REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL CASE NO. 13 OF 2017

FORMERLY MERU ELC CIVIL APPEAL CASE NO. 31 OF 2011

BORANA KIARA.....APPELLANT

VERSUS

BILISTA KAMBURA MIRITI (REPRESENTING THE ESTATE

OF ADELINA GAAJI MAGIRI (DECEASED).....RESPONDENT

JUDGMENT

1. This appeal is against the ruling/order of P. M. Ngare Gesora, Principal Magistrate at Chuka in PMLDT Case No. **52 of 2005** dated **9th February, 2011.**

2. The Memorandum of Appeal is in the following format:

MEMORANDUM OF APPEAL

Being an appeal against the ruling/order of P. Ngare Gesora Principal Magistrate in Chuka PM LDT case no. 52 of 2005 dated 9th February, 2011.

The appellant being aggrieved by the ruling/order of P. Ngare Gesora Principal Magistrate dated 9th February, 2011 in Chuka Principal Magistrate LDT Case No. 52 of 2002 appeals against the entire ruling/order and sets hereinbelow his grounds of appeal.

1. The learned Principal Magistrate erred in law and in fact in failing to appreciate that the elders award was clear that the respondent was to share the 2 acre awarded by the elders with her sister Dorothy Ntue if she came back from where she is married and ignoring the appellant's evidence that the said Dorothy Ntue had already returned to the suit land and made developments thereon and therefore the respondent was enjoined to share her two acres with the said Dorothy Ntue.

2. The Learned Principal Magistrate erred in law and act in failing to find that the subdivision schemes giving rise to LR No. Mwimbi/S. Magumango/2226 and 2227 were as a result of the surveyors report as agreed by consent of both parties. The said surveyor had recommended that the area occupied by Dorothy Ntue did not fall within the area excised for the respondent which report was adopted as an order of the court and the said subdivision was meant by agreement of both parties to cure that contradiction with the elders award and bring the area occupied by Dorothy Ntue within the ambit of the respondent's land and the learned magistrate fell in great error to later contradict his own previous order and find that the respondent was the ultimate beneficiary of the two acres.

3. The Learned Principal Magistrate's ruling is against the evidence and submissions placed before him.

Reasons wherefore the appellant prays for an order setting aside the ruling/order dated 9th February, 2011 and therewith substitute an order dismissing the respondent's application dated 24th December, 2010 with costs herein and the court below to the appellant.

DATED AT MERU THIS 9TH DAY OF MARCH, 2011

FOR: KIAUTHA ARITHI & CO.

ADVOCATES FOR THE APPELLANT

3. The appeal was canvassed through written submissions.

4. The appellants written submissions are reproduced herebelow in exactly the form they were filed and without any changes or erasures whatsoever.

APPELLANT'S WRITTEN SUBMISSIONS

May it please your Lordship,

On behalf of the Appellant, we elect to humbly submit as follows:

Being an appeal against the ruling/order of Hon. P. NgareGesora Principal Magistrate in Chuka P.M LDT Case No. 52 of 2005 dated 9th February, 2011, the Appellant appeals against the entire ruling/order on the following grounds:

1) The Learned Principal Magistrate erred in law and in fact in failing to appreciate that the elders award was clear that the Respondent was to share the 2 acres awarded by the elders with her sister DOROTHY NTUE if she came back from where she is married and ignoring the Appellant's evidence that the said DOROTHY NTUE had already returned to the suit land and made developments thereon and therefore the Respondent was enjoined to share the her two acres with the said DOROTHY NTUE.

2) The Learned Principal Magistrate erred in law and fact in failing to find that the subdivision schemes giving rise to L.R NO. MWIMBI/S.MAGUMANGO/2226 and 2227 were as a result of the surveyors report as agreed by consent by both parties. The said surveyor had recommended that the area occupied by DOROTHY NTUE did not fall within the area excised for the Respondent which report was adopted as an order of the court and the said subdivision was meant by agreement of both parties to cure that contradiction with the elders award and bring the area occupied by DOROTHY NTUE within the ambit of the Respondent's land and the learned magistrate fell in great error to later contradict his own previous order and find that the Respondent was the ultimate beneficiary of the two acres.

