REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC APPEAL CASE NO. 11 OF 2019

MARGARET KANINI MURAGE..APPELLANT

VERSUS

KINYUA MURAGE..RESPONDENTT

JUDGMENT

1. The Judgment in this matter was to be delivered on **24th March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Judgment will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Judgment electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. The Memorandum in this Appeal states as follows:

MEMORANDUM OF APPEAL

(An appeal from the judgment of J. M. Njoroge in Chuka Chief Magistrate's Environment and Land case Number 166 of 2014, Margret Kanini Murage and Another versus Kinyua Murage)

The appellant being dissatisfied with the decision in the above stated case, files an appeal against the said judgment and sets forth the following grounds of appeal to be argued at the hearing thereof.

> 1. That the Learned Magistrates erred in law by ordering the appellant to testify in court in absence of her advocate on the basis of Chief Justice direction on completion of matters instead of doing substantial justice to the applicant hence denying her right to legal representation and visiting the mistake of her advocates on the appellant which greatly prejudiced and occasioned miscarriage of justice the appellant did not put her case properly before the court.
>
> 2. That the Learned Magistrates erred on law and fact in failing to make a finding that the appellant had established a claim against Land Number Mugumoni/Mwonge/434 based on trust.
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> 3. The Learned Magistrate erred on a point of law and fact in failing to take into account the period the appellant had occupied out on the said land which facts proved a case based on trust.
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> 4. That the Learned Magistrate erred in law and fact in failing to take into account that Land Number Mugumoni/Mwonge/434 was family land which the father to the appellant had transferred to the respondent to hold on his own behalf and that of the appellant.
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> 5. That the learned magistrate erred in fact in making a find that the father to the appellant and the respondent was the owner of Land Number Kiringani/Gitare/60 and that it was him who transferred the said land parcel of land to one Justus Gitari Chabari and the appellant claim should have been against the said land.
>
> 6. That the Learned magistrate erred in law and fact in making a finding that the parties father transferred land number Kiringani/Gitare/60 and Land Number Mugumoni/Mwonge/434 to Justus Gitari Chabari and the defendant respectively with intentions of sharing the same between the house of the appellant and that of the defendant.
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> 7. That the learned magistrate erred on a point of law and fact in replying on the tribunal case between Ephantus Kinyua Murage versus Justus Gitari Chabari in dismissing the appellant claim when the appellant was not a party to the aid tribunal case.

8. That the learned magistrate erred in dismissing the appellant claim and in holding that the appellant did not belong to the house of the defendant hence could not claim from Land Number Mugumoni/Mwonge/434.

Reasons wherefore the appellant prays that her appeal be allowed and the order dismissing her case be set aside and the court do make a finding that the respondent holds land number Mugumoni/Mwonge/434 on his own behalf and on behalf of the appellant and that she is entitled to a share of the same as prayed in the plaint.

Dated at Meru this 30th day of November, 2019

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J. K. NTARANGWI & CO.

ADVOCATES FOR THE APPELLANT

3. The Appeal was canvassed by way of written submissions.

4. The Appellant's submissions are reproduced here below without any alterations whatsoever, including spelling or any other mistakes:

APPLELLANTS SUBMISSIONS

Your Honour, the appellants case in the lower court is as per her plaint dated 3rd of October 2012.

The appellants suit was dismissed as per the trial courts judgment dated 4th September 2019. The appeal is against the said judgment.

The appellant has set **8 grounds** of appeal which she relies on. Your Honour, the appellants intends to do submissions on grounds **1 and 7** as separate grounds while submissions on grounds **2,3,4 and 8** will be combined and grounds **5 and 6** will be dealt with together.

The appellant relies on ground **1** as set on the Appeal Record. Your Honour, the court record indicates that on 27th of January 2014 when the matter came up for mention for directions to confirm compliance, the appellant attended court and she continued to attend court save on 14 th day of May 2014 when she was unwell. On 27th of May 2015 the parties agreed to take out the matter by consent and the advocates for the parties were present.

Further your Honour, the matter had to be adjourned on 3rd November 2015 due to the death of the 2nd plaintiff.

