THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT N0.615 OF 1992

MUKISA FOODS LIMITED::PLANTIFF

—versus—

EAST AFRICAN DEVELOPMENT BANK::DEFENDANT

BEFORE: THE HON. MR. JUSTICE I. MUKANZA

RULING:—

The plaintiff in this case is a limited liability company incorporated in the Republic of Uganda and carrying on business in Uganda brought an action against the defendant a Development Bank seeking for a number of declarations against the defendant among which were that as a Ugandan limited liability company the plaintiffs property to wit freehold Register Volume 8 Folios 3,4 and 5 plot Nos. 124, 125 and 126 land at Kawempe Kyadondo and the plaintiffs other property, undertakings shares or equities were never subject to expropriation by the Government of Uganda pursuant to expropriation Decrees of Asian properties passed under Idi Amin or other expropriation laws enacted there after.

When the case came for hearing the learned counsel appearing for the defendant in the names of Sebalu from Sebalu and Lule company advocates raised a preliminary point of law hence this ruling to resolve the matter. He submitted that it was alleged in the plaint that the plaintiffs were a Uganda company as per pargraph3 but that was not true. According to the plaintiffs annexture “M” the annual return for the year 1970. The shareholders of the company paragraph 5, the particulars of the Directors, shareholders and secretaries if one compared the directors and their nationalities one would find that all the names are, almost similar. One Mr. Hassanali is British and held 2400 shares. One Mandatali is Ugandan and held 2160 shares, Badrudin a British and held 1800 shares, Sutuwali is British and held 1800 shares and Parali is British and held 1500

shares. All together the British and non Ugandan held 8040 shares and the Ugandan held 3960 shares. The non Ugandan holding share is 67 percent of the issued shares which is 1200 shares and Ugandans were holding only 33 percent. Looking at this share holding should the company be called Uganda. He submitted that it couldnot be. There has been several Investment Acts starting on in 1964. It was foreign Investment Protection Act. That act speaks of foreign National. It defines foreign National in **section *5*** as a person who is not a citizen of Uganda. That definition was carried out in the decree **Amin's Foregn Investment Decree of 1977**. It also speaks of Foreign National. The same reference is also made in the Investment Code Statute No.1 **of** 1981.

In paragraph 4 it read it was registered interlia by Ugandan citizen of Asian extraction on or about the 29th August 1952 and had at all material times remained on the register as Ugandan company. Meaning even at the moment is a Ugandan company. He submitted that it was not from what he had submitted above. And that when the Asian decrees were passed the company which Was composed of 2 Ugandan directors and 4 British directors was not Ugandan company and therefore it was properly taken over or nationalized.

In fact the plaint relies heavily on the letter of repossession as a basis of claiming the right to their property. All the declarations they were seeking on page 1 that these suit properties were not subject to appropriation by the expropriated decree and what they wee referring to is repossession by letter as the authority he contended that the application for these properties ought to have complied with the Expropriated Properties Act No. 9/1982. The Act sets out conditions under which the property could be returned to the former owners. He applied to the plaintiff for the application for the properties. He gave them notice to produce. They produced the application which was dated 20th March 1992. The applicant ought to have complied with section *3* of Act of 1982 which was to the effect that former owners must apply in writing for repossession of popery business. That the properties were properly taken over and if the former owners were applying for them they did not comply with the section. The Act came into force on 24.2.1983. It was not three months and it was nearly nine years. The application was therefore seriously out of time and he had not seen any amendment and not even seen an application for extension of time. There had been some political announcements but those do not ouster the law.

He further submitted that there are other provisions that if the minister is releasing the business to the former owner (section 8 of Act 9 of 1982) he may make an order that the properties be retained by the Government was specifically referred to in section 5 which provides;

> *"Notwithstanding the provisions of subsection 2 of section 1 and section 2 the property or business affected eith provisions of the Act is applied for by a former owner and such property or business is the subject of a caveat, lien, loan, charge, mortgage or any other registered encumbrance in favour of a bank, financial institution or any other tender as the case maybe, with a view to securing mutually acceptable arrangements for the discharge of any such liabilities or encumbrances."*

He submitted that if those properties were returned to the former owners that arrangement should have been done. The minister never contacted former owner and the bank for mutual acceptable arrangement. Another point he submitted that if in returning property of this nature the law requires that he issues a certificate as provided under section 4 (Act 9 of 1982). In the present case something like letters of repossession had been issued. That was unknown in the law. That the certificate referred to the Act which gave power to the Registrar to amend the certificate of title appropriately. He enquired from his learned friends whether they had known of such amendment and they replied negatively. He finally submitted that the case before the court is not properly before you and the same should be dismissed.

Mr. Kalengera on the other hand submitted that the nationality is that of the company not the nationality of the individual shareholders. He submitted that the plaintiff company in this case is a Ugandan company. The company's Act section 2(1) defines a company as that is found and registered under the Act. The same Act goes to differentiate between a Ugandan and foreign company in section 369 of the Company's Act Cap were; it provides interlia all foreign companies incorporated in Uganda are Ugandan companies and not foreign companies. The definition of the company relevant to this case is the Company's Act. The definitions contained in the **Foreign Investment Act 1964,** the **foreign investment Code 1977** which definition have been relied upon by his learned friend are not relevant to this cases. Such definition would only be relevant in cases of foreign investment for the protection of foreign investors and dividends of assets. It is now settled law that all corporate bodies which are Uganda or foreign were not liable

to expropriate in all the Amin's decrees Therefore since they were talking about corporate bodies the Nationality of individual shareholders is not relevant. There are a number of cases that have been decided in this court and Supreme Court Uganda. I was referred to the case of **Lutaya vs. Gandosha HCCS NO.860/1992. United Assurance Company vs. Ag Scu 1/86** all those cases upheld that corporate bodies and their property are not liable to expropriation, the plaintiff in this case is a body cooperate. What happened was that in 1972, the work permit ct non citizen Asians were cancelled and that as by decree 30 of 1977.

The immigration of entry permit cancelled the were residence. The cancellation affected individuals who not citizens of this country and it never affected companies which are incorporated companies which never required work permit. The plaintiffs company in this case could not depart because non Asians had departed

He submitted that the issue before the court which is the suit belonged, to the company and not to the shareholders and since the said company never departed according to decrees of 1970's the said property was not liable to the said misappropriation. That company is a legal entity separate from individual shareholders.

Apart from submitting and disputing the expropriation of the suit property the plaintiff is oven disputing the expropriation of the shares of the members of the plaintiff company. They intend to lead evidence to show that the government took over even the shares of the members of the plaintiff company. They intend to lead evidence to show that the government took over even the shares of the members of Plaintiff's company who were Ugandans. His learned friend was relying on a law in which the ministry of industry took over purportedly all the shares of the company. They will call evidence to the effect that the ministry of industry and commerce had taken over all the shares of the company including, those in Uganda.

As regards repossession, His learned friend questioned the time in which the application for repossession was made and referred to the letter of repossession. They had documents and they entered to show in evidence that the plaintiff applied for repossession in 1983. They had a photostat copy of the application. The issue whether the application was valid or not will be led by evidence which they could not put in at that stage. They shall contend that the property of the

company is not liable to be taken over and they will lead evidence that there was no need to have applied for repossession. After referring to the remarks by the Chief Justice in Gandesha's case that the applicant should have valued and taken over repossession the learned counsel submitted that the mode and time of application for repossession and the result whether the certificate was obtained or letter is very immaterial to the plaintiff's case in the resent case. If any body was aggrieved by the minister in which repossession was effected the remedy open to Such a person or body was appeal against the decision of the minister under section 14 of Act 9 of 1982. It was held so in the case **A.J. Jayon Sing .V. Sam sebuliba HCCS No. 443/92**. If his learned friend was dissatisfied with the decision of the minister he should have appealed. He prayed that the preliminary objections be over ruled.

In reply Mr. Sebalu submitted that as he had stated earlier on he maintained that the plaintiff, as former owner did not apply for repossession within the time prescribed by section *3* of the Expropriate property Act 1982. He served notice to produce on the plaintiff had made. And I was given a copy of the application which the plaintiff had made. And I was given a copy of the application which he exhibited in the court and the date of the application was 20th march 1992. He submitted that was ten years out of time. His learned friend said verbally that they had applied in 1983. But no copy of the application was produced. He never saw the application. It was not shown to him and the court. If they had made an application they would not be attaching the certificate of title at the stage. They would have done so earlier on. That the first time they applied otherwise they would have referred to an earlier application. The so called letter does not give them any authority at all. It is not a certificate being referred to in the Act. They should have cited some authority. That was not mere irregularity. The government made a mistake. It was a useless paper. He prayed that the court takes no notice of the same.

The learned counsel reiterated that 67% of the shares were held by British Asians and only 33% was, held by Ugandan Asians. The managers left the company without proper management. The government was entitled to take it as abandoned. There was no warrant in the plaint that so and so was appointed to manage the company after the former owners had ran away. It was not enough to say that good management was left. They wanted to know who these were.

That the authority referred to by his learned friend were irrelevant except the **Assurance company Ltd .v. Attorney Geranal.** He criticizes the Annual return of the company of 1970. He argued that people controlling the company at that the time had the authority to apply for loans and run business.

I have very carefully listened and considered the submissions of the learned counsels and at the same time had the opportunity to persue the authorities cited to me. The background of this dispute is well laid down in the plaint and the facts briefly were that the plaintiff company was registered interalia by Uganda citizens of Asian extraction on or about the 29th August, 1952 and had at all material times remained on the Register as a Ugandan company. They are the registered proprietors of the lands comprised in freehold. Register Vol.88 folios 3, 4 and 5 plot Nos. 124, 125 and 126 respectively all the factory undertakings thereon and equities in the company known as Mukisa Foods Limited Kwempe. In 1972 when Idi Amin promulgated the **Immigration Cancellation of Entry Permit and Certificate of Residence (Decree 17 of 1972)** which extended to cancellation to any other person who was of Indian Pakistan origin or decent irrespective of his citizenship many Ugandan of Asian extraction fled the country. As a result the Uganda Development Corporation took over the management of the plaintiff's company later the properties were allocated to the National Enterprise Corporation which occupies the property up to date.

It was argued on behalf of the defendant that the company plaintiff was composed of British Asians as the majority shareholders were Ugandans of Asian extraction. And that being a foreign company it was properly taken over or nationalized.

Section 2(1) of the Companies Act Cap 85 defines a company as meaning a company formed and registered under this Act or an existing company. And under S.369 (2) of the same Act a foreign company shall not be deemed to have a place of business in Uganda solely on account of its doing business through an agent in Uganda at the place of business of the agent. And under the Foreign Investment Protection Act Cap 160 which provides that any foreign national who has invested or intends to invest foreign assets in any section of the national economy may apply to the minister in the prescribed manner for a certificate of an approved enterprises whereas the Foreign Investment Decree 1977 gives exemption of foreign investors from certain taxes. With

the provisions of the referred law in mind it is common knowledge that the plaintiff company is a Ugandan company registered in Uganda and carrying on business here. The foreign investment protection Act and Decree 17 of 1972 were in my humble opinion meant to protect foreign investors and to exempt the same from certain taxes. Certainly the said law is not applicable to the present situation. Besides that in **United Assurance Company Co. Ltd vs. Attorney General Civil appeal No.1 of 1986** a Supreme Court decision. There it was held that it was trite law that a company is legal entity separate from the shareholders and while the shares in the appellant company belonged to the departed Asians and were vested in the government or the custodian board, the suit property belonged to the appellant company and not to the individual shareholders.

I am of the view that the principle in the above case is an authority to the instant case in that the plaintiff's assets belong to the plaintiff which is a Ugandan company as opposed to the shareholders. It could not therefore be taken over or nationalized by the government. It is a legal separate entity from the Asian shareholders whose shares could be taken over by the government.

It has however been argued on behalf of the plaintiff company that they will lead evidence to the effect that the Ministry of Industry and commerce had taken over all the shares of the company including those of Ugandan shareholders. I do not want to express my opinion about the take over of all shares belonging to Uganda Asians by the government because doing so would be prejudging the issue in the main suit.

As regards repossession the learned counsel appearing for the defendant argued that the plaintiff company relied on the letter of repossession as a basis for claiming the right to their property and that the application for these properties should have been made under the expropriated properties 1982 (Act 9 of 1982 (section 3)).

Whereas Mr. Kalengera argued that his learned friend questioned the time in which the application for repossession was made. He contend that they intend to show in evidence that the plaintiff applied for repossession in 1983 and that they had a photostat copy of the application and that whether the application was valid or not will be led in evidence which they could not put in at that stage.

Well to express my opinion on whether the applicant was issued with a certificate of repossession and whether the same was valid or not would be in my humble opinion be highly prejudicial because I would be expressing my opinion adjucating on matters to be decided at the trial when evidence has been led.

However the application for repossession of property according to **Statutory Instrument No.6 of 1993 (The Expropriated properties (Repossession Disposal) Regulation 1993 sections**. An application for repossession shall be made in the form specified in the first schedule to these regulations and shall be addressed and sent in the Ministry either directly or to the address specified in the application form or though Uganda Diplomatic mission or such other authorized agent as the minister may determine. Section 2 provides that every application form shall be accompanied by the requirements of certain conditions.

As I stated earlier I cannot at this stage tell whether the application was made by the plaintiff company in compliance with the above provision of the law or not and also it is early to say whether there was necessity for such application. Those are matters to be adjudicated upon when evidence has been led.

However what was certain is that if any body was aggrieved by the decision of the Minister in issuance of Certificate of repossession the course open to such person or body was to appeal against that decision as provided for under section 14 of Act 9/82 (The Expropriated Act 1982.)

Besides what has transpired above the administration of justice should normally required that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights. See **Esaji v. Solanki 1968 P.218 but at page 224.** I am of the view that the plaintiff company should be accorded an opportunity to present its case. The question whether they did or did not apply for repossession of the premises whin the prescribed period that should not debar it from the pursuit of its rights. The dispute should be investigate and decided on merits after evidence has been led.

In the end result the preliminary points of law raised by learned counsel for the defendant that the suit not properly before the court and that the same be dismissed is overruled with costs to the company plaintiff.

I.MUKANZA

JUDGE

11.2.1994