THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 105 OF 2002

CHIMANLAL BHAILALBHAI PATEL :::::::::::::::::::::::::: PLAINTIFF

VERSUS

THE ATTORNEY GENERAL:::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. MR. JUSTCE R.O. OKUMU WENGI

JUDGMENT:

By an amended plaint the plaintiff sued the government of Uganda for compensation, arrears of rent, mesne profits and general damages arising out of his failure to repossess expropriated property. The plaintiff, was the former owner of a building on plot 15 Nakivubo Road Kampala which property was taken over in 1972. It was so held under the expropriation laws until 1992. The plaintiff had registered an application for repossession but this application was not dealt with in his favour. By 1996 when the Minister went about dealing with it, the building had already been donated to a third party, Donati Kananura, by virtue of a Certificate of Purchase dated 21/3/1992. It is the plaintiffs case that the grant left his application for repossession rejected or that it extinguished his interest in repossessing his property, and he would be entitled to compensation, hence this suit.

In his amended written statement of defence the Attorney General denied liability. He contended that the suit is time barred, discloses no cause of

action against him and is misconceived, incompetent and ought to be dismissed with costs. He further contended that the plaintiff is not entitled to compensation or any of the remedies sought in his plaint. He also denies that statutory Notice of intention to sue was given as alleged, and if any had been given it related to a claim for repossession and not for compensation, the latter being a new claim. Of course this is not correct as the original plaint filed on 13/2/2002 pleaded an alternative prayer for compensation.

It must be pointed out that initially the plaintiff had sought orders directing that he be granted repossession of the property and the transfer to Donati Kananura, who was then the second defendant be cancelled. By a consent order, filed in court on 4/9/2003, the suit against Donati Kananura was withdrawn. This left the Attorney General as the sole defendant. The plaintiff presented a total of 37 exhibits while the defendant put in 5. The plaintiff called 3 witnesses. But when it came to the defence to open its case, he opted to call no witness. The court put the question to him if he indeed had opted not to call any witness and he said he would not call any. The matter then proceeded to submissions with each side filing written submissions.

The case had proceeded on a number of agreed facts as follows:-

1. The plaintiff was the registered owner of suit property before 1972 [and until 8/6/1992].

2. The property was mortgaged to National Insurance Corporation in 1972.

3. Property was vested in the Departed Asians Property Custodian Board and later on the Minister of Finance under the Expropriated Properties Act.1982.

4. Property was sold in an auction by NIC to the 2nd defendant under the mortgage in 1979.

5. The plaintiff applied for repossession on 17/5/1983.

6. On 20/5/1983 the 2nd defendant lodged his claim of interest which was acknowledged in Exhibit P 27 by the Verification Committee.

7. On 21/3/92 the Minister of Finance issued a certificate of purchase No. 51 in favour of 2nd defendant.

8. On 18/6/96 a meeting was held by the Minister together with the plaintiffs advocate, the 2nd defendant and NIC to deal with all the claims of interest.

9. The Minister then proceeded on 19/6/96 to reject the plaintiff's application for repossession.

10. The second defendant paid a token fee of shs 50,000/= on 21/2/92 for "legalisation."

11. The second defendant is the new registered owner and is in possession of the suit property.

The above agreed facts were recorded on 14/5/2003 by which time Donati Kananura was still a party to the suit. Again at the beginning seven issues were framed for trial but eventually it was agreed to address only four of them as follows:-

1. Whether the rejection by the Minister of the plaintiffs Application for repossession was proper.

2. Whether the suit is barred by Limitation.

3. Whether the plaintiff is entitled to challenge the Minister's decision by bringing this suit.

4. Remedies available to the parties.

In dealing with this case however I would like to address the following issues namely:-

(a) whether the suit as brought by the plaintiff is barred by law and or is in competent.
(b) whether the plaintiff in this case is entitled to compensation and general damages.
(c) if so what is the quantum

The reason for this is that since the claim has been limited to compensation and general damages the question of the propriety of the Ministers decision becomes a moot point. In any case it is now trite law that the Minister is given wide discretion to deal with expropriated property and there is no question that in this case he dealt with it when he opted to issue a purchase certificate to a third party.

On the issue of limitation and competence of the suit there are principally two arguments. One is that No statutory notice was given by the plaintiff to the Attorney General before filing this suit. The second is that in so far as the suit is challenging the decision of the Minister it has been brought out of time as it was not filed within 30 days of the decision of the Minister. It is contended for the defendant that the statutory Notice as given, was given by one N.K Radia and not the plaintiff. Counsel for the defendant cited **Rwakasoro & Ors Vs Attorney General** (1982) HCB, 40 to say that a case filed without a valid notice cannot be instituted. The reason is that the intending plaintiff in the Notice on record was N.K Radia and not the plaintiff. Secondly that the cause of action notified in that notice related to a claim for repossession and not compensation. In reply counsel for the plaintiff referred to exhibit P 35 which was a notice served upon the defendant on 29/7/99. He further contended that the error of using N.K Radia was corrected by Exhibit P 37. From the circumstances of this case I would be persuaded to agree that the Notice issued was sufficient notice to the defendant who initially did not object to it. The registered proprietor of the property subject of the notified suit was clearly disclosed in the Notice as the current plaintiff. Indeed where notice is signed by a person

