



**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: GICHERU, AKIWUMI & SHAH, J.J.A.)**  
**CIVIL APPEAL NO. 109 OF 1993**

**BETWEEN**

**MICHII KENYA LIMITED.....APPELLANT**

**AND**

**HONOURABLE ATTORNEY-GENERAL.....1ST RESPONDENT**

**COMMISSIONER OF LANDS.....2ND RESPONDENT**

**Appeal from the judgment of the High Court of Kenya at  
Nairobi (Shields, J.) dated 13th April, 1993  
in  
H.C.C.C. NO. 3670 OF 1987)**

\*\*\*\*\*

**JUDGMENT OF THE COURT:**

By Legal Notice NO. 155 of 1970 dated 30th July, 1970 the Minister for Lands and Settlement in exercise of the powers conferred upon him by section 3(1) of the Land Adjudication Act, Chapter 284 of the Laws of Kenya, hereinafter called the Act, ordered that the Act shall apply to that part of the Trust Land situated within the Northern and Southern Divisions of the Kilifi Administrative District. Subsequent thereto, it would appear from the Adjudication Record Number A 620820 that land parcel number Kilifi/Madeteni/610, hereinafter referred to as the suit land, measuring approximately 6.2 hectares was adjudicated in favour of one Kadir Sharif Mohamed as its owner. From the said Adjudication Record, it seems that the ownership of this parcel of land passed on to one Margaret Nkatha Marete from whom it would appear that the appellant acquired the same for valuable consideration and was registered as its proprietor on 31st July, 1981 and issued with a land certificate in respect thereof on 7th December, 1981.

In a circular letter dated 3rd June, 1986 addressed to the proprietors of the plots in Chembe/Kibabamshe, Kilifi/Jimba, Kilifi/Madeteni, Kakuyuni/Madunguni and Kilifi/Mataangoni Adjudication Sections and copied to the Provincial Commissioner, Coast Province, the District Commissioner, Kilifi and the District Land Officer, Kilifi, the Commissioner of Lands advised the owners of the said plots that the Act was erroneously applied to Government Land. As the Act applied only to Trust Land, their registration as the proprietors of the plots in the Adjudication Sections referred to above was a nullity ab initio with the result that their titles in respect thereof were defective. To this end therefore, the Government of Kenya had decided to cancel the said titles. The suit land was within Kilifi/Madeteni Adjudication Section and it would appear that the appellant's title in respect thereof was cancelled on the strength of the circular letter referred to above and with effect from 22nd December, 1986 its proprietorship reverted to the Government of Kenya. In view of the acts of the Commissioner of Lands as are outlined above, the appellant brought an action against the first and second respondents in

the superior court the former being sued in a representative capacity on behalf of the Government of Kenya and sought inter alia:

1. A declaration that the expropriation or acquisition of the suit land by the Government of Kenya was null and void;
2. An order that it be re-registered as the proprietor of the suit land; and
3. Damages for the unlawful acquisition of the suit land.

The respondents' defence to the appellant's claim was that the suit land was part of the Kilifi/Madetení Adjudication Section which was Government Land and which had erroneously been adjudicated as Trust Land. No legal or any right or title had therefore passed to the appellant in respect thereof and the said land could not have been expropriated or acquired by the Government of Kenya which at all material time was its lawful owner.

At the hearing of the appellant's suit in the superior court, the record of the proceedings before that court indicate that counsel then appearing for the appellant in that court told the said court that he saw no reason for calling any witness. No evidence was therefore led in support of the appellant's claim and it would appear from the record of the proceedings in the superior court that that claim depended solely on counsel's submission on what he considered to be the relevant law in regard to the said claim.

The respondents called the Land Registrar, Kilifi who without any supporting evidence except the circular letter referred to towards the beginning of this judgment said that the suit land was Government Land and was therefore erroneously adjudicated.

