

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 379 OF 2019**

MANHARLAL THAKKAR ::APPLICANT

VERSUS

DEPARTED ASIANS PROPERTY CUSTODIAN BOARD :::RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application is brought under Section 33, 36 of the Judicature Act Cap 13 as amended, Rules 3,4,5,6 and 7 of the Judicature (Judicial review) Rules SI No.11 of 2009 and the Judicature (Judicial Review) (Amendment) Rules SI No. 32 of 2019 seeking for orders of prohibition and injunction against the respondent and restraining it and its agents from taking action and purporting to engage in the verification, investigation of ownership or any other action adverse to the interests of the applicant in respect of property comprised in Plot 2, Buremba Road LRV 454, Folio 18, Mbarara District.

This application was supported by grounds in the Notice of Motion and elucidated by evidence contained in supporting affidavit of Manharlal Thakkar.

The respondent did not file any response in opposition of the said application even after it was ordered by court that the applicant serve the respondent again.

The applicant was represented by *Mr. Ebert Byenkya* and *Mr. Bazira Anthony* whereas the respondent did not appear in to oppose the application having been served.

Court therefore ordered the parties file their submissions which was accordingly done by the applicant. The respondent did not file its submissions in respect of the matter.

The Applicant proposed the following issues for determination by this court;

- 1. Whether the Respondent acted legally, rationally and improperly when it purported to investigate the authenticity of the Applicant's Repossession Certificate.**
- 2. What remedies are available to the Applicant.**

DETERMINATION OF ISSUES

Issue 1:

Whether the Respondent acted legally, rationally and improperly when it purported to investigate the authenticity of the Applicant's Repossession Certificate

Submission:

Counsel for the applicant submitted that there was need to first establish whether the suit property falls under the Expropriated Properties Act Cap 87. On whether the property was reposed, counsel submitted that under Decree No. 27 and 29 OF 1972, all property for non-citizen Asians and Ugandan citizens of Asian Origin was vested in government upon their expulsion from Uganda. The laws on the management of expropriated property were eventually consolidated into the Assets of Departed Asians Act Cap 83 which vested the Departed Asians Property Custodian Board with power to manage the assets until 1982 when the Expropriated Properties Act was enacted. Refer to *Shishir*

Praful Patel & Another versus DAPCB & Another HCCS No. 116 of 2017, page 4.

Counsel stated that *Section 1* of the Assets of Departed Asians Act Cap 83 is to the effect that every departing Asian had a duty of declaring his or her assets to the Minister. The Expropriated Properties Act (*herein EPA*) was enacted to remedy the evil committed by the decrees by returning all the property that was expropriated to the former owners according to *Registered Trustees of Kampala Institute v Departed Asians Property Custodian Board SCCA No. 21 of 1993*.

Upon its enactment, the property which had been expropriated during the military regime was vested in the hands of the Minister for Finance on behalf of the Government to provide for return to its former owners. The Board created earlier was re-vested with powers to manage these properties but without any power to effect transfers or sale. As per **annexure B**, the then Finance Minister issued a certificate of repossession to Harilal Gagulal Thakkar and Monharlal Tribhovandas Thakkar as co-owners of the suit property on 28th November 1991 and thus the said property falls within the Act.

As to the effect of a repossession certificate, counsel for the applicant submitted that *Section 4 of the EPA* provides for application of a certificate of repossession. Where the Minister is satisfied with the merits of an application for repossession, he or she shall under his or her hand issue to the applicant a certificate of repossession. As evidenced from the affidavit, a Repossession Certificate was issued to Harilal Gagulal Thakkar and Monharlal Tribhovandas Thakkar as co-owners of the suit property.

Further, certificates issued under the Act do not confer ownership. Their effect is no more than that of deeds of transfer or assignment under the RTA which is the clear implication of *sections 7(a) and 9(3)* under the EPA. It provides 'sufficient authority' for the registrar to effect transfer of title, and thus must be completely issued.

It was submitted that upon issuance of the certificate of repossession to the former co-owners, partial interests in the land were purchased by the Applicant and that by virtue of Letters of Administration granted to the Applicant, he continues to faithfully administer the Estate of the late Mohanlal Tribhovandas Thakkar which is part of the said suit property.

Counsel stated that **Justice Mulenga** in *SCCA No. 14 of 2002* went on to note that, the minister has no power to cancel a certificate issued under the EPA. **Section 14 of the EPA** did not expressly reserve in the minister, any power to review such a decision upon request by an aggrieved person but only directed such person should appeal to the High Court.

Counsel therefore submitted that when the Repossession Certificate was granted by the Minister, the suit property divested from government and reverted to the Applicant as from 28th November, 1991 upon acquiring partial interests in the suit land Letters of Administration. The Applicant became the legal owner of the suit property and that the divestiture committee in purporting to investigate the suit property would be acting *ultra vires* in disregard of the existing jurisprudence since being a committee of the Departed Asians Property Custodian Board, it has duties to advise the Minister on issues relating to the implementation of the Act and to perform such other functions such as examining and verifying the authenticity of applications, documents

accompanying, claims of interests and competing claims *before repossession* among others. This right does not extend to verifying Repossession documents after the Minister of Finance has granted a Certificate to the owner. He stated that the moment the Minister Issued a certificate of Repossession, the Board and the committee had nothing to do with the property repossessed and that if the Divestiture committee were aggrieved and wished to investigate the applicant's interests in the suit property, they would have challenged the decision within 30 days after grant of the repossession certificate in accordance with *Section 15 of the EPA*.

It was therefore the applicant's submission that it is illegal for the Respondent to try and reopen the repossession exercise concluded 28 years ago under the guise of verifying the authenticity of documents accompanying the Applicant's Application for Repossession.

Determination

The applicant is challenging the respondent's decision on ground that it was illegal, irrational and procedurally improper and ultra vires.

Illegality as a ground of review looks at the law and the four corners of the legislation i.e it's powers and jurisdiction. When power is not vested in the decision maker then any acts made by such a decision maker are ultra vires. In the case of *R v Lord President of the Privy Council, ex parte Page [1993] AC 682* Lord Browne-Wilkinson noted;

" The fundamental principle(of judicial review) is that the courts will intervene to ensure that the powers of a public decision-making bodies are exercised lawfully. In all cases...this intervention...is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a

manner which is procedurally irregular or is wednesbury unreasonable, he is acting ultra-vires his powers and therefore unlawful."

In addition, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion.

The actions of the 1st respondent are clearly illegal and abuse of authority and power for which this court can bring into question any decision taken in order to uphold the rule of law.

In the area of administrative exercise of power, the courts have tried to fly high the flag of Rule of Law which aims at the progressive diminution of arbitrariness in the exercise of public power.

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, it can validly be used only in the right and proper way which Parliament conferring it is presumed to have intended.

The law requires that statutory power is exercised reasonably, in good faith and on correct grounds. The courts assume that Parliament cannot have intended to authorise unreasonable action, which is therefore ultra-vires and void. *Firdoshali Madatali Keshwani & Another versus DAPCB & 2 Others Miscellaneous Cause No. 11 of 2019, page 17.*

The **Expropriated Properties Act, Cap 87** was enacted 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 former owners or disposal of the property by the Government.

The purpose of the Act is in a nutshell to provide for the return to the former owners of the properties that had been expropriated during the Military Regime.

Under **Section 3 of the Act**, the Minister shall have the power to transfer to the former owner of any property or business vested in the Government under this Act that property or business. This is intended to urgently ascertain former owners and the properties they claim repossession of, to enable government to deal with their matters speedily.

The applicant in this case applied for repossession of the property under section 4 of the Act where upon the minister issued the applicants with a certificate of repossession in accordance with the law on the 28th November 1991.

Upon this issuance of the certificate of repossession, the applicant was clothed with the equitable right over the suit property pending the transfer of the legal right by the government on repossession. Registration is a formality as government is bound under the Act to transfer the property to the former owner with the certificate of repossession. *See; Jaffer Brothers Ltd v Mohammed Magid Bagalaliwo & 2 Ors Civil Appeal No. 43 of 199).*

The Act under **section 7 (a)** provides that a certificate of repossession issued under section 5 and 6 shall be sufficient authority for the Chief registrar of Titles to transfer title to the former owner.

Having issued the said certificate of repossession, the Minister is functus officio according to the Act as it did not leave a window for which the Minister's decision would be changed or amended unless by way of appeal under **section 15 of the Act** which is to be made within thirty days from the date of communication of the decision to the High Court. Retention of any implied power by the minister to revoke his decision on the ground that it was made in error would perpetuate the very uncertainties about ownership of the expropriated properties, which the Act intended to eliminate.

In the circumstances, the respondent had a right to apply to this court for an appeal against the decision of the Minister having been aggrieved by the same rather than investigate the authenticity of the applicant's repossession certificate as it does not have the power to do so.

It would be wrong and unjust to return property which the Military Regime took over lawfully and refuse to return property which was illegally taken over. This Court cannot approve of such an injustice and which runs contrary to the purpose of the Act.

It is the function of judicial review, in a democratic society to draw a fine balance between the conflicting claims of an individual and the administration. Maladministration results in weakening and not strengthening the Government as people get alienated from it. Thus it becomes necessary to ensure that powers are exercised properly and for the purposes conferred.

The respondent overstepped its authority or acted unlawfully when it tried to investigate the applicant's interests in the suit property after 28 years without any justification or in accordance the law. The common principles of judicial review are based upon this edifice of Constitution, parliamentary intent and statutory interpretation.

I therefore find that the respondent acted illegally when it purported to investigate the authenticity of the applicant's repossession certificate without following the law and for improper motives.

Issue 2:

What remedies are available to the Applicant.

Since the respondent is found to have acted illegally, this court would afford the applicant proper remedies to stop the unlawful acts of the respondent.

1. An order of Prohibition issues against the Respondent from investigating the authenticity of the Repossession Certificate issued to the Applicant in excess of its powers.
2. An injunctive order restraining the respondent and its agents from purporting to engage in verification, investigation or any other action adverse to the interests of the applicant in respect of the suit property.
3. This application is allowed with costs.

I so order.

SSEKAANA MUSA
JUDGE
26th March 2020