



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 10 OF 2018

SAMUEL NJAGI M'NYAMBA.....APPELLANT

VERSUS

GILBERT NDIGWA MWANGIE.....RESPONDENT

JUDGMENT

(Being an appeal arising from the Ruling/order of Honourable J. M. Njoroge – Chief Magistrate, Delivered on 21st November, 2018 in Chuka LDT No. 9 of 2009)

1. The Memorandum of Appeal in this matter states as follows:

MEMORANDUM OF APPELLAL

SAMUEL NJAGI M'NYAMBA the above named appellant appeals to the High Court against the ruling of the above mentioned decision on the following ground:-

1. THAT the Learned Trial Magistrate erred in law and fact in ordering for eviction of the Appellant from land parcel number KARINGANI/NDAGANI/7509 in total disregard of clear and undisputed facts that the Appellant is not in occupation of Land Parcel Number KARINGANI/NDAGANI/7509.
2. THAT the Learned Magistrate erred in law and facts by not considering the surveyors report that clearly showed that land parcel number KARINGANI/NDAGANI/7509 is not demarcated on the ground therefore the same does not exist.
3. THAT the learned Magistrate erred in law and facts by granting eviction orders in an application where a substantive suit had not been filed and parties heard on their evidence contrary to the rules of natural justice.
4. THAT the learned trial magistrate erred in law and facts by not considering the fact that the initial dispute filed by the Respondent and determined by the Tribunal solely touched on a boundary dispute and not trespass as pleaded in the application.
5. THAT the Learned Trial Magistrate erred in law and facts and totally failed to appreciate the surveyors report that stated “The *boundary between land parcel number KARINGANI/NDAGANI/7509 and KARINGANI/NDAGANI/4417 is intact, reliable and properly demarcated*”.
6. THAT the learned trial Magistrate erred in law and facts in failing to appreciate the fact that if the boundary is reliable, intact and properly demarcated then the Respondent claim of and lifting of boundary and trespass against the Appellant failed totally.
7. THAT the Learned Trial Magistrate clearly erred in law and facts expressed outright bias against the Appellant and wholly disregarded his argument.
8. THAT the learned Trial Magistrate erred in law and facts and or intentionally misinterpreted the surveyors report in favor of the Respondent despite the same being clear, express and against the Respondents claim.
9. THAT the Trial Magistrate erred in law and facts in converting a boundary dispute to a trespass and eviction dispute contrary to the judgement of this court in ELC Civil Appeal No. 21 of 2017 that clearly stated that the dispute involved a boundary tussle.
10. THAT the Trial Magistrate failed to appreciate the fact that since the Respondent land is not demarcated on the ground and the fact that there is no evidence tendered to prove trespass by the Appellant the order issued is subject to abuse and anarchy by the Respondent.

REASONS WHEREFORE predicated upon the foregoing grounds, the Appellant seeks orders that:

1. The Learned Magistrate Ruling issued on the 21st November 2018 be set aside and the Appeal be allowed.
2. Cost of this appeal to the Appellant.

DATED AT CHUKA THIS.....19THDAY OF.....DECEMBER.....2018.

FOR: KIJARU, NJERU&CO

ADVOCATES FOR THE APPELLANT (sic)

2. The appeal was canvassed by way of written submissions.
3. The appellant's written submissions are reproduced herebelow. Any spelling or other mistakes are ascribable to the appellant's advocates.

APPELLANT'S SUBMISSIONS

Your Lordship,

The Appellant filed the instant appeal on the 19th day of December 2018 appealing against the ruling of Honourable J.M. Njoroge Chief Magistrate issued on the 21st November 2018 in LDT No. 49 of 2009.