other than the plaintiff but under the authority of the plaintiff and on his behalf, the identity of both having been established in the trial, such notice is not invalid per se: **Sahdul Vs Union** A (1968) P.188. Moreover no evidence was called to challenge the Notice or to show that no notice was given at all as alleged in the WSD. And as I will say, the right of the plaintiff as a former owner to claim for either repossession or compensation for expropriated property is not only a statutory right but may become a constitutional right to property. A claim for compensation in this case may be brought, notwithstanding the statutory limitations imposed by the Civil Procedure (Limitation of Proceedings Act) Misc. Provisions Act Cap 70 Laws of Uganda. It is a vested right under the Expropriated Properties Act and under Article 26 of the constitution of Uganda which provides:

> "26. (1)
>
> (2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied –
>
> (a)…….
>
> (b)…….

In the present case the plaintiff became entitled to compensation in respect of his former property that had been expropriated and was later on transferred to a third party under a law that afforded him compensation as a statutory alternative to repossession attaching to his property once it had been dealt with under the Expropriated Properties.

The right of a former owner of expropriated property to apply for repossession of his property or compensation as a vested right, ought, once an application has been made, to be dealt with according to law. Section 6 of the Expropriated Properties Act (Cap 87 Laws of Uganda) Provides:-

> "6 Notwithstanding sections 2(2) and 3 where the property or business affected by this act is applied for by a former owner and the property or business is the subject of a caveat, lien charge Mortgage or any other registered encumbrance in favour of a bank, financial institution or any other lender, the Minister shall first hold consultations with the former owner and the bank, financial institution or other lender as the case may be with a view to securing initially acceptable arrangements for the discharge of any such liabilities or encumbrances."

In the present case the encumbrance or mortgage had been reinstated by the operation of section 2 of the same Act. Although Mr Donati Kananura had brought the property in a sale by the Mortgagee (NIC) this transaction had been nullified. The Minister was obliged to first deal with the property as directed by the mandatory provisions of section 6. Indeed under the Regulations made under the Act there is established a method for the negotiations to be conducted. But what happened was that the Minister first of all sold the property to Kananura on 21/3/92 and only on 18/6/96, four years later, did he attempt to deal with the property in terms of section 6 of the Act. By the time he did this, the substratum had ceased to exist in the form of expropriated property as the property had been sold off or dealt

with and title had passed. The property was no longer vested in the Minister: **Mohan Musisi Kiwanuka Vs Asha Chand** AC 14 of 2002. The sale itself, and this is the other way of looking at it, though premature, as the conditions in section 9 of the Act were not present, gave title to the purchaser, as soon as he became registered, as owner. The Minister became *functus officio* and when he purported to exercise a power to reject the plaintiff's application for repossession this had little or no legal effect on the property itself or the plaintiffs application for repossession which had been overtaken by events in the 1992 purchase. Neither the Attorney General nor the purchaser was able and or liable to give (vacant) repossession to the plaintiff as from registration of the purchaser. But when in 1996 the Minister rejected the plaintiff's application he effectively acknowledged the compensation due to the plaintiff and this entitlement was further reaffirmed as the 1995 constitution had come into force. In other words I have come to the conclusion that the plaintiff in this case was duly denied repossession of this property by the defendant. This was effective in 1992 before the *a posteriori* act by the Minister in rejecting his application for repossession in 1996 when technically the Minister was no longer vested with the property. The plaintiff had been prejudiced and had lost his equity of redemption by way of repossession, by implication. By this alone the plaintiff's interest in the property had been foreclosed through a prior sale done without prior adequate compensation. The 1996 action revived the plaintiff's cause of action in any event. From all this it is patently clear, that in the further view that no evidence was called by the defendant, the plaintiff has proved his case on more than a balance of probabilities. Having said this I am therefore satisfied that the plaintiff is entitled under section 12(1) and 9(1) (b) of the Expropriated Properties Act

to compensation and general damages arising from the failure to pay him due compensation. He is also entitled to claim redress in this court in terms of Article 26 and 50 of the constitution. And for this reason he may approach this court in any manner including the mode adopted herein for redress. I therefore hold that notwithstanding any irregularity in the statutory notice, as argued, this suit is properly brought and is competent. According to the Privy Council decision in **Jaundoo Vs Attorney General of Guyana** (1971) AC 972 at page 982 (per Lord Diplock)

> "To "apply to the High Court for redress" was not a term of art at the time the constitution was made… It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created… These words in their lordships view are wide enough to cover the use by an applicant of any form of procedure by which the High Court can be approached to invoke the exercise of its powers…"

See also **Dr James Rwanyarare & others Vs Attorney General** Const. Applic. No. 1 of 1993 (ruling No. 2) unreported.

