

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA**

**CORAM:**

**HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.**

**HON. JUSTICE C.N.B. KITUMBA, JA**

**HON. JUSTICE S.B.K. KAVUMA. JA**

**CIVIL APPEAL NO.32/2002**

**ATTORNEY GENERAL:.....APPELLANT.**

**VERSUS**

**OSOTRACO LTD:.....RESPONDENT.**

**[Appeal from the judgement of the High Court (Egonda-Ntende J)  
dated 20<sup>th</sup> March 2002 in High Court Civil Suit No.1380 of 1986]**

**JUDGMENT OF A.E.N. MPAGI-BAHIGEINE, JA.**

This appeal arises from the judgement and orders of the High Court (Egonda-Ntende J) dated 20<sup>th</sup> March 2002. The learned Judge ruled section 15 (1) (b) of the Government Proceedings Act not to be in conformity with the 1995 Constitution and made an ancillary order of eviction against the appellant and its agents, with costs. The order of eviction was to be complied with within 30 days of the date of the judgement.

The background to this suit was that the respondent, Osotraco Ltd, claimed to be the registered proprietor of the suit property, at Plot No. 69 Mbuya Hill, Kampala; having purchased the same from

Uganda Times Newspapers Limited in June 1985 and got duly registered. The property was, however, at the material time occupied by employees of the Ministry of Information who refused to vacate, despite a request to do so. The Ministry claimed the  
5 property to be theirs whereupon the respondent filed HCCS No. 1380 of 1986, claiming the following reliefs:-

- a) *An Order of eviction from the suit premises;*
- b) *A permanent injunction;*
- c) *Special and General damages;*
- 10 d) *Mesne profits;*
- e) *Interest and costs of the suit.*

The amended memorandum of appeal comprises only two grounds, namely;-

- 15 1. **That the learned Judge erred in law and fact when he construed section 15 (1) (b) of the Government Proceedings Act not to be in conformity with the Constitution.**
- 20 2. **That the learned Judge erred in law in granting the respondent an order of vacant possession of the suit property and/or eviction as against the appellant.**

Mr. Mike Chibita, learned Principal State Attorney, for the appellant argued that the learned trial Judge misconstrued section 15 (1) (b) of the Government Proceedings Act and in so doing failed to redirect himself to article 273 as he could have but  
5 encroached on article 137, contrary to his mandate. Article 137 (3) vests in the Constitutional Court powers to make a declaration as to any inconsistency or contradiction of any law or act with a provision of the Constitution. The learned trial Judge usurped the powers of the Constitutional Court. Learned Principal State  
10 Attorney, pointed out that section 15 (1) (b) involves a substantial question of law and in view of its importance could not be dealt with so casually. The Judge ought to have referred the question to the Constitutional Court for its decision on the matter.

Learned Counsel further argued that this matter involved an Act  
15 of Parliament as against the Constitution and that the Judge basically amended the Act of Parliament and yet he had no such powers to do so. This amounted to venturing into the territory of the Constitutional Court. He prayed Court to rectify the judgement and quash the orders thereunder.

20 In reply, Mr. Christopher Madrama learned counsel for the respondent, maintained that the learned trial Judge was correctly moving under article 273 (1) and did not exceed his jurisdiction. The learned Judge was indeed modifying the existing law, otherwise article 273 would be rendered inoperative. The Judge  
25 acted properly, especially in light of article 126. None of the

parties reserved any question for interpretation and the Judge on his own motion considered whether there was such question to be referred to the Constitutional Court and found that there was none. Mr. Madrama prayed court to dismiss the appeal as the  
5 learned Judge had the power to do what he did.

