THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. MR. JUSTICE G.M OKELLO, JA;
HON. MR. JUSTIC2 J.P. BERKO, JA; AND
HON. MR. JUSTICE S.G. ENGWAU, JA.

CIVIL APPEAL NO.43 OF 1997

JAFFER BROTHERS LIMITED::APPELLANT

VERSUS

MOHAMED MAGID BAGALALIWO & 2 OTHERS:::::::::::::::::::::::: ;RESPONDENTS

[Appeal from the Ruling and Orders of the High Court at Kampala (Kato J. as he then was) dated 18th August, 1997.)

JUDGEMENT OF G.M. OKELLO, JA.

This appeal is against the Ruling and Orders of the High Court (C.M. Kato J. as he then was) dated 18th August, 1997, in Civil Suit No. 31 of 1995, whereby he dismissed with costs the appellant's Suit on the ground that it was time barred and disclosed no cause of action against the respondents. He held that the 1st Respondent's counter-claim had abated and awarded costs thereof to the respondents.

The background to this appeal may be stated simply, that the appellant is a Ugandan incorporated limited liability Company whose shareholders are all of Asian extraction. All the shareholders fled Uganda in 1972 following the expulsion of Asian from Uganda in 1972. At the time of expulsion, the appellant was the registered proprietor of Plot No. 9 HILL LANE, KOLOLO, KAMPALA, comprised in Lease hold Register Volume 354 Folio 17, which for convenience, I shall henceforth refer to as the suit property. Subsequently, Government of Uganda (3rd respondent) took over the suit property and by virtue of Decree No. 27 of 1973, vested it in the Departed Asian Properties Custodian Board (DAPCB) (2nd respondent) for management. This Decree 27 of 1973 came into force on 7/12/1973. Sometime in 1977, the DAPCB sold the suit property to one Francis Nyangweso who in turn transferred it to Bagalaaliwo, (1st respondent). Mr. Bagalaaliwo
was on 21/4/80 registered as the new proprietor of the suit property. By a consent judgment dated 18/11/87 between Bagalaaliwo and the Attorney General in High Court Civil Suit No. 310 of 1987, the suit property was decreed in favour of Bagalaaliwo.

In November, 1993, however, the appellant obtained from the Minister of State for Finance and Economic Planning in-charge of Custodian Board (DAPCB), a letter dated 7/12/93, Annexture 'B' to the amended Plaint, authorizing the appellant to repossess the suit property. This letter was clarified by a subsequent letter dated 28th September,, 1994, Annexture 'F' to the amended plaint. Armed with these letters, the appellant filed the original suit against Mohammed Magid Bagalaaliwo and Ronald Muwenda Mutebi to secure inter-alia, vacant possession of the suit property. The Plaintiff later withdrew the claim against Ronald Muwenda Mutebi. At the instance of Bagalaaliwo, DAPCB and the Attorney General were joined as defendants.

In his amended Written Statement of Defence, the 1st respondent countered the appellant's claim by a counter claim in which he claimed inter alia, compensation as an alternative remedy against the 2nd and 3rd respondents.

When the suit came for hearing, the respondents raised three preliminary objections, namely:

[1] that the suit was time barred, it having been instituted allegedly well after 12 years from the date when the cause of action occurred thus violating Section 6 and 7 of Limitation Act Cap. 70;

[2] that the plaintiff has no locus standi in the suit since it does not hold any valid certificate of repossession;

[3] that the suit discloses no cause of action against all the defendants.

The trial Judge heard the objections and upheld all the grounds and dismissed the appellant's suit. Hence this appeal.

There are seventeen grounds of appeal namely:

[1] The learned trial Judge erred in law in finding that the time began to run against the plaintiff in respect of the suit property from 7/12/73 as far as the second and third defendants are concerned.

[2] The learned trial Judge erred in law in holding that time began to run against the plaintiff from the moment the first defendant acquired the suit property from Major General Nyagweso in 1980 and not from 7/12/93.

[3] The learned trial Judge erred in law in concluding that in the absence of any disability on the part of the plaintiff or fraud on the part of the defendants in the plaintiff's pleadings, the plaintiff's claim was time barred in respect of the defendants.

