

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

CONSTITUTIONAL PETITION NO. 9 OF 1997

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.,
HON. LADY JUSTICE MPAGI-BAHIGEINE, J.A.,
HON. MR. JUSTICE J.P. BERKO, J.A.,
HON. MR. JUSTICE S.G. ENGWAU, J.A. &
HON. MR. JUSTICE A. TWINOMUJUNI, J.A.

PYRALI ABDUL RASUL ESMAIL.....PETITIONER

VERSUS

ADRIAN SIBO.....RESPONDENT

JUDGMENT OF BERKO, J.A.

This reference for interpretation was made by Tinyinondi, J. on the 3rd December 1996 to this court under Article 137(1) and (5) of the 1995 Constitution of Uganda. The facts have fully set out in the Judgments of my Lords which I had the privilege of reading in draft.

At the trial one of the issues framed for determination was:-

“Whether the Expropriated Properties Act, 1982 (Act 9) to the extent that it nullifies the sale of the Suit property to the defendant and accordingly deprives him of his proprietary interest therein contravenes the Constitution of the Republic of Uganda and is thereby null and void”.

It was that issue which was referred to this court.

The matter raised therein seems to me to be that the nullification of sales and purchases or dealings of expropriated properties under Act 9 of 1982, was illegal and unconstitutional. In my view the spirit of the Act is to return the expropriated properties to their original owners. The objective of the Act was to correct a historical wrong that was done to the Asian Community in Uganda by the infamous Military Regime and in a way to prevent the endless mischief or injury. Under the Constitutions of 1967

and (1995) the people who purchased expropriated properties but have to lose them under the Act are entitled to fair, adequate and prompt compensation.

Mr. Lule who appeared for the respondent conceded that the Expropriated Properties Act, (Act 9 of 1982) complied with all the constitutional requirements that deprivation of property must be accompanied by compensation. His complaint however, is that though the Act provided for compensation, it did not provide for "reasonable compensation" as required under the 1967 Constitution or "prompt, fair and adequate compensation" under the 1995 Constitution and to that extent the Act is unconstitutional. I do not subscribe to such a view. Since the Act complies with the Constitutional requirement that deprivation of property under the Act must be accompanied by Compensation, then it cannot be said to be inconsistent with the Constitution. The question whether the compensation provided is "prompt, fair and adequate" is a matter for enforcement of a right under the Constitution that can be dealt with by any competent court. That is not a matter of interpretation of the Constitution and therefore does not belong to this court.

In the result I would also declare that the Expropriated Properties Act, 1982, Act 9, to the extent that it nullified the sale and purchase of the suit property and thereby dispossessed the defendant/Respondent of the same, is not inconsistent with any provisions of the Constitution. I would remit the case to the High Court to dispose the case in accordance with this decision. I agree with the Orders as to cost proposed by D.C.J.

Dated at Kampala 23rd this day June 1998.

J.P. Berko
JUSTICE OF APPEAL

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CORAM:

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HON. MR. JUSTICE A. TWINOMUJUNI, JA.

PYARALI ABDUL RASUL ESMAIL:::::::::::::::::::::::::::::PLAINTIFF

VERSUS

ADRIAN SIBO:::DEFENDANT

JUDGMENT OF ENGWAU, JA.

In the High Court Civil Suit No. 1056 of 1995, a reference was made to this Court in accordance with Article 137 (1), (5) (a) and (b) of the 1995 Constitution of Uganda. In that case, the Plaintiff sued the Defendant for recovery of Farm Land. Before his expulsion from Uganda in 1972, the Plaintiff was the registered owner of Plots 4 and 5 comprised in Freehold Register Volume 302 Folios 20 and 21 at Kyampisi in Bulemezi (hereinafter referred to as the "Suit Property").

Following the exodus of the Asians from Uganda, the Military Government put in place a series of Decrees governing the assets of the Departed Asians. Those decrees were later consolidated into the "Assets of Departed Asians Decree No. 27 of 1973". Under Section 4 thereof, all the properties left behind by the Asians were expropriated and vested in the Government. Section 13 transferred the expropriated properties to the Departed Asians Property Custodian Board for purposes of day to day management. Section 7 (1) (e) thereof gave the DAPCB, (hereinafter referred

to as the "Board") the power to sell or otherwise deal with the expropriated properties as the former owner could have done.

In 1975, the Board sold the Suit Property to the Defendant who in the same year registered it in his names. However, the Expropriated Properties Act No. 9 of 1982, was enacted with the objective of returning the expropriated properties to the former owners. This Act nullified any purchases, transfers and grants of or any dealings of whatever kind in such property or business, and vested such property or business in the Government and to be managed by the Minister of Finance who has been empowered to transfer to the former owner of any of such property or business.

In April 1991, the Plaintiff applied for repossession of the Suit Property and in 1993, the Minister of Finance issued him with a repossession certificate pursuant to the provisions of Sections 4 and 5 of the EPA. In 1994, the Chief Registrar of Titles registered the Plaintiff as the proprietor of the Suit Property and thereby cancelling the names of the Defendant from the register in accordance with the provisions of Section 6 of the EPA. Despite the change, the Defendant has since refused to give vacant possession of the Suit Property on the grounds that he is a bona fide purchaser for value and that he has spent large sums of money for improvements on the property. In the alternative, that he be paid adequate compensation before he can surrender the property.

During the trial of the suit, one of the issues framed and agreed upon was:-

"Whether the Expropriated Properties Act No. 9 of 1982, to the extent that it nullifies the sale of the Suit Property to the defendant and accordingly deprives him of his proprietary interest therein, contravenes the Constitution of the Republic of Uganda and is thereby null and void."

The learned trial Judge sent the above reference to this Court for interpretation on 3/12/96. The issue is that the Expropriated Properties Act, 1982, is being challenged by the defendant as being null and void to the extent that it nullified the sale of the suit property thereby depriving him of his proprietary interest therein. Mr. Godfrey Lule, SC for defendant submitted that the reference as framed, is for determination of the validity of some provisions of the Act where those provisions deprive the defendant, for that matter anybody else, of an interest in property. The learned Counsel singled out Section 1 (1) (a), (2) (a); Section 2 (1); Section 5 (1); Section 6 (a) and Section 11 (3), (4) and 6 of the EPA.

