

UGANDA / JUDGMENT

Lule v Attorney General (Civil Appeal No. 2 of 2000) [2001] UGCA 49 (12 September 2001)

[2001] UGCA 49

COURT

Court of Appeal of Uganda

BEFORE

Okello, JA, Mpagi-Bahigeine, JA, Engwau, JA

CASE / FILE NUMBER

Civil Appeal No. 2 of 2000

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THE REPTICLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**CORAM: HON. JUSTICE G. M. OKELLO, JA. HON. JUSTICE A. E. N. MPAGI-BAHIGEINE, JA. HON. JUSTICE S. G. ENGWAU, JA.****CIVIL APPEAL NO.2 OF 2000****Between****GODFREY LULE APPELANI' AND****ATTORNEY GENERAL : : : : : I : : : : : RESPONDENT**

(An appeal from the judgment and decree of the lligh Court of Uganda at Kampala (Byamugisha, J.) d^ted 25/10/99 in H. C. S. N0.940 of 1993)

JUDGEMENT OF ENGWAU . I. A

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This is an appeal against the dismissal of H. C. C S. No. 940 of 1993 in which the appellant had sued the respondent. The brief facts which gave rise to the suit were that the appellant had purchased an expropriated property (house situated at Plot No.19 Hanlon Road Bugolobi Kampala) from the Departed Asians Property Custodian Board (DAPCB) that was managing it on behalf of the government in 1975 at the agreed price of Ug. Shs.275,000/-. The price was paid in fi"rll and the appellant became a registered proprietor.

As the property was in a very poor state of repair, the appellant spent in the I0 first place Shs.400,000i: on its repairs. After the repair he let it to paying tenants

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in 1976. In January 1977 the appellant fled into exile where he lived up to 1983. On his return, the appellant entered into a second rehabilitation contract with Roko Construction Company at a cost of \\$11000. To repay that cost, the appellant assigned the rent to Roko Company for about 3 years expiring in 1989.

As the housing industry became very competitive, the appellant once again entered into an extensive renovation with Roko Construction at a cost of shs.30,175,000/ \$=\$. As the job was in progress, the suit property was repossessed by the former owners on the 17th August, 1993. The appellant asked for compensation for his nullified purchase from the Government and the Custodian board by appealing to the High Court by a suit, to protect his interest but lost the suit, hence this appeal.

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There are 15 grounds of appeal which can be summarised as follows:-

- 1. The learned trial judge erred in fact when she held that the appellant used the suit property from 1975-1982.
- 2. The learned trial judge erred in law when she held that the burden of proof of compulsory acquisition lay on the appellant that his property was compulsorily acquired for uses specified in Article 26 of the 1995 Constitution.
- 3. The learned trial judge misinterpreted and misconstrued the extract in the judgment of Manyindo, DCJ. in Pryarali Abdul Rasul Ismael v. Adrian Sibbo, when she held it to have meant that there was no compulsory acquisition of the appellant's property for the purposes specified in article 26 of the 1995 Constitution.
- 4. The learned trial judge erred in law and fact when she so narrowly construed compulsory acquisition of property to mean to acquire property for public use.

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- 5. The learned trial judge erred in law and fact when she applied the Land Acquisition Act to a case based on the Expropriated **Properties Act**.
- 6. The learned trial judge erred in law when she failed to appreciate that section 11(3) of the Expropriated Properties Act made payment of compensation to a deprived purchaser mandatory, but came to the conclusion that it was the discretionary power of the Minister.

- \$7.\$ The learned trial judge misconstrued the judgment in the case of the Registered Trustees of Kampala Institute and came to the conclusion that the appellant was not entitled to fair and adequate compensation as this would perpetuate injustice which the Act was enacted to redress.
- 8. The learned trial judge erred in law and in fact when she held that paying compensation would lead to unjust enrichment of the appellant, when unjust enrichment was neither one of the issues framed nor was it canvassed by the parties and was not even raised by the court itself to receive submissions on it.
- 9. The learned trial judge erred in law and fact when without evidence or claim from the parties and without assessing the value of the suit property and computing the income received, she held that the income the appellant received from the suit property was sufficient to purchase a property comparable to the one which he was dispossessed of.
- \$10.\$ The learned trial judge erred in law when, after finding that the Minister's offer of compensation transgressed the formula contained in section 11(4) of the Expropriated Properties Act, made no order for the Minister to assess the value of compensation on the basis of the formula, if she genuinely believed that the Minister should use that formula in spite of the Minister's conviction that the formula was unconstitutional and searched for another formula which he imagined would be in line with the provisions of article 26 of the Constitution as to fair and adequate compensation.

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- 11. The learned trial judge erred in law and fact to reject the appellant's evidence regarding the assessed value of the property when the respondent did not adduce any contradicting evidence.
- \$12.\$ The learned trial judge erred in law and fact not to have entered interlocutory judgment on the amount of compensation admitted by the respondent and thereafter try the rest of the non admitted issues.
- The learned trial judge erred in law when she held that the 13. appellant was not entitled to all the reliefs prayed for including compensation.
- \$14.\$ The learned trial judge erred in law when she failed to refer the matter to the Constitutional Court as prayed by the appellant in his evidence.
- \$15.\$ The learned trial judge erred in law when she failed to distinguish between constitutionality of an Act and the unconstitutionality of a provision in such Act and held that because the Expropriated Properties Act had been held valid, it necessarily followed that every provision of it was constitutional, thus going against the doctrine of severability.

The counsel for both parties filed their written submissions on the matter pursuant to rule 97(1) of the Rules of this court. Mr. Godfrey Lule, the appellant, appearing in person, argued all the 15 grounds of appeal generally making reference to the issues framed in the High Court proceedings. Counsel for Attorney General addressed each ground of appeal separately. I shall follow the style adopted by Mr. Lule. The issues framed were as follows:

- 1. Whether the suit property was purchased by the plaintiff lawfully.
- 2. If there was a purchase, was it nullified by the subsequent legislation.

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- Whether the certificate of repossession as issued was valid in the light of Article 26 of the 1995 Constitution. J
- Whether section 11 provides a formula for a fair and adequate compensation to the deprived purchaser, in accordance with the Constitution. 4
- Whether the offer of compensation by the Minister to the plaintiff was in accordance with the law on fair and adequate compensation. 5.

6 What reliefs if any?

It is not in dispute that the learned trial judge correctly answered the first two issues in the affirmative. Like the trial judge, I agree that the suit property was purchased by the appellant lawfully, but the purchase was nullified by the subsequent legislation, the Expropriated Properties Act No.9 of 1982.

On issue No.3, whether the certificate of repossession as issued was valid in the light of Article 26 of the 1995 Constitution, Mr. Lule conceded that the learned trial judge made a correct decision that the certificate of repossession was valid. However he argued that the learned trial judge had misinterpreted and misconstrued the provisions of Article 26(2)(a) of the 1995 Constitution when she arrived at the erroneous conclusion that: "there was no compulsory acquisition of the plaintiffs property for purposes specified in Article 26"

Mr. Lule submitted that the learned judge had focused her mind on only one aspect of Article 26(2)(a) and that, is "public purposes" (which she referred to as "public use") and totally never considered other items, among them, "public order" and "public morality". An acquisition on any one of those conditions, in counsel's

view, satisfies the requirements of Article 26(2)(a) and justifies such acquisition for mandatory compensation which must be prompt, fair and adequate

Learned counsel representing the Attorney general submitted that the trial judge did not limit her decision to "public use" only. She referred to Article 26(2) as a whole and made a conclusion thus:

> "If the plaintiff has to succeed on this ground, he has to bring himself within the ambit of the above Article. He has to show that his property was compulsorily acquired for use specified in the article primarily public use, that

She concluded:

"The plaintiff in his testimony to the court and in his written submissions did not allude to the fact that his property was taken away for purposes specified in the Constitution. "

According to learned counsel for Attorney General, the above was a correct conclusion. Ground 2 should, therefore, fail.

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It is common knowledge that the suit property was acquired under section 1(i)(a) of the Expropriated Properties Act No.9 of 1982 and remained vested in the Government until dealt with by the Minister of Finance under the Act. Section 2(1) of the Act confers authority upon the Minister to transfer to the former owner of property vested in the Government while section 5(1) empowers the Minister to issue a certificate of repossession authorising the former owner to repossess the expropriated property. In the instant case, the certificate of repossession was issued to the former owners on the 11th day of August, 1993 and as a result the appellant was deprived of his proprietary interest on the suit property. The purpose of the Expropriated Properties Act was to correct injustices which were meted out to the former owners of property and businesses by the military regime.