Your Honour, we submit that from the record, the appellant had not conducted herself in any manner in which the court could infer that she was not desirous of having her case finalized. So when the matter came up for hearing on 24th of October 2018 the court should have considered her conduct from the proceedings and should have excised (sic) its discretion in adjourning the matter since her advocate had not turned up by 12:30 p.m.

Your Honour, directions had been given by the chief Justice on completion of old matters and there was a need to complete the same. However your Honour, regard should have been taken of the nature of the matter and the conduct of the appellant before requiring her to proceed with her case in the absence of her advocates.

Your Honour, on 24th of October 2018, the court managed to only take the evidence of the appellant and the matter was adjourned. Your Honour, the court having waited for the appellants advocates up to 12:30 pm, it would have excised (sic) its discretion by giving the matter another date since the matter was not finalized on the same day.

Your Honour, the appellant had filed her statement and the list of documents dated 3rd of October 2012 which are contained at pages **8-11 of the appeal record**. She had also filed her list of documents which she intended to rely on during the hearing of the case.

Your Honour, the appellant having testified in person without being lead (sic) by her advocate in giving evidence in chief was not able to put up her case properly. Her statement and list of documents were not admitted as part of her evidence.

She did not also have the opportunity of having the issues that arose during cross-examination clarified in re-examination. It was the appellant's advocate who failed to turn up in court on that particular day and the issue should not have been visited on the appellant

Your Honour, the plaintiffs claim in the lower court was for a declaration that the defendant held Land Parcel Number MUGUMONI/MWONGE/434 for himself and in trust for the appellant. In regard to grounds **2,3,4 and 8** of the Memorandum of Appeal, the appellant prays that this honourable court do take into account the fact that were proved from the evidence which was tendered by the appellant and her witnesses.

It was proved that Land Parcel Number MUGUMONI/MWONGE/434 was ancestral land where the parties were brought up as the land belonged to the parties father and was transferred to the respondent.

Your Honour, as at the date of death of one Joseph Murage who was the parties father, the appellant was in occupation of Land Parcel Number MUGUMONI/MWONGE/434 which parcel of land she was utilizing. This was as per the evidence of the appellant as contained on page **74** of the Appeal Record.

Your Honour, the 2nd plaintiff who died during the pendency of the case was buried on Land Parcel Number MUGUMONI/MWONGE/434 next to the parents graves. The respondent did not object to the said burial as per the evidence of PW2 AND PW3 who are Ejidio Gitonga and Festus H'Murage Kanyi respectively. Their statements were each adopted in court as evidence, they testified that the appellant and her sister the second plaintiff lived on the subject matter. The appellant houses were on the said land. There were photographs showing her houses on the said land as shown on pages **14 to 18** of the appeal record.

Your Honour, no evidence was tendered by the respondent and his witnesses to rebut that the appellant had been in occupation of the land in issue.

Your Honour, the appellant claim was based on trust. Appellant prays that the court do take into account the finding of the court in the case of **KIRWERE NJOGU VERSUS PIUS MUGO NJOGU, NYERI COURT OF APPEAL CIVIL APPEAL NO 59 OF 2015**. The court held that the issue of trust was a question of fact which must be proved by evidence. The trial court did not take into the above facts in making its decision as to whether the appellant had established her claim.

Your Honour, in regard to Grounds **5 and 6** of the Memorandum of Appeal, Land parcel Number KIRINGANI/GITARENE/60 was introduced in these proceeding by the respondent in his pleadings. It was the respondents case that the said parcel of land initially belonged to the parties father who transferred the same to one Justus Gitari Chabari.

It was the respondents case that the said Justus Gitari held the said land even for his sisters who belonged to the house of his mother while the respondent held the subject matter for himself and his sisters from the house of his mother. Your Honour, the respondents further evidence was that the parties father had indicated that Justus Gitari was to take in his sisters while the respondent was also to do so should they leave their matrimonial home.

The trial court agreed with the respondents case. Your Honour, the court erred in making such a finding in its judgment. There is a copy of the search certificate for Land Number KIRINGANI/GITARENE/60 which was availed in court as evidence by the respondent. The respondent failed to produce or attach a green card showing the entries for said parcel of land. His allegation that it was the late Murage who transferred the same was not proved. The name of the father to the parties was one NKIRIA KABETE ALIAS MURAGE. At no time was he known as Chabari.

