REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 252 of 1996

THE COMMISSIONER OF LANDS
THE MINISTER FOR LANDS AND SETTLEMENT.....
.....APPELLANTS

VERSUS

COASTAL ACQUACULTURE LIMITED…….....
.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Justice Ringera) dated 21st March, 1996

IN

MOMBASA H.C.MISC. APPLI. NO. 55 OF 1994

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JUDGMENT OF AKIWUMI, J.A.

This appeal is from the judgment of Ringera, J. in which, he granted an order prohibiting the Commissioner of Lands from continuing with an inquiry into compensation to be paid in respect of land acquired under the Land Acquisition Act.

The background to all this is as follows. In 1993, the Commissioner of Lands whom I shall henceforth, refer to as "the Commissioner", caused to be published Gazette Notice No. 3590 dated 22nd July, 1993, under the heading "Intention to Acquire Land", that in pursuance of section 6(2) of the Land Acquisition Act which I shall henceforth, refer to as "the Act", he was giving notice that the Government intended to

acquire land which belonged to Coastal Acquaculture Ltd., the respondent herein, "for Tana River Delta Wetlands". The Commissioner also caused to be published another Gazette Notice No. 3591 of the same date, giving notice of the date when an inquiry would be held to hear claims to compensation by those affected by the acquisition of the same land, which was the respondent. But before the inquiry could begin, the respondent through its advocate, Mr. Ghalia, in his letter of 30th July, 1993, to the Commissioner, and copied to the Attorney General, charged that not only, was Gazette Notice No. 3591 defective because the date stated therein, for the hearing of the inquiry did not comply with section 9 (1) of the act, but also, that Gazette Notice No. 3590 giving notice of the intention to complusorily acquire the respondent's land, was, having regard to section 6(1) of the Act, defective in that it did not state either the public body for which the acquisition was being made, or the public purpose to be served by the acquision. Mr. Ghalia therefore, requested the Commisioner to publish fresh Gazette Notices which satisfied the provisions of the Act. The Commissioner, however, merely published a CORRIGENDUM Gazette Notice No. 3982 dated 9th August, 1993, giving a new date for the hearing of the inquiry. The Commissioner did nothing about the complaint made that Gazette Notice No. 3590 was defective. He did not even reply to Mr. Ghalia's letter of 30th July, 1993. On 12th, 18th and 30th August, 1993, Mr. Ghalia wrote to the Commissioner with copies to the Attorney General, inter alia, complaining about the illegality of the first two notices. In the last two letters, he threatened to sue if fresh notices which complied with the Act, were not gazetted. The Commissioner, as was now beginning to be his custom, did not only, ignore these letters but would also, not condescend to reply to them. Not surprisingly, Mr. Ghalia applied to the High Court in Mombasa for leave to apply for an order of prohibition to restrain the Commissioner from commencing and or continuing with the inquiry into claims to compensation under the Act as notified in the three Gazette Notices, inter alia, on the ground that the Gazette Notices Nos. 3590, 3591 and 3982 above mentioned, were defective as they failed to set out the public body for which the respondent's land was being compulsorily acquired and the public purpose for which the acquisition was intended.

Good sense seems at last, to have prevailed, for by a consent letter dated 22nd September, 1993, signed by Mr. Ghalia for the respondent and by the then Deputy Chief Litigation Counsel of the Attorney General's Chambers for the Commissioner, and addressed to the Registrar of the High Court in Mombasa, and filed in that court on 23rd September, 1993, it was agreed that the intended inquiry be discontinued forthwith; that the Commissioner regazette the compulsory acquisition notices by "fresh valid Legal Notices issued and served in accordance with law", and which can only mean that at least, the Commissioner had conceded that the attacks on the legal validity of the Gazette Notices Nos. 3590, 3591 and 3982 were valid; and this also speaks volumes, that the Commissioner should pay to the respondent She. 5,000/= by way of costs. A question which I would like to pose at this stage, is whether if Gazette Notices under section 6 are valid, an inquiry thereunder, can be discontinued or whether this can only be done where the Notices are invalid? Section 23(1) of the Act, empowers the Minister at any time before possession is taken of any land compulsorily "acquired under this Act", to revoke his direction to the Commissioner to acquire the land. But apart from this, I see nothing in the Act whereby, an inquiry which can only be as to claims to compensation, can be prematurely brought to an end, except where it is for instance, based on an invalid notice. It is, however, important to note now that section 23(1) of the Act also illustrates that acquisition takes place upon the Minister's direction to the Commissioner and no further prescribed steps for this purpose are laid down to be taken by the Commissioner. In other words, acquisition takes place upon the Commissioner receiving the Minister's directions to acquire. I shall refer to this again later in this judgment.

However, it seems that good sense did not prevail for long, for some forty three days after the filling of the consent letter, the Commissioner caused to be published in a SPECIAL ISSUE of the official Gazette, Gazette Notices Nos. 5689 and 5690. The first one which was headed "INTENTION TO ACQUIRE LAND", was exactly, word for word as that of Gazette Notice No. 3590 dated 22nd July, 1993. It simply again stated that the Commissioner IN PURSUANCE of section 6(2) of the Land Acquisition Act, was giving notice that the Government intended to acquire the respondent's land "for Tana River Delta Wetlands". The inquiry then began, according to the record of proceedings made by one J.B.K. Mwaniki, Chief Valuer of the Ministry of Lands and Settlement, who appeared to head a team of four Valuers, and who described himself in that record as Chairman of the Inquiry, on 30th December, 1993.

According to the record of proceedings, Mr. Mwaniki first explained to Mr. Ghalia that the respondent's land was being acquired in accordance with section 6 of the Act. The first sign of trouble then surfaced after Mr. Mwaniki had refused to allow the proceedings to be tape recorded. The relevant parts of the record of proceedings are as follows:

"Mr. Ghalia

Raised a preliminary matter which he claimed to be important (underlining supplied). Was the Commissioner of Lands to undertake the Inquiry?

I showed Mr. Ghalia and his clients the two letters from the Hon. Minister.

One directing the Commissioner of Lands to acquire the land.

The other authorizing the four valuers to conduct the Inquiry.".

So far so good, for under section 6(1) of the Act, the Minister after certifying to the Commissioner that a given land is required for the purpose of a public body and that it is for the public good and was for those reasons justified, may then in writing direct the Commissioner to acquire the land compulsorily. Secondly, although sub-sections (3) to (5) of section 9 of the Act clearly vest in the Commissioner the power to hold an Inquiry, the word "Commissioner" is so defined under section 2 of the Act to include "any person authorized by the Minister in writing in any particular case to exercise the powers conferred on the Commissioner by this Act". Since the written authority of the Minister was not made part of the record of proceedings of the Inquiry or produced in the proceedings in the superior court, one may not assume particularly, because of further excerpts from the record of proceedings of the Inquiry which appear hereinafter, that it was in order so that Mr. Mwaniki and the three other valuers can be said to have been properly authorized by the Minister to exercise the powers of the Commissioner in holding the Inquiry. Apart from the fact that appointing four persons to hold such an Inquiry would present its own problems, the one that immediately arose was whether Mr. Mwaniki had been authorized by the Minister not merely to be a member of the team to carry out the Inquiry, but whether he had been authorized by the Minister to be the Chairman of the Inquiry.

The following excerpts from Mr. Mwaniki's very own record of proceedings illustrate the dilemma that he found himself, in concerning his assumed role as Chairman of the Inquiry and indeed, concerning the basic question of who was undertaking the Inquiry, after Mr. Ghalia had raised his preliminary point already referred to:

"At this point I advised Mr. Ghalia that the Commissioner of Lands was chairing and conducting the Inquiry.(underlining supplied)

Mr. Ghalia was satisfied with the Hon. Minister's Letters.

Mr. Ghalia asked if the Attorney General was going to be represented.

I informed Mr. Ghalia the Commissioner of Lands was chairing the Inquiry(underlining supplied) and NOT the Attorney General. Mr. Ghalia gave the impression that he had been talking to Attorney General.

At this point the Chairman was called by the Commissioner of Lands.

When the Chairman resumed he informed those assembled that there were new developments. I informed Mr. Ghalia that the Attorney General had instructed that the Inquiry be adjourned to a later date. (underlining supplied) Reasons - Mr. Ole Keiwua who was to attend was due to unforeseen official duties engaged elsewhere.

Mr. Ghalia insisted to know if the Inquiry was being adjourned because of the Attorney General's absence.

I informed him that since the Attorney General has instructed we adjourn, we have to." (underlinging supplied).

From Mr. Mwaniki's own lips as it were, which is the only cogent evidence on the issue, it is clear and undisputed that he was not the Chairman of the Inquiry even though he described himself as such. And if as Mr. Mwaniki stated, that "the Commissioner of Lands was chairing and conducting the Inquiry", then again, on the face of the record, Mr. Mwaniki has shown that he himself, and for that matter, his other three valuer colleagues, had no jurisdiction to begin and to hear the Inquiry as they did and that what they did was null and void. And for that matter, it does not matter that Mr. Ghalia had said that he was satisfied with the Minister's letter which was not, and has not, been produced. It is only when the Commissioner is not carrying out the Inquiry himself, that others may be appointed by the Minister to do so. Mr. Mwaniki himself, has set at naught the Minister's authority if that it what it was intended to be, and he and his team of valuers should not have started and gone on with the Inquiry.

The foregoing excepts from Mr. Mwaniki's record of proceedings also show the lack of control that Mr. Mwaniki had over the proceedings. He was taking instructions which he should not have, if he were really the Chairman of the Inquiry, from the Commissioner and from the Attorney General. Any way, the Inquiry which had no basis for the reasons I have already given, went on for some four days, on 30th December, 1993, 28th February, 1994, 1st March, 1994 and 3rd March, 1994. On the last day, Mr. Mwaniki was served with ex parte orders obtained by the respondent granting leave to prohibit by way of judicial review, the continuation of the Inquiry and an interim stay of the proceedings of the Inquiry. As already noted, the questioning of the validity of the Inquiry occurred at its inception. It is also true that Mr. Mwaniki was served with the ex parte orders after the Inquiry had been on for some days, but that makes no difference to the validity of Inquiry if it was invalid right from the beginning. In other words, the respondent's continued participation for four days in the Inquiry even after Mr. Mwaniki as already shown, had disclaimed his jurisdiction to be the Chairman of the Inquiry or to conduct it, does not amount to a waiver or estoppel that can legitimate action which is ultra vires. To quote from Wade's Administrative Law (4th Edition) p.222:

"… The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power that it legitimately possess. Once again, the principles of ultra vires must prevail when it comes into conflict with the ordinary rule of law.".

The non compliance of the relevant requirement of the Act in the light of the record of proceedings as regard the jurisdiction of Mr. Mwaniki and his fellow valuers, to conduct the Inquiry which was raised on the very first day of the Inquiry, was one of the grounds, in support of the amended Notice of Motion for judicial review which came before Ringera, J. for hearing on 18th January, 1996. It was put this way:

"It was only upon answering to the summons under Gazette Notice Number 5690 of 1993 that the applicants realised that the purported inquiry under the chairmanship of Mr. Mwaniki was irregular as -

…

…

the inquiry was being conducted without proper jurisdiction and irrationally.".

As I have already stated, the lack of jurisdiction on the part of Mr. Mwaniki and his team to conduct the Inquiry which is based on Mr. Mwaniki's own disclaimer, is there for all to see on the face Mr. Mwaniki's own certified record of proceeding of the Inquiry. In Rex v Croke (1774) 1 Cowp. 26, it was held that where:

"… by statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued; and appear to be so on the face of their proceedings.".

Applying the following dictum of Lord Mansfield in that case to the present one:

"This is a special authority delegated by the Act of Parliament to particular persons to take away a man's property and estate against his will; therefore it will be strictly pursued, and must appear to be so upon the face of the order.",

the analogy that can be drawn is this. In Kenya where the statutory power to compulsorily acquire a person's land against his will is first derived from the carefully worded provisions of the Constitution itself; where land is a most sensitive issue; and where in effect, the land in question has already been compulsorily acquired, though not taken possession of, by the time the interested party is notified so as to make his claim for compensation, there is all the more reason to ensure that all procedures related to compulsory acquisition must not only, be strictly pursued, but must also, appear to be so on the face of the inquiry.

The other aspect of the act of jurisdiction to hold the Inquiry and which was more substantially argued before Ringera, J., was whether the Gazette Notice No. 5689 of 4th November, 1993, which gave notice of the Government's intention to compulsorily acquire the respondent's land, was sufficient to grant jurisdiction for the holding of the Inquiry.

It was argued on behalf of the respondent that the Gazette Notice was invalid because it did not set out the conditions which must be satisfied before the respondent's land could be compulsorily acquired as laid down in section 75 of the Constitution read together with section 6 of the Act, namely, that the acquisition was for a public body for any of the public interests or benefits enumerated in section 75(1)(a) of the Constitution, and that this justified the hardship that the compulsory acquisition would cause the respondent. Section 75(1)(c) of the Constitution which provided for the promulgation of detailed legal provisions for the implementation of the constitutional provisions, namely, the compulsory acquisition of property, claim for compensation and matters related thereto, led to the enactment of the Act. Section 6 of the Act which is headed "Acquisition of Land" is the one that is relevant. Its marginal note is "Notice of Acquisition". This section has been fully set out in the Judgment of Ringera, J. and I will only summarise it here. It is firstly, according to section 6(1) of the Act, that where the Minister is satisfied that land is required for a public body, that this is necessary for a stated public purpose and that this justifies the hardship that a compulsory acquisition of the land will entail, and has so certified all this in writing to the Commissioner, the Minister may then direct the Commissioner in writing to compulsorily acquire the land. Secondly, and according to section 6(2) of the Act, after the Commissioner has received the Minister's direction, he shall cause a notice to the effect that the Government intends to acquire the land, to be published in the Gazette. But a notice does not quite reflect what the actual position is. It gives the wrong impression which is more in line with section 3 of the Act whereby, if the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6 of the act, the Commissioner may cause notice thereof to be published in the Gazette, that the Government only intends to acquire the land. The notice published under section 6(2) of the Act, does not reflect, as would appear to be supported by the Minister's certificate and written direction to the Commissioner, that the land has, to all intents and purposes, already been acquired. Apart from anything else, the subsequent sections of the Act show that all that then remains to be done after the publication of the notice of intention to acquire land, only concerned the assessment and payment of compensation for the compulsory acquisition; the revocation of a directive to acquire land before actual possession is taken; the taking possession of such land; and the right of appeal to the High Court to challenge the amount of compensation awarded. It was further submitted on behalf of the respondent, that the drastic and exceptional powers granted to the Commissioner on the say so of the Minister, and I may add, a process in which the person to be affected has absolutely no part to play, are such that at least, when it comes to the process of claim to compensation, the affected party should be informed in the notice which the Commissioner caused to be published of the Government's intention to acquire land, of the reasons and conditions which justify the compulsory acquisition such as the public body for which the land had been acquired and the public purpose for the acquisition.

On behalf of the Commissioner, it was submitted that even though section 6(1) of the Act lays down the reasons for and conditions which must first be satisfied before land is compulsorily acquired, section 6(2)

of the Act which only provides that the Commissioner shall, upon receiving the Minister's direction to acquire land, cause to be published in the Gazette a notice that "that Government intends to acquire the land", does not require such notice to contain any other information such as the name of the public body for which the land had been acquired and the public purpose which the acquisition was intended to promote.

After hearing arguments Ringera, J. concluded in the following excerpt from his judgment as regards the validity of General Notices Nos. 5689 and 5690 and which deserves to be quoted in extenso as follows:-

"As regards the adequacy and validity of the notice published under section 6(2) I have come to the judgment that notice should reflect the Minister's certificate to the Commissioner under section 6(1), and must accordingly include the identity of the public body for whom the land is acquired and the public interest in respect of which it is acquired. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies hardship to the owner. Those details must be contained in the notice itself for the prima facie validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence. I do not understand Re KISIMA (supra) to hold that information subsequently gleaned from material before the court can cure the defects apparent on the face of the notice. I understand the case to hold that failure to specify the public body for whom the land is acquired and the purpose of the acquisition are the defects which persuaded the court that the applicant therein had established a prima facie case that the Commissioner of Lands lacked jurisdiction to proceed with compulsory acquisition. The learned judge also made the additional observation that if the affidavit evidence before him was to be accepted the persons for whose benefit the land was intended to be acquired were not a public body. In the result, I find and hold that Gazette notice number 5689 of 4th November, 1993 is defective and invalid for the reason that it did not identify the public body for whom the land was being acquired and the public purpose to be served by such acquisition. The words "Tana River Delta Wetlands" cannot but be a geographical-cum-ecological description. They are not the name of any public body or descriptive of the public purpose of the acquisition. They are accordingly incompetent to satisfy the requirements of the law. That being the position, it follows that Gazette notice number 5690 of 4th November, 1993 notifying interested parties of the holding of an inquiry into claims for compensation was also invalid. As the jurisdiction of the Commissioner of Lands to hold the inquiry was conditional on publication of valid notices of the acquisition and of the inquiry, I must, and do conclude, that the Commissioner lacked jurisdiction to commence or continue the inquiry under section 9(3) of the Land Acquisition Act. I am accordingly inclined to order that prohibition do issue as prayed.".

It is this decision that has prompted the present appeal.

The submission made in this appeal are really the same that were made before Ringera, J. and I agree entirely with his judgment and only have the following additional points to make.

I recall again the dictum of Lord Mansfield in Rex v Croke earlier referred to, and would add that where as in this appeal, the person affected, namely, the respondent had absolutely no say in the making of the original decision by the Minister which was conveyed to the Commissioner and the Minister's written direction to the Commissioner to acquire the land and which merely on the say so of the Minister, had been so acquired by the Commissioner, it is more than desirable indeed, mandatory, that the respondent be given a fair chance and opportunity of challenging the decision and actions of the Minister and the Commissioner, by furnishing the respondent in the notice of intention to acquire and which notice, as I have noted, is misleading in nature, not only, with the information that the Commissioner had received the Minister's direction to acquire the land but also, of the public body for which the land had been acquired, the public purpose therefor, and that all this was justified under the given circumstances. This is particularly so where it is the notice of the compulsory acquisition which for the first time, informs the affected party of what had happened to his land and also sets in motion the claim to compensation process. It is also not sufficient, indeed, well nigh uncandid, when the evidence at the Inquiry showed that the land had been acquired for the Tana and Athi Rivers Development Authority, a statutory body

corporate created by section 3 of its Act with perpetual succession and a common seal and capable in its corporate name of suing and being sued, acquiring property and borrowing and lending money in its corporate name etc, to say that the public body for which the land had been acquired had been sufficiently identified in the Gazette Notice No. 5689 merely because it gave notice than "Government intends to acquire the land". Furthermore, section 8(a) of the Tana and Athi Rivers Development Authority Act which established the Authority, has as one of its functions which distinguishes it from the Government:

"to advise the Government generally and the Ministries set out in the Schedule … on all matters affecting the development of the Area including the apportionment of Water resources.".

To conclude on this particular issue, "public body" is defined in section 2 of the Tana and Athi Rivers Development Authority Act to mean:

"the Government" or "any authority, board or other body which has or performs … functions of a public nature, or which engages or is about to engage in the exploitation of natural resources …".

It is clear that the Tana and Athi River Development Authority is such a body with functions of a public nature and it should have been specified as the public body for which the Government intended to acquire the land. As Ringera, J. said, applying Re Kisima Farm Ltd (1978) KLR 36:

"The test must be satisfied at the outset and not with the aid of subsequent evidence.".

In this case, the subsequent evidence has only succeeded in showing the notice of intention to acquire land to be less than candid.

As regards the public purpose for which the land had been acquired, merely stating in Gazette Notice No. 5689 that the Government intended to acquire the land "for Tana River Delta Wetlands" and which mischievously gives the impression that it is a public body, is simply not good enough. If it is meant to be the public purpose for which the land has been acquired, that too, is simply not good enough. It would even have been sufficient if the notice in this regard, had only said that the land had been required "for the development of the Tana River Delta Wetlands". A more patriotic purpose would have been as the Tana and Athi Rivers Development Authority more wordily put it in its Madaraka Day Congratulatory Advertisement in the Sunday Standard of 1st June, 1997, "for promoting environmental conservation for the sustainable development" of the Tana River Delta Wetlands. Or better still, as was contained in the Kenya Wildlife Service, Press Release on World Wetland Day 1997, published in the Sunday Standard of 2nd February, 1997, for "ENSURING A SUSTAINABLE FUTURE FOR WESTLANDS AND THE COMMUNITY". Merely stating "for Tana River Delta Wetlands" as Ringera, J. observed, "cannot but be a geographical-cum-ecological description", and which I may add, is neither a public body nor a public benefit.

I would now like to revert briefly to Re Kisima which was an application for leave to issue an order of prohibition and in which, it was held that the existence of a right of appeal did not constitute a bar to an application for an order of prohibition. The position has been well stated in Constitutional and Administrative Law by E.C.S. Wade and A.W. Bradley, Tenth Edition p 638 as follows:

"This supervision does not seek to provide a fresh decision on the merits but to ensure that the body in question has observed the limits which are a condition of its power to make binding decisions. According to a famous dictum in R. v. Nat Bell Liquors,

'That supervision goes to two points" one is the area of the inferior judgment and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.'

Thus all tribunals and like bodies are subject in English law to control by the High Court on jurisdictional grounds, whether or not there is a statutory right of appeal from their decision.".

The reasons for the granting of leave by Hancox, J. as he then was, in Re Kisima are in my view, correct

as stated in his following observations:

"I would comment that there appear to me to be defects in the expression of the Commissioner of Lands' intention in the respective Gazette notices. For instance, section 6 requires that the Minister shall be satisfied that the land in question is required for the purpose of a public body. No public body and no particular purpose is specified in Gazette Notice 3678. Moreover, if the affidavit of Mr. Powys is to be accepted, the Minister in question informed him that the land was "for the members of the Meru tribe". I agree with Mr. Couldrey that this would not be a public body or purpose envisaged by the definition in the Act. In the circumstances (and leaving aside for the moment alleged inaccuracies in the acreage of the parcel of land…) this prima facie seems to constitute an absence of jurisdiction to acquire the land, and, consequently, an absence of jurisdiction in the Commissioner of Lands to act in pursuance of a direction given in that behalf."

I am of the view that Ringera, J. was quite right in following and adopting Re Kisima. But he is not the only Judge who has adopted the reasoning in Re Kisima. A week after delivering his judgment in Re Kisima, Hancox, J. had before him a similar application for leave to apply for an order of prohibition in the case of In the Matter of an Application by Marania Limited for Leave to apply for Orders of Prohibition and Centiorari and In the Matter of the Constitution of Kenya and In the Matter of the Land Acquisition Act (Cap 295) Miscellaneous Civil Application No. 68 of 1978 (unreported). In his ruling with respect to the application for leave to apply for the order of prohibition, Hancox, J. followed his judgment in Re Kisima. Two years later, Simpson, J. as he then was, considered Re Kisima in the case of Reginald Destro & Others v Attorney General H.C.C.C. No. 2414 of 1979 (unreported). The matter before Simpson, J. concerned the validity of the Minister's certificate required under section 6(1) of the Act in respect of which, he held that there was no error on the face of it. His attention had, however, been drawn to Re Kisima and this is what he had to say about it:

"Mr. Dobry said he relied on Hancox, J.'S rulings in Civil Application 62 of 1978 - Kisima Farms Ltd. and 68 of 1978 - Marania Ltd., both applications for prerogative writs relating to land acquisition. In both cases the Gazette Notices expressing the Commissioner of Lands' intention were defective in that not only was no public body but also no particular purpose was specified. The land in question was in fact required for resettlement of certain members of the Meru tribe clearly not a public body.".

In both Re Kisima and Marania the wording of the Gazette Notices of intention to acquire land namely, Nos. 3678 of 1977 and 3682 of 1977 respectively, were as follows:-

"In pursuance of section 6(2) of the Land acquisition Act, 1968, I hereby give notice that the Government intends to acquire the following land for a public purpose.".

This may have been the previous practice, so what. That which is wrong and contrary to law, should not be condoned particularly, as earlier shown, that this had been conceded by the Commissioner in the letter of consent dated 22nd September, 1993, already referred to. I can only add that Ringera, J. was right at the conclusion he came to that the order of prohibition sought should be granted.

The role of marginal notes in legislation deserves a brief comment. Marginal notes are often found at the side of sections in an Act. They purport to summarize the effect of the sections, and have sometimes been used as an aid to construction. Whilst it is true that marginal notes are not part of the Act, some help might be derived from them to show what the sections to which they relate, are dealing with. In respect of the whole of section 6 of the Act, the marginal note is "Notice of acquisition" signifying the importance of the notice of acquisition and what it should contain which are the conditions for the compulsory acquisition as set out in section 6(1). In the case of Bushell v Hammond (1904) 2 KB 563, at 567, Collins M.R. in his leading judgment stated that in order to understand subsection 4 of the Licencing Act, 1902:

"… we must look at the whole of the section of which it forms part, and some help will be derived from the side note (though of course it is not part of the statute), which shows that the section is dealing with the control of parties over the structure of the licenced premises.".

In Stephens v Cuckfield R.D.C. (1960) 2 Q.B. 373, at 383 C.A. at 383, upjohn L.J. in the judgment of the court, had this to say about the role of a marginal note:

"While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it was aimed with the note in mind.".