In the present case, the plaintiff has come to court to press for repossession, which became difficult. Later he dropped this prayer and stuck to the alternative claim for compensation. He did not need to give another statutory Notice in order for his claim to be entertained, when in the original plaint an alternative prayer for compensation had been pleaded. Compensation is in any case the logical alternative to repossession and is protected by law. I think he is not to be hindered in his access to this court as there was no bar regarding a claim for compensation against the

government. In essence therefore I find and hold that the suit is not barred either by the issue of statutory notice or the 30 days rule regarding appeals against the Ministers decision. The claim for compensation under section 12(1) of the Expropriated Properties Act is not limited by the rule in section 15 of the Act. There has also not been any decision by the Minister to deny the plaintiff compensation from which decision he would be required to appeal within 30 days. In fact the liability of the defendant is a legal one and arises from the failure in 1992 to provide fair and adequate compensation to the plaintiff at the time of dealing with the plaintiffs property. I have said that the Minister in 1996 did acknowledge plaintiffs right to compensation. The next question which arises is what quantum is that compensation, and since no evidence was called by the defendant to challenge its liability, what would be the quantum of general damages.

On this issue there was the evidence of P.W.2 Charles Okolong who carried out a property valuation of the suit property (Exhibit P.34) under the aegis of Oringo & Co. valuers in November 2002. There was another valuation (Exhibit D 5) done by Mr Bwiragura Chief Government valuer earlier on 16th June 2002 which put the value at shs 672 million. M/Oringo & Co Valuers found the open market value at shs 700 million. They also gave the total rental value of the property for the period 8/6/92 to 30/11/2002 as shs 936 million. They further gave a sum of shs. 60 million as the value of improvements made on the building most likely effected by the present owners. Mr. Okolong also stated in his evidence that property and rental values have gone down a little. He told court that the annual rental value of the property was shs. 12 million discounted at a 10% to 20% index due to lowering rates. He also pointed out that exhibit D5 did not

contain a rental valuation unlike Exhibit P.34. No evidence was brought by the defendant that there was a valuation for 1992.

Given the above evidence and having found that the plaintiff is entitled to compensation I would assess compensation due to him at shs. 700 million. This value takes into account the currency adjustments that have taken place and represents today the amount of compensation that should be paid to the plaintiff.

The plaintiff was entitled to this compensation from the date when the minister issued a certificate of purchase i.e. on 21/3/1992. The meeting of 1996 as a result of which the plaintiff's claim for repossession was formally turned down only served to acknowledge compensation as due from the defendant to the plaintiff. It did not postpone the effective date for the compensation, and none was ascertained or communicated to the plaintiff, as a result of that meeting. No repossession could be considered or given as the Minister was *functus officio* after the purchase transaction. The meeting was inconsequential as regards the ownership of the property but reinforced the statutory compensation that had been triggered by the 21/3/92 transaction, and the indefinite failure to pay it.

There was no evidence of the property having been valued through a Board of valuers as required by law to guide the transfer of the property to the purchaser in 1992. I have evidence to suggest that the rental value since 1992 was lower and kept rising as indicated in the valuation given in evidence but the open market value of the property at the time is not available. In my view this court should ensure that adequate compensation

is given to the plaintiff. Rather than mesne profits claimed I am guided by the rental valuation given for the period 1992 – 2002 to arrive at either the amount that the plaintiff would have earned if he had got repossession and or the value of what he would have earned had he been given compensation for his property in 1992. This process is used to determining general damages claimed and or the interest payable on the plaintiffs claimed. Using what would have otherwise been only value of mesne profits seems the only feasible way of determine the general damages that may be awarded to the plaintiff. I would also exclude the rental valuations for the year 2002 as the case was filed at the beginning of that year and award of interest would take care of it. In that event I would assess these damages at two thirds of the sum of shs. 963 million namely 642,000,000/= and award it as general damages. Accordingly I enter Judgment for the plaintiff against the defendant and make the following orders:-

1. A declaration is issued that the plaintiff is entitled to compensation by the defendant for property comprised in LRV 393 Fol 21 Plot 15 Nakivubo Road, Kampala.

2. The defendant shall pay to the plaintiff the sum of shs.700,000,000, as compensation due to him.

3. The defendant shall pay to the plaintiff shs. 642,000,000 as general damages.

4. Interest on the above sums at 20% from date of filing till payment in full.

5. The defendant shall pay costs of this suit.

R.O. Okumu Wengi

JUDGE

12/2/2004.

Court:

Judgment signed dated this 12th day of February 2004 in presence of Mr Byamugisha and Senabulya Court clerk.

Sgd: R.O. Okumu Wengi

JUDGE

12/2/2004.