THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 107 OF 2017

(Arising from the Ruling dated 15th July, 2016 and delivered on 24th August, 2016 by the High Court of Uganda at Kampala (Hon. Mr. Justice. Alfonse Chigamoy Owiny-Dollo) (as he then was) in High Court Miscellaneous Application No. 833 of 2006 arising from High Court Civil Suit No. 614 of 1993)

MERCATOR ENTERPRISES LIMITED:::::::::::::::::::::: APELLANT

VERSUS

SHELL (UGANDA) LIMITED::::::::::::::::::::::::::::::::::RESPONDENT

Coram:
Hon. Justice Geoffrey Kiryabwire, JA
Hon. Justice Monica.K.Mugenyi, JA
Hon. Justice Remmy.K.Kasule, Ag JA

Judgment of Hon. Justice Remmy. K. Kasule, Ag. JA

This appeal is against a Court Ruling (Alfonse Chigamoy Owiny-Dollo, J, as he then was) dated 15th July, 2016 and delivered on 24th August, 2016 in High Court at Kampala **Miscellaneous Application No.833 of 2006** arising from High Court **Civil Suit No. 614 of 1993: Mercator Enterprises limited Vs Shell (Uganda) Limited**.

Background

The Appellant is the successor in title to the original plaintiffs to the suit from which this appeal arises. They were Amirali.H.Nathu, Hussein H.Nathu, Sadrudin AG.Nathu, Sherbanu H.Nathu and all were shareholders in a limited liability Company Messrs Hasanali Nathu Limited under which they operated. After the suit i.e HCCS No. 614 of 1993 had been lodged in Court, the Appellant, with permission of the Court succeeded to the suit and became the plaintiff, now the Appellant, to the suit and the Appeal. Thus the term **"Appellant"** shall where appropriate, refer to the Appellant's predecessors in title.

The Appellant and the Respondent had a business working relationship during the period 1969-1972. This relationship resulted in the appellant contracting with the Respondent to develop the land property comprised in Plot 49 Ben Kiwanuka street, Kampala City, herein after referred to as "the suit property" of which, at that material time, had the Respondent as the registered proprietor.

The contract executed between the Appellant and the Respondent was that the Appellant was to construct upon the suit property commercial premises comprising of a petrol station on the ground floor and two floors above the petrol station to be used as office apartments.

It was an agreed upon term of the contract that upon the Appellant completing the construction of the petrol station on the ground floor, the Respondent was to transfer the ownership of the suit land into

the names of the Appellant, and thereafter, as registered proprietor, the Appellant was to sub-lease the area comprising the petrol station to the Respondent for the term of the head lease less one day. The two floors of the office apartments above the petrol station were to remain the property of the Appellant.

Pursuant to and in compliance with the executed contract, the Appellant constructed the building structure, the ground floor being the petrol station and the two floors above, being the office apartments.

In September, 1972, the Appellant handed over to the Respondent, the ground floor being the petrol station. The Respondent took ownership, occupation and operation of the same.

From 26th January, 1971, Uganda was under the governance of a Military Government led by General Idi Amin Dada who had assumed power through a military coup. In 1972, Idi Amin's Military Regime expelled from Uganda those Asians who were not citizens of Uganda. The Uganda Government, took over the ownership and use of the properties, moveable and immoveable, of the expelled Asians.

The Appellant were Asians with Uganda Citizenship. They were however affected by the expulsion, as in practical terms, the expulsion affected all Asians in Uganda, both citizens and none citizens.

The said expulsion came after the Appellant had carried out to completion the construction of the petrol station and the office

apartments upon the suit property. The Appellant had thus completed execution of his part of the contract. The Respondent's obligation of transferring the suit land into the Appellant's names, and the Appellant, in turn, executing a sub-lease of the petrol station into the names of the Respondent, remained outstanding and pending, frustrated by the expulsion of Asians from Uganda. The same awaited to be carried out by the Respondent in future.

In the meantime, pursuant to the contract, the Appellant remained as equitable owner of the suit land, and when the Appellant's Asian owners remained outside Uganda, the Respondent, who had taken over not only the petrol station, but also the office apartments, of the suit property, held the same for and on behalf of and/or in trust of the Appellant.

In 1979, the Idi Amin Military Regime lost political power. The expelled Asians including the Appellant returned to Uganda. The Appellant commenced their commercial and business activities, including those contracted with the Respondent. They demanded of the Respondent to transfer the suit property into their names, so that they, in turn, could execute a sub-lease of the petrol station, in favour of the Respondent. They also further demanded of the Respondent to account for and/or pay them the rent and/or mesne profits that the Respondent had collected during the period of the expulsion of Asians when the office apartments had been under the control, use and/or management of the Respondent.

The Respondent denied the Appellant's claims. The Appellant then lodged in the High Court at Kampala **Civil Suit No. 614 of 1993** to have the High Court determine the dispute between the Appellant and the Respondent as to the validity of the claims. The proceedings were closed in the said suit and a formal hearing date by the High Court was being awaited.

On 18th May, 2001, both the Appellant and the Respondent mutually reached a partial resolution of the issues in the High Court **Civil Suit No. 614 of 1993**. The Respondent agreed to transfer the suit property into the names of the Appellant. The Appellant, in turn, agreed to execute a sub-lease for the whole term of the lease less one day whereby the Respondent would be registered owner of the petrol station.

As to recovery of rents and/or mesne profits by the Appellant from the Respondent, and all other issues arising from the suit, the Appellant and Respondent, through their respective Counsel, agreed to determine those issues by holding, further negotiations between themselves. In case of failure to reach an agreement, then both the Appellant and the Respondent, would go back to the High Court to have the issues upon which disagreement still persisted to be determined by the High Court.

The Appellant and Respondent failed to reach a settlement on the issue of rent/mesne profits, and also on the issue of whether or not the Respondent held the office apartments in trust for the Appellant

and whether the Expropriation Decrees issued by the Idi Amin Military Regime applied to the suit property.

High Court at Kampala **Miscellaneous Application No. 833 of 2006** was instituted in the High Court by the Appellant against the Respondent as arising from **HCCS No. 614 of 1993** to resolve those issues of the disagreement.

The Hon. Mr. Justice Alfonse Chigamoy Owiny –Dollo, of the High Court, as he then was, entertained the application and rendered his decision dated 15th July, 2016 on 24th August, 2016. The learned Judge held that the appellant's claim against the Respondent, pertaining to any loss of earnings from the suit property had no basis in law because the property had been expropriated during the Amin Regime and the same had later been re-vested in the Uganda Government by the Expropriated Properties Act, 1982. This Act had nullified all dealings whatever in the suit property during the period of expropriation. The learned Judge thus dismissed the Appellant's claims and ordered each party to bear its own costs.

On 01st March, 2017, the High Court (Bashaija,J) through **Miscellaneous Application No. 1108 of 2016** granted to the Appellant leave to appeal the said Ruling of Hon. Justice Alfonse Chigamoy Owiny-Dollo delivered on 24th August, 2016 in High Court **Miscellaneous Application No. 833 of 2006**. Hence this appeal to this Court.

Grounds of Appeal

"1. The learned Trial Judge erred in fact and in law when he held that the Expropriation Decrees of 1972-1973, passed by the Idi Amin regime, applied in this case and operated so as to invalidate the appellant's claim.

2. The learned Trial Judge erred in law when he held that:

a. Important issues between the parties, that conclusively established the liability of the Respondent, had not already been resolved,

b. The doctrine of resJudicata did not apply; and

c. Such issues were open to a de novo reconsideration by the court.

3. The learned Trial Judge erred and failed to properly exercise his duty when he omitted to consider, ascertain, and pronounce upon the quantum of mesne profit and damage due".

Legal Representation

Advocates Joel Olweny and Samash Nathu appeared for the Appellant, while Joseph Luswata was for the Respondent.

Mr. Stephen Chomi, Company Secretary of the Respondent was also present in Court.

With permission of Court, Counsel for the respective parties adopted their written submissions and conferencing notes that they had filed in Court for their respective parties.

Submissions for the Appellant.

Ground 1.

Appellant's Counsel submitted that the Expropriation Decrees No. 27/1972, 29/1972 and 27/1973 did not apply to the appellants' predecessors in title because they were Asian Uganda citizens while the stated Decrees were issued to deal with Asians who were not Uganda Citizens.

The evidence adduced at trial in proof of this fact was not in any way contradicted by any other evidence from the Respondent, or from any other source. Accordingly it was a proved fact that the Appellant's predecessor in title were Asians of Uganda Citizenship.

Section 1 of Decree 27 of 1972: "The Declaration of Assets (Non-Citizen Asian) Decree, 1972 defined "departing asians" as those Asians leaving Uganda by virtue of the provisions of the Immigration (cancellation of Entry Permits and Certificates of Residence) Decree, 1972. The Appellant's predecessors in title were citizens of Uganda, not by way of entry permits or certificates of residence that could be or were cancelled. There was no evidence at all adduced to rebut this assertion, Appellant's Counsel so submitted.

The Appellant's predecessors-in-title were also not covered by the definition of "departed Asian" in Decree 27 of 1973 as opposed to

"departing Asian" in Decree 27 of 1972 because, Counsel so contended, the Appellant's predecessor in title were not in the category that left Uganda in such a manner as would necessitate the taking over in the public interest of any property left in Uganda by them.

The Appellants' predecessors in title left Uganda in October, 1972, on their own, like any other citizen would go out of the Country. They left before Decree 27 of 1973 was issued. Therefore there was no evidence that they left Uganda in such a manner as would necessitate the taking over in the public interest of their properties, including the suit property. Indeed, throughout the material period, the Respondent, who had control, occupation and management of the suit property did not on their own, surrender the same and were never required by the Government of Uganda to hand over the suit property to the Government to be taken over in the public interest.

Learned Counsel for Appellant thus prayed this Court to allow ground 1 of the appeal.

Ground 2.

Appellant's Counsel contended in respect of ground 2 that the learned Trial Judge erred when he held that the consent order dated 18th May 2001 executed by the Appellant and the Respondent with approval of the Court at the trial of **HCCS No. 614 of 1993** did not resolve issues of the Respondent being liable to account for and to

pay rent or mesne profits to the Appellant, and that the only issue for trial, if an amount could not be agreed upon, being how much rent and/or mesne profits payable.

