IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: WAMBUZI, C.J., PLATT, J.S.C. SEATON, J.S.C.

CIVIL APPEAL NO. 13/91.

BETWEEN

CHRISTOPHER SEBULIBA:: APPELLANT

AND

ATTORNEYGENERAL OF UGANDA:: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Mr. Justice Kityo) dated 15/3/91)

IN

HIGH COURT CIVIL CASE NO. 528/88

JUDGMENT OF PLATT J.S.C.

The learned trial Judge had before him strange, proceedings caused by the omissions of the parties. The Plaintiff, Mr. Christopher Sebuliba, had sued the Attorney General and two army personnel called Mohamed Matovu (Defendant 2) and David Kizito (Defendant 3) to recover possession of Plot No. 21 Namirembe Road Kampala and damages. The Plaintiff claimed that the Attorney General, as representing the Ministry of Defence, was responsible on behalf of Government for the two other Defendants named above, since they were employees of that Ministry. The Defendants, Matovu and Kizito were served with the summons to appear and defend the suit. They took neither course, and ex parte judgment was entered against them, for at least apart of the claims put forward by the Plaintiff. Although it was said that judgment was allowed as prayed, that seems to lave meant that

> "The plaintiff eviction order is hereby sanctioned". (Sic)

It may also have meant, that a declaration was granted that the Plaintiff was the Owner of the property and entitled to immediate possession thereof. It did not mean that general damages for trespass had been granted; at least, the matter was not set down for the assessment of damages. No evidence had been heard at that stage. When the Plaintiff did call his evidence, none of the Defendants was present and the case proceeded ex parte against the Attorney General. It might first have been a case for assessment of damages, but that was not clear.

Later on State Counsel appeared and was allowed to cross-examine the Plaintiff. Thereafter State counsel called no witness for the defence, and both counsel addressed the Court. In the end the suit was dismissed as against the Attorney General, and no damages were assessed. The Plaintiff considered this short shrift and appealed against the Attorney General only. I shall refer to the parties as they stood at the trial.

Before reaching the Plaintiff's evidence it would be profitable to notice the admissions in the pleadings. The Attorney General admitted paragraphs 2, 3, 5; 6 & 7 of the plaint.

Para 2 described the three Defendants, as they have been described at the commencement of this judgment.

Para 3 stated:-

> "The Plaintiff is the registered owner/proprietor Of the premises comprised in Plot No. 21 Namirembe Road, Kampala".

Para 5 reads:-

> "In April, 1979 or thereafter, the Plaintiff entered into a Tenancy Agreement with the Commissioner of Lands and Surveys acting on behalf of the Ministry of Defence for a period dating from the 1st day of May, 1979 to the 31st day of December, 1984 in respect of the premises comprised in Plot No. 21 Namirembe Road Kampala, as a result of this agreement Military Offices and Personnel were housed therein."

Para 6 reads: -

> "The Ministry of Lands and Surveys authorities purportedly handed over the premises to the plaintiff the owner thereof to revest in him free of any other occupation for all

the period after the 30th day of June 1986, and stopped paying rent for it."

Para 7 reads:-

> "After the 30th day of June, 1986, the Commissioner of Lands and Surveys or his agents terminated the tenancy and communicated the same to the Ministry of Defence together with notice of eviction to the Defendants of which were copied to the plaintiff."(sic)

Then, what was left of the plaint? Para 4 stated that the suit was for a declaratory judgment and eviction of the Defendant, because of the facts pleaded thereafter. Para 8 averred that despite notice of termination and the various eviction notices, the Director of Legal Services N.P.A. acting in the course of his employment or
as agent of the 1st Defendant caused and/or encouraged he 2nd and 3rd Defendants to refuse to take heed of and/or obey the notices and they have remained therein as trespassers. Para 9 continued to allege that by so remaining in the premises the 2nd and 3rd Defendants deprived the Plaintiff of his use of the party or rent therefrom, caused damage to the roof, walls and compound by their care less and malicious uses, although all along the Plaintiff was the legal proprietor. (Para 10). Hence the Plaintiff prayed for: -

a) A declaration that the Plaintiff is the owner of the suit premises, and entitled to immediate possession;

b) an order of eviction; -

c) general damages for trespass;

d) costs.

