IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Wambuzi, Law JJ A & Miller Ag JA)

CIVIL APPEAL NO 25 OF 1978

TIMOTHEO MAKENGE......................................APPELLANT

AND

MANUNGA NGOCHI..RESPONDENT

JUDGMENT

It is, I think, settled law that *certiorari* will issue from the High Court to quash a determination of an inferior tribunal for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice, or when the determination was produced by fraud, collusion or perjury: See 1 *Halsbury's Laws of England* (4th Edn), page 150, paragraph 147.

In the case before us it would appear that Madan J issued the order of *certiorari* for three main reasons. Firstly, because there was an error of law in that the matter constituting the appeal before the Minister of Lands and Settlement was *res judicata*. Secondly, because the Minister ought not to have used assessors, presumably exceeding his jurisdiction. Thirdly, because there was a violation of the rules of natural justice in that the effect of the Minister's order to alter certain entries in the register was to deprive certain people who were not parties to the appeal of their plots of land.

With regard to *res judicata*, its essence, as a fundamental doctrine of all Courts, is that there must be an end to litigation. Both parties to this appeal were involved in litigation over land prior to 28th June 1968, the date of the commencement of the Land Adjudication Act. The disputed land was referred to as "Muthanthara" in case 9 of 1960 and in case 13 of 1963 and as "Riamurithi" in case 26 of 1964. All three cases were tried by Magistrate's Courts whose decisions were confirmed by the Court of review.

Three points emerge from the three cases. (1) All three cases decided that the disputed land belonged to Mununga, the respondent, (2) It appears that the dispute related to the boundary between the two clans. And (3), all three concerned the same block of land.

It would appear that, as far as this particular land is concerned, another court action claiming the same land by either of the parties to those cases could be resisted by *res judicata*. However, by section 13 of the Land Adjudication Act, every person who considers that he has an interest in land within an adjudication section may make a claim to the recording officer and point out his boundaries to the demarcation officer. The area would then be demarcated and shown on a demarcation map. Under section 19(2) of the Act, the recording officer is empowered to resolve any conflicting claims to an interest in land, or to submit the dispute to a committee for decision if he is unable to resolve the conflict. In the case before us the record is silent as to whether either of the parties to this appeal made any claim under section 13 of the Act. There is no indication that any recording officer submitted the dispute to the committee. The record

shows the appellant, Makenge, as plaintiff and the respondent as defendant. It appears that the committee proceeded as an ordinary Court to decide a land dispute between the appellant as plaintiff and the respondent as defendant. One of the findings made by the committee was:

> The committee having heard both parties, it finds the [respondent] had cased with a brother of the [appellant]Munduwanjau and therefore the case is *res judicata*.

The decision reached by the committee was that the respondent was to remain on the land. In my view this was a serious misdirection on the part of the committee and a complete misapplication of the provisions of the Land Adjudication Act. In the first place, there is no question of anyone bringing a land action before the committee. The functions of the committee are clearly laid down in section 20 of the Act. As far as is relevant to this case the section provides that the committee shall, "adjudicate upon and decide in accordance with recognised customary law any question referred to it by the demarcation officer or the recording officer". If a question is referred to the committee, it has to decide thatquestion and cannot say that the matter is *res judicata*. The alternative is to refer the matter to the arbitration board for decision under section 21(1) of the Act if the committee is unable to reach a decision. It may be noted that, by section 21(2) of the Act, the adjudication officer may require the committee to reconsider any decision which it has made. In these circumstances I very much doubt whether the doctrine of *res judicata* has any application to committee proceedings under the Act. In my view on a proper application of the Land Adjudication Act in the case be fore us, there should have been a reference on a specific matter by the demarcation officer or the recording officer in respect of a well-marked or identified interest in land for its decision. The recording officer would then reflect the decision on the demarcation map accordingly.

Under section 21 of the Act any person affected by a decision of the committee and who considers the decision to be incorrect may complain to the executive officer of the committee who refers the complaint to the arbitration board appointed under section 7 of the Act. Here, again there is no indication that any of the parties to this appeal made any complaint to the executive officer of the committee in regard to the decision of the committee, or that the executive officer referred such complaint to the arbitration board. Instead there is an objection to a land adjudication officer.