The evidence from the appellant witnesses was that though the said Justus Chabari had initially been living on Land Parcel Number MUGUMONI/MWONGE/434 he was not a child of the late Murage though he was born by the appellants mother.

The said Justus Chabari got the land from Chabari who was his father which was Land Number KIRINGANI/GITARENE/60 as per the evidence of the PW1, PW2 and PW3. The appellant could therefore not lay a claim against the said parcel of land as it did not initially belong to her father neither was she living on the said Land. Parcel Number KIRINGANI/GITARENE/60 was not the subject matter before the court. The appellant claim was against her fathers land which was before court and which land was transferred to the respondent as the only son.

Your Honour, the respondents assertion that the late murage had intended that the daughters from each house be represented by each son was not proved. Had that been the intention of the late Muarage, then he would not have left the appellant and her late sister occupying the subject matter.

Your Honour, at the time the respondent sued the late Justus chabari before the tribunal he did not lodge a claim against the appellant to also vacate the land. He should have done so if at all he knew the appellant was entitled to the land held by Justus Chabari.

We submit that the Honourable Magistrate erred in making a finding that the appellants claim lay on the land held by Justus Chabari since she did not belong to the house of the respondent. The appellant was claiming land through her father and not her mother since it is her father who left them on the said land which he had transferred to the respondent.

Your Honour, the respondent filed part of the proceedings before the Land Dispute Tribunal involving the case between the Ephatus Kinyua Muarage versus Justus Gitari Chabari. The said proceedings were relied on by the trial court in making a finding that the appellant claim on trust should have been on Land Number KIRINGANI/GITARENE/60.

Your Honour, the proceedings before the Land Disputes Tribunal were incomplete as the same did not contain the evidence of the persons who were before the said tribunal. It cannot be ascertained from the said proceedings that the appellant was to get her share from Land Number KIRINGANI/GITARENE/60. The said proceedings did not deal with the subject matter. The appellant was not a party in the said proceedings and it was also not indicated in the ruling of the tribunal that each brother held the respective parcels of land for the daughters from the house of his respective mother. Had she been a party to the said proceedings and had she been heard and a determination made, then the court would have relied on the same.

The court applied sections 24 (a) of the Land Act 2012 only that it held that the appellant was entitled to claim from Justus Gitari which we respectively submit that the court failed to take into account the evidence of the appellant and her witnesses that Justus Chabari was not a son of Murage and the proved facts which established a claim of trust on the subject matter.

The appellant also relies on the submissions as were made by her advocate at the trial court and on the following cases:

1. TIMOTHY MUCHINA CHEGE AND ANOTHER VERSUS ELISHIPHA WANJIKU THIONGO. NYERI COURT OF APPEAL CIVIL APPEAL NO 134 OF 2010.

2. STEPHEN MURIUKI NJUNGU VERSUS FLORENCE WAMBUI MAINA .NYERI COURT OF APPEAL CIVIL APPEAL NUMBER 25 OF 2016.

The appellant prays that her appeal be allowed and the order dismissing her case be set aside and the court do allow her claim as prayed in the plaint.

DATED AT MERU THIS ………14th ….DAY OF …………JANUARY,……..2020
J.K. NTARANGWI & CO.

ADVOCATES FOR THE APPELLANT

5. The Respondent’s submissions are reproduced herebelow without any alterations whatsoever, including spelling or any other mistakes.

THE RESPONDENTS’ FINAL SUBMISSIONS IN RESPECT OF THE INSTANT APPEAL

1. Your lordship this is an appeal against the judgment of **J.M NJOROGE-CM in PMCC NO 166 OF 2014** which was delivered on 4th September 2019.The appellant has posted 8 grounds of appeal in her memorandum of appeal dated 30th November 2019 at page 1 of ROA(RECORD OF APPEAL.The respondent shall respond to all the grounds of appeal although some are repetitive and verbose.

2. Your lordship the first ground of appeal is posted in the following manner “that the learned magistrate’s erred in law by ordering the appellant to testify in court in absence of her advocate on the basis of chief justice directions on completion of matters instead of doing substantial justice to the applicant hence denying her right to legal representation and visiting the mistake of her advocates on the appellant which greatly prejudiced and occasioned miscarriage of justice

The appellant did not put her case properly before the court” from the manner in which the first ground is couched the appellant seems to be complaining of the following issues:

i) That the trial magistrates directed the matter to proceed into hearing guided by the chief magistrates directions that suits of 5 years and above should be judiciously and expeditiously determined.

ii) That the appellant was denied her right to legal representation by an advocate of her choice when she was ordered to proceed with the matter in absence of her advocate on record.

iii) That trial magistrate erred by visiting the errors and omission of a counsel to a litigant.

There is no doubt your lordship that the chief justice gave directives that matters that are 5 years and over should be judiciously and expeditiously determined. Every court including that of the trial magistrates was out not to go against the directions of the chief justice. The trial magistrates was clear to mark the time when he had to make the order that the plaintiff(appellant) had to proceed with her case.It was at midday.The trial court was patient enough to give counsel for the plaintiff to appear and represent his client.The trial magistrate was clear in his mind that no excuse had been given by the appellant over the absence of his counsel in court.The appellant and her counsel could not hold the court and the defence at ramsom.Justice is two edged. IT applies to the two adversaries in equal measure. What is good for a geese it is good for a gendar.

The appellant argues that substantive justice was not done or seem to be done when the court directed that the matter do proceed I the absence of her counsel.The defendant was in court ready to defend his case.The appellant should have noted from the previous proceedings that the counsel was missing in action in several occasions.It cannot be argued that if the counsel for the appellant failed to completely appear to court the mater should come to an halt.Justice delayed is justice denied.The appellant did not complain that she was not ready to proceed with her matter in absence of her counsel.She gave evidence and was crossexamined.Substansive justice f the case in the circumstances demanded that the matter should proceed and this is exactly what the trial magistrates’ directed.

When the counsel for the appellant appeared during the next hearing date he must have perused the court record.Even having done so he did not pray that the plaintiff be recalled. It means therefore that both the counsel for appellant and the appellant herself were satisfied with the manner in which the appellant conducted her case in the absence of her counsel.Nothing would have been easier than the counsel for the appellant to pray for orders recalling the appellant upon the counsels reentry into the proceedings .this would have healed the wounds if any that would have been caused by the appellant appearing and conducting her case in absence of her counsel.The instant ground is an afterthought and it should fail.

Was the appellant denied legal representation as alleged in ground 1 of appeal?The answer to this question is in the negative.It is true that during the first hearing on 9th October 2012 the appellant appeared without her counsel. In the subsequent proceedings the appellants counsel appeared and prosecuted the appellants case to its logical conclusion.Counsel for the appellant absented himself during the judgment just as he was used to absenting himself during the proceedings.We have noted supra that when the counsel for appellant reappeared in the proceedings he must have taken instructions from the appellant regarding the proceeding when the appellant appeared without her counsel.The fact that the counsel for the appellant did not apply for recalling the appellant make one

to infer that the appellant and her counsel were in agreement that she conducted herself properly when she proceeded with the matter without her counsel.We are submitting that the idea of denial of representation in this appeal is an afterthought on the part of the appellant. This ground should fail.

In the first ground the appellant is arguing that errors of a counsel should not be visited upon a litigant. Simply put the appellant is saying that errors of a counsel not to attend court should not be visited upon her.Many court including the instant one have interrogated this idea of errors of a former counsel being visited upon a litigant.This court in particular has pronounced itself that a case does not belong to a counsel but a litigant.The litigant has a duty to act diligently whether represented or not and see to it that his or her case proceed to its logical conclusion expeditiously. Not all errors of a counsel will not be visited upon a litigant. The errors must be excusable and explainable.The litigant must demonstrate that she did all she could to see to it that the matter does not stall.The absence of her counsel during several occasions during the proceedings should have been a wakeup call to the appellant to either keep her counsel or appoint another one.The appellant chose to proceed with her counsel meaning she was satisfied in the manner she was represented.She is estopped from arguing that errors of a counsel should not be visited upon a litigant.By so submitting we are guided by the following authourity:(**A RULING IN CHUKA ELC CASE NO 93 OF 2017,RUKENYA BUURI-PLAINTIFF VERSUS M'ARIMI MINYORA & 2 OTHERS-DEFENDANT)**

3. Ground number 2 is couched in the following manner "that the learned magistrates erred in law and fact in failing to make a finding that the appellant had established a claim against land number LR:Magumoni/Mwonge/434 based on trust."Your lordship trust is a question of fact which must be proved by way of evidence.The appellant pleadings as contained in the plaint in page 3 to 7(ROA) the appellant at paragraph 6 of the plaint raises the issue of trust.Other than pleading trust in the plaint the oral evidence by the appellant and her witnesses does not prove existence of trust constructive or customary.In fact it is the trial court that on his own motion made a finding that the two sons of Nkiria Kabata gave the respondent LR:Magumoni/Mwonge/434 to the respondent and Justus Gitari Chabari Karingani/Gitareni/60 to hold in trust for their benefit s and their respective sisters in the event that they deserted their matrimonial home for one reason or the other. To say the least trust was not prove but the court went an extra mile to apply his discretion to serve substantive justice. There is no doubt that the appellant and the respondents' common father had two houses. The respondent belonging to one house while the appellant and one Justus Gitari Chabari belonging to the other.Each house had a son and small wonder that rial magistrate was quick and right to make a finding that sisters of every son were to benefit from the two respective parcels of land LR:Magumoni/Mwonge/434 and LR:Karingani/Gitareni/60 which are equal in size.The trial magistrate cannot be faulted for making a finding that it was Justus Gitari Chabari who held LR:Karingani/Gitareni/60 in trust for himself and the appellant given that the appellant was a sister to the said Justus Gitari Chabari.On the other hand the court correctly held that the respondent hold LR:Magumoni/Mwonge/434 for the benefit of the respondent and his sisters I the event that they deserted their matrimonial home for one reason or another.

4. In response to ground 3 of appeal we wish to make a statement that being on the land alone is not enough to prove trust.He who claims trust must go an extra mile to demonstrate the existence of such trust.The entire family of Nkiria Kabata which include the appelant,respondent and one Justus Gitari Chabari among others were settled on LR:Magumoni/Mwonge/434.As regards LR:Karingani/Gitareni/60 the entire family cultivated the said land.The two parcels of land were family land.Justus Gitari Chabari was registered with LR:Karingani/Gitareni/60 when he was a very young boy.Infact he realized he was the registered proprietor when he was an adult.The house of Justus Gitari and the appellant seemed to overdo the family of the respondent making Nkiria Kabata to direct that Justus Gitari should move to LR:Karingani/Gitareni/60.This was after the tribunal and ordered Justus Gitari Chabari to move into his land and leave the respondents with LR:Magumoni/Mwonge/434.DW2 recognizes the right of the appellant to have a place to settle and even cultivate.He is however quick to point out that the appellant should make such a claim to his brother Justus Gitari Chabari who is the registered proprietor of LR:Karingani/Gitareni/60.Their common father one Nkiria Kabata pronounced himself before death that Kinyua Murage the respondent was to cater for her sisters in the event that they returned home from their matrimonial homes for one reason or another.On the other hand Justus Gitari Chabari was to cater for her sisters in the event that they deserted their matrimonial homes for ne reason or another.The two sons held the respective land parcels in trust for the benefit of their respective sisters.The trial magistrates therefore was right to make a finding that the appellant should have made her claim from Justus Gitari Chabari the proprietor of LR:Karingani/Gitareni/60.The respondent ha her sisters to cater fro according to his fathers wishes.Ground 3 should therefore fail and be rejected by the court.

5. Ground 4 is misplaced and misconceived .Throughout the judgment and proceedings there is no where the trial magistrate misdirected himself that LR:Magumoni/Mwonge /434 was not family land.The trial magistrate recognized LR:Magumoni/Mwonge 434 and LR:Karingani/Gitareni/60 all as being family land.In fact the trial magistrate rightly held that the two parcels of land were held in trust by the registered proprietors for their benefit and their respective sisters.The respondent had the burden to provide for Elsie Ciamingi,Josephine Muthoni and Dorcas Karimi. Out of LR:Magumoni Mwonge/434 while Justus Gitari Chabari was obligated to cater for Alice Cianthiri,Irene Cimbuba,Joseline Ciatharaka ,Margret Murage out of LR:Karingani/Gitareni/60.The trial magistrate did not miss the point that the two parcels of land LR:Magumoni/ Mwonge/434 and LR:Karingani/Gitareni/60 were family land and held in trust by the proprietors.

6. That ground no 5 in the memorandum of appeal is couched in the following manner "that the learned magistrates erred in fact in making a finding that the father to the appellant and the respondent was the owner of land number LR:Karingani/Gitareni/60 and that it was him who transferred the said parcel of land to one Justus Gitari Chabari and he appellant claim should have been against the said land. Ground 4 raises 2 fundamental issues; the first issue is whether originally the father of the appellant and the respondent was the owner of LR:Karingani/Gitareni/60 before he caused it to be transferred to Justus Gitari Chabari. Your lordship its worth noting that Justus Gitari Chabari was registered with LR:Karingani/Gitareni/60 when he was a young boy.That Nkiria Kabata lived with Justus Gitari Chabari as his own child.There is no evidence that prove Justus Gitari Chabari is not a son of Nkiria Kabata.The appellant did not in her evidence raise the issue of pertanity in the issue of Justus Gitari Chabari. In fact the appellant refers him as a brother with no qualifications. In fact on cross examination she admitted that Justus Gitari Chabari is her brother.PW2 and 3 were the only persons who told the court that Justus Gitari Chabari was of another father.They did not support with evidence their allegations or substantiate their evidence.They did not explain why Justus Gitari Chabari lived with Nkiria Kabata if indeed he was not a son of the said Nkiria Kabata.The revertable presumption is that it is Nkiria Kabata who caused LR:Karingani/Gitareni/60 to be registered in the name of Justus Gitari Chabari.The appellant and her witnesses did not revert this assumption.

According to the appellant (Justus Gitari Chabari)was registered with LR:Karingani/Gitareni/60 at the instance of her mother.This is very much doubtful because aroud this time Justus Gitari was registered with LR:Karingani/Gitareni/60 women were not involved or engaged in land matters.That M'nkiria Kabata was part and parcel of Justus Gitari Chabari being registered with LR:Karingani/Gitareni/60. Hence the land is family land.The trial magistrate did not miss the point that the two land are family/ancestral land held in trust by Gitari Kinyua Murage LR:Magumoni/Mwonge/434 and Justus Gitari Chabari LR:Karingani/Gitareni/60 in trust for the entire family.In order to stabilize the family the trial court lightly directed that the appellant do make a claim from her brother out of LR:Karingani/Gitareni/60. M'nkiria Kabata their common father had 9 children ,2 sons and 7 daughters. DW2 was emphatic that every daughter had a right to claim a place to settle from his brother. Hence the appellant was supposed to claim from her brother one Justus Gitari Chabari out of LR:Karingani/Gitareni/60. In MAGUMONI LDT NO 27 of 2011(IN WHICH THE OBJECTOR JUSTUS GITARI CHABARI DID NOT APPEAL) the tribunal made a finding that LR:Karingani/Gitareni/60 was given to Justus Gitari Chabari by his father N'nkiria Kabata.

7. Your lordship ground 6 has been responded to by our submissions in regard to number 5 herein above.We do not wish to repeat our submissions as contained in our submissions regarding ground 5 of appeal. The appellant is wrong by arguing that it was not the father of the appellant and the respondent who gave the respondent LR:Magumoni/Mwonge/434 and equally gave Justus Gitari Chabari LR:Karingani/Gitareni/60.The appellant has not tabled any evidence to any contrary to the averments. This ground should be rejected by the court.

8. Your lordship in ground 7 the appellant raises ground of appeal to the effect that the trial court relied on the tribunal case to deny the appellant her share.The trial magistrate was right by denying the appellant the right to get her portion out of LR:Magumoni/Mwonge/434 registered under the name of the respondent. That M'nkiria Kabata had 9 children in total.On the side of the respondent there were 3 daughter and one son.On the side of Justus Gitari Chabari there were 4 daughters and one son. The trial magistrate reasoning(which was right)was that each of the daughters of Nkiria Kabata should claim from their respective brothers.By so doing the trial magistrates was answering the disharmony and acrimony between the two houses.In any case DW2 was categorical that Nkiria Kabata had pronounced himself that each son was to cater for his sisters needs in the event that any of the sisters was divorced And required a place to settle. It is true that the appellant was not a party to the tribunal case.However it was clear that the tribunal made a finding that LR:Karingani/Gitareni/60 was family and or ancestral land.The trial magistrate did not deny the appellant the right to get a share from the family land. Rather what the trial magistrate held was that the appellant should claim from his brother.The respondent has 6 sisters and the 3 sisters can only go to the respondent for a place to settle in the event that they deserted their matrimonial home for one reason or the other.

9. For reasons already advanced herein above ground 8 of appeal should fail and be rejected by court.We have submitted on the reasoning why the trail magistrate directed that the appellant do claim from her brother Justus Gitari Chabari.The appellant and Justus Gitari Chabari belong to one house of Nkiria Kabata.The respondent belong to the other house.Each house has daughters.The two houses have never lived in harmony when they were all living in LR:Magumoni/Mwonge/434.the trial magistrate was right to hold that the appellant did not belong to the house of the respondent and her interest out of the family lands lay on LR:Karingani/Gitareni/60 which land is registered in the name and style of her brother Justus Gitari Chabari.As pointed out supra the respondent had sisters who would rightly claim from him in the event that they deserted their matrimonial home.The appellant sisters are also entitled to claim from their brother Justus Gitari Chabari out of LR:Karingani/Gitareni/60.The 8th ground of appeal is misplaced and the court should reject it given that the trial magistrates' finding were based on law and fact.

10. Your lordship the appellant ha prayed for two orders in his appeal.The first order prayed for by the appellant is to have the instant appeal allowed with costs to the appelant.We have challenged and faulted all the 8 grounds that the appellant has set fourth in support of her appeal. We submit that none of the grounds has stood the acid test of meritocracy and in particular whether the trial magistrates erred in law and fact. It is for this reason we are praying that the appeal should be disallowed and the judgment and orders of the trial magistrate be upheld by this court. the second prayer by the appellant in this court is couched as follows:……………………………………and the order dismissing her case be set aside and the court do make a finding that the respondent holds land number LR:Magumoni/Mwonge/434 on his own behalf and on behalf of the appellant and that she is entitled to a share of the same as prayed in the plaint."it is selfish on the part of the appellant to urge the court to urge that the respondent hold LR:Magumoni/Mwonge/434 in trust for his benefit and that of the appellant only.What the appellant has forgotten when praying for this order is that Nkiria Kabata had 9 children so if this land is held in trust by the respondent it is for the benefit of the respondent and 8 other children who include the appellant. It must not be forgotten also that if the court directs that orders that the respondent hold LR:Magumoni/Mwonge /434 in trust so does Justus Gitari Chabari hold LR:Karingani/Gitareni/60 in trust for the benefit of himself and 8 other children of Nkiria Kabata. The appellant is biased and discriminatory contrary to article 27 of the constitution of Kenya.

The appellant prays for orders that she be given a share of LR:Magumoni/Mwonge /434 as prayed in her plaint. In the original plaint dated 3rd October 2012 and the amended plaint dated 5th January 2018 the appellant claim half of LR:Magumoni/Mwonge/434 which translates to 2.22 acres.This is ridiculous and selfish to say the least on the part of the appelant.If the appellant gets half and respondent gets the other half of LR:Magumoni/Mwonge/434 well what will happen to the other 7 children of Njeru Kabata?The respondent cannot be seen to hold LR:Magumoni/Mwonge/434 for his benefit and that of the appellant only. If the respondent hold the said land intrust then it is for the benefit of the respondent and all the children of Nkiria Kabata.If the appellant is entitled to any portion out of LR:Magumoni/Mwonge/434 such portion should be 1/9 of 4.44 acres(the size of LR:Magumoni/Mwonge/434.)The appellant is also entitled to 1/9 out of LR:Karingani/Gitareni/60.The two parcels of land are equal in size. That 1/9 of 4.44 acres translate to 0.493 acres.To avoid bulkunization of the two parcels of land the trail magistrates reasonably ordered that the house of Kinyua Murage the respondent to go with LR:Magumoni/Mwonge/434 while the house of Justus Gitari Chabari to go with LR:Karingani/Mugirirwa/60.

11. Your lordship in the light of the foregoing we pray that the instant appeal be dismissed with cost to the respondents.

