THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

MISCELLANEOUS APPLICATION No. 833 OF 2006

(Arising from H.C.C.S. No. 614 of 1993)

MERCATOR ENTERPRISES LIMITED } ..... PLAINTIFF/ APPLICANT

VERSUS

SHELL (UGANDA) LIMITED } ..... DEFENDANT/ RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

The Plaintiff/Applicant brings this application pursuant to admissions of facts the Defendant/Respondent in the head suit has made with regard to the Plaintiff's claim therein. The application therefore seeks a judgment of this Court with consequential orders including the following: –

(i) A declaration that as a matter of law, the Currency Reform Statute does not apply to sum of money due from the Defendant to the Plaintiff.

(ii) A direction to the Defendant/Respondent to forthwith pay over to the Plaintiff/Applicant, the sum of US$ 2,629,722.00 (Dollars Two million, six hundred twenty nine thousand, seven hundred twenty two only), being the sum owing from rents and mesne profits for the upper floor of the building on property comprised in Leasehold Register Volume 57, Folio 14 Plot 49 Benedicto Kiwanuka Street (formerly South Street); hereinafter referred to as 'the suit property', interests thereon up to the 31st December 2006, less the sum due to the Defendant/Respondent under a mortgage registered on the title to the suit property.

(iii) Award of costs of the application to the Plaintiff/Applicant.

The Plaintiff/Applicant states in the grounds for the application, and this is spelt out further in the affidavit of Amirali H. Nathu, sworn in support thereof, that: –

1. The Defendant/Respondent has already conceded its liability to pay to the Plaintiff/Applicant, rent and mesne profits for the Upper Floor of the building on the suit property. It spells out certain particular facts, now no longer in dispute, which give rise to the said liability of the Defendant/Respondent to the Plaintiff/Applicant; and these are that: –

(a) Under a certain agreement dated 17th July 1972, the Defendant/Respondent was obliged to transfer the suit property to the Plaintiff/Applicant on 22nd September 1972.

(b) The Plaintiff/Applicant would, after the said transfer, be entitled to free and an unencumbered exclusive possession, use, benefit, and enjoyment of the Upper Floors of the building thereon.

(c) The Defendant/Respondent failed and or refused to effect the transfer of the title to the Plaintiff/Applicant; until 15th June 2001.

(d) The Defendant/Respondent failed and or refused to surrender possession of the said Upper Floors to the Plaintiffs/Applicants; until 19th January 2002.

(e) As a result, the Defendant/Respondent did withhold and deprive the Plaintiffs/Applicants of its proprietary and possessory rights and benefits over the said Upper Floors for the period 22nd September 1972 to 19th January 2002.

(f) The Defendant/Respondent did thereby hold the said Upper Floors as trustee, for the benefit of the Plaintiff/Applicant, for the period 22nd September 1972 to 19th January 2002.

(g) Accordingly, the Defendant/Respondent is liable to pay over to the Plaintiff/Applicant, the mesne profits accruing from the Upper Floors, for the period from 22nd September 1972 to 19th January 2002; and, as well, interests thereon up to the date of payment in full, together with VAT thereon as applicable under the Value Added Tax Statute of 1997 (as amended).

2. In a Consent Order dated 18th May 2001, this Court advised the parties hereto to pursue a mutually acceptable settlement with regard to the quantum payable; and stated that in the event of failure of the parties to reach a settlement as advised, Court would then adjudicate on the matter. Following this, the Plaintiff/Applicant submitted to the Defendant/Respondent two separate expert valuations on the quantum payable to it; which the Defendant/Respondent has not contested or controverted by a contrary valuation, but has not acted thereon.

3. It would therefore be just and proper for the Court, pursuant to the Consent Order of 18th May 2001, to adjudicate the matter and provide judgment in the terms sought, awarding the sum prayed for to the Plaintiff/Applicant for immediate payment by the Defendant/Respondent

For the Defendant/Respondent, its Legal Secretary, Stephen Chomi, swore an affidavit in response to the application; wherein, while conceding that there has been a Consent Judgment on the matter, he however denied that the Defendant/Respondent was liable to the Plaintiff/Applicant in the manner or in the terms stated by the latter.