3) The Learned Principal Magistrate's ruling is against the evidence and submissions placed before him.

Your Lordship, with the grounds now set forth herein above, we elect to submit on each ground separately as hereunder:

Ground 1

Your Lordship, a keen perusal of the proceedings and the ruling held in the Land dispute tribunal at Kieganguru, the one thing that rings crystal is that the elders, on page 18 of the record of appeal, ruled that the Respondent herein be given two (2) acres from the suit land and if she went back to where she was married then the piece of land so given would remain the family's property and would be left to the administrator (appellant herein). They also went forth to rule that the Plaintiff shall live in that piece of land with her sister NTUE if she comes back home from where she is married currently and finally finished off with the directive that both parties do live in peace as evidenced in the alleged oral will.

It is our humble submission that the Learned Principal Magistrate erred in failing to apprehend and consider the Appellant's evidence that oneDOROTHY NTUE had returned home and where she settled, she had made some developments thereon and that as per the elders' ruling, the Respondent would live in the piece of land entitled to her together with her sister. This crucial bit of evidence was ignored and such omission of consideration would render the determination unfair, unjust and prejudicial to the Appellant. If the same would have been put into consideration, the tables would have tilted in favour of the Appellant.

Ground 2

The Honourable court was aware, through the Appellant's Application dated 21st January, 2009 that the Appellant had been ordered by the court to give the Respondent 2 acres from L. R NO. MWIMBI/S.MUGUMANGO/495. However, the Respondent, through collusion with the handling surveyor excised 2.27 acres thereby making the Appellant lose 0.27 acres of his land.

Out of this anomaly, it was ordered on 27th May, 2009 that a resurvey of L. R NO. MWIMBI/S.MUGUMANGO/495 (Subdivided into 2035 and 2036)be done. The resurvey was done on 13th July 2009 and a report was prepared thereafter by one Justin Kithinji under the County Council of Meru South as it was back then. The findings on the ground were that the area covered by L. R NO. MWIMBI/S.MUGUMANGO/2036 which was meant for the Respondent and her sister measured approximately 2.30 Acres. It was also found that the land occupied by the Respondent's sister, DOROTHY NTUE did not fall within the area captured by L. R NO. MWIMBI/S.MUGUMANGO/2036 meant for both of them. Finally, it was found out that the registry index map was amended on 11th December, 2007 though the resultant parcels (2035 and 2036) were yet to be registered in the resident land registry.

The recommendations given after the exercise were that the subdivision of L. R NO. MWIMBI/S.MUGUMANGO/495 should be nullified and land registrar Meru South be ordered to direct the registry index map be amended to enable fresh subdivision be carried out to correct the acreage to two(2) acres and to accommodate the site occupied by DOROTHY NTUE, the Respondent's sister. The said report can be found on pages 25 to 27 of our Record of Appeal.

On 27th May, 2010, the said report was adopted by consent and it was thereby ordered that the Surveyor's report dated 13th July 2009 and filed in court on 15th July 2009 be and is hereby adopted as an order of the court. The order is annexed in our Record of Appeal on page 28. The effect of the said orders was to nullify the previous subdivision that had been carried out on the said land and the Land Registrar Meru South was ordered to direct the Registry Index Map to be amended to enable fresh subdivision to be carried out to correct the

Plaintiff/Respondent's acreage to two (2) acres and to accommodate the site occupied by DOROTHY NTUE as per the elders award.

It is our humble submission that the said orders adopted by consent were meant to cure the contradiction with the elders award, which contradiction had been caused by the Respondent's malicious ploy to excise more than what had been awarded by the Elders tribunal, and bring the area occupied by DOROTHY NTUE within the ambit of the Respondent's land. It is also our humble submission that the learned magistrate fell in great error when he contradicted his own previous order and found that the Respondent was the ultimate beneficiary of the two acres. In that regard, we beg to rely on the case of **M'RUKARIA M'MBUI v PRISCILLAH GITONGA MUGAMBI [2007] eKLR**where Justice Lenaola said thus: ***What I am trying to illustrate is that matters falling within s.3(1) of the Land Disputes Tribunal shall be heard by the Tribunals and the magistrates' court have no jurisdiction as to the merits or demerits of those matters. To do so would amount to assuming Jurisdiction which such a court cannot does not have. What a magistrate's court can do by law is in mandatory terms:- it "shall enter Judgment in accordance with the decision of the Tribunal"***

It is therefore our humble submission that the Learned Principal Magistrate erred in contradicting the elders award by delving into the merits or the demerits where the only option he had was to adopt the elders award and foresee compliance by both parties where the Appellant was to excise two acres and the Respondent was to share and own the said two acres with her sister jointly.

