



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC PETITION NO 24 OF 2017

IN THE MATTER OF: ARTICLES 19, 22, 23, 40, 47, 50, 64, 162 (2)(b) AND 165(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT AND LAND COURT, 2011 SECTIONS 24, 25, AND 26 OF THE LAND REGISTRATION ACT, 2012 SECTIONS 3 AND 4 OF THE FAIR ADMINISTRATIVE ACT, 2015 AND THE REPEALED LAND DISPUTES TRIBUNAL ACT, 1990.

AND

IN THE ALLEGED CONTRAVENTION OF THE RIGHT TO PROPERTY OVER TITLES No. NYANDARUA/KARAGOINI BLOCK 1/56 AND 705

BETWEEN

JOHN MWANGI KANYI.....1st PETITIONER

JOHN KING'ORI KANYI.....2nd PETITIONER

LABAN NDUATI MACHARIA.....3rd PETITIONER

VERSUS

MARY WANGUI WAITATHU.....1st RESPONDENT

LAND REGISTRAR, NYANDARUA.....2nd RESPONDENT

HON ATTORNEY GENERAL.....3rd RESPONDENT

JUDGEMENT

1. On the 11th July 2017, the Petitioners filed their Petition dated the same date seeking for the following orders;

- i. A Declaration that the ruling of the 2nd Respondent dated the 22nd October 2015 and subsequent excision of two (2) acres out of the Petitioner's Titles No. Nyandarua/Karagoini Block 1/56, and 705 is unconstitutional, null and void.
- ii. An order directing the Respondents to restore the illegally excised portion back to the Petitioners failing which the Petitioners be authorized to do so at the Respondent's cost.
- iii. A conservatory order do issue to preserve the status quo prevailing prior to 27th June 2017 until the suit is heard and determined.
- iv. Cost of the suit plus interest at court's rate.
- v. Any other or better relief deemed fit to grant by the honorable court.

2. Alongside the said Petition, the Petitioners filed an application dated the 11th July 2018 seeking conservatory orders pending the hearing of the application inter parties. Before any directions with regard to either the Notice of Motion or Petition could be made, the 1st Respondent

filed a Notice of Preliminary Objection dated 29th September 2017, objecting to the hearing of the Petitioner's Notice of Motion Application, as well as the Petition, on the grounds that;

- i. Matters raised in the Petition dated 11th July 2017 are res judicata
- ii. That the Petition dated 11th July 2017 is otherwise an abuse of the court process
- iii. That both the Petitions dated 11th July 2017 and Application dated 11th July 2017 should be struck out with costs to the 1st Respondent.

3. The court found that the Preliminary Objection dated 29th September 2017 raised the issue of res judicata which in effect sought to dispose of both the Petition and application dated the 11th July 2017. It was to this effect that the court directed that the Preliminary Objection be disposed of first by way of written submissions. Wherein upon compliance a ruling was delivered on the 8th February 2018 dismissing the said Preliminary Objection with cost to the Petitioner. Upon delivery of the said ruling, Counsel for the Petitioner sought to have their application dated the 11th July 2017 marked as withdrawn which application was allowed and parties ordered to maintain the status quo pending the hearing and determination of the Petition.

4. The 2nd and 3rd Respondents did not file their response to the Petition.

5. By consent, parties sought to dispose of the Petition by way of written submissions. wherein the Petitioner filed their submissions on the 23rd April 2018, the Hon the Attorney General on behalf of the 2nd and 3rd Respondents filed their submissions on the 24th May 2018 while the 1st Respondent filed her submissions on the 29th August 2018 with the Petitioner filed their response to the 1st Respondent's submission on the 4th September 2018.

The Petitioner's case.

6. The Petitioners' case is set out in the Petition and grounds thereof dated the 11th July 2017, as well as the supporting affidavit of John King'ori Kanyi, the 2nd Petitioner herein, sworn on the 11th July 2017.

7. The Petition is based on the infringement of the Petitioners' right within Article Articles 10, 19(2), 20(1)(2)(3) and (4), 21(1), 22, 23, 40, 47(1), & (2), 50 & 165(3)(b)(iii) of the Constitution.

8. The 1st and 2nd Petitioners who are siblings herein, are the registered proprietors of parcels of land No. Nyandarua/Karagoini Block 1/56, land which was originally owned by their father the deceased Kanyi Waithaka pursuant to his membership in Nyahururu Farmers' Co-operative Society Ltd.

