have been rendered unlawful and voided on account of: (a) section 45 of the LSA, as the subject property, Kamagambo/Kanyamamba/33 was the property of a deceased

person, and no grant of representation had as at 22nd June, 2013 been granted under the Law of Succession Act; (b) no confirmation of grant had been issued pursuant to section 55(1) of the LSA as at 4th March, 2016, and so no disposition or sale of Kamagambo/Kanyamamba/33 could lawfully be made by then; or, in the alternative, Kamagambo/Kanyamamba/33 being co-owned by two tenants in common, being Thomas Ngutu Okong'o and Jared Ochieng' Okong'o, could not be sold, in part, by the Claimant to the Respondent without written consent of the other tenant in common, but could only be sold to the other tenant in common, pursuant to section 91(5) and (6) of the LRA; and (c) sections 6, 7, 8 and 22 of the Land Control Act, as applications for consent of the said sale transactions were not made within 6 months of the respective transaction dates, and so the sale transactions were void for all purposes. 10

62. The remedy for addressing the unlawful transactions that were the Sale of Land Agreements dated 22nd June, 2013 and 4th March, 2016, and the consequential permission to the Respondent to occupy a portion of Kamagambo/Kanyamamba/33, is provided for in section 7 of the Land Control Act, as read together with section 22 of the said Act: (a) recovery of the consideration of Kshs 87,000/- paid by the Respondent to the Claimant pursuant to the Sale of Land Agreement dated 22nd June, 2013; (b) recovery of the consideration of Kshs 32,000/- paid by the Respondent to the Claimant pursuant to the Sale of Land Agreement dated 4th March, 2016; and (c) vacation by the Respondent from the land occupied following the payments of the said consideration. 20

Summary Of Findings

63. In summary, I make the following findings and holdings:

63.1. This arbitral tribunal possesses the jurisdiction to resolve the instant dispute between the Parties.

63.2. The land the subject of the Sale of Land Agreements dated 22nd June, 2013 and 4th March, 2016 between the Claimant and the Respondent, Kamagambo/Kanyamamba/33, was as at those dates registered in the name of a deceased person – the father of the Claimant, Odhiany Ngutu.

63.3. As at the first land sale transaction date, 22nd June, 2013, no grant of representation under the Law of Succession Act had been made, and consequently no 30

person had for whatever purpose the authority to take possession of or dispose of or otherwise intermeddle with Kamagambo/Kanyamamba/33, then registered to belong to the Claimant's father – then deceased.

63.4. Succession proceedings for the estate of the late Odhiany Ngutu commenced in 2014, in Rongo Principal Magistrate's Court Succession Cause No. 147 of 2014, with a grant of representation sought by Thomas Ngutu Okong'o and Jared Ochieng' Okong'o.

63.5. As at the second land sale transaction date, 4th March, 2016, Kamagambo/Kanyamamba/33 had yet to be partitioned and was beneficially co-owned by Thomas Ngutu Okong'o and Jared Ochieng' Okong'o.

63.6. Pursuant to section 91(5) and (6) of the Land Registration Act, the Claimant 10
could not sell any portion of his share in Kamagambo/Kanyamamba/33 to any person other than the other tenant in common, or sell to another person without the written consent of the other tenant in common. As no proof of any such written consent was tendered in this arbitration, the land sale transaction of 4th March, 2016 is deemed void.

63.7. No applications for consent of the land sale transactions dated 22nd June, 2013 and 4th March, 2016 were respectively made within 6 months of the transaction dates – that is by 22nd December, 2013 and 4th September, 2016 respectively. Consequently the said land sale transactions were void for all purposes pursuant to the provisions of the Land Control Act.

63.8. Article 40(6) of the Constitution provides that the right to protection of property 20
does not extent to any property found to have been unlawfully acquired. Consequently, as a total of 0.5 hectares of Kamagambo/Kanyamamba/33 has been found to have been unlawfully acquired by the Respondent, the property protection rights in Article 40 do not extend to him as concerns the said property.

63.9. Pursuant to section 7 of the Land Control Act, the total consideration of Kshs 119,000/- paid by the Respondent to the Claimant is recoverable by the Respondent as a debt.

63.10. Pursuant to section 22 of the Land Control Act, section 45 of the Law of Succession Act, and section 91 of the Land Registration Act, the Respondent must vacate and be dispossessed of any portion of Kamagambo/Kanyamamba/33, now 30
registered as Kamagambo/Kanyamamba/2642 and 2644, that he took occupation or possession of on account of the Sale of Land Agreements dated 22nd June, 2013 and 4th

March, 2016.

Costs Of The Arbitration

64. Section 32B(1) of the Arbitration Act, 1995 provides that unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5). As is evident from my analysis above, both Parties took part in executing unlawful Sale of Land Agreements, and so are responsible for the same and arising consequences. Consequently, each party shall bear its own legal and other expenses, and shall equally bear the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, such as the fees of the arbitral institution for its administration of the arbitration. 10

65. It is estimated that 0.5 hectares of what was previously Kamagambo/Kanyamamba/33 and now Kamagambo/Kanyamamba/2642 and 2644 is valued at no less than Kshs 1,750,000/-. Pursuant to Part 4 of the First Schedule of the Aluochier Dispute Resolution Arbitration Rules (ADR Arbitration Rules), arbitral tribunal fees for this subject matter value of between Kshs 1,000,000/- and Kshs 20,000,000/- is Kshs 157,500/-. Where the dispute is disposed of *ex parte*, the fee is 50% of this value, and so amounts to Kshs 78,750/-. Administrative costs amount to Kshs 31,500/-. Consequently, the total arbitration fees for the instant *ex parte* arbitration amounts to Kshs 110,250/-, payable to the arbitral institution, Aluochier Dispute Resolution, on behalf of both the arbitral tribunal and itself. Until fully settled, compound interest shall accrue at the rate of 12% per annum, compounded monthly, payable as from the date of this award. Additionally, until fully settled, the arbitral institution shall have a first charge on Kamagambo/Kanyamamba/2644, pursuant to rule 26.6 of the ADR Arbitration Rules governing the administration of this arbitration. 20

Final Orders

66. In concluding, I make the following final orders, to give effect to the above findings:

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- 66.1. The Claimant to repay the Respondent the total of considerations of Kshs 119,000/-, repayable as a debt recoverable by the Respondent.
- 66.2. The Respondent to vacate the portion of what was previously Kamagambo/Kanyamamba/33 and now Kamagambo/Kanyamamba/2642 and 2644, amounting to about 0.5 hectares, that he occupied and took possession of following the Sale of Land Agreement transactions dated 22nd June, 2013 and 4th March, 2016. The Respondent to vacate the said parcels of land within 60 days of the date of this award.
- 66.3. Both Parties are equally responsible for the fees of the arbitral tribunal and the costs of the administration of the arbitration, in total amounting to Kshs 110,250/-. The said amount attracts compound interest at the rate of 12% per annum, compounded 10 monthly. Until fully settled, there shall be a first charge in favour of the arbitral institution, Aluochier Dispute Resolution, over Kamagambo/Kanyamamba/2644.

Dated and signed at Rongo this 22nd April, 2024

With the juridical seat being Nairobi, Kenya



Isaac Aluochier, FCIArb

Arbitrator

P O Box 436-40404, Rongo

Email: aluochier@gmail.com