In his judgment dated 13th April, 1993, Shields, J. observed that the parties to the suit before him agreed that the area in which the suit land was situated was at all material time Government Land. Hence, the application of the Act to this area and the subsequent registration of the suit land in the appellant's name were ultra vires and therefore void ab initio. Indeed, according to him, the purported cancellation of the appellant's title to the suit land was unnecessary since such cancellation was not in pursuance of any statutory authority. To the learned judge therefore, the appellant obtained nothing by the registration of the suit land in its name and lost nothing by the cancellation of the said registration. Consequently, the learned judge held that the appellant had no cause of action and proceeded to dismiss the appellant's suit with one set of costs. It is against this decision that the appellant now appeals to this Court.

The appellant's memorandum of appeal contains twenty one grounds of appeal which in essence comprises of four complaints. Firstly, that both the conduct and the recording of the proceedings in the superior court were deficient with the result that the learned trial judge failed to adequately consider and determine the issues before him leading to a miscarriage of justice. Secondly, that the learned trial judge erred in holding that the parties to the suit before him agreed that at all material time the area in which the suit land was situated was Government Land and consequently that the suit land was Government Land. Thirdly, that in holding that the application of the Act to the area in which the suit land was situated was ultra vires and void ab initio, the learned judge was in error. Fourthly, that in failing to give weight to the Land Adjudication Record Number 620820 which indicated that the first adjudicated owner of the suit land was one Kadir Sharif Mohamed who sold the said land to one Margaret Nkatha Marete from whom the appellant was a bona fide purchaser for value of the same, the learned trial judge was in error.

At the hearing of this appeal on 25th, 26th, 28th and 29th April, 1996, the thrust of the submissions of counsel for the appellant was that the record of the proceedings before the superior court was so scanty that it was incapable of giving the learned trial judge a proper view of the case before him nearly two years after its hearing commenced before him. Indeed, his holding that the parties to the suit before him agreed that the area in which the suit land was situated was at all material time Government Land was unsupported by the said record. The result was that the decision of the learned trial judge was a total misdirection. Counsel therefore sought to have the appellant's appeal allowed with its prayers in the superior court being granted together with the costs of this appeal.

The submissions of counsel for the respondents, however, were that there was no reply to the respondents' defence which as is indicated above alleged that the suit land was at all material time to the suit in the superior court Government Land. In the absence of any material to disprove this allegation which, according to counsel, was backed by the respondents' only witness who had been the Land Registrar, Kilifi since 1989, the decision of the learned trial judge cannot be faulted.

The fulcrum to the appellant's appeal is whether or not at all material time to the suit in the superior court the suit land was Government Land; for upon it depends all the other complaints in this appeal. As the learned trial judge quite correctly pointed out in his judgment, section 3 of the Act confined the application of the Act to any area of Trust Land but not to any other Land. Hence, if the suit land was not Trust Land at the material time, then the application of the Act to it was unlawful. In holding that the suit land was not at the material time Trust Land, the learned trial judge relied on what he said was agreed by all the parties before him that at all material time the area in which the suit land was situated was Government Land. As counsel for the appellant quite rightly submitted before us, the record of the proceedings before the learned trial judge does not support him in this regard. Indeed, except for the bare statement by the respondents' sole witness in the superior court and the circular letter of the Commissioner of Lands referred to towards the beginning of this judgment, which indicate that the suit land was Government Land, there appears to have been no sufficient material before the learned trial judge upon which he could have arrived at a firm decision that the suit land was at all the material time either Government Land or Trust Land. His conclusion therefore that the suit land was Government Land when the Act was applied to it may or may not have been correct. In view of the incertitude surrounding this conclusion, we think that this appeal must succeed to the extent that the decision of the superior court dismissing the appellant's suit with costs should be set aside and to that extent only, the appellant's appeal is allowed. However, as the issue upon which the appellant's cause of action hinges is whether or not the suit land was at the material time Government Land which issue, we think, remains unresolved, we order a new trial of the appellant's suit in the superior court with the view of conclusively resolving the said issue only. The costs occasioned by this appeal are awarded to the appellant against the respondents jointly and severally.

**Dated and delivered at Nairobi this 30th day of April, 1996.**

**J.E. GICHERU**

.....

**JUDGE OF APPEAL**

**A.M. AKIWUMI**

.....

**JUDGE OF APPEAL**

**A.B. SHAH**

.....

**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**