This is under section 26 of the Act which enables any person named or affected by the adjudication register, who considers it to be incorrect, to object to the adjudication officer after the register is notified to be complete. By section 24 of the Act the adjudication register comprises the adjudication record and the demarcation map. At this stage one would expect an indication on the register of the claimants and their respective parcels of land, presumably numbered. This notwithstanding that the land in dispute before the adjudication officer is merely referred to as "land at Mutheiri or Muthanthara". "The claims are recorded thus:

> Objecting against the judgment passed in case 26 of 1964, case 13 of 1965, [appeal] case 13 of 1963, case 74 of 1971 and arbitration board case 35 of 1972.

Here again, the land is not identified by reference to the demarcation map but by reference to previous court decisions. The adjudication officer appears to have acted as a Court of Appeal and his decision does not refer to the register at all. He said:

> I have perused all the case files which had involved the land in question and have found that the case was finalised by the Court of review and no appeal was lodged.
>
> It is pointless to continue with this case because the judgment of court of review is unchallengeable and that it stands.
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> Decision. Objection is dismissed with all costs. Court of review judgment (cases 3 of 1964 and 13 of 1965 to stand.) The disputed land to remain property of [the respondent].

The adjudication officer should have indicated the land in question as it appears in the register and his

decision should have been to the effect that the respondent remains the registered claimant.

As regards the appeal to the Minister Madan J held as follows:

> In my opinion the appeal to the Minister was *res judicata* concerning as it did directly with the same subjectmatter between the same parties and being the same land in issue both previously and before the Minister. There must be an end to litigation. Although competent to hear the appeal the Minister was bound to take a note that the dispute was *res judicata*. He was bound to take a note of written law of the land. He therefore erred and went against written law. I think the [respondent's] contention is right that the land in dispute was the same as the land in case 26 of 1964.
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> In my opinion the contention is also right that the final order or decision of a court made or in proceedings concerning land in an adjudication section which it was so in this case, is a bar to further proceedings by virtue of the provisions of section 30(4) …

The section 30(4) provides as follows:

> The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.

The "foregoing provisions" prevent any person instituting civil proceedings in a Court of law concerning an interest in land in an adjudication section without the consent of the adjudication officer, and proceedings current at the date of the notification of an adjudication section are discontinued.

My understanding of section 30(4) of the Act is that the judgments and orders affecting land prior to the land being declared part of an adjudication section are valid and enforceable. This means that in the present case the respondent would be entitled to enforce the judgments pronounced in his favour. On the basis of these judgments the committee and the adjudication officer were entitled to find for the respondent and it may well be that this as their findings, although they wrongly applied the doctrine of *res judicata*. The respondent had to prove before the various tribunals, under the Act, his claims as supported by the court decisions in his favour and to identify the relevant parcels of land. Once this is done the tribunal, including the Minister, is bound to take into account the courts' decisions and to give effect to them. I think that any other construction would render nugatory the provisions of section 30(4) of the Act. In my view, the intention of the legislation was to ascertain rights, not to deprive any person of his rights over land. In the end I agree with Madan J's final decision, but for somewhat different reasons. With respect, having found that the Minister had jurisdiction to hear and determine the appeal the judge could not have held at the same time that *res judicata* applied to this case or that section 30(4) of the Act was a bar to further proceedings.

I think the judge meant that the Minister was bound to act according to the law. As pointed out by Law JA, this case is in many respects similar to *Bisuche v Barasa* (unreported), with one significant difference that there was, in that case, a pending appeal which was automatically discontinued unless the adjudication officer otherwise directed under section 30 (2) of the Act. It is arguable that there was no final court decision in the *Bisuche* case within the meaning of section 30(4) of the Act to bind the Minister. In the case before us there was no pending appeal, the cases having been finally settled by the relevant Courts. In my view, if a tribunal purported to ignore the courts' decisions it would be acting in excess of (or without) jurisdiction or contrary to the law in depriving the respondent of his rights under the judgments which are recognised under the Act. I think that this is what the Minister has done. He refers to claims as shown to various Courts but made no attempt to ascertain these. Instead he awarded the whole land in dispute to the appellant. His decision is not only wrong, it is also contrary to the law. As was stated in *R v Nat Bell Liquors Ltd* [1922] 2 AC 129, 156:

> That the superior court should be bound by the record is inherent in the nature of the case. Its

> jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction … That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the court of its exercise.

