THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MASAKA

CIVIL SUIT NO.30 OF 2006

EDWARD WALIGO ::: PLAINTIFF

VERSUS

1. Deported Asians Properties Custodian Board
2. Interco (Uganda) Ltd. ::::::::::::::: ::: DEFENDANTS
3. Attorney General

BEFORE: HON. JUSTICE V.F. MUSOKE-KIBUUKA

JUDGMENT:

INTRODUCTION:

The Plaintiff sued the three defendants seeking a variety of reliefs from this honourable Court against them:

a) a declaration that the Plaintiff is the rightful owner of the Property known as Plot 33 and 35, Hobert Street, in Masaka Municipality and contained in LVR270, Folio 18,

b) a declaration that the cancellation of the Plaintiff's purchase offer for that property was unlawful,

c) a declaration that the return of the property to the second defendant, by the Hon. Minister of Finance, was unlawful;

d) an order canceling the certificate of title issued to the second defendant;

e) an order prohibiting the second defendant from interfering with the plaintiff's possession of the suit property;

f) an order compelling the first defendant to receive the balance of the purchase price from the plaintiff;

g) an order giving the Plaintiff a grace period within which to pay the balance of the purchase price;

h) an order awarding general damages to the Plaintiff; and

i) an order awarding costs in respect of this suit, to the Plaintiff.

FACTS AND PLEADINGS:

On 18th May, 1965, the second defendant obtained a lease over plots 33 and 35, Hobert Street, Masaka Municipality, in this judgment referred to as “the suit property”. The plaintiff became one of the tenants on the suit property in August 1968. He operated a photo studio as his business.

In 1972, the suit property was affected by the expulsion of the Asian directors of the second defendant. It became one of the properties under the custodian of the first defendant. The plaintiff became a tenant of the first defendant. Unfortunately, during the liberation war of 1978-9, the suit property was damaged. Subsequently, the plaintiff carried out some repairs on the suit property after getting in touch with the office of the town clerk for Masaka Municipality. The Plaintiff, thereafter, remained a tenant of the first defendant.

The suit property was advertised for sale upon the basis that the original owner had, in 1983, opted for compensation instead of repossession. The advertisement appeared in the New Vision Newspaper of 1st May, 1995. on 26th May, 1995, the Plaintiff having been selected the successful bidder, entered an agreement with the Government of Uganda to purchase the suit property at the cost price of Shs.98,700,000/=. Among the conditions to be fulfilled by the plaintiff was to pay 10% of the purchase price not later than 5.00p.m on the fifth working day from 25th May, 1995.

Secondly, the plaintiff had to pay the full balance of the purchase price, in one single payment, not later than 60 days from the tender opening date, which was 25th May, 1995.

The Plaintiff paid made the initial payment of Shs.9,876,000/= constituting the 10% of the purchase price. He however, failed to meet the condition of payment of the balance of the purchase price, in

one single sum, within the 60 days from the date of the offer or opening of the tenders' opening date. By 5th February 2005, the Plaintiff had only made a total payment of shs.19,840,200/=. The first defendant had also agreed that the amount of Shs.51,360,000/= which the Plaintiff claimed as repair costs for the suit property would be off-set from the purchase price. After several appeals from the Plaintiff for extension of time within which to pay had been given to him but he had failed to effect full payment, the divestiture Committee decided to cancel the Plaintiff's offer to purchase the property.

In the meantime, the original owner changed its mind. It claimed that since no compensation had been forthcoming and the property had not been sold, it preferred to obtain repossession. A repossession Certificate was issued to the second defendant on 4th January, 06. The second defendant was re-registered as proprietor on 12.01.05. The lease was extended for a further period of 79 years seven months and twenty days from 4th January, 06.

Each defendant filed a separate defence. Counsel for the plaintiff filed a reply to all the three defences.

The second defendant filed, in its defence, a counterclaim. In it, the second defendant claims that as a result of the plaintiff's refusal to hand over the suit property to it, it suffered loss and damage whose particulars included;-

- unlawful depreciation of use of the suit property
- denial of possession of the land
- Inconvenience or embarrassment

The second defendant prayed for the following reliefs:

a) a declaration that the suit property lawfully belongs to the second defendant;
b) an eviction order against the plaintiff;
c) general damages for inconvenience;
d) mesne profits
e) costs of the suit.

ISSUES:

Several issues were agreed upon by all counsel. They are:-

a) Whether the suit is time barred;

b) Whether the cancellation of the plaintiff's offer to purchase the suit property was lawful;

c) Whether the plaintiff is competent to challenge the second defendant's certificate of repossession through this suit;

d) Whether the plaintiff merits the reliefs he seeks through the plaint;

e) Whether the second defendant is entitled to the reliefs which he seeks through the counterclaim.

WHETHER THE SUIT PROPETY IS TIME BARRED

It is the case for the first and third defendants that in as far as the Plaintiff's case seeks to challenge the Minister's exercise of the powers vested in him or her under Section 3(1), of the Expropriated Properties Act, Cap.87, counsel for the first and third defendants rely upon the provisions of Section 15(1) of the Expropriated Properties Act, and submit that any challenge to the exercise by the Hon. Minister of Finance, of the power to issue a repossession Certificate to a former owner must come to the High Court as an appeal authorized under Section 15(1) of that Act, within 30 days from the date of the communication of the decision to the person challenging the decision.

Learned Counsel for the Plaintiff, Mr. Mungoma, has opposed the submission by both Counsel. According to him the holdings in *Mohan Musisi Kiwanuka Vs. Asha Chand, Civil Appeal No.4 of 2002 and Mansukhlal Ramiji Karia & Others Vs. Attorney General & 2 Others, Court of Appeal Civil Appeal No.20 of 2002 as well as Oil Seeds (U) Ltd Vs. The Attorney General, CA Civil Appeal No.127 of 2003.* According to learned counsel for the Plaintiff, an appeal under Section 15(1), of the EPA must be commenced in the High Court by ordinary suit as the authorities cited above state. Once that is the position, the person intending to file such a suit will have to observe the requirement of serving a statutory notice to the Attorney General. He or she can, therefore, not be bound by the limitation of the 30 days provided for under Section 15(1) of the EPA.

With the greatest respect to learned Counsel, Court thinks that that argument is not well founded.

Indeed, all the three authorities cited above were merely concerned with procedure for presenting an appeal under Section 15(1), of the EPA before the High Court. They were not concerned with the limitation aspect

of the appeal provided for under that section. Those decisions were limited to whether the person appealing would do so by way of a memorandum of appeal or by way of an ordinary suit.

Secondly, in *Bashir Ahamed Arain Vs. Uganda Kwegatta Construction Ltd. CS No. 612 of 1999*, this court did emphatically observe that all questions relating to repossession of the expropriated properties ought to be determined within the ambit of the EPA, 1982. The EPA is a specific law. It is also a later law than the *Civil Procedure And Limitation (Miscellaneous Provisions) Act,* Cap.72 or any other law providing for the serving of a notice before filing a suit against the Government. In short, Court is of the view that even if an appeal under Section 15(1) is presentable by way of an ordinary suit in the High Court, it remains a statutory appeal presented by way of a statutory suit which remains governed solely by Section 15(1) of the EPA in as far as the limitation aspect is concerned. That suit must be filed in the High Court not later than 30 days after the decision of the Minister was communicated to the person filing it or upon whose behalf it is filed.

In the instant case, the Hon. Minister exercised his powers under Section 3(1) of the EPA on 4th January, 06. Mrs. Namirembe Olijo Ruth, wrote exhibit D2, which is a notification to the tenants and occupants of the suit property, of the fact of repossession. The plaintiff in his evidence admits early receipt of the communication. However, this suit was not filed in Court until 20th June, 06, nearly 6 months afterwards. Like all limitation provision, Section 15(1) is not flexible. It is not elastic. It operates upon the basis of mathematics. An appeal that is presented more than 30 days after the fact of the issuance of the certificate of repossession has been communicated is incompetent. It is barred by law. *Iga Vs. Makerere University [1972] E.A. 65*.

Consequently, the Plaintiff's case, in as far as it challenges the return of the suit property by the Hon. Minister of Finance, is incompetent. It is barred by the Limitation Cause in Section 15(1), of the EPA, Cap.87. The plaint would be rejected to that extent.

Issue number one is, accordingly, answered in the affirmative but only to the extent the suit purports to challenge the exercise by the Hon. Minister of Finance his powers under Section 3(1) of the EPA to return the suit property to the second defendant.

The finding under issue number one also effectively disposes of the third issue which is whether the plaintiff is competent to challenge the second defendant's certificate of repossession through this suit. Since the plaintiff is barred by the limitation clause under Section 15(1) to do so, he is clearly not competent. Issue number three is therefore, answered in the negative.

WHETHER THE CANCELLATION OF THE PLAINTIFF'S OFFER TO PURCHASE THE SUIT PROPERTY WAS LAWFUL

The Plaintiff got the offer to purchase the suit property on 15th May 1995. on the same day, a sale agreement was executed between him and the Government of Uganda through the Ministry of Finance.

It is the case for the plaintiff that he had purchased the suit property by the time the first defendant cancelled his offer to purchase it. In other words, according to the plaintiff, by the time the first defendant cancelled the plaintiff's offer the property was already vesting in the plaintiff. The cancellation was ineffective as there was no longer an offer in existence by that time.

The agreement of sale that was executed on 25th May, 1995, between the Plaintiff and the Government of Uganda Exhibit P1, was a standard one which was used for similar sales of all proprieted properties that were sold during the exercise. It contained five terms and conditions of the sale which were to bind the parties. They were:-

"1. *To pay an amount of Uganda Shs.9,876,000/= which is equal to ten (10) percent of the above purchase price not later than 5.00p.m on the fifth working day from today.*

2. *To pay the full balance of the purchase price in one single payment not later than 60 days from the tender opening date which was 25th May, 1995.*

3. *All payments must be made by bank draft payable to Deported Asians' Property Custodian Board and must be delivered to the Finance Manager, Deported Asians' Property Custodian Board, Nkurumah Road, Kampala. A receipt must be obtained.*

4. *Failure to adhere to any of terms and conditions to purchase property sealed Tender Bid Form or this Sale Agreement shall result into the termination of this agreement and forfeiture of any deposits that have been paid.*

5. *Upon receipt of the full purchase price of the property, the minister of Finance will issue a certificate of purchase in the name of the about listed buyer. It shall be the purchaser's responsibility to have the property registered in his/her name and to pay all fees or other charges necessary to effect the transfer."*

From the language in which the agreement was coached, it is clear not only that time within which payment was to be made, was of essence but also that property was to pass only after full payment of the purchase price was made. It was expressly provided that the balance on the payment was to be made within 60 days from 25th May, 1995. As it was observed in *Sharif Osuran Vs. Haji Haruna Mulengwa, SC Civil Appeal No. 38/95*, even in the absence of that express intention by the parties under both common law and equity time is essential even where it has not been so expressly provided by the parties. In the instant case performance by the plaintiff had to be completed upon a precise date which was specified in the contract.

The plaintiff, according to exhibit P3, paid the 10% deposit on 29th May, 1995. The amount was approximated to Shs.9,900,000/=.

On 12th June, 1995, the executive secretary of the first defendant wrote exhibit P3, confirming the plaintiff's claim of Shs.963,000/= which the plaintiff had alleged to have spent on repairs of the suit property during the years 1980/1981 following the liberation war, 1979. The first defendant converted that money at the rate 18/= per Us. dollar to be the equivalent of US $53,500. It then reconverted the US53,500 dollars into Uganda shillings at the rate of 960/= each dollar to become the equivalent of Shs.51,360,000/=. The first defendant placed the sum of Shs.51,360,000/= upon the Plaintiff's suit property purchase account. Together with the Shs.9,900,000/= which had been paid by the plaintiff, the total amount deemed to have been paid by the plaintiff became shs.61,260,000/=. That left a balance to be paid by the plaintiff, of Shs.37,500,000/=. The Executive Secretary, in exhibit P3, requested the plaintiff to pay that amount before the 26th day of July, 1995, which was the deadline of the 60 days stipulated in the agreement of sale.

The plaintiff never paid that money, as was required under the agreement, in one installment or completely. Although the plaintiff was required to have paid the balance by 26th July, 1995 according to exhibit P2-1 to 22 for the whole of 1995 he made only one payment, on 22nd July, 1995, and of only shs.508,500/=. During the year 1996, he made no payment at all. During the year 1997, he paid three installments during the

months of July and September, totaling to Shs.1,500,000/=. During 1998, the plaintiff paid two installments during the months of April and October, totaling to Shs.3,000,000/=.

Earlier, on 7th May, 1998, however, as exhibit D7 shows, the Devastative Committee had taken a decision to cancel the offer to the plaintiff to purchase the suit property. Exhibit D7 was communicated to the plaintiff who appealed to the Hon. Minister of Finance against the Devastative Committee's decision to cancel the offer. Two letters were written to the plaintiff as a result. One, exhibit D8, was written by the Task Force and signed by Ruth Namirembe Olijo. It gave the plaintiff a new deadline of 31/3/2000 to pay the remaining balance. The other, exhibit D9, was written by Hon. E. Ssendawula, then Minister of Finance. It informed the plaintiff that unless he showed seriousness by *making further payment before 30th June, 2000*, he would not be given any further extension. The Minister also informed the plaintiff that unless he showed seriousness in that regard, the first defendant would be free to cancel his purchase offer and re-allocate the property to a more serious purchaser.

Indeed, even then, the plaintiff never showed any seriousness as requested by the Hon. Minister of Finance to make further payments, before 30th June, 2000. During the entire year of 2000, the plaintiff made only two payments, both of them on 30th June, 2000 and not before as the Hon. Minister had directed. The two installments amounted to shs.600,000/= only.

During the year 2001, the plaintiff made only two payments, on 1st June and on 10th August. The two payments totaled to 600,000/=.
During the year 2002, the plaintiff made payments during each of eight months. The total payment made that year was shs.1,140,000/=. The eight installments paid by the plaintiff during the year 2002, appear to have drained the plaintiff's will to make further payments for during the year 2003, he made only one payment which was received on 3rd January 2003. For the whole of the rest of that year and the entire 2004, the plaintiff made no payment.

On 4th February, 2005, Ruth Namirembe Olijo, wrote exhibit D10, to the plaintiff informing him that his offer to purchase the suit property had been cancelled and that it would be offered to the former owner, the second defendant.

The plaintiff then complained to both H.E. the President and to the I.G.G. However, as exhibit D12 and D14 shows, the first and third defendants rejected any possibility of according any further chance to the plaintiff to retain the suit property. Consequently, on 4th January, 06, the Hon. Minister of Finance issued exhibit D4, the certificate of repossession to the second defendant.

From that set of facts and circumstances court finds that the payment of the entire purchase price was a condition in the agreement. It went to the core of the contract. Property would not pass before the entire payment was made. The completion of the contract and passing of property was to take place after full payment. There was even no issuance by the Minister of the certificate of purchase as stipulated in the Agreement.

Court would, therefore, not agree with the contention that by the time of cancellation property had vested in the plaintiff. An offer does not vest property neither does part-performance, however substantially where the intention of the parties points to the contrary in the instant cases, the written agreement is clear and the intention of the parties not doubtful.

Regarding the arguments relating to the alleged waiver, court accepts that there was a waiver of the 60 days period and the requirement to make one payment for the balance after the 10% deposit. However, court rejects the argument made on behalf of the plaintiff that by the waiver the first and second defendants waived their right to repudiate the contract of sale for breach beyond 26th July, 1995. Instead, court accepts the argument by learned counsel Mr. Makeera that the right to repudiate was itself not waived by reason of the extension of the 60 days, deadline or the alteration of the requirement to pay the balance in a single payment. The English decision by *Lord Denning in Charles Richards Ltd. Vs. Oppenheim [1950] ALL E.R 420*, which Mr. Makeera has cited, appears to be both pertinent and persuasive on this point.

The plaintiff submitted that the 2nd defendant's repossession was time barred. He however has pointed to no law that barred the repossession. Court found none. In any case, it was the plaintiff's own conduct, as the evidence shows that led to the delay in the repossession. Originally the second defendant had opted for compensation. The government could not effect compensation before the plaintiff had paid the full purchase price. Later since no compensation was forthcoming, the second defendant opted for repossession – Court,

therefore, answers the second issue in the affirmative. The cancellation as well as the repossession were lawful.

WHETHER THE PLAINTIFF MERITS THE RELIEFS HE SEEKS

The plaintiff, seeks several reliefs which were listed at the beginning of this judgment. However, since the plaintiff has not proved his case upon the balance of probabilities, he merits none of those reliefs. His case must be and is dismissed with costs against each of the three defendants.

WHETHER THE SECOND DEFENDANT IS ENTITLED TO THE RELIEFS SOUGHT BY HIM IN THE COUNTERCLAIM

In the Counter claim, the second defendant seeks a declaration that the suit property lawfully belongs to the second defendant. Court sees nothing to bind it from the declaration sought in that regard.

Similarly, the second defendant seeks an eviction order against the plaintiff requiring him to hand over vacant possession of the suit property to the second respondent. Likewise, that order shall issue.

The second defendant seeks an order awarding it general damages against the plaintiff for the inconveniences caused to it by the plaintiff's refusal to hand over the suit property to it and the denial for the second defendant to use it. The resistance and denial have persisted from January 2006 to date, a period of about 3 years. The second defendant's attorney has made a number of trips from Canada to Uganda to claim for compensation and for possession after repossession. The second defendant waited for compensation from 1983 to 2006, when the property was returned to it's a period of 23 years. The evidence shows that the government could not compensate the second defendant partly because the plaintiff could not complete payment of the purchase price after the agreement of purchase had been executed between the government and the plaintiff in 1995.

In those circumstances, Court would award a sum of shs.10,000,000/= as general damages to the second defendants.

Through the counterclaim, the second defendant also seeks mesne profits.

The evidence shows that the second defendant obtained the repossession certificate on 4th January, 2006. Exhibit D2 shows that, the first defendant wrote a notification of the change in ownership to the plaintiff on 5th January, 2006. The plaintiff acknowledges receipt of that notification. He also admits that he has ever since been collecting rent from tenants. He himself operates a studio and resides on the suit property. The plaintiff also admits the correctness of the contents of exhibit D11 which shows the levels of the rent corrected by him or due from the various occupants of the suit property as at 22nd February, 2005.

Section 2 of the Civil Procedure Act, Cap.71, as "*those profits which the person is wrongful in possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits but shall not include profits due to improvements made by the person in wrongful possession,*" and in possession collecting rent from the other occupants as exhibit D11, whose contents the plaintiff himself admits reveals. Exhibit P11 shows the following as moneys received or would have been received by the plaintiff during the period he has been illegal possession. Although the rest assessment contained in exhibit P11 was made in February, 2005, when it was put to the plaintiff during the trial he agreed that the position had persisted to-date except in respect of only one Emmanuel Kiweewa, whom he said was his relative and was only paying rent Shs.50,000/= and not Shs.100,000/= per month, as exhibit P11 indicated.

In effect, for the period from January, 2006, to January 2009, the following rent has been received or would have been received by the plaintiff .

Tenant	Rent @ year	Total
- Bata Shoe Shop	3,000,000/= x 3	9,000,000/=
- Kafunda Traders	600,000/= x 3	1,800,000/=
- Fatuma Asiimwe	1, 200,000/= x 3	3,600,000/=
- Maama Siyena (Saloon I)	600,000/= x 3	1,800,000/=
- Maama Siyena (Saloon II)	960,000/= x 3	2,880,000/=
- Mr. Sseggane (shop stationery)	1,200,000/= x 3	3,600,000/=
- Ndibalekera Victor (" ")	720,000/= x 3	2,160,000/=

- Bwanika & Co. Tax Consultants 600,000/= x 3 1,800,000/=
- Emmanuel Kiweewa 600,000/= x 3 1,800,000/=

28,440,000

Court, therefore, awards the sum of Shs.28,440,000 as mesne profits to the plaintiff. The sum of shs.28,440,000/= does not include rent which the plaintiff would have received from renting out the studio, the shop that was vacant on 22nd Febraury, 2005, when exhibit D11, was made the flat upstairs and the Boys' Quarters, all utilized by the Plaintiff and his family members during the period covered by the mesne profits.

Each of the three defendants shall recover his or its taxed costs from the plaintiff.

RESULT:

In the result,

a) A part from the order rejecting the plaint in as far as it sought to challenge the decision of the Hon. Minister of Finance to issue a repossession certificate in favour of the second defendant, the plaintiff's case is dismissed with costs to each of the three defendants;

b) Court enters judgment in favour of the second defendant against the plaintiff in respect of the counterclaim. It makes the following declaration and orders:

    i) a declaration that the suit property, Plot 33/35, Hobert Street, Masaka Municipality belongs to the second defendant;

    ii) an eviction order against the plaintiff requiring him to hand over vacant possession of the suit property to the second defendant, not later than 14 days from the date of the delivery of this judgment;

    iii) an order requiring the plaintiff to pay the sum of shs.10,000,000/= (ten million) as general damages to the second defendant; and

    iv) an order requiring the plaintiff to pay shs.26,520,000/= (twenty six million, five hundred and twenty thousand only) as mesne profits to the second defendant.

V.F. Musoke-Kibuuka

Judge

09.02.09