THE REPUBLIC OF UGANDA

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IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J.; ODER, J.S.C.; AND KANYEIHAMBA, J.S.C.).

CIVIL APPEAL NO. 40 OF 1995.

BETWEEN

NOORDIN CHARANIA WALJI:::.:::.:APPELLANT

AND

DRAKE SEMAKULA:::RESPONDENT

(Appeal from the judgment of the High Court at Kampala (Kityo, J.) in Civil Suit No. 685 of 1989, dated 31/8/1993).

JUDGMENT OF ODER, J. S. C.

This is an appeal by the party who lost a suit in the High Court as the defendant. The present respondent was the successful plaintiff in the Suit.

In 1955 the respondent granted a lease to the appellant of Mailo Register Volume 926, Folio 9, Plot 153, Balintuma Road in Kampala (referred to hereinafter as "the Suit property"). The appellant was an Indian Merchant at the material lime. The lease was for a period of 49 years beginning 29/5/1955.

The lease agreement contained the usual covenants on the part of the lessee, but of particularly relevance to this case were the covenants that the appellant should: pay a yearly rent of Shs. 800/=, payable in advance by equal half yearly installments; use the suit property for residential purpose only; keep the buildings erected thereon in good and tenantable

condition, clean and tidy; and allow the respondent, his servants or agents once a year during the lease to enter upon the suit property to review the state of repair thereof.

The lease agreement also provided that in case the rent or any part thereof fell in arrears for a period of thirty days, or the appellant was in breach of any of the other covenants to be observed on his part, then the respondent or his transferee was entitled to re-enter and take possession of the suit property.

In 1972, the appellant left Uganda during the expulsion of persons of Asian origin from Uganda by the regime of Idi Amin. Consequently, the suit property was taken over by the Departed Asians Property Custodian Board, a body which had been established by law to manage the property of Asians who had been so expelled.

During 1980 the Board apparently acted in breach of several of the covenants contained in the lease agreement made between the respondent and the appellant in respect of the suit property.

In 1980, the respondent, on grounds of the alleged breaches and in accordance with the terms of the lease agreement, and pursuant to section 102(6) of the Registration of Titles Act. (Cap 205), re-entered and took -possession of the suit property. The respondent also notified the Board of his act of re-entry, and applied to the Registrar of Titles to note his re-entry upon the title to the suit premises.

Thereafter, the appellant apparently returned to Uganda and obtained a Repossession Certificate in respect of the suit property on 31/10/1988, pursuant to sections 4 and 5 of the Expropriated Properties Act, 1982 (referred to hereinafter as “Act 9 of 82”).

On the basis of the Repossession Certificate, the appellant attempted to evict the respondent from the suit property, using the services of a firm of Auctioneers. The respondent resisted the attempted eviction and filed the suit already referred to earlier in this judgment.

The suit was for special and general damages for threatened trespass. The respondent alleged in his plaint that the Board had acted in breach of the covenants in the lease agreement binding the appellant, namely that the Board failed to pay the stipulated rent, failed to keep the suit property in good and tenantable condition, and sublet the suit property. It was also contended in the plaint that the Board as successors in title had assumed both the rights and

obligations of the appellant in the lease agreement and that upon the respondent's re-entry and repossession of the suit property, the lease agreement was terminated for all intents and purposes and the appellant no longer had rights derived therefrom.

. The respondents' prayers in the suit were for: -
(a) General damages for threatened trespass;
(b) A declaration that the respondent was the rightful owner of the suit property;
(c) Interest on the decretal amount at the rate of 12% per annum from the date of judgment till payment in full;
(d) Costs of the suit;
(e) Any other alternative relief as the Honourable Court would deem fit.

The appellant resisted the suit, denying that he had abandoned the suit property. In the alternative it was contended that if the appellant had abandoned the suit property the lease agreement in question was resumed by the issue to the appellant of the Repossession Certificate under the provisions of Act 9 of 1982.

At the trial of the suit, a number of issues ere framed. Those relevant to this appeal are: -
1. Whether the respondent was the rightful owner of the suit property.
2. Whether the appellant breached the conditions of the lease agreement.
3. Whether the respondent was entitled to re-enter and stay in the suit property.
4. If the answer to first issue in the negative, then was the appellant entitled to the ownership of the suit property?
5. ……...
6. Whether the respondent was entitled to the reliefs sought.

It appears that the learned trial Judge's answer to the first issue was in the affirmative. His answers to the second and third issues were clearly in the affirmative In light of his answers to the second and third issues, the learned trial Judge saw no need to answer the fourth issue. With regard to the issue concerning any apparent discrepancies in the description of the suit property and of the respondent, what can be gathered from the judgment of the learned trial Judge is that there were such discrepancies in the plaint and in the repossession certificate (exhibited). Whereas the suit property was described in the lease agreement as " Plot No. 153, Balintuma Road, Mengo", it is described in the Repossession Certificate as "Plot No. 153/1

and 153, Balintuma Road Mengo". There was a second discrepancy. This concerned the names of the appellant — whether it was "Noor Mohamed" as stated in the lease agreement, or Noor Charania Waiji" as stated in the plaint. As far as can be gathered from his judgment, the learned trial Judge found that the Suit property as described in the lease agreement, in the plaint, and in the Repossession Certificate *was* one and the same property. It was the suit property, concerning the names of the appellant, the learned trial Judge apparently found that the names in question all described the same person, namely the appellant. This must be so, because at the hearing of the appeal before us, Counsel for both the parties so agreed.

The learned trial Judge's answer to the sixth issue was also in the affirmative. He concluded his judgment thus:

"accordingly enter the - desired declaratory judgment for the plaintiff as prayed and award general damages for trespass in the sum of Shs. 3,000,000/= the interest on the decretal amount at the court rate from the date hereof till payment in full as well as the costs the suit."

When the appeal first came for hearing before us on 18/5/1988 only the appellant and his Counsel, Mr. Mwesigwa Rukutana, assisted by Mr., Kato Sekabanja, appeared The respondent was absent, though his lawyers M/s Kayondo & Co. Advocates, had been served with Hearing Notice. At first Mr. Rukutana wished to proceed exparte, but he could not do so, because he also applied to file an amended Memorandum of Appeal, which application was granted by the Court. However, as it was necessary for the absent respondent to be served with the amended Memorandum of Appeal, the hearing of the appeal was adjourned to 25/5/1998.

On the latter date, the appellant was represented by his Counsel as before, and the respondent was represented by Professor Kakooza of M/s Kayondo and *Co.* Advocates. The learned Professor, however, applied for an adjournment of another date, on the ground that Mr. Kayondo, S.C. who had been personally handling the case before, had gone abroad for medical treatment, and his return to Uganda had been delayed due to his passport having been lost. The application for adjournment was objected to by the appellant's learned Counsel, Mr. Rukutana, on the ground that the learned Professor had previously appeared for the respondent in this case when, on 26/2/1998, Mr. Rukutana successfully argued for restoration of the appeal after it had been dismissed for want of prosecution. The application for adjournment was objected to on another ground, which was that on 18/5/1998, Counsel from

the firm of M/s Kayondo & Co. Advocates brought a written note that both Mr. Kayondo S.C., and Professor Kakooza who had charge of the case were absent abroad.

The Court upheld the objection by the learned Counsel for the respondent, and ordered the hearing of the appeal to proceed.

Six grounds of appeal were set out in the amended Memorandum of Appeal but the sixth ground was, in effect, not a ground of appeal but a prayer.

1. The learned trial Judge erred in law when he held that the appellant's willingness to pay the arrears of rent and his offer to do so was too late, and that the respondent was entitled to re-entry under sections 102 and 105 of the Registration of Titles Act.

2. The learned trial Judge erred in law when he held that the respondent's purported re-entry was valid and had not been affected by the provisions of the Expropriated Properties Act, 1982.

3. The learned trial Judge erred in law and fact when he held that the defendant was liable to pay damages of Shs. 3,000,000 and interest thereon and the costs of the suit.

4. The learned trial Judge erred when he passed judgment and made orders against the appellant without resolving the issues regarding his identity and the identity of the suit property.

5. The learned trial Judge erred when he found as fact that the description of the suit property which was returned to the appellant was strange and that the descriptions related to different properties.

Mr. Rukutana, learned Counsel for the appellant first took the first and second grounds together.. Under these grounds, he submitted that there was no dispute that the suit property vested in Government and fell under the management of the Board after the appellant left in Uganda in 1972. The learned Counsel contended that the provisions of Act 9 of 1982 applied to the Board after the appellant left Uganda in 1972. The learned Counsel contended that the provisions of Act 9 of 1982 applied to the suit property. In the circumstances, it was said, the respondent's re-entry could not stand in view of the provisions of section 1(1) (a) and sub-section (2) (a) of the Act. The respondent's purported re-entry was a dealing in the suit

property under S. 1(2) (a) and since the suit property had vested in the Government and subsequently vested in the Board, the respondent's re-entry to the suit was a dealing nullified by Act 9 of 1982.

The learned Counsel further submitted that the provisions of sub-section (2) super ceded the provisions of any written law, including those of the Registration of' Titles Act, empowering a lesser to re-enter land on breach by the lessee of covenants provided for by a lease.

This means, it was contended, that any law or agreement which conflicts with the provisions of the sub-section is nullified. For his submission the learned Counsel relied on the case of Gakaldas Laximadas Tanna Vs. Sister Mary Muyinza and Another, Civil Appeal No. 12 of 1992 (SCU) (Unreported).

The learned Counsel concluded on this point that the provisions of S.1 (2) (a) of Act 9 of 1982 nullified the respondents re-entry, because the re-entry was prior to the coming into force of Act 9 of 1982.

In reply Professor Kakooza, the learned Counsel for the respondent, submitted that the lease and the respondent's power to re-enter under the lease was not in dispute. The only point to be resolved in this case was whether Act 9 of 1982 applied to the suit property.Was the respondent's re-entry "dealings" in land under S. 1 (2) (a)? The learned Counsel contended that it was not, because by exercising his right of re-entry, the respondent did not "deal" with anybody else. He acted alone "Dealing", it was contended involves two or more parties. One cannot "deal" with oneself. The ordinary meaning of the word "dealings" used in sub-section (2) (a) must mean
dealings between two or more persons.

Secondly, the learned Counsel contended that the respondent's re-entry on to the suit property did not amount to "purchases", "transfers", or "grants" of the suit property in the way meant in sub-section (2) (a) of Act 9 of 1982.

Thirdly, it was contended that section 1 (1) and (2) (a) and (b) of the Act did not apply to the suit property because, if it did, the respondent would be deprived of his constitutional right to the suit property. In passing Act 9 of 1982, it was said, it could not have been the intention of

Parliament to deprive persons in the respondent's situation to be deprived of their constitutional right to property. The learned Counsel acknowledged that this point of that Section 1(1), (2) (a) and (h) was unconstitutional was neither raised nor argued in the trial Court.

Indeed the provisions of Act 9 of 1982 which are relevant to this case are in section 1 (1), 2 (a) and (b). They say;

1(1) Any property or business which was,
(a) Vested in the Government and transferred to the Departed Asians Properly Custodian Board under the Assets of Departed Asians Decree, 1973,
(b) ……..

©……..
Shall, from the commencement of this act, remain vested in the Government and managed by the Ministry of Finance.
(2) For the avoidance of doubt, and not withstanding the provisions of any written law governing the conferring of title of laud, properly or business and passing or transfer of such title it is hereby declared that

(a) any purchases, transfer and grants o/ or any dealings of whatever kind in, suit property or business are hereby ,nullified.
(b,) where any property affected by this section was at the time of its expropriation held under a lease or an agreement for a lease, or any other specified tenancy of whatever description, and where such lease, agreement for a lease, or tenancy had expired or was terminated, the same shall be deemed to have continued, and to continue in force until such property has been dealt with in accordance with this Act; and for such further period as the Minister may be regulations made under this Act prescribe."

In the instant case the lease of the suit property was terminated by the respondent's reentry in 1980. Consequently, Sub-section (2) (b) of Act 9 of 1982 applies, and the lease must be deemed to have been revived by Sub-section (2) (b) of the Act.

The case of Gokaldas Laximidas Tanna (Supra) is relevant to the instant case. In that case the property which was the subject matter of a suit in the High Court was originally owned by

one V. D. Desai who, on 2 1/12/1965, executed a legal mortgage in favour of the Uganda Commercial Bank (UCB) as security for a loan from that Bank. The mortgage was registered as an encumbrance on the property. In 1972 Desai left Uganda as a "departed" Asian. Consequently the property was expropriated by the Uganda Government. In 1972, the property was vested in the Departed Asians Property Custodian Board, created by virtue of the provisions of the Assets of Departed Asians Decree, 1973. Owing to a default in payment under the relevant mortgage agreement, the property was sold by public auction to the appellant in that case on 22/2/1982. The sale was effected on Uganda Commercial Bank's instruction as the mortgagee to recover the loan due under the mortgage. An attempt to register the transfer to the purchaser at first failed, but was later effected on a Court Order. By then the property was occupied by the first respondent as the tenant of the Departed Asians Property Custodian Board. The tenant, however, refused to recognise the purchaser's claim to the property as the person who had purchased the property or to enter into a tenancy agreement with him. Consequently the purchaser sued the Custodian Board and its tenant for a Court declaration that he was the rightful owner of the property as the person who had purchased the property in a public auction under the mortgage. Only one issue was agreed for decision by the trial Court. It was whether the property was sold lawfully to the purchaser by Uganda Commercial Bank, as the mortgagee, and the purchaser obtained good title or whether no property passed and the property still belonged to the Custodian Board. In view of the provisions of Act 9 of 1982, the main point for decision in that case was whether the sale and transfer of the property to the purchaser under the mortgage was nullified by the Act, which was enacted subsequent to the sale and transfer. In essence the trial Court answered that question in the negative and allowed the purchaser's suit. On appeal, this Court overturned the judgment of the lower Court and decided that the sale and transfer of that property under the mortgage was nullified by the provisions of Act 9 of 1982. Wambuzi, C. J., after setting out the provisions of section 1(1), (2)
and (3) of the Act said:

"Having *regard to these provisions I have no doubt in my mind that the sale and transfer of the properly in this appeal were nullified, and would accordingly agree that this appeal should fail."*

In the leading judgment of Oder, J. S. C. , he said:
"according to the agreed facts the suit properly was sold to, and purchased, by the appellant on 22 February, 1982 in the process of enforcement by Uganda Commercial Bank of its

rights of sale as the mortgagee. Subsequent to the sale, Uganda Commercial Bank transferred the title to 11w appellant. The purchase and transfer in question, in my view, were nullified by section 1(2) (a) of the Act notwithstanding any written law under which Uganda Commercial Bank was entitled to sell and transfer to the appellant the situ property as the mortgagee ".

In my view this Court's decision in Gokoldas Laximidas Tanna (supra) is still good law.

In the instant case, it is common ground that the appellant was a "departed" Asian, that after he left Uganda in 1972 the property was expropriated by the Uganda Government and vested in the Departed Asians Property Custodian Board by the Assets of the Departed Asians Decree 1973, the predecessor of Act 9 of 1982 that after the suit property was expropriated in 1972, the suit property was managed by the Custodian Board until the appellant obtained repossession thereof in 1985, and that when the respondent effected his re-entry the suit property was still under the management of the Custodian Board. In those circumstances I have no doubt in my mind that Act 9 of 1982 applied to the suit property. The only question is whether the appellant's re-entry having been subsequent to the Act, it was one of the incidences
nullified by the Act.

In my view the appellant's re-entry, had the effect of transferring the suit property from the Custodian Board to himself. The appellant took all the necessary steps to effect his re-entry. He notified the Custodian Board, although the Board did not respond to the notice. In a letter dated 1 4th January 1982, (exhibited) the Chief Registrar of Titles also notified the Custodian Board of the respondent's re-entry onto the suit property. The letter said in part:
"2 The Lessee sub-let the leased premises without the Landlord's consent

3. The Lesser re-entered upon the Leasehold premises in strict conformity with clause 3 of the Lease agreement, during May, 1979 and his physical occupation of the same has never been challenged or disturbed by lessor (sic) since that time.

Take NOTICE therefore, that unless you show cause to the contrary this office may proceed to Note the Reentry in the Register Book in accordance with the provisions of the Law relating to Re-entry, after tile expiration of 30 days from the date of this Notice is served upon you.

It appears that the Custodian Board did not respond to the Chief Registrar's notice of the respondent's re-entry on the suit property either.

From all these facts it is clear in my view that the respondent effected a re-entry, as he was entitled to do under the lease agreement with the appellant, and in accordance with the provisions of sections 102 and 113 of the Registration Titles Act (Cap. 205).

As far as section 1 (2) (a) of Act 9 of 1982 was concerned 1 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 subsection. By his action of re-entry the proprietary interest in the suit property reverted to the respondent. Moreover the respondent did no 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.

In the circumstances, I have no doubt that the respondent's re-entry was nullified by section 1(2) (a) of Act 9 of 1982. With respect therefore, lam unable to agree with the learned Counsel for the respondent.

The first and second grounds of appeal must therefore succeed.

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 fox the alleged- threatened trespass. The learned Counsel for the appellant, nevertheless, argued this point under the third ground of appeal. He said that as the respondent in his suit claimed for general damages for threatened trespass, he had to prove that as a result of the fluent by the appellant, he incurred damages. However, the respondent's evidence did not indicate how he incurred any damages as a result of the threatened trespass. There was no evidence at all to that effect.

In reply, Professor Kakooza, learned counsel for the respondent submitted that the respondent's evidence showed that he was attacked by Auctioneers who had been sent by the appellant's lawyers, M/s Mulira and Company, who wanted to remove him out of the house. The learned trial Judge awarded Shs. 3,000,000 as general damages for the threatened

trespass because there was evidence to prove wrongs done on behalf of the appellant, so the learned Counsel contended, The learned Counsel referred to the respondent's evidence that he paid more than Shs. 2,000,000 to secure the suit premises, but be also conceded that no special damages was pleaded or proved.

The respondent's evidence in this regard is as follows: -

"*I re-entered the house in 1980 because the house was not looked after, the house was not repaired. The house was being pulled down and other fixtures were being removed, the compound had grown wild. I had to* clear the *bush and repair the house before I occupied it.*

I had to engage some people to stay with me, because the security in the area was bad. I paid a lot of money more than 2,000, O00/= to keep it. 1 had to sell my other land to raise the money. Under paragraph 3 of the lease - i*f the tenant was in arrears for payment of rent for a period of 30 days. 1 was entitled to re-enter. By 1980, the lessee had not paid rent/or about two years, and had not kept the house in a clean condition. So, re-entered It was then that I went in. I am, in the house upto now*
I was attacked by Auctioneers sent by Mulira & Co. They wanted me to move out of the house. But I had filed this suit. I resisted the order through my lawyer."

My understanding of this evidence is that expenses incurred by the respondent had more to do with repairing the suit property and for paying people he hired to stay with him at the house because security in the area was bad, than with resisting the threatened trespass by the appellant's Auctioneers. The respondent did not say that the insecurity in the area was caused by the threatened eviction. It appears that there was insecurity in the area generally. Even if the expenses of Shs. 2,000,000/= was incurred to resist the threatened eviction (which in my view it was not) the respondent's evidence in that regard was more consistent with proof of special damages, which was not pleaded, than with proof of general damages, which was pleaded.

In his plaint, the respondent did not plead that he suffered general or special damages. He pleaded loss and damage in general terms. The plaint stated, in part:

"17. By reason of the aforesaid the plaintiff has suffered loss and is bound to suffer more damages unless the defendant is restrained by this Honourable Court ".

The plaint ended in paragraph 20 with a prayer for, inter alia, "(a) General Damages."

No doubt the respondent's evidence showed that he incurred some quantifiable expenses as a result of his re-entry upon the suit property: such evidence, in my view was relevant to proving special damage which, as I have already said in this judgment, was not pleaded.

In "McGregor on Damages, 4th Edition" in paragraph 1498, the learned Author states: -

"Where the precise amount of particular item of damages has become clear before the trial, either because it has already occurred and so become crystallized, or because it can he measured with a complete accuracy this exact loss must be pleaded as special damages."

I agree with this statement of the law about special damages.

In the instant case, the respondent did not plead special damages. So, he cannot be awarded such damages even if it were to be assumed that the evidence he adduced tended to prove special damages.

In the circumstances, in my view and, with respect, the award to the respondent of Shs. 3,000,000/ as general damages should not have been made. The third ground of appeal must also succeed.

It is obvious that if by his suit in this case the respondent does not recover the expenses he incurred in improving the Suit property, he would not have obtained substantive justice, which is the objective of Article 126 (2) (e) of the present Constitution of Uganda. But I do not think that the legal requirement that special damages should be damages pleaded and proved, which the respondent ought to have complied within the instant case, is a mere technicality, which the farmers of Article 126 (2) (e) had in mind. That legal requirement therefore, to my mind, does not offend the provisions of that Article of the Constitution. The appellant (as the defendant in the suit) was entitled to know precisely what case he had to meet. Hence the respondent should have pleaded special damages in order to be entitled to recover by this suit the expenses he incurred on the suit property after his (the respondent's) re-entry on the same.

Secondly, the respondent need not have completely lost out to recover the expenses he incurred on the suit property, because first, he would have recovered the expenses if he pleaded and proved them as speci-a1-damages as I have already alluded to in this judgment. Secondly he could have claimed for compensation under section 11(2) of Act 9 of 1982. Thirdly, he could have challenged the Minister's decision to issue to the appellant the Certificate of Repossession. Section 14 of the same Act provides for an appeal to the High Court against a decision of the Minister.

Professor Kakooza, the learned Counsel for the respondent, raised a legal point that in so far as section 1(2) (a) had the effect of nullifying the respondent's re-entry, the section was unconstitutional in that it deprived the respondent of his right to property without compensation. This was contrary to Article 13 of the 1967 Constitution, which prohibited deprivation of property without compensation. The 1967 Constitution was the one in force at the time material to this case.

In his the reply, Mr. Rukutana, learned Counsel for the appellant, contended that the respondent ought to have raised constitutionality of section 1(2) (a) during the hearing of the case in the High Court, and not during the hearing of the case on appeal, as has been done now. Secondly, the learned Counsel argued that alternatively, the respondent ought to have given the ground of unconstitutionality of that section of Act 9 of. 1982 in a notice supporting the trial Court's decision on grounds other than those relied on by that Court. Such notice was permissible under rule 91 of the Supreme Court Rules of 1972. Yet the respondent did not file such a notice.

I agree with Mr. Rukutana's submission in this regard. in my view if any question as to interpretation of the Constitution arose, arises, or can be raised, during the trial of a case under Article 87, it should be done before the trial Court, and not on appeal from the High Court. I also agree that if the respondent wished to rely on section 1(2) (a) of Act 9 of 1982 being unconstitutional, the respondent should have put it in a notice under rule 91 of the 1972 Rules of this Court.

For the reasons given I am of the view, with respect, that the point of unconstitutionality of section 1 (2) (a) of Act 1982 raised before us by the learned Counsel for the respondent had no merit.

The fourth and fifth grounds of the appeal were conceded by the respondent's learned Counsel.

In the result, I would allow this appeal with cost in this Court and in the Court below.
Dated at Mengo this 15th day of July 1998.

A H. 0. ODER
JUSTICE OF THE SUPREME COURT

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

W.MASALU MUSENENE
REGISTRAR SUPREME COURT.

JUDGMENT OF WAMBUZI, C. J.

I have had the benefit of reading in draft the judgment delivered by Oder, J S. **C.** and I agree that his appeal must succeed.

The facts are set out in the judgment of the learned Oder, J. S. C. The main issue in this appeal is whether the Expropriated Properties Act, 1982 applies to the property under dispute. This is raised in the second ground of appeal.

In so far as is relevant, section 1 of the Expropriated Properties Act provides as follows:
1(1) *Any property or business which was*
(a) vested in the Government and transferred to the Departed Asians Property custodian Board under the Assets to Departed Asians Decree, 1973.
(b)…….
(c) ……..
shall from the commencement of this Act, remain vested in the Government and he managed by the Ministry of Finance.

(2) for the avoidance of doubt, and not withstanding the provisions of any written law governing the conferring of title to land, property or business and the passing or transfer of such title, it is hereby declared that,

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

(b) where any properly affected by 1/us section was at the time of its expropriation held under a lease or an agreement for a lease, or any other specified tenancy of whatever description, and where such lease, agreement - for lease or tenancy had expired or was terminated, the same shall he 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 tile Minister may by regulations is made under this Act *prescribe"*

From those provisions we can extract the following points: -
1. Under section 1 (1) (a) of the Act any property which was vested in the Government and transferred to the Departed Asians Property Custodian Board under the Assets of Departed Asians Decree, 1973 remains vested in the Government and is managed by Ministry of Finance.

2. Any dealings of whatever kind in such property are nullified. This is under section 1(2) (a). And,

3. Under section 1 (2) (b) not only is it clarified that such property includes any property held under a lease, but provides further that where such a lease was terminated, as in the case before us, the lease shall be deemed to have continued and to continue in force until such property had been dealt within accordance with the Act.

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. To that extent, I agree that ground 2 should succeed.

Ground 3 complained that the learned Judge erred in law and in fact when he held the defendant liable to pay damages of Shs. 3,000,000/= and interest thereon.

Because the re-entry whereby the respondent regained possession of his property was nullified in 1982, when the respondent field in his action in 1989, the leasehold was vested in the appellant by virtue of the Repossession Certificate dated 31/10/88. 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 I agree that ground 3 of the appeal should also succeed as no damages would be recoverable.

In my view, ground I does not arise. It makes no difference in this appeal whether the re-entry was valid or invalid. If valid, it was nullified and if invalid, it had no effect. In either case the property remains vested in the appellant as leaseholder.

Professor Kakooza, Counsel for the respondent, raised a point of law to the effect that the Expropriated Properties Act 1982 is unconstitutional as it purports to extinguish vested rights without compensation. Mr. Mwesigwa -Rukutana objected, quite rightly, in my view, to the raising of this point which had not been raised in the Court below and in respect of which no notice was served as required by rule 91 of the Rules of this Court applicable to this appeal to affirm the decision of the High Court on grounds other than or additional to those relied upon by the trial Judge.

Be that as it may, learned Counsel has raised a very important point which as far as I am aware, has never been raised. In this case, it appears the respondent's re-entry was perfectly legal and the lease was terminated. Is nullification of the re-entry and recreation of the lease deprivation of property? If so, is it in any way contrary to Article 13 of the Constitution which was in force at the time which provided that no property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, unless certain conditions are met? For any Court to answer these matters there must be proper pleadings. I would accordingly uphold Mr. Mwesigwa - Rukutana's objection.

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.

As Kanyeihamba, J. S. C. also agrees with the order proposed by Oder, J. S. C., it is so ordered.

Dated at Mengo this 15th day of July 1998.

S. W. W. WAMBUZI
CHIEF JUSTICE

JUDGMENT OF KANYEIHAMBA. J. S. C.

I have read in draft the judgment of Hon.Odër J. S. C. and I concur with his findings. I have nothing more to add.

Dated at Mengo this 15th day of July 1998

DR. G. W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT.

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