I would, on this ground alone, dismiss the appeal except so far as the order of prohibition is concerned. I agree that it should not have issued and should be recalled. I appreciate that upholding the issue of *certiorari* involves quashing the Minister's decision and leaving nothing in its place; but, as I understand the position, *certiorari* does not include a power to remit the appeal with directions, as can be done with *mandamus* which was not, however, applied for in this case; see, for example, *Hypolito Cassiano de Souza v Chairman and Members of the Tanga Town Council* [1961] EA 377. I would, however, see no objection to the Minister hearing the appeal *de novo* if the order of *certiorari* were upheld. As, however, Law JA and Miller Ag JA are of different opinion as regards the order of *certiorari*, the appeal is allowed and there will be an order in the terms proposed by Law JA. I would only add that I wholly endorse his views as to costs and hope that these will be defrayed from public funds.

Law JA. On July 12, 1971, the Riandu administrative sub-location of Nthawa location, Mbere division, Embu district, was declared an adjudication section of the Embu adjudication area, and the land therein became subject to the provisions of the Land Adjudication Act ("the Act"). An undefined part of that land, which was trust land, had for many years past been claimed as belonging to two clans, represented in these proceedings by the appellant and the respondent; it was what might be described as a "buffer zone" between two recognised areas of land occupied by the two contending clans. There was Litigation between representatives of the two clans in the Mbere African Court over "land called Muthanthara" which was resolved in favour of the respondent in this appeal; there was a further suit in the Court of the District Magistrate at Siakago, over "land called Riamurithi" which was also resolved in favour of the respondent; and appeals to the Court of review were dismissed.

When the Riandu sub-location was declared an adjudication section, it (or part of it) was claimed as belonging to their respective clans by the appellant and the respondent. The dispute was referred to the land adjudication committee, which proceeded to adjudicate in accordance with section 20 of the Act. The committee decided that the dispute was *res judicata* and that the respondent's clan should "remain in the land in question". The adjudication register was completed accordingly. There were no other persons claiming an interest in the adjudication area at that time. The appellant objected to the register to the adjudication officer, under section 26 of the Act. The adjudication officer heard the objection, and dismissed it. He confirmed the decision of the committee, relying (as did the committee on the Court of review's judgment. The respondent, at this stage, had won all along the line. The appellant, nothing daunted, appealed to the Minister of Lands and Settlement under section 29 of the Act. In his "form of appeal" to the Minister, the appellant objected to the adjudication officer's decision against him in respect of "Plot 246". There was no reference to any such plot in the adjudication officer's decision. By an additional document filed in the appeal and accepted by the Minister, the appellant explained that his objection was in respect of thirty-four plots, whose numbers he gave. These plots are all on the disputed land, and appear to have been placed on the register by persons claiming an interest in the land awarded by the committee and the adjudication officer to the respondent's clan. These interests flow from allocations made by the respondent to members of his clan, and must have been created after the adjudication officer's decision, as none of these interests were the subject of claims when the dispute was adjudicated by the committee and the adjudication officer. The only claimants at that time were the appellant and the respondent, as clan heads.

In due course, the Minister heard the appeal. He went to Embu. He enlisted the aid of a number of assessors. He heard the evidence of the parties and their witnesses. He went on to the land itself, and the parties pointed out on the ground the boundaries claimed by their respective clans. The Minister decided the appeal in favour of the appellant and his clan. His decision reads as follows:

> Summary. I have given both the appellant and respondent ample time to make their claims and I have even visited the land under dispute. Both parties have given in details how the land came into their possession and how they have dealt with the land thereafter. The appellant claims that the

> respondent with whom they have a common boundary crossed the boundary, and claimed a big area of respondent's land. On the other hand, the respondent claims that he has all along shown the same boundary to the respective Courts which had awarded him the land but also claims that the appellant has been changes [*sic*] his claims, sometimes claiming more land at other times claiming less land. After visiting the land and listening to both claims, on the actual area under dispute, I am satisfied the appellant has got right to own the land.
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> Judgment. Appeal is allowed.

The Minister thereupon ordered that thirty of the numbered plots, and part of two other plots, be awarded "to [the appellant] and his clan", and that the register be altered accordingly.

Section 29(1) of the Act provides that the Minister's determination shall be final. The respondent accordingly had no right of appeal. He applied to the High Court for the issue of orders of *certiorari* and prohibition to quash the Minister's decision, and in his affidavit in support of his application he detailed the grounds upon which he relied, including (*inter alia)* (a) that the decision was *ultra vires* and against the rules of natural justice; (b) that it disregarded the principles of *res judicata*; (c) that it affected the rights of persons who were not parties to the appeal: (d) that the Minister allowed persons calling themselves assessors to hear the appeal and advise him; (e) that the Minister acted without jurisdiction; (f) that he failed to give reasons for his decision; and (g) that there was error of law on the face of the record.

Madan J, who heard the application, allowed it and ordered *certiorari* and prohibition to issue. He directed himself as follows at the beginning of his judgment.

> Although section 29 of this Act lays down that the order made by a Minister on an appeal to him is final, the High Court always has supervisory jurisdiction to review the decision of a quasi-judicial tribunal such as a decision delivered by a Minister in an appeal to him under statutory provisions, and to correct any error which the interests of justice may require.

I respectfully agree, with the qualification that the last sentence is perhaps too widely stated. In *certiorari*, it is not "any error" which may be corrected; it is only an error on the fact of the record, or what is known as a "speaking error", which will justify the Court quashing an order in the exercise of its supervisory jurisdiction; see *R v Nat Bell Liquors Ltd* [1922] AC 129, 156, *per* Lord Summer:

> That the superior court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior court has not exceeded its own, and for that reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined.

I have emphasised the words "not of review", which make it clear that the court's jurisdiction in *certiorari* is supervisory, and not in the nature of a jurisdiction to review generally (or to sit on appeal from) the proceedings which led to the impugned decision. As is stated in 1 *Halsbury's Laws of England* (4th Edn) page 150, paragraph 147, *certiorari* will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, or breach of the rules of natural justice, or where the determination was procured by fraud, collusion or perjury, but Madan J seems to have found that there was excess of jurisdiction in the use by the Minister of assessors, because in his words "It is not possible to say with certainty that the decision reached by the Minister was his own. This was another incurable irregularity." With respect, I am unable to agree. It is true that the Act does not specifically authorise the use of assessors; equally, it does not forbid their use. A Minister hears appeals under the Act from all over the country. He cannot be expected to be familiar with the customary laws of all the tribes, and it seems to me eminently reasonable that, before deciding an appeal, he should seek the advice of men experienced in local law and local conditions. The essential thing is that the decision should be the Minister's and nobody else's, and it is clear from his decision on record in this case that the decision was in fact his and his alone, reached after hearing the evidence and visiting the scene. I see no excess of jurisdiction arising out of the use of assessors in this case.

Two other matters caused Madan J much concern, and amounting in his view to violations of the rules of natural justice. One was the failure of the Minister to apply the principles of *res judicata* in the light of previous court decisions affecting the land in dispute; and the other was that his decision adversely affect persons who had not been served in the appeal and who had no opportunity to defend their claims to plots on the disputed land.

On this second point, those persons were members of the respondent's clan who had been allotted plots by the respondent after the decisions of the Court of review, the committee and the adjudication officer which were in his favour. As the respondent said, in reply to a question by the appellant in the course of the appeal before the Minister, "The land is mine. I defeated you, I could give the land away as I liked." It thus appears that the persons affected by the minister's decision were clan members who claimed interests in the disputed land on the ground that they had been "given" plots by the respondent as head of the clan. These claims were valid only to the extent that he respondent's claim was valid. The Minister held that the respondent's claim failed, and it must follow in my view that the claims of the thirty-two interested parties must suffer the same fate. I see no breach of the rules of natural justice in this.