In the case of Mugo v R (1966) E.A. 124 at 128 Rudd Ag. C.J. in the judgment of the court, first referred to the discontinued old English parliamentary tradition whereby, bills submitted to parliament were engrossed without punctuation or marginal notes on the roll but which nevertheless, had led some English judges to disregard marginal notes when construing sections of an Act. He, however, and in a departure from this line of thought, then went on to refer to cases including Bushell (supra) where it had been held in England that marginal notes can show what a section was intended to cover, to support the taking into consideration of the marginal note in construing the section of the Evidence Act which was involved in the appeal then before the court. Newbold, V.P. as he then was, put the position in Kenya more clearly in the Court of Appeal case of Visram & Karsan v Bhatt (1965) E.A. 789 AT 794. He put it this way:

"While in Britain the courts will not normally have regard to marginal notes for assistance in construing the terms of a section, this is due to the historical reason that prior to 1850 marginal notes did not form part of the bill as presented to Parliament and they were only added after the legislation had been passed. It could not, therefore, as least as regards the earlier legislation, be said that the marginal note played any part in disclosing the intention of the legislature. The position in Kenya is very different. Marginal notes always form part of the bill as presented to Parliament for enactment. Indeed, there are a number of enactments, including the Acts amending the present Constitution of Kenya, in which marginal notes have been the subject of amendment by legislation. Further, a constitutional document (the Royal Instructions) prior to independence specifically required that a marginal note should appear on each section of a bill as presented to the legislature.".

To the foregoing can be added the authoritative words of Garth Thornton who had unrivalled and distinguished career in legislative drafting in East Africa. Garth Thorton was Chief Parliamentary Draftsman of Tanzania for many years and was one time, Deputy Legal Secretary of the East African Common Services Organization. In his latter office he was responsible for the drafting of East African legislation which were debated by the Central Legislative Assembly of the East African Common Services and which when passed by that Assembly, had the force of law in the constituent East African countries of Kenya, Uganda and Tanzania. He defines "marginal notes" in his book "Legislative Drafting" as follows:

"The object of a marginal note is to give a concise indication of the contents of a section. A reader has only to glance quickly through the marginal notes in order to understand the framework and the scope of an Act and also to enable him to direct his attention quickly to the part of an Act which he is looking for.

To achieve this object, a marginal note must be terse and it must be accurate. It must describe, but it should not attempt to summarize. It should inform the reader of the subject of a section. It cannot hope to tell him what the section says about that subject.

Like a signpost, a marginal note must be brief and to the point, and it must be pointing where it says it is pointing.".

Section 6(1) of the Act lays down the conditions which must be fulfilled before land can be compulsorily acquired and goes on to provide that where these exist, the Minister upon so certifying to the Commission, can then direct the Commissioner in writing to acquire the land. Subsection 6 (2) then goes on to state that upon the receipt by the Commissioner of the Minister's written direction, he shall give notice of the intention of the Government to acquire the land. In my view, the wording of the marginal note to section 6 of the act if one looks at the whole of that section, supports the view that the section deals mainly with the publication of a notice of the intention to acquire land upon the direction of the Minister after all the conditions for compulsory acquisition have been fulfilled so that the affected party

may not only make his claim for payment of compensation but most of all, be made cognizant of the grounds on which his land has been compulsorily acquired, for if this was meant to be a secrete, section 75 of the Constitution and section 6(1) of the act would not have gone to the trouble of publicly proclaiming the conditions which must exist before the Minister directs the Commissioner to compulsorily acquire the land in question. The modern approach to the construction of legislation which supports the view I have just expressed, is to be found in the following statement of the law which appear in de Smith's Judicial Review of Administrative Action, Fourth Edition, by J.M. Evans p.98:

"In the past English courts have tended to favour a formal, linguistic and textual analysis or legislation in an attempt to discover the "true meaning" of statutory provisions. The principal shortcomings of this approach are the assumptions that every word and phrase has a true, single meaning and that, despite the draftsman's detailed elaborations, the text is capable of producing an answer to every conceivable factual situation to which the legislation may have to be applied. On the other hand, a "purposive" approach, often associated with the mischief rule enunciated in Heydon's case, aimed at giving effect to the intention of Parliament, unrealistically assumes that every statutory formula embodies an intention that can be ascribed to Parliament as a whole, or to the collective will of a majority of either House or to the draftsman. In amy cases, of course, the approaches converge to produce the same result; but in so far as they diverge, courts have recently tended to move away from a purely linguistic analysis, and have been prepared to blend it with an approach to interpretation that takes account of the historical context of the legislation, and the extent to which a literal reading would do violence to the legislative intention inferred both from other provisions of the measure and from accepted notions of good government and administration.".

I had when dealing earlier with the issue whether Mr. Mwaniki and his colleagues had jurisdiction to undertake the Inquiry, concluded that in view of Mr. Mwaniki's answer to the pertinent question put to him by Mr. Ghalia, whereby, he had asserted that the Inquiry was being undertaken by the Commissioner, he Mr. Mwaniki had denied that he and his colleagues had any jurisdiction to undertake the Inquiry. As is apparent on the face of the record, Mr. Mwaniki and Co. had acted ultra vires which is a matter which could not be condoned or corrected merely because the respondent had taken part in the Inquiry for four days before successfully seeking leave to apply for an order of prohibition in respect of the Inquiry and a stay of its proceedings.

With regard to the scope of the lack of jurisdiction of a tribunal which Mr. Mwaniki's Inquiry was, and which under the circumstances, applies to it, and which may give rise to an order of prohibition, de Smith's (ibid., p.396) under the heading "Lack of Jurisdiction", correctly summarized the position as follows and which Ringera, J. adopted:

"Jurisdiction may be lacking if the tribunal is improperly constituted; or if essential preliminary requirements have been disregarded; or if the proceedings are otherwise improperly instituted; or if the tribunal is incompetent to adjudicate in respect of the parties, the subject matter or the locality in question; or if the tribunal, although having jurisdiction in the first place, proceeds to entertain matters or make orders beyond its competence.".

Having regard to the foregoing summary, I would say that Mr. Mwaniki's Inquiry lacked jurisdiction for more than one of the reasons set out in the summary. On this issue, my attention was also drawn to the judgment of Sheridan, J. in the case of Masaka Growers v Mumpiwakoma Growers (1968) E.A. 258, in support of the proposition that the respondent having taken part in the Inquiry for some four days, had waived his right to challenge the jurisdiction of the Inquiry. The pertinent part of that judgment at 261 et sea, is as follows:

"Prohibition lies only for excess or absence of jurisdiction. It dies not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings: 11 HALSBURY'S LAWS (3rd Edn.) p.114. I do not agree with counsel for the applicants' submission that it lies as of right as there is no defect of jurisdiction apparent on the face of the proceedings: HALSBURY (ibid. p. 115). It is a discretionary remedy and the Court may decline to interpose, by reason of the conduct of the party. Counsel relies on Farquharson v. Morgan [1894] 1 Q.B. 552) as authority for the proposition that that

acquiescence in the exercise of jurisdiction by the inferior court is no bar to the issue of prohibition, but in that case there was a total absence of jurisdiction apparent on the face of the proceedings, which is not the case here.

On the other hand, in Mouflet v. Washburn [1886], 54 L.T. 16). SIR JAMES HANNEN following ERLE, J., in Jones v James (1850), 1 L.M. & p. 65), decided that the defendant, by once appearing before the county court judge, had waived the right of examining into the process by which he had been summoned to appear, and that a subsequent application by such defendant for a writ of prohibition to prevent the judge of the county court from proceeding in such suit must be refused. A court may also decline to interpose of there is a doubt in fact or law whether the inferior tribunal is exceeding its jurisdiction or acting without jurisdiction " 11 HALBURY'S LAWS (3rd Edn.) p.116. I entertain such a doubt."

I, on my part, have no such hesitation. Moreover, this is a case where from Mr. Mwaniki's own lips fell his disclaimer of jurisdiction thus making it apparent on the fact of the proceedings, that there was a total lack of jurisdiction. I therefore hold that Masaka Growers is not applicable in the present appeal.

Finally, Ringera, J. having considered the conduct of the Commissioner in the saga of the acquisition of the respondent's land, quite rightly, I think, came to the following conclusion"-

"I cannot help feeling in these circumstances that either the author of the notices was downright incompetent or he was mischievour."

I am inclined to the view that the latter criticism seems more apt. But what is worse, is that behaviour like that by a high Government official only helps to bring the Government that he serves into disrepute.

In the result, I will dismiss the appeal with costs for the respondent. As Tunoi and Pall, JJ.A. agree, it is so ordered.

Dated and delivered at Nairobi this 27th day of June, 1997.

A.M. AKIWUMI

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JUDGE OF APPEAL