[4] The learned trial Judge erred in law in finding that Annexture 'B' to the Amended Plaint was a mere administrative letter outside the ambit of the Expropriated Properties Act (E.P.A) No. 9 of 1982 and cannot be used by the plaintiff to recover the suit property.

[5] The learned trial Judge erred in law in finding that the Plaintiffs have never been issued with a Certificate Authorizing Repossession of the suit property.

[6] The learned trial Judge erred in law in concluding that since the plaintiff was not issued with a Certificate of Repossession of the suit property, they had no locus standi to sue the three defendants on the matter concerning the suit property.

[7] The learned trial Judge erred in law in failing to find that the consent judgment in HCCS No. 310 of 1987 (Mohamed M. Bagalaaliwo Vs the Attorney General) was null and void since it contravened the express provisions of E.P.A. No. 9 of 1982.

[8] In the alternative but without prejudice to ground 7 above, the learned trial Judge erred in law in failing to hold that the plaintiff was not bound by the consent Judgment in HCCS No. 310 of 1987, since they were not parties to the said suit and consent Judgment.

[9] The learned trial Judge misdirected himself when he concluded that the effect of the consent Judgment in HCCS No. 310 of 1987 was to remove the Suit Property from the ambit of the E.P.A. No. 9 of 1982.

[10] The learned trial Judge erred in law and fact when he assumed that when the Attorney General Consented to Judgment in HCCS No. 310 of 1907 contrary to Sections 1 (2) of the E.P.A. No. 9 of 1982 which he had pleaded, the Attorney General must have realized that the Act was not applicable to the Suit Property.

[11] The learned trial Judge erred in law and fact in assuming that the Attorney General cannot consent to an illegality.

[12] The learned trial Judge erred in law and in fact in holding that even if the provisions of S. 1 (2) of the Expropriated Properties Act 1982 were applicable to the Suit Property the first respondent remained the undisputed owner of the Suit Property as long as the consent Judgment in HCCS No. 310 of 1987 stands.

[13] The learned trial Judge erred in law in holding that the Plaintiff had no vested interest in the property since they had no legally recognized Certificate of Repossession.

[14] The learned trial Judge erred in law in holding that the plaintiff did not have any cause of action against any of the three defendants.

[15] The learned trial Judge erred in law in upholding the defendants' preliminary objections and dismissing the suit with costs.

[16] The learned trial Judge erred in law by awarding costs of the counter claim to the defendants when they had not addressed Court on costs of the counter claim.

[17] The trial Judge generally failed to properly evaluate all the pleadings of the parties and thereby reached wrong decisions and dismissed the suit.

Before I consider the merits of these grounds, there was an oral application by Counsel for the 1st respondent, seeking leave to argue ground, other than the ones upon

which the trial Judge relied, to affirm the decision of that Court. Counsel for the 2nd and 3rd respondents had no objection to the application being granted.

On the other hand, Counsel for the appellant, opposed the application. We allowed the application whilst reserving our reasons which I propose to give now.

Mr. Serwanga learned Counsel for the 1st respondent's argument was that he desired to contend at the hearing that the decision of the High Court should be affirmed on the ground other than that upon which High Court relied. The ground he sought to argue was that:

> "The Suit was time barred in as far as the appellant did not follow the procedure under Expropriated Properties Act, 1982 in time.'

He blamed his failure to give the Notice of that ground under Rule 91 of the Rules of this Court, on oversight and numerous interlocutory applications which distracted his attention.

Counsel for the appellant gave the following three grounds for his opposition:-

[l] That the application should have been made formally before a single Judge in accordance with Rule 52 (2) read together with Rule 42 both of the Rules of this Court.

[2] The Notice was not lodged within the period prescribed in Rule 9 (2) of the Rules of this Court and was too general to comply with Rule 9 (1)

[3] That the proposed ground was a new matter which was neither raised nor canvassed before the trial Court.

On those grounds he prayed that the application be rejected.

In a brief response, Mr. Serwanga contended that the application could be made orally. He cited **Civil Appeal No. 12 of 1992, GOUALDAS LAXMIDAS TANNA VS SR ROSEMARY MUNINZA AND DAPCB (Sc) (unreported).**

I agree with Mr. Walubiri, Counsel for the appellant, that Rule 91 of the Rules of this Court provides for procedure and time limit for giving Notice of grounds other than or additional to those relied on by the trial Court, for affirming the decision of that Court. I am however, persuaded by the decision in TANNA'S case (supra) by which I am bound, that under certain circumstances, oral application of this type can be allowed to argue ground other than or additional to those upon which the trial Court relied, to affirm the decision of that Court.

In that case, the appellant had in 1982 bought the Suit Property, Plot 12 Hannington Road in Kampala from a Public Auction ordered by UCB as the Mortgagee to recover a loan. The original owner of the Suit Property who had mortgaged it had left the Country as a Departed Asian" following the expulsion of Asians from Uganda in 1972 before he repaid the loan. Government of Uganda expropriated the Suit Property and by virtue of Decree 27 of 1973 vested the same in the DAPCB for management The appel1ant became the registered owner of the Suit Property in 1986. In the meantime the Suit Property was occupied by the 1st respondent as a tenant of the DAPCB. She refused to recognize the Appe1lant's ownership over the Suit Property and resisted his attempt to evict her. Consequently, the appellant sued the 1st respondent and the DAPCB in the High Court claiming inter alia vacant possession. At the hearing, the question of the effect of Section 1 of the Expropriated Properties Act, 1982 on the sale of the Suit Property to the

appellant was raised and argued. The trial Judge dismissed the appellant's suit on a different ground other than on the basis of Section 1 of the Act.

On appeal, Counsel for the respondent sought orally in the cause of the hearing, leave to argue the effect of Section 1 of Expropriated Properties Act on the sale of the Suit Property to the appellant as a ground for affirming the decision of the trial Court.

In an unanimous decision, Wambuzi, CJ, said at page 4 of his judgment that:

> "It would have been preferable for Counsel for the respondent to have given Notice under Rule 91 of the Rules of this Court of grounds for affirming the decision of the superior Court on grounds other than or additional to that relied on by that Court. However, in the circumstances of this appeal, we allowed learned Counsel for the respondents to put forwards arguments relating to Section 1 of the Expropriated Properties Act, 1982 to enable the Court to reappraise the issues and decide the real issues between the parties."

The circumstances of that appeal as contained on page of the Judgment of Oder JSC were:-

"Both the respondents in their Written Statement of Defence relied on the effect of that Act as the ground for resisting the appellant's claim. In the agreed facts, the second respondent reiterated its contention that the transaction between the Uganda Commercial Bank and the appellant was nullified by the provisions of the Act."

The gist of the above circumstances is that the point sought to be argued was not new. It was pleaded and canvassed at the trial. It was central to the case.

The above principle, in my view, applies to the case before us as the circumstances of the two cases are similar. In the instant case, the issue of procedure to repossess property under the Expropriated Properties Act was pleaded by the second respondent in paragraphs 5 and 6 of its Written Statement of Defence. It was also canvassed at the trial by Counsel for the second respondent. He argued at the trial that the Suit Property was not returned to the appellant under

the Expropriated Properties Act, 1982. This ground is therefore not new. It is also central.to this appeal.

It was therefore necessary that Counsel for the respondent present their arguments relating to that procedure to enable the Court to consider the point and effectually determine the real issue between the parties. It was for this reason that we allowed the oral application.

I now turn to the grounds of appeal. The appeal was argued on a broader question whether the appellant applied to repossess the Suit Property under the Expropriated Properties Act, 1982 in time.

The argument put forward for the respondents, as I understand it, was, that the appellant did not apply to repossess the Suit Property within the ninety days prescribed under the Act and did not comply with the procedure prescribed for such application. In Counsel's view, Annexture 'B' was not issued under the Act as it did not refer to application nor did it even talk of returning property and was not signed by the Minister responsible for Finance. For these reasons, Mr. Sekandi, Counsel for the second respondent, submitted that the suit was time barred.

Counsel for the 1st and 3rd respondents associated themselves fully with the submission of Counsel for 2nd respondent.

On the other hand, Counsel for the appellant contended that Annexture 'B' was issued under the Act to return the Suit Property to the appellant, a former owner. He submitted that as the substance of Annexture 'B' and 'F' to the amended Plaint tallies with the purpose of the Act, which is to return the properties to their former owner, Section 5 (1) of the Act and Regulation 10 (3) of Regulations 1983 (S. 1 No. S of 1983) should be interpreted liberally so that Annexture 'B' should be regarded as a Certificate of Repossession.

Section 3 of the Expropriated Properties Act, 1982 sets time limit within which a former owner may apply to repossess .his/her/its property which had been expropriated by the Military Regime and vested in the Government under Section 1 of the Act. It reads:-

> "Any former owner of the property or business vested in the Government under Section 1 of this Act, may within ninety days of the commencement of this Act, apply to the Minister in writing and in such form as may be prescribed for repossession of the property or business."

The effect of the above Section is that a former owner who wished to repossess his/her/its property has to submit his/her/its application on a prescribed form within ninety days from the date when the Act came into force. The Act came into force on 21/2/83 by Statutory Instrument No. 6 of 1983. By a simple calculation, the ninety days ended on 22/5/1983.

However, there was General Notice No. 88 of 1993 issued by the Minister responsible for Finance and published in Uganda Gazette, Vol. LXXXVI No. 20 of May 13th 1993, and a Statutory Instrument No. 1 of 1994. The Statutory Instrument referred in its preamble to the General Notice. The General Notice invited former owners, both citizens and non-citizens whose properties had been expropriated by the Military Regime to apply up to 30/10/93, to repossess them. The General Notice and the Statutory Instrument in effect amended Section 3 of the Expropriate Properties Act, 1982 by extending the ninety days period prescribed in the Section. None of the Counsel for the parties had alluded to these documents when they argued the appeal. We therefore invited them to address us on the effect of the two documents.

Mr. Sekandi, learned Counsel for the 2nd respondent, argued that the General Notice was issued by the Minister as Chairman of the DAPCB under Decree 27 of 1973 in a mistaken belief that he had powers under Section 17 of the Decree to return properties of citizens. Yet, that Section 17 of the Decree had been repealed ten years ago when the Expropriated Properties Act came into force. And that the distinction between citizens and non citizens had been abolished from the day of the judgment of the supreme Court in **The Registered Trustees of Kampala Institute Vs DAPCB - Civil Appeal No. 21 of 1993 (unreported).** According to that Judgment, all expropriated properties, whether belonging to citizens or non-citizens now fall under the Act. In Counsel's view, the Minister has no power under the Act to issue such a Notice or to amend any provision of the Statute. That the General Notice is a mere administrative "confusion" without any legal effect on the case in hand. He cited **TARMAL INDUSTRIES LT VS COMMISSIONER OF CUSTOMS AND EXCISE (1986) EA 471**. He concluded that it was a misconception on the part of the Minister to have referred to the General Notice in the preamble of the Statutory Instrument No. 1 of 1994.

Counsel for the 1st and 3rd respondents associated themselves fully with the above submission.

From the outset, I agree with Counsel for the respondent that as from the date of the judgment of the Supreme Court in **The Registered Trustees of Kampala Institute (supra),** all expropriated properties whether belonging to citizens or non- citizens of Uganda at the time of expropriation, now fall under the Act. I am however, unable to agree that the General Notice was issued by the Minister under Decree No. 27 of 1973 nor that he did so under a mistaken belief that he had powers to return expropriated properties of citizens under Section 17 of the Decree. There is no suggestion that that was the case. Reference to Decree No. 27 of 1973 in the General Notice was to show the origin of the DAPCB which manage the expropriated properties. The Minister must have known of the repeal of that provision because he never referred to it in the Notice. He must have, wrongly or rightly, issued the Notice under the Act since he referred to a provision of the Act in the Notice.

The salient question to be answered here, in my view, is whether the Minister has powers under the Act to issue such a General Notice which has the effect of amending a provision of the Act?

Mr. Bamwine, learned Counsel for the appellant, contended that the Minister has powers under Section 8 of the Act to issue such a Notice to enable him receive late applications and deal with them to carry out the purpose of the Act. His argument was that Expropriated properties Act being a remedial Statute, must be given liberal construction to achieve the purpose of the Act. In Counsel's view, Sections 3 and 8 read together, would show that Parliament did not intend, that Section 3 should be mandatory. He argued, that these two Sections be interpreted liberally. He cited **SECRETARY OF STATE FOR TRADE AND INDUSTRY VS LANGRIDGE (1991] 3 ALLER 591** as authority for the principles for determining whether a Statutory provision is mandatory or directory.

I am persuaded by the argument that Expropriated Properties Act being a remedial Statute must be interpreted liberally to give effect to the purpose of the Act. To adopt a strict interpretative approach canvassed by Counsel for the respondents, would only help to perpetuate the mischief which the Statute intended to combat and to provide no remedy to the former owners for wrong done to them by the Military Regime. This is infact what Odoki JSC as he then was, said in the

unanimous decision in **The Registered Trustees of Kampala Institute (supra).** He said on page 6 of his judgment that:-

> "The Expropriate Properties Act is therefore a remedial Act. I agree that such a Statute must construed liberally and not restrictively. To do otherwise would be to perpetuate the mischief intended to be redressed and not to provide a remedy to the injustice which was occasioned by the Military Regime to the former owners. It would be wrong and unjust to return property which the Military Regime took over lawfully and refuse to return property which was illegally taken over. This Court cannot approve of an interpretation which would result in such an injustice and which runs contrary to the plain meaning of the words and the purpose of the Act."

I have perused the **SECRETARY OF STATE FOR TRADE AND INDUSTRY (SUPRA)** to which Counsel for the appellant referred us. That case concerned interpretation of Section 16 (1) of the Company Directors Disqualification Act, 1986. The Section requires that Notice of Intention to apply for disqualification order 'shall' be given to the person against whom the order is sought not less than ten days before filing the application. The Secretary of State gave to Mr. Langridge less than ten days Notice. The question before Court was whether the statutory provision for ten days Notice period is mandatory or mere directory. What is the effect of failure to given the ten days Notice?

The Court adopted the following principles from the **Smith's Judicial Review of Administrative Action (4th Edn, 1980 pp 142- 143** to resolve the questions before it:-

> "When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The Court must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity• of what has been done (though in some cases it has been said there must be "substantial compliance" with the Statutory provisions if the deviation is to be excused as a mere irregularity) .

> Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purposes of enactment must be considered and one must assess “the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act.” In assessing the importance of the provision, particular regards may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by Statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural, or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be cause by holding them to the mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.”

I find the above principles relevant and also persuasive. I shall adopt them to handle the question in hand.

The purpose of the Expropriated Properties Act, 1982, is contained in its long title or preamble which reads:-

“An Act to provide for the transfer of the properties and businesses acquired or otherwise expropriated during the Military Regime to the Ministry of Finance to provide for the return to the former owners or disposal of the same by Government and to provide for other matters connected therewith or incidental thereto.”

> The purpose of the Act is in a nutshell to provide for the return to the former owners of the properties that had been expropriated during the Military Regime.
>
> Section 3 of the Act which is said to have been disregarded was set out earlier in this judgment. It is intended to urgently ascertain former owners and the properties they claim repossession of, to enable government to deal with their matters speedily. The Section is

in my view, procedural in nature. It is intended to benefit the former owners and to protect them and government against fraudulent claimants. A strict interpretation of the provision as Counsel for the respondents canvass would produce substantial prejudice to the former owners for whose benefit the provision was intended.

It would result in former owners not receiving back their properties. That would perpetuate the mischief Parliament intended the Act to combat. The effect of that interpretative approach is to deny the administrative scheme established by the Statute enough time to deal with the load of work to implement the purpose of the Act. I cannot imagine Parliament to waste so much time and public funds to make this Act if its objectives were not to be carried out.

The Section cannot be construed restrictively. I would interpret the word 'may' in Section 3 to make the Section directory so that non compliance with it, is only an irregularity. That is the only sensible meaning which Parliament must have intended. The provision to Section 8 gives the Minister discretion to give direction as he deems fit, if he is satisfied that retention of the property would be prejudicial to the minority interest in a registered enterprise or business. The provision strengthens the view that Parliament did not intend that Section 3 be mandatory but directory.
In view of the above, I am satisfied that the Minister has powers under Section 8 of the Act to issue the General Notice and there was no misconception to have referred to the Notice in the preamble of Statutory Instrument No. 1 of 1994. He is empowered so to do under Section 15 (b) of the Act.

I now revert to the argument that the appellant did not apply to repossess the suit property under the Act in time. For this argument to succeed, it had to be shown that the appellant's application was submitted after the 30th day of October, 1993. The onus is on the respondent who alleged the lateness of the appellant's application. Unfortunately no such facts had been shown.

Annexture 'B' was issued on 7/12/93. It was explained by a subsequent letter dated 28/9/94 (Annexture 'F').

It was argued that Annexture 'B' was not issued under the Act because it did not refer to application, did not even talk of return property and was not signed by the Minister responsible for Finance.

I think that these are matters of technicality relating to form which should not override substance. If the substance of the letter complies with the intent and purpose of the Act it should be given effect. To do otherwise would be going contrary to Article 126 (2) (e) of the Constitution which provides that "Substantive justice shall be administered without undue regard to technicalities." This is also in line with the provision of Section 43 Interpretation Decree No. 18 of 1976 which provides that: -

> "Where any form is prescribed by any Act or Decree, an instrument or document which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance of such instrument or document or which is not calculated to mislead."

Annexture 'F' which explained Annexture 'B' reads in part as follows: -

"28th September, 1994.

M/S Kwesigaba, Bamwine and
Company Advocates,
KAMPALA.

RE: PLOT 9 HILL LANE, KOLOLO, KAMPALA
LEASEHOLD REGISTER VOLUME 354 FOLIO 17.

I acknowledge receipt of your letter CIV/75/94 dated 6th September, 1994 with regard to the above subject. For a long time properties of Uganda citizens have been returned using letters of repossession while these of non-citizens are issued Certificates. **Therefore the letter dated 7th December, 1993 is a bona fide document authorizing the owner to repossess his property."** [emphasis mine)

It is clear from the above that the Minister intended in the letter dated 7th December, 1993 which is Annexture ‘B’, to return the Suit Property to the appellant. That is what the purpose of the Act is and that is what Section 5 (1) thereof and regulation 10 (3) of the Expropriated Properties (Repossession and Disposal) Regulations, 1983 (S. 1 No. 6 of 1983) are intended to accomplish. Deviation of Annexture ‘B’ from Form (3) prescribed in Regulation 10 (3) above should not render Annexture ‘B’ void since its substance is not affected. It was meant, to return the property to the former owner.

The issuance of Annexture B and F shows that the Minister was satisfied under Section 5 (1) of the Expropriated Properties Act, 198 2.

I am satisfied that the appellant applied and obtained Annexture B which amounts to a Certificate of Repossession under Expropriated Properties Act, 1982, in time. The Suit is
therefore not time barred.

As I have held above, Annexture B and F constitute a Certificate of Repossession. The Certificate immediately clothed the appellant with equitable right over the Suit Property, pending the transfer of the legal right by Government on registration. Registration is a formality as Government is bound under the Act to transfer the property to former owner with a Certificate of Repossession. The equitable right enabled the appellant to serve a quit Notice to the 1st respondent who occupies the Suit Property as a Statutory tenant under Section 9 of the Act. Failure by the 1st respondent to comply with the quit notice gave the appellant a cause of action against the 1st respondent. The appellant therefore has locus standi to bring the. Suit and has a cause of action against the 1st respondent.

Finally, dismissal of the main suit does not automatically abates the counter claim. Under O8 R2 of the Civil Procedure Rules, a counter-claim is a cross claim. It should have been heard on the merits. The trial Judge was therefore wrong in holding that the counter-claim abated.
In the result, I would allow the appeal with costs to the appellant. I would set aside the dismissal and other consequential orders made by the trial Judge and remit the case to the High Court for hearing on merits as there is a cause of action against 1st respondent. As Berko JA and Engwau JA both also agree the appeal is allowed.

The dismissal and other consequential orders made by the trial Judge are set aside. The case is remitted to the High Court for hearing on merits. The respondents shall pay appellant costs of this appeal.

Dated at Kampala this 3rd day July 1998.
G.M. OKELLO
JUSTICE OF APPEAL.

JUDGMENT OF BERKO, JUSTICE OF APPEAL.

I agree that an Order should be made as proposed by Kilo, J.A. I add some observations of my own because we are differing from Kato J. (as lie then was) on one point of general importance and out of deference to the arguments of Counsel.
The facts of this appeal are set out in the judgment of Okello, J.A. which I have had the advantage of reading in draft. I find it unnecessary to restate the facts, submissions and legislation save in so far as this is necessary to give point to the **reasoning** in **my** judgment.

The main issues in contention in this appeal are:

(1) Whether the Judge was right in holding that the appellant's **suit** against all the defendants was time barred,
(ii) Whether the appellants have ever been issued with a certificate of repossession of the suit property,
(iii) Whether the appellants had locus standi to sue the defendants concerning the suit property,

(iv) The legal effect of the consent judgment in H.C.C.S. No. 310 of 1987 and
(v) Whether the trial Judge was correct when lie held that the counter — claim of the

First respondent abated when the appellant suit was dismissed.

It is a common ground that after the expulsion of Asians from Uganda in 1972 the Government took over the suit property and by virtue of Decree No. 27 of 1 973 vested it in the Departed Asian Properties Custodian Board to manage. Some time in 1977, the Departed Asians Property Custodian Board sold the property to one Major Francis Nyangweso who in turn sold it to the first respondent who was registered as the proprietor of the suit property on 21/4/80. The purchases and transfers of the suit property from the Departed Asians Properties Custodian Board to Major Francis Nyangweso and from Major Francis Nyangweso to the first respondent were nullified by S. 1(2)(a) of the Expropriated Properties Act 1 1982, Act 9. Section 1(a) of the Act vested the property back in the Government and brought it under the management of the Ministry of Finance. See: **Gokaldas Laxirnidas Tanna v Sr Rosemary and Departed** Asian **Property Custodian Board — Civil Appeal** No. **120 of 1992.**

Thereafter the first respondent ceased to have tittle to the suit property. His right to occupy the property was regulated by Section 9(1) of the Act which provides:

> ***"9(1) Any person who, at the commencement of this Act is legitimately occupying or managing property or business affected by the provisions of Section 1 of (his Act, shall continue to so occupy or manage the property or business until such (line as the property or business is returned to the former owner or is sold or otherwise disposed of under the provisions of this Act.***
> ***(2) An officer, or employee of the Government, Government Institution or parastal body or other legitimate tenant shall be entitled to not less than ninety days notice to vacate any residential property he is legitimately occupying, where such property is returned to a former owner, sold or***
> ***otherwise disposed of in accordance with the provisions***
> ***of this Act".***

It is plain from the above provisions that after the First respondent's purchase of the suit **property** had been nullified by the Act of 1982, he had only a right under the Act to occupy the

property until it was returned to the former owner or sold or disposed of by the Minister of Finance in accordance with the provisions of the Act. That right to occupy the property did not confer on him a right to prevent the Minister from returning the property to its former owner. Consequently he cannot set up a Statute of Limitation to defeat the appellant's right to repossess his property from the Minister of Finance. The first respondent cannot set up ***jus terti*** against the appellants claim.

The situation, however, will be different, if after the former owner had repossessed his property, he went to sleep for over twelve years without taking action to recover the property from the person in occupation by virtue of S.9 of the Act. In such a case, the occupant can resist the former owner's claim to recover possession from him by a plea that his claim is time barred.

In the instant case the evidence on record shows that the appellant was issued with a letter of repossession by the Minister of the 7/12/93. Therefore the Judge erred when he held that time began to run against the appellant from the moment the first respondent acquired the suit property from Major Francis Nyangweso in 1980.

The next point I want to deal with is the effect of the consent judgment in the HCCS 310 of A'1987 between Mohammed Bagalaliwo **v** Attorney General. In my view the consent judgment is not worth the paper on which it was written. My reasons are firstly, that the appellant cannot be sound by a judgment in ***personam*** when he was not a party to it; Secondly, as the provisions of Section 1 of the Expropriated Properties Act, 1982 nullified tile sale and purchase of the suit property by the first respondent, the consent judgment cannot restore to him what had been taken away from him by an Act of Parliament: See: **Gokaldas Laximidas Tanna (Supra).** The objective of the Act was to correct a historical wrong that was done to the Asian Community in Uganda by the then Government in power and in a way to prevent the endless mischief and injury: See Constitutional Petition No. 9 of 1997: ***PyraIi Abdul Rasul Esmail vs. Adrian Sibo, court of Appeal (unreported,).*** That objective cannot be defeated by a consent judgment recorded behind the back of the former owner. The learned Judge therefore erred when he held that so long as the consent judgment stands the respondent remains an undisputed owner of the property. The other points are adequately covered by Okello, J.A.

For the above few observations, I agree that the appeal be allowed.

Dated at Kampala this 3rd day of July 1998

J.P. Berko

JUSTICE OF APPEAL

JUDGMENT OF ENGWAU, JA.

I have had the benefit of reading the judgment of G.M. Okello, JA in draft and I agree with it. It is common knowledge that after the expulsion of the Asian community from Uganda in 1972, the suit property was among the properties expropriated and vested in the military Government of the day and to be managed by the Departed Asian Properties Custodian Board by virtue of Decree No. 27 of 1973.

In that Decree the Departed Asians Property Custodian Board was empowered to manage the expropriated properties as the former owners could do. So in 1977, that Board sold the suit property to one Major Francis Nyangweso who was in active service during the military era. Major Francis Nyangweso later sold the same property to the first respondent. The latter was registered as the proprietor of the suit property on 21/04/80.

The purchases, transfers and all dealings of whatever kind with the expropriated properties were nullified by the Expropriated Properties Act, No. 9 of 1982. Consequently, the sale and transfer transactions between the Departed Asians Property Custodian Board and Major Francis Nyangweso and also between Major Francis Nyangweso and the first respondent were affected

by the provisions of that Act. The objective of that Act was to return to the former owners their expropriated properties. In so doing the act removed the “evil” imposed on the former owners by the military Government by returning the properties.

In compliance with the provisions of the Act of 1982, the Minister issued the appellant with a letter of repossession of the suit property on 7/12/92, Annexture F. In my view, those letters authorizing the appellant to repossess his property under dispute, have the same legal effect as repossession certificates issued by the same Minister to the former owners pursuant to the provisions of the No. 9 Act of 1982.

In order for time to start running against the appellant the 7/12/93 would be the starting point, in my view, when the Minister issued him with that letter of the repossession of the suit property. The learned trial Judge, with due respect, erred in holding that time started to run against the appellant in 1980 when the first respondent had acquired the suit property from Major Francis Nyangweso.

By the issuance of the letter of repossession by the Minister, the appellant has since had locus standi to sue anybody blocking him from repossessing his property including the respondents in the instant case. It is also my well considered view that the consent judgment in the HCCS NO. 310 of 1987, between the first respondent and the Attorney General was and is still of no legal consequence as far as the appellant is concerned. It does not bind him as he was not a party to it. In any case the Expropriated Properties Act, 1982 nullified the sale and purchase of the suit property between Major Francis Nyangweso and the first respondent. Therefore, the consent judgment cannot restore to the first respondent what had been taken away from him by an Act of Parliament. The objective of that Act was to remove the wrong that was done to the former owners by preventing continuous injury caused by the then Government in power.

On the issue of a counter-claim, my understanding is that that was a separate and distinctive suit which should have been heard and determined on its merit regardless of the dismissal of the lead suit instituted by the appellant. Therefore, the learned trial Judge erred in holding that the

counter-claim of the first respondent abated when the appellant's suit was dismissed.

In the result, I would allow the appeal with orders made by Okello, JA.

Dated at Kampala this 3rd day of July 1998.

S.G. ENGWAU

JUSTICE OF APPEAL.