As regards *res judicata*, section 12(1) of the Act imposes on the adjudication officer a duty, when hearing an objection, "so far as is practicable" to follow the procedure directed to be observed in the hearing of civil suits. Section 7 of the Civil Procedure Act precludes any Court from trying an issue which has been heard and finally decided by another Court. Order XX, rule 4, of the Civil Procedure Rules lays down that a judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

But no such duty to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure. His duty, by section 29 of the Act, is to, "determine the appeal and make such order thereon as he thinks just." That is exactly what the Minister did in this case. He had in mind the previous litigation, but gave no effect to it. In my view, he was justified in doing so. The "final decision" of the court of review, whilst upholding the respondent's claim to "land at Raimurithi", spoke of constant "encroachments". The exact area was not precisely defined, presumably because it could not be precisely defined. The Minister also noted that boundaries had been crossed, and that claims to the land had been changed. This lack of precision as to the extent of claims leads me to believe that *res judicata* could not have applied to the proceedings before the Minister, and I do not think that any breach of natural justice resulted from the Minister's refusal to give effect to decisions in earlier litigation. It is also arguable that the principles of *res judicata* have no bearing on disputes under the Act, except to the extent of showing whether a claimant has a *bona fide* claim or not. Section 18 of the Act makes it clear that existing boundaries can be altered and adjusted. This would not be possible if the rules of *res judicata* were strictly applied. In my view, interests in land within an adjudication area previously recognised by Courts are not binding in land adjudication proceedings, and are only relevant as a factor to be taken into account. Where the interest relates to disputed clan land, the question of the over-riding interest in that land is in my view an open question, at any rate so far as the Minister is concerned. No title to such land exists, it is the right of a particular clan to use that land as a clan which is in question. It seems to me, in accordance with the preamble to the Act, that its object is to enable the ascertainment of rights and interests in trust lands. These rights and interests arise out of customary law, and are normally (as in this case) of an imprecise and vague character. The Minister is the final arbiter as to the extent of these rights and interests. In this case, after a full and thorough inquiry, the Minister has held that the rights and interests claimed by the appellant in the "buffer zone" have been established and that they prevail over the rights and interests claimed by the respondent. The Minister had jurisdiction to entertain the appeal, and even if he has reached a wrong decision, which may well be the case, his jurisdiction is not destroyed. As was said by lord Raid in *R v Governor Brixton Prison, ex parte Armah* [1968] AC 192, 234, "If he has jurisdiction to go right he has jurisdiction to go wrong".

I can see no error of law on the face of the record, and no breach of the rules of natural justice, in this case, such as to warrant interference by the superior court acting in its supervisory jurisdiction. The Minister's decision was a harsh one, so far as the respondent is concerned, and may have been a wrong one. This case has many features in common with *Bisuche v Barasa* (unreported) in which the appellant, whose right to ownership of certain land in an adjudication area had been recognised by the adjudication

committee, by the arbitration board and by the adjudication officer, yet on an appeal to the Minister, he lost everything. The High Court refused to issue *certiorari*, and this Court's predecessor agreed, on the basis that no want or excess of jurisdiction had been established.

I would accordingly allow this appeal, recall and set aside the orders issued in the nature of *certiorari* and prohibition by Madan J, and restore the Minister's decision. I have not dealt specifically with the order of prohibition; but I doubt whether it should have issued at all, as nothing remained to be done by the Minister which could be prohibited.

The order for costs in this appeal causes me some concern. The Minister was not formally cited as a respondent; he was, however, served as an interested party, and appeared and was heard on this appeal, representedby State Attorney, Mr Munene, who supported the appellant in arguing that the appeal should be allowed. Mr Munene did not ask for an order for costs.

As regards the respondent, costs must in my view follow the event, and I would order that the appellant be paid his costs in the appeal, to include a certificate for two counsel, and his costs of the proceedings in the High Court, by the respondent. At the same time I express the hope (I can do no more) that the Government will defray these costs. The respondent and his clan have already suffered a considerable loss as a result of the Minister's decision, which may well have been wrong, and it would be a great hardship to the respondent and his clan, in the circumstances of this case, if they have to bear the additional hardship of having to pay what will doubtless be a large sum by way of costs.