To these allegations, which were not admitted, the Attorney General added in his defence, that the 2nd and 3rd Defendants were currently occupying the premises in their own private-capacities and not as employees/servants/agents of the 1st Defendant. Therefore the Attorney General *was* not vicariously, liable. The 1st Defendant pleaded that he was the wrong person to sue. Consequently, no order could be made on any ground pleaded.

The learned Judge agreed with the Attorney General and dismissed the suit. The first ground of appeal was that he should not have held that the Attorney General representing Government was not vicariously liable. The learned Judge was wrong to agree that the 2nd and 3rd Defendants were occupying the suit premises on a frolic of their own. In the second ground it was said that the learned Judge was wrong to hold that the Ministry of Defence did, not claim the suit property. In ground 3 it was alleged that the 2nd and 3rd Defendants had occupied the premises as servants of the Ministry of Defence.

No issues for trial were framed but the learned Judge directed himself in the following mariner:-

> "Therefore, having taken, into consideration of the pleadings of both sides as regards the defendant No.1 the high and important issue to be resolved is: whether or not the Ministry of Defense was liable for those alleged unauthorised acts of the other two defendants in this suit, who are at the same time employees of the Ministry of Defence." -

He observed that if the Ministry were found to be liable, the Attorney General would be answerable in his representative capacity.

On the evidence, however, the learned Judge held that the tenancy had come to an end in 1986; no new negotiations had been entered into; and the Attorney General could only be held liable, if there were evidence to establish that the Ministry of Defence continued to claim, or was still claiming, the ownership of the property, after the expiry of the

tenancy agreement. The Ministry did not do so in their case. On the other hand, if the Plaintiff relied on the attitude of the Director of Legal Services N.R.A. then he should have been joined as a defendant, to enable the Court to decide on his liability. As it was, the discontinuance of the payment of rent of the Ministry of Defence inclined the Court to take the view that the Attorney General was not liable, after the discontinuance of the lease. Consequently, no order for eviction could be made against the Attorney General, unless the 2nd and 3rd Defendants could be shown to be in occupation authorized by Government.

With respect to the learned Judge, it seems to me clear that the Plaintiff's evidence did prove the case against the Attorney General. The lease had been admitted from 1st May 1979 to 31st December 1984. Its determination had been admitted. It was also admitted that the Ministry of Lands communicated the determination of the lease to the Ministry of Defence together with notice of eviction, a copy of which the Plaintiff had received. This letter was the subject of an application during the course of the appeal hearing. It was put in, in a supplementary record of appeal. I stand by that ruling, because it was part of the admission in paragraph 7 and because the defence offered no evidence against it. It was marked Exhibit P2 and recites as follows:-

Department of Lands and Surveys

20th February, 1985.
The Secretary for Defence,
P.O. Box 7096,
Kampala.

House on Plot NO.21 - Namirembe Road, Kampala

I wish to refer you to my letter ref. ULC/228/KLA/330 of 7th May, 1984 which was addressed to my Permanent Secretary and copied to you among others. You will note from that letter that the tenancy agreement was determined on 31st December, 1984 and that you

were supposed to vacate this house on or before 31st December 1984. However, you have not vacated the premises up to now.

The purpose of this letter is, therefore, to request you to make immediate arrangements to vacate the premises by the end Of March 1985. By copy of this letter, the Director of Barracks is requested to hand back the house to the owner on or before 31st March 1985. The Permanent Secretary, Ministry of Lands, Mineral and Water Resources, is requested to extend payment to the end of March 1985 and thereafter delete this property from the Rent Register.

A.J. Bwiragura
for Chief Government Valuer
Exhibit P2
Sgd.

One can see from this letter how the various departments of government concerned, worked together. It was for the Secretary of Defence in the Ministry of Defence to make arrangements to vacate the premises. The actual handing over was to be carried out by the Director of Barracks. The Ministry of Lands was to pay the rent until March 1985.

After this letter, the Plaintiff testified that, of the four officers of the Ministry Of Defence who had Occupied the house, two were taken away. But the Defendants 2 and 3 continued to occupy the premises. No rent was paid. Then the two officers who went away came back again so that there were four of them once again occupying the whole house. In the meantime, the Director of Legal Services in the Army wrote to the Director of Barracks as follows:-

Exhibit P1

Director of Legal Services
National Resistance Army,
G HOS

Kampala
11/2/88

From: Directorate of Legal Services
To: Director of Barracks and Stores.

Could you kindly send to us all the relevant information and documents on properties situated on Plot 124 Mbuya Hill and the one in Bugolobi currently being occupied by an Indian known as Mustake?

This is for purposes of cross-checking with Custodian Board and verification committee.

As far as plot 21 Namirembe Road is concerned we still stand on our reports submitted to you in 1986 and 1987 and affirm that that house is a defence house and employees of the Ministry and Army should not be evicted. Let the claimants continue with Court action which solves the problem once and for all." (sic)
There can be no doubt after this letter that General Headquarters of the National Resistance Army, through the Director of Legal Services, instructed the Director of Barracks not to evict the employees of the Ministry and Army. It was claimed to be a Defence House, which clearly implied that it was a house properly occupied by employees of the Ministry and Army, and the registered owner must prove a better right to it. It is clear that whether or not the Ministry and Army actually claimed title to the house, they were determined to continue their occupation of it as a Defence House, until the Owner proved his Case.

These letters and the evidence of the Plaintiff were not controverted by evidence for the defence. They were not controverted by any defence at all by the Defendants 2 and 3. There was no evidence at all upon which the defence could rest its allegation that the Defendants 2 and 3 were currently occupying the premises in their own private capacities. The defence was dated 21st June 1988. Exhibit P1 is dated 11th February 1988. Nothing had occurred as far as

the evidence is concerned to alter the position since February 1988. The plaint indeed is dated 28th March 1988. It is clear that the plaint was filed on the basis of the letter of 11th February, 1988.

There is also a second aspect of this position. As the Defendants 2 and 3 did not defend themselves, ex parte judgment was given on the strength of the plaint and evidence in support. There can be no case of the Defendants 2 and 3 being there "on a frolic of their Own." paragraph 8 of the plaint was thereby proved that the Director of Legal Services caused or encouraged the Defendants 2 and 3 to refuse to take heed of or obey the notices to vacate the premises. They were alleged to be trespassers. The learned Judge accepted that and gave an order for their eviction. It would be in contradiction to the basis of the ex parte proceedings, to later hold that the Defendants 2 and *3* were not there with the consent of the Army and Ministry of Defence. Moreover, when State Counsel did appear to cross-examine the Plaintiff, he did not challenge the facts upon which the Plaintiff founded his claim. The questions raised concerned rent and repairs.

The only conclusion that can be come to is that the Defendants 2 and,3 were employees of the Army and Ministry of Defence and kept in occupation of the Plaintiff's premises with the support of the Army and Ministry.

Bearing these facts in mind, Can the views of the learned Judge be accommodated? It does not seem so, with respect. It is not important that the Defendants 2 and 3 were not named in the lease; nor that the Director of Legal Services was made a Defendant. Had the Attorney General wished to clarify the Director's position he could have done so. He did not even call him as a witness. It was not material that a new tenancy was not renegotiated. It was simply a Case of holding over and rent had to be paid. Neither the Ministry of Lands and Surveys nor the Army paid it. Liability does not cease with determination of the lease if the lessee holds over. He is then in breach of his agreement and becomes liable as such. These Defendants 2 and 3 wore admittedly employees of the Army and Ministry Of Defence, and as they were in occupation, and as the Army was determined that they should stay in occupation, they were there unlawfully. It was not necessary for the Ministry to claim ownership. It was simply a case of the Army claiming the right to occupy the house as a Defence House, and keep

employees of the Army and Ministry in occupation, until the Court decided otherwise.

On the evidence in this case, there can be no doubt that the Attorney General was properly sued in his representative capacity on behalf of the Ministry of Defence who employed the Defendants 2 and 3 as Army personnel. The Defendants were wrongly in possession of the premises as directed by the Army through the Director of Legal Services.

The question then is whether this Court can decide between Government departments, since in principle the Court ought to support the Ministry of Lands whose action appears to have been entirely correct. It is claimed however that Section 15 of the Government Proceedings Act (Cap 69) does not permit the Court, to decide this issue by granting an eviction order, against the Attorney General Or the Army personnel. Section 15 provides as follows:-

> "15.(1) In any civil proceedings against the Government the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:-
>
> a) where in any proceedings against the Government any such relief is sought as might in proceedings between private persons be granted by way of injunction Or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

b) in any proceedings against Government for the recovery of the land or other property the Court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

2. The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government."

It will be seen that in so far as the Attorney General represented the Ministry of Defence the provisions of Section 15 subsection 1 proviso (b) would apply. In so far as he could be representing the two military personnel Section 15 subsection (2) would apply. However, it is clear that the Attorney General was not representing the two military personnel, Matovu and Kizito, the 2nd and 3rd Defendants. In para. 2 of the plaint the Attorney General was described as being sued in his representative capacity for the Ministry of Defence, while the 2nd and 3rd defendants were said to be employees of that Ministry. In his written statement of defence, the Attorney General, admitted the description of the parties as set out in para.2 of the plaint. But the Attorney General's main defence was that he was not properly sued, since the Ministry of Defence had no liability for the defendants 2 and 3, since they were acting entirely in a private capacity. Consequently the 1st defendant was not vicariously liable. It further seems that the Attorney General did not prepare any defense for the 2nd and 3rd defendants. When the trial started the Attorney General appeared only for the 1st defendant and not for the 2nd and 3rd defendants, Matovu and Kizito.

Then, for lack of a defence by the 2nd and 3rd defendants themselves, judgment was given against them in their absence. That was a logical step to take if it were accepted by the Court that the Ministry of Defence was not liable for the 2nd and 3rd defendants. But it would be questionable if the Attorney General acting for the Ministry of Defence was vicariously liable

for the 2nd and 3rd defendants.

In the course of the proceedings Mr. Muwayire in moving the Court for a temporary injunction made the following comments:-

> ‘The Appellant has faced a problem - The Solicitor General and the Director of Barracks deny responsibility for continued occupation, but do nothing to remove the Government employees therefrom and the Director of Legal Services insists that such employees will only leave after a court order.”

It was therefore prayed that the court should intervene to end the matter.

The High Court refused to grant a temporary injunction; but at a later stage that Court accepted that the Government was not responsible, and firstly, gave judgment against the 2nd and 3rd defendants by default, and secondly in favour, Of the Attorney General dismissing the suit.

Hence, not only did the Director of Legal Services insist that the 2nd and 3rd Defendants remain in their premises, but he directed that that should remain so until there was a court order. If such a View is taken it is a clear challenge to the legality of the action taken by the Ministry of Lands, and it was not supported by the Attorney General. The latter, indeed, denied any liability, not because the Ministry of Defence had acted correctly, but because the 2nd and 3rd Defendants were acting outside the scope of their employment with the Ministry of Defence. It is clear, therefore, that the Attorney General had done his best to avoid any responsibility by putting the blame totally on Defendants 2 and 3, who were by implication at fault.

The learned Judge accepted the Attorney General’s view of these extraordinary facts, and in a general way, gave the order which both the Attorney General and the Plaintiff wanted, namely the removal of the Defendants 2 and 3. For my part, I would say that the decision was

astute in that it avoided all the difficulties which Section 15 of the Government Proceedings Act would bring into play. But though I applaud the learned Judge for his common sense attitude, it is clear that damage would be done to the principle of vicarious liability. On the other hand, to save this principle intact, it would require a new interpretation of Section 15.