9. The 3rd Petitioner on the other hand is the son to the late Ephraim Macharia Nduati who was the proprietor of land parcel No. Nyandarua/Karagoini Block 1/55. That he was registered as the proprietor of land parcel No. Nyandarua/Karagoini Block /705, which was a sub division of his father's land, on the 26th June 1996 which land borders the 1st Respondent's parcel of land No. Nyandarua/Karagoini Block 1/57.

10. The Petitioners' joint petition is to the effect that by virtue of titles issued to them under the repealed Registered Land Act, which vested in them all privileges and appurtenances incapable of being defeated except as provided for in the Act.

11. That in the year 2009 the 1st Respondent filed a claim vide Ndaragwa Land Disputes Tribunal Case No. NDA /17/2009 against Ephraim Macharia Nduati and Kanyi Wathatha (deceased) in regard to parcels No. Nyandarua/Karagoini Block 1/56, 55 and 57.

12. That after deliberation on the matter, the decision of the tribunal was that the two, Ephraim Macharia Nduati and Kanyi Wathatha (both deceased) were entitled to 8¹/₂ acres and 8 acres respectively, of land previously owned by Nyahururu Farmers' Co-operative society Ltd in which they were shareholders.

13. It was further passed that the District land Registrar and District surveyor to visit the site to establish the correct boundaries and right acreages as per entitlement of the claimant and the defendants so that they could be issued with their respective documents.

14. On the 30th March 2010, the tribunal's ward was adopted as the judgment of the court in Nyahururu PMC Land Dispute Case No. 6 of 2010 long after the demise of their father.

15. That on the 19th June 2017 the Petitioners received a letter from the 2nd Respondent that he would visit the suit land among others on the 27th June 2017 to implement his ruling which was undisclosed.

16. On the 27th June 2017, the 2nd Respondent, in the company of the district surveyor, Nyandarua North, visited the suit land wherein they excised one (1) acre each from land parcels No. Nyandarua/Karagoini Block 1/56 and Nyandarua/Karagoini Block 705 respectively and added the same to Title No. Nyandarua/Karagoini Block 1/57 belonging to the 1st Respondent thereby reducing the Petitioners' acreages and creating new boundaries.

17. That the Petitioners subsequently obtained a record of a copy of the 2nd Respondent's ruling dated the 22nd October 2013 which was addressed to the Principal Magistrate, Nyahururu Law Court but which letter was not copied to the Petitioners hence they were not notified of the proceedings and ruling by the 2nd Respondent (sic) affecting their land.

18. The Petitioners' claim is that the Principal Magistrate's Ruling clearly contradicted the award of the Ndaragwa Land Disputes Tribunal and the decree arising therefrom.

19. That the 2nd Respondent had no jurisdiction to re-hear the case and make a different finding from that of the tribunal.

20. That further, the excision of 2 acres out of their respective parcels of land and addition thereto the land owned by the 1st Respondent amounted to compulsory acquisition of land without compensation.

21. That further, them having not be supplied with adequate notice of the 2nd Respondent's ruling, they were denied an opportunity of challenging the same on appeal thereby leading to them being condemned unheard.

22. The Petitioner considered the issues raised in the 1st Respondent's affidavit filed on the 29th September 2017 wherein they framed their issues for determination as:

i. Whether the Ruling of the 2nd Respondent dated the 22nd October 2015 and the subsequent excision of the two acres out of the Petitioners' titles No. Nyandarua/Karagoini Block 1/56 and Nyandarua/Karagoini Block 705 was unconstitutional, null and void.

ii. Whether an order should be issued directing the Respondents to restore the illegally acquired portion back to the Petitioners failing which the Petitioners be authorized to do so at the Respondents' cost.

iii. Whether the instant Petition is properly before court and if so, whether the Petitioners are entitled to the reliefs claimed.

23. On the first issue, the Petitioners' submission was that the petition is founded on Articles 10, 19(2), 20(1)(2)(3) and (4), 21(1), 22, 23, 40, 47(1), & (2), 50 & 165(3)(b)(iii) of the Constitution.

