

**THE REPUBLIC OF UGANDA,  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPEAL NO 126 OF 2012**

**(ARISING FROM THE JUDGMENT OF THE HIGH COURT HOLDEN AT  
GULU DELIVERED BY HIS LORDSHIP HON. MR. JUSTICE WILSON  
MASALU MUSENE ON 16<sup>TH</sup> FEBRUARY, 2012 IN HCT – 02 – CV – CS –  
074 – 2007)**

**(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)**

**OJEDE ABDULLA BIN CONA}.....APPELLANT**

**VERSUS**

**PHOEBE LUTALO} .....RESPONDENT**

**JUDGMENT OF COURT**

This appeal arises from the judgement of Honourable Mr Justice Masalu Musene, judge of the High Court delivered on 16<sup>th</sup> February, 2012. The appellant's suit was for recovery of land known as Leasehold Register Volume 7 Folio 21, Plot Number 5 Bazaar Road, Lira Municipality (hereinafter referred to as the suit property) wherein the plaintiff sought cancellation of title of the first defendant, general damages and costs. According to the facts as set out in the judgement of the High Court, the property was registered in the names of Dahyabhai Moraiji, Manibhai S Patel as tenants in common with the appellant's father was registered on the other half of the property. The suit property had been purchased from Manibhai S. Patel Ltd by the appellant's father as to half of the suit property on 20th of July 1971. The appellant's father died in 1976 and his grandfather Mr Abdullah Gulu obtained letters of administration to his son's estate in 1988. The appellant's claim was in respect of Plot No. 5 Part

"B" which comprised half of the suit property and not the other half known as Part "A". The conflict arose from the fact that the property was leased by Lira District Land Board to the respondent who tried to evict the appellant. The agreed facts before the High Court were:

1. The suit land is plot number 5 formerly Bazaar Road, but now Obote Avenue comprised in LRV 7 Folio 21, Lira district.
2. The initial release in respect of the property expired in 1973.
3. By 13<sup>th</sup> July, 1999, the property was registered in the names of Dahyabhai Moraiji, Manibhai S. Patel Ltd both owning 1/2 shares; having been issued by the then custodian board with a certificate of possession 2339 of the property on 27<sup>th</sup> December, 1994.
4. The first defendant was issued with a certificate of title to the suit property by the second defendant (Lira District Land Board) on 25th of November 2005.
5. The plaintiff is in occupation of the suit property.

It was agreed that the issues for determination were:

1. Whether the suit property was subjected to the Expropriated Properties Act.
2. Whether or not the second defendant acted rightly to grant ownership of the suit property to the first defendant, given the fact that at the material time, the plaintiff was in occupation and claimed ownership of the very same suit property.
3. Whether or not the defendants jointly and/severally acted fraudulently in respect of the suit property.
4. What are the remedies available to the parties?

The judgement of the court on issue number one is not explicit but implied. Admitted in evidence was a certificate of repossession and also exhibit D2 which is a letter dated 31st of July 1997 from the Commissioner for land

'registration rejecting the application of the appellant. The letter relied on shows that the original lease comprised in the property expired on 31<sup>st</sup> August, 1973 and the automatic extension of the lease for two years allowed under the Expropriated Properties Act, expired. The appellant had been advised to apply to the District Land Board. It follows that the property at the time of the suit was not subject to the Expropriated Properties Act though it had been subjected to the Expropriated Properties Act before the expiry of the lease. The learned trial judge answered the second issue in the affirmative. On the third issue, the learned trial judge held that the first defendant applied for and consequently acquired a lease without any fraud. The learned trial judge held that no fraud had been proved against the defendants jointly or severally. On the issue of the remedies available, the learned trial judge dismissed the appellant's suit and held that the first defendant was free to demolish the property and develop it. The appellant being aggrieved lodged an appeal to this court on the following grounds:

1. The learned trial judge erred in law and fact when he held that the suit property was not subject to the provisions of the Expropriated Properties Act.
2. The learned trial judge erred in law and fact when he held that the second respondent acted correctly to grant ownership of the suit property to the first respondent when the appellant occupied and claimed ownership of the same.
3. The trial judge erred in law and fact when he held that the respondents/defendants were not fraudulent in their dealings with the suit land.
4. The learned trial judge erred in law and fact when he failed to properly evaluate the available evidence on record thereby arriving at a wrong conclusion.

At the hearing of the appeal learned Counsel Mr Odoi Patrick appeared for the appellant while learned Counsel Miss Natukunda Antonia appeared for the respondent.

Mr. Odoi adopted the written submissions of the appellant's counsel on record.

### **Submissions of the Appellant**

The appellants counsel submitted that the first complaint of the appellant was not directly handled by the trial judge who put emphasis on a letter dated 31st of July 1997 by the Commissioner for Land Registration who refused to issue the appellant with a special certificate of title. The judge held that the appellant should have applied to the District Land Board for the whole plot. He contended that it was never the appellant's intention to own the whole property as he was only interested in their portion. Secondly the suit property was dealt with under the Expropriated Properties Act (EPA) because a certificate authorising repossession was issued by the Minister under section 6 of the Act. It was issued as to one half of the property. He contended that the only way part of the suit property which belongs to the appellant's family could have been brought under the EPA was through section 2 (2) that nullified any purchases or dealing of any kind in such property. He further submitted that the law was that where the property affected by this section was at the time of its expropriation held under a lease, and the lease has expired, it shall be deemed to have continued and will continue in force until the property had been dealt with in accordance with the provisions of the EPA. A certificate issued by the Minister is sufficient authority for the Chief Registrar of Titles to transfer the property to the former owner. A person aggrieved by the decision of the Minister may appeal to the High Court against the decision within 30 days from the communication of the decision. He contended that the learned trial judge's decision was that since the Commissioner for land registration rejected the

appellant's application, the matter automatically reverted to the district land board. He submitted that the property had first to be dealt with and therefore the Commissioner for Land Registration's letter was unlawful and of no legal effect. He contended that the property was dealt with under the EPA and the ground of appeal should be answered in the affirmative.

On the second ground as to whether the district land board acted correctly to grant the land to the respondent when the appellant was in possession and claiming ownership, it is submitted that the learned trial judge ruled that since the lease of the property had expired in 2003, the respondent was free to apply for it and did apply for it whereupon she was granted a lease over the whole property. The learned trial judge further determined that the appellant had slept on his rights. Further, the court decided that the land board was not obliged to give the appellant first priority to extend his lease. The learned trial judge further ruled that the appellant never resided in the suit property but relied on the respondent's evidence that she used to see people come and go from part B of the property. The learned trial judge did not explain why he believed the respondent's evidence and not that of the appellant. The appellant testified that the respondent only came to the suit property in the late 1990s. She only started living on the suit property in 2000. She informed court that due to sickness she was not living in the suit property but her children were the ones who resided there. The children never testified. The question was whether there was evidence that the appellant was living on the suit property and evidence clearly shows that the appellant was living on the suit property.

The appellant's counsel submitted that by the time the respondent applied for the suit property, she was aware that the appellant occupied part of the building. Secondly the respondent had testified that the custodian board allowed her to be a tenant on Part A of the building. Her testimony was that

the occupant of the building had since passed away. Regarding the occupant of part B of the building, she was told that person that she had been given the whole property. Secondly, the person occupying Part B was different from the appellant. The appellant's counsel referred to several matters of evidence that we do not need to delve into. He concluded that the Land Board in leasing the whole property to the respondent did not follow the rules of natural justice. The appellant had never received communication that his lease had expired.

On the third issue of whether there was fraud, the appellants counsel submitted that the respondent contrary to the evidence tried to deny knowledge of the existence of other interest in the suit property. Secondly she did not produce evidence before the land board about purchasing the suit property from the custodian board. The lease to the appellant's brother was cancelled and never communicated which showed fraud on the part of the land board. Finally it is clear that the appellant's predecessor was registered as a tenant in common as to half of the suit property. In the premises the land board and the respondent were fraudulent in the way they dealt with the property.

### **Submissions of the respondent**

In reply on the first issue Ms Antonia submitted for the respondent on whether the suit property was subject to the provisions of the Expropriated Properties Act.

The submissions are that the assets or property which was subjected to the Expropriated Properties Act were those that fell under the Assets of Departed Asians Act. A departed Asian was defined as an Asian who left Uganda on or after 9<sup>th</sup> August, 1972 in such manner as necessitated the taking over in the public interest of any property of business he or she left in Uganda. The appellant's case is that his father bought ½ share of the

property in 1971 before the Asians were expelled from Uganda. The appellant's counsel relied on the evidence on record to the effect that his father bought the property before the expulsion of the Asians. His father was a Ugandan born in Lira and grew up in Uganda. The appellant's family was in possession of the property until 1979 when they went into exile.

The second question the appellant's counsel addressed was whether the land board acted correctly to grant ownership of the suit property to the respondent given the fact that the appellant was in occupation and claimed ownership of the same.

She submitted that once a lease expires, the property reverts to the controlling authority. Whoever is interested in the property should apply for it and the application is subjected to further consideration by the controlling authority (see **Kampala Bottlers Ltd v Damanico (U) Ltd Supreme Court Civil Appeal No 22 of 1992**). The appellant's case is that the lease over the property had expired in 1973 and even the automatic extension of the lease under the EPA expired. The appellant was advised to get in touch with the land board to consider his interests if any. He was granted a lease offer for five years from 1998 which also expired. The respondent also applied for the lease property and was granted the application.