In the appeal the appellant raises the following ground (sic) of Appeal:-

11. THAT the Learned Trial Magistrate erred in law and fact in ordering for eviction of the Appellant from land parcel number KARINGANI/NDAGANI/7509 in total disregard of clear and undisputed facts that the Appellant is not in occupation of land parcel number KARINGANI/NDAGANI/7509.
12. THAT the Learned Magistrate erred in law and facts by not considering the surveyors report that clearly showed that land parcel number KARINGANI /NDAGANI/7509 is not demarcated on the ground therefore the same does not exist.
13. THAT the learned Magistrate erred in law and facts by granting eviction orders in an application where a substantive suit had not been filed and parties heard on their evidence contrary to the rules of natural justice.
14. THAT the learned trial magistrate erred in law and facts by not considering the fact that the initial dispute filed by the Respondent and determined by the Tribunal solely touched on a boundary dispute and not trespass as pleaded in the application.
15. THAT the Learned Trial Magistrate erred in law and facts and totally failed to appreciate the surveyors report that stated "*The boundary between land parcel number KARINGANI/NDAGANI/7509 and KARINGANI/NDAGANI/4417 is intact, reliable and properly demarcated*".
16. THAT the learned trial Magistrate erred in law and facts in failing to appreciate the fact that if the boundary is reliable, intact and properly demarcated then the Respondent claim of lifting of the boundary and trespass against the Appellant failed totally.
17. THAT the Learned Trial Magistrate clearly erred in law and facts expressed outright bias against the Appellant and wholly disregarded his argument.
18. THAT the learned Trial Magistrate erred in law and facts and or intentionally misinterpreted the surveyors report in favor of the Respondent despite the same being clear, express and against the Respondents claim.
19. THAT the Trial Magistrate erred in law and facts in converting a boundary dispute to a trespass and eviction dispute contrary to the judgement of this court in ELC Civil Appeal No. 21 of 2017 that clearly stated that the dispute involved a boundary tussle.
20. THAT the Trial Magistrate failed to appreciate the fact that since the Respondent land is not demarcated on the ground and the fact that there is no evidence tendered to prove trespass by the Appellant the order issued is subject to abuse and anarchy by the Respondent.

And he prays that the court do allow the Appeal and set aside the judgement of the lower court. Your Lordship, the Appellant was dissatisfied with the ruling of Honourable J.M. Njoroge that was issued on the 21st November 2018 ordering the Appellant to be evicted from land parcel number KARINGANI/NDAGANI/7509.

FACTS

Your Lordship, this dispute emanates from CHUKA LDT CASE 49 of 2009 where the Appellant was sued by the Respondent over boundary dispute involving land parcel number KARINGANI/NDAGANI/7509 registered with the Respondent and land parcel number KARINGANI/NDAGANI/4417 recorded in Appellant name. The dispute was determined at the District level in favour of the Respondent herein, later an appeal was lodged with the provincial Tribunal by the Appellant which overturned the decision and later in this court in

Chuka ELC Civil Appeal No. 21 of 2017 formerly Meru Civil Appeal No. 117 of 2010.

And this court made the following observation and or judgement.

“It is veritably pellucid that the land Dispute Tribunal in Chuka was purely dealing with a boundary dispute. I need not say any more. In terms of the provisions of sections 3 (1) a of the Land Disputes Tribunal Act, it had jurisdiction to handle and determine the dispute that spawned this Appeal.

In the circumstances this Appeal is allowed in favour of the Appellant in the following terms:-

- a. The principal Appeals Committee awarded judgement / ruling is hereby set aside and the same is substituted with the award of District Land Tribunal in Chuka Case No. 6 of 2009.
- b. Cost will follow the event and are awarded to the Appellant.

Your Lordship,

The District tribunal in Chuka case 6 of 2009 made the following ruling, award and or judgement:-

“In the view of the foregoing, this tribunal (sic) elders order the survey of Kenya to move in and rectify and bring the boundary to where it was fixed.

Cost be in the cause.

Your Lordship, instead of extracting and implementing the decision of this court as ordered in Chuka Civil Appeal No. 21 of 2017, the Respondent filed the application dated 12th March 2018 in LDT 49 of 2008 praying for the following orders;

1. THAT the defendant by himself, servant, agent or any person acting on his behest be ordered to give vacant possession of the plaintiff's land parcel LR; KARINGANI/NDAGANI/7509 and in default the defendant his servant, agent or any person acting on his behest and the defendant properties be forcefully evicted and removed from parcel number LR; KARINGANI/NDAGANI/7509 at the defendant expense.
2. That the district surveyor be ordered and directed to map and beckon the common boundaries between land parcels LR; KARINGANI/NDAGANI/7509 and LR; KARINGANI/NDAGANI/4417 at the defendant expense.
3. THAT the OCS Chuka Police station be ordered and directed by the court to provide security when implementing or enforcing orders 1 and 2 above.
4. A permanent injunction restraining the defendant by himself, agents, assignees or any person acting on his behest from encroaching, entering or trespassing into LR;KARINGANI/NDAGANI/7509 once common boundary between LR; KARINGANI/NDAGANI/7509 and LR; KARINGANI/NDAGANI/4417 is established.
5. THAT the OCS Chuka Police Station be served with these orders for compliance.
6. Cost of this application be paid by the defendant.

Your Lordship,

The Appellant contends as follows:

1. THAT the orders of eviction sought by the Respondent are farfetched, they were not issued by the tribunal in LDT NO.6 of 2009. The same are final orders that cannot be issued without filing a substantive suit and giving parties a chance to be heard. The initial prayers sought by the Respondent and issued by the court read;

“In the view of the foregoing, this Tribunal (Sic) elders order the survey of Kenya to move in and rectify and bring the boundary to where it was fixed”.