The learned Judge held;-

***“In the circumstances of this case a declaratory order is less than appropriate relief. It is not effective redress. And the provisions of existing  
10 law, that is the proviso (b) to section 15 of the Government Proceedings Act, that would compel this court to avail only such relief, is not in conformity with the constitution. I would therefore construe it in such a manner, by  
15 qualifying the proviso (b) to section 15 of the Government Proceedings Act, not to be applicable to the case at hand. I therefore order the defendant and its servants to give vacant possession of the suit property to the plaintiff, not later than thirty days from the date of pronouncement of this judgement, failing which  
20 eviction shall issue.....”.***

Section 15 (1) (b) of the Government Proceedings Act which is now section 14 (1) (b) of the Government Proceedings Act  
25 (Chapter 77) under the Laws OF Uganda 2000, reads;-

**“14. (1) In any Civil proceedings by or against the Government, the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between private persons and otherwise to give such appropriate relief as the case may require; except that-**

**a).....**

**b) In any proceedings against the Government for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu of those orders make an order declaring that the plaintiff is entitled as against the Government to the land or property or to possession of the land or property”.**

The learned Judge in construing section 15 (1) (b) not to be in conformity with the constitution claimed to be acting under article 273 (1) which provides;-

**“273. (1) Subject to the provisions of this Article, the operation of the existing law after the coming into force of the constitution shall not be affected by the coming into force of this constitution but the existing law shall be construed with such modifications, adoptions, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.**

**(2) For the purposes of this article, the expression “existing law” means the written law of Uganda or any part of it as existed immediately before the coming into force of this constitution, including any Act of Parliament or Statute or Statutory instrument enacted or made before that date which is to come into force on or after that date”.**

This court has in a number of cases pronounced itself on the import of article 273 and ruled that it only empowers all courts to modify existing unjust laws without necessarily having to refer all such cases to the constitutional court. This provision enables the  
5 court to expedite justice by construing unjust and archaic laws and bringing them in conformity with the Constitution, so that they do not exist and are void.

This article does not oust the jurisdiction of the Constitutional Court under article 137 where it can later declare these laws  
10 unconstitutional. This Court has applied article 273 in a number of cases. In **Pyarali Abdu Ismail v Adrian Sibó, Constitutional Petition No.9 of 1997**, this court directed the trial Judge to construe and modify section 11 (4) (b) of the Expropriated Properties Act No. 9 of 1982 which was prescribing unfair and  
15 inadequate compensation for compulsorily acquired property. Section 11 (4) (b) was adapted and qualified so as to conform to article 26 (2) (b) (1) of the Constitution providing for prompt payment of fair and adequate compensation for the property. The matter had been referred to the Constitutional Court under article  
20 137 (5). This course of action was found not to have been necessary. The Judge should have moved under article 273, without wasting any time, and applied the constitutional provisions.

Further illustrations as to how article 273 is to be applied can be  
25 found in the neighboring jurisdiction, in the case of **Ephrahim v**

**Pastory and Another (1970) LRC (Const.) 757**, the Tanzanian Constitution of 1984 construed section 4 (1) of the Act No.16 of 1984, which was similar to our article 273. A woman in one of the clans in Tanzania had validly inherited a piece of land from her father by will. She later sold the land to a non-clan member. Their customary law did not allow a female member of the clan to sell land to a non-clan member. The position was, however, different for a male member of the clan. Her nephew sued the buyer to recover the land claiming that the sale was void as under their customary law a female member could not sell land belonging to a clan. The Tanzanian Court of Appeal held that customary law as an existing law was construed as modified to be void for being inconsistent with the provision of the Bill of Rights that provides against discrimination on the basis of sex.

15 In **Bull v Minister of Home Affairs (1987) LRC (Const.) 547**, the Zimbabwe Constitution which came into force in 1980 had a provision similar to article 273. In an action to declare section 106 (2) of their Criminal Procedure and Evidence Act (Cap 59) which restricted the right to bail contrary to sections 13 and 18 of their Constitution, the Supreme Court held that the provision in the Criminal Procedure and Evidence Act was inconsistent with the right to liberty in the Bill of Rights. The court agreed that if indeed that provision in the Criminal Procedure Act was inconsistent with the right to liberty prescribed in the Bill of Rights then it would be as modified such that it did not exist but void.