In Section 1 (1) (a) of the EPA, any property which was vested in the Government and transferred to the Departed Asians Property Custodian Board under the Assets of the Departed Asians Decree No. 27 of 1973, from the commencement of this Act, remain vested in the Government and to be managed by the Ministry of Finance. Under Sections 1 (2) (a) of the Act, any purchases, transfers and grants of or any dealings of whatever kind in such property or business were nullified. In Section 2 (1), the Minister has power to transfer any property or business vested in the Government to the former owners and under Section 5 (1), the Minister after satisfying himself with the merits of the application, should issue a certificate of repossession authorising the former owner to repossess such property or business.

A certificate so issued under Section 5 of this Act, shall be sufficient authority for the Chief Registrar of Titles to transfer Title to the former owner pursuant to Section 6 (a) thereof. Where property or business had been transferred to any person or body for value and such property or business was returned to a former owner, the former owner or the Government should be liable to pay compensation to such person or body. 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. Unless compensation was paid before the commencement of this Act, the Minister would determine or negotiate with the person or body to be compensated the mode of payment (Section 11 (3), (4) and (6) of the EPA).

Mr. Lule SC contended strongly that under those circumstances, the defendant was deprived of his proprietary interest in the Suit Property as a bona fide purchaser for value without provision for the payment of reasonable compensation. Learned Counsel, however, conceded that deprivation of property and compulsory acquisition of property are not unlawful in themselves. What is unlawful, in his view, is deprivation of property without payment of compensation at all or where compensation is paid such compensation is unreasonable. My understanding of that argument is that Act No. 9 of 1982, is valid in so far as it provided for deprivation of property, save it made no adequate provisions for compensation. So what is questionable is the reasonableness of the quantum of compensation.

Learned Counsel for defendant argued that the Expropriated Properties Act No. 9 of 1982, in so far as those provisions are concerned, is unconstitutional, null and void as it contravened Article 8 and 13 of the 1967 Constitution. In his view, the same provisions of the EPA violate the provisions of Article 26 of the operational 1995 Constitution.

Mr. Peter Mulira, learned Counsel for Plaintiff, disagreed with Mr. Lule. He argued that the nullification of the defendant's Title pursuant to the Expropriated Properties Act, 1982 is not unconstitutional. The EPA, in his view, complied with the provisions of Articles 8 and 13 of the 1967 Constitution and Article 26 of the 1995 Constitution. Even Counsel for defendant conceded that deprivation of property and compulsory acquisition of property are not unlawful per se. The objective of Act No. 9 of 1982 was to return the expropriated properties to the former owners and in that way no hardship would be inflicted to any

person who had interest or right over the property. The Act provided for payment of compensation and it also gave a right of access to the High Court directly or by way of appeal.

Learned Counsel for Plaintiff contended instead the expropriation of the assets from one race in order to favour another race without provision for compensation was not only discriminatory but was also in contravention of the provisions of Articles 8 and 13 of the 1967 Constitution and Article 26 of the 1995 Constitution. In the premises no valid title to the Suit Property could have been acquired by the defendant. The defendant, in his view, was therefore not deprived of any proprietary interest in the Suit Property as a bona fide purchaser for value.

Learned Counsel for the Plaintiff submitted that by returning the expropriated properties to the former owners, Act 9 of 1982 was serving the interest of public morality as well as promoting public benefit. Learned Counsel contended that the question whether or not reasonable compensation was payable under the provisions of the 1967 Constitution or the 1995 Constitution is not a constitutional issue within the terms of the reference to be determined by this Court. Under Sections 4 and 5 of the EPA, the Minister of Finance allowed the Plaintiff to repossess his property having been satisfied with the merits of the application.

In Section 14 (1) of the Act, an aggrieved party has a right of appeal to the High Court against the Minister's decision to return the land to the former owner. The defendant chose not to exercise his right of appeal. Therefore, he cannot be heard to complain that the taking over the Suit Property was unconstitutional.

In conclusion, Mr. Mulira urged this Court to hold that Section one of the Expropriated Properties Act, 1982 is constitutional since compensation is provided for and the aggrieved party is

given a right of access to the High Court; Decree No. 27 of 1973 contravened Article 13 of the 1967 Constitution and the defendant acquired no proprietary interest in the Suit Property; and that costs of the reference follow the event.

Learned Counsel for Attorney General submitted that since Counsel for the defendant has conceded that deprivation of property and compulsory acquisition of property are not unlawful in themselves, the Attorney General is of a similar opinion, that the Expropriated Property Act, 1982 is valid law and does provide for compensation to a deprived person in accordance with the provisions of both the 1967 and 1995 Constitutions. In his view, matters relating to how much compensation is payable in each particular case can be negotiated inter-parties or be adjudicated upon by the High Court.

The Attorney General submitted that the defendant, in the instant case, has not been offered any specific sum as compensation nor has he demanded any from the government or the Plaintiff for the property and alleged improvements. The defendant has instead refused to vacate the Suit Property on the ground that it should be the Plaintiff to be compensated. It was the contention of the Attorney General that the issue of how much compensation should be paid to the defendant does not require the interpretation of this court. The nullification of the sale to the defendant of the Suit Property and consequently his deprivation of proprietary interest therein was done pursuant to the provisions of the 1967 Constitution under which the EPA was enacted and the same provisions of the Act do not contravene the operational 1995 Constitution.

By the time the Board sold the Suit Property to the defendant in 1975, the former owner had not been compensated. The Attorney General conceded that the issuing of repossession certificate by the Government was an indication that the defendant was deprived of the property by the Government. It was the argument of the Attorney General that the acquisition was pursuant to the

provisions of Article 13 of the 1967 Constitution and in line with Section 1 (1) of the EPA. Having acquired the Suit Property, the government then transferred to the Plaintiff. It was open to the defendant to appeal against the Minister's decision to the High Court by virtue of Section 14 (1) of the EPA.

According to the Attorney General Article 8 (2) (c) of the 1967 Constitution protects an individual right to property, but under Article 13 thereof, deprivation in certain instances is allowed as long as compensation is paid. Section 11 (3) of the EPA provides for payment of compensation to whoever is deprived of his property. It was his submission that it was in the interest of justice and for public morality that the Suit Property had to be returned to the Plaintiff in conformity with the law.

It was the argument of the defendant that he is the bona fide purchaser for value of the suit property, but the Attorney General submitted that under Section 1 (2) (a) of the EPA, any purchases, transfers and grants of or any dealings of whatever kind in, such property or business were nullified. In his view, the question of who is and who is not a bona fide purchaser does not arise.

It is common knowledge that the defendant bought the Suit Property from the DAPCB in 1975 and registered it in his names the same year. This transaction was conducted under the Assets of Departed Asians Decree No. 27 of 1973 which was in force. By that time the former owner of the property had not been compensated. In my view failure to provide for payment of compensation to the plaintiff was a violation of the provisions of Article 13 of the 1967 Constitution. The acquisition of the expropriated properties was based on racial discrimination without provision for payment of compensation. In that context I would hold that no valid title to the suit property had been acquired by the defendant and that he was not deprived of any proprietary interest therein as a bona fide purchaser for value.

The spirit with which the EPA was enacted, was to remove that "evil" and return the properties to the former owners who had not been compensated.

Mr. Lule conceded that deprivation of property and compulsory acquisition of property are not unlawful in themselves. What is unlawful to the learned Counsel is deprivation of property without payment of compensation at all or where compensation is paid such compensation is unreasonable. In his view, the deprivation in 1982 was in contravention of Article 8 of the 1967 Constitution and the acquisition contravened Article 13 of the same Constitution. In both cases, deprivation or acquisition are in contravention of Article 26 of the 1995 Constitution.

The question of reasonableness of compensation, in my view, does not arise in that learned Counsel for defendant is departing from issue referred to this Court. The issue is "whether the EPA to the extent that it nullifies the sale of the Suit Property to the defendant and accordingly deprived him his proprietary interest therein contravened the Constitution of Uganda and is null and void." As I understand the issue, the reasonableness or unreasonableness of compensation is irrelevant.

In the instant case, the defendant had submitted his interest in the suit property to the Verification Committee and the matter was pending negotiation with the Minister. No specific sum of compensation had been reached between the defendant and the Minister or between the defendant and the plaintiff. In any case, if no agreement was reached inter-parties, the matter would be resolved by adjudication in the High Court. An aggrieved party has access to the High Court by way of appeal. The question of reasonableness or unreasonableness of compensation is, with respect, prematurely raised in this Court. In other word, the question of compensation is not a matter of interpretation by this Court.

I would conclude that the EPA in so far as the provisions

complained of are concerned, does not violate Articles 8 and 13 of the 1967 Constitution under which it was enacted nor does it offend Article 26 of the 1995 Constitution.

In the result, I would remit the results of this reference to the High Court with an Order that the issues in Civil Suit No. 1056 of 1995 be determined on merit and I would make no Order as to costs for this reference.

Dated at Kampala this....^{23rd}.....day of...^{June}.....1998.


S.G. ENGWAU
JUSTICE OF APPEAL.

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: S.T. MANYINDO, D.C.J.; A.E. MPAGI-BAHIGEINE, J.A.;
J.P. BERKO, J.A.; S.G. ENGWAU, J.A. AND A.
TWINOMUJUNI, J.A.

CONSTITUTIONAL CASE NO.9 OF 1997
(REFERENCE NO.1056B FROM HIGH COURT CIVIL SUIT NO.1056 OF 1995)

PYARALI ABDUL KASULE ISMAILPLAINTIFF/RESPONDENT
VS
ADRIAN SIBODEFENDANT/APPLICANT

JUDGMENT OF TWINOMUJUNI J.A.

This is a reference from the High Court (G. Tinyinondi, J) to this court made under Art. 137(1) and (5) (a) of the 1995 Constitution of Uganda. The facts which give rise to this matter are as follows.

The plaintiff/respondent, Pyarali Abdu Rasul Esmail (Hereinafter referred to as the plaintiff) was up to 1972 the registered owner of land comprised in freehold Register volume 302 Folio 20 and 21 and known as plot 4 and 5, Kyampisi, Bulemezi (hereinafter referred to as the suit property).

Being of Asian origin, he was among thousands of members of the Asian community who were expelled from Uganda by President Idi Amin. On leaving this country the suit property was vested in the Departed Asians Property Custodian Board (DAPCB) by a series of Decrees which were later consolidated into one decree called Assets of Departed Asians Decree No.27 of 1973. That decree gave the DAPCB the power to manage properties of departed Asians including the power to sell any property if deemed necessary.

In 1975 the DAPCB sold the suit property to the defendant/applicant (hereinafter referred to as the defendant) who in the same year became the registered owner of the property.

In 1982, the Parliament of Uganda enacted the Expropriated Properties Act (No.9/82) which nullified all dealings of any kind in properties which had been expropriated under Decree No.27 of 1973. The main objective of Act 9/1982 was to return the expropriated properties to its former owners.

In April 1991 the plaintiff returned to Uganda and applied to repossess the suit property. On 18th December 1993 the Minister of Finance issued him with a Re-possession certificate in accordance with sections 4 and 5 of the Expropriated Properties Act, 1982. The Chief Registrar of Titles then amended the register and re-instated the plaintiff as the registered owner of the suit property. The defendant refused to surrender the property but in the negotiations that followed with the Minister of Finance, he was promised compensation in accordance with section 11(4) of Act 9 of 1982. He subsequently wrote to the Minister suggesting that given his involvement with the suit property for many years and the developments he had put thereon, it would be more just if the government compensated the plaintiff. The matter seems to have remained at that as far as the Ministry of Finance was concerned.

In the meantime, the plaintiff filed High Court Civil Suit No.1056 of 1995 against the defendant to secure physical possession of the suit property. One of the issues which were agreed at the trial was:-

"Whether the Expropriated Properties Act No.9 of 1982, to the extent that it nullifies the sale of the suit property to the defendant and accordingly deprives him of his proprietary interest therein contravenes the Constitution of the Republic of Uganda and is thereby null and void".

On the 3rd December 1996 G. Tinyinondi, J. made an order referring this question to this court for interpretation.

In this court, both parties submitted written arguments. The Attorney General who was not a respondent in the case was served with the reference under Rule 5(2) of Legal Notice No.4/96 and he also submitted written arguments. All the three counsel submitted very lengthy arguments. They took liberty to deal with a lot of matters that I do not consider to be relevant to the issue before this court. In my attempt to summarise arguments of counsel, I shall only extract what I consider to be relevant to the issues before the court.

Mr. Godfrey Lule, learned Senior Counsel for the defendant submitted that by virtue of an act of purchase and subsequent registration of the suit property in his favour, the defendant became a bona fide purchaser of the suit property. Mr. Lule then argued that to the extent that section 1(1) and 2(a) of the Expropriated Properties Act, deprived the defendant, a bona fide purchaser for value, of the property he purchased, without provision for payment of prompt, fair and adequate compensation, they violated Articles 8 and 13 of the 1967 constitution and Article 26 of the 1995 constitution and were therefore null and void.

Mr. Lule conceded that the Expropriated Properties Act fulfilled all the conditions that must be fulfilled as laid down in Article 13 of 1967 constitution and Article 26 of 1995 Constitution before compulsory acquisition of property can be done except only one condition; the prompt payment of adequate compensation. According to him, section 11(4) of Act 9/1982 provided for a formula of compensation which leads to unreasonable, unfair and inadequate assessment of compensation and therefore was unconstitutional, null and void. He also submitted that section 11(6) of Act 9/1982 was also unconstitutional, null and void in as much as it derogated from the payment of prompt, fair and adequate compensation prior to

the taking of possession or acquisition of the property as required under the 1995 constitution.

In support of his submission that section 11(4) of Act 9/1982 provided a formula of compensation that would result into injustice and was therefore unreasonable, Mr. Lule discussed at length the meaning of "compensation" and what amounted to "adequate compensation". He relied on the English case of West Midland Baptist Trust (incorporated - vs - Birmingham Corporation (1968) Q.B. 188 and four other Ugandan authorities in which, he submitted that it was held that for compensation to be reasonable it must be assessed at market value at the day of judgment or at the time of trial. He concluded that the compensation formula provided in section 11(4) of Act 9/1982 was bound to result in absurd, unfair or unreasonable compensation or no compensation at all and this rendered the Act unconstitutional and null and void.

In support of his submission that section 11(6) of Act 9/1982 was unconstitutional, null and void because it derogates from the payment of prompt, fair and adequate compensation prior to the taking of possession or acquisition of the property, Mr. Lule argued that, that section must now be construed as provided for in Article 273 of 1995 constitution which requires that:

"existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this (1995) constitution".

According to Mr. Lule, compensation payable now must be as required by Article 26 of 1995 constitution, namely,

"prompt, fair and adequate compensation prior to the taking of possession or acquisition of the property".

His prayer was that this court should declare that the Expropriated Properties Act was unconstitutional, null and void as it contravened Articles 8 and 13 of 1967 constitution and Article 26 of the 1995 constitution and that costs of this reference be

awarded to the defendant.

Mr. Mulira who submitted written arguments on behalf of the plaintiff argued that the Expropriation Decrees which were later consolidated into Decree 27 of 1973 were unconstitutional and therefore null and void for two reasons:-

(1) That since they were discriminatory and only aimed at people of Asian origin, they contravened Article 20 and Article 58 of the 1967 constitution.

(2) That they contravened Article 13 of the 1967 constitution.

According to him, since Decree 27/1973 was null and void, it never conferred any title to expropriated properties on Custodian Board (DAPCB) or the defendant who purported to purchase from the Board. He argued that accordingly the defendant never acquired any legal ownership to the suit property to be "deprived" of by Act 9 of 1982. He concluded that Act 9/82 was valid because all it did was to address an unconstitutional act which arose because of Act 27/1973 and did not contravene any provision of the 1967 or 1995 constitution.

On whether section 11(4) and 6 of Act 9/82 contravened Articles 8 and 13 of 1967 constitution, I was unable to ascertain Mr. Mulira's reply from his written submission except the statement that these provisions did not arise unless the defendant got a good title by virtue of decree 27/1973. He submitted that since it was his contention that the 1973 Decrees were null and void, the constitutionality of section 11(4) and (6) of Act 9/1982 did not arise.

His prayer was that:-

(a) This court makes a declaration that Decree 27/73 contravened Article 13 of 1967 constitution, and accordingly no interest was acquired by the defendant.

(b) This court should declare that section 1 of the

Expropriated Properties Act, 1982 is constitutional since the aggrieved party is given a right of access to the High Court.

In his submissions the learned Attorney General first argued that it was no longer in dispute that the Government and subsequently the DAPCB legally acquired the Expropriated Properties of which the suit property was part. Unfortunately the learned Attorney General did not cite any authority to support this proposition. He argued that the former owners were entitled to compensation as was required by Article 13(1) of the 1967 constitution. He argued that this condition together with other conditions laid down in Article 13 to be fulfilled before compulsory acquisition could be valid were not complied with. The learned Attorney General concluded, strangely in my view, that the taking over of the Departed Asians Property was unconstitutional. This appears to me to be strange because he cannot in one breath argue that the expropriation of Asian properties was legal and argue in the next breath that the whole exercise was actually unconstitutional. Building on this conclusion, he argued that since the Expropriated Properties Act 9/1982 was enacted for the purpose of addressing this constitutional injustice, it would be unfortunate to declare the Act unconstitutional.

His second argument was that section 1(1) of Act 9/1982 did deprive the defendant of property which he had bought in 1975.

He argued that this was in accordance with S.13(1) of the 1967 Constitution which laid down conditions to be fulfilled before acquisition could take place as follows:-

- "(a) the taking of possession or acquisition is necessary in the interest of Defence, Public Safety, Public order, Public Morality, Public Health, town and country planning or the development or utilisation of any property in such a manner as to promote the public benefit; and

- (b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest or a right over the property; and
- (c) provision is made by a law applicable to that taking of possession or acquisition,
 - (i) for the payment of prompt and adequate compensation; and
 - (ii) Security to any person having interest in or right over the property, a right of access to the High Court, whether or on appeal from any other authority, for determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and that amount of any compensation to which he is entitled and for the purpose of obtaining payment and of that compensation."

Learned Attorney General submitted that at the time the suit property was returned to the former owner, all conditions laid down in Article 13 of 1967 Constitution had been complied with.

On the question of reasonableness of compensation which is the central issue in the defendant's submission, he submitted that section 11(4) of Act No.9/82 provided a formula that would guarantee reasonable compensation. He argued that in order to understand the full meaning of that section, it has to be read together with S.11(2) of the Act which provided that where property is returned to a former owner, government or the former owner shall pay the value of any improvements to the property to the deprived person. The effect of both sections read together was that when the purchaser who was deprived of property, as in this case, is paid for improvements and the purchase price then the total sum of these payments would amount to reasonable compensation within the meaning of Article 13 of the 1967 Constitution.

He argued further that there was provision in Act 9/82 that where there was a dispute on compensation the matter could be resolved in

a court of law.

Finally learned Attorney General, quoting several authorities including:-

(1) Gokaddas Luxi Midas Tanna vs SR. Rosemary Muyinza & DAPCA Civil App. No. 12/82.

(2) Nakabiri & Others vs Masaka Cooperative Union - Civil Suit No.835/1983.

submitted that the defendat was lawfully deprived of property in accordance with both the 1967 and 1995 constitution and his only remedy was to get compensation as provided for by section 11(4) and (6) of Act 9/82. His prayer was that this court holds that S.1(1), 2(a), 11(2), 11(4) and 11(6) of Act 9/82 are constitutional and that this case should be remitted to the High Court for determination of other issues including the quantum of compensation payable to the defendant by the plaintiff.

In my humble judgment, it is not necessary or relevant in this reference to decide one way or the other on the issue as to whether the Expropriation Decrees violated the 1967 constitution. If there was ever any doubt as to the constitutionality of the Decrees, such were put to rest in 1982 when the issue came up for decision in the Court of Appeal in Departed Asians' Property Custodian Board vs Kayond & Another [1982] H.C.B. 17 where the court held:-

"The Military Government's takeover of properties and businesses of non-Ugandans amounted to nationalisation with provisions for payment of compensation under law (Decree 32 of 1972, S.1(2) and Decree No.12 of 1975, S.15); and therefore there was no violation of Article 13 of the constitution especially as the non-citizens were no longer eligible for residence in Uganda."

Similarly in my humble judgment, the Expropriated Properties Act (Act 9/1982) which had the effect of depriving some people of property they had legally bought from DAPCB did not violate the spirit of Article 13 of the 1967 constitution because the Act provides for compensation. Mr. G. Lule, S.C., himself conceded this much in his submission, and so did the Attorney General.

I have had considerable difficulty in deciding whether the reference before us can be adequately disposed of without implying into it the constitutional issues of promptness and adequacy of compensation that must be paid following any act of compulsory deprivation of property. All Counsel seem to have understood the reference to include the compensation issue, and they fully covered it in their submissions.

After considering that this is not an academic exercise and that the reference arose from a factual situation, I came to the conclusion that the issue of compensation cannot be divorced from this reference. Whereas it is not the duty of this court to decide on the quantum of compensation and whether it is reasonable or not, this court cannot shun the issue as to whether S.11(4) and (6) of Act 9/82 is contrary or in conflict with Article 13 of the 1967 constitution and Article 26 of the 1995 Constitution. In my view this is a constitutional issue requiring interpretation of this court and it is implied in this reference. Since it was fully argued by all the parties to this reference, it is only fair that it receives an answer.

The contentious provisions of Act 9/1982 provide as follow:-

S.11(4) :

"The compensation payable under the immediately preceding subsection shall be the purchase price less the income derived or which ought to have been derived from the said property or business from the date of such transfer."

S.11(6):

"Any compensation unless already paid before the commencement of this Act, shall be paid over such a period and in such a manner as the Minister may determine or negotiate with the person or body to be compensated."

In order to resolve this matter, I will endeavour to provide answers to the following three questions:-

- (a) Did the above two sections of Act 9/82 offend against Article 13 of 1967 constitution?
- (b) Is it of any consequence today whether any of our laws offend against the 1967 constitution?
- (C) Do the said sections of Act 9/82 offend against the 1995 constitution?

We now know as a fact that the defendant in this case legally purchased the suit property from the DAPCB in 1975. In the same year he became the registered owner thereof. Act 9/82 nullified that transaction and had the effect of depriving him of his property. Under the provisions of both the Act and Article 13 of the constitution then in force, he was entitled to adequate compensation." Mr. Lule's argument is that the formula for compensation contained in section 11(4) of the Act could not conceivably achieve "adequate compensation" and amounted to a violation of the 1967 constitution. He advanced two reasons to support this proposition:-

First, that the provisions ignored the common sense economic principle of value. That value depends on market forces and rises or falls with market forces. That any formula which ignored this principle, as the formula in Section 11(4) does, was bound to

produce absurd results and the resulting compensation was bound to be unreasonable.

Secondly, that the formula ignores another economic reality of fluctuation in the value of currency, and assumes that the currency maintains its undiminished value.

The learned Attorney General maintained that the payment of the value of improvements to the property provided for in section 11(2) and compensation provided for in section 11(4) was enough to satisfy the requirements of Article 13 of 1967 constitution.

This brings me headlong to the question: what is reasonable or adequate compensation?

To "compensate" is defined in "WEBSTERS NEW 20TH CENTURY DICTIONARY OF ENGLISH LANGUAGE" 2ND ED. thus:-

- (i) to give equal value
- (ii) to be equivalent in value
- iii) to supply an equivalent.

The meaning of compensation was considered in the case of Hern vs Sunderland Corp. [1941] 1 ALL. ER. 491 where Scatt L.J. stated that:-

".....what is given to the owner compelled to sell is compensation - the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but on the other hand, not greater."

In the case of West Midlands Baptist vs Birmingham Corp. [1968] 1 ALL. E.R. 205. It was held that compensation should be assessed at the market value of property at the time of judgment. A number of cases decided in Uganda have upheld this principle that the market value of the property in question assessed at the time of judgment is a reasonable measure of fair and just compensation - Civil Appeal No.33 of 1992 Interfreight Forwarders (U) Ltd. vs East African Development Bank (Supreme Court), Civil Appeal No.3 of 1993 Esso Standard (U) Ltd. vs Samu Amanu Opio (Supreme Court), and

Matigo Byabalema and 2 others vs UTC (1975) Ltd.

In the latter two cases it was also held that fluctuations of currency, where applicable, must be taken into account in assessing what reasonable compensation was due.

I have now to examine the provisions of section 11(4) of Act 9/82 and determine whether compensation computed in accordance with the formula provided therein would put the defendant in the same position as if the suit property has not been taken from him. The formula is that compensation payable shall be the purchase price less income derived or which ought to be derived from the property or business from the date of such transfers.

The example of the instant case will illustrate how absurd a result this formula can produce. In this case the purchase price was UG. Shs.75,000/= (1975 market value). From that figure there must be deducted income derived or which ought to have been derived from the property since 1975. Since the economy of Uganda has experienced violent fluctuations over the years since 1975, it is not clear whether the computation of derived income from the property over the years can be done without any reference to market forces prevailing during the period in question. In my view if any income was derived from the suit property at all and such income is deducted from the purchase price of Shs. 75,000/=: I doubt whether there would remain any balance to pay to the defendant. Even if it was found that no income whatsoever was ever derived from the suit property, it would be absurd to imagine that compensation of Shs.75,000/= to the defendant would be adequate. In my humble opinion the formula is capable of producing an absurd situation where the defendant would not only get no compensation at all but could be presented with a negative balance payable by the defendant to government or the plaintiff.

But learned Attorney General argued that S.11(4) must be read together with S.11(2) which provides for compensation for improvements made on repossessed property so that the two sections provide reasonable compensation.

With respect, I cannot agree. In my view the two provisions

provide for two separate and different situations. While S.11(2) clearly covers improvements on the property in question, S.11(4) deals with compensation for the property as originally purchased. In both situations, the compensation had to be reasonable or adequate to conform with Article 13 of 1967 constitution.

In my judgment the formula for compensation provided in section 11(4) of Act 9/82 could not guarantee reasonable compensation to an owner of property who is deprived of the property by the operation of the Act. To that extent the section was in conflict with Article 13 of the 1967 constitution and would have been null and void if the 1967 constitution was still in operation.

Now, the 1967 constitution is history. We have the 1995 constitution which saves the Expropriated Properties Act 1982 through Article 273 which provides as follows:-

"273(1):

Subject to the provisions of this Article, the operation of existing law after the coming into force of this constitution shall not be affected by the coming into force of this constitution but the existing law shall be construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it into conformity with this constitution." (Emphasis is mine)

This means that Act 9/82 must be "construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this (1995) Constitution.

Section 11(4) and (6) of Act 9/82 which provides for the disputed compensation formula and also allows the Minister liberty to determine the mode and period of payment of compensation must now be construed accordingly so as to bring them into conformity with the 1995 constitution especially Article 26 thereof which provides:-

"Article 26(2): No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied -

(a)

(b) the compulsory taking or acquisition of property made under a law which makes provision for -

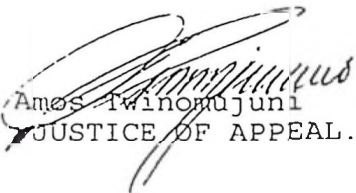
(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of property; and

(ii)"(emphasis is mine).

In conclusion I would hold that the Expropriated Properties Act 1982 may have had a few provisions contrary to the provisions of 1967 constitution especially section 11(4) and (6) of the Act. However since that constitution is no more, the Act is good law. Offending sections of that Act like section 11(4) and (6) must be construed so as to conform to the provisions of Article 26 of the 1995 constitution.

I would order that the results of this reference be remitted to the High Court with the order that Civil Suit No.1056 of 1995 be determined accordingly. ~~we~~^I would make no orders to costs.

Dated at Kampala this ^{23rd}.....day of ^{June}.....1998.


Amos Twinomujuni
JUSTICE OF APPEAL.

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

ACORAM *S. T. MANYINDO - DCJ, A. E. MPAGI-BAHIGEINE - JA, J. P. BERKO - JA,*
S. G. ENGBAL - JA, A. THINOMUJUNI - JA

CONSTITUTIONAL PETITION NO. 09 OF 1997

B E T W E E N

PYRAH ABDUL RASUL ESMAIL: : : : : : PETITIONER/PLAINTIFF

V E R S U S

ADRIAN SIRO: : : : : : RESPONDENT/DEFENDANT

JUDGMENT OF MANYINDO - DCJ:

The facts of the case have been fully set out in the judgments of My Lords just delivered. At the trial the following seven issues were framed for determination:

1. Whether plaintiff is the registered proprietor of suit property;
2. Whether Defendant purchased the suit property bonafide for value without notice.
3. Whether the Exp. Act 1982, to the extent it nullifies sale of suit property to Defendant and accordingly deprives him of his proprietary interest therein contravenes the Constitution of Republic of Uganda and is thereby null and void.
4. Whether:
 - (a) the plaintiff's application for repossession of suit property, and

7/1
(b) the grant to plaintiff of a certificate authorising repossession, and

(c) the substitution of the plaintiff for the defendant as registered proprietor of suit property is/are null and void for non-compliance with the law.

5. Whether Defendant wrongfully refused to hand over to plaintiff vacant possession of suit property.
6. Whether the plaintiff suffered inconvenience and loss.
7. Whether plaintiff is entitled to damages and mesne profits and if so, the quantum." (sic)

Only issue No. 3 was referred to this Court. I do not read the matter of compensation in that issue. The point raised therein seems to be plain to me. It is that the nullification of sales and purchases of expropriated properties under Act No. 9 of 1982, was illegal and unconstitutional. In my view the spirit of the Act is to return the expropriated properties to their original owners. It seeks or was intended to redress a wrong that was done to the Asian Community in Uganda by the Military Regime. Under the Constitutions of 1967 and 1995, the people who purchased the expropriated properties but have to lose that property under the Act are entitled to fair, adequate and prompt compensation.

Since it is conceded by Counsel for the respondent that the Act complies with the Constitutional requirement that deprivation of property must be accompanied by compensation, then it can not be said to be inconsistent with the Constitution. Whether the compensation provided for is fair or reasonable or adequate and prompt is a matter for

the Constitution in a competent Court. It is not a matter of interpretation of the Constitution and therefore, does not fall within the jurisdiction of this Court.

I do not find it necessary to go into the matter of compensation beyond what I have said already as it is not raised in the reference. Nor do I have to consider the expulsion decrees as they are irrelevant to the reference.

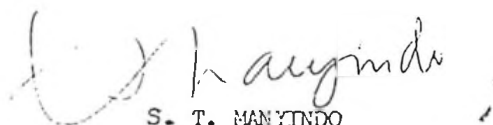
In the result I would declare that the Expropriated Properties Act, to the extent that it nullified the sale and purchase of the suit property and thereby dispossessed the defendant/respondent of same, is not inconsistent with any provision of the Constitution. I would remit the case to the High Court to determine the remaining issues. I would make no order as to costs in this Court and the Court below regarding the reference.

In accordance with the ^{unanimous} ~~majority~~ view, it is ordered that the following declaration shall issue:-

The Expropriation Act, 1982, to the extent it nullifies sale of ^{the} suit property to defendant and accordingly deprives him of his proprietary interest therein does not contravene the Constitution and is therefore not null and void.

There will be no order for the costs of the reference.

DATED at Kampala this: 23rd day of: June 1998.


S. T. MANYINDO
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.9/97

(CORAM: S.T. MANYINDO, DCJ; A.E. MPAGI BAHIGEINE, JA; J.P. BERKO, JA; S.G. ENGWAU, JA; A. TWINOMUJUNI, JA.)

PYRALI ABDUL RASAU ESMAIL PETITIONER/PLAINTIFF

- VERSUS -

ADRIAN SIBO RESPONDENT/DEFENDANT

JUDGEMENT OF JUSTICE A.E. MPAGI BAHIGEINE

This is a reference from the High Court pursuant to Article 127(1), (5)(a) and (b) of the Constitution.

It was requested by Counsel Mr. G. Lule, S.C., for the defendant Adrian Sibbo in HCCS No.1056 of 1995 in the following terms.

"Whether the Expropriated Properties Act No.9 of 1982, to the extent that it nullified the sale of the suit property to the defendant and accordingly deprives him of his proprietary interest therein, contravenes the Constitution of the Republic of Uganda and is thereby null and void."

The background facts are as follows.

The plaintiff Pyrali Abdul Rasaul Ismail, an Asian, was the original registered proprietor of freehold land comprised in Plots 4 and 5, Volume 302 Folio 20 and 21 Kyampisi, Bulemezi.

He fled the country during the Asian exodus of 1972. His property hereinafter referred to as the suit property was expropriated by the Government under the Assets of the Departed

Asians Decree No.27 of 1973.

In 1975, the defendant, Adrian Sibo, purchased the suit property and had it registered in his names on 28th February 1975 by Instrument No.1951315. He held this property until 1982 when his title was nullified by the Expropriated Properties Act No.9/82.

On 1991 the plaintiff purportedly proceeding under the Expropriated Properties (Repossession and Disposal) Regulations, 1993 applied for and was issued with a repossession certificate on 10th December 1993. His name was reinstated on the Register of Titles as the registered proprietor on 26th February 1994.

However todate the defendant has refused to vacate or give up possession on the ground that he had bought the property bona fide and had spent colossal sums of money on its improvement and development. He prefers to retain the property or else be paid adequate compensation prior to surrendering it.

At the time of filing this suit, the Minister was in the process of negotiating with the defendant as to the terms of compensation under section 11(4) and (5) of the Expropriated Properties Act No.9/82.

Written submissions were filed by all three Counsel.

They will briefly summarise their arguments.

Mr. M. Lira for the plaintiff argued that the Expropriation of the properties were unconstitutional and as such no valid title to the land could have been acquired by the defendant.

Mr. M. Lira pointed out that though the state had power to expropriate property belonging to non-nationals, the taking had to comply with Article 13 of the 1967 Constitution, failure of which meant that the Government did not acquire any interest in the assets vested in it by section 4 of Decree 27/73. He claimed any purchaser of such property from the Government

could not and did not acquire a valid title.

He asserted that the Expropriated Properties Act No.9/82 nullified the sale of the property to the defendant, and sought to do four things.

- (a) Transfer properties and businesses acquired during the military regime to the Ministry of Finance;
- (b) To effectuate their return to the former owners;
- (c) To make provision for their disposal by government, and
- (d) Provide for other matters.

He argued that it was not the intention of the Act that the Government acquire proprietary interest in the properties and businesses illegally taken over from the former owners. He maintained that nullification of the defendant's purchase was unconstitutional in that it was done pursuant to a law which allowed the defendant access to the High Court, as provided under the Constitution.

Mr. Barishaki Cheborion, Senior Principal State Attorney, for the Attorney General submitted that the nullification of the sale to the defendant of the suit property was done in accordance with the provisions of both Constitutions 1967 and 1995. He pointed out that the Expropriated Properties Act No.9/82 is valid law. It provides for compensation to the defendant or any deprived person in accordance with both Constitutions. The Government and the DAPCB legally acquired the expropriated properties. The acquisition was lawful because there was provision in law for payment of compensation under Article 13(1)(c)(i) of the 1967 Constitution. He however contended the plaintiff had not been compensated. Therefore the taking of his property was unconstitutional for non-compliance with Article 13(1)(c)(i) of 1967 Constitution. It is this "evil" that the Expropriated Properties Act No.9/82 was enacted to remedy by returning the

properties to former owners who had not been compensated. He maintained the issue of how much compensation should be paid to the defendant is not a matter for the interpretation of the Constitution by this court. He said that Act No.9/82 did not offend either the 1967 Constitution nor the 1995 Constitution by virtue of Article 273(1) of the 1995 Constitution. He stated the Expropriated Properties Act No.9/82 was promulgated and operated under the 1967 Constitution. Its provisions were saved by virtue of Article 273(1) of the 1995 Constitution. In his view the 1995 Constitution did not operate retrospectively so as to change the Expropriated Properties Act provisions. S.1(2) of the Act nullified all transactions and was intended to act retrospectively notwithstanding any other law. He prayed court to hold that sections 1(1), 2(a); 11(4) and 11(6) of the Expropriated Properties Act are Constitutional and expressed skepticism regarding the effect which a contrary interpretation would have upon the already completed transactions that have been based on such provisions.

Mr. Godfrey Lule, SC, for the defendant based his argument on sections 1(1)(a) and (2)(a); section 2(1)(2)(3); section 6(a); section 5(1) and section 11(3)(4) and (6) of the Expropriated Properties Act No.9/82 which he said were ultravires both the 1967 and 1995 Constitutions. He stated that to the extent that sections 1(1)(a) and (2)(a) deprive the defendant a bona fide purchaser for value of property he purchased without adequate compensation established according to market value at the date of payment, such provisions are unconstitutional, null and void. He pointed out that compensation prescribed under section 11(4) is an unreasonable, unfair and inadequate assessment which is unconstitutional, null and void, and that section 11(6) derogates from payment of reasonable or prompt compensation and is therefore unconstitutional, null and void. He acknowledged that deprivation of property and compulsory acquisition of property are not unlawful per se, but that what is unlawful is deprivation without meeting the criteria set out in Article 13(1)(c)(i) of the 1967 Constitution which was then applicable and where

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compensation should be reasonable. He said today deprivation or compulsory acquisition would be unlawful if the amount of compensation did not meet the criteria in Article 26 of the 1995 Constitution. He asserted that the defendant was resisting the plaintiff's repossession of the suit property on the ground that the plaintiff should instead be paid compensation, or that the defendant be paid adequate compensation prior to his surrendering the suit property. He submitted in depth that reasonable, fair and adequate compensation within the meaning of both Constitutions is based on the current market value of the land as assessed at the date of judgment.

All three Counsel seemed to have agreed to the 12 sub-issues as framed by Mr. Lule, judging from their treatment of the matter.

In my view the reference involves both nullification of title and compensation. It is not disputed that it was indeed the duty of the state which had power to correct past wrongs committed by the military regime by returning the expropriated properties to their former owners and compensating the bona fide purchasers of such properties. This is amplified by the preamble to the Act No.9/82

"An Act to provide for the transfer of the properties and business 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 same by Government and to provide for other matters connected therewith or incidental thereto".

Mr. Lule, SC, attacked this Act in his written submissions on the ground that the provisions of Section 11(4) and (6) regarding compensation for the nullified title or the compulsorily deprived property do not conform to the provisions of either Article 13(1)(c)(i) of the 1967 Constitution which stipulates for "the prompt payment of adequate compensation" nor do they conform to Article 26(2)(a) and (b) (i) of the 1995 Constitution which provides for the "prompt payment of fair and adequate

compensation prior to the taking of possession."

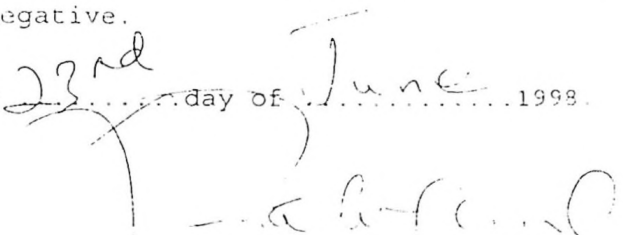
The Act No.9/82 was enacted under the 1967 Constitution which constitution is a thing of the past. The trial court has power by virtue of Article 273 of the 1995 Constitution to construe the Act and make modifications, adaptations, qualifications and amendments if it may be necessary to bring it into conformity with the 1995 Constitution thus contravening the Constitution. This is necessary because under Article 2 the Constitution is the supreme law and prevails over any other law or custom inconsistent with it, and that other law shall to the extent of the inconsistency be void.

I would therefore make the following declaration.

That since the Act No.9/82 is an existing law within the meaning of Article 273 of the 1995 Constitution, the provisions of the impugned Section 11(4) and (6) would be construed qualified and adapted to conform to Article 26(2)(b)(i) of the 1995 Constitution by the trial court. The Act therefore would not be null and void.

I will remit the file back to the trial court to dispose of the case. I make no order as to costs. My answer to the reference therefore is in the negative.

Dated at Kampala this 23rd day of June 1998.


A.E. Mpagi Bahigeine
JUSTICE OF APPEAL