Counsel also contended that the issue of whether the relationship of the Respondent and the predecessors in title of the Appellant, at that material time, amounted to a trust, had been settled by the said consent order. Therefore the learned Trial Judge erred to hold otherwise.

Appellant's Counsel thus contended that under the principle of ResJudicata, the trial Court had been barred to adjudicate on those issues. Accordingly ground 2 had to be allowed.

Ground 3.

Counsel for the Appellant reiterated the submissions that the Expropriated Decrees Nos 27 of 1972, and 27 of 1973 did not affect the rights of the Appellant's predecessors in-title in the suit property.

The evidence also established that the Respondent occupied, controlled and obtained benefit out of the suit property throughout the material time the Appellant's predecessors in-title were out of Uganda from October, 1972 up to 2001 when the Respondent transferred the suit property to the Appellant.

Appellant's Counsel thus argued that the learned trial Judge ought to have ordered the Respondent to account for and to pay the Appellant the accumulated money paid as rent that the Respondent earned from the upper floors of the suit property from 1972 to 2001.

The fact that the learned trial Judge did not so hold and did not determine the actual amount payable was an error and as such ground 3 ought to be allowed.

Appellant's Counsel thus prayed the whole appeal to be allowed.

Submissions of Counsel for the Respondent.

Ground 1

Respondent's Counsel maintained that the Expropriation Decree 27 of 1972 enacted September, 1972 but retrospectively effective from 9th August, 1972 as well as Decrees 29 of 1972 and 27 of 1973 effective December, 1973 expropriated the suit property of the Appellant. This is because the Appellant's predecessors in-title were Asians who had left Uganda in a manner that necessitated the taking over of their interests in the suit property in the public interest. It did not matter whether the interests of the Appellant's predecessors in title in the suit property were in the nature of being beneficial owners or as beneficiaries under a trust, whether oral trust or Alibhai trust. Whatever was the nature of the interest, the same was expropriated by the stated Decrees.

Relying on the persuasive case authority of ***HCCS No. 1136 of 1999: Peter Mulira Vs Crown Beverages,*** Respondent's Counsel reasoned that the fact that the suit property had been left by the Appellant in the hands of the Respondent did not stop the process of the same being expropriated in the public interest by the then existing law. Further, Respondent's Counsel contended that the fact that the

ownership of the suit property had by consent of the Respondent and the Appellant been transferred to the Appellant, could not do away with the operation of the then existing law of having the property being automatically expropriated under the said law. Counsel for the Respondent relied on the decision of the Court of Appeal Civil Appeal **No. 70 of 2014: Elizabeth Nalumansi Wanda Vs Jolly Kasande,** in support of his submissions.

Respondent's Counsel thus prayed that ground 1 be disallowed.

Ground 2

Counsel for the Respondent contended that the consent order dated 18th May, 2001 between the Appellant and the Respondent in **HCCS No. 614 of 1993** did not amount to a concluded agreement that the Respondent admitted liability to pay rent and/or mesne profits to the Appellant. Counsel reasoned that the said issue was expressly left for determination by the trial Court, once the parties failed to agree on the issue.

Counsel further contended that the learned Trial Judge acted rightly and correctly when he held that the said issue was not ***ResJudicata*** and proceeded to try the same issue and others de novo. Counsel prayed that ground 2 be dismissed as having no merit whatsoever.

Ground 3.

It was submitted by Counsel for the Respondent that the claim of the Appellant for rent/mesne profits for the period from 22nd September, 1972 when the suit property was handed over to the Respondent up

to 2002 when the Appellant re-took possession of the suit property less the petrol station that remained with the Respondent was not recoverable by the Appellant. This is because the interests of the Appellant in the suit property had been expropriated by Section 3 of Decree 27 of 1973. The suit property was, at that material time, an asset left behind by the Appellant's predecessors in-title who were Asians who had left Uganda at that time. Accordingly the suit property automatically, without any further authority, vested in the Government. The Appellant's claim could only be addressed to the Government of Uganda into whom the suit property had been vested.

Accordingly learned Counsel for the Respondent maintained that the learned Trial Judge decision to that effect was correct and as such ground 3 had no merit and ought to be disallowed.

All the grounds of the appeal having failed, the whole appeal had to be dismissed with costs, Counsel so submitted.

Resolution of the grounds of appeal.

The duty of this Court as an appellate Court of first instance is to carry out its own consideration of the evidence as a whole and make its own decision thereon. As a first appellate Court, this Court has a duty to review the evidence of the case and to reconsider the materials adduced before the trial Judge. This first appellate Court must then make up its own mind not disregarding the Judgment appealed from but carefully weighing and considering it. **Rule 30(1)(a)** of the Rules of this Court clearly sets out this duty. The Supreme Court reiterated this duty of a first appellate Court in **Civil**

The above duty will be carried out in resolving the grounds of this appeal.

Ground 1

In Ground 1, it has to be resolved whether or not the learned trial Judge erred in law and in fact when he held that the Expropriation Decrees passed by the General Idi Amin Regime during the period 1972-1973 applied to the case of both the Appellant and Respondent in this appeal and whether the said Decrees operated so as to invalidate the Appellant's claims in the suit property.