He asserted that no meaningful negotiations for settlement had taken place between the parties regarding the business that was not concluded by the Consent Order; for which it became necessary to have the matter tried and determined by Court.

The head suit herein, from which this application arises, has had a woefully long and checkered history. The present Plaintiff/Applicant became party to the suit owing to an assignment, vide an order of Court by consent, of the whole of the interests its predecessors as Plaintiffs had in the head suit from which this application arises. The reliefs the Plaintiff seeks, which are set out in the plaint in the head-suit, are as follows: -

(a) a declaration that the Plaintiffs are the rightful owners of the property comprised in Leasehold Register Volume 57, Folio 14 Plot 49 Benedicto Kiwanuka Street (formerly South Street), and hereinafter 'the suit land';

(b) an order rectifying the Register of Titles to show that the Plaintiff is the owner of the suit land;

(c) an order of eviction against the Defendant from the suit land;

(d) mesne profits; and

(e) alternatively, but without prejudice to the above, a declaration that continued denial of possession to the said property, amounts to deprivation of property contrary to the constitution.

The Plaintiff/Applicant's claim for compensation founded on mesne profits is premised on an alleged trust relationship created between its original predecessor in title to the suit land and the Defendant/Respondent; which the latter however discounts. The Defendant/Respondent has raised the legal contention, first, that

there was in fact no trust relationship created between it and the Plaintiff/Applicant's predecessor in title. Second, an agreement between the original parties to create a trust, as is contended by the Plaintiff/Applicant, was in fact illegal as it offended the various Decrees issued by Idi Amin, which expropriated properties of departed Asians such as the suit property.

Counsel for the Plaintiff/Applicant has, in his robust response to the submissions made by Counsel for the Defendant/Applicant, made a scathing attack thereon. He contends first, that the objections raised by Counsel for the Defendant/Respondent with regard to the Defendant/Respondent's obligation to account for and pay mesne profits to the Plaintiff/Applicant are res judicata; maintaining that they have been discharged through the Consent Order referred to herein above. Second, the Decrees by Idi Amin expropriating properties were not intended to, and in fact did not, affect the suit property or the interest of the Plaintiff/Applicant's predecessors in title therein.

The Consent Order of Court, which the parties hereto do not contest, and which has admittedly partly resolved the matters in dispute between them, obliged the Defendant to deliver the duplicate certificate of title to the suit property to the Plaintiff's Counsel. It also enjoined the Plaintiff's Counsel to register on the title to the suit property, the transfer deed that had been stamped on 4th October 1972, the executed mortgage deed that had been stamped on 29th September 1972, and the unexecuted draft Form of sub-lease of the suit property agreed thereon between the original parties to the agreement. The Consent Order then urged the parties to pursue an amicable settlement of the outstanding business.

It is this last provision in the consent order, which the parties failed to resolve by a negotiated settlement; hence this application seeking Court's intervention for a final determination thereon. With regard to the issue of res judicata, raised by Counsel for the Plaintiff/Applicant, I concur with the proposition of law set out in the case of ***Karshe vs Uganda Transport Co. Ltd. [1967] E.A. 774*** (cited by Counsel for the Plaintiff/Applicant); where at p. 777 thereof, the Court stated that: –

> *"[O]nce 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 relitigate the issue again or deny that the decision had in fact been given."*

I also agree with Counsel's submission that the doctrine of res judicata does not only serve as a bar to the relitigation of issues already decided by Court; but is also a bar to all other matters that ought to have been raised and litigated upon, from being raised to reopen a decided case. The case ***of Henderson vs Henderson [1843–60] All E.R. 378***, cited by Counsel, is authority for that proposition; as at p.381 thereof, Wigram V.C. clarified on the matter as follows: –

> *"[T]he Court requires the parties to ... litigation to bring forward their whole case, and will not ... permit the same parties to reopen the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not only because they have, through negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies ... to every point which belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."*

However, upon a scrutiny of the Consent Order entered into between the parties hereto, I have not been able to discern anywhere that the Court made any conclusive decision on the issue of mesne profits and other issues not agreed upon and determined by consent of the parties; and yet they were clearly in issue. To the contrary, these issues were deliberately left unconcluded, and were left to the parties to resolve them amicably; failing which, they were to revert to Court to make a final determination. To enable a better understanding of this issue there is need to reproduce, here in extenso, the part of the Consent Order pertaining to the outstanding business, which the Court left to the parties to resolve by a negotiated settlement. It states as follows: –

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

The Consent Order, which only partially resolved the issues in contention between the parties, was in effect an inchoate process. It left other issues pending determination either by consent or by Court decision. The issues pertaining to rent or mesne profits, and that of trust, were certainly not covered by the consent order; but were left to the parties to pursue a negotiated settlement. However, there was a rider to it that Court would intervene, and resolve the matter itself, if the parties could not determine them by consent. In the event, the parties were unable to resolve them by consent; hence this application seeking Court intervention for a final determination. Accordingly, in the circumstance, it would be inappropriate to raise the plea of res judicata with regard to the issues that were not determined by the Consent Order, but were expressly left outstanding for further action.

Second, I find the contention by the Counsel for the Plaintiff/Applicant that the parties had, under agreed facts, agreed that the expropriation Decrees did not affect the rights and interests of the Plaintiffs' predecessors in the suit property, hence it should not be raised for consideration, untenable. I think it is improper for parties to include principles of law under agreed facts; as this has the danger of impinging on, and ousting, Court's jurisdiction over the construction of legislation. However, the parties may agree on the law applicable, if the contract forming the basis of litigation expressly provides for the application of such law. Accordingly then, the parties hereto could not, by agreement, oust Court's jurisdiction to consider the effect of the expropriation Decrees over the suit property.

Counsel for the Defendant/Respondent has submitted that the issue of mesne profits claimed by the Plaintiff/Applicant cannot be delinked from the expropriation Decrees of Idi Amin; hence, it cannot be determined without a proper construction of the Decrees. For his part, however, Counsel for the Plaintiff/Applicant has castigated the expropriation Decrees, terming them as '*reprehensible and odious*' for having stripped a whole category of people of their rights '*on the basis of race*'. He points out that '*they are a stain on the proud legal traditions of this country*'. Indeed as he rightly points out, the Supreme Court of Uganda had no kind words for theses Decrees; calling them '*evil*'. I, myself, in the case of ***Mabale Growers Tea Factory Ltd. vs Noorali Mohamed & Anor, Fort Portal HCCS No. 65 of 2006***, referred to the ignoble expropriations by the Decrees as: –

> "*a monstrous wrong committed against a section of property owners in this country, by a notorious regime, by reason only of the property owners' race.*"

In this regard therefore, learned Counsel and I are singing the same hymn as it were! In the light of this adverse contention between the parties, the logical thing for Court to do is to first dispose of the effect, on the transactions between the parties, of the various Decrees by which properties of certain categories of persons were expropriated during the regime of Idi Amin. The first of the Decrees, was the Declaration of Assets (Non-Citizen Asians) Decree, No. 27 of 1972 dated 4th October 1972, which had a retrospective effect in as much as it was deemed to have come into force on the earlier date of 9th August 1972. Section 1 of that decree prohibited the creation of new liabilities by departing Asians.

The two agreements between the parties hereto – the mortgage agreement and the agreement providing for transfer of the head-lease to the Plaintiff/Applicant and for sublease of the suit property to the Defendant/Respondent after the completion of developments thereon – both preceded Decree, No. 27 of 1972. Accordingly then, the prohibition contained in Decree, No. 27 of 1972 did not affect them; but only any further transactions between the parties, pursuant to those agreements, intended to give effect to the agreements. Thus, this affected such processes as the stamping of the executed mortgage deed on 29th September 1972, and the stamping of the transfer deed on 4th October 1972; both of which were executed when Decree, No. 27 of 1972 was already in force.

Notably, section 2 of Decree, No. 27 of 1972 specified assets which departing Asians were under duty to declare. This included loan agreements and contracts or other agreements regarding those assets. The section also enjoined the departing Asian to give notice in writing nominating a person to act as his agent to sell his property or business. However, the Declaration of Assets (Non-Citizen Asians)

Decree, No. 29 of 1972, dated 25th October 1972, which amended Decree No. 27 of 1972, limited the scope of the powers earlier granted to the agent of the departed Asian. It provided that the agent appointed by the departing Asian could acquire, sell, let, transfer, or convey by gift the property left behind by the departed Asian; but only with the directions of the Custodian Board.

This then gave the Custodian Board a supervisory power over the departed Asian's agent in his or her specified dealings with the abandoned property. Decree, No. 27 of 1972 and Decree, No. 29 of 1972 certainly never applied to the Plaintiff/Applicant's predecessors in title despite their being of Asian extraction, given that they were Ugandan citizens; as, under the two Decrees, only non–citizen Asians had to leave the country. However, this legal position was altered by the issuance of yet another expropriation Decree; namely, the Assets of Departed Asians Decree, No. 27 of 1973, dated 7th December 1973. The head–note to this third expropriation Decree stated that it was a ***'Decree to Consolidate With Amendments The Law Relating To The Declaration Of Assets By Departed Asians And To Provide For Other Matters Connected Therewith Or Incidental Thereto.'***

Section 35 of Decree No. 27 of 1973, being the interpretation section thereof, provided that: –

" '*departed Asian*' *includes a departing Asian and* *any other Asian leaving Uganda on or after the 9th day of August, in such manner as would necessitate the taking over in the public interest of any property left in Uganda by him*". (**emphasis added**)

Counsel for the Plaintiff/Applicant has submitted that this Decree would not apply to the Plaintiff/Applicant who, admittedly, were citizens. He also sought to make a distinction between a departing and departed Asian; which, with respect, I think Counsel was merely

splitting air. The language of the Decree is clear and unmistakable, and so one does not have to look elsewhere for its import. In the case of ***Noor Mohamed Jiwa v. Rex (1951)18 E.A.C.A. 155***, Court had to construe whether the word *'and'* was the same as *'or'* in the legislation in issue. Referring to ***Maxwell on Interpretation of Statutes 9th (1946) Edition***, it reproduced the passage on page 212 of the book, which offers good guidance on how to avoid ending up with an absurdity in giving effect to the intention of the legislature. It states as follows:–

> *"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.*
>
> *This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning.*
>
> *Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. The rules of grammar yield readily in such cases to those of common sense."*

It is evident from the provision of section 35 of Decree No. 27 of 1973 reproduced above, that the law envisaged two categories of departed

Indians. First, was the departing non-citizen Asians as had strictly, and unmistakably, been provided for in the two earlier Decrees. Second, Decree No. 27 of 1973 expanded the category of departed Asians to include any person of Asian extraction whose departure from Uganda, at the time, would necessitate the taking over in the public interest of property such a person had left in Uganda. This second provision is better understood upon internalising the import of section 4(1) of this Decree No. 27 of 1973, which provided that: -

"Any assets declared by a departing Asian including any property or business recorded in the register kept under section 3 of this Decree, and any assets left behind by any Asian who failed to prove his citizenship at the time and in the manner specified by the Government shall, without any further authority, vest in the Government." (**emphasis added**)

It is therefore quite clear from the above-cited section 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/Applicant's predecessors had proved their citizenships 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. This duty is dictated by the provisions of section 106 of the Evidence Act (Cap. 6, Laws of Uganda 2000 Edn.) which states as follows: -

"106. Burden of proving, in civil proceedings, fact especially within knowledge.

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person."

To the contrary, from the evidence adduced by the Plaintiff's witness, Mr. Amirali H. Nathu, it is clear that even before the issuance of Decree No. 27 of 1973 the Defendant/Respondent's predecessors in title were alive to their vulnerability with regard to their interests in the suit property. Mr. Amirali H. Nathu's letter of 1st November 1972 to Arthur Reed the Managing Director of the Defendant (*exhibit* '*D2*' to his affidavit in reply dated 14th February 2008), states as follows: –

> *"Circumstances beyond our control delayed the completion at Plot 49 South Street, but we were able to hand over the service station to you in September 1972 for full occupation. ... Under the terms of the agreement, the Head Lease is to be transferred to us and Shell and B.P. Uganda Ltd. is to pay us an annual rent of Shs. 40,000/= on the date the service station is handed over to them. We are also required to pay (on 1st October) a sum of approximately 47,000/= towards repayment of the loan advanced and being advanced by you.*
>
> *We have the payment due to you ready but have not sent it to you, nor asked for the rent due from you because we feel it might be wiser to ascertain the possibility of when and whether the Head Lease can be transferred to our name. In the event the Head Lease cannot be registered in our name, the agreement between us provides for your retention of the Head Lease and refund to us of monies spent on the project."* ***(emphasis added)***

In a manifestation of equal unease about giving effect to the agreements between the parties, owing to the expropriation Decrees, Mr. Reed (Managing Director of the Defendant/Respondent) wrote to Mr. Amirali H. Nathu, on the 26th February 1973 (see the same Affidavit of Mr. Amirali H. Nathu); wherein he stated as follows: –

"Not only is it still unclear whether we shall be able to transfer to you the head lease, but by recent decrees it would appear that we may be legally bound to pay any monies due to you to [the government]. ... We are obtaining legal opinion on all these points and will let you know the outcome in due course."

The legal opinion, dated 20th December 1974, given to the Defendant/Respondent by its lawyers, first pointed out that the Defendant/Respondent was under obligation, and should have paid the monies owing, to the Plaintiff/Applicant much earlier; but despite this, the legal Counsel concluded their legal opinion as follows: –

"In spite of what we have stated above, we however feel that in the present circumstances it would not be prudent to pay that money to that Company. You would therefore be well advised either to hold the money yourselves or to pay the same to the Departed Asians Property Custodian Board. In any case we do not see how H. Nathu Ltd. can enforce their rights against you now. Nevertheless, we would not at the same time like to draw the attention of the Departed Asians Property Custodian Board to the fact that such a liability exists against you and we accordingly advise you to do the same."

It is noteworthy that the legal opinion of the Defendant/Respondent's lawyers stated above was given after Decree No. 27 of 1973 had already come into force; a fact the legal Counsel, quite strikingly, never took cognizance of. Since the Plaintiff/Applicant's predecessors in title had departed from the country without proving their citizenship, they had certainly, pursuant to the provision of section 35 of Decree No. 27 of 1973, departed from the country *'in such manner as would necessitate the taking over in the public interest of any property left in Uganda by him'*. Accordingly, the full force of the

provision of section 4(1) of this Decree No. 27 of 1973 applied to the suit property; namely that it had to, '*without any further authority, vest in the Government*'.

I should point out that it was not a pre-requisite that the departing or departed Asian had to declare or specify such property, for it to be so expropriated and vested in Government. Similarly, it was not a legal requirement that government, or anyone, had to physically take over such properties for expropriation to take place. The expropriation of such properties, and vesting them in government, was automatically effected by the letter of the Decree (through the operation of law) once the person of Asian extraction departed from the country. Furthermore, the effect of the law was not restricted only to interests the departed Asian had in such properties. It went further, and provided in section 4(3) of Decree No. 27 of 1973 as follows: -

"Any liabilities attaching to anything vesting in the Government by virtue of the foregoing provisions of this section shall also vest in the Government."

To my understanding, this provision of the law applied to all liabilities that were created in the agreements between the parties, over the suit property, prior to the issuance of the expropriation Decrees. Such liabilities included the mortgage agreement, the agreement for the Defendant/Respondent to transfer the head lease to the Plaintiff/Applicant's predecessors in title, and the agreement for the latter to sub lease the suit property to the former to operate a fuel station therein. I believe it was owing to the Defendant/Applicant's understanding of the full import of this provision of the law that, following the advice of its Counsel, it notified the Plaintiff/Applicant's predecessors in title of the difficulty it had with giving effect to the various agreements between them with regard to the suit property.

The monstrosity of Idi Amin's expropriation Decrees notwithstanding, the legal position is that until their repeal, they were valid and enforceable legislations; which were in fact effected. Hence, they affected properties of departed Asians; of which the suit property was one. Authorities abound, guiding Courts of judicature on how to treat legislation whose very enactment is under challenge. In our jurisdiction, the Courts can strike out an Act of Parliament; but only where such legislation contravenes a provision of the Constitution. This is because the Constitution is the supreme law of the land. Otherwise, Courts have no authority to revoke or invalidate any legislation merely because it is unpalatable or injurious to society.

English authorities are quite the opposite for the reason that under English law, Parliament is Supreme; hence, its right to legislate is unquestionable, and only Parliament itself can amend or repeal a piece of legislation for whatever reason. Accordingly then, although English authorities are pertinent and persuasive in this regard, they only apply in our situation to any legislation that does not contravene some provision of the Constitution. In ***Duport Steels Ltd vs Sirs [1980] 1 WLR 142*** (HL), Lord Diplock stated as follows:–

> *"... My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the ... role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they*

themselves consider that the consequences of doing so would be expedient, or even unjust or immoral."

Lord Scarman for his part stated as follows:–

"But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes, and un–makes, the law: the judge's duty is to interpret and to apply the law, not to change it to meet what the judge's idea of what justice requires. ... If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires."

It is in keeping with the spirit of the law postulated by the authorities cited above that, through the enactment of the Expropriated Properties Act 1982 (now Cap. 87, Laws of Uganda 2000 Edn.), which came into force in early 1983, Parliament took the bold step to rectify the grave wrongs occasioned by the expropriation Decrees cited hereinabove. The preamble or head–note to the Act spells out the purpose for which it was enacted; as follows:–

"An Act to provide for the transfer of the properties and businesses acquired or otherwise expropriated during the Military regime to the Ministry of Finance, to provide for the return to the former owners or disposal of the property by Government and to provide for other matters connected therewith or incidental thereto."

This means the Act recognized the Decrees as having been valid laws; which had legally expropriated properties of certain persons. Therefore, the Act had to repeal them to enable it return the

properties to the dispossessed owners; and thereby bring closure to the unpalatable acts of expropriation they had suffered. In the case of ***Registered Trustees of Kampala Institute vs. The Departed Asians Property Custodian Board; S.C. Civ. Appeal No. 21 of 1993,*** Platt JSC aptly pointed out the purpose of the Act as follows:–

> *"This is a remedial statute; it is putting right what the legislature in 1982 thought had been unfortunately decreed or done a decade earlier. It was aiming at returning property to the former owners."*

The other point of importance is that section 2(1) of the Act provided that the properties, that had been expropriated by Idi Amin's Decrees referred to hereinabove, re–vested in Government and were to be managed by the Ministry responsible for Finance. Section 2(2) provided that:–

"For the avoidance of doubt, and notwithstanding the provisions of any written law governing the conferring of title to land, property or business and the passing or transfer of that title, it is declared that–

(a) any purchases, transfers and grants of, or any dealings of whatever kind in, such property or business are nullified; and

(b) where any property affected by this section was at the time of its expropriation held under a lease or an agreement for a lease, or any other specified tenancy of whatever description, and where the lease, agreement for a lease or tenancy had expired or was terminated, the same shall be deemed to have continued, and to continue in force until such property has been dealt with in accordance with this Act; and for such further period as the Minister may by regulations made under this Act prescribe."

(3) The Minister may, by statutory order, appoint any person or body to manage any property or business vested in the Government under subsection (1).

(4) Until such a time as the Minister has exercised his or her powers under subsection (3), the Departed Asians' Property Custodian Board established under section 4 of the Assets of Departed Asians Act shall continue to manage such properties and businesses." (**emphasis added**)

It is therefore clear, from the provisions of the Act cited above, that it revived whatever agreements, leases, or agreements to lease, that were extant at the time of expropriation of the properties under the Decrees; even where such leases had expired or agreements had terminated during the period of expropriation. Second, which is quite pertinent for the determination of the issue now in contention before this Court, the Act nullified all the transactions, and whatever dealings, that were executed with regard to the expropriated properties; as long as these dealings took place between the date of their expropriation and vesting in Government under the Decrees, and the date of enactment of the Expropriated Properties Act 1982.

The case of ***Gokaldas Laximidas Tanna vs. Sr. Rosemary Munyinza & Departed Asian Property Custodian Board; S.C. Civ. Appeal No. 12 of 1992,*** is quite instructive here. It is about the property of a departed Asian, which had been sold by public auction in early 1982 under the terms of the mortgage in which it was held. The Court had to determine whether the provisions of the Assets of Departed Asians Decree, 1973 (Decree No. 27 of 1973), the Registration of Titles Act, and the Mortgage Decree, 1974, applied to this case in exclusion of the Expropriated Properties Act, 1982. Oder J.S.C. and Wambuzi C.J. both held that the Expropriated Properties Act, 1982, had nullified the sale and transfer

of the property by the bank to the buyer; although the bank, as mortgagee, had executed a valid sale and transfer.

Oder J.S.C. pointed out therein that section 1 (2) (a) of the Expropriated Properties Act above – now section 2 (2) (a) of Cap 87 Revised Edn. 2000 – nullified any of the transactions enumerated therein: –

> *"... if the transaction was effected between the time when the ... property was first vested in Government by the Assets of Departed Asians Decree, 1973 and the time when the Act of 1982 came into force, namely on the 21st February 1983."*

In ***Noordin Charnia Walji vs. Drake Semakula, S.C. Civ. Appeal No. 40 of 1995,*** Court had to decide whether a re–entry made upon expropriated property, under the control of the Departed Asians Property Custodian Board, was a dealing with expropriated property within the meaning attached to it by the Expropriated Properties Act; Act 9 of 1982. Oder J.S.C. held that: –

> "*In my view the appellant's re-entry had the effect of transferring the suit property from the Custodian Board to himself. The appellants took all the necessary steps to effect his re-entry. He notified the Custodian Board, although the Board did not respond to the notice. ...*
>
> *As far as section 1(2) (a) of Act 9 of 1982 was concerned I think that the respondent's action did not fall under 'purchases, transfers or grants' of the suit property in their ordinary meaning as apparently used in the sub-section. But I have no doubt that it was a dealing in the suit property. It fell under the expression 'any dealings of whatever kind in' the suit property, which was nullified by that sub-section.*" (**emphasis added**)

Wambuzi C.J. for his part stated as follows:

> *"Though the re-entry by the respondent was valid in 1981, it was nullified on the coming into force of the Expropriated Properties Act in 1982 when the lease revested, so to speak, in the Government."*

Therefore, in the instant matter before me, if indeed a trust relationship was created between the parties hereto as is claimed by the Plaintiff/Applicant, which I doubt, it was nullified by the Expropriated Properties Act, 1982. Furthermore, the Act also nullified any, and all, tenancies that the Defendant/Respondent may have executed with third parties over the suit property while it was under expropriation, since these were 'dealings' within the meaning assigned to them by the Act. Owing to the provision of section 2 of the Act cited above, the Plaintiff/Applicant can neither rely on a purported trust created over expropriated property, nor make any claim for rentals or mesne profits that accrued from such property since all this was nullified by the retrospective effect of the Act.

It is in the light of this position of the law that there is relevance in the proposition of law expounded by Katureebe J.S.C. (as he then was) in ***SCCA No. 27 of 2010 – N. K. Chowdhary vs Uganda Electricity Board***, wherein the learned Justice stated that: –

> *"It is true that although have freedom of contract, they do not have freedom to contract out of the law. Indeed, contracts such as tenancy agreements invariably always provide for the governing law. It is therefore important that we consider the relevant law affecting the relations between these parties.*"

Although the Expropriated Properties Act, 1982 repealed Idi Amin's expropriation Decrees, the properties that had been expropriated under those Decrees were re-vested in Government by the Act; and

the Custodian Board continued to manage them. In ***Victoria Tea Estates vs. James Bemba C.A. Civ. Appeal No. 49 of 1996***, the suit property fell under the Expropriated Properties Act, 1982; but the lessor (Respondent) made a re-entry on it in 1991. However, the lessee (Appellant) obtained a certificate of repossession later in the same year. The High Court had held that the re-entry was lawful; but on appeal, Twinomujuni J.A. reversed that decision and held that since the property had been expropriated by the Government under the 1982 Act, the re-entry effected thereon was unlawful. He said: -

> *"The suit property became the statutory property of Government, until the Minister of Finance dealt with the property as provided for by Act 9 of 1982. Any other purported dealings in such property would be null and void. Any attempt by the lessor to re-enter the property by reason of non-payment of rent would be null and void ... This remains so whether the Government paid the ground rent or not. The lessor could of course maintain a separate action against Government to recover unpaid arrears of rent, but that is another matter."*

In the instant matter before me, since the 1982 Act re-vested the suit property in Government, it was to the Ministry of Finance that the Plaintiff/Applicant should have directed its demand for its repossession. Under the law, the dispossessed owner of expropriated property had no locus to demand repossession from whomever else it found was either physically in possession, or was managing it. However, since the Court ordered the return of the suit property to the Plaintiff/Applicant, and this has been effected, it is now a moot point. In any case, it is only the Ministry responsible for Finance, which could challenge such repossession of the hitherto expropriated property for having been done in a manner contrary to law.

Similarly, the Plaintiff/Applicant has no locus to claim for the rentals and mesne profits that accrued out of the suit property from the date of enactment of the 1982 Act to the date of repossession of the suit property. It is only the Ministry of Finance/Custodian Board, which could legally make such claim. In the ***Noordin Charnia Walji*** case above, Oder J.S.C. stated as follows: –

> *"As the respondent's re-entry and repossession were nullified by Act 9 of 1982, it is my view that there was no basis for him to claim damages for the alleged trespass"*

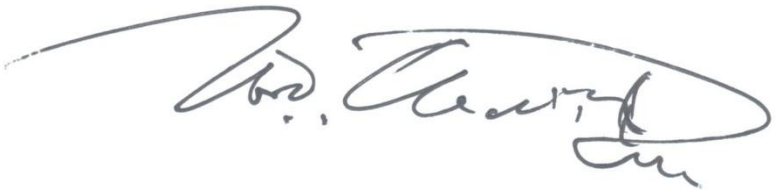
Wambuzi C.J. also agreed; and stated as follows: –

> *"Because the re-entry whereby the respondent regained possession of his property was nullified in 1982, when the respondent filed his action in 1989, the leasehold was vested in the appellant by virtue of the Repossession Certificate dated 13/10/88. Technically the appellant as lessee had legal possession of the property, and could not therefore in law be guilty of trespass on the premises leased to him. To that extent ... no damages would be recoverable."*

It is my finding, basing on the authorities cited above, that the whole of the Plaintiff/Applicant's claim pertaining to any loss of earnings from the suit property cannot stand. This is owing to the expropriation of the property during the Amin regime and its further re–vesting in Government under the Expropriated Properties Act of 1982; with its nullification of all the dealings whatever in the suit property during the period of expropriation. In the event, then I find this application lacking in merit; and therefore dismiss it. Accordingly, the final judgment of the Court in the head–suit herein will contain the terms embodied in the Consent Order of Court, with

the exception of the third item in the Order; read together with this Order dismissing the claim for rentals or mesne profits.

Since there is no award of monetary benefits accruing to the Plaintiff/Applicant, I see no point in delving into the issue of the effect of the currency reform raised and canvassed by Counsels on either side. Furthermore, as pointed out above it is my finding that repossession of the suit property through Court action was itself, in my considered opinion, not the right procedure; and the suit for the repossession was, in fact, brought against the wrong party. Nonetheless, the repossession of the suit property has, however, been ordered by a Court of equal jurisdiction as mine; and I do not sit here on appeal over it. Accordingly, I leave the decision undisturbed; but consider that the justice of the case requires each of the parties hereto to bear their respective costs of the head suit and this application. I so order.



Alfonse Chigamoy Owiny – Dollo

JUDGE

15 – 07 – 2016