Ground 3

On this last ground, it is quite evident upon a quick perusal of our Record of Appeal and the proceedings therein that the Learned Principal Magistrate came to a determination which was against the weight of evidence from the applications by the Appellant herein to the previous ruling and award by the elders and the very fact that DOROTHY NTUE had come back to the family home and was therefore entitled together with the Respondent herein to own a total of two acres jointly. The finding that the Respondent was entitled to two acres by her own was therefore misguided, an abuse to the court process and a gross injustice upon the Appellant herein.

In conclusion, we do pray Your Lordship, based on the weight of evidence and the provisions of law, to allow this instant appeal and do make an order setting aside the ruling/order dated 9th February 2011 and therewith substitute an order dismissing the Respondent's Application dated 24th December 2010 with costs herein and the court below to the Appellant.

WE BEG TO REST.

DATED THIS.....13TH.....DAY OF.....APRIL.....2018

FOR:KIAUTHA ARITHI & CO.

ADVOCATES FOR THE APPELLANT

5. The respondent's written submissions are reproduced herebelow in exactly the form they were filed (meaning without any changes or erasures whatsoever):

RESPONDENT'S FINAL SUBMISSIONS

(A) INTRODUCTION

1. Your lordship these are the respondent's submissions in respect of the entire appeal. The respondent's hope that by the time she closes her submissions she will have gone an extra mile in persuading and impressing the court that the appeal is not meritorious and the same should be disallowed with cost to the respondent.

(B) A CASE FOR SUMMARY DISMISSAL OF THIS APPEAL

2. Your lordship we propose that for the reasons set out in this paragraph the court do consider summarily dismissing the instant appeal with costs to the respondent. These reasons include the following;

(a) The record of appeal is a misrepresentation of the lower court's proceedings. If the court compares the lower court proceedings with the record of appeal it will show clearly that the record of appeal has omitted crucial items which are necessary to adjudicate over this matter. We submit that the omissions are deliberate.

(b) Having compared the record of appeal in the court file and the one served to the respondent a very pertinent document has been omitted. This is the ruling dated 9th February 2011 and which ruling the appellant is appealing against. Having omitted such a vital document for this appeal this court should consider summarily dismissing the appeal for this dint. As the court will note the appellant probably never wanted the court to look at the said ruling which speaks volumes against the grounds of appeal set out in the memorandum of appeal by the appellant. The appellant probably felt that by introducing the ruling in the record of appeal the court may summarily dismiss the appeal anyway.

(c) Your lordship of interest to note is that the proceedings leading to the ruling dated 9th February 2011 the ruling the appellant is appealing against have not been factored in the record of appeal. This is yet another manifestation of dishonesty on the part of the appellant. By failing to incorporate the proceedings leading to the ruling of 9th February 2011 is a clear indication of the appellant trying to keep away vital and important information that would help this court to reach a fair verdict. The appellant hoped against hope that by omitting the proceedings leading to the ruling being appealed against the court will not look at the same. This is a mistaken notion and it seems the appellant had

forgotten that the lower court file always form part of record of an appeal. The appellant avoided in certain these proceedings in the record of appeal, in our humble view to avoid the court noting under what circumstances the trial magistrate reached the ruling dated 9th February 2011. A quick perusal of the proceedings will demonstrate the dishonesty displayed by the appellant in their bid to relocate the respondent against the tribunal's award. For this dint we urge the court to consider summarily dismissing this appeal.

3. Your lordship another ground upon which this court should consider summarily dismissing this appeal is that a decree was never extracted and it is not factored as part of the record of appeal. Given that the decree is conspicuously missing from the record of appeal or from the lower court's record we submit that this is a good case for summary dismissal.