The essence of the 1st ground of appeal and indeed the whole appeal is to determine whether or not the learned trial Judge was right, both in fact and in law, when he held that the suit property Plot 49 Ben Kiwanuka Street, Kampala City, and the developments thereon, comprising of a commercial building structure with a petrol station on the ground floor and office apartments on the two floors above the petrol station ground floor, was expropriated by the Expropriation Decrees passed by the Idi Amin Regime during the period 1972-1973 when the said Regime expelled certain categories of Asians from Uganda.

A resolution of the above, requires an examination of the relevant Expropriation Decrees that the Idi Amin Regime passed in 1972-1973.

First to be made on 4th October, 1972, but deemed to have come into force on the 9th August, 1972 was: "The Declaration of Assets (Non-Citizen Asians) Decree, 27 of 1972.

This Decree made provision for the Declaration of Assets by Non-Citizen Asians leaving Uganda by reason of cancellation of the entry permit and certificate of residence under Decree No. 17 of 1972.

Then there followed "The Assets of Departed Asians Decree No. 27 of 1973 which barred a departing Asian under the category of Decree 17 of 1972 from transferring, mortgaging, issuing new shares, appointing new directors and/or changing salaries or terms of employment of staff in respect of any immovable property, bus company, farm, including live stock, and/ or any business.

Every departing Asian had to declare his/her assets and liabilities to the Government through the Minister of Commerce and Industry. A departing Asian could also appoint an agent to sell the property under the supervision and direction of the Government.

The Appellant's predecessors in title were Asians who were citizens of Uganda by birth. They were not in Uganda on the basis of being granted Entry permits and Certificates of Residence. Accordingly Decree 27 of 1972, on its own, did not apply to them.

The other law was "The Declaration of Assets (Non-Citizen Asians) (Amendment) Decree 29 of 1972 made on 24th October, 1972.

This Decree amended Decree 27 of 1972 by providing for the establishment of a Board to manage the properties abandoned by the

Departing Asians. This body was the ***"Abandoned Property Custodian Board".*** It was a body corporate with powers to sue and to be sued. It comprised of the Ministers of Commerce and Industry who was the chair, of Finance, Internal Affairs, Foreign Affairs, Mineral and Water Resources, Public Service and Local Administrations. This body took over and managed as a State Organ, every property of the departed Asians that was vested in it with power to deal with the same in the same way as the departing Asian would have done. With respect to any agreement to which a departed Asian was a party, the Custodian Board was to be substituted for that departed Asian. Under **Section 12** of this **Decree**, every property left by a departing or departed Asian, without further assurance, automatically became vested in this Board. Under **Section 12 (2),** any property abandoned by a departing Asian, or which was left without adequate arrangement for its proper and efficient management, could be vested in this Board by Statutory Order. **Section 12(3)** widened the term ***"departing Asian"*** to include a non-citizen and a Uganda Citizen of Asian origin for the purposes of **Sections 12, 13** and **15** of **Decree 29** of **1972.**

It is of significance that **Section 17(3)** of the **Assets of Departed Asians Decree No. 27 of 1973** provided that:

"For the removal of doubts where any property is allocated pursuant to Section 16 of this Decree, and the Owner immediately before the acquisition of such property by the Government was a Ugandan Citizen of Asian Origin, who has

confirmed his citizenship in the manner prescribed by Government, the property shall, as soon as maybe, be restored to the said owner, if restoration is possible, but where restoration is not possible, Compensation shall be paid therefor by the Board"

Section 16 of **Decree 27** of **1973** provided for the allocation of Assets to Uganda Citizens. What has to be inferred from **Section 17(3)** of **Decree 27** of **1973** is that when a Uganda Citizen of Asian origin confirmed his/her citizenship in the manner prescribed by Government, then his/her property had mandatorily to be restored to such a one, and where restoration was not possible, then compensation had to compulsorily be paid to such a one by the Departed Asian Custodian Board.

The other law is ***"The Assets of Departed Asian Act, Cap. 38 Laws of Uganda"***, with a commencement date of 8th December, 1973. **Section 3** of this Act vested the assets and liabilities declared by a departing Asian, including property or business recorded in the register of property and businesses of departing Asians, as well as any assets left behind by an Asian who failed to prove his or her citizenship at the time and in the manner specified by the Government, into the Government. **Section 4** of the Act established the Departed Asians Property Custodian Board with powers set out in Section 6 of the Act, the main power being to take over and manage all assets transferred to it by virtue of **Section 13** of the **Assets of Departed Asian Decree No. 27 of 1973.**

The appreciation of the above stated laws shows that expropriated properties, at that material time, consisted of those properties belonging to the Non-Citizen Asians who had been expelled from Uganda. These included also those Asians who were staying in Uganda but whose entry permits and Certificates of Residence had been cancelled by and/or under the Immigration Cancellation of Entry Permits and Certificate of Residence Decree, 1972. See: **Section 4(5)** of **Decree 27 of 1972.** This category was later enlarged by **Section 12(3)** of **Decree 29 of 1972** for a departing Asian to include both non-citizen and Uganda Citizens of Asian origin.

However, the property of a Uganda Citizen of Asian origin could only be expropriated if that Ugandan citizen left Uganda abandoning the property or leaving the same in such a way without making adequate arrangement for its proper and efficient management. See: **Section 12 (2) and (3)** of the **Decree 19 of 1972**. It thus follows that if one claimed to be a citizen of Uganda, but failed, when required to do so to prove that citizenship, then such a one would be treated as a Non-Citizen of Uganda and the property would be expropriated. See: **Section 4(1) of Decree 27 of 1973: Assets of Departed Asians Decree, 1973.**

The property of a Uganda Citizen of Asian origin who proved and/or confirmed his/her being a citizen of Uganda had compulsorily to be restored to the said Uganda citizen owner of Asian origin, and if restoration was not possible, then the said owner had to be paid compensation by the Government through the Custodian Board. The

restoration and/or payment of compensation to such Uganda citizen owner of Asian origin had to take precedence over any other compensations under **Decree 27 of 1973.**

Therefore the law as it was at that material time provided protection to a citizen of Uganda of Asian origin whose citizenship was not questioned or disputed and who did not abandon his/her property or left the same in such a manner without care and management as would necessitate the taking over of the same in the public interest.

The learned trial Judge found in his Ruling that the predecessors-in-title of the Appellant did not prove their citizenships when they departed from Uganda in October, 1972, and that by reason thereof their respective interests in the suit property became expropriated under **Section 4(1)** of **Decree 27 of 1973.** The Learned Judge held at page 636 paragraph 3 volume 3 of the Record of Appeal thus:

"It is therefore quite clear from the above cited Section (i.e.S.4(1)) of the Decree No. 27 of 1973 that it was incumbent on departing Ugandan Citizens of Asian extraction who wished to avoid their assets being expropriated, and vested in Government, to prove their citizenship before their departure. There is no evidence before Court that the plaintiff's/Applicant's predecessors had proved their citizenship when they departed from Uganda in October 1972; or at any other time after their departure. The burden rested on them to adduce evidence in Court that they had complied with this clear provision of the law".

With the great respect to the learned trial Judge, he had no basis to hold as he did above, because the issue of whether or not the predecessors in title to the Appellant had to prove or proved their being Uganda Citizens by birth did not at all arise with the pleadings filed by either party in original **HCCS No. 614 of 1993.**

Had the Respondent raised the issue in its written statement of defence to the Appellant's assertions in the plaint in the said suit, then the Appellants would have appropriately pleaded in reply to the said written statement of Defence.

At trial, the Appellant would also have adduced the necessary evidence of having proved their Ugandan Citizenship by birth or otherwise.

Indeed, at the trial stage of **HCCS No. 614 of 1993**, the Respondent/Defendant agreed with the Appellant/Plaintiff and it was recorded as an agreed fact that:

"In October 1972 the plaintiff (i.e. now Appellant) left Uganda in the Asian Exodus, but their interest and rights in the plot (i.e. the suit land) were not affected by the Expropriation Decrees".

There is no way the Respondent would have taken that as an admitted fact in the absence of the knowledge that at the time the Appellant left Uganda under the Asian Exodus, they had proved that they were Ugandan Citizens.

Further support for the above is in the testimony of Amirali.H.Nathu as witness for the Appellant/Plaintiff under cross-examination by Counsel for the Respondent/Defendant on 27th January,2009 at page 496 volume Three of the Record of Appeal. He stated he was 70 years old and that he was born in Uganda. It was not put to this witness that he was not telling the truth or that he had failed to prove his citizenship when he left Uganda during the Asian Exodus in October, 1972. It was also not put to him by Counsel for the Respondent that the rest of the Appellants had failed to prove their Ugandan Citizenship in October 1972 and thereafter.

The Respondent having assured the Appellant that it was an agreed upon admitted fact that the Appellant rights in the property **"were not affected by the Expropriation Decrees"** thus making it unnecessary for the Appellant to prove the issue of Ugandan citizenship, the Respondent was estopped to assert that the interests of the Appellant in the suit property had been expropriated by reason of the Appellant's failure to prove their being Ugandan citizens.

With respect to the **Expropriated Properties Act, 1982, (now Cap.87, Laws of Uganda, 2000 Edition),** the Act was to provide for the return to the former owners of properties that had been acquired or otherwise expropriated during the Idi Amin Military Regime.

The Act applied and still applies to the properties that had been physically taken and managed by Government under the expropriation process. The Act places these properties under the management of the Government through the Ministry of Finance with

a view to having the same returned to the Asian owners from whom they were expropriated whether lawfully or unlawfully, by the Idi Amin Military Regime. The Supreme Court has so held in **Civil Appeal No. 21 of 1993: Registered Trutees of Kampala Institute Vs Departed Asians Property Custodian Board.** The Supreme Court further held in the same decision that the Expropriated Properties Act was intended to effect justice and as such it must be interpreted and applied in a manner that produces and promotes a just and not an unjust result so that the injustice of the expropriation is not prolonged. Accordingly, the fact of an actual or unjust physical taking over of the property was an essential basis for applying the Act.

In the case of the suit property, the subject of these Court proceedings, there was no physical taking over of the suit property by the Government at all.

The Respondent remained in control, occupation and use of the suit property from the time it was handed over to them in by the Appellant in 1972 until 2001 when through a Court consent order in **HCCS No. 614 of 1993**, they transferred the same to the Appellant.

It has to be appreciated that the Respondent, in a legal opinion sought from their lawyers, Ms Kulubya & Co. Advocates, were addressed as to the possibility that the suit property might have been in the category of an expropriated property and as such they, the Respondent, were accountable for it to the Departed Asians Property Custodian Board. The Respondent addressed themselves to this, but,

from the evidence of their conduct on record, rejected it and continued to occupy, control and manage the whole property, including running their own petrol station on the ground floor and occupying and/or renting out at monthly rentals to various tenants the office apartments in the upper two floors.

An inference that the Respondent acted as they did because they were aware that the Appellant's interests in the suit property were not expropriated because the Appellant's citizenship as Ugandans by birth still obtained and that the suit property had not been left by the Appellant in such conditions that rendered the same to be expropriated, but rather the same was left under the well set control, management and use of the Respondent, cannot be taken to be far-afetched.

It is also the finding of this Court that, while the Expropriation Decrees of the Idi Amin Regime as well as the Expropriated Properties Act, 1982, created automatic expropriation of categories of properties of Departed Asians, there was no provision in them, or in any other law, preventing the Government, or any other relevant body of the Government, to come across a property, which falls under the category of being expropriated property, but leaving the same in the condition it was in and under the hands of those who had it, without doing anything on that property in the area of expropriation.

The suit property in this case was situate at Plot 49 Ben Kiwanuka Street, the South Street, the Centre of the Capital City of Uganda and was as such easily noticeable and identifiable by the Government.

Indeed, the Government of Uganda at the material time held some shares in the Respondent who were in control, occupation and managing the suit property for and on behalf of the Appellant.

On the available facts therefore, it is safe to conclude, as an alternative, that, the suit property, even if it was in the category of Expropriated Properties, the same was left un expropriated by the relevant powers of Government and the law did not prevent this. The Respondent therefore remained accountable and liable to the Appellant under the contract arrangement between the Respondent and the Appellant as related to the suit property. This arrangement amounted to the Respondent holding, managing and controlling the material part of the suit property for and on behalf of and/or in trust and for the benefit of the Appellant.

Having applied the above stated principles to the facts as were adduced at trial, I have come to the conclusion that ground 1 of the appeal has to be allowed.

Ground 2

In ground 2, the learned Trial Judge is faulted for having held that, inspite of the parties having executed a consent order in **HCCS No. 614 of 1993**, important issues between the parties that conclusively established the liability of the Respondent, had not already been resolved and that the doctrine of **res-judicata** did not apply. As such, the issues were open to a de novo reconsideration by the Court.

On 18th May 2011, after the parties to the original **HCCS No. 614 of 1993** had closed pleadings, a consent order was agreed upon by the parties to the suit and the Court issued the same. The consent order provided for the Respondent to transfer the suit property to the Appellant. The Respondent was to surrender the duplicate certificate of title for the suit property to the Appellant so that the executed transfer deed executed in 1972 could be registered into the names of the Appellant, along with certain interests of the Respondent, including the Mortgage.

Paragraph 3 of the Consent Order provided that:

"Rent for the suit property and all other issues to this suit be determined by negotiation between the parties or, in default of agreements, be adjudicated and determined by this Honourable Court".

While through the said consent order, the parties to the suit, with the concurrence of the trial Court, conclusively resolved some of the issues in dispute other issues remained unresolved due to lack of agreement between the two parties. Those resolved included the registration of the mortgage deed on the suit property with Respondent as mortgagee and the Appellant as mortgagor and the registration of the sub-lease with the Appellant as sub-lessor and the Respondent as sub-lessee.

However the issue as to payment of rent by the Respondent to the Appellant, and how much was payable and for what period, as well as other related issues arising from the suit, remained to be resolved

through negotiation between the two parties, and in case of failure of such negotiations, then the same to be adjudicated and determined by the trial Court.

The contention of the Appellant that the said consent order amounted to the Respondent admitting to be liable to the Appellant in respect of all issues and therefore the doctrine of **res-judicata** applied to the case as to the question of the Respondent being liable to the Appellant for payment of rent and/or mesne profits, the quantum of which being the only issue for determination, in absence of a consensus, cannot be valid.

The learned trial Judge rightly set out the law as to ***res-Judicata*** as pronounced in **KARSHE Vs Uganda Transport Co. Ltd [1967] EA 744 at P.777** that:

"Once a decision has been given by a Court of competent Jurisdiction between two parties over the same subject matter, neither of the parties would be allowed to re litigate the issue again or deny that the decision had in fact been given"

Res-Judicata is a bar to re litigation of issues that the Court has already decided and is also by extension a bar to all other matters that ought to have been raised and litigated upon in a case so that the same cannot be raised to re-open a decided case. See**: Henderson Vs Henderson [1843-60] ALLER 378 at P.381.**

The above being the state of the law, it cannot be a valid submission for the Appellant that the consent order entered in **HCCS No. 614 of 1993** at the trial resolved all the issues in that suit including those relating to payment of or giving accountability as regards rent and/or mesne profits, whether the relationship of the Appellant and Respondent as regards the suit property amounted to a trust or not, as well as other related issues. The consent order provided for further negotiations to be held by the parties over these issues and if the negotiations failed, then the trial Court was to provide the final decision after holding an appropriate trial.

The learned Trial Judge was thus correct when he held that some important issues between the parties as to the liability of the parties had not already been resolved, that the doctrine of ***res-Judicata*** did not apply to all issues in **HCCS No. 614 of 1993** and that, in failing to reach an agreed upon position through negotiation of the parties to the suit, a de novo reconsideration by the Court had to be done. Ground 2 of the appeal is accordingly dismissed as having no merit.

Ground 3

In this ground, the trial Judge is faulted for having failed to properly exercise the duty of considering, ascertaining and pronouncing upon the quantum rent, mesne profits and/or damages due in the case.

It was incumbent upon the learned Trial Judge regardless of what decision he took on other issues, to consider and pronounce himself

upon the quantum of rent and/or mesne profits and/or general damages. The learned Judge ought to have indicated what he would have awarded. See: **AKPM LUTAAYA Vs ATTORNEY GENERAL: Supreme Court Civil Appeal No. 2 of 2005 [2001] UGCA 15 (20/12/2001).**

Having allowed ground 1 of the appeal, it follows that the Appellant was entitled to recover some income whether by way of collected rent and/or mesne profits the Respondent had recovered from the suit property when managing the same since 1972. The facts as to rent collection and/or mesne profits had been entirely kept away from the Appellant by the Respondent. The Appellant could therefore not plead them in detail in the plaint.

At the trial, by agreement between the parties to the suit and with permission of the Court, each party engaged expert witnesses who submitted to Court, as evidence, their respective expert reports of valuation and assessment of the rents that were stated to have been obtained from the two upper floors of the suit premises by the Respondent.

The said rents had to include appropriate interest and had to be evaluated in two ways, one taking into account the currency reform and the other when the currency reform had not been taken into account.

The Appellant engaged the East African Consulting Surveyors and valuers and their reports were adduced in evidence by valuation surveyors Claude P. Robertson-Dunn and Richard Ivan Mungati

respectively in the trial on 13th October, 2008 and 18th November, 2008. According to the evidence of these witnesses and their respective valuation reports, the Respondent had to pay to the appellant Ugx 11,876,691,288/= (Eleven billion, eight hundred seventy-six million, six hundred ninety-one thousand, two hundred eighty-eight) rent if the Currency Reform Act is not applied. If the said Act had to be applied, then the sum due had to be Ugx 10,844,384,410/= (Ten billion, eight hundred forty-four million, three hundred eighty-four thousand, four hundred and ten). This rent was from 1972 up to 2008. The figures included interest and also took care of a set-off in favour of the Respondent for the mortgage amounts due to the Respondent. They excluded VAT and interest from 01st January, 2009.

The Respondent also submitted two reports of expert valuers, namely Allied Property Surveyors and Mungereza & Kariisa Valuers. The two reports gave figures of Ugx. 27,000,000 (Twenty-seven million and Ugx 262,000,000/= (Two hundred and sixty-two million) as the rent due for the period 1972 to 2002. Mr Chomi the legal Secretary of the Respondent and Mr. Mungereza, the expert valuer, tendered in evidence the respective reports for the Respondent.

With all that evidence on record, it is only just and appropriate, particularly given the age of this claim, that this Court, though on an Appellate level, proceeds to determine the quantum of the amounts claimed.

I have carried out, a careful analysis of the contents of each one of the valuation reports tendered in evidence. The valuation Report of C.P. Robertson-Dunn as well as that of the East African Consulting Surveyors proceed and draw conclusions that the rent and mesne profits have to be on the basis of the United States dollars as the hard stable currency because the Uganda currency was unstable and unpredictable at the material time. This approach was wrong. The evidence of the tenancy agreement of the tenants who rented the suit property were paying rent in Uganda currency and not in US dollars. The tenancies were executed in Uganda currency.

Even where there was mention of US dollars, the equivalent amount in Uganda currency was stated and payments were in Uganda currency. As such the Uganda currency ought to have been the basis for any accountability by the Respondent to the Appellant for any rent and/or mesne profits collected and/or due from the suit property. See: **Bukoto Farmers & General Merchandise Vs Libyan Arab Bank and Bank of Uganda: SCCA NO. 37 of 1993; and also; Kabale Industries Ltd Vs Uganda Cement Corporation & Another: SCCA NO. 192 of 1984.**

Both reports did not also exhaustively take into account the Uganda currency reform of the 1987 whereby two zeros were knocked off the money amount and the remaining value of the same was reduced by 30%.

The two reports also do not cater for any management fees incurred in managing and the cost of maintenance of the suit property.

As to the Respondent's Mungereza & Kariisa Report of the Review of the rental valuation Reports, Mr. Mungereza, a senior partner in this firm, admitted himself that the Report of his firm had some mistakes he could not clearly account for.

I have on the other hand found the Appraisal Report of the Rental values of the suit property for the period September, 1972 and December, 2001 by Allied Property Surveyors to have been realistic and based on sound basic facts. The same was made in July, 2007.

It considers the location of the suit property at Plot 49 Ben Kiwanuka street, Kampala, and gives reasons why the location reduces rent in the suit property because of lack of proper parking space, too much noise and then being in the vicinity of the taxi and bus parks, the place is ever populated by all sorts of traveleers to and from Kampala City. It was thus not an ideal place for offices.

The Report considers in detail, the various economic periods of IDI Amin era (1971-1979) when Asians were expelled from Uganda, the UNLF, Obote II and "the Okellos" era (1980-1986), and the 1990-2001 era and how rent performance was during those periods.

The effects of the Currency Reform Decree is considered in detail by the Report as well as the effect of Inflation and the monetary policies that were operational at the material time.

The Report thus sets out the Rental incomes for the respective periods from 1972 up to 2001 with explanations and justifications to back up the conclusions. These are that the rent from the suit

property out of the two upper floors during the pre-currency Reform period from 1972 to June 1987 was shs. 4,657,205/=. Then the rent during the post-currency Reform period, that is June 1987 to December 2001 was shs. 154,762,781/=.

I find the Allied Property Surveyors Report of July 2007 to be realistic and not exaggerated in its conclusions.

I therefore accept it as the most realistic and reliable valuation Report as regards the accountability for the rent/mesne profits due from the suit property.

The appellant's predecessors in title in High Court Civil Suit No. 614 of 1993 specifically pleaded for mesne profits in that, it was the Respondent who had illegally retained the suit property from them. It follows therefore that the Appellant are entitled to recover from the Respondent the sums of money which the Allied Property Surveyors Report has brought out as rent that was collected by the Respondent during the period the Respondent illegally deprived of that part of the suit property from the Appellant.

When the Ug. shs. 4,657,205/= rent pre-the currency Reform is subjected to that currency Reform it comes to approximately Ug. shs. 32,600/=. Thus the total post currency Reform rent is Ug.shs (154,762,781 + 32,600) = 154,795,381/= as of December, 2001. This sum is awarded to the Appellant as the rent and/or the money got and accounted for as mesne profit from the suit property for the period February 1972 to December, 2001.

The Appellant have also suffered much from the conduct of the Respondent who failed to carry out those responsibilities as agreed upon with the Appellant's predecessors-in-title and as such the Appellant is entitled to general damages from the Respondent.

Having considered all circumstances, I find it fair and just that a sum of Ug.shs 50,000,000/= be awarded as general damages to the appellant. I so award the same.

The sum of Ug. Shs 154,795,381/= is to bear simple interest at 20% p.a. from 1st January, 2002 up to payment in full.

The general damages of Ug.shs 50,000,000/= are also to bear simple interest at the Court rate of 9% from the date of Judgment till payment in full.

Ground 3 of the appeal is thus allowed in the terms stated above.

Grounds 1 and 3 having been allowed, this appeal stands partly allowed on the above stated terms.

As to costs, the Appellant has been successful in the crucial grounds of the appeal, and as such is awarded the full costs of the appeal and those in the Court below.

Dated at Kampala this..20th..day of..Dec.....2021.

.....

Remmy Kasule, Ag, Justice of Appeal

19th July 2021

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 107 OF 2017

MERCATOR ENTERPRISES LIMITED ========== APPELLANT

VERSUS

SHELL (UGANDA) LIMITED ========== RESPONDENT

(An Appeal from the Ruling of the High Court of Uganda at Kampala before Hon. Justice Alfonse Owiny Dollo (as he then was) dated 15th July, 2016 in High Court Misc. Application No. 833 of 2006)

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

HON. LADY JUSTICE MONICA MUGENYI, J.A.

HON. MR. JUSTICE REMMY KASULE, Ag. J.A.

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Remmy Kasule, Ag. J.A.

I agree with his Judgment and I have nothing to add. Since the Hon. Lady Justice Monica Mugenyi, J.A. also agrees, we hereby order that:-

1. The Appeal is partly allowed.
2. A sum of Ug shs 154,795,381/= is awarded to the Appellant as mesne profits from the suit property.
3. A simple interest of 20% p.a is awarded on the mesne profits from 1st January 2002 up to payment in full.
4. General damages of Ug shs 50,000,000/= are awarded to the Appellant.
5. A simple interest of 9% is awarded on the general damages from the date of Judgment until payment in full.

6. The costs of this Appeal and those in the Court below are awarded to the Appellant.

It is so ordered.

Dated at **Kampala** this ..... 20th ..... day of ..... Dec .....2021.

.....

HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: KIRYABWIRE AND MUGENYI, JJA AND KASULE, AG. JA

CIVIL APPEAL NO. 107 OF 2017

BETWEEN

MERCATOR ENTERPRISES LIMITED ..... APPELLANT

AND

SHELL (UGANDA) LIMITED ..... RESPONDENT

(Appeal from the Ruling of the High Court (Chigamoy Owiny-Dollo, J) in Miscellaneous Application No. 833 of 2006, arising from High Court Civil Suit No. 614 of 1993)

JUDGMENT OF MONICA K. MUGENYI, JA

I have had the benefit of reading in draft the lead Judgment of Hon. Justice Remmy Kasule, Ag. JA in this Appeal. I agree with the decision arrived at and the orders therein, and have nothing useful to add.

Dated and delivered at Kampala this 20th day of Dec, 2021.

MKMugenyi.

Hon. Lady Justice Monica K. Mugenyi

JUSTICE OF APPEAL