2. The tribunal did not address the issue of eviction. As the learned judge correctly observed in civil appeal No. 117 of 2010 the dispute involved a boundary dispute. If the issue of trespass was to be determined by the Tribunal, then the tribunal lacked the jurisdiction to hear such matter and I invite this court to look at its judgement in Chuka Civil Appeal 21 of 2017.

Your Lordship,

Your Lordship, the Appellant avers that the Respondent purchased land parcel No. KARINGANI/NDAGANI/7509 from JOSEPH GITONGA a brother to the Appellant. The initial parcel of land was KARINGANI/NDAGANI/4418. But the said vendor did not apportion and or subdivide LR NO. KARINGANI/NDAGANI/7509 on the ground. He only transferred on paper. This was the observation by the District Surveyor who stated; *“I have carried out survey to determine the reliability of the existing boundary separating*

KARINGANI/NDAGANI/4417 and 7509. I have concluded that the ground position of existing boundary separating the two aforementioned parcels of land is intact, reliable and properly demarcated”.

This means that LR NO. KARINGANI/NDAGANI/7509 has never been demarcated and or placed on the ground. If that is the case then, how comes the Respondent alleges that the Appellant has uprooted his boundary and encroached on his land.

“The boundary separating KARINGANI/NDAGANI/7509 and 7510 is missing on the ground. Therefore, its placing is necessary so that KARINGANI/NDAGANI/7509 is properly demarcated on the ground”. Contrary to the allegations by the Respondent that the Appellant has removed the boundary existing between land parcel number KARINGANI/NDAGANI/4417 and 7509 the District Surveyor observed as follows;

“I have carried out survey to determine the reliability of the existing boundary separating KARINGANI/NDAGANI/4417 and 7509. I have concluded that the ground position of existing boundary separating the two aforementioned parcels of land is intact, reliable and properly demarcated”.

Therefore your Lordship, the Respondent cannot claim that the Appellant has lifted the common boundary and trespassed on his land is baseless and without merit.

Your Lordship, talking of trespass and evictions, the Applicant has never been in occupation of the Suitland parcel number KARINGANI/NDAGANI/7509. The surveyor reported as follows:

“I have also noted that the plaintiff has not occupied KARINGANI/NDAGANI/7509 even though he is the registered owner.”

Your Lordship, if the Respondent wanted to seek for orders of eviction, he ought to have done so through a substantive suit by way of a plaint or originating summon and or petition as provided by law. Orders of eviction cannot be sought by way of an application without filing a substantive suit. Remember your Lordship, this claim was initially filed in the district Tribunal as a boundary claim.

And this court ruled as such. Now the Respondent cannot claim eviction in the same suit without bringing appropriate papers.

The orders of eviction issued by the lower court are subject to abuse by the Respondent. If the Respondent land has never been demarcated on the ground as observed by the District surveyor, then how will the Respondent know the extent of his boundaries?

Despite the court observing that the Appellant is not in occupation of the suit land and that he is not claiming ownership of the subject parcel the court went ahead to state as follows;

“The defendant or anyone else in occupation shall be granted 45 days to vacate and upon expiring of 45 days the defendant or anyone else shall be forcibly evicted”.

This is contrary to the court observation that the Appellant was not in occupation. So the question is; where is being evicted from if he is not in occupation of Respondent parcel of land? We reiterate that the orders are subject to abuse.

Your Lordship, the Surveyor stated that the boundary is intact. This means that contrary to the averment of the Respondent that the Appellant had lifted the common boundary was a fallacy and untrue, therefore the Respondent claim of boundary lifting should have failed terribly.

We pray that the appeal be allowed and the ruling on the lower court seeking to evict the Appellant be set aside.

Our submissions.

DATED AT CHUKA THIS 02ND DAY OF MAY, 2019

FOR: KIJARU, NJERU & CO.

ADVOCATE FOR THE APPELLANT

4. The respondent’s written submissions are reproduced in full herebelow. Any spelling or other mistakes are ascribable to the respondent’s advocates.

RESPONDENT FINAL SUBMISSIONS

Your lordship the respondent is opposed to the appeal. The ground set forth by the appellant are not meritorious . The main purpose of this appeal is to prevent the respondent from enjoying fruit of successful litigation. We will now respond to each and every ground of a appeal as set out in the memorandum of appeal at page 1 of record appeal (RAO).

1. The first ground of appeal is to the effect that the trial magistrate erred in law and fact by ordering the appellant to be evicted from the respondent parcel of land despite that the appellant was not occupying the respondent land. This preposition that the appellant is not on the respondent land is from the bar. This allegation is not supported by any evidence. in LDT NO.49 OF 2009 (from which this appeal rise) the

respondent was claiming that the appellant has trespassed into the respondent land parcel LR.KARINGANI/NDAGANI/7309. This issue could only be determined by the surveyor. Who should have demarcated the appellant land KARINGANI/NDAGANI/417 and the respondent parcel of land KARINGANI/NDAGANI/7509 and establish a common boundary. This was not done. Looking at surveyors report surveyors only said that the appellant boundary is intact (see RAO page 59) , one would wonder how the surveyor would have come to the conclusion that the appellant boundary was intact without showing the respondent and the appellant their parcels of land.