(C) GROUNDS OF APPEAL BY THE APPELLANT

4. Your lordship the appellant in his memorandum of appeal dated 9th March 2011 page 1 in the record of appeal R.O.A set out his grounds of appeal as follows;

(i) The learned principal magistrate erred in law and in fact in failing to appreciate that the elders award was clear that the respondent was to share the 2 acres awarded by the elders with her sister DOROTHY NTUE if she came back from where she is married and ignoring the appellant's evidence that the said DOROTHY NTUE had already returned to the suit land and made developments thereon and therefore the respondent was enjoined to share her two acres with the said DOROTHY NTUE.

(ii) That the learned principal magistrate erred in law and fact in failing to find that the subdivision schemes giving rise to LR; NO MWIMBI/S.MUGUMANGO/2226 AND 2227 were as a result of the surveyor's report as agreed by consent of both parties. The said surveyor had recommended that the area occupied by DOROTHY NTUE did not fall within the area excised for the respondent which report was adopted as an order of the court and the said subdivision was meant by agreement of both parties to cure that contradiction with the elders award and bring the area occupied by DOROTHY NTUE within the ambit of the respondent's land and the learned magistrate fell in great error to later contradict his own previous order and find that the respondent was the ultimate beneficiary of the two acres.

(iii) That the learned principal magistrate's ruling is against the evidence and submissions placed before him.

(D) ANALYSIS OF GROUNDS OF APPEAL VIS A VIS THE RULING DATED 9TH FEBRUARY 2011, PROCEEDINGS OF LOWER COURT LEADING TO THE RULING DATED 9TH FEBRUARY 2011, THE AWARD OF THE TRIBUNAL AND THE SUBMISSIONS BY THE APPELLANT

5. Your lordship we shall now attempt to critically analyze each and every ground of appeal posted by the appellant in the memorandum of appeal and replicated I number 4 herein above. We shall endeavor to contrast the appellant's submissions, the ruling appealed against, the proceedings leading to the ruling appealed against together with the award of the tribunal.

(a) Your lordship ground one we submit humbly amount to misapprehension and misinterpretation of the tribunal's award. The relevant paragraph of the tribunal's award/ruling at page 18 of the R.O.A reads as follows, "the plaintiff shall live in that piece of land with her sister NTUE if she comes back home from where she is married currently". A natural interpretation of this sentence is that by the time the award was being read DOROTHY NTUE had not come home from her place of marriage. She was only to enjoy the two acres awarded to the respondent on happening of a future event. We are not told anywhere in the award that DOROTHY NTUE had anything on the suit land. Her right would only accrue if she deserted her matrimonial home because of one reason or another.

That the proceedings which the appellant has deliberately failed to factor in the record of appeal shows that the court visited the locus in quo at one point in time of the proceedings. The court was clear that the respondent had her houses at one portion of the land. The court did not find any developments or settlements of DOROTHY NTUE. This compounds the respondent's arguments that the appellant has misinterpreted the award of the tribunal by arguing that DOROTHY NTUE was on the land under reference. The proceedings leading to the ruling appealed against will show that it is only the respondent who was on the land and DOROTHY NTUE was still married even when the court visited the locus in quo.

It was the lower court's finding of fact which has not been challenged by the appellant that DOROTHY NTUE died and was buried at her husband's land which resulted to the respondent being the only beneficiary of the two acres awarded by the tribunal. Looking at the ruling appealed against at page 2 which is equally missing in the R.O.A at paragraph 4 the trial court observed correctly, "…….her sister DOROTHY NTUE (deceased) was not a party to the said case and she never even testified at the hearing. The only time that she is mentioned is when the elders were making their ruling. Her inclusion was to cushion her against any adverse situation that may befall her in case she is divorced and comes back home. This never happened and even in her death, she was **buried** in her husband's home". We attach herewith the ruling for ease of reference.

The appellant therefore are simply wrong and misleading the court that DOROTHY NTUE had gone back to her home from where she was married. The appellant is also wrong by suggesting that DOROTHY NTUE had gone back to her parents and made developments to the suit land. As we have noted earlier as of the time the respondent was awarded two acres DOROTHY NTUE was still at her husband's home. By the time the court visited the locus in quo (see the proceedings that have not been factored in the record of appeal) DOROTHY NTUE had not come back home and as equally pointed out the trial magistrate made a finding or fact which is not challenged in this appeal that DOROTHY NTUE died and was buried at her husband's home. The trial magistrate was very much in order to make the ruling he made dated 9th February 2011 which the appellant is appealing against. This was especially incumbent upon the trial magistrate to do so granted that the appellant always wanted to relocate the respondent from where she has called home from time immemorial to a stony and unarable part of the suit land in the guise that this is where DOROTHY NTUE had developments which developments were not seen when the trial magistrate visited the locus in quo.

(b) In response to the appellant's ground 2 we wish to make the following observations.

(i) It is true that several subdivisions of the suit lands have been carried out by various surveyors over the suit land and for one reason or another a party was not satisfied with the subdivisions which resulted in each going to court. The last application was by the respondent dated 24th December 2010 which sought, 1….2 "that the court be pleased to make an order lifting, cancelling and or annulling the subdivisions schemes of LR; MWIMBI/S.MUGUMANGO/495 giving rise to LR; MWIMBI/S.MUGUMANGO/2226 and 2227 by one J. D OBEL through his agent JUSTIN KITHINJI of the County Council of Meru South on 12th august 2010. That the court be pleased to issues fresh subdivision schemes based on transparency and the letter and spirit of the order giving authority for the subdivision of LR; MWIMBI/S.MUGUMANGO/495". Because of many applications and counter applications the trial magistrate in his ruling said that he was visiting this issue of giving the respondent two acres with a heavy heart. There was no transparency even from the surveyors whose much transparency was expected. This application lead to the current ruling which the appellants are appealing against. The turns and twists in the manner the award was implemented came about due to the agent surveyors who could not go by the spirit and wording of the tribunal's award. The respondent cannot be blamed for this. She was only a victim. The alleged collusion with the surveyor is not substantiated given that the respondent is an old woman and all she wanted was her two acres as awarded by the tribunal. The surveyor by the name JUSTIN KITHINJI probably in conjunction with the appellant should carry the whole blame. According to the surveyor (a fact that was later proved by the court to be untrue) DOROTHY NTUE had already come back home and she was settled on land parcel LR; MWIMBI/S.MUGUMANGO/2036. Surveyor Justin Kithinji factored the issues of DOROTHY NTUE in his report which was outside his mandate as given by the court order authorizing the subdivisions. To the surveyor therefore the respondent had to move from where she was settled and go to this land LR; MWIMBI/S.MUGUMANGO/2036 which according to the surveyor was meant for the respondent and DOROTHY NTUE. As pointed out supla and compounded by the court's findings DOROTHY NTUE has never come back to her parent's home. She died and was buried at her husband's home. It means therefore that respondent was supposed to be given her two acres where she is settled to date. It is DOROTHY NTUE who was to join the respondent at her place of residence and not the respondent to join DOROTHY NTUE on the portion that DOROTHY NTUE has never occupied until her death. One is bound to read some compromise on the part of surveyor Justin Kithinji. Looking at the proceedings leading to the ruling the court will make a finding and hold that the trial magistrate was right in ordering fresh subdivisions making sure that the respondent is not moved or relocated from where she has called home from time immemorial and seemingly this was the intention of the appellant in collusion with surveyor Justin Kithinji to see to it that the respondent relocates from her prime land to stony, barren and hilly land simply because she is a woman.

There is a running theme in the second ground of appeal that the tribunal and the trial court ordered surveyor Kithinji to put into account the land DOROTHY NTUE had occupied and developed. This theme is fig of imagination on the part of the appellant. The tribunal's award only provided that DOROTHY NTUE would benefit with the two acres awarded to the respondent in the event that she went back home. The trial magistrate on his part did not order that the suit lands be subdivided in a manner that the "portion" occupied by DOROTHY NTUE is factored in the portion given to the respondent. The trial magistrate could not have done this because he had already confirmed that DOROTHY NTUE died and was buried at her husband's home. DOROTHY NTUE has never been in occupation of the suit land save for when she was young and living with her parents where her parents had properties and houses (homestead).

We had a chance of perusing the authority by Justice Lenaola which has been quoted by the appellant in his submissions. This is the case of M'RUKARIA M'MBUI v PRISCILLAH GITONGA MUGAMBI. This authority is not applicable to this case although it is the correct law. The appellant is challenging the trial magistrate's sentiments that the respondent would be the ultimate beneficiary of these two acres. This was not a contradiction of the tribunal's award. This was prompted by the fact that DOROTHY NTUE was now deceased and buried at her husband's home. The two acres were only to be enjoyed by DOROTHY NTUE and the respondent in the event that DOROTHY NTUE divorced and came back home. This eventuality did not happen. That being the case naturally the respondent was the ultimate beneficiary of the two acres. Minus DOROTHY NTUE who else could come in her place? Nobody. If for example a child of DOROTHY NTUE was introduced to the scene this would be against the spirit and wording of the tribunal meaning therefore that ultimately the respondent was the beneficiary. The trial magistrate did not give himself the jurisdiction of the tribunal. In fact he acted to the letter and spirit of the tribunal. Although the authority sited is the law the trial magistrate's findings in this case cannot be faulted for he did not alter or vary the finding or the wording of the tribunal's award. The submissions therefore by the appellant in this regard are wrong and misplaced. The trial magistrate did not vary the elders' award. DOROTHY NTUE having died and buried at her husband's home who else could be brought in? Nobody. Consequently and ultimately the respondent remains the only beneficiary of the two acres.

(c) Ground three your lordship is a repetition of the arguments by the appellant in ground 1 and 2. The appellant stands to suffer no injustice if the respondent is given her two acres and excised so that it includes her homestead. By submitting that he will suffer injustice it only confirms that the sole intention of the appellant is to see that the respondent is removed from her homestead to another part of the land that is hilly, stony and unarable. The appellant is hiding under the guise of DOROTHY NTUE having returned home. This eventuality has never happened. DOROTHY NTUE died and was buried at her husband's home and it is for this reason your lordship that we humbly submit that the ultimate beneficiary of the two acres is the respondent. These rights to enjoy the two acres by the respondent could be curtailed only and only if DOROTHY NTUE divorced and came back to her parent's home. Once more we repeat the respondent according to the tribunal at page 18 of the record of appeal is the ultimate beneficiary of the two acres. The trial magistrate cannot be faulted for observing this position. The appellant cannot take the respondent's land. He is obligated to give the two acres to the respondent. The subdivisions carried out by JUSTIN KITHINJI was unfair and not within the mandate of the court order ordering fresh subdivisions. In particular the subdivisions were supposed to be such that the respondent was not removed from her homestead. Subdivisions should be carried out by an independent person preferably the survey of Kenya who are not partisan and see to it that the respondent gets her two acres encompassing her homestead and her developments and where she has called home from time immemorial. The appellant should not be allowed to relocate her which are his very intentions.

6. In light of the foregoing your lordship we urge the court to dismiss this appeal and uphold the ruling of the trial magistrate dated 9th February 2011. The ruling goes to the heart of justice and fairness in this case. It is out to have the tribunal's award implemented in a transparent, fair and just manner. By dismissing this appeal your lordship the court will have served justice.

7. We rest our submissions and pray.

DATED AT CHUKA THIS.....19TH.....DAY OF.....APRIL,.....2018

DRAWN AND FILED BY

I.C MUGO & CO, FOR THE RESPONDENT

6. The appellant placed reliance on the case of M'Rukaria M'Mbui versus Priscillah Gitonga, Meru High Court Civil Appeal No. 42 of 2002 and highlighted the opinion of Justice Lenaola as he then was which stated: ***"What I am trying to illustrate is that matters falling within S 3(1) of the Land Disputes Tribunal shall be heard by the Tribunals and the Magistrates' Court have no jurisdiction as to the merits or demerits of those matters. To do so would amount to assuming jurisdiction which a court does not have. What a Magistrate's court can do by law is in mandatory terms: It "shall enter judgment in accordance with the decision of the Tribunal".***

7. The respondent annexed the case ***Adelina Gaaji Magiri versus Borana Kiara***. This is the impugned ruling which spawned this appeal. The profferment of this ruling is meant to demonstrate that the plaintiff in her application sought court orders requiring full compliance with the award of the elders and the sentiments of the court that she should not be moved from the portion that she occupied.

8. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions.

9. The case of ***M'Rukaria M'Mbui (appellant) versus Priscillah Gitonga Mugambi (Respondent) (op.cit)*** is a good authority that magistrate's courts do not have any choice but to read the tribunal's judgment without any changes whatsoever. The facts of that case are not congruent to the facts of this case. In this case, the Tribunal's decision was properly pronounced. What the respondent was disputing was its implementation. It goes without saying that once the Tribunal's decision was pronounced, it became a decision of the magistrates court. Judgments and decisions of magistrates courts are implemented by those courts. Issues concerning enforcement cannot be sent back to the Tribunals. I find that the impugned ruling was delivered in the course of the PM's court's implementation processes.

10. I find that by proffering the impugned ruling as an authority, the respondent demonstrates that she was challenging in her application, which spawned the said ruling, the improper manner in which she felt the apposite award was being implemented.

11. I do find that the lower court had visited the locus in quo. This was within its implementation mandate. I do not find anything wrong regarding its findings in this matter. I, therefore, dismiss ground 1 of the appeal. I also do not find anything wrong with the ruling of the lower court to persuade me to allow ground 2 of the appeal. I, therefore, also dismiss this ground.

12. I find that the petitioner has not provided enough evidence to support the claim that the Learned Principal Magistrate's ruling was against the evidence and submissions placed before him. I, therefore, dismiss ground 3 of the Appeal.

13. In the circumstances, I dismiss this appeal.

14. This Civil appeal was filed in the year 2011, seven years ago. Chuka Principal Magistrate's LTD No. 52 of 2005, has remained uncompleted for the last 13 years. As Article 159 2(b) states: "Justice shall not be delayed". I opine that in this matter justice has been delayed for a veritably inordinate period of time. I find it necessary to invoke the provisions of orders 42, rule 25 and order 42, rule 32 of the Civil Procedure Rules in order to bring this matter to its merited conclusion.

15. Order 42, rule 25 of the Civil Procedure Rules states:

> ***"where the evidence upon the record is sufficient to enable the court to which the appeal is preferred to pronounce judgment, the court to which the appeal is preferred may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than on which the court to which the appeal is preferred proceeds".***

16. Order 42, Rule 32 states as follows:

> ***"The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross appeal".***

17. On **19th February, 2018**, this court allowed Bilista Kambura Miriti to be enjoined in the suit as a respondent as she is the legal representative of the estate of Adelina Gaaji Magiri (deceased), the original respondent in this appeal. This new status is noted. However, this court will order the suit land to b registered in the name of Adelina Gaji Magiri 9deceased). The family of the deceased Adelina Gaji Magiri will pursue other issues apposite to her appeal in succession proceedings.

18. To bring the issues in this appeal to their deserved conclusion, and since there is no dispute that the respondent is entitled to 2 acres out of LR. NO. Muthambi/S. Mugirango/459, since her sister Ntue is now deceased, and therefore cannot return to the suit land, IT IS ORDERED, as follows

a) 2 acres of land be excised from L.R. No. Mwimbi/S. Mugumango/495, and be marked by way of beacons and be registered in the name of the respondent Adelina Gaji Magiri, (deceased), within 6 months of this judgment.

b) The apposite survey be done by a government surveyor, and the 2 acres to include the area where the respondent has developed and also has her homestead.

c) With the implementation of the orders issued herein, it is clarified that the dispute in the lower court is deemed to have been brought to an end EXCEPT for any issues relating to the implementation of this court's judgment delivered today which strict implementation shall remain the province of the lower court and all apposite documents shall be executed by the Deputy Registrar.

19. As the parties are close relatives and to promote family harmony, I exercise my judicial discretion and order that parties bear their own costs.

20. For clarity purposes, this appeal is dismissed.

21. Orders accordingly.

Delivered in open court at Chuka this 11th day of December, 2018 in the presence of:

CA: Ndegwa

Bilista Kabura Miriti – Appellant

Borana Kiara - Respondent

P.M. NJOROGE

JUDGE