**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**CIVIL SUIT No. 0065 OF 2006**

**MABALE GROWERS TEA FACTORY LTD. …… PLAINTIFF**

*VERSUS*

**1. NOORALI MOHAMED }**

**2. THE REGISTRAR OF TITLES } :::::::::::::::::::::::::::::::::::::::::::::::::: DEFENDANTS**

**BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO**

**JUDGMENT**

The Plaintiff herein, a limited liability company, brought this action, initially against both Defendants jointly and severally, seeking the following reliefs from this Court; namely:

(a) An order for the cancellation of a Certificate of Repossession No. 3530 dated the 15th March 2006; issued to the 1st Defendant by the Minister of Finance.

(b) An order for the cancellation of the special certificate of title for property comprised in LRV 598 Folio 3; otherwise known as the Nyamasoga Estate; and hereafter known as the suit land.

(c) An order of permanent injunction restraining the Defendants from disposing off or in any way dealing with the suit property; and restraining the 2nd Defendant from effecting or registering any instrument on the title to the suit land.

(d) An order for general damages for inconveniences, disruptions of activities, and suffering caused by the Defendants.

(e) An order for costs of the suit.

The 1st Defendant responded by denying the claims made by the Plaintiff; and pleaded with Court to dismiss the suit with costs. He also made a counterclaim against the Plaintiff for what he called the Plaintiff's illegal re–entry onto the leasehold property (the suit land); which was fully developed with mature tea plantation from which the 1st Defendant had realised certain earnings

annually. He therefore prayed for specified special damages and general damages for loss of earnings and trespass; and finally costs of the suit.

At the scheduling conference, and prior to Court adopting the scheduling memorandum mutually executed by the counsels for the Plaintiff and the 1st Defendant, the Plaintiff withdrew its claim against the 2nd Defendant with leave of Court, and proceeded with the suit against the 1st Defendant alone; hereinafter referred to simply as the Defendant. The sole agreed fact was that the Plaintiff is the registered freehold proprietor of the suit land. The rest of the averments and contentions in the pleadings from either side were therefore contested and up for proof. The issues as framed by counsels were: –

1. Whether the re–entry by Clovis Balya Winyi onto the suit property was lawful.
2. If so, whether the sale of the suit property by Clovis Balya Winyi to the Plaintiff was lawful.
3. Whether the 1st Defendant committed any fraud.
4. Whether the Plaintiff is entitled to the remedies prayed for.
5. Whether the Defendant is entitled to the remedies in the counterclaim.

I prefer to first deal with, and dispose of the second issue; namely: whether or not the sale of the suit property by Clovis Balya Winyi to the Plaintiff was lawful. The evidence on record is that on the 14th August 1997, Mr. Clovis Balya Winyi as vendor executed an agreement with the Plaintiff (exhibit PE1) as purchaser of its freehold interest described therein. Admittedly, in that sale agreement there is confusion in that the freehold property demised is described as Mwenge Block 36 Plot No 10 Nyamasoga estate, LRV 598/3 comprising 60.7 hectares or 150 acres. The agreement however expressly states in clause 1 thereof, that the land or interest sold is the 'freehold land'. The reference both to the freehold and the leasehold titles in the said agreement has led to the confusion with the result that issue No. 2 has been framed in a manner that detracts from the real issue in controversy between the parties to this suit.

The lease agreement entered into between Aberi Balya (the Lessor) and the Defendant (the Lessee) on the 16th day of November 1965, to run for 99 years from the date the lease was registered, and this was 8th January 1966 (exhibit DE1), is clear that the land leased is 150 (one hundred and fifty) acres or thereabouts, out of 320 (three hundred and twenty) acres of land comprised in Freehold Register Volume 76, Folio 13 at Nyamasoga in Mwenge County in Toro

District. The reason for the confusion is not hard to come by. It would appear that later, the land leased to the Defendant was curved out and given a separate freehold title known as Mwenge Block 36 Plot No 10; and the lease above now reflected as arising therefrom.

Hence at the time of the re-entry, both the freehold title (exhibits PE2, DE10 and DE12), and the leasehold title of the Defendant (the suit land) (exhibits PE3 and DE9), measured 60.7 hectares (which is 150 acres); and both referred to exactly the same chunk of land on the ground at Nyamasoga. Thus the LRV 598/3 description referred to in the agreement of sale between Clovis Balya Winyi and the Plaintiff is none other than the leasehold interest out of the freehold interest known as Mwenge Block 36 Plot No 10. The two titles are otherwise separate and different proprietary interests or estates in the said same piece of land. However, in the light of the contention by the Plaintiff that it's said predecessor in title had duly made a re–entry which had extinguished the aforesaid lease, I find that the reference to the leasehold title in the agreement of sale of the freehold was therefore redundant.

If the Plaintiff's contention that the re–entry was valid and the lease was extinguished is upheld, then there was no leasehold interest Clovis Balya Winyi could have sold to the Plaintiff as purported in the agreement. If however the converse is true then the lease remained extant and was subject to the law of expropriation; and still, could not have been sold either. Otherwise, there was absolutely nothing unlawful whatever in Clovis Balya Winyi disposing of the freehold property comprised in Mwenge Block 36 Plot No 10 to the Plaintiff as he did. However, it is rather the leasehold estate and not the freehold estate which is the subject of the contested re–entry; and is the suit property. I therefore find that the suit property was not the subject of the sale agreement between Clovis Balya Winyi and the Plaintiff.

On the first issue – that of lawfulness or otherwise of the re–entry made onto the suit property by Clovis Balya Winyi – despite the rather surprising submissions by counsel for the Plaintiff to the contrary, it was common ground at the hearing that the Defendant was of Asian extraction and had been a victim of Idi Amin's order of expulsion in 1972. Both the Chairman of the Plaintiff Co., Eulogio Mulindwa Rusoke (PW1), and its agent Augustine Bafaki Kayonga (PW2) stated that they had known the Defendant before he was thrown out of Uganda by Idi Amin. PW1 had specifically known the Defendant as having been engaged in the tea industry, and the suit land to have been leased to the Defendant.

In cross–examination, PW1 testified that they had verified with the Custodian Board before purchase. The fact of the Custodian Board's management of the suit property and of the Lessor's knowledge thereof, is manifest from paragraph 5 (c) of the plaint and the documents annexed thereto; namely: A3 (letter from the Registrar of Titles notifying the Defendant and the Custodian Board of the Lessor's application to have the re-entry noted), and A4 (advert in the New Vision newspaper notifying the Defendant and the Custodian Board of the said application to note a re-entry). These documents were in turn exhibited and marked as PE1 and DE13 respectively. Further to this was the letter the Lessor's advocate had written to the advocate for the Defendant in the flurry of correspondences following the re–entry.

In their letter of 30th August 1995 (exhibit PE7) M/s Winyi & Co. Advocates (then acting for the Lessor) wrote to M/s Mukasa & Co. Advocates (then acting for the Defendant), advising the latter to in turn advise his client (the Defendant) as follows:

1. *That his interests in the land are no longer protected as he did not lodge any claim for repossession during the stipulated time as was by law required.*

2. *In the event that DAPCB who were holding in trust his interest defaulted in the payment of ground rent and most importantly in the development of land in line with the stipulations of the lease agreement.*

From the three documents cited immediately above, it is clear that the Plaintiff's predecessor in title was fully aware that the suit premises was vested in Government and managed by the Custodian Board. PW2 whose duty it was to carry out the due diligence before the Plaintiff could purchase the freehold from its predecessor in title provided useful insight into this aspect of the case. In his testimony during cross–examination, this is what he said:

> *"As a lawyer, I knew this property of an Asian was vested in Government, but I did not bother to verify with the Custodian Board because when I established there had been a re-entry, I thought the legal aspect had been resolved."*

In re–examination, the witness repeated this position by stating that:

*"I restricted my search to the registers in the freehold and leasehold titles. I did not go to Custodian Board because when I saw the entry on the register, I assumed the entry was correct."*

In their written submissions, counsel for the Plaintiff argued quite forcefully that the predecessor in title to the Plaintiff had made a lawful re–entry onto the suit property owing to the Defendant's breach of the covenant to pay rent as agreed, and this had been noted by the Registrar of Titles as required by law. Counsel contended that the Defendant as Lessee having defaulted in rent payment beyond the period permissible under the covenant that bound him to the Lessor, the re–entry which was duly noted in the register of titles was lawful and the lease was accordingly cancelled. Counsel relied on the lease covenants and the provisions of the Registration of Titles Act in support of this contention.

Counsel for the Defendant on the other hand contended that the re–entry was unlawful by reason of the fact that this was expropriated property vested in Government and managed by the Custodian Board; and was therefore governed by the provisions of the Expropriated Properties Act, 1982. Counsel argued further that the re–entry was riddled with fraud and irregularities and did not conform to the legal requirements for executing such a course of action. He contended therefore that the lease of the suit land to the Defendant had never been terminated by the action of the Lessor purporting to re–enter thereon. What is not in dispute is the fact of the lease contractual relationship created by the Plaintiff's predecessor in title and the Defendant as pointed out above.

This lease was expressly stated to be subject to the covenants and powers implied under the Registration of Titles Ordinance then (later Registration of Titles Act) and to the covenants and conditions contained in the lease. However, as is very well known to the parties, an intervening factor did occur with the expulsion of the Defendant in 1972 and expropriation of the suit property by the Government. Following the overthrow of Idi Amin – the architect of the intervening factor aforesaid – the Expropriated Properties Act, 1982 was enacted. Due to the bearing it has on the instant matter before me, there is need to dwell at greater length on this legislation which was passed in 1982, but came into force in early 1983. The overriding purpose for which the Act was enacted is manifest from the preamble to it; which states that it is:

***"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 property by Government and to provide for other matters connected therewith or incidental thereto."***

As I understand it, the provision in the Act transferring the expropriated properties, from the institutions in which they had been vested by the Decrees of Idi Amin in the 1970s, to the Ministry of Finance, was for the principal purpose of effecting their return to their former owners; and in the alternative, for disposal of the same by Government. I must say from the outset that it is apparent that the order of priority, as set out in the preamble, is instructive. It is the return of the properties to the former owners that takes precedence over any other form of disposal of the expropriated properties by the Government. The relevant provisions of section 2 of the Expropriated Properties Act, 1982 (Laws of Uganda Cap. 87, 2000 Edn.), for purposes of this case, state as follows:

*"**2. Revesting of properties in the Government, etc.***

*(1) Any property or business which was–*

*(a) vested in the Government and transferred to the Departed Asians' Property Custodian Board under the Assets of Departed Asians Act; …….*

*shall, from the commencement of this Act, remain vested in the Government and be managed by the Ministry responsible for Finance.*

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

*(a) any purchases, transfers and grants of, or any dealings of whatever kind in, such property or business are nullified; and*

*(a) 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 the 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; and*

*for such further period as the Minister may by regulations made under this Act prescribe."*

*(3) The Minister may, by statutory order, appoint any person or body to manage any property or business vested in the Government under subsection (1).*

*(4) Until such a time as the Minister has exercised his or her powers under subsection (3), the Departed Asians' Property Custodian Board established under section 4 of the Assets of Departed Asians Act shall continue to manage such properties and businesses.*

According to Oder J.S.C. in ***Gokaldas Laximidas Tanna vs. Sr. Rosemary Munyinza & Departed Asian Property Custodian Board; S.C. Civ. Appeal No. 12 of 1992,*** section 1 (2) (a) above – now section 2 (2) (a) of Cap 87 Revised Edn. 2000 – nullified any of the transactions enumerated therein:

*"… if the transaction was effected between the time when the … property was first vested in Government by the Assets of Departed Asians Decree, 1973 and the time when the Act of 1982 came into force, namely on the 21st February 1983."*

That provision of the Act has a retrospective effect and nullified all the categories of transactions and dealings entered into with regard to the expropriated properties in the period between the expropriation by the Decrees of Idi Amin and the Expropriated Properties Act, 1982, as correctly pointed out by Oder J.S.C. above, regardless of such transactions or dealings having been validly made. The Act also in section 2 (2) (b) reinstated leases and agreements for leases or any other specified tenancies which might have expired or were terminated. However the Act appears to be silent about transactions and dealings that would be entered into subsequent to the coming into force of the Act, with regard to an expropriated property held under a lease, agreement for a lease or specified tenancy.

Nonetheless the Act, through the provisions of section 2 (2) (b) and (4) above is clear that a lease, agreement for a lease or specified tenancy in an expropriated property is deemed to continue in force; and the property shall continue to be managed by the Custodian Board until the property has been dealt with by the Minister of Finance in accordance with the Act. This provision is clearly and firmly prohibitory of any purchases, transfers, grants, or any dealings whatever, in

expropriated property such as the suit property, from the date the Act came into force, until the Minister has dealt with it in accordance with the provisions of the Act. Hence, while section 2 (2) (a) operates in retrospect, subsection (2) (b) thereof, by the same token, does so in prospect. Otherwise it would lead to an absurdity for the Act to nullify transactions and dealings in the expropriated properties entered into prior to the enactment of the law; and yet permit similar transactions in the same properties subsequent to the Act coming into force, and before the Minister has dealt with the property. Parliament could never have intended such a thing.

In ***Victoria Tea Estates vs. James Bemba C.A. Civ. Appeal No. 49 of 1996***, a case on all fours with the instant one before me, the suit property was subject to the Expropriated Properties Act, 1982; but the lessor (Respondent) had in March 1991 made a re–entry thereon, and then the former owner (Appellant) obtained a certificate of repossession in November of the same year. The High Court had decided in favour of the lessor, holding that the re-entry was lawful. On appeal, Twinomujuni J.A. reversed that decision and held that since the property had been expropriated by the Government under the 1982 Act, the re-entry effected thereon was unlawful. He said**:**

> *"The suit property became the statutory property of Government, until the Minister of Finance dealt with the property as provided for by Act 9 of 1982. Any other purported dealings in such property would be null and void. Any attempt by the lessor to re-enter the property by reason of non-payment of rent would be null and void … This remains so whether the Government paid the ground rent or not. The lessor could of course maintain a separate action against Government to recover unpaid arrears of rent, but that is another matter."*

To me then, it would be superfluous to inquire into whether the re-entry by Clovis Balya Winyi onto the suit property itself, the notice given by the Chief Registrar of Titles for the noting of, and the noting of the re-entry, were regular or not. The property was by law under the management of the Custodian Board; and as clearly provided in section 2 (2) (b) of the Expropriated Properties Act, any written law governing the conferring of title to land, property or business and the passing or transfer of such title was overridden by the provisions of the Act. Clovis Balya Winyi had no right to dispose of a leasehold interest vested by law in the Minister of Finance before the Minister had dealt with the property in accordance with the Act.

In the ***Gokaldas Laximidas Tanna*** case above, the property of a departed Asian had been sold by public auction in early 1982 under the terms of the mortgage in which it was held. The sole issue for consideration was whether the provisions of the Assets of Departed Asians Decree, 1973 (Decree No. 27 of 1973), the Registration of Titles Act, and the Mortgage Decree, 1974, applied to this case in exclusion of those of the Expropriated Properties Act, 1982. Oder J.S.C. and Wambuzi C.J. held that the Expropriated Properties Act, 1982, had nullified the sale and transfer of the property by the bank to the buyer; notwithstanding that the bank as mortgagee had carried out a valid sale and transfer. In ***Noordin Charnia Walji vs. Drake Semakula, S.C. Civ. Appeal No. 40 of 1995,*** the issue for determination was whether a re–entry upon expropriated property which was still under the control of the Departed Asians Property Custodian Board, was a dealing with expropriated property within the meaning attached to it by the Expropriated Properties Act; Act 9 of 1982. Oder J.S.C. held that:

> "*In my view the appellant's re-entry had the effect of transferring the suit property from the Custodian Board to himself. The appellants took all the necessary steps to effect his re-entry. He notified the Custodian Board, although the Board did not respond to the notice.*
> ……
>
> *As far as section 1(2) (a) of Act 9 of 1982 was concerned I think that the respondent's action did not fall under 'purchases, transfers or grants' of the suit property in their ordinary meaning as apparently used in the sub-section. But I have no doubt that it was a dealing in the suit property. It fell under the expression 'any dealings of whatever kind in' the suit property, which was nullified by that sub-section. By his action of re-entry the proprietary interest in the suit property reverted to the respondent. Moreover the respondent did not act alone, in my view. He notified the Chief Registrar of Titles of his re-entry, who in turn notified the Custodian Board of the same.*"

The instant matter before me also turns, amongst other things, on the issue of whether the re–entry was a 'dealing' in the suit property. The prohibition of any dealings in the suit property was not a creation of the lease agreement between the Lessor and the Lessee herein; rather it was a creature of the law. Therefore it was to the Ministry of Finance and the Custodian Board that further search and inquiry ought to have been directed by the Plaintiff to establish whether the freehold estate it sought to purchase was indeed free of the leasehold encumbrance as the register of title stated. PW2's evidence of exercise of due diligence was therefore carried out in the

wrong place; or at the very least done partially only. The knowledge which PW1 and PW2 had of the Defendant's lease before his expulsion, as shown above, ought to have put them on notice to verify with the Custodian Board, or the Ministry of Finance itself, whether or not the suit property had been dealt with by the Minister in accordance with the provisions of the Act.

As it is, the Minister only dealt with this suit property by returning it to the former owner (the Defendant) on the 16th day of June 2006 (exhibit DE4), long after the Plaintiff had already acquired the freehold estate in the mistaken belief that it was an unencumbered title. Upon being presented with proof of the issuance of a certificate of repossession the Registrar of Titles had no option but to amend the register and re–instate the Defendant's leasehold title (the suit property) (exhibit DE9) as an encumbrance on the Plaintiff's freehold title (exhibit DE10) in compliance with the provisions of the Expropriated Properties Act. But all this was after the transaction between the Plaintiff and Clovis Balya Winyi, as pointed out above, had long since been concluded. I therefore resolve issue No. 1 in the negative. The re–entry onto the suit property by the Plaintiff's predecessor in title was unlawful for offending the provisions of the Expropriated Properties Act prohibiting such dealing.

On the third issue, that of whether or not the Defendant committed fraud, counsel for the Plaintiff submitted that the Defendant committed acts of fraud in his application for repossession. Counsel contended that the Defendant who lives in Canada has never come back to Uganda; and in fact applied for repossession way outside the 90 days permissible under the provisions of section 4 of the Expropriated Properties Act; a statutory limitation which counsel contended has never been extended. In support of this counsel referred me to the case of ***Habre International Co. Ltd. vs. Ebrahim Alarakia Kassam & Ors SC Civ. Appeal No. 4 of 1999***; and the remark made by Wambuzi C.J., in his judgment therein, wherein the learned C.J. stated that he was not aware of any amendment to the law affecting the 90 days period.

Additional act of fraud, counsel further contended, was in the dishonesty with which, he alleged, the Defendant had applied for and obtained the certificate of repossession. Counsel submitted that the Defendant had made the application possession with intent to defeat the interest of the Lessor with whom he had commenced negotiations for an outright purchase. He submitted that the Defendant had concealed the fact of these negotiations in making his application. Finally, counsel pointed out that the Defendant knew that the Plaintiff was in possession of the suit property and

yet he applied for repossession without giving it notice of the application. All this, counsel contended amounted to dishonesty; hence fraud.

Section 3 of the Expropriated Properties Act seems not to put return by a former owner as a pre-requisite to the Minister's exercise of the power to issue the certificate of repossession. It seems to endow the Minister with the exercise of discretion in judgment over the matter. It says:

***"3. Power to transfer property or business.***

*(1) Subject to this Act, the Minister shall have the power to transfer to the former owner of any property or business vested in the Government under this Act, that property or business.*

*(2) Nothing in this Act shall be construed as empowering the Minister to transfer property or business to a former owner unless the Minister is satisfied that the former owner shall physically return to Uganda, repossess and effectively manage the property or business."*

I do not read anything in the provisions above requiring the physical presence of the former owner in Uganda as a prerequisite for the Minister to issue the certificate of repossession. It is perfectly lawful under the Act for the Minister to return property to a former owner before such owner has in fact set foot in Uganda. All that is required of a former owner is to give an undertaking or promise, to the satisfaction of the Minister, that such former owner shall return to Uganda and manage the property. In any case, in the instant case, the evidence adduced in Court by Ibrahim Hassan Moredina DW1, holding a power of attorney duly executed by the Defendant, was clear that the Defendant had in fact come back to Uganda after the fall of the Government of Idi Amin, and had told the witness about the tea estate in Fort Portal which he (the Defendant) had not succeeded in its repossession. Counsel did not challenge the witness in cross examination about this part of his testimony.

Having failed to do so, counsel could not then in his final submissions seek to ignore that piece of evidence; which I find nothing incredible about. In the ***Habre International*** case above, Karokora JSC commenting on a similar situation, referred to the cases of ***Kabenge vs. Uganda, C.A. Crim. Appeal No. 19 of 1977*** (unreported); and ***James Sowoabiri & Anor. vs. Uganda, S.C. Crim. Appeal No. 5 of 1990*** (unreported); where both Courts had held that –

*"Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all. Therefore, an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to the inference that the evidence is accepted, subject to its being assailed as inherently incredible."*

Regarding the contention that the Defendant had applied for repossession after the statutory 90 days had elapsed, and that this was evidence of fraud, I must say from the outset that this would not amount to fraud on the part of the Defendant. It could only be an irregularity or illegality depending on the letter and spirit of the Expropriated Properties Act. DW1 testified that the Defendant had, upon coming back to Uganda, made a futile attempt at repossession. The witness then made an application for repossession after the re-entry discussed above had been made, and noted in the register; and he followed it up. This was of course after the 90 days provided for in the Act. Two points arise from this. First, without making the Minister of Finance, who granted the certificate of repossession, a party to the suit, or called to testify, one cannot say on what considerations he granted the certificate of repossession which on the face of it was so done outside the period of limitation.

I am not sure that it was a wise decision for the Plaintiff not to have joined the Minister as a party to the suit in which fraud and irregularity featured in the Plaintiff's complaint against the grant of that certificate of repossession; and especially since I have found that there was no fraud in the Defendant conduct in applying outside of the period provided by the law. This was the type of fatal procedural lapse in failure to join, to the suit, an important party whose appearance in Court would have helped greatly to shed light on the point in controversy between the parties herein; an omission which Platt J.S.C. frowned upon in ***Kampala Bottlers Ltd. vs. Damanico (U) Ltd.; S.C. Civ. Appeal No. 22 of 1992.*** Be it as it may, it cannot be said that the Defendant could have or indeed misled the Minister that his application for repossession still fell within the 90 days ordained by the law; and thereby amount to a culpable act on his part. It would surely be an insult on the intelligence of the Minister to suggest that his grant of the certificate, on an application made beyond the 90 days period, was owing to the Defendant having misled him on that aspect.

Second, the remark made by Wambuzi C.J., and cited by counsel in his submissions, about the learned Chief Justice not being aware of any amendment to the law is couched in very cautious and passive language. The Chief Justice did not call for the quashing of repossession certificates granted upon applications made outside the 90 days statutory time-frame. Alongside that remark by the learned Chief Justice, in the same case, is that of Mulenga J.S.C. in his judgement pointing out that the period within which the Minister was empowered to entertain the former owners' claim for repossession was in fact extended by General Notice. The Act itself does not provide that repossession certificates granted upon applications made outside the 90 days shall be null and void. It appears to me that the 90 days time–frame was merely regulatory; and not much should be unduly read into it.

In fact the ***Habre International*** case was itself one such instance where the application for repossession had been made long after the expiry of the statutory 90 days. The Expropriated Properties Act is a noble and laudable legislation enacted for rectification. It endeavours to put right a monstrous wrong committed against a section of property owners in this country, by a notorious regime, by reason only of the property owners' race. It is in recognition of the sanctity, and for the protection, of property rights. Hence, in construing its provisions, one needs to adopt a liberal approach. In ***Registered Trustees of Kampala Institute vs. The Departed Asians Property Custodian Board; S.C. Civ. Appeal No. 21 of 1993,*** Platt JSC aptly pointed out with regard to the Act that:

> *"This is a remedial statute; it is putting right what the legislature in 1982 thought had been unfortunately decreed or done a decade earlier. It was aiming at returning property to the former owners. Such an Act should be given a liberal interpretation. (See* ***Dapueto vs. Wylie, The Pievo Superiore (1874) C.R. 5P.C 482; Craies on Statute Law 7th Ed. p. 185****). This attitude also fits in this case, with the Mischief Rule which may also be called the 'Rules in Heydon's Case' which was referred to us. An apt example may be found in the views of Lord Reid in* ***Cartside vs. I.R.C. (1968) A.C. 553, 612****:-*
>
> > *'It is always proper to construe an ambiguous word or phrase in the light of the mischief which the provision is obviously designed to prevent and in light of the reasonableness of the consequences which follow from giving it a particular construction.'*
>
> *Applying those principles to the present case, the mischief was the expropriation of property; and the remedy was that it should be returned to the former owners. … Having in*

*mind that this Act was to redress the expropriations, would it not be strange to remedy what could be done under a Decree, and provide no remedy for an expropriation which infringed a Decree?"*

The other leg of the fraud the Plaintiff alleged the Defendant committed is that in applying for repossession without giving notice of such application to the Plaintiff, the latter had acted to defeat the interest of the Plaintiff in the suit property. Having resolved that the Plaintiff's predecessor in title had effected re-entry onto this property in contravention of the law, as the Minister had not yet dealt with it as provided for by the law, the Plaintiff had no legal or equitable interest in the property that the Defendant's failure or refusal to give it notice could have infringed, and thereby amount to fraud.

In any case, such notice is not provided for in the Act; and even if it were so, and had been given, it would only have served the purpose of compensation. The authority in the ***Habre International*** case above is to the effect that all applications for repossession brought after the 90 days period had expired would have denied any claimant for compensation the opportunity to file their claim with the Minister, as the time for filing such claim was itself limited; and therefore such claim for whatever values the claimant has added to the property repossessed should rather be handled between the repossessing former owner and the claimant.

Finally on fraud, the Plaintiff's case is that the Defendant had entered into negotiations with its predecessor in title for outright purchase of the suit property; and therefore his acquisition of the certificate of title was a breach of these negotiations and therefore an act of fraud. I am a little at a loss as to under what head of claim the Plaintiff seeks to pin down the Defendant here. Because the negotiations referred to were not with the Plaintiff, no evidence was adduced by the Plaintiff at the hearing to this effect. It is to the evidence of DW1 and the several exhibits tendered in during the scheduling memorandum which one has to have recourse, to establish the claim.

DW1's testimony was that it was around 1995 during the time when there was an advert about re–entry, that there was another by Winyi and Co. Advocates putting up the property for sale. Because he did not have a repossession certificate the Defendant instructed his lawyers M/s Mukasa & Co. Advocates to follow up the matter with M/s Winyi & Co. Advocates. The Defendant's lawyers protested both the noting of the re–entry and the reasons for the re–entry.

The Defendant then applied for repossession, and also approached Winyi with a view to settle the arrears of rent and take possession.

Winyi however declined, stating that he could only accept fresh terms; and in the alternative offered the property for outright purchase of the freehold. The negotiations failed as Winyi frustrated attempts to sit down. DW1 later learnt of the sale of the freehold to the Plaintiff. He obtained repossession certificate, caused the re–entry to be cancelled and the lease title reinstated; and he then gave the Plaintiff 90 days notice to vacate the suit property. He followed up this with an attempt at an amicable solution but there was no response except through this suit. In cross examination, he stated that they learnt of the sale of the freehold to the Plaintiff around 2001. He conceded that they had not approached the Plaintiff while applying for repossession; and only did so after securing the repossession certificate.

The reason he gave for this was that their quarrel was with Winyi, and they could not approach the Plaintiff before repossession. He recognised the Plaintiff as the bona fide purchaser of the freehold and that by this it had stepped into the shoes of Winyi. In further cross examination, he stated that the Defendant had before 1994 asked some other persons to follow up the matter of repossession but this was unsuccessful for reasons which he did not know. He also stated that they were talking with Winyi while challenging the noting of the re–entry; but that they never offered any price to Winyi. It was instead Winyi who offered 60m/= for the freehold; but that they never sat down to conclude anything, and that this pursuit was not an acceptance of the re-entry. He stated that he only visited the suit estate in 2008 with the authority of the Plaintiff's management, and found the tea estate in good shape, and fully developed.

It is evident from the relevant exhibits on record that indeed negotiations did ensue between the Defendant and Winyi for purchase of the freehold. Exhibit PE7, dated 30th August 1995, which is a letter from M/s Winyi & Co Advocates on behalf of Winyi, declining an earlier proposal by the Defendant to pay off the rent arrears and take possession of the suit property, proposed fresh terms of the lease, and kicked off the offer for the outright sale of the freehold instead; to which M/s Mukasa & Co. Advocates on behalf of the Defendant, responded by theirs exhibit PE8, dated 12th September 1995, seeking information on the fresh terms proposed or for the outright sale, so that negotiations could ensue.

Then there is letter – exhibit PE11 – dated 2nd of November 1995; from DW1 proposing a lower figure than what Winyi had quoted for the purchase of the freehold, and requesting for a valuation report. Finally there is the letter from M/s Winyi & Co. Advocates to the Defendant dated the 23rd April 1997, showing that they were sticking to the 60m/= offer, for property which the letter said had been valued at 75m/=; and that if the Defendant was not willing to take up the offer the property would be passed on to some other prospective purchasers. There is no evidence on record that the negotiations between Winyi and the Defendant went beyond 1997, or were concluded. In the end the property was purchased by the Plaintiff.

It is not a requirement of any provision of the Expropriated Properties Act that a former owner applying for repossession must also notify the person in possession. The application for repossession was not tendered in evidence; hence the contention that the Defendant concealed the fact of the re-entry has no evidential basis. I should like to believe that in the course of exercising his administrative functions the Minister of Finance could not have handled the application for repossession without recourse to the Custodian Board which was charged with the management of the property, and had knowledge of the re-entry.

Counsel for the Plaintiff cited several authorities to back up the plea of fraud and misrepresentation. With regard to misrepresentation, the authorities are against the Plaintiff. First, it did not plead misrepresentation as is strictly required by the Civil Procedure Rules. Second, the evidence adduced does not show that there were ever any negotiations between the Plaintiff and the Defendant. Instead, the Plaintiff was a beneficiary of the inconclusive negotiations between the Defendant and its predecessor in title. There is nothing that the Defendant said or did during those negotiations that can be said to have misled the Plaintiff's predecessor in title, and facilitated the repossession.

In ***Central London Property Trust Ltd. vs. High Trees Ltd.***, ***[1947] K.B. 130***, otherwise popularly known as the High Trees case, one of those famous decisions where Lord Denning expanded the frontiers of the law; and for which he will eternally receive acclaim, he said:

> *"… where parties enter into an arrangement which is intended to create legal relations between them, and in presence of such arrangement one party makes a promise to the other which he knows will be acted upon by the promise, the court will treat the promise as*

*binding on the promisor to the extent that it will not allow to act inconsistently with it even though the promise may not be supported by consideration in the strict sense"*

This authority was followed in cases such as ***Nurdin Bandali vs. Combank Tanganyika Ltd. [1963] E.A. 303***, and then ***Century Automobile vs. Hutchings Biemen Ltd. [1965] E.A. 304****;* and recently by our Supreme Court in the case of ***Bank of Uganda vs. Fred William Masaba & Ors., Civ. Appeal No. 3 of 1998,*** where Oder J.S.C. pointed out that this equitable doctrine of estoppel has been incorporated into section 113 of our Evidence Act. He recast and restated this doctrine, as follows:

*"… if parties who have entered into definite and distinct terms involving certain legal results, certain penalties or legal forfeiture afterwards by their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced these rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.*

*Three elements which must be present for the doctrine of equitable estoppels to operate are, first, a clear and unequivocal representation; second, an intention that it should be acted upon; and, third, action upon it in the belief of its truth. Another important nature of the principle of equitable estoppel is that in its application, it is used as a defence and not to found a cause of action."*

I must say, nothing that was said or done in the aforesaid negotiations in the instant case before me even remotely satisfied a single of the three elements ably elucidated above. The failed negotiations took place after the re–entry and the noting thereof in the register of titles which in any case was unlawful, it having been forbidden by law. The negotiations were conducted alongside the Defendant's protest against the re–entry, and were not tagged to any promise on the part of the Defendant to abandon his quest for the recovery of his leasehold interest.

Instead, had they succeeded, they would have afforded the Defendant the acquisition of a superior title to the same piece of land; namely the freehold estate. There is nothing the Defendant did that amounted to fraud; and I therefore resolve issue No. 3 in the negative. For a

plea of fraud to succeed, the fraud proved, as Wambuzi C.J. said in ***Kampala Bottlers Ltd. vs. Damanico (U) Ltd.; S.C. Civ. Appeal No. 22 of 1992***, must be:

> *"… attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. … Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters."*

On issue No. 4, regarding the remedies which the Plaintiff has prayed for; and which are set out at the outset of this judgment, the whole issue turns on my finding above that the re–entry was unlawful. The Plaintiff inherited the title of its predecessor with all the attributes, liabilities and fetters thereon. For the reasons which are clear in my judgment, I can neither cancel the certificate of repossession granted to the Defendant, nor the special certificate of title for LRV 598 Folio 3, otherwise the suit property; which was rightfully issued subsequent to that repossession.

In the same vein the Plaintiff is not entitled to an order of injunction against the Defendant as prayed for. Upon the Defendant obtaining a certificate of repossession, the operation of the law of expropriation which had intervened and interrupted the contractual relationship between the Lessor and the Lessee was extinguished. That contractual relationship has thereby been restored; and it is the terms, conditions, and covenants contained in the lease of the suit property, and the laws applicable thereto, and to which the parties must henceforth look, that now govern this relationship.

From the date of the certificate of repossession, the Defendant was entitled to possession of the suit property. The evidence before me is that DW1 only physically set foot on the suit property when armed with the certificate of repossession. The Plaintiff inherited a freehold title encumbered by a leasehold interest which was expropriated property, and by operation of the law not extinguished despite the purported re–entry. The Plaintiff having inherited, and as well perpetuated, the wrongful re–entry onto the suit property made by its predecessor in title is therefore not entitled to any award of damages. In the ***Noordin Charnia Walji*** case above, Oder J.S.C. had this to say:

*"As the respondent's re-entry and repossession were nullified by Act 9 of 1982, it is my view that there was no basis for him to claim damages for the alleged trespass"*

Wambuzi C.J. for his part had this to say:

*"Though the re-entry by the respondent was valid in 1981, it was nullified on the coming into force of the Expropriated Properties Act in 1982 when the lease revested, so to speak, in the Government. … Because the re-entry whereby the respondent regained possession of his property was nullified in 1982, when the respondent filed his action in 1989, the leasehold was vested in the appellant by virtue of the Repossession Certificate dated 13/10/88. Technically the appellant as lessee had legal possession of the property, and could not therefore in law be guilty of trespass on the premises leased to him. To that extent … no damages would be recoverable."*

Further on the award of damages, the learned Chief Justice said as follows:

*"There is some evidence that before the re-entry, the property had been neglected and the respondent incurred considerable expenses on repairs. However, the plaint alleges breach of the terms of the lease, reference is made to the re-entry but there is no claim for any repairs. The only claim is for general damages for threatened trespass. Accordingly, the expenses which were not pleaded and which should have been pleaded as special damages are not recoverable."*

If a re–entry which was initially lawful but was only nullified by the operation of the law could not afford the Lessor an award of damages, then the case of the Plaintiff herein who had re-entered in contravention of the law is even much more precarious. Kenneth Kyamulesire – PW3, testified that the Plaintiff had invested some 362m/= to rehabilitate the suit estate, this sum was not pleaded and claimed as special damages at all; and would not have been recoverable, even if the Plaintiff had succeeded.

In any case, as pointed out above, even if the sum had been pleaded and proved, I would not have awarded it due to the Plaintiff's illegal re–entry onto the suit property. It would be absolutely wrong for the Plaintiff to be the beneficiary of the illegal act to which it is party. All in all, the

Plaintiff is not entitled to any of the reliefs prayed for; and I must therefore, as I hereby do, dismiss this suit with costs to the Defendant. I resolve the fourth issue too, in the negative.

I turn now to the counterclaim. The Defendant claimed, as special damages, the sum of U. shs. 24,500,000/= allegedly for travel, hotel accommodation, subsistence, and legal fees. He also prayed for general damages for loss of earnings and trespass; and then costs of the suit. No attempt was however made to prove the special damages. It is trite law that special damages must not only strictly be pleaded but also equally proved. I disallow that claim. I also wonder whether these were not costs incurred pursuant to this suit; in which case they could instead be included under claims for disbursements in the Defendant's bill of costs for taxation should he be awarded costs.

It is to the claim of general damages for loss of earnings and trespass that I must now turn. The Plaintiff is the lessor of the suit property to the Defendant. It has the superior title to the suit land. The Defendant's right to possession of the suit property is founded on the contract of lease between the parties. There is no way the Plaintiff which has the superior title and therefore is perpetually in legal possession can trespass onto its own property. Hence, the claim of trespass cannot stand. I disallow the claim for general damages based on trespass too.

What the Plaintiff is guilty of is that from the 16th of March 2006, this being the date of the repossession certificate, it has committed a breach of the express and implied term and covenant in the lease which provides that the Defendant is entitled to enjoy quiet possession of the suit property. For that reason, any computation or award of general damages must ensue from that date. The parties have however not assisted Court arrive at the monetary value of this head of claim.

The allegation that the suit estate was benefitting the Defendant with an annual sum of US$ 100,000 (One hundred thousand) is not borne out by the evidence on record. In his submissions counsel for the Defendant proposed a sum of U shs. 350m/= for general damages. He based this on the alleged earnings of 800m/= the Plaintiff made in the year 1997 alone; suggesting that owing to the years the Plaintiff has been in wrongful occupation and use of the suit property, that sum would be reasonable. The evidence on record however does not support this claim.

PW3 clearly stated in evidence that the Plaintiff's earnings of 800m/= in 1997 was the consolidated earnings from the various estates belonging to it. Court was not favoured with information on the number of other estates the Plaintiff had, and which contributed to the said consolidated earnings; or what portion of the said earnings was from the suit estate alone. Counsel for the Defendant unfortunately did not pursue this to its logical conclusion and establish the earnings from the suit estate for the years the Plaintiff has been in wrongful occupation.

I am aware that the Plaintiff had in their failed bid prayed for the sum of U. shs. 50m/= for general damages for alleged trespass and inconvenience. I take serious consideration of the fact that, but for what the Plaintiff has done on the estate, the Defendant would, upon repossessing the suit property, have had to first make heavy investment to clear the overgrown tea bushes to render it usable. Therefore in awarding what are really mesne profits for the Plaintiff's use of the suit premises from the date of the said certificate of repossession, equity sets in and I have to take cognizance of the fact that the Defendant will now take possession of property whose value has been greatly enhanced, as it is a going concern.

Therefore, doing the best I can in the circumstance of the case, I award the Defendant the sum of U. shs. 48m/= per annum in mesne profits from the 16th of March 2006, when he obtained the certificate of repossession, to the date of taking vacant possession of the suit property. This means as at the date of this judgment the Defendant is entitled to the sum of 160m/= as damages in mesne profits. The counterclaim is therefore allowed; and the Defendant is entitled to vacant possession of the suit property; and costs of the suit and of the counterclaim. Both the award of general damages and costs shall attract interest at Court rate from the date of judgment.

**Chigamoy Owiny – Dollo**

**JUDGE**

**30 – 07 – 2009**