

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT UGANDA AT MENGO
(COR: MANYINDO, D.C.J., ODOKI, J.S.C., & TSEKOOKO, J.S.C.)

CIVIL APPEAL 5/1995

CHRIS AKENA ONAPA APPELLANT

- VERSUS -

MOHAMED HUSEIN RASHID PUNJANI..... RESPONDENT

Appeal from judgment and decree of the High Court of Uganda (R.
Rajansingham J.) dated 5th December, 1994)

JUDGMENT TSEKOOKO. J.S.C.

In the High Court, the respondent brought an action against the appellant seeking for, inter alia; a declaration that he is owner of the property comprised in LRV 759 Folio 4 known as Plot No. 7A Acacia Avenue Kampala. Judgment was given in favour of the respondent. The appellant who was the defendant appeals against judgment.

The facts of the case are these: The respondent held a lease on plot No. 7 Acacia Avenue. In 1969 he sub-divided it into plot 7A and plot 7B. He disposed of 7B but retained 7A. Kampala City Council (K.C.C.) granted the respondent a three year lease over Plot 7A for purposes of constructing a house thereon. I shall hereinafter refer to plot 7A as the suit property. The lease was to run up to 31/10/1972. The respondent started to construct a storied residential house on it. Because he had not completed the construction of the house, in September, 1972, he applied to the K.C.C for the extension of the lease from 1/11/1972. On 28/3/1973, the commissioner of lands as agent of K.C.C. informed the respondent by letter exh. B.9, of the approval of the extension of lease by a further period of 12 months from 1/11/1972. By that letter the respondent was required to fulfil certain conditions. I shall revert to this letter later.

It appears that the respondent was among the Asians to be expelled by Amin in August/September, 1972. However on the 24/9/1972 (Vide Exh. B 8) the Permanent Secretary, Ministry of internal Affairs reinstated his entry permit and certificate of residence. But that reinstatement was temporary because it was cancelled on 12/2/1973 by the office

which had re-instated it (see exh. B 11).

The respondent then left Uganda without declaring his assets and before he received the offer of the extension of the lease (exh. B.9). The suit property remained at the level reached by the respondent before he left Uganda. The building was basically a shell of the ground floor and some general frame work of the upper floor.

On 25/9/1983 the appellant applied for the plot (see exh. 2) because the Expropriated Properties, Act, 1982 (Act 9 of 1982) had been enacted; K.C.C. sought legal advice in respect of the suit property. On 6/6/1984 the Development Committee of K.C. C. recommended the grant of lease to appellant although in between there were consultations about the status of the suit property. Following consultations, the Solicitor-General by his letter reference C.M. dated 26/6/1984 (Exh. H.W. 13) advised the K.C.C. Advocates that Act 9 of 1982 did not apply to the property.

On 29/6/1984 the Town Clerk wrote Exh. BAO 4 to and offered the plot to the appellant. K.C.C. agent offered the appellant lease offer form dated 3/7/1984 (Exh. BAO 5) offering the appellant a lease of the suit property for two years. Appellant was required to pay certain expenses. In addition he was asked to pay shs. 6m/= for the uncompleted structure standing on the plot. Eventually the appellant met the conditions of the offer and so he was issued with a certificate of title to the suit property for a period of to years.

The appellant engaged various experts for advice and construction of the house. On 7/4/1986, the appellant anticipating that he would not complete the house before the expiry of 2 years lease on 30/6/1986, applied for extension of three years, extendable thereafter to 99 years (see Ex. BAO 10). This was granted through the letter of the K.C.C. Town Clerk reference LAN. 3/9 dated 7/5/1986. By a letter dated 31/3/1987 (Exh. BAO 16), the Town Clerk indicated that K.C.C. had granted to the appellant full term lease of the suit property and that occupation permit had been issued to the appellant who had by now jet the house out. Occupation permit Exh. BAO 14 is dated 28/12/1985. On 24/8/1988 a lease by Urban Authority was executed between the appellant and K.C.C. granting the appellant a 97 years

lease over the suit property (see exh. BAO 17).

P.W.3, L.Lubwama, the officer-in-charge of leases in shows in evidence that because of a certain letter by P.W.2 the certificate of title has not been issued to the appellant.

Following the issuance of repossession Certificate, the appellant on 22/12/1992 petitioned the Minister of Finance and Economic Planning (Exh. BA. 020). In the petition the appellant points out that the respondent revived his interest only in 1987 and that during 1986 the Government unsuccessfully attempted to acquire the building from the appellant under the Land Acquisition Act, 1965 because the Government of Zaire had also laid claim to the same.

In his evidence the respondent stated that since 1973 he has been laying claim to the suit property. Yet he did not get the offer for extension of the lease (exh. B.9) till 1992 when he collected it from his Post Office Box 3341, Kampala where it had been lying for 20 years. The learned trial judge stated that the offer was frozen during that period of 20 years.

On 21/8/1990 the respondent wrote a letter to the Deputy Minister of Finance in charge of Custodian Board properties claiming for the suit property. Eventually, on 16/11/1992 the Minister of Finance & Economic Planning issued the appellant with a certificate authorising repossession of the suit property (exh. B 16). After an unsuccessful attempt to evict the tenants in the suit property, the respondent instituted these proceedings. Six issues were framed for decision of the Court. They are:-

- (1) Was plot 7A Acacia Avenue, Kampala comprised in leasehold Register Vol. 759 Folio 4 lawfully vested in the Departed Asians Property Custodian Board?
- (2) If issue (1) is answered in the affirmative, is the plaintiff the rightful owner of the said property by virtue of Repossession Certificate granted by the Minister.

- (3) If issue (1) is answered in a negative did the lease granted by the Kampala City Council validly vest the leasehold in the defendant?
- (4) If issue (1) and (2) are answered in the affirmative is the plaintiff entitled to an order for immediate vacant possession?
- (5) If issue 3 is answered in the affirmative is the defendant entitled to an order dismissing the plaintiff's action with costs?
- (6) If issue (1), (2) and (4) are answered in the affirmative, what compensation if any is the defendant entitled to for t i i e improvements made to the said property?

After hearing evidence from both sides the learned judge answered issue 1,2,3,4 (and 6) in the affirmative. Re answered issue 5 in the negative; lie accordingly gave judgment or the respondent but ordered that the appellant was entitled to shs. 116m/= for the improvements on the property and that the respondent was entitled to \$36,000 as mesne profits by way of rent from the date of repossession.

The appeal contained 5 grounds but grounds 3 and 4 were abandoned.

The respondent cross-appealed on two grounds.

The first ground of appeal which is the crux of these proceedings complains that the learned judge erred in law in declaring that the plaintiff's title comprised in LRV 745 (sic) Folio 4 plot 7A Acacia Avenue was affected by the Expropriated Properties Act, 1982 which vested it in the Government of Uganda. This ground is directly related to the first and second issues which the judge answered in the following words

- “(1) Yes, the property at plot 7A comprised in leasehold register vol. Folio 4 was lawfully vested in the Departed Asians Property Custodian Board.
- (2) The plaintiff is the rightful owner of the said property by virtue of the repossession certificate dated 16/11/1992, granted by the Minister.

Arguing ground 1 for the appellant, Mr. Kagumire submitted that the suit property never vested in the Government and hence the Departed Asians Property Custodian Board. In his view the word “property” means legal estate/interest in property which could be transferred or could vest in the Government; and not the building or land itself which vests in the Government.

He submitted that since the respondents lease granted on 1/11/1969 expired by 31/10/1972 the respondent had no interest in the property because the interest had reverted to K.C.C. as a controlling authority. Counsel contended that the offer of extension of the lease dated 28/3/1973 (exh. B 9) was not seen by the respondent till 1992. That in order to create interest in favour of the respondent he should have-accepted the offer by replying and paying the fees stipulated in exh. B. 9 so as to create a contract. That this would be the position even if the respondent was a Ugandan. Learned counsel criticised the trial judge for holding that so long as the respondent had applied for the extension of the lease and even if he had not paid fees the lease continued in the respondents favour. Learned counsel cited Halsburys laws of England, 3rd ed., Vol. 8, page 69 para. 118 and Halsburys laws of England, 4th Ed., Vol. 27 page 53 para 57, to illustrate the operation of the twin doctrines of offer and acceptance. He submitted that because the interest in the suit property had reverted to K.C.C. the same interest could not pass to the Government and therefore to the Board. Consequently Section (1) (a), (b) and (a) did not apply to the suit property.

Learned Counsel criticised the learned trial judge for basing in decision on the ease of Registered Trustees of Kampala Institute vs D.A. Property Custodian Board (Supreme Court Civil Aea1 No.21 of 1993 (unreported)) because in this latter case the take-over by the Government was effected while the lease was still valid in favour of the Registered Trustees

of Kampala Institute who owned a completed Building which was taken over and occupied by the Government.

Counsel Submitted that Section 1(2)(b) of Act 9 of 1982 only applies where an existing lease or agreement for a lease expires. But if a lease has expired, nothing can revive it.

Professor Ssempebwa for the respondent submitted that the contentions of appellant's counsel were based on the non-existence of a lease interest at the time the respondent left Uganda.

Professor Ssempebwa contended that the letter of renewal of the lease was not renewal at all.

That the respondent wanted extension of the lease and as I understand learned counsel, it was

K.C.C. which accepted the offer. His main contention is that the question whether the

respondent's lease continued between September, 1972 until Repossession i.e. 16/12/1992,

can be answered by Section 1(2) (b) of Act 9 of 1982. He contended that even if the original

lease had expired on 31/10/1972, on the evidence the respondent continued to hold the lease

in the absence of contrary evidence that K.C.C took legal interest until 1984 when it

purported to grant a lease to the appellant. Counsel contended that if a lease expires and a

tenant continues in occupation then the tenancy at will results where the landlord has no

Objection. Learned counsel argued that the expression "or any other specified tenancy of

whatever description" in S. 1(2) (b) would Cover the situation of the respondent. That

between September, 1972 and March, 1973, the respondent was occupying the

suit land as tenant at will in which case the respondent had an interest to claim. That exh. B 9

backdated the lease to 1/11/1972 and therefore, at all the material times there was an interest

held by the respondent which could be (acquired or in any other way was appropriated) by

the Government as provided by the provisions of Act. 9 of 1982.

Learned Counsel submitted that if the respondent did not comply with the terms of K.C.C.,

then the matter was between the respondent and K.C.C.

That after respondent as an Asian left, property vested in Government and therefore, the

D.A.P.C. Board which is a statutory tenant should have fulfilled the terms for the extension.

Counsel contended that in seeking opinions from the Commissioner for Lands and later from

the Solicitor-General after the appellant had applied, for the Suit Property, K.C.C. shows that

it had not resumed ownership of the Suit Property. He relied on the decision in Registered

Trustees of Kampala Institute (supra) for the view that this Suit Property falls within the

category of Property which Parliament intended to be returned to former owners. I don't agree that D.A.P.C. Board is a Statutory tenant; it is in fact a management agency for the Government.

I think that the facts in the Registered Trustees' Case are distinguishable from the facts of the case before us. I need not reproduce all the facts of Registered Trustees Case. But the following are relevant. The lease in Registered Trustees Case which was for 49 years ran from 18/7/1932 to 17/7/1981. At the time when the trustees were expelled from Uganda in 1972 there was a valid lease with a further life of about 10 years. The buildings on plot were occupied. On 14/12/1972, the Prisons Department of the Ministry of Internal Affairs forcefully took over the building and converted it into a Mess for Senior Officers who occupied it till the time the case was decided. The Custodian Board managed the property in the Registered Trustees' Case in every sense. Clearly those facts are different from the facts of the case before us where there was no completed building on the suit land. There is not a scintilla of evidence that in fact the D.A.P.C.B. managed the suit property in any sense after the respondent left Uganda in 1973. There is no evidence that any agent or department of the Military Government ever took over the Suit Property. There is no evidence as I shall show that the property was taken over in any other way as provided for by S.1 (1) (a) to Act 9 of 1982. Perhaps this is understandable since evidence shows that the structure left behind by the respondent was that of uncompleted wall structures. In that case it has to be decided whether the mere departure of the respondent vested the structure in Government. The question whether the interests of the respondent continued in the property after 31/10/1972 can be answered after examining (a) Exh. B5 which is the lease granted by K.C.C to the respondent for the period 1/11/1969 to 31/10/1972; and (b) Exh. B 9 which is a letter dated 28/3/1973 by which the Commissioner for Lands and Surveys as agent of K.C.C. conveyed approval of the extension of the initial lease by twelve months from 1/11/1972.

There is no dispute that the respondent had a valid title to the suit Land for a period of 3 years ending on 31/10/1972 (Exh. B.5).

In the lease exh. B.5), the respondent as lessee covenanted in Clause 2 as follows -

“(a) to observe and perform all the conditions and covenants implied by law in this case or otherwise herein contained or referred to,

(b)

.....
.....
.....

(c) to complete the said buildings for occupation and use to the satisfaction of the lessor on or before 31st day of October, one thousand nine hundred and seventy two.

(f) in addition to any covenant implied herein the Lessee shall not, until he has completed the said buildings and obtained a final occupation permit in respect thereof, sell or sublet our part with the possession of or suffer anyone to use or confer on any one any equitable interest in or any way mortgage the said land or buildings or any part thereof without having first obtained the written consent of the Lessor.”

Clause 4 “When the Lessee shall have complied with the building covenant herein and if there shall not at any time be any existing breach or non-observance on the part of the Lessee of any of the Covenants and conditions in this lease whether express or implied, the said term shall be enlarged to seventy-seven years and eight(8) months.....”

The lease which expired on 31/10/1972 had been given to enable the respondent to construct a house before the lease would be extended to full term of 77 years.

Clearly the K.C.C. retained control over the Suit Property so long as the building covenant had not been fully complied with by the respondent, i.e. completing the building. Renewal of the lease because of non compliance with covenants in exh. B. e.g. completion o the building was technically not automatic:

Premchand Nathu vs. Land Officer (1960) E.A. 941.

Exh B. in full reads as follows:-

“Department of Lands & Surveys,
P.O. Box 7061,
Kampala, Uganda.
Date: 28th March, 1973.

To:

Mr. Mohamed H.R. Punani,
P.O. Box 3341,
Kampala.

Plot No. 7A Acacia Avenue, Kampala
L.R.V. 759 Polo 4 (Expired)

I am directed by the City Council of Kampala to refer to your1 application for an extension to the initial term of the above lease and to inform you that a period of 12 months from 1/11/1972 is approved on the following conditions:

- (a) No further extension will be considered unless substantial progress in actual building work has been made by the date of expiration of the extension now approved.
- (b) A remittance for the following fees (made payable to Uganda Administration) to be paid to me within 14 days of the date hereof:
- | | |
|--------------------------------------|------------|
| Plans - _ | Shs. 6/= |
| Preparation of Lease/Supplement Deed | Shs. 100/= |
| Registration Fee_ | Shs. 60/= |
| Issue of Certificate of title_____ | Shs. 50/= |
| Assurance of Title_____ | Shs. 120/= |
| | Shs. 336/= |
| | ===== |
- (c) Stamp duty will be payable to the Registrar of Title on execution of the deed.

P. K. KATEREGA

For Commissioner for Lands & Survey

c.c. The Town Clerk,
Kampala City Council,
P.O. Box 7010,
Kampala”

There can be no doubt from the above that from 1/11/1972, the respondent had no valid title to the Suit Property. The title reverted to K.C.C. The expired lease would have been extended if the respondent had complied with the conditions spelt out in exh. B.9. and quoted above. In his evidence-in-chief the respondent stated:

“To my best recollection I was asked to prove that I had been exempted so that Kampala City Council could extend my lease”.

This is confirmation that the respondents interest had ceased. Exh. B.9 could not have been written if K.C.C. was aware that the respondent would not complete the building. The respondent did not see exh. B. 9 till 1992 and he therefore, never fulfilled the Conditions requisite to the acquisition of title. With respect I don't understand the view of the trial Judge that conditions in Exh. B. 9 were frozen for 20 years. Nor do I accept Professor Ssempebwa e arguments that in writing Exh. B.9, the K.C.C. were accepting an offer from the respondent.

Prof. Ssempebwa submitted that after 1/11/192 the respondent became a tenant at will.

In my view if the respondent had received B.9, paid the requisite fees and left before executing the lease or completing the lease or completing the building he would have been a tenant at will to K.C.C. But he could not be a tenant at will otherwise.

Did the Suit Property vest in the Government so as to fall within the ambit of Sections 1 and 2 of Act 9 of 1982? To answer this question relevant Provisions of the Assets of Departed Asians decree 1973 (Decree 27/1973) should be examined. Section 2 of Decree No. 27 of 1973 required a Departing Asian to declare his assets and liabilities. The respondent admitted in evidence that he did not declare his assets because he had no opportunity to do so. However, by Section 4(1) and (2) it is provided that –

“4(1) Any assets declared by a departing Asian including any property or business recorded in the register kept under Section 3 of this Decree, and any Assets left behind **by any Asian who failed to prove his Citizenship at the time in the manner specified by the Government shall, without any further authority, vest in the Government.**”

I think that if the lease was still subsisting by the time the respondent left Uganda in February, 1973, the expression in Section 4(1) which states:-

“...and any assets left behind by any Asian who failed to prove his citizenship” could have applied to the Suit Property. In that way the provisions of Sections 1(2)(b) of Act 9 of 1982 which reads-

“(2) For the avoidance of doubt, and notwithstanding the provisions of any written law governing the conferring of title of land, property or business and the passing or transfer of such title it is hereby declared that,

(a)

.....
.....

(b) Where any property affected by this Section was at the time of its expropriation held under a lease or an agreement for a lease, or any other specified tenancy of whatever description, and where such lease, agreement for a lease or tenancy had expired or was terminated the same shall be deemed to have continued, and to continue in force until such property has been dealt with in accordance with this Act”,

would have applied to the Suit property.

In order for sub-section 2(b) to apply, the property affected must have vested in the Government, when the lease, agreement for a lease or any other specified tenancy was still in force. Subsequent expiry of such a lease or agreement for the lease or tenancy would not affect the status of the property so long as at the time of expropriation (vesting in the

Government) the lease or agreement for the lease or tenancy was subsisting.

In the circumstances of the case before us there was no lease or agreement for a lease to vest in Government when the respondent left Uganda in February, 1973. With respect I think that the learned trial Judge erred in holding that the lease of Plot 7A Acacia Avenue, Kampala, subsisted at the date of his expulsion and the trial Judge further erred when he declared that the lease granted to the appellant by K.C.C. is null and void. In my view ground one must succeed. The conclusions I have just reached also disposes of the second ground of appeal which must also succeed.

In effect this disposes of this appeal.

Because of the conclusions reached on grounds one and two of the memorandum of appeal it is not necessary for me to consider arguments in support of the cross appeal.

In the result I would allow the appeal, set aside the decree and orders of the Court below. I would substitute an order dismissing the Suit. I would award the appellant the costs of the appeal arid of the lower Court.

I would dismiss the cross appeal with costs.

Delivered at Mengo this 9th day of February, 1996.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT UGANDA AT MENGO

(COR: MANYINDO, D.C.J., ODOKI, J.S.C., & TSEKOOKO, J.S.C.)

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- VERSUS -

MOHAMED HUSEIN RASHID PUNJANI..... RESPONDENT

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Rajansingham J.) dated 5th December, 1994)

JUDGMENT OF MANYINDO.D.C.J.

I have read the Judgment of Tsekooko, Justice of the Supreme Court in draft and I agree with it. As Odoki Justice of the Supreme Court also agrees the appeal is allowed.

There will be an order in terms proposed by Tsekooko, Justice of the Supreme Court.

Dated at Mengo this 9th Day of February, 1996.

S.T. MANYINDO,
DEPUTY CHIEF JUSTICE.

CERTIFY THAT THIS IS THE
TRUE COPY OF THE ORIGINAL.

E.K.E.TURYAMUBONA.

DEPUTY REGISTRAR, THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT UGANDA AT MENGO

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JUDGMENT OF ODOKI, J.S.C.

I agree with the judgment of Tsekooko, J.S.C. which I have had the benefit of reading in draft. I also agree with the orders he has proposed.

Delivered at Mengo this 9th day of February, 1996.

B.J. ODOKI.

Justice Of the Supreme Court.

I CERTIFY THAT, THIS IS THE
TRUE COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA,
DEPUTY REGISTRAR, THE SUPREME COURT.