Be that as it may, it is to be noted that there is no provision in the Act which requires the consent of the registered proprietor who had purchased an expropriated property prior to the taking away of such property. In my view, the acquisition of the suit property was achieved by exercise of a statutory power. This implies a compulsory acquisition to rectify the evil that was done against former owners of such property and businesses. To that extent I would say that there was compulsory acquisition of the appellant's property for purposes specified in Article 26 of the 1995 Constitution, especially the condition of public morality.

The next pertinent issue was whether section 11 of the Expropriated Properties Act provides a formula for a fair and adequate compensation to the deprived purchaser, in accordance with the Constitution. It is notable from the outset that section 11(3) of the Expropriated Properties Act provides for payment of compensation for expropriated property. The provisions for compensation, in my view, are mandatory upon the person paying it. However, section 11(4) provides a formula of paying such compensation. The compensation payable should be the

purchase price less the income derived or ought to have been derived from the said property or business from the date of such transfer.

The suit property in the present case was transferred to the former owners on 17.8.93 by a certificate of repossession. In computing the payment for compensation the respondent did not use the formula provided by section 11(4) of

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20 Expropriated Properties Act on the ground that by adopting such formula the purchaser would end up in absurdity by getting absolutely nothing at all. The policy adopted by the respondent was that in 1995 when the appellant bought the suit property, US\$1 was equivalent to Ug.shs.7. The appellant purchased the suit property at Ug. Shs.270,000/: equivalent to US\$38,851. In 1996, date of refund, the rate was Ug. Shs.1000/: US\$1. The respondent, therefore offered Ushs.38,571,000/: to the appellant as fair and adequate compensation but he refused the offer.

The appellant declined the offer not only as inadequate but also that the amount did not include the sum spent on improvements (renovations) of the suit property. The learned trial judge criticised the Minister of Finance for using an illegal formula not provided for by section 11(4) of Expropriated Properties Act. She held that the appellant had collected in rent more than what was enough to buy himself another property of similar value. To pay him compensation would amount to unjust enrichment which the Act was enacted to redress. Learned counsel for Attorney General supported the trial judge on that finding and submitted that courts should not condone to such illegality.

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In 1996 the respondent offered the appellant a compensation of shs.38,571,000/: as fair and adequate compensation for the suit property returned to former owner but the offer was refused. In my view, the court should have invoked the provisions of Order 11 r 6 of the Civil Procedure Rules on such admission and proceeded to have the unadmitted issues to be tried on merit. This the court did not do.

In 1999 the respondent again offered the appellant a compensation of shs.55,952,581/: due to variation in the exchange rate which had moved from shs.1000/: per US\$ to shs.1450/= per US\$. In my view, the learned trial judge was in error to hold that to pay such compensation to the appellant would amount to unjust enrichment. She had also erred when she held that the appellant had collected in rent more than what was enough to buy himself another property of similar value. Payment of compensation is a statutory requirement for which the appellant was entitled. In the result, I would enter judgment for Shs.55,952,581/: to the appellant pursuant to Order 11 r 6 of Civil Procedure Rules on the admission of the respondent as fair and adequate compensation in line with Article 26 of the 1995 Constitution I would also order for prompt payment. The formula used by the Minister, in my view, was not illegal or unjust enrichment of the appellant.

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As regards unadmitted matters which include costs for renovation and interest thereon, I would agree with learned counsel for the Attorney General that section 11(2) of Expropriated Properties Act, and Regulation 8(1) of Expropriated Properties (Repossession and Disposal) regulations, 1983 enjoin former owners to pay compensation for any improvements or renovations the appellant might have made on the property. The appellant was at liberty to institute a suit in the High Court and prove what was due to him applying the ordinary rules of proof in any Civil Suit, claiming liquidated amounts. See *Habre International ComDany Ltd. v Ebrahim Alasaka Kassan & Others*, S. C. C. No.4 of 1999 (unreported). Section 11(2) of Expropriated Properties Act, also imposes a burden on the Government to pay for any improvements.

In my view, it was appropriate that all the parties to the transaction had to give and take in the process of remedying the wrong. The purchaser was to get back his purchase price at current exchange rate. The former owner was to get back his property and pay for any improvements made on it but the Government which had perpetuated the wrong would get nothing. The appellant cannot now get his purchase price at current exchange rate on the ground that he has conceded that the trial judge should have entered a judgment when the respondent offered compensation for Shs.55,952,581/- in 1999. He cannot and should not be allowed to delay payment of compensation in order to benefit from fluctuating exchange rate.

My judgment for Shs.55,952,581/- is based on the error when the trial judge did not enter judgment for Shs.38,571,000/- in accordance with the provision of Order I I r 6 of Civil Procedure Rules.

In the result, it is not necessary to consider other grounds of appeal. I would partially allow this appeal with no order as to costs.

Dated at Kampala this day of 2001

s.c.ioi\svau' JUSTICE OF APPEAL

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

CORAM: HON. JUSTICE G.M. OKELLO, JA. HON. JUSTICE A. E. MPAGI-BAHIGEINE, JA HON. MR JUSTICE S. G. ENGWAU, JA.

CIVIL APPLICATION NO.2 OF 2000

BETWEEN

GODFREY LTILE APPELLANT

AND

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ATTORNEY GENERAL ::::::::::: RESPONDENT

(Appeal from the decision of the High Court (Byamugisha, J) dated 25/10/99 in HCCS NO.940 of 1993).

JUDGMENT OF A. E. N. N.,{PACI-BAHIGEINE. JA

I have read in draft the judgment of Engwau, J. A. and I agree with it

It was mandatory and incumbent upon the Minister to assess and promptly pay to the appellant fair and adequate compensation for the repossessed property, commensurate with the prevailing market price at the time.

Dated at Kampala this . day of 2001

A. E. MPAGI-BATHIGEINE JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA HOLDEN AT
KAMPALA**

CORAM: HON. JUSTICE G. M. OKELLO, JA. $\overline{\$}$ HON. JUSTICE A. E. MPAGI-
BAHIGEINE, JA. HON. JUSTICE S. G. ENGWAU, JA.

CIVIL APPEAL NO. 2 OF 2000

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BETWEEN

GODFREY LULE::::::::::::::::::::

$\$15\$$

AND

ATTORNEY GENERAL::::::::::::::::::::

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(Appeal from the decision of the High Court (Byamugisha, J) dated 25/10/99 in HCCS NO. 940 of 1993)

JUDGMENT OF G. M. OKELLO, JA

I have had the chance to read the proposed judgment of Engwau, JA and I agree \$25\$ that the appeal must succeed. I have nothing useful to add. As Mpagi-Bahigeine, JA also agrees, the appeal is allowed on the terms proposed by Engwau, JA.

Dated at Kampala this. 2001.

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JUSTICE OF APPEAL**THE REPUBLIC OF UGANDA****IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA****CIVIL APPEAL NO. 2 OF 2000**

GODFREY LULE ::::::::::::::::::::::::::::::

VERSUS

ATTORNEY GENERAL

DECREE

This appeal coming on for hearing this 12th day of June, 2001 before their Lordships HON MR. JUSTICE G. M. OKELLO, JA; HON LADY JUSTICE A. E. N. MPAGI-BAHIGEINE, JA and HON MR JUSTICE S. G. ENGWAU, JA in the presence of Mr. Fred Makada, for Godfrey Lule, the appellant, and Mr. Cheborion Barishaki counsel for the respondent, when both parties agreed to file written submissions, and the appeal was stood over for judgment. And this appeal coming for judgment this 12th day of September, 2001.

IT IS ORDERED THAT;

- The respondent promptly pay the appellant the sum of \$Ug. Shs55,952,581 = \$1.\$ (Uganda Shillings Fifty Five million nine hundred fifty two thousand five hundred eighty one).
- \$2.\$ There be no order as to costs.

Dated at Kampala this 12th day of September, 2001

Extracted this 26th day of September, 2001 by \$M/s\$ Sebalu & Lule Advocates.

| We Approve: |-----| | | COUNSEL FOR
RESPONDENT | | | Given under my hand and the seal of this Honourable Court this 12th day
of | | | **REGISTRAR** | | |

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