Looking at Section 15(1)(b) there is a plain prohibition in suits against the Government for recovery of land or other property; and the prohibition is:-

> 'The court shall not make an order for the recovery of the land but may in lieu thereof make an order declaring that the plaintiff is entitled as against Government to the land ..... or the possession thereof."

The Court is unable to disregard an Act of parliament, and especially one so important to the operation of Government affairs. The same would apply to Section 15(2) of the If an order against the Government cannot be granted under Section 15(1)(b), the order against an employee of Government cannot be granted under Section 15(2) which should have effect of circumventing Section 15(1) of the Act. But I think that there maybe a new way of looking at the ambit of the section.

The situation is anomalous. This is not a case where the Government wishes to maintain possession of the premises; nor is it a case where the Government has taken any stand to support the Army men; and moreover in defiance of the civilian arm of Government, the Army has stated that the men, the 2nd and 3rd defendants, will not move out of the premises, unless there is a court, order. It is therefore entirely in favour of the Government that the order of eviction against the 2nd and 3rd defendants should be maintained.

It is absurd to hold that the protection of the Government which the parent Ministry, namely 'the Ministry of Lands, does not seek, and that the Attorney General does not seek, should nevertheless be upheld under Section 15 of the Act.

The real meaning of section 15, I feel sure, is that the Government by a procedural divide is not required to carry out a Court Order to vacate premises (inter alia) which it ought to have carried out itself. f the citizen sues Government and is right in his contentions a declaratory judgement setting out his rights may be given in lieu, say, of an order of eviction, thus providing the Government with that much protection. As this Court heard last year, several common law jurisdictions have partly abandoned this protection; but it still obtains in Uganda. However, is it the case that .f the Government does not want the protection of Section 15, the section must still be applied? Here is a case where the Legal Secretary has ordered the 2nd and 3rd Defendants to remain in the premises until there is a court order, despite the instructions of the Ministry of Lands, and despite lack of support from the Attorney General. Can Government then waive the protection of Section 15?

There is no precedent that my researches have unearthed on this point. I proceed therefore from first principles. First, it is a procedural protection, against fault on the Government's Part. Of course Government needs no protection if it is not at fault. Secondly, where such a protection is unconscionable, it should be scrutinized very carefully, Government may not expressly insist on protection, or Government may be held to impliedly waive it. Let us compare the situation under the Statute of Frauds. Equity intervened with the doctrine of part performance, where the Statute of Frauds was itself an engine of fraud. However, since the idea was grasped that the Statute did not render the contract void ab initio, but rather that as it was a matter of non-compliance of a procedural provision, the contract was unenforceable, then it was clear that the defendant could waive the protection of the Statutes of Fraud. There was provision in the Rules of Court in England, to the effect, that if the Defendant wished to rely on this privilege, he must expressly plead it. (See Cheshire Fifoot, The Law of Contract 6th Ed. p. 174). That situation illustrates a close parallel to the problem under Section 15. Would it for instance, be right for the Attorney General not to support the Plaintiff, indeed, not to sue on behalf of the Ministry of Lands, and then capriciously appear for the Ministry of Defence, relying on Section 15, to defeat or delay the Plaintiff in the rightful exercise of his liberties? That would surely be unconscionable.
Accordingly I would hold that:-

a) this being a procedural protection of a wrong done by Government;

b) the wrong having been done by one arm of Government against the main interest of Government;

c) the main interest having not been asserted; and the protection not specifically relied upon; and the wrong doers having challenged the correct position of the Ministry of Lands by maintaining possession until a court order, it must follow –

d) that the Government by its inaction on the one hand, and defiance on the other, has impliedly waived its right to the protection of Section 15(1) for itself, and for its servants (sec. 15(2)).

It follows then that the High Court ought to have granted an order of eviction against the Attorney General, and ought not to have dismissed the suite The Court was right to issue the orders of eviction against the Defendants 2 and 3. They have not appealed, however.

On the other hand if I were to be wrong in my main opinion, then I would have agreed with the learned Chief Justice, that this Court would have been bound to set aside the orders against the Defendants 2 and 3, even though they have not appealed. That is so because the Court must guard against accidental non-compliance of an Act of Parliament, by supporting orders, though given in good faith, are ultimately unlawful. The power Of this court is to draw inferences of fact, to give any judgment and make any order which ought to have been given Or made and make such further or other order as the case may require; and moreover these powers may be exercised notwithstanding that no Notice of Appeal Or respondent's notice has been given in respect of any particular part of the decision of the court below, or by any particular party to the proceedings in that court, or an ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice, but the court may make any order which is just to ensure the determination on the merits of the real questions in controversy between the parties (See Halsbury's Laws of England 4th Edition

Vol. 37 p. 532). But as I say, having determined that the Government has not sought the protection of the Act which was never mentioned at any time, but indeed sought to avoid it, it is not necessary for me to deal, with the Defendants 2 and 3 who have not appealed. Indeed, I would say that if the concept of waiver is accepted, the real issues in, controversy have been dealt with.
Finally, there was a claim for general damages. There are two parts, arrears of mesne profits and repair charges. On the former head of claim the Plaintiff unilaterally increased the rent. What was needed was evidence as to the rent the house would fetch as from 'the time the lease ended. It is not right to put down figures as the Plaintiff pleases. Without evidence of the market rental value of the house the rent should be the rent arranged namely shs 15,000/- p.m. old money. The total sum should be worked out until the date of judgment, and converted to new money. Counsel can assist the Court to work out that sum less tax.

On the second heading there was merely a guess at the cost of repair. It was unsatisfactory evidence. Perhaps the Plaintiff was not fully aware of the damage done. We cannot guess what the figure should be; and certainly we are not aware of the terms of the lease and the state of the buildings when the lease commenced.

Moreover it is not clear what effect the trespass per se had on the buildings. It would seem that on this point, that it would be better .for the Plaintiff to bring a fresh suit on the lease for the repairs or lack of the repairs for which he is entitled to compensation.
In the result I would allow the appeal, set aside the judgment in favour of the Attorney General and substitute judgment for the Plaintiff as prayed against the Attorney General for the declaration and order for eviction. I would award damages in the um worked out by Counsel and the costs of this appeal and of the trial below.

Dated at Mengo this 21st day of May, 1992.

Sgd: H.G. Platt

Justice of the Supreme Court

Order: After hearing both Counsel, general damages are assessed and awarded at Shs.11,745/- (new currency) net of tax.

JUDGMENT OF WAMBUZI C.J.

I have had the benefit of reading in draft the judgment prepared by Platt JSC and I agree that this appeal should be allowed. This was clearly a case of holding over, Defendant 2 and 3 were employees of the Ministry of Defense. They were put in occupation by the Ministry and should have been removed when the lease was terminated. The other two employees of the Ministry of Defence who were removed at the termination lease also came back encouraged by the Ministry of Defence who claimed ownership of the property. The Ministry of Defence did not prove such ownership. It is clear on the evidence that the employees of the Ministry were on the property by virtue of the lease and they did not vacate the lease was terminated. I would agree that in these circumstances the Attorney General is liable.

As for the remedies I wish to add that the pleadings are unsatisfactory. Although the plaint refers to loss of rent and damage caused to the roof no amounts were indicated as being claimed.
The Appellant prayed only for general damage for trespass.

In the premises, it is my view that the judgment entered against the defendants 2 and 3 in their personal capacities cannot stand. The Appellant cannot sustain his claim against the government and also against the defendants 2 and 3 in their personal capacities in respect of the same claim. The defendants 2 and 3 were in occupation either as employees of he Government or in their own private capacities.

The Appellant’s claim against the defendants 2 and 3 in their personal capacities must therefore be in the alternative. I would accordingly set aside the judgment against the defendants 2 and 3 and the ardors made against them as a result.