12. We rest our submissions and pray.

DATED AT CHUKA THIS ….17TH ….DAY OF …DECEMBER,…….2019

I.C MUGO & CO ADVOCATES

FOR THE RESPONDENT

6. I have considered the proceedings in the lower court, the impugned judgment, the Grounds of Appeal in this appeal and pleadings in support thereof and the written submissions filed by the parties in support of their diametrically divergent assertions. I have also considered the authorities filed by the parties in support of their assertions. The authorities are good authorities in their facts and circumstances. I, however, do opine that no two cases are congruent in their facts and circumstances to a degree of mathematical exactitude. I have taken the principles enunciated in those authorities into account when making my decision in this appeal. I need not regurgitate the principles enunciated by those authorities as they have been elaborated upon in the parties' written submissions which have been reproduced in full in an earlier part of this judgment.

7. Grounds 2, 3, 4, 5, 6, 7 and 8 are attacking the integrity of the findings of the Honourable Chief Magistrate regarding matters that arose from the evidence proffered by the parties. I have carefully gone through the record of the proceedings in the lower court. I find that the Honourable Chief Magistrate had based his findings on the evidence proffered by the parties. He did not contrive his own evidence. I find that I have no reason whatsoever to interfere with his well founded findings. In the circumstances, grounds 2, 3, 4, 5, 6, 7 and 8 of the Appeal are hereby dismissed.

8. Regarding ground No. 1 of the Appeal, it contains the hackneyed phrase that ***"a mistake of a litigant's advocate cannot be visited upon the litigant."*** The record shows that the Honourable Chief Magistrate, on 24.10.2018 stated as follows: ***"It is now 12.30pm. The plaintiff's counsel is absent without any explanation. In view of the CJ's direction on completion of matters 5 years and above, I shall order that the matter to proceed."*** The appellant did not protest. She went ahead to give her evidence. I find the Hon. Chief Magistrate's statement was an innocent one considering that although this suit was filed on **5th October, 2012**, this was the first time that the plaintiff was giving her evidence. This evidence was being given over 6 years after the suit had been filed. Surely, why file a suit and for a period of over 6 years, you do not strive to have it heard? This is a preposterous situation which should not be encouraged to persist. Interestingly enough, when the Hon. Chief Magistrate gave the **16th of November, 2018** as the next hearing date, the parties did not go to court as a result of which another hearing date had to be fixed.

9. Order 12 of the Civil Procedure Rules is pellucid that if any party fails to attend during the date fixed for hearing of the suit a dismissal order may be issued by the court against the case of the absent litigant, be it a plaintiff or a defendant. Order 11 of the Civil Procedure Rules gives an elaborate guidance meant to ensure that cases are heard and determined efficiently. I opine that fixing a hearing date is the most important aspect of case conferences. This is because if cases are not heard, litigation will never end. To me it is quite clear that dates fixed for hearing of cases must be taken seriously by all the parties.

10. I take the position that litigating parties should not be allowed to take courts to ransom by failing to attend scheduled hearings, be they the litigants or their advocates. This predisposition to choose when to attend hearings by the parties must invite deprecation from courts of law and must not be seen to be encouraged. The sword of justice must cut both ways. What is good for the goose is good for the gander. A litigant, in this case the plaintiff in the lower court, should not be allowed to disadvantage the other litigant, in this case the defendant in the lower court. I find that the chief magistrate in the lower court was guided by the law and good practice when he went ahead to have the appellant give her oral evidence, as earlier scheduled, in the absence of her advocate.

11. I unequivocally find that no miscarriage was occasioned by the suit being heard as scheduled. Indeed, I opine that if ground number 1 in the appeal is allowed, this would amount to giving litigants and their advocates a carte blanche to decide when and when not suits would be heard by courts of law. This would spawn veritable confusion in the administration of justice.

12. In the circumstances, judgment is hereby entered for the respondent against the appellant in the following terms:

a) This appeal is dismissed.

b) Costs shall follow the event and are awarded to the respondent.

Delivered in open Court at Chuka this 5th day of May, 2020 in the presence of:

CA: Ndegwa

Miss Atieno for the Appellant

Mark Muriithi h/b I.C. Mugo for the Respondent

P. M. NJOROGE,

JUDGE.