REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ELC APPEAL CASE NO. E003 OF 2025

KABARARWA:: APPELLANT

VERSUS

KIRAWI::1ST RESPONDENT

LAND ADJUDICATION AND SETTLEMENT OFFICER MARAKWET EAST:::2ND RESPONDENT

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(Being an appeal from the ruling of **HON.G. ADHIAMBO SENIOR PRINCIPAL MAGISTRATE** delivered on 4th February 2025 in **ITEN SENIOR PRINCIPAL MAGISTRATES' COURT LAND CASE NO. 9 OF 2007)**

JUDGEMENT

1.The dispute between the **KARAWI CLAN** (the 1st Respondent herein) and the **KABARARWA CLAN** (The Appellant herein) Involved boundaries to unregistered land. The 1st Respondent was the plaintiff while the Appellant was the defendant. The dispute was heard by the then **MARAKWET LAND DISPUTES TRIBUNAL** (The Tribunal) as was the procedure under the then

law being the **LAND DISDPUTE TRIBUNAL ACT NO 18 OF 1990**(now repealed).

2. After hearing the parties, the Tribunal rendered its decision on 26th February 2007 in which it directed that the land in dispute be divided into two equal parts between the two clans. For some unknown reasons, it was not until 23rd February 2011 (four years later) when the Tribunal's award was adopted as the judgement of the Iten Magistrates' court. A decree followed issued on 7th June 2011.

3.No appeal was filed to the Appeals Committee by any of the parties as was their right under section **8(1)** of the repealed law and therefore, there was no further appeal to the high court on matters of law under section **8(9)** of the repealed Act. It follows therefore that the award of the Tribunal as adopted by the Iten Magistrate's court as it's Judgement and decree to the effect that the land in dispute be divided equally between the parties remains as the judgement to be enforced in this dispute. And as provided under section 7(2) of the repealed Act, that Judgement was to be enforced in accordance with the provision of the Civil Procedure Rules.

4.What followed however, was a plethora of applications.
First, was the Appellants motion dated 11th April 2016 seeking an order that the Provincial Administration be prohibited from

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executing the Tribunal's award as adopted by the magistrate's court. That motion was dismissed by **HON.H.M NYABERI** (**PRINCIPAL MAGISTRATE)** vide a ruling delivered on 22nd June 2016.

5.Then followed a chamber summons application by the 1st Respondent dated 21st February 2027 seeking orders that the county Surveyor and Land Adjudication Officer Elgeyo Marakwet County do survey and subdivide the land in dispute pursuant to the decree of the Iten Principal Magistrate's court. That motion appears not to have been canvassed and if it was, it is not clear from the record what orders were made. But the record shows that the 1st Respondent filed another motion dated 20th March 2017 seeking similar orders as contained in the earlier motion dated 21st February 2017.

6.The motion dated 20th March 2017, was allowed by **HON H.M NYABERI** on 17th March 2017, Vide a motion dated 18th April 2019, the 1st Respondent moved the subordinate court once more specifically seeking an order that the land in dispute be subdivided between the parties **"vertically**".
This was necessitated by the fact that the Tribunal's award which was adopted by the magistrate's court had not specified whether the land in dispute was to be sub-divided "**vertically**"or "**horizontally**"

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This time, the motion was heard by **HON. C.A KUTWA (SENIOR PRINCIPAL MAGISTRATE**) who vide a ruling delivered on 17th July 2019, directed that the land in dispute be sub-divided into two equal parts **“vertically**”. It would appear that the Iten County Surveyor and the land Adjudication officer Elgeyo Marakwet did not comply with the orders issued by **HON.C. A KUTWA.**

That default necessitated the filling of another motion dated 2nd August 2024 by the 1st Respondent seeking an order that the Land Adjudication and Settlement Officer be summoned to show cause why the Decree issued herein on 7th June 2011, was not enforced. Summons were issued and the matter came up on 20th September 2024 now before **HON.G. ADHIAMBO SENIOR PRINCIPAL MAGISTRATE** and though served, the said Land Adjudication and Settlement Officer Marakwet Sub County one **MR MUNONO MWENDWA** did not attend and a warrant for his arrest was issued, on the application of **MR OMWENGA** counsel for the 1st Respondent. The matter was then listed for mention on 9th October 2024 and on that day, **MR KURGAT** counsel for the Appellant informally raised the issue with the court that the decree herein had been caught up with the statute of limitation .**MR MUNONO MWENDWA** the Land Adjudication and Settlement Officer who was also present in person informed the court that he had been away in Nairobi and had only been served with the summons. He was given time to seek legal advice while **MR. KURGAT** was also given time to file a formal application

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opposing the execution process. That culminated in the Appellant filling the Notice of motion dated 24th October 2024.
I may add that prior to that, the Appellant had filed a Judicial Review Application No 2 of 2016 at Eldoret court seeking to prohibit the 1st Respondent from executing the decree herein. That application was dismissed by **OMBWAYO J**. vide a ruling delivered on 28th October 2016.

7.Then, there was another Judicial Review Application No 64 of 2002 filed at Eldoret Court challenging the same Decree. That one was struck out by the late **M. K IBRAHIM J** (as he then was) vide a ruling delivered on 21st August 2012.The rulings by the two Judges are not relevant for purposes of this Judgement.

8.Vide a Notice of Motion dated 24th October 2024,and which is the subject of this Judgement,the Appellant citing the provision of Sections **1A,1B,3,3A** and **63 (C)** of the Civil Procedure Act and Sections **4(4**) and **7** of the Limitation of Actions Act ,approached the Subordinate court seeking the remedy that the execution of the Judgement and consequential orders of the Tribunal be declared illegal, null and void .The thrust of the motion was that the award of the tribunal having been made on 26th February 2007, it became statute barred after 12 years and is not capable of execution and should be set aside. Further, that the parties should continue living in the portions of the land allocated to

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them and therefore the order directing that the land be sub-divided was made in total disregard of the law.

9.The motion was opposed by the 1st Respondent vide a replying affidavit filed by its chairman and dated 15th November 2024. Therein, it is **averred inter alia**, that the decree herein is not statute barred and the motion is therefore misconceived, frivolous, vexatious and an abuse of the process of this court. It is that motion which fell for determination before **HON.ADHIAMBO SENIOR PRINCIPAL MAGISTRATE.**

10.Upon hearing the motion, the trial Magistrate dismissed it with costs vide her ruling delivered on 4th February 2025.The Appellant is aggrieved. That ruling precipitated this appeal in which the Appellant has set out the following six (6) grounds of appeal:

> **1.The learnt trial Magistrate erred in law and in fact in dismissing the appellant's notice of motion dated 24th October 2024.**
>
> **2.The learned trial magistrate erred in law and in fact in finding that she had jurisdiction to determine the issues pending before the court and to alter the decisions of the Tribunal.**

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3. The learned trial magistrate erred in law and in fact in failing to evaluate the evidence in it's totality and in failing to take into consideration that there was no evidence that the respondent had commenced execution of the Tribunal's decision given on 26th February 2007 before expiry of 12 years.

4. The trial Magistrate erred in law and in fact in holding that the applications dated 17th July 2019 and 12th November 2019 were not statute barred.

5. The learned trial magistrate erred in law and in fact in failing to appreciate that there were no stay orders given by any Court in favour of the Appellant hence arriving at erroneous decision that applications to execute the decree made over 12 years were within the time limits.

6.The learned trial Magistrate erred in law and in fact in failing to establish when execution was commenced and when time started running in respect to the decision made on 26th February 2007.

The Appellant therefore seeks from this court the following orders:

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a). The ruling of the Subordinate court be set aside and the Notice of motion dated 24th October 2024 be allowed.
b). Costs of this appeal be awarded to the Appellant.

11.The appeal has been canvassed by way of written submissions. The same have been filed by **MR MOSE** instructed by the firm of **MOSE, MOSE & MOSE ADVOCATES** for the Appellant, **MS MBOGAA** instructed by the firm of **OMWENGA &COMPANY ADVOCATES** for the 1st Respondent and by **MS ODEYO** instructed by the **HON. ATTORNEY GENERAL** for the **LAND ADJUDICATION & SETTLEMENT OFFICER MARAKWET** (the 2nd Respondent).

12. I should at this point clarify that by a Notice of Preliminary Objection by the 2nd Respondent dated 24th march 2025, he sought for an order that the trial court has no jurisdiction to determine the suit in view of the provisions of section **30(1)** of the Land Adjudication Act and also because the Appellant had not exhausted other dispute resolution mechanism. It is not clear what became of that Preliminary Objection. However, a notice of motion dated 25th February 2025 and filed by the Appellant seeking to stay the proceedings **in ITEN MAGISTRATE'S COURT LAND CASE NO 9 OF 2007** pending the hearing and

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determination of this appeal was dismissed by **WAITHAKA J**. vide a ruling delivered on 10th July 2025.

13. I have considered the appeal, the record and the submissions by counsel.
This is a first appeal and my duty is to re-consider and re-evaluate the evidence which was before the trial court and draw my own conclusions. My mandate is well set out in various decisions of the Appellate Court including **SELLE & ANOTHER VS ASSOCIATED ASOCIATED MOTOR BOAT COMPANY LTD & OTHERS 1968 EA 123, ABOK JAMES ODERA & ASSOCIATES VS JOHN PATRICK MACHIRA T/A MACHIRA & COMPANY ADVOCATES 2013 KECA 208 KCR, MWANASOKONI VS KENTA BUS SERVICES LTD 1985 KCR 931** and also **OKENO V.R 19 1972 EA 32** among other cases.
I shall consider grounds No1.2 and 4 together. The trial Magistrate is faulted for assuming jurisdiction which she did not have and in the process, altering the Tribunal's decision and holding that the applications dated 17th July 2019 and 12th November 2019 were not statute barred and thereby dismissing the Appellant's motion dated 24th October 2024.

14.What gave rise to the impugned ruling delivered on 4th February 2025 was the Appellant's Notice of Motion dated 24th October 2024, and which sought the only remedy that the award of the Tribunal be declared illegal and null.

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That award had been adopted as a Judgment of the Magistrate's Court on 23rd February 2011 followed by a decree on 7th June 2011 The Tribunal award had been rendered on 26th February 2007.The trial magistrate had no jurisdiction to declare the award of the Tribunal illegal or null. The jurisdiction to do so was the preserve of the Appeals Committee under section **8(1**) of the repealed Act which set out in clear terms that:

> **8 (1) "Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated".**

15.Therefore, the decision of the Appeals Committee was appealable to the High Court by dint of the provisions of section **8(9)** of the re-pealed Act. Which provided that:

> **(a) "Either party to the dispute may appeal from the decision of the Appeals Committee on a point of law within sixty days from the date of the decision appealed from**"

Therefore, no matter how persuasive the arguments would have been, the trial Magistrate would be usurping the jurisdiction of the Appeals Committee and the High court if she had purported "**to alter the decision of the tribunal".**

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The trial Magistrate is assailed for altering the decision of the Tribunal.

To appreciate whether or not the trial magistrates altered the Tribunal's award, I have looked at it and it reads:

> **"RULING/AWARD**
>
> **"The elders observed very keenly and decided to re-settle the two clans to live in harmony like before, therefore they unanimously agreed to divide the land in question into two equal parts and award the both parties" (sic).**

16.It turned out that the land in dispute was "**partly barren and partly fertile".** Therefore, vide a letter dated 3rd October 2017 and addressed to the parties, the **DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER MARAKWET, SUB-COUNTY** advised them as follows:

> **"RE: CONSENT TO GO TO COURT FOR INTERPRETATION ON A COURT RULING OF 23RD MARCH 2011 ADOPTING LAND TRIBUNAL RULING OF 2007 AT KAPSOWAR BETWEEN KIRAWI/KABARWA CLANS.**
>
> **Under section 30(1) (2) of the Land adjudication Act cap 284 Laws of Kenya 1, the Land Adjudication and Settlement Officer Marakwet Sub-county do hereby allow you through your representatives to seek further directions on the above captioned. This action was taken because the ruling adduced by the two**

honourable courts did not specify the format of land subdivision. <u>There has been a long-standing dispute on whether to subdivide the land vertically or horizontal”</u> “.**Emphasis mine.**

The letter is signed by **CATHERINE J. YATOR THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER MARAKWET SUB-COUNTIES.**

Arising out of that advice the 1st Respondent moved the trial court vide the Notice of motion dated 18th April 2019 seeking the main order that:

> **“1: Spent**
>
> **2: The Honourable court be pleased to order that the said land in dispute between the Kirawi clan and Kabararwa clan be sub-divided into two equal parts, vertically as per attached sketch map in execution of the decree and order of this court dated 7.6.2011”.**

17. The Motion was heard by **HON. C.A KUTWA SENIOR PRINCIPAL MAGISTRATE ITEN** and allowed on 17th July 2019. No appeal was preferred against that order. It cannot therefore be correct to say that **HON.G. ADHIAMBO SENIOR PRINCIPAL MAGISTRATE ITEN** altered any order vide the impugned ruling. Indeed, in the last paragraph of the said ruling, **HON G. ADHIAMBO** addressed the issue as follows:

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"It is therefore evident that the defendant/respondent who were well represented were well aware of the application dated 18.4.2019 but they chose not to participate in the prosecution of the same. They had a chance to give their views as to whether the said property should be sub-divided vertically or horizontally and the court made its decision which they are bound by. This court does not hold appellate jurisdiction and if the defendant/applicants are aggrieved by the decision of the court directing that the said property be subdivided vertically, then they should appeal before the Environment and land court. The Notice of motion application dated 24.10.2024 lacks merit as such the same is dismissed with costs to plaintiff/Respondent.

It is so ordered."

18.On the ground that the trial magistrate erred in law and in fact in holding that the applications dated 17th July 2019 and 12th November 2019 were not statute barred, the record shows that the award of the Tribunal was in fact adopted as a judgement of the subordinate court by **B. N MOSIRIA** on 23rd November 2011.The proceedings of that day read:

"23.11.2011

Before: B.N MOSIRIA

Court Clerk: Mercy

Objectors absent thought (sic) served.

Claimant present.

Court: The Tribunal's award be and is hereby adopted as a judgement of this court. Any party has a right of appeal within 30 days to Provincial Land Dispute Tribunal.

HON. B.N MOSIRIA

SENIOR RESIDENT MAGISTRATE"

The decree issued on 7th June 2011 reads

"<u>DECREE</u>

This award coming up on 23rd day of march 2011 before Honourable B.N MOSIRIA Senior Resident Magistrate for reading and adoption of the Tribunal's award and upon reading and adoption of the Tribunal's award in the presence of claimant and absence (sic) of the objectors.

<u>IT IS HEREBY ORDERED.</u>

1.That the elders observed very keenly and decided to settle the two clans to live in harmony like before.

2. That: Therefore, they ananimously (sic) agreed to devide (sic) the land in question into two equal parts and award the (sic) both parties(sic).

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GIVEN UNDER MY HAND AND THAT OF THIS HONOURABLE COURT THIS 23 DAY OF 02 2011
B.N MOSIRIA
SENIOR RESIDENT
MAGISTRATE
ITEN.
ISSUED AT ITEN THIS 7TH DAY OF JUNE 2011
B.N MOSIRIA
SENIOR PRINCIPAL MAGISTRATE
ITEN".

19.It is therefore clear that there is a disconnect between the proceedings of 23rd November 2011 which show that the Tribunal's award was adopted as a judgment of the court on that day and the decree issued on 7th June 2011 which shows that the award was in fact adopted as a judgement of the court on 23rd march 2011.However, nothing really turns on that lapse.

What is clear is that by the decree as drawn, the tribunal's award became the Judgement of the court on 23rd march 2011 when it was adopted by **HON. B.N MOSIRIA SENIOR RSDIENT MAGISTRATE.**

Having been adopted as a judgement of the court on 23rd march 2011, the Tribunal's award became enforceable as a decree of the court in accordance with the provisions of the Civil Procedure Act Section **7 (2**) of the repealed Act is clear on that. It reads:

(2) **"The court shall enter judgment in accordance with the decision of the tribunal and upon**

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Judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the civil procedure Act."

Counsel for the Appellant has taken the view that the award of the Tribunal having been made on 26th February 2007, the Judgement of the Subordinate court could not have been executed in 2019 since it was statute barred in accordance with the provisions of section 4 (4) of the Limitations of Actions Act which he cites as follows:

> **"An action may not be brought upon a judgement after the end of twelve years from the date on which the Judgement was delivered, or (where the Judgement or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the request or delivery in question and no arears of interest in respect of a judgement debt may be recovered after the expiration of six years from the date on which the interest became due".**

Relying on the above provision, counsel for the Appellant has submitted as follows:

> **"Your Honour,**
>
> **The judgement in question was given by the Land Dispute Tribunal Marakwet District made on**

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16.2.2007 pursuant to the provisions of Land Dispute Tribunal Act repealed.

It is very clear that the said Judgement was not executed until on 17.7.2019 and 12.11.2019 when the plaintiff made an application to the court for further orders as to how the decree was to be implemented. The said actions were well outside the stipulated timelines of 12 years and since no leave of the court was sought for enlargement of time to execute the decree, the said directions were given by the court which was devoid of jurisdiction and are thus, null and void.

The 12 years period lapsed on 16.2.2019 and the application for implementation of the order was made in June 2019 some for months after the expiry of time."

On his part, counsel for the 1st Respondent made the following submissions on that issue in paragraphs 35 and 37:

35: "The appellant also took issue that the period for execution had since lapsed. It is established that the judgement of the court becomes operational since the same has been taken to court for reading and adoption in order to

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become a court order or decree capable of execution.

The reading and adoption of the decision of Marakwet Land Dispute tribunal was done in the learned Senior Resident Magistrate Iten HON. B.N MOSIRIA on 23.03.2011 and the decree issued on 7.6.2011"

37: "In view of the provisions of Sections 7 and 8 of the Land Tribunal Act (sic) repealed and the case law above, it is therefore not accurate that time started running when the decision was made in the Marakwet Dispute Tribunal on 26.02.2007 as alleged but time began running after the decision had been adopted by the court on 23.3.2011 and became judgement of the court."

Counsel for the 2nd respondent also takes the same view. He makes the following submissions at paragraph 18 (2):

"The LDT rendered it's award on 15th February 2007, however, that award was not itself executable as a judgement of the court. Under the Land Dispute Tribunal Act (now repealed) a Tribunal award only acquired the force of a judgement upon adoption by a court of competent jurisdiction".

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The exposition of the law by counsel for the Respondents is the correct one. Section **7(1)** of repealed Act provided that:

> **"7 (1) "The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal."**

20. It is only after the Tribunal's award has been received by the court and adopted that it becomes a judgement of the court and enforceable in accordance with the provisions of the Civil Procedure Act as stated clearly in section **7(2**) of the repealed Act and which I have already cited above. Clearly therefore the award of the Tribunal did not become a judgement of the court when it was delivered by the Tribunal on 26th February 2007.Rather it became a judgement capable of enforcement on 23rd march 2011 when it was adopted as a judgement of the court by **HON. B.N MOSIRIA**. From the record, execution proceedings by the Respondent commenced as far back as 2016 because on 11th April 2016, the Appellant filed an application to stay execution of the Tribunal's award as adopted as the judgement of the subordinate court. And by an application dated 21st February 2017, the Respondent sought an order for the Land Adjudication Officer and surveyor Elgeyo Marakwet County to sub-divide the land in dispute into two equal parts pursuant to the Decree issued

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on 23rd march 2011.That application was made well within the statutory period set out in section **4(4**) of the Limitation of Actions Act .The trial magistrate was alive to this and in page 5 of the impugned ruling, she addressed the issue thus:

> **"On the issue as to when the award of the Tribunal becomes a judgement of the court capable of being executed, I have made the following observations:**
> **The defendant/applicant vide the supporting affidavit sworn by one JAMES ROTICH particularly of paragraph 10 averred that the time for execution of the award of the Tribunal began to run at the time the Marakwet Land Dispute Tribunal made it's decision on 23.2.2007 and therefore execution should have been completed on 26.2.2019.**
>
> **22.The plaintiff/respondent on the other hand submit that the applicant's aforesaid argument is unfounded for reasons that the decision of the Marakwet Land Dispute Tribunal had to first be taken to court for reading and adoption in order to become a court order or decree capable of execution. In the instant case, the reading and adoption of the decision of the Marakwet Land Dispute Tribunal was done on 23.3.2011 and the**

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decree was issued on 7.6.2011 as per the decree annexed to the said replying affidavit as annexture A"

The trial Magistrate then proceeds to cite the relevant provisions of the Land Dispute Tribunal Act and the Limitation of Actions Act. She then adds as follows at page 6 of the impugned ruling.

> "**The Plaintiff /Respondent has demonstrated vide annexture 2 to their affidavit that he moved the court vide an application dated 20.3.2017 seeking to execute the decree issued on 7.6.2011. It therefore means that the application for execution was filed before the lapse of 12 years**"

21. The trial Magistrate was in my view correct. Section **4(4)** of the Limitation of Actions Act, in my understanding, prohibits the **<u>commencement</u>** of any proceedings by way of a Plaint, Petition ,Originating Summons or any application seeking to enforce or execute a judgment. It does not mean that the execution process once commenced must be completed within 12 years. Indeed the provision commences with the following words which are germane.

> **"An action may not be brought upon a judgment after the end of 12 years on which the judgement was delivered ….."**

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The Tribunal award having been adopted as a judgement of the subordinate court on 23rd March 2011 and the decree issued on 7th June 2011, it is clear that the execution proceedings were commenced well within the twelve-year period set out in the Limitation of Actions Act. Those proceedings cannot be faulted. There can be no doubt that the motion dated 24th October 2024, and which gave rise to the impugned ruling was within the jurisdiction of the trial Magistrate. And all that the Magistrate did was to dismiss the motion which required her to declare the award of the Tribunal as illegal and null. I do not therefore see how she can be said to have altered the decision of the Tribunal. Grounds 1,2 and 4 have no merits. They are dismissed.

22.In ground no 3 the trial magistrate is assailed for failing to evaluate the evidence in it's totality and failing to take into consideration that there was no evidence to show that the Respondent commenced the execution of the Tribunal's award before the expiry of 12 years.
In the preceding paragraphs of this judgment I have already cited in extenso page 5 of the impugned ruling where the trial Magistrate has very ably addressed the issue and made a finding that the execution of the judgement commenced within the 12 year Limitation period. She cannot be faulted on that finding. Ground No3 is therefore dismissed.

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23. Similarly grounds No 5 and 6 also raise the issue that the trial Magistrate erred in law and in fact in failing to establish when time started running in respect of the decision made by the Tribunal on 26th February 2007.Further that she erred in law and in fact in failing to appreciate that there were no stay orders given by the court in favour of the Appellant hence arriving at an erroneous decision that the applications to execute were within the time limit. Again, those grounds are premised on the erroneous argument that the Tribunal's award became a judgement of the trial court on 26th February 2007 when it was issued. As is now clear from the facts and the law, the Tribunal's decision only became a judgement of the trial court when it was adopted on 23rd March 2011 and a decree followed. That was when time started running. Not in 2007 when the Tribunal rendered its award.

Those grounds are devoid of any merit and must also, be dismissed.

The upshot of all the above is that having considered the appeal, the record and submissions by counsel. I issue the following dispositive orders:

1.The appeal is dismissed.

2.The Appellant shall meet the costs of the 1st respondent both here and in the court below.

3.The Appellant shall meet the costs of the 2nd respondent only in this court.

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JUSTICE BOAZ N. OLAO
25th March 2026

Judgement dated, signed and delivered by way of electronic mail on this 25th day of March 2026.
Right of Appeal.

JUSTICE BOAZ N. OLAO
25th March 2026

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