Miller Ag JA. It is not necessary to restate the facts or examine the individual stages of proceedings which led up to this appeal, as this has been done by Law JA; but I find it appropriate to add the following. A brief look at the Acts of Parliament dealing with land and title to land would show that between 1959 and 1968, the government took laudable and practical steps to ensure that, *inter alia*, Kenyans who had been occupying lands in the country on the basis of custom and customary heritage would no longer merely refer to such lands as their "forefathers' land" or having been "captured" by them or their predecessors, but were to be free to take steps towards the acquisition of title to those lands on proof of legally-recognisable claims. This is concisely stated in the preamble to the Land Adjudication Act ("the Act"); and, as it were, in aid of the administration of expected incidents arising from the "ascertainment of rights and interests in trust land," the Legislature enacted the Land (Group Representatives) Act, both Acts coming into operation on the same day, ie 28th June 1968, and the latter Act adapting the definition of "group" in the Act as meaning "a tribe, clan, section, family or other group of persons". If I might say so, I am of the view that the Legislature may have contemplated the day when the Land Adjudication Act should have outlived its usefulness, when claims to group customary occupation and interests in land should have been fully replaced by registrations. The scope, spirit and intention of the Act are therefore of the utmost importance when construing its provisions. I fully agree with Madan J who heard the application from which this appeal is brought, that:

> The High Court always has supervisory jurisdiction to review the decisions of a quasi-judicial tribunal such as a decision delivered by a Minster in an appeal to him under statutory provisions, and to correct any error which the interests of justice may require.

I, however, believe that care must be taken in the application of the ending of the above-quoted observation, ie "… and to correct any error which the interests of justice may require". It is well settled that where, for example, by subsidiary legislation a Minister (by himself, or through his officers to whom his powers are delegated) offends the spirit or dictates of a principal Act of Parliament, the Courts can intervene and correct the situation; but I think that it is (basically) a slightly different matter (as in the present case) where the Legislature (by section 29 of the Act) itself vested in the Minister personal and unfettered power to dispose finally of appeals to him. In the latter premise, and with the purpose of this particular Act in view, there is a latent need for a sideways glance at Ministerial responsibility, then the cabinet, then the Fountain of Authority. It appears to be not without relevant reason that latterly subsection (4) was added to section 29 of the Act, whereby a delegate of the functions of the Minister of Lands and Settlement shall be deemed "the Minister acting in person for all purposes". What is more, the Act prescribes within itself a specific and complete code for the treatment of the land adjudication cases

through set stages, with the Minister empowered to determine appeals to him "and make such orders as he thinks just"; his orders being final. It cannot therefore be said that he acted without jurisdiction. In my humble view the phrase "as he thinks just" is expressive of a statutorily-empowered latitude which may have been overlooked by Madan J when reflecting on the principles of natural justice, and that some thirty-two claimants should have been heard. I think, however, that the case is better viewed, in fact, as between tow parties as "group" or clan representatives before the Minister (and as defined in the Act); and that the acceptance or refusal of either rival claim to consideration for allotment to the contested area of land was the salient question. I therefore do not think that the failure or refusal to hear the claims to interests by individual clan members (already being contested through the two clans' leaders) constituted a breach of the principles of natural justice on the appeal to the Minister; for even at that stage it was not a matter of interference with the vested rights of individuals within the clans demanding that each be heard in his cause, but the determining of the validity of claims as between two clans. Further, no error on the face of the record has been shown; a matter which counsel for the appellant has vehemently stressed. I have deliberately refrained from making observations on the point *res judicata* which has been peddled at the committee stage of adjudication, in the High Court and before this Court. My reasons are that by section 30 of the Act, civil proceedings concerning land in an adjudication area are (unless the adjudication officer otherwise directs) subject to the final decision of the Minister. More particularly, sub-section (4) of section 30 does not prevent the enforcement or execution of a final court order. For the above reasons I do not agree that the Minister's order should be quashed but that the appeal be allowed and costs awarded as ruled by Law JA.

Appeal allowed with costs.

Dated and delivered at Nairobi this 8th day of February 1979.

S.W WAMBUZI

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR