1980 June 14

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ECATERINI EPAMINONDA AND OTHERS,

Applicants,

v.

THE CHAIRMAN AND MEMBERS OF THE MUNICIPAL COMMITTEE OF LIMASSOL,

Respondents.

(*Case No.* 86/79).

Time—Within which to file a recourse—Article 146.3 *of the Constitution—Running of time—Whether governed by different legal principles in the case of an omission to perform a legal or constitutional duty and in the case of an omission to exercise a discretion—Claim for offering back land compulsorily acquired—Rejection on the ground that the matter had been settled earlier—Amounted to a definite refusal with its own legal consequences—Time of* 75 *days under the above Article started running as from communication of said refusal.*

Compulsory acquisition—Non-attainment of purpose—Claim for offering back land—Rejection—Commencement of running of time for the purposes of Article 146.3 *of the Constitution.*

The applicants are the heirs of the deceased Takis Epaminonda, who was the registered owner of immovable properties ("the properties") situated at Limassol. In June, 1961 the Council of Ministers sanctioned the compulsory acquisition of the properties by the respondents for the purpose of creating within the Municipal limits of Limassol of a wholesale market of perishable goods and parking place for vehicles.

In November 1966 the applicants filed a recourse complaining against the omission of the respondents to offer the properties to them on the ground that the purpose of the acquisition had not been attained. This recourse was withdrawn on July 21,

1977 by means of a letter* which was addressed to the Chief Registrar by counsel for both sides

On October 19, 1968 the applicants, through their advocates, asked the respondents to offer to them the properties, in accordance with the law and the Constitution, on the ground that they had not been put to the uses for which they had been expropriated but to unauthorised uses. The respondents replied by letter of their advocate dated the 8th November, 1968, whereby they rejected applicants' claim for the return to them of the acquired properties and referred to the settlement reached between the parties to this recourse and to the written notice dated the 21st July, 1967, signed by both Counsel on the basis of which the recourse was withdrawn

On March 6, 1978, counsel for the applicants addressed a further letter** to the respondents in which it was stated that the purpose of the acquisition had been definitely abandoned and that the respondents were under an obligation to return the properties to their lawful owners The respondents replied by letter*** dated the 15th March, 1978 confirming, *inter alia* their aforesaid letter dated 8th November, 1968 by means of which applicants' claim for the return of the properties was rejected

On September 16, 1978 applicants addressed a further letter**** to the respondents in which it was stated that they (applicants) were not bound by the settlement reached in the previous recourse and that they had a right to take back their property The respondents replied by letter dated the 4th December, 1978 and informed the applicants that they had no reason to revert on the subject Hence this recourse, which was filed on February

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* The letter read as follows

'Please take notice that the above Recourse has been settled out of Court as follows

The Respondents have agreed and undertaken the obligation to pay to the Applicants the sum of £4 500 000 mils (Four Thousand and Five Hundred pounds) in consideration for the withdrawal by the Applicants of this Recourse which shall be deemed to have been settled accordingly

In view of the above promise and undertaking this Recourse is hereby withdrawn and we pray that it be dismissed with no order as to costs"

** Quoted at p 286–87 *post*

*** Quoted at p 287 *post*

**** Quoted at p 288–89 *post*

15, 1979 and by means of which applicants complained against the omission of the respondents to offer the properties to them.

On the preliminary point, whether or not the recourse was filed within the time of 75 days provided by Article 146.3 of the Constitution, counsel for the applicants contended:

(a) That the failure of the Municipality to offer the subject properties back, irrespective of the exchange of letters, is an omission on their part to do what they were bound to do under the express provisions of the Law and the Constitution and they could not escape from that by saying that they had already replied and their reply amounted to a decision which was of an executory nature and so the time limit of 75 days provided for under Article 146.3 of the Constitution had lapsed and therefore the return of the properties could not be claimed.

(b) That the non return of the properties amounted to a continuing omission and therefore the recourse was not out of time.

(c) That there was a distinction between an omission to perform a legal or constitutional duty and an omission to exercise a discretion; and that in the former instance the time limit could not start running in any event even when there is a refusal to perform such legal or constitutional duty, which was omitted to be performed, as distinguished with the legal position with regard to refusal to exercise a discretionary power which was being omitted to be exercised.

Held, that this recourse is out of time as the decision of the respondents, communicated to the applicants by their letter of the 15th March, 1978 rejecting the claim of the applicants for the return to them of the acquired property on the ground that the matter had been settled earlier, amounted to a definite refusal with its own legal consequences, which should have been challenged by the applicants under Article 146 of the Constitution as an executory act and as from the communication of which to them the mandatory time of 75 days prescribed by para. 3 of Article 146 of the Constitution started running (see *Papasavva* v. *Republic* (1979) 3 C.L.R. 563).

Held, further, (1) that this Court does not subscribe to the view that because there exists a legal and constitutional obligation to return properties to their owners when the purpose, for which same had been acquired compulsorily, has not been attained, such an obligation which constitutes a continuing omission can be challenged by a recourse indefinitely and that a definite express refusal by the administrative organ concerned. as in the present case, to perform what was omitted. does not set the time limit, prescribed by para. 3 of Article 146 of the Constitution. in motion.

(2) That no different legal principles, regarding the commencement of the running of the time within which a recourse may be filed govern an omission to perform a legal or constitutional duty, and different ones govern an omission to exercise a discretion when in either instance there supervenes an express definite refusal to perform what until then had been omitted to be done; and that, therefore, the recourse must fail as filed out of time.

Application dismissed.

Cases referred to:

Moustafa v. *The Republic*, 1 R.S.C.C. 44;
Georghiades v. *The Republic*, (1966) 3 C.L.R. 153;
Mourtouvanis v. *The Republic* (1966) 3 C.L.R. 108;
Pikis v. *The Republic* (1965) 3 C.L.R. 131;
Papasavva v. *The Republic* (1973) 3 C.L.R. 467 at pp. 475-476; (1979) 3 C.L.R. 563 at p. 568;
Ktenas and Another (No. 1) v. *The Republic* (1966) 3 C.L.R. 364;
Demetriades & Son v. *The Republic* (1968) 3 C.L.R. 34;
Police Association & Others v. *The Republic* (1972) 3 C.L.R. 1.

Recourse.

Recourse against the decision of the respondents not to offer to the applicants immovable properties which belonged to the deceased Takis Epaminonda and had been compulsorily acquired by the respondents or their predecessors.

G. Cacoyannis with *P. Pavlou*, for the applicants.

J. Potamitis with *A. Triantafyllides*, for the respondents.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. The applicants by the present recourse seek the following relief:

"A declaration that the omission of the Respondents to

offer and/or their decision not to offer to the Applicants the immovable properties described in Schedule I annexed hereto (hereinafter referred to as 'the properties') which belonged to the deceased Takis Epaminonda, late of Limassol, and had been compulsorily acquired by the Respondents or their predecessors, the Municipal Corporation of Limassol, ought not to have been made and/or that it is null and void and of no effect whatsoever, as being contrary to the provisions of the Constitution and in particular of paragraph 5 of Article 23 thereof and/or of the Compulsory Acquisition of Property Law, of 1962 (No. 15/1962) and in particular of section 15(1) thereof and/or that it was made or taken in excess and/or in abuse of their powers."

The applicants are the heirs of the deceased Takis Epaminonda, who was the husband of applicant 1, and the father of the others. He was the registered owner of the aforesaid properties when on the 29th June, 1961, the Council of Ministers by notification No. 338 published in Supplement No. 3 to the Official Gazette of the Republic, dated the 22nd September, 1961, (*exhibit* "L") sanctioned the compulsory acquisition of the aforesaid properties by the respondents or their predecessors, the Municipal Corporation of Limassol.

The purpose for which the said properties were compulsorily acquired was the "creation and/or establishment within the municipal limits of Limassol of a Wholesale Market of Perishable Goods and Parking Place for vehicles", (διὰ τὴν δημιουργίαν Ἀγορᾶς Χονδρικῆς Πωλήσεως Φθαρτῶν καὶ χώρου Σταθμεύσεως Ὀχημάτων).

In November, 1966, the applicants filed in the Supreme Court recourse number 286/66 (the file of which has been produced as *exhibit* "O"), by which they sought a declaration, framed almost verbatim as the one claimed by the present recourse, i.e. that the omission of the respondents to offer the said properties to them at the price at which they were acquired was contrary to the Constitution and/or the Law and/or was in excess and/or in abuse of the powers of the respondents. This relief sought was based on the fact that the purpose of the acquisition had not been attained within three years from the date of such acquisition, in fact it had not been attained until the date of the filing

of that recourse, nor had any work been commenced for the attainment of such purpose.

That recourse was preceded by correspondence exchanged between the parties, by which the applicants by letter through their advocate, dated the 30th August, 1976, requested the respondents to offer to them the said properties in accordance with the provisions of the Constitution and the Compulsory Acquisition of Property Law, 1962 (Law No. 15 of 1962) on the ground that the said acquisition had not as yet been attained. The respondents by letter dated the 7th September, 1966 replied that they did not agree with the contents of the said letter of the applicant and they could not accept their claim. The opposition to the said recourse was filed setting out the relevant grounds of Law on which the claim of the applicants was opposed. In the statement of facts the respondents stated *inter alia* that they had been actively engaged on the project of the municipal market since the date of the acquisition and had engaged for that purpose an architect to prepare the necessary plans and after referring to several steps taken they concluded by saying that it could be seen from such steps that far from the purpose having become non-attainable they were about to commence fulfilling the purpose of that acquisition.

The case came up for hearing on the 27th March, 1967 and counsel appearing for both sides addressed the Court on the issues. It was then adjourned for the purpose of calling evidence. As the record goes, by letter dated the 21st July, 1967, counsel appearing for both sides informed the Chief Registrar of the Supreme Court as follows:

> "Please take notice that the above Recourse has been settled out of Court as follows:
>
> The Respondents have agreed and undertaken the obligation to pay to the Applicants the sum of £4,500.000 mils (Four Thousand and Five Hundred pounds) in consideration for the withdrawal by the Applicants of this Recourse which shall be deemed to have been settled accordingly.
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> In view of the above promise and undertaking this Recourse is hereby withdrawn and we pray that it be dismissed with no order as to costs."

Thereupon the case was struck out with no order as to costs.

The applicants through their then advocates Messrs. M.M. Houry and Co., by letter dated the 19th October, 1968, (*exhibit* "Q") asked the respondents to offer to them the said properties in accordance with the Law and the Constitution. The applicants were themselves prepared to return the £20,000.- and £4,500.- which they had received as compensation and by way of settlement respectively from the Municipality. It was mentioned therein that the Municipality had not put the land so far to the uses for which it had been expropriated but on the contrary the land had been put to unauthorised uses; it was also added that in the meantime the Municipality had accepted a large area of land in Limassol (Ayia Philaxi) from Mr. Petros Tsiros, as gift, for the purpose of establishing the projected market and parking grounds for which their clients' land had been acquired, which virtually meant—as stated in the said *exhibit*—that the Municipality had abandoned the scheme for which their clients' land was acquired.

The respondents, by letter through their advocate dated the 8th November, 1968, (*exhibit* "F"), replied to the aforesaid letter and referred to the settlement reached between them and the Municipality, and to the written notice dated the 21st July, 1967, signed by both counsel and on the basis of which Recourse No. 286/66 was withdrawn. It appears that sometime between 1973-1974 the respondents built the wholesale market for perishable goods with parking space for vehicles in the outskirts of the town on the property donated by Mr. Tsiros. There is a further letter dated the 6th March, 1978, (*exhibit* "J") which was addressed to the respondents on behalf of the applicants through one of the present counsel, in which after reference is made to the compulsory acquisition of the property in question it is stated:

> "In accordance with the provisions of the Constitution immovable property that has been acquired compulsorily can be used only for the purpose for which it was so acquired. In addition, the acquiring authority is under obligation to offer the immovable property to its owner, if within three years from the date of the acquisition the purpose of the acquisition has not been attained.
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> In the case of the immovables of the late Takis Epaminonda, the purpose of the acquisition has neither been

nor in the future can be attained because the project which was programmed to take place in the space of this immovable property has already been executed in another part.

As it is known in 1966 the heirs of the late Taki Epaminonda asked the return of the aforesaid immovables and when the Municipality refused they filed a recourse in the Supreme Court. In the opposition filed in that recourse, the Municipality of Limassol alleged that its intention was to attain the purpose of the acquisition and based its case on the allegation that the purpose continued to be attainable. As you know that recourse was withdrawn after the payment to the applicants of additional compensation of £4,500.-.

To-day when it is unquestionable that the purpose of the acquisition has been definitely abandoned, we believe that the Municipality is under obligation to return the properties to their lawful owners. For this purpose, in accordance with the Constitution, we ask you to offer the property to our clients without any delay and we inform you that they are ready to return the whole compensation they collected from the Municipality."

On the 15th March, 1978, counsel for the respondents sent the following letter (*exhibit* "K") in reply thereto.

"..... Your letter dated 6th March, 1978, addressed to the Municipal Committee has been given to me with the instruction that in reply thereto I confirm my letter addressed to you, dated the 7th September, 1966 and my letter to Messrs. M.M. Hourry and Co., advocates of your clients, dated 8th November, 1968, copy of which I attach hereto."

Reference has already been made to the contents of the letter of the 8th November, 1968, (*exhibit* "F"). It may be added, however, here that by that letter the respondents were rejecting the claim of the applicants for the return to them of the acquired properties. The stand of the respondents was obvious. The payment of the £4,500.- compensation in return of which the applicants withdrew their recourse No. 286/66 took away from the applicants, according to the respondents, the right to claim

the return of the said properties. The matter however, did not rest at that.

A further letter, dated the 16th September, 1978, was addressed to counsel of the respondents. After referring to the reasons for the delay in answering the letter of the respondents of the 15th March, 1978, (*exhibit* "K") and that they understood the stand of the Municipality as contained in their letter of the earlier one to Messrs. Houry, attached thereto, as being a matter of res judicata, because the same dispute was the subject of recourse No. 286/68, which was settled and withdrawn, they went on to say the following:

"We believe that our clients are not bound by the settlement reached in recourse No. 286/68 for the following reasons:

(a) the *sub judice* dispute in the aforesaid recourse was the omission of the Municipality to attain the purpose of the acquisition within three years from the date of the compulsory acquisition of the property. The objection of the Municipality was based on the allegation that the purpose continued to be attainable. Today it is clear that this purpose is not attainable once the whole project was executed in another place.

(b) In section 15 of Law No. 15 of 1962 there are two instances when the acquiring authority must return the property to its owner. The first instance is when the purpose for which the acquisition was made is not 'attained' and the second when 'the attainment of such purpose was abandoned by the acquiring authority'. We do not think that there is room for arguing that in fact in the case we are discussing the purpose has been abandoned. The claim, therefore, of our clients is based on this basis which was not the object of the previous proceedings.

(c) But in addition to the aforesaid we have the fundamental provision of paragraph 5 of Article 23 of the Constitution and of Article 14 of Law 15 of 1962 which prohibits the use of property which was acquired for a purpose other than that for which the acquisition was made. Is there an allegation that the property for

which we are arguing has not been acquired by the Municipality by means of compulsory acquisition?

For all the aforesaid reasons we apply that our clients have a right to take back their property and return the whole amount which they collected.

For that reason we ask you to inform us which is the final decision of the Municipality so that we shall advise our clients accordingly."

Counsel for the respondents replied on the 29th September, 1978, (*exhibit* "H") that although he was of the view that the applicants did not have the rights mentioned in the last paragraph of the aforesaid letter, yet, he would refer same to the Municipal Committee and would inform them accordingly about the latters decision.

Finally, by letter dated the 4th December, 1978 (*exhibit* "I") counsel for the respondents informed counsel for the applicants that the Municipality of Limassol saw no reason to revert on this subject, i.e. of the heirs of Takis Epaminonda, which had been settled already since many years.

On the 15th February, 1979, applicants filed the present recourse and the first point to be considered is whether same is out of time.

It was argued on behalf of the respondents with regard to this point that this is a case of a definite and final decision or a definite and final omission, which is distinguishable from a continuing omission, and that as from the date that same came to the knowledge of the interested person the 75 days period started running.

In elaborating on this stand, counsel for the applicants referred me to the case of *Hassan Moustafa* v. *The Republic*, 1 R.S.C.C. p. 44, which was found to be an instance of an omission of a continuing nature and therefore that application was not time-barred as distinguished from a non-continuing omission. Then reference was made to the case of *Georghiades* v. *The Republic* (1966) 3 C.L.R. 153, where after referring to the particular facts of that case, Triantafyllides, J., as he then was, said at p. 168:

"I have now to decide in this Case whether there exists

a decision of Respondent, refusing the approval of the appointment and salary of Applicant, or only an omission to deal with the question of such approval under the relevant legislation.

On the totality of the material before me I have come to the conclusion that Respondent is only guilty of an omission to exercise his powers,....."

The *sub judice* decision therefore in that case was treated not as a decision taken in the course of the exercise of certain statutory duties, but only as a decision not to exercise such powers for the time being. The Judge then went on to deal with a number of cases relied upon by counsel in support of his argument that that was a decision and not an omission and said the following:

"The first one is that of *Ozturk and The Republic* (2 R.S.C.C. p. 35): I consider that this case is different from the present one, because the Respondent there, the Public Service Commission, had embarked upon exercising its relevant powers and it was found that an 'act' had resulted, through the deadlock which supervened amongst its members, preventing it to reach a decision with the necessary majority. The second case is that of *Marcoullides and The Greek Communal Chamber* (4 R.S.C.C. p. 7): That is again different because in that case there existed a decision not to appoint the Applicant, and not merely an omission to decide whether to appoint her or not. Lastly, counsel has referred me to *Vafeadis and The Republic* (1964 C.L.R. p. 454): There, the refusal of the Respondent was not a refusal to exercise the relevant powers—as in this Case—but a refusal to transfer Applicant i.e. a refusal decided in the exercise of the relevant powers."

The next case referred to was that of *Mourtouvanis* v. *The Republic* (1966) 3 C.L.R. p. 108, in which the applicants requested the Customs to return to them certain goods and the Customs simply acknowledged by a card the receipt of that request. It was held that the nature of the complaint in respect of which that recourse had been made was an omission to return the disputed goods and the exemption certificate claimed by those applicants and such omission was still continuing on the

date on which that application was filed and that the matter should be regarded as a continuing omission for the purpose of paragraph 3 of Article 146 of the Constitution and therefore the recourse was not out of time.

Then reference was made to the case of *Pikis* v. *The Republic* (1965) 3 C.L.R. p. 131 which was a claim for offering back to the applicant for sale land compulsorily acquired. As it appears therefrom, that was a case where there had only been a refusal to attend to and decide applicant's request without the possibility arising of implying also a refusal of the substance of such request, and that that refusal to consider the applicant's request in the circumstances in which it had taken place, was not a new confirmation of a past decision of Government in the matter a novus actus with its own legal consequences, because it was the first time that that applicant was putting forward his claim under the relevant legislation and that such refusal to consider it resulted in preventing the applicant from pursuing further his claim in the administrative field, causing him thus in any case the detriment that would ensue if it was rejected on the merits.

I was also referred to the case of *Papasavva* v. *The Republic* (1973) 3 C.L.R. p. 467 where the question of the termination of a continuing omission by re-examination of the matter was dealt with and that the 75 day period commenced to run from the date that a non-continuing omission or the termination of a continuing one comes to the knowledge of the person making the recourse. In that case, after referring to what was said in *Hassan Moustafa and The Republic of Cyprus* (*supra*) I had this to say at pp. 475-476:

> "It is a prerequisite, therefore, to the non-commencement of the running of the time provided for by Article 146.3 of the Constitution as enunciated in the aforementioned judgment of the Supreme Constitutional Court, that the omission be of a continuing nature. Otherwise the period commences to run from the date that a non-continuing omission or when a re-examination takes place comes to the knowledge of the person making the recourse.
>
> It appears, however, that the present case is one where by the re-examination of the matter the continuing nature of the omission was terminated. This was done by the decision taken by the Chief of Police in the light of the

judgment of the Supreme Court in Recourse No. 21/69 by the 1st May, 1970 and as a result of which *exhibit* 3 hereinabove set out, was addressed to the Nicosia Divisional Commander of Police."

This approach was upheld by the Full Bench of this Court on appeal reported under the same name in (1979) 3 C.L.R. p. 563 where Triantafyllides P., in delivering the judgment of the Court said at p. 568:-

"It has often been pointed out by this Court that when a decision refusing to do something is taken it cannot be said that it amounts, also, to an omission to do the same thing (see, *inter alia*, *Vafeadis* v. *The Republic*, 1964 C.L.R. 454).

We are of the view, on the basis of the facts of the present case, that the decision of the Chief of Police of May 1, 1970, constituted a refusal to reappoint the appellant as an acting police sergeant and that it could not be, therefore, treated as an omission of a continuing nature to do so; and, consequently, that it was rightly held that the time of seventy-five days provided for under Article 146.3 of the Constitution began to run as from August 6, 1970; thus, the appellant's recourse No. 431/72 was out of time."

And then at p. 569:

"In trying to persuade us that this is a case where there exists a continuing omission counsel for the appellant has referred, *inter alia*, to the case of *Mustafa* v. *The Republic*, 1 R.S.C.C. 44, where the following were stated (at p. 47):-

'Leaving aside 'decisions' or 'acts', with which the Court is not concerned in this, case, and dealing only with 'omissions', a distinction must be made between a non-continuing omission (e.g. the failure of a competent authority to issue a permit in respect of something to be done on a particular date) and an omission which is of a continuing nature.'

We are of the view that the *Mustafa case* is clearly distinguishable on the basis of its particular facts from the present case and that the abovequoted dictum of the Court in that

case has to be read and understood by reference to the said facts,....."

Counsel for the applicants has argued that from the moment the respondents decided not to go ahead with the project at all, new facts and circumstances came into being, which created a new obligation on the respondents and unconnected with the previous obligation to attain the object within a certain time, that is a new obligation to hand the property back to the applicant. That obligation was a legal one and not a matter of discretion at all.

I was referred to the case of *Ktenas and another* (*No.* 1) v. *The Republic*, (1966) 3 C.L.R. 364. That was a case of request for the return of property which had previously been compulsorily acquired and had not been utilised for the purpose for which it was so acquired. In the course of his judgment Triantafyllides J., as he then was, distinguished that case from the *Pikis case* (*supra*) as there could be no question of an omission on the part of the Director of Lands and Surveys, to whom the request was made to deal with same as compared with the *Pikis case*, where such a request was found not to have been properly examined. Relying on the *Ktenas case* counsel for the applicants argued that the obligation of the Municipality to return the property after the abandonment of the project for which it had been acquired was not an obligation to take a decision but an obligation to hand over the property. The failure of the Municipality in the present case to offer the subject property back, irrespective of the exchange of letters, is an omission on their part to do what they were bound to do under the express provisions of the Law and the Constitution and they could not escape from that by saying that they had already replied and their reply amounted to a decision which was of an executory nature and so the time limit of 75 days provided for under Article 146.3 of the Constitution had lapsed and therefore the return of the property could not be claimed. He maintained that the non return of the property amounted to a continuing omission and therefore the recourse was not out of time. He then went on to make a distinction between an omission to perform a legal or constitutional duty and an omission to exercise a discretion and referred to the cases of *Demetriades & Son* v. *The Republic* (1968) 3 C.L.R., p. 34; *The Police Association & Others* v. *The Republic* (1972) 3 C.L.R., p. 1. He argued that in the former set

of cases the time limit could not start running in any event even when there is a refusal to perform such legal or constitutional duty, which was omitted to be performed, as distinguished with the legal position with regard to refusals to exercise a discretionary power which was being omitted to be exercised. He also referred to the *Pikis and Papasavvas* cases (*supra*) and the other cases with which I have already dealt.

On the totality of the aforesaid authorities and bearing in mind the facts and circumstances of this case and in particular relying on the authority of *Papasavvas case* (*supra*) as decided by the Full Bench of this Court, I have come to the conclusion that this recourse is out of time as, to say the least, the decision of the respondents communicated to the applicants by their letter of the 15th March, 1978 (*exhibit* "K") rejecting the claim of the applicants for the return to them of the acquired property on the ground that the matter had been settled earlier amounted to a definite refusal with its own legal consequences, same should have been challenged by the applicants under Article 146 of the Constitution as an executory act and as from the communication of which to them the mandatory time of 75 days prescribed by para. 3 of Article 146 of the Constitution started running.

I do not subscribe to the view that because there exists a legal and constitutional obligation to return properties to their owners when the purpose, for which same had been acquired compulsorily, has not been attained, such an obligation which constitutes a continuing omission can be challenged by a recourse indefinitely and that a definite express refusal by the administrative organ concerned, as in the present case, to perform what was omitted, does not set the time limit, prescribed by para. 3 of Article 146 of the Constitution, in motion.

Moreover, no different legal principles, regarding the commencement of the running of the time within which a recourse may be filed govern an omission to perform a legal or constitutional duty, and different ones govern an omission to exercise a discretion when in either instance there supervenes an express definite refusal to perform what until then had been omitted to be done.

For all the above reasons this recourse should fail as being filed out of time. In view of this result I need not proceed to examine the merits of the recourse.

In the result the recourse is dismissed but there will be no order as to costs.

Application dismissed. No order as to costs.