24. That the genesis of the Petition was the ruling of the 2nd Respondent herein which was compiled pursuant to the court order made by the Principal Magistrate, Nyahururu Court wherein the 2nd Respondent proceeded to add onto the ruling the following phrase

“that the plots No 55 and 56 have each got one acre more above the 7 acres recommended that each member was to get from the Company...that since there was no evidence of the owners have (sic) bought extra above the 7 recommended by the Company, the excess of the one acre each from plot No.55 and 56 making a total of 2 acres be added to plot No. 57 to make a total of 7 acres to plot No.57”

25. The Petitioners contention was that the 2nd Respondent had no jurisdiction to re-hear the matter and to change the findings of the Land Disputes Tribunal which had already been adopted by the Principal Magistrate's Court as a judgment. In so submitting, they relied on the decided cases of:

i. Zedekia M. Mwale vs Bikeke Farm Directors & Another Civil Appeal No. 25 of 1998 at Kitale-unreported and

ii. Naomi Muthoni Muniu vs Attorney General & 4 Others [2014] eKLR

iii. Republic vs National and Commission and Anotehr exparte Cecilia Chepkoech Leting and 2 Others [2018] eKLR

iv. Samwel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR

26. That by the excision of two acres of land from the Petitioners' respective parcels of land and adding the same to the 1st Respondent's land, the 2nd Respondent acted in contravention of the provisions of Article 40(3) of the Constitution without affording any compensation. The said action was not only null and void but also offended the right to fair administrative action enshrined under Article 47 of the Constitution. To support their submission, the Petitioners relied on the decided case of **Multiple Haulers East Africa Ltd vs Attorney General & 10 Others [2013] eKLR** and the case of **Evelyn College of Design Ltd vs Director of Children's Department & Another [2013] eKLR**

27. That the award of the tribunal and the resultant decree were meant to be implemented as per the tribunal's findings without any alterations. The 2nd Respondent had no jurisdiction to sit on appeal against the Tribunal's decision.

28. That the court decree did not empower the 2nd Respondent to do what the Land Disputes Tribunal Act did not contemplate. He was not acting under the Land Registration Act while implementing the court decree.

29. While relying on the case of **M'ikiara M'rinkanya and Another vs Gilbert Kabere M'Mbijiwe [2007] eKLR**, the Petitioner's further submission was that the issues raised in their Petition was not an abuse of the court process and that the same could not be raised in the Nyahururu Land Dispute Case No 6 of 2010 as the provision of Section 34 of the Civil Procedure Act only dealt with procedural and not

substantive matters, hence the said provision of the law was not applicable in the present circumstance where constitutional issues had been raised.

30. It was the Petitioners' submission that the present matter was based on the issue as whether the 2nd Respondent's ruling of excising 2 acres of land from the petitioners' land was unconstitutional or within his jurisdiction, which was an issue that could not be decided in the subordinate court as is stipulated under article 162(1)(b) of the Constitution as read with Sections 13(5) and (7) of the Environment and Land Court Act, 2011.

31. That the Respondent had raised the same issue in their Preliminary objection, which Objection was dismissed by the court. The petitioners prayed for their reliefs to be granted.

The 1st Respondent's Case

32. The 1st Respondent's submission was to the effect that the Petitioners' Petition was to impugn the ruling of the 2nd Respondent dated the 22nd October 2015 and his subsequent visit in the company of the district surveyor, Nyandarua North, on the 27th June 2017 to the suit land wherein he had excised of two (2) acres from the suit land and added the same to Title No. Nyandarua/Karagoini Block 1/57 belonging to the 1st Respondent.

33. Their response was that that the 2nd Respondent had been given the said powers by the court so as to solve the dispute between the parties once and for all. That since the 2nd Respondent's actions were carried out pursuant to the court order and in execution of a valid order (decree) of the court, the present Petition was an abuse of the court process.

34. The 1st Respondent, like the Petitioner framed their issues for determination as follows:

i. Whether the Petition date the 11th July 2017 was an abuse of the court process.

ii. Whether the impugned ruling of the 2nd Respondent dated the 22nd October 2015 and the impugned acts of the 2nd Respondent of visiting the suit land in the company of the District surveyor, Nyandarua North, on the 27th June 2017 and excising a total of two (2) acres and adding the same to Title No. Nyandarua/Karagoini Block 1/57 belonging to the 1st Respondent thereby reducing the Petitioners' acreages and creating new boundaries violated the Petitioners constitutional rights under Articles 40, 47, and 50 of the Constitution of Kenya 2010.