On the third issue of whether the defendants acted fraudulently? The respondents counsel relied on the case of **Kampala Bottlers Ltd v Damanico (U) Ltd** (supra) for the proposition that fraud must be proved strictly and the burden being higher than that on the balance of probabilities. Secondly, to impeach the title of the respondent, fraud had to be attributed to the defendant either directly or by necessary implication. Thirdly, particulars of fraud were required to be pleaded and she contended that there were only two particulars of fraud. The first one is that on evidence of the appellant the respondent was not his tenant. Secondly, the

respondent denied knowledge of any interest of the appellant in the property. She checked various offices and was informed that the property was free for allocation and leasing. She applied and was granted a lease. By the time the respondent applied for the suit property, neither the appellant nor his late father's estate had any interest in the property. Fraud was therefore not proven against anybody let alone the respondent. She prayed for dismissal of the appeal.

### **Resolution of appeal**

We have carefully considered the facts of this appeal, the evidence on record, the submissions of counsel and the law. As a first appellate court, it is our duty to reappraise the law and come to our own conclusions on all issues of fact and law bearing in mind, that we did not hear or see the witnesses testify. This duty is found under Rule 30 (1) of the Rules of this court which provides that:

“30. Power to reappraise evidence and to take additional evidence  
(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) reappraise the evidence and draw inferences of fact; and ...”

In **Peters v Sunday Post Limited [1958] 1 EA 424**, Court of Appeal for East Africa at page 429 held that:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

In **Kifamunte Henry v Uganda; Supreme Court Criminal Appeal No. 10 of 1997**, The Supreme Court of Uganda held that:



"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that the question turns on the manner and demeanour the appellate court must be guided by the impressions made on the judge who saw the witnesses. However there may be circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the judgement on the question of fact turning on credibility of witnesses which the appellate court has not seen."

The first ground of appeal avers an error of fact as well as an error of law that the learned trial judge erred in law and fact when he held that the property was not subject to the provisions of the Expropriated Properties Act. The way the issue was framed and the ground of appeal does not resolve the dispute in light of the admitted fact of expiry of the lease even after purported repossession. There is uncontested evidence that the property had been subjected as a matter of fact to the provisions of the Expropriated Properties Act and the certificate of repossession had been issued in respect thereof on 27 December 1994 by the Minister of Finance & Economic Planning. The certificate reads in part as follows:

"... After being satisfied with the merits of the application of Messrs DAHYABHAI MORARJI AND MANIBHAI S. PATEL LIMITED AS TENANTS IN COMMON IN EQUAL SHARES; AS TO ½: CONA BIN GULU to repossess the property PLOT NO. 5, BAZAAR RAOD, LIRA LRV 7 FOLIO 21, a certificate is hereby issued, subject to the provisions of section 8 (1) (d) of the Act, authorising the said applicant to repossess the said property/business."

On the face of the certificate, it is not clear who the applicant is. However on the face of the certificate, the repossession certificate affected the entire interest because it also affected the interest of CONA BIN GULU. A letter written pursuant to the said repossession certificate notified that the Departed Asians Property Custodian Board was no longer responsible for the property. The letter also does not clearly indicate whether repossession affected both tenants in common who shared the land equally in terms of Part "A" and Part "B". The appellant derives title from GONA BIN GULU. The pleading of the appellant in paragraph 6 of the Plaint is clear that on 20<sup>th</sup> July, 1971 Dahyabhai Morarji and Manibhai S. Patel Ltd transferred their undivided half share to Cona Bin Gulu. The certificate of title clearly shows that on 29<sup>th</sup> December, 1971 the property mentioned was accordingly transferred to Cona Bin Gulu of P.O Box 66 Lira. The appellant testified as PW1 and stated that his family had been in possession of the suit property from 1971 except in 1979 when his grandfather went into exile. The property had never been expropriated as a matter of fact. In cross examination he testified that his father was not an Asian but a Ugandan born in Lira who grew up in Lira. His father passed away in 1976 and his grandfather applied for letters of administration. Thereafter his grandfather died in the 1990s and he also acquired letters of administration to the estate of his father. This evidence was not contradicted and came out in cross-examination.

The property of Ugandans was not as a matter of law expropriated. Moreover as a matter of fact, the family of the appellant remained in Uganda until 1979 and were in occupation of the suit property. The property could not have been dealt with lawfully under the provisions of the EPA. Under section 1 (c) of the Expropriated Properties Act, Cap 87, the appellant's father was not a "former owner". Section 1 (c) of the EPA provides that:

"(c) "former owner" means and includes any person who was either the registered owner or proprietor of any real or movable property in Uganda or was a shareholder in a business or enterprise registered in Uganda and who was either expelled or forced to flee from Uganda during the period of the military regime or was in any other way dispossessed of the property or business; and anybody who is the legal heir or successor of that person;"

On the basis of the above section, it can be concluded that the appellant's father was not a "former owner". The property had not been expropriated by the law. It followed that the learned trial judge did not err in law to hold that the property was not subject to the Expropriated Properties Act. Ground one of the memorandum of appeal has no merit and is disallowed.

Ground 2 of the memorandum of appeal is that the learned trial judge erred in law and fact when he held that the second respondent acted correctly to grant ownership of the suit property to the first respondent when the appellant occupied and claimed ownership of the same.

The question for consideration is one of law as well based on uncontested facts. As a matter of fact, the original lease was granted by the controlling authority which was the town council. The Land Act Cap 227 section 1 (m) thereof defines "former controlling authority" to mean the Uganda Land Commission or a designated authority in existence before the coming into force of the Constitution. Secondly, under section 1 (n) thereof a "former designated authority" means a City Council, Municipal Council, Town Council or, Town Board established in a designated urban area. Section 59 (1) (c) of the Land Act provides that the functions of a district land board shall inter alia be to –

"(c) take over the role and exercise the powers of the lessor in the case of a lease granted by a former controlling authority."

A town council is not a former controlling authority under section 1 of the Land Act cited above. It is a "former designated authority". Statutory leases to former designated authorities were abolished by Article 286 of the Constitution of the Republic of Uganda 1995. Though Article 286 of the Constitution has since been repealed, it was repealed after it had revoked statutory leases to urban authorities. The repeal of Article 286 of the Constitution did not revive statutory leases to urban authorities. Article 286 of the Constitution before repeal provided that:

"286. Revocation of statutory leases to urban authorities.

Upon the coming into force of this Constitution and subject to the provisions of article 237(2) (a) of this Constitution, statutory leases to urban authorities shall cease to exist."

Upon the coming into force of the 1995 Constitution of the Republic of Uganda, statutory leases granted to urban authorities ceased to exist. The point to be made is that the District Land Board could not take over and exercise the role of a lessor with regard to a lease formally issued by a town council under section 59 (1) (c) of the Land Act. The District Land Board could only receive fresh applications from the former lessees of the property. The second respondent could not have acted correctly because it was not the lessor with reversionary interest. It had not succeeded to any reversionary interest in the lease property. It purported to grant the lease upon the expiry of a former lease. Granted the original lease granted by the urban authority had expired in 1973. However as a matter of law, by 1995, the appellant's family had been in occupation of the lease property for more than 20 years. It was their property by prescription and they were entitled to apply for recognition of their ownership. They even had a right to apply for freehold subject to any law made by Parliament for purposes of urban development under article 237 (7) of the Constitution.

Article 237 (1) of the Constitution the Republic of Uganda provides that land in Uganda belongs to the citizens of Uganda and shall be vested in them in accordance with the land tenure systems provided for in the Constitution. Article 237 (5) of the Constitution of the Republic of Uganda provides that:

"(5) Any lease which was granted to a Ugandan citizen out of the public land may be converted into freehold in accordance with a law which shall be made by Parliament.

(6) For the purposes of clause (5) of this article, "public land" includes statutory leases to urban authorities.

The record showing the counterclaim of the respondent is that she averred that the first defendant applied for the lease after the expiry of the plaintiff's lease in 2005. She avers that the property had vested in the District Land Board. Exhibit D3 is an application which was made after the coming into force of the Constitution on 21<sup>st</sup> July, 1998. The final result is that we do not see any legal basis for dispossession of the appellant's family. The estate administered by the appellant had a right to apply for freehold title and land had vested in the citizens under Article 237 of the Constitution. The learned trial judge erred in law to hold that the second respondent acted correctly to grant ownership of the suit property to the fourth respondent when the appellant occupied and claimed ownership of the same. Ground two of the appeal is allowed.

Having found that there was an error of law, there is no need to resolve grounds three and four of the appeal which proceed from the premises that the respondent had a right to apply for Part B from the land Board when the appellant was vested with a right to apply for freehold. The respondent's application was not tenable. The appellant's appeal is hereby allowed. The appellant is entitled to Part "B" while the respondent may

claim Part "A" of the plot which is not in dispute. The original lessees were tenants in common and that arrangement can be maintained. Any title issued by the district land board shall reflect the interests of the appellant's family to the suit property as aforesaid. The appellant being the administrator of the estate of the original registered proprietor Cona Bin Gulu shall be registered as the administrator of the "B" of the property.

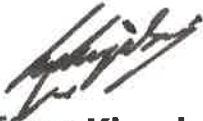
The appellant's appeal succeeds with costs.

Dated at Kampala the 6<sup>th</sup> day of May 2019



**Kenneth Kakuru**

**Justice of Appeal**



**Geoffrey Kiryabwire**

**Justice of Appeal**



**Christopher Madrama Izama**

**Justice of Appeal**