The learned Judge in his judgement reviewed a number of foreign decisions whose primary object was “to do away with the archaic State protection and to place the state or the Government at par with any other juristic legal entity in line with modern social thinking of progressive societies”. This is the object of article 273 as illustrated by the above authorities. It cannot therefore, be said that he acted outside the ambit of article 273. Mr. Chibita asserted that the learned Judge “strayed” into the province of article 137, when he said:-

10           ***“The Constitution of Uganda is the Supreme Law, and any law that is inconsistent with it, is void to the extent of the inconsistency vide article 2 of the Constitution. At the same time Article 273 of the Constitution requires existing law to be construed with such modifications, adoptions, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution.....***

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20           ***I am aware that under Article 137 (5) of the Constitution if any question arises as to the interpretation of the Constitution in a court of law, (Which includes this Court), the court may, if it is of the opinion that the question involves a substantial question of law, refer the question to the Constitutional Court for decision in***

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**accordance with clause (1) of Article 137. It is the Constitutional Court to determine any question with regard to interpretation of the Constitution. But where the question is simply the construing of the existing law with such modification, adaptations, qualifications and exceptions as to bring such law into conformity with the Constitution, in my view, this may be determined by the court before which such a question arises.**

**The question before me implicit in the issue whether the plaintiff is entitled to an eviction order or not against the Attorney General is whether the existing law, in terms of the proviso to section 15 of the Government Proceedings Act, is in conformity with the Constitution of Uganda, and is not whether it may be construed in such a manner as to bring it in conformity with the Constitution of Uganda”.**

The foregoing is mere self-direction, by the learned Judge, as to the import of the exclusive mandate under articles 137 and 273. The mandate under each article is different. Article 137 reads;-

**“(1).....**

**(2).....**

**(3) A person who alleges that;-**

(a) **An Act of Parliament or any other law or anything in or done under the authority of any law; or**

(b) **Any act or omission by any person or authority, is unconstitutional with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.**

**(4).....**

**(5) Where any question as to the interpretation of this constitution arises in any proceedings in a court of law other than a field court martial, the court;-**

(a) **May, if any party to the proceedings request it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of this article.**

**(6).....**

**(7).....”**

The import of article 137 clause (3) which is the operative one has been highlighted several times in various judgements of both this court and the Supreme Court. In **Attorney General v Major General David Tinyefunza, Constitutional Appeal No.1** of 1987, my Lord Mulenga JSC, had this to say about clause (3);-

*“.....Under clause 3 the Constitutional Court is empowered to do more than “interpret” in the sense of “giving meaning to words” of the provisions of the Constitutional. Under paragraph (a) of clause (3),*

5            *the constitutional court is empowered to, and may “interpret” provisions of an Act of Parliament or any other law in order to determine whether such Act or other law is inconsistent with some provision of the Constitution even if the latter is so clear that there is no question as to its interpretation.....”.*

His lordship summed up;-

10            *“.....It is my considered opinion that the new constitution, in clause (3) of Article 137 gives to the Constitutional Court, over and above the jurisdiction to interpret the Constitution in sense of giving meaning to words and expressions therein, original jurisdiction, (a) to review Acts of Parliament, and other laws and (b) to determine any question on the inconsistency of anything with a provision of the constitution, and/or on*  
15            *the contravention of a provision of the Constitution by anything”.*

Clearly there is nothing in the judgment of the learned trial Judge to support Mr. Chibita’s contention that he attempted to do any of  
20 the above, to interpret or give any meaning to any words or review any law. His preoccupation was with trying to modify the archaic section 15 (1) (b) by bringing it into conformity with the 1995 Constitution, article 26 thereof which protects the citizen’s right to own property.

Mr. Chibita in challenging the Judge's orders, relied heavily on the case of the Attorney General v Silver Spring Hotel Ltd and others, Supreme Court Civil Appeal No.1/1989, where section 15 was highlighted as "an enactment of special application, dealing, inter-  
5 alia with injunctions against the Government and providing safeguards against judicial interference in the Government's exercise of its prerogatives and privileges in public interest. To protect the Government against embarrassing court injunctions and to keep the machinery of Government going. Their Lordships  
10 concluded that in view of the importance of section 15, it is expected to be amended or repealed by a bold express provision but should not be left to an implied repeal. It is a matter that requires careful consideration so as to replace it with a law that will serve the public interest and the ends of justice.

15 The Silver Springs case predates the 1995 Constitution by about six years. Times have changed. The decision cannot therefore be said to be in line with the spirit of the new Constitution especially article 126 (1) which provides that;-

20 **"126 (1) Judicial powers is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people".**

That being the case I entirely agree with the learned Judge that  
25 the law has to be construed in line with the thinking or norms of progressive societies.

The trial Judge referred to an Indian case of **N. Nagendra Rao and Co. v State of A.P. AIR (1994) S.C. 2663** R.OH, where Sahai J. said inter alia;-

5 ***“No legal or political system today can place the state above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of the officers of the state without any remedy. The modern social approach is to do away with archaic state protection and place the state or the Government at par with any other juristic legal entity”.***  
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He also referred to **Byne v Ireland and the Attorney General (1972) 1R 241** at 282, where Walsh JSC said;-

15 ***“Where the people by the Constitution create rights against the state or impose duties upon the state, a remedy to enforce them must be deemed to be also available. It is as much the duty of the state to render justice against itself in favour of citizens as it is to administer the same between private individuals. There is nothing in the Constitution envisaging the writing into it of a theory of immunity from the suit of the state (a state set up by the people to be governed in accordance with the provisions of the Constitution) stemming from or based upon the immunity of a personal sovereign who was the key stone of a feudal edifice- English Common law practices, doctrines or immunities***  
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***cannot qualify or dilute the provisions of the Constitution”.***

I respectfully subscribe to the above reasons. It is clear from the above authorities that since the 1995 Constitution, the rights,  
5 powers and immunities of the State are not immutable anymore. Article 20 (2) enjoins everybody including Government agencies to protect and respect individual fundamental human rights. The Constitution has primacy over all other laws and the historic common law doctrines restricting the liability of the state should  
10 not be allowed to stand in the way of constitutional protection of fundamental rights. Article 26 protects the respondent’s right to own property. The respondent having obtained judgement is clearly entitled to a meaningful form of redress under article 50, as the Judge so put it.

15 Since this is not a case of compulsory acquisition in the public interest, the respondent would be entitled to have his property back.

The learned Judge was moving under article 273 and did not encroach on article 137 as alleged by the appellant. I would thus  
20 confirm the Judge’s orders of eviction and costs against the appellant.

In my view, ground 2 becomes superfluous. I would dismiss the appeal with costs. Since my lords, Kitumba and Kavuma JJA, also

agree, it is so dismissed. The trial Judge's orders are hereby confirmed with costs here and below.

Dated this.....30<sup>th</sup> .....day of...June.....2005.

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*A.E.N. MPAGI-BAHIGEINE*  
**JUSTICE OF APPEAL.**

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**JUDGEMENT OF CNB KITUMBA JA**

I had the benefit of reading in draft the judgment of Mpagi-Bahigeine JA. I agree with it.

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Dated this 30th June 2005

CNB Kitumba

Justice of Appeal

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**JUDGMENT OF STEVEN BK. KAVUMA**

25 I have had the advantage of reading draft the judgment of Hon Lady Justice AEN Mpagi-Bahigeine JA. I entirely agree with the judgment, the finding and orders made therein

I have nothing useful to add.

Dated at Kampala this 30<sup>th</sup> day of June 2005

5 Steven BK. Kavuma  
Justice of Appeal