35. The 1st Respondent's submission was that since it was not in dispute that an award, Judgment and decree had been passed in the Nyahururu PMC Land dispute No.6 of 2010, the 2nd Respondent as well as the District land Surveyor had been mandated, authorized and empowered to visit the disputed suit lands being No. Nyandarua/Karagoini Block 1/55, 56 and 57 establish the correct boundaries and the right acreage as per the entitlement of the claimant and the defendant so that the parties could get the correct documents. The Petitioner could therefore not challenge actions of the 2nd Respondent which were pursuant to the enforcement, implementation and execution of a decree of the Nyahururu PMC Land dispute No.6 of 2010. In so submitting, they relied on the provisions of section 34 of the Civil Procedure Act.

36. That based on the decision in the case of **Joseph Mwangi Theuri & 37 others vs David Gitinga Githinji (Nakuru ELC No. 238 of 2014)**, it was not open for the Petitioners to challenge the acts of the 2nd Respondent and the District Surveyor-North, done pursuant to and in execution of the decree in the said Nyahururu PMC Land dispute No.6 of 2010 through a separate suit or legal proceedings and especially through the instant Constitutional Petition.

37. That the Petitioners had alleged violation of their Constitutional rights under the provisions of Articles 40, 47, and 50 of the Constitution. That from the Tribunal Proceedings in Tribunal case No. NDA/17/2009, herein annexed in the 1st Respondent's replying affidavit as MWW 4(b), it is clear the 2nd Petitioner who was a son to the Deceased Kanyi Wathatha, who was the proprietor of parcel of land No. Nyandarua/Karagoini Block 1/56, was present at the said hearing wherein he actively participated and testified as a representative of his deceased father.

38. That the 3rd Petitioner herein being the registered proprietor of land parcel No. Nyandarua/Karagoini Block 1/705, a subdivision of Nyandarua/Karagoini Block 1/55 which was originally owned by his father also attended the Tribunal proceedings and participated in the same effectively.

39. That having established that the Petitioners were aware of the proceedings in the Land tribunal, they never challenged the proceedings, award, judgment and decree adopted in the Nyahururu PMC Land dispute No.6 of 2010.

40. That on the 2nd October 2014, the Petitioners were present when the 2nd Respondent and the surveyor visited the suit land and made their report dated the 22nd October 2015 and 22nd November 2015 respectively, which reports were subsequently implemented on the 27th June 2017 when the 2nd Respondent and the surveyor visited the suit land again to pick the original and correct boundaries, wherein they placed beacons thereon as mandated by the court.

41. That there had been no requirements that or directions in the decree passed by the court in Nyahururu PMC Land dispute No.6 of 2010 that mandated the 2nd Respondent to file his report during execution since the said decree was a final decree that needed not further interrogation.

42. That the Land Disputes Tribunal had made a finding that each fully paid up member of Nyahururu Co-operative Society Ltd was entitled to Seven (7) acres from the land owned by the society. That the 1st Respondent's deceased husband was a fully paid up member of the said society and that while his Title deed read 1.097 hectares, on the ground the acreage was approximately 5 acres.

43. A visit on the ground by the 2nd Respondent and the district surveyor established that the 1st Petitioner's parcel of land measured 8 acres while the 3rd Petitioner's parcel of land comprising of parcels No. 705, 706, 707, and 708 all combined measured 8.1 acres.

44. That it was only the 1st Respondent's parcel of land that measured less than the other disputed plots which were held by the Petitioners herein, yet all parties were fully paid up members of the Nyahururu Co-operative Society Ltd.

45. That the decision of the 2nd Respondent in implementing the decree in Nyahururu PMC Land dispute No.6 of 2010 so as to ensure that all parcels of land in dispute measured 7 acres each, was the most reasonable, fair and just thing to do in the circumstance.

46. That the acts complained of by the Petitioner were done by both the 2nd Respondent and the District surveyor who was not party to the proceeding hence the relief sought cannot be granted to the Petitioners.

47. The 1st Respondent prayed that the Petition dated the 11th July 2017 was an abuse of the court process, had no merit and ought to be dismissed with costs.

The 2nd and 3rd Respondent's case

48. The 2nd and 3rd Respondent's response to the petition was short and brief. In effect, it raised grounds of objection to the effect that the Petition herein had not met the threshold set out in the case of **Anarita Karimi Njeru vs The Republic (196-1980) KLR 1272** where the court held that where a person alleged a constitutional violation and infringement and brings a claim to court, it was important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

49. That the Petitioners had alleged that the impugned ruling had infringed their constitutional rights pursuant to articles 50, and 47 of the Constitution yet it was not clear which of the ruling it was, whether the ruling of the Land Disputes Tribunal dated the 14th February 2010(JKK3), the order of the court dated the 31st March 2010(JKK4) or the letter written by the District Land Registrar to the Principal Magistrate on the 22nd October 2015(JKK8)

50. That further the said allegations under Articles 47 and 50 of the Constitution had not been set out in precision as to who how the violation had occurred.