The learned trial magistrates was right in ordering that the appellant do vacate from the respondent parcel of land . That this appeal has been preferred from LDT NO.49 OF 2009 . Once the boundary between the appellant land parcel KARINGANI/NDAGANI/4417 and the respondent KARINGANI/NDAGANI/7509 WAS established the person encroaching on the other land was bound to move out . In our present case the appellant remained on the respondent parcel of land . The magistrates had all the right to give an order that the appellant do vacate from the respondent land. One wonders why hue and cry by the appellant if the magistrates orders for an ejection order if he was not in anybody's land let alone that of respondent. If the appellant has not encroached or trespassed into the respondent parcel of land KARINGANI/NDAGANI/7509 he has no reasons to worry about the magistrates eviction orders. Now that he knows that he is on the respondent land . This is why he is opposing the magistrates eviction orders. Your lordship the first ground of appeal should fail.

2. Your lordship ground two should fail. In LDT NO.49 OF 2009 the board of contention between the appellant and the respondent was the common boundary between appellant land parcel KARINGANI/NDAGANI/4417 and the respondent parcel of land KARINGANI/NDAGANI/7509. The respondent produced a title deed of his land as exhibit . The survey report is also bias and un professional. The surveyor report did not say that the title the respondent held was fake. If one look keenly at the surveyors report one is bound to conclude that the surveyor was compromised. Why for example did the surveyor fail to map and beacon the common boundary between the appellant land parcel KARINGANI/NDAGANI/4417 and the respondent land parcel KARINGANI/NDAGANI/7509 . If the surveyor had done is work diligently this matter would be a matter that would have been settled long time ago. It means that the surveyor does not want to settle the boundary dispute between the appellant and the respondent herein. The same surveyor had visited the suit land there before and the beacon he placed were uprooted by the appellant.(see RAO page 19 affidavit by the appellant).

3. Your lordship in light of the foregoing we submit that ground three should fail. We have submitted that this appeal originate from LDT case no.49 of 2009. In a LDT case eviction orders can be issued. Once the boundary dispute is dissolved and one party is found to be on the others land the aggrieved party has the right to seek for eviction orders without filing a fresh suit. The appellant was heard in LDT NO.49 OF 2009 and found to be a trespasser. The respondent did not have to go back and file a fresh suit seeking for eviction orders against the appellant. In so submitting we are guided by the following authorities.

(i) The high court of Kenya at Machakos Civil Misc App No.52 of 1996. In this suit his lordship held that it was tenable in lawful to seek for eviction order in execution proceeding in an LDT matter (the said authority is herewith attached). The trial magistrates was right in ordering for eviction order against the appellant , if he was on the respondent land parcel LR.KARINGANI/NDAGANI/7509. We pray that this ground should also fail

4. In response to ground four of the appeal, which is to the effect that the trial magistrates did not consider the initial dispute between the appellant and the respondent was boundary dispute but not trespass and therefore the trial magistrates erred by considering the matter as trespass. We submit that the boundary dispute and trespass are a inter-twinned dispute. if it is found that the appellant had encroached on the respondent land by relocating the boundary. It means that the appellant is a trespasser viz –a-viz the respondent portion that has been alienated. Unless the boundary is correctly positioned then any change of the position of the boundary will mean that one party has trespassed into the others land. In the instant suit the surveyor knowingly and deliberately failed to measure map and beacon, the respondent land parcel KARINGANI/NDAGANI/7509 CLAIMING THAT IT DID NOT EXHIST which argument was afarasy on the part of the surveyor. We do not see any fault in the trial magistrates finding and holding . we submit that ground four should fail.

5. Ground five is contradictory and confusing. The trial magistrates is accused by not following the surveyors report which says “the boundary between land parcel number KARINGANI/NDAGANI/7509 and KARINGANI/NDAGANI/4417 is intact, reliable and properly demarcated”. In the same report the surveyor said that the respondent land parcel is not demarcated on the ground and therefore does not exist . If LR.KARINGANI/NDAGANI/7509 is not demarcated on the ground and the board of contention between the appellant and the respondent is the location of the common boundary between their two respective parcels of land how then on earth is the appellant boundary intact, reliable and properly demarcated. The surveyor did a shoddy job. Is assignment was to resolve a boundary dispute between the appellant and the respondent but all he did was to leave the parties neither here nor there. The respondent in particular, was not shown his land on the ground. Your lordship we pray that this ground no.five fails.

6. We have looked for bias on the part of the trial magistrates as alluded to in ground six of appeal and we cannot find it. The trial magistrates finding and holding are supported by the evidence on record. The trial magistrates did not go out of the way and be guided by his own whelms. His finding are not founded on sinking sand as alleged by the appellant in ground number six. The trial magistrates finding and holding are sound, legal and lawful. There being no trace of bias (Leal or perceived) we submit that ground seven of appeal should fail.

7. We once more submit that the surveyors report was incomplete. It did not solve the salient dispute between the appellant and the respondent. At paragraph two of the report the surveyor says that “the boundary separating KARINGANI/NDAGANI/7509 AND 7510 is missing on the ground. Therefore, it's placing is necessary so that LR.KARINGANI/NDAGANI/7509 is properly demarcated on the ground” from the foregoing the surveyor is clear that KARINGANI/NDAGANI/7509 is not properly demarcated on the ground. Why didn't he demarcate the land to sort out this dispute if he was not compromised. This ground should equally fail.

8. As pointed out the surveyors report was ambiguous. The trial magistrates was not bound by the surveyors report . The magistrates could only be guided by the surveyors report. The surveyor report was contradictory as pointed out supra. The surveyor did not show the respondent the parameters of his land . The surveyor was clear that the respondent land was not demarcated on the ground despite that the respondent was the registered proprietor of LRKARINGANI/NDAGANI/7509. This ground should equally fail.

9. Your lordship ground nine should not see the light of the day. We have earlier submitted that boundary disputes and trespass are cousins. If a party has relocated the common boundary with another party such party as trespassed into the others land. The tussle between

the appellant and the respondent is where exactly on the ground the common boundary between the respondent LR.KARINGANI/NDAGANI/7509 and appellant land parcel LR.KARINGANI/NDAGANI/4417 . If the surveyor had demarcated and shown the parties to this appeal the perimeters of their respective parcels, this appeal would not have been necessary. The canvassed issue would have been settled once and for all. For one reason or another the surveyor report left the litigant fighting when he could have sorted out the matter. If the tussle between the two is boundary dispute how can the appellant boundary be “intact, reliable and properly demarcated”, when the respondent land parcel KARINGANI/NDAGANI/7509 is not demarcated on the ground as per the said surveyor.

10. The appellant pleading in ground ten, support the respondent argument , that for real the surveyor did a shoddy job. The surveyor ought to have demarcated both the respondent land parcel and that of the appellant to sought out their dispute. Now that the respondent land is not demarcated by the surveyor . It cannot be argued with excecute pricesation and correctness that the appellant boundary (between his land and which other land) was “intact, reliable and properly demarcated”.Infact this court should go out of his way and excise its inherent discretion and order that the district surveyor in company of the litigant and private surveyors of the litigant choice , should visit the two disputed land parcels and this time, map and beacon the two land parcels and show to every litigant the perimeter of their respective parcels of land, by so ordering your lordship this matter will come to its logical conclusion and finalization.

11. For the foregoing reasons your lordship we pray that this appeal should be dismissed with cost to the respondent. The prayers posted by the appellant should be substituted with the proposal by the respondent posted at paragraph 10 herein above.

12. We rest our submission and pray.

DATED AT CHUKA THIS3RDDAY OFMAY,.....2019

DRAWN AND FILED BY

M/S I.C MUGO & CO ADVOCATES

FOR THE RESPONDENT

5. A conspectus of the circumstances which led to the filing of this appeal is contained in the lower courts order issued on 28th January, 2019. The order is reproduced in full herebelow.

ORDER

IN OPEN COURT ON 21ST DAY OF NOVEMBER, 2018 BEFORE CHIEF MAGISTRATE HONOURABLE J. M. NJOROGE

APPLICATION FOR ORDERS:

1. That the defendant by himself, servant, agent or any person acting on his behest be ordered to give vacant possession of the plaintiff's land parcel LR; KARINGANI/NDAGANI/7509 and in default the defendant, his servant, agent or any person acting on his behest and the defendant's properties be forcefully evicted and removed from parcel number LR; KARINGANI/NDAGANI/7509 at the defendant (sic) expense.
2. That the District surveyor be ordered and directed to map and beckon the common boundaries between land parcels LR. KARINGANI/NDAGANI/7509 and LR. KARINGANI/NDAGANI/4417 at the defendant (sic) expense.
3. That the O.C.S. Chuka Police Station be ordered and directed by the court to provide security when implementing or enforcing orders 1 and 2 above.
4. That a permanent injunction (sic) restraining the defendant by himself, agents, servants assignees or any person acting on his behest from encroaching, entering or trespassing into LR. KARINGANI/NDGANI/7509 once the common boundary between LR. KARINGANI/NDAGANI/7509 and LR. KARINGANI/NDAGANI/4417 is established.
5. That the OCS Chuka Police Station be served with these orders for compliance.
6. Costs of this application be paid by the defendant

Upon this matter coming up for ruling on 21st November, 2018;

IT IS HEREBY ORDERED:

1. That the defendant by himself, servant, agent or any person acting on his behest be and is hereby ordered to give vacant possession of the plaintiff's land parcel LR; KARINGANI/NDAGANI/7509 and in default the defendant, his servant, agent or any person acting on his behest and the defendant's properties be forcefully evicted and removed from parcel number LR. KARINGANI/NDAGANI/7509 at the defendant's expense.
2. That the District Surveyor be and is hereby ordered and directed to map and beckon (sic) the common boundaries between land parcels LR. KARINGANI/NDAGANI/7509 and LR. KARINGANI/NDAGANI/4417 at the defendant expense.

3. That the O.C.S. Chuka Police Station be ordered and directed by the court to provide security when implementing or enforcing orders 1 and 2 above.
4. That a permanent injunction is hereby issued restraining the defendant by himself, agents, servants, assignees or any person acting on his behalf from encroaching, entering or trespassing into LR. KARINGANI/NDAGANI/7509 once the common boundary between LR. KARINGANI/NDAGANI/7509 and LR. KARINGANI/NDAGANI/4417 is established.
5. That the OCS Chuka Police Station be and is hereby served with these orders for compliance.
6. That the defendant or anyone else in occupation shall be granted 45 days to vacate.
7. That upon expiring of 45 days the defendant or anyone else shall be forcibly evicted.
8. That OCS Chuka Police Station shall provide security during the exercise.
9. That each party to bear their own costs.
10. That matter shall be marked as closed.

Given under my hand and seal of this honourable court this 21st day of November, 2018

ISSUED AT CHUKA THIS 28TH DAY OF JANUARY, 2019

6. It is pellucid that this matter had earlier on been escalated to an appeal before this court. In a way, matters in this case are being canvassed twice in appeals before this court. In view of the peculiar circumstances of this matter, I reproduce herebelow the judgment of this case in ELC Civil Appeal No. 21 of 2017 (Formerly Meru ELC Case NO. 117 of 2010)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO 21 OF 2017

FORMERLY MERU ELC CASE NO. 117 OF 2010

GILBERT NDIGWA MWANGIE.....APPELLANT

VERSUS

SAMUEL NJAGI M'NYAMBA.....RESPONDENT

JUDGMENT

(Being an Appeal from the Decision of the Provincial Appeals Committee in Appeal No. 102 of 2009).

1. The Memorandum of Appeal in this appeal is dated 5th October, 2010 and has the following grounds:
 1. The Provincial Appeals Committee erred in law by holding that the Land Dispute Tribunal Case No. 49 of 2009 was a claim based on ownership of land when in fact the claim was on boundary dispute.
 2. The Provincial Appeals Committee erred in law by failing to hold that the Land Dispute in Chuka Case No. 49 of 2009 had jurisdiction to hear and determine the case since it was a boundary dispute.
 3. The Provincial Appeals Committee erred in law by failing to uphold the District Land Dispute Tribunal judgment which was lawful and legal.
 4. That the Provincial Appeals Committee erred in law by conducting a hearing during the appeal instead of analyzing the evidence on record and in the particular the proceedings and award of the District Land Dispute Tribunal together with the grounds raised in the memorandum of appeal.
 5. That the Provincial Appeals Committee erred in law by delivering a judgment/ruling in favour of the respondent when there was no evidence to support the respondent's claim.
 6. The Provincial Appeals Committee erred in law by failing to make a finding and holding in favour of the appellant when evidence on record was overwhelmingly against the respondent.

Reasons wherefore the appellant proposes to the honourable court that,

a) The Provincial Appeals Committee award/judgment/ruling be set aside and the same be substituted with the award of the District Land Dispute Tribunal.

b) Costs of this appeal be borne by the respondent.

2. Predicated upon the foregoing grounds, the Appellant seeks orders that:

a) The Provincial Appeals Committee award/judgment/ruling be set aside and the same be substituted with the award of the District Land Dispute Tribunal.

b) Costs of this appeal be borne by the respondent.

3. This appeal was canvassed by way of written submissions.

4. The appellant's submissions, by and large, mirror the grounds contained in the memorandum of appeal. On ground 1 in the appeal he asserts that the claim concerned a boundary dispute and not ownership of land. He also says that the appeals committee in appeal No. 102 of 2009 conducted itself as a trial court rather than as an appellate court by hearing oral evidence. He laconically asserts that as this matter was a boundary dispute the Appeals Committee erred in finding that the Land Disputes Tribunal had no jurisdiction.

5. On ground 2, he asserts that by finding that the Land Disputes Tribunal had no jurisdiction, the Appeals Committee erred as the matter was a boundaries dispute within the purview of section 3 of the defunct Land Disputes Tribunals Act. He goes on to say that ground 3 has merit as the District Tribunal had jurisdiction to handle boundary disputes.

6. Regarding ground 4, he asserts that it was unlawful for the Appeals Committee to conduct a hearing instead of analyzing the available evidence. On ground 5 the appellant says that the available evidence did not support the judgment delivered by the Appeals Committee. Ground 6 is, by and large, an echo of ground 5 and says that the Appeals Committee decision should have been in favour of the Appellant as there was overwhelming evidence against the defendant.

7. The appellant asserts that not to find in his favour would subject him to substantial injustice. He says that he bought the suit land from the brother of the respondent and that he had developed the land. After requesting the respondent to leave part of his land, the respondent refused to vacate his land. He filed LDT Case No. 6 of 2006 where he raised the issue of trespass and a boundary dispute. He says that the LDT rightly found in his favour. He says that the Appeals Committee acted illegally by employing an unorthodox procedure which entailed re-hearing of the case. He says that the decision of the Appeals Committee had awkward ramifications as he cannot access his land even though he is the registered owner of land parcel no. KARINGANI/NDAGANI/7509.

8. The appellant says that section 40 of the Constitution entitles him to protection of his right to property. He restates that he bought the suit property and had acquired title.

9. The respondent in response to grounds 1, 2, 3, 5 and 6 of the appeal says that Land Disputes Tribunal Case No. 6 of 2009 concerned ownership of land and not a boundary dispute. He says that the notice to vacate the land dated 19.2.2009 directed at the respondent by the appellant shows that the issue in dispute was land ownership. He avers that the respondent relied on this letter on 6.4.2009 during the hearing of LDT. Case No. 6.

10. He says that the appellant bought the suit land when there was a pending suit involving the respondent and his brother. He says that parcel No. Karingani/7509 was hived from land parcel No. Karingani/Ndagani/6304 which was one of the parcels of land being contested in Chuka PM's Court, Suit No. 37 of 2005. He submits that the appellant had abused the court process as he should have waited for the outcome of Chuka PM's Court No. 37 of 2005.

11. The claim by the respondent that during the hearing of this matter by the appeals committee, both parties had conceded that the tribunal in LDT Case No. 6 lacked jurisdiction, is not substantiated. I will say no more about this claim.

12. Concerning ground 4 of the Appeal, the respondent says that in conducting a hearing, rather than merely analyzing the evidence on record, the Appeals Committee was complying with mandatory provisions of, to wit, sections 8(6), 8(7) and the proviso to section 8(7) of the Lands Disputes Tribunals Act.

13. The respondent says that this appeal was filed 7 months from 23.2.2010 when the impugned decision was made instead of within the 60 days stipulated by the law. He also states that it is Chuka LDT Case No. 6 of 2009 that spawned this appeal and not Chuka LDT Case No. 49 of 2009 which is unknown to him. He urges the court to dismiss the appeal for reliance on a non-existent land disputes tribunal case.

14. I find that the primary issue to be determined is whether the original dispute in the Chuka Land Disputes Tribunal was a boundary dispute or a claim for ownership of land. Whichever finding this court will make will have ramifications as to whether the appeal will be allowed or be dismissed.

15. The Memorandum of Appeal in this Appeal is dated 5th October, 2010 and was indeed originally referred to as Meru High Court Civil Appeal No. 117 of 2010. I opine that the submission by the respondent that the appeal was filed outside the prescribed statutory period comes rather late, 7 years after the appeal was filed. It should have been raised as a preliminary objection soon after the appeal was filed.

16. The prayer that the appeal be dismissed as it refers to LDT Case No. 49 of 2009 instead of LDT Case No. 6 of 2009, is not tenable as it is cured by the fact that in their pleadings and submissions, the parties refer to the correct subject matter and the correct tribunal case.

17. It is not controverted that the appellant is the registered owner of land parcel NO. Karingani/Ndagani/7509. It is not also controverted that he bought the suit land from the respondent's brother. His claim that he has developed his land is not challenged. Proceedings in Chuka PM's Court, Civil Suit No. 37 of 2005, which the respondent says was ongoing when the appellant bought his land from the respondent's brother have not been annexed. The court is not aware of the decision made in that suit. However, these issues though important, will not determine how this appeal will be decided. The primary determinant will be if or if not this suit originally emanated from a boundary dispute or a land ownership dispute.

18. I find the authority proffered by the Appellant, that is, Meru HCC Appeal No. 106 of 2008 (Meru Catholic Diocese AND Lawrence Gitonga) relevant to this matter. The re-hearing of the suit by the Appeals Committee was rather unorthodox.

19. The decision of the Land Disputes Tribunal in Chuka Case No. 6 of 2009 was in the following terms:

A: DECISION OF THE TRIBUNAL

Having heard and considered the representation of all the parties and having considered all the documents submitted to us we hereby decide as follows;

B. BACKGROUND FACTS/ FINDINGS

1. **The** boundary in dispute is an Agricultural Land Reg. No. Karingani/Ndagani/7509
2. **The** boundary was established by the survey of Kenya through the court order.
3. **The** tribunal elders visited the boundary in dispute and found that boundary marks and the fence had been removed.

C. JUDGMENT/ORDER

In view of the foregoing this tribunal (sic) elders order the survey of Kenya to move in and rectify and bring the boundary to where it was fixed. Costs be in the cause.

20. It is veritably pellucid that the Land Disputes Tribunal in Chuka was purely dealing with a boundary dispute. I need not say any more. In terms of the provisions of section 3(1) (a) of the Land Disputes Tribunals Act, it had jurisdiction to handle and determine the dispute that spawned this Appeal.

21. In the circumstances this appeal is allowed. I grant judgment in favour of the Appellant in the following terms:

- a) The provincial appeals committee award/judgment/ruling is hereby set aside and the same is substituted with the award of the District Land Disputes Tribunal in Chuka Land Disputes Tribunal Case NO. 6 of 2009.
- b) Costs will follow the event and are awarded to the appellant,

Delivered in open court at Chuka this **14th day of November, 2017** in the presence of:

CA: Ndegwa

I.C. Mugo for the Appellant

Samuel Njagi M'Nyamba - Respondent

P. M. NJORGE,

JUDGE.

7. Courts of law must avoid issuance of conflicting opinions and orders. In a case such as this where the parties are the same, the lower court is duty bound not to issue orders that are in conflict with the orders of a higher court. A finding in this regard requires, of necessity and in obeisance of the principle of binding precedents, to be pellucidly made in this matter.

8. I have carefully considered the pleadings filed by the parties in support of their veritably diametric assertions.

9. By and large, the appellant has raised issues which had definitively been decided by this court in ELCA Case No. 21 of 2017. If the appellant is not in occupation of the suit land, then he should not be bothered as the orders issued by the lower court will not affect him. Trespass and a boundary dispute have very thin lines separating them. Without going beyond the concerned boundary, you cannot trespass on the said land. I opine that the appellant should not shrewdly hide behind the shroud of semantics.

10. The District Tribunal had visited the suit land and made appropriate orders. These had been overruled by the Provincial Tribunal whose decision was set aside by this court in an appeal. Consequently, the decision of the District Tribunal was upheld. The issue of if or if not the suit land had been demarcated cannot be canvassed twice.

11. Regarding the issue of eviction, it is not necessary that it takes place only where a litigant has permanent property or crops on the suit property. The Blacks Law Dictionary (10th Edition, 2014) defines eviction as: “The act or process of legally dispossessing of land or rental property.” Ipso facto, an order of eviction can be granted to put a litigant in possession of his land or property. This is the effect of the orders issued by the lower court. Indeed, those orders seem to be definitively putting to rest issues canvassed in ELCA 21 of 2017.

12. Having perused the apposite pleadings, I find that the appellant has not demonstrated, even through one iota of evidence, that the Chief Magistrate evinced bias against the appellant.

13. I find myself inclined to dismiss all grounds, 1 to 10, in the Memorandum of Appeal.

14. By and large, I find the respondent’s submissions persuasive.

15. I now come to the issue of if or if not the lower court’s ruling contradicts the decision of this court in ELCA No. 21 of 2017 (Formerly Meru High Court Civil Appeal No. 117 of 2010). In its findings, the District Tribunal had found that boundary marks and the fence had been removed. The tribunal ordered the refixing of the boundary. But then what happens? Supposing one of the litigants once again removes the fence. Litigation must somehow come to an end. The orders given by the lower court simply seek to bring litigation between the two litigants to an end. I do unreservedly find that the orders issued by the lower court do not in any way contradict the orders of this court issued in its judgment delivered on 14th November, 2017. I do find that this appeal lacks merit.

16. In the circumstances, I grant judgment for the respondent against the appellant in the following terms:

a) This appeal is dismissed and the ruling of Hon. J. M. Njoroge, Chief Magistrate delivered on 21st November, 2018 is hereby upheld.

b) Costs of this appeal are awarded to the respondent.

17. Orders accordingly.

Delivered in open Court at Chuka this **26th day of June, 2019** in the presence of:

CA: Ndegwa

Samuel Njagi M’Nyamba – Appellant

Respondent and his advocate - Absent

P. M NJOROGI,

JUDGE.