Having found the attorney General liable any order for eviction must be made against the Government, the party liable. In my view such an order would be contrary to the provisions o

section 15 of the Government Proceedings Act, 1968 which in so far as is relevant provide as follows;

> "15(1) In any civil proceedings by or against the Government the court shall, subject t the provisions of this Act, have power to make all such orders as it has power to make n proceedings between private persons, and otherwise to give such appropriate relief as the case may require:
>
> > Provided that
> > . . . . ……... . . . . . .
> > (b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to The land or property or to the possession thereof.
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government."

In my view even if this is a dispute between Government departments, any eviction order made against the department in default will be caught by the provisions of sub section (2) as right or wrong the party at fault are officers of the Government.

For the judgment of the High Court I would substitute judgment in favour of the appellant against the Attorney General. I would grant the declaration prayed for and I would also agree to the proposed order for damages and costs of this appeal, and in the court below.

As Seaton JSC agrees, this appeal is allowed, the judgment in favour of the Attorney General is set aside and there is substituted therefor judgment in favour of the Appellant. The declaration prayed for by the Appellant is granted and there will be paid to the Appellant damages at the rate of Shs.15,000/= per month old money till judgment to be converted into new money. We shall hear argument by Counsel as to the total, sum due. The Appellant shall have the costs of this appeal and in the court below.

Dated at Mengo this 21st day of May 1992

S.W.W. WAMBUZI
CHIEF JUSTICE.

JUDGMENT OF SEATON, J.S.C.

I have had the benefit of reading in draft the Judgments of My Lord the Chief Justice and of Platt, J.S.C. I concur with their views that On the evidence the Defendants 2 and 3 were employees of the Army and the Ministry of Defence; that they were kept in occupation the house of the suit premises after the termination of the lease with the support of the Ministry of Defence; and that the Attorney General was properly sued as representative of the Government.

As I disagree, however with one of the remedies proposed by my learned brother, Platt, J.S.C. I shall set out the reasons which have led me to a different conclusion thereon.

As a follower of the common law tradition, the High Court of Uganda in practice exercises its jurisdiction in accordance with the manner in which similar proceedings are dealt with in England. This is, of course, subject to any statutory directives that may apply here. It is therefore appropriate to review the manner of evolution and current practice. In England regarding proceedings such as those instituted by the plaintiff in the instant case.

In England, a citizen has the right to proceed against the Crown as of right and without Her Majesty's Fiat in cases where, before the passing of the Crown Proceedings Act 1947, the claim might have been enforced by the petition of right or under any of the statutory provisions repealed by the Act. (S.1).

Civil proceedings against the Crown are instituted against the appropriate authorized Government Department. (S.17 (3). However, if it is not clear as to which Government Department should be proceeded against the proceeding may be started against the Attorney General, but he may apply to have the name of the correct department substituted (Ss. 17, 18).

As to the nature of the relief, the English Courts have not in cases involving the Crown all such powers as it may have against ordinary citizens, for S.21 provides that:

> "(1) In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make any such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may provide:
>
> Provided that:-
>
> (a) . . . . . .

(b) in any proceedings against the Crown for recovery of land or other property the Court shall not make an order for the recovery of land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof".
(Underlining added)

In Uganda the position of the Government is substantially similar to that of the Crown in England in so far as concerns civil proceedings.

The Government Proceedings Act Cap. 69 ("the Act") came into force on 7th May 1959. Since that date civil proceedings must follow rules which permit the bringing of suits but subject- the citizen. to certain limitations in respect thereof.

Thus, it is provided in S.II of the Act that civil proceedings by or against the Government shall be instituted by or against the Attorney General. There is no provision in the Act similar to 5.17 of the (English) Crown Proceedings Act 191+7, whereby civil proceedings shall be instituted against the authorised Government Department.

There is, however S.15 of the Act, relating to the nature of the relief that ray be granted, which corresponds to S.21 of the (English) Crown Proceedings Act 1947 (hereinafter referred to as "the English Act")

Insofar as is relevant to the instant case, the Act provides as follows:-

"15 (1) In any proceedings by, or against the Government the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as

the case may require:

Provided that:

(a) . . . . . .

(b) In any proceedings against the Government for the recovery of land or other property the Court shall not make any order for the land recovery of the/or the delivery of the property, but may in lieu thereof make an, order declaring that the plaintiff is entitled as against the Government ‘to the land or property or to the possession thereof. (Underlining added).

It will hot be taken amiss, I hope, if I advert to the purpose of the declaratory order in proceedings brought in England under the former petition of right. In the case of Dyson V. Attorney General (1911) 1K. B.41O, 421, Farwl1 L.J. in the course of the appeal quoted the following remarks in 1667 of Baron Atkyns in Pawlett v. Attorney General

> “The party ought in this case to be relived against the King, because the King is the fountain and head of Justice and equity, and it shall not be presumed that he will be defective in either; it would derogate from the King’s honour to imagine that what is equal against a common person should not be equal against him”,

Dyson V Attorney General (above cited) was not a case for petition of tight, but the plaintiff sought a declaration from the Court regarding an Act which imposed burdensome and expensive inquires upon him in respect of his ownership and occupation of Agricultural land and buildings on it under the Finance (1969 - 10) Act, 1910, and for non-compliance with which he was threatened with fines. The Court of Appeal upheld the decision of the Lower Court that it had jurisdiction to maintain an action against the Attorney - General as representing the Crown, although the immediate and sole object of t1e action was to effect

the rights of the Crown in favour of the plaintiff.

In the instant case, the plaintiff alleged that the first Defendant was sued in his representative capacity for the Ministry of Defence of whom the 2nd and 3rd Defendants were employees. Paragraph 8 of the Plaint raised an allegation of vicarious liability for the tortuous action on the part of the Director of Legal Services of the National Resistance Army in encouraging the 2nd and 3rd Defendants to be have as trespassers on the Plaintiffs premises. Alternatively, the said Director was alleged to have acted in so doing as Agent of the first Defendant.

The first question that thereby arises is whither the Defendant was a proper party to the suit. It is clear that in England, the Plaintiff would have been obliged to sue the Ministry of Defence if it were an authorised Government Department under S.17(3) of the English Act, However, if the Plaintiff were in doubt as to which Department to sue, he could have started proceeding against the Attorney General.

In Uganda the Plaintiff had no option but to sue the Attorney General under S. 31 of the Act. I would answer this question therefore in affirmative.

The next question that arises is as to the nature of the relief. The prayer in the plaint was for (a) a declaration that the Plaintiff is the owner of the property, and is entitled to immediate possession thereof; an order of eviction from the said property; (c) general damages for trespass; aid (d)costs.

Could these reliefs be granted by the Court? There seems to be no reason why the reliefs (a), (c) and (d) could not have been granted as they might have been in proceedings by and against ordinary citizens. I agree that the plaintiff is entitled to these remedies. As to the relief in prayer (b) of the plaint, I regret that I find my
self unable to support the view that it would not be right to apply the prohibition inS.15(1)() of the Act. With respect, I would not treat the instant case as exceptional because there was between two Government Departments a dispute. I agree that in the events that led up to the Court Proceedings the Ministry of Lands acted impeccably whereas the conduct of the employees of the Ministry of Defence was tortuous. But the instant case is not one that

involves two Government Departments as parties.

For the reasons I have attempted-to set out above, I would allow the appeal, set aside the judgment in so far as it dismisses the appellant's suit against the respondent and substitute therefor a declaration that the appellant is the owner of the property and is entitled to immediate possession thereof. I would also grant to the appellant against the defendant jointly and severally general damages in the sum of (as worked out by counsel) and costs of this appeal and in the Court below.

DATED AT MENGO THIS 21ST DAY OF MAY 1992

SEATON, J.S.C.

I CERTIFY THAT THIS IS A TRUE COPY
OF THE ORICINAL.

B.B.B. BABIGUMIRA
REGISTRAR OF THE SUPREME COURT