51. The second issue that the Respondent pointed out was whether the Learned Magistrate erred in adopting the ruling of the Land Disputes Tribunal. It was the Respondent's submission that the court in the order did not omit or add anything to the judgment. It merely adopted it as it was. That the provisions under section 7(2) of the Land Dispute Tribunal Act provided:

The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure.

52. To this effect therefore the Learned Magistrate acted within the Law and its decree was lawful.

53. That the letter herein marked as JKK8 dated the 22nd October 2015, written to the Principal Magistrate was not a decree or an order of the court owing to its characteristics as a letter.

54. That the Petitioners did not exhaust all avenues necessary to file their Appeal including applications to file an appeal out of time. That in the circumstance, the petition did not meet the evidentiary threshold to warrant issuance of orders so sought to which, the Petition ought to be dismissed with costs to the Respondents.

Analyses and Determination.

55. I have carefully considered the content of the Petitioner's Petition as well as the supporting affidavit. I have also considered the Respondents' replying affidavits and the submissions of Counsel as well as the relevant provisions of the law and Authorities herein cited. I find the issues arising for determination are as follows:-

- i. Whether the Petition discloses a legal interest capable of protection under the law.
- ii. Whether any of the Petitioners' Constitutional rights had been infringed.
- iii. Whether the Petitioner is entitled to the orders sought in the Petition?

56. On the first issue for determination, the Petitioners must establish this, not only clearly identifying the relevant and specific Articles of the Constitution but availing evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petitions as set out in the case of **Anarita Karimi Njeru vs The Republic (196-1980) KLR 1272** where it was held, in the

words of the Justices Trevelyan and Hancox that ;

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

57. From the above captioned Petition, the Petitioners have alleged, by setting out with a reasonable degree of precision that their Constitutional rights envisaged under Articles 40, 47 and 50 of the constitution had been violated by the 2nd Respondent herein. For ease of reference, I shall set out the said provisions of the law as;

58. Article 40 of the Constitution provides a follows:-

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

59. Article 47 of the Constitution provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair

60. Article 50 (1) of the Constitution provides that:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

61. From the pleadings and documents filed in this suit, it is clear that the Petitioner is challenging the Principal Magistrate's Ruling and

decree arising therefrom for contradicting the award of the Ndaragwa Land Disputes Tribunal.

62. The Petitioners have also taken issue with the 2nd Respondent's action which they stated amounted to re-hearing of the case and making a different finding from that of the Tribunal, without jurisdiction.

63. That following the action of the 2nd Respondent and the district surveyor, there was the excision of 2 acres out of their respective parcels of land which land was added to the land owned by the 1st Respondent, an action which amounted to compulsory acquisition of land without compensation.

64. Further that the 2nd Respondents' ruling was delivered and acted upon without Notice thereby denying them an opportunity of challenging the same on appeal hence being condemned unheard.

65. All these actions amounted to the deprivation of their Constitutional rights as enshrined under Articles 40, 47, and 50 of the Constitution.

66. The root of the titles of the parcels of the suit land in question, being No. Nyandarua/Karagoini Block 1/55, No. Nyandarua/Karagoini Block 1/56 and No. Nyandarua/Karagoini Block 1/57 as well as the issuance of an award in the Ndaragwa Land Disputes Tribunal, case No. NDA/17/2009 not being in dispute, I shall look at the particulars of the said award and its repercussions thereafter, which is the subject in dispute herein.

67. On the 4th February 2010, the Ndaragwa Land Disputes Tribunal, in case No. NDA/17/2009 passed its award in the following terms:

'The Tribunal having observed the above came to the conclusion that the District Land registrar and the District Surveyor should visit the site and establish the correct boundaries and the right acreage as per the entitlement of the claimant and the defendants so that they can get the correct documents''.

68. That this award was adopted by the subordinate court in Nyahuruu PMC Land Dispute Case No. 6 of 2010 on 31st March 2010 as the judgment of the court wherein vide its decree, the court had stated as follows;

'That the District Land registrar and the District Surveyor do visit the disputed parcels of Land being NYA/KARAGOINI Block 1/55, 56 and 57 and solve the dispute once and for all.'

69. This was pursuant to the provisions of Section 7 (1) of the repealed Land Disputes Tribunal Act which states as follows;

(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.

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

70. This matter thus came to an end because the role of the Magistrate was restricted to reading and adopting the award.

71. From the proceedings and submissions herein, no appeal appears to have been filed against that award and in terms of provisions of Section 8 (1) of the repealed Land Disputes Tribunal Act which provides as follows:

'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.'

72. Pursuant to the adoption of the award and issuance of the decree herein the District Land Registrar and the District Surveyor did visit the suit land herein wherein vide a letter dated the 22nd October 2015, filed their report in court which was to the effect that:

The ground of plot No. 57 is approximately 5.1 acres

The ground area of Plot No. 56 is approximately 8 acres

The ground acreage of Plot No. 705, 706, 707 and 708 combined is approximately 8.1. This is the total acreage of Plot No. 55 on the ground

It is clear from the above that plot No. 55 and 56 have each got one acre more above the 7 acres recommended that each member was to get from the Company. I recommend that since there was no evidence of the owners have (sic) bought extra acres above the 7 recommended by the Company, the excess of the one acre each from plot No.55 and 56 making a total of 2 acres be added to plot No. 57 to make a total of 7 acres to plot No.57.

The three plots 55, 56, and 57 should have seven acres each''

73. Up to this point, I am in agreement with Respondents that both the District Land Registrar and the District Surveyor had acted pursuant to the court order and in execution of a valid order (decree) of the court. The report which was received by the court, thus formed the basis of the award.

74. Having found that the 2nd Respondent herein and District Surveyor acted pursuant to a valid court decree, the next issue was whether their finding and execution therefore infringed on the Petitioners' rights.

75. Suffice to say that the finding of the 2nd Respondent as stipulated in his report dated the 25th October 2015 constituted a decision that was independent of the award. To this effect thereof the court finds that the same having not been part of the award and subsequent decree and further, the same having introduced new issues as it did, which new issues aggrieved the Petitioners', their avenue of addressing their grievance was through the filing of a separate suit, and not through an appeal to the Provincial land disputes Tribunal or the court executing the decree. I find that the Petition is therefore proper before this court and the provisions of Section 34 of the Civil Procedure Act are inapplicable in the circumstance.

76. The 2nd Respondent's report dated the 22nd October 2010 was made pursuant to the provisions of Section 21 of the Registered Land Act (Now Repealed) which proviso provide as follows:

(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

77. Pursuant to the above provisions, and the 2nd Respondent having powers to determine boundary issues, once the report was made, and pursuant to the provision in sub-rule (4) of the Act, the court could entertain an action or other proceedings relating to a dispute as to the boundaries of the land because the boundaries had been determined.

78. The next issue for this court to determine is whether the Petitioners herein were parties to the 2nd Respondent's determination and whether the said determination fair and just.

79. From the submissions herein, and from the report dated the 22nd October 2015, I find that when the 2nd Respondent and the District surveyor visited the suit land on the 2nd October 2014, pursuant to the decree of the Nyahururu PMC Land Dispute No. 6 of 2010, both parties herein being the 2nd and 3rd Petitioners as well as the 1st Respondent, were present where all agreement, they all stated that the suit parcels of land were issued to members of the Nyahururu Farmers' Co-operative Society Ltd where each fully paid up member was entitled to 7 acres of land.

80. The 2nd Respondent in his report found as follows:

'It is clear from the above that plot No. 55 and 56 have each got one acre more above the 7 acres recommended that each member was to get from the Company. I recommend that since there was no evidence of the owners have (sic) bought extra acres above the 7 recommended by the Company, the excess of the one acre each from plot No.55 and 56 making a total of 2 acres be added to plot No. 57 to make a total of 7 acres to plot No.57.

The three plots 55, 56, and 57 should have seven acres each''

81. I therefore find that the decision of the 2nd Respondent to implement the decree in the Nyahururu PMC Land Dispute No.6 of 2010 in such a manner that each of the parcels of land in the dispute measured 7 acres was reasonable fair and just in the circumstance.

82. The excision of two acres of land from the Petitioners' respective parcels of land and adding the same to the 1st Respondent's land, was therefore not done in contravention of the provisions of Article 40(3) of the Constitution and neither did it offend the right to fair administrative action enshrined under Article 47 of the Constitution as against the Petitioners herein.

83. Having found as herein above, I find that the Petitioners' Petition herein lacks merit and the same is dismissed with costs to the Respondents.

Dated and delivered at Nyahururu this 4th day of April 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE