



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Sir James Wicks CJ, Wambuzi & Law JJ A)

CIVIL APPEALS NOS 15 AND 16 OF 1978

COMMISSIONER OF LANDS.....APPELLANT

AND

ESSAJI JIWAJI.....RESPONDENT

PUBLIC TRUSTEE.....RESPONDENT

JUDGMENT

Wambuzi JA In these two appeals (which we have consolidated) the Commissioner of Lands is the appellant. Both appeals are from an order of the High Court (Sheridan J) in its appellate jurisdiction under the Land Acquisition Act.

In each appeal, three questions were raised before the judge; they are (1) whether compulsory acquisition of land by the Government under the provisions of the Land Acquisition Act is subject to the Income Tax (Amendment) Act 1976; (2) whether the Commissioner of Lands is entitled to deduct 10 per cent withholding tax from the compensation payable for the compulsory acquisition of land; and (3) whether the compensation awarded is full and adequate compensation within the meaning of the Land Acquisition Act if 10 per cent of the amount is deducted by way of withholding tax.

Sheridan J answered all three questions in the negative; the first by implication, and the other two expressly. The appellant has brought the two appeals to this court against these holdings.

Mr Shields for the appellant has argued on a number of grounds that the judge should have answered all three questions the other way, that is, in the affirmative. In his judgment the judge considered the provisions of section 8 of the Land Acquisition Act, which provides that full compensation shall be paid promptly to all persons interested in the land which is compulsorily acquired under the Act. He held that these provisions are in accordance with section 75(1)(c) of the Constitution which grants protection from deprivation of property unless certain conditions are satisfied, including provision in a law applicable to the deprivation for prompt payment of full compensation. The judge then considered the provisions of the relevant income tax law under which the appellant purported to act.

In effect, he held that compensation would not be full compensation if any part of it is withheld. I agree, as the party may or may not be liable to income tax. In effect, the judge found that there was no liability to income tax in the circumstances of these appeals because this withholding tax is only chargeable on a transfer of property. A transfer is defined in paragraph 6(1)(a) of the Eighth Schedule to the Income Tax Act as being: “where property is sold, exchanged, conveyed or otherwise disposed of in any manner whatever (including by way of gift) whether or not for consideration ...”. The judge held that this

provision related only to voluntary transfers and that sub-paragraphs (b) and (c) of paragraph 6 are inapplicable. I agree. Had the Legislature intended that tax should be levied on the price paid on the compulsory acquisition of land it would no doubt have said so. I do not agree with Mr Shield that, because taxes are paid by every citizen, a tax is necessarily imposed in the special circumstances of a compulsory acquisition without clarity of language. I find the case of *Marjorie O'Byrne v Minister for Finance and the Attorney General* [1959] 1 R cited by counsel of no assistance.

I agree with the judge's decision on all three points at issue and find nothing raised on these appeals to justify departure from the conclusions so carefully reached by the judge. I would accordingly dismiss the appeals with costs and certify for two counsel.

Law JA. I agree with the judgment of Wambuzi JA. The question of substance in this consolidated appeal is whether on the compulsory acquisition of land there has been a transfer of property within the meaning of paragraph 6(1) of the Eighth Schedule to the Income Tax Act. If there has been a transfer as Mr Shields submits there has, then the Commissioner of Lands is apparently bound to deduct 10 per cent withholding tax on the compensation under the Third Schedule, Head B, paragraph 6. Sheridan J held that on a compulsory acquisition there is no disposal of land in the sense of a transfer by the person from whom the land is acquired.

He did so on his interpretation of paragraph 6(1) of the Eighth Schedule to the Income Tax Act which defines a "transfer" as meaning "where property is sold, exchanged, conveyed or otherwise disposed of in any manner whatsoever (including by way of gift) whether or not for consideration". The judge held that this provision envisaged voluntary dispositions of property only and did not include a compulsory acquisition.

I am of the same view. When property is compulsorily acquired by the Government, it vests in the Government. The previous owners merely loses his rights and title to the property; he does not in any sense transfer the property.

The judge also held that no withholding tax could be deducted from a payment of compensation for compulsorily acquired property because, by section 75(1)(c) of the Constitution, no property of any description shall be compulsorily acquired unless provision is made by law for the prompt payment of full compensation. That provision is to be found in section 8 of the Land Acquisition Act, which provides for the prompt payment of full compensation. No exception is made in that Act for the retention of any part of that compensation in payment of income tax, past, present or future, or for any other reason. The full compensation must be paid. Again, I am in agreement with the judge.

Mr Shields is apprehensive that the effect of the judge's decision is that no tax is payable on a payment of compensation under a compulsory acquisition of land. That may well be so; but I do not think that is what the judge purported to hold. I read his judgment as deciding that a compulsory acquisition of land does not fall within the definition of "transfer" in paragraph 6(1) of the Eighth Schedule to the Income Tax Act and that the compensation payable is accordingly not subject to reduction by 10 per cent withholding in respect of possible liability to gains tax on the transfer of property. That was all he was called upon to decide. Nowhere has the judge said, in terms, that gains tax is not payable on compensation paid on a compulsory acquisition. He may have said so inferentially. That is a question that does not fall to be decided in this appeal; but if Mr Shields's apprehensions are well founded they could be allayed by legislation. On the other hand, it may have been the intention of the Legislature to exclude compensation for compulsory acquisitions for liability to income tax. Be that as it may, all that the judge has held in the instant case is that under the law such compensation must be paid in full and not subject to a deduction by way of withheld income tax to which the payee may or may not be liable. I entirely agree. I would also dismiss this appeal, and I concur in the order proposed by Wambuzi JA.

Sir James Wicks CJ. I agree with the judgments of Wambuzi and Law JJA. Section 75(1) of the Constitution provides in part:

(1) No property of any description shall be compulsorily taken possession of, and no interest in or

right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say: ... (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

Provision has been made by the law and that is to be found in section 8 of the Land Acquisition Act which includes the words “full compensation shall be paid promptly”. Mr Shields who appears for the appellant refers us to the Irish case *Marjorie O’Byrne v Minister for Finance and the Attorney-General* [1959] 1 R 1.

That case concerned article 68 of the Constitution of Eire, which provided that the remuneration of the judges of the Supreme Court should not be diminished during their continuance in office. There is a similar provision in the Constitution of the United States of America and in the Constitution of the Republic of South Africa. The claim was that the salaries of judges of the Supreme Court should be paid free of income tax on the ground that to deduct tax would “diminish” the judge’s salary. In his judgment Maguire CJ said, at page 36:

The prohibition is directed against the diminution of the salaries of judges as such and cannot be construed to protect him from the incidence of a tax of general applicability.

Diminution of salary as such would involve, for instance, the reduction of a judge’s salary from £10,000 per annum to £9,999 and the purpose of the article is to avoid this evil. Maguire CJ continued, at page 38:

To require a judge to pay taxes on his income on the same basis as other citizens and thus to contribute to the expenses of Government cannot be said to be an attack upon his independence.

Similar reasoning is to be found in cases involving equivalent articles of the Constitution of the United States of America and the Republic of South Africa.

In the case before us the element in section 75 of the Constitution is “payment in full”. Those are plain words and the meaning is clear the compensation must be paid in full. As in *Marjorie O’Byrne’s* case above, should any tax of general applicability be due, then it is payable.

The only other matter I refer to is Mr Shields’s submission that the compulsory acquisition of the property was a “sale”, or the property was “otherwise disposed of”, within the meaning of paragraph 6(1) of the Eighth Schedule to the Income Tax Act. I agree that the words “otherwise disposed of” must be construed *eiusdem generis* with “sold” and “exchanged”. In *Kirkness v John Hudson & Co Ltd* [1955] AC 696 the issue was whether or not the compulsory acquisition of some railway wagons was a sale within section 17 of the Income Tax Act 1945. Viscount Simonds said, at page 707:

To say of a man who has had his property taken from him against his will and been awarded compensation in the settlement of which he had no voice, to say of such a man that he has sold his property appears to me to be as far from the truth as to say that a man who has been deprived of his property without compensation that he has given it away.

With respect I agree, and the matter is aptly put by Law JA in his judgment:

When property is compulsorily acquired by the Government, it vests in the Government. The previous owner merely loses his rights and title to his property; he does not in any sense transfer the property.

The appeal is dismissed and there will be an order in the terms proposed by Wambuzi JA.

Appeal dismissed.

Dated and delivered at Nairobi this 24th day of October 1978.

SIR JAMES WICKS

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CHIEF JUSTICE

S.W .W WAMBUZI

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR