THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA KANYEIHAMBA, J J.S.C.)

CIVIL APPEAL NO. 8 OF 2000

B E T W E E N

M/S TATU NAIGA & CO. EMPRORIUM APPELLANT

A N D

VERJEE BROTHERS LIMITED RESPONDENT

(Appeal arising from the judgment of the Court of Appeal of Uganda at Kampala, (Manyindo, DC, Okello and Twinomujuni, J.J.A), dated 14th July, 2000 in Civil Appeal No.15 of 99,)

JUDGMENT OF KANYEIHAMBA, J.S.C.

This is an appeal from the judgment and orders of the Court of Appeal dismissing an appeal with costs against the judgment and orders of the High Court (Musoke-Kibuuka, J), dated 14th July, 2000.

The background to the appeal is briefly as follows: Plot 7 Burton Street, Kampala, hereinafter referred to as the suit property, was on 25.8. 1924, leased to one Francisco De Souza and two others for a period of 99 years under Crown Lease No. 19496. In 1947, the suit property was transferred to the respondent, a limited liability company registered under the Companies Act. The shareholders and directors of the

company were a mixed group of Ugandan and non-Ugandan Asians. By the year 1972, the suit property had been developed by the respondent to the extent that a block building comprising some 11 shops had been constructed. However, in the same year the non-Ugandan shareholders and directors of the company were expelled from the country by the military government of Id Amin. As a result, the suit property was taken over by the government of the day and handed over to the Departed Asians' Property Custodian Board, hereinafter referred to as "Custodian Board", for management in accordance with the provisions of Assets of Departed Asians Decree No. 27 of 1973. Under the Custodian Board management, each of the shops in the suit property was allocated to individual tenants. The appellant was one of the said tenants.

During the 1979 liberation war, part of the suit property was extensively damaged. In 1984, the appellant applied to the Custodian Board for permission to reconstruct and renovate the damaged part of the suit property. Permission to do so was granted and later, the Kampala City Council apparently approved the appellant's plans for the reconstruction of the building. The appellant applied to the Kampala City Council for an occupation permit in its own right. However, the Council granted the permit not to the appellant but to the Custodian Board, which had been established to manage such property. The appellant was unhappy with this switch because at that time it had began to consider itself as the owner of the suit property.

The available evidence does not indicate that any formal agreement between the appellant and Kampala City Council was concluded regarding the terms and conditions of the reconstruction. However, the evidence shows that there was an understanding between the appellant and the Custodian Board management that, following the successful reconstruction of the building, the appellant would remain a tenant of the Custodian Board but without the obligation to pay rent. In fact, from 1989, the Custodian Board did not charge rent either from the appellant who occupied one of the shops or the other tenants in the suit property. Further, the appellant collected rent from all the other tenants in the suit property.

On 7/2/1992, a Certificate of Repossession was issued to the respondent in respect of the suit property in accordance with the provisions of the Expropriated Properties Act, 1982. The Custodian Board informed all the tenants in the suit property, including the appellant, of the fact that the suit property had been reclaimed by its previous owners and they were now the effective landlords with whom the tenants should deal directly. The appellant refused to recognise or deal with the respondent as the true owners of the suit property. It resisted attempts by the respondent to take physical possession of the suit property and prevented the other tenants in the premises from paving their own rent to the respondent. In fact the said tenants continued paying their rent directly to the appellant which rejected all offers of settlement and compensation from the respondent. The appellant went as far as lodging a caveat against the suit property under Instrument No. 270622 of 18/5/95 with the Registrar of Titles. This *impasse* prompted the respondent to file in the High Court, C.S No. 587 of 1993. After hearing the suit, the learned trial judge found for the respondent and made several orders including the order for the appellant to vacate the premises and pay to the successful respondent the sum of Shs. 238,000,000 as *mesne profits* in respect of the five shops for the period between the dates of repossession and judgment, together with costs. The appellant appealed to the Court of Appeal which dismissed the appeal and confirmed both the findings and orders of the High Court, hence this appeal.

There are six grounds in the Memorandum of Appeal framed as follows:

1- The learned Justices of the Court of Appeal erred on the facts and in law in holding that the suit property was lawfully repossessed by PW2 acting on behalf of the Respondent Company.

2- The learned Justices of the Court of Appeal erred on the facts and in law in holding that when the suit was being instituted against the appellant, PW1 was clothed with the authority of the respondent to instruct advocates in Uganda to bring the suit in the name of the Respondent Company.

3- The learned Justices of the Court of Appeal erred in law in not carrying out their own independent evaluation of the evidence of D.W.I, D.W.4. D.W. 5, and D.W. 7, called by the appellant in proof of the amount and value of her developments on the suit plot and for that reason they erred in upholding the finding of the learned trial judge that the appellant had failed to prove her counterclaim and they further erred in holding that the learned trial judge had sufficiently considered the appellant

counterclaim and that the amount of Shs. 50m/= awarded by the learned trial judge to the appellant as compensation for her developments on the suit plot was reasonable.

4- The learned Justices of the Court of Appeal erred in not carrying out their own independent evaluation of the evidence of PW1, PW2, and PW3 called by the respondent to prove its claim in the suit and for that reason erred on the facts and in law in holding that the Respondent was entitled to payment of *mesne profits* and they erred in law in upholding the decision of the learned trial judge to award to the respondent *mesne profits* amounting to Shs. 238 *m/=*.

5- The learned Justices of the Court of Appeal erred in law in upholding the decision of the learned trial judge to deny the appellant the costs of the counterclaim and interest thereon.

6- The learned Justices of the Court of Appeal erred in law in upholding the decision of the learned trial judge to award the respondent interest on the *mesne profits* at the rate of 25% per annum.

The Memorandum of Appeal proceeds to seek several

orders from the Court. I notice that the Memorandum of Appeal infringes the provisions of Rule 81 of the Rules of this Court. Except for grounds 1,5 and 6, the rest of the grounds are narrative, argumentative and repetitive. Grounds 3 and 4 deal with the same subject matter of the appeal, namely, the contention by the appellant that there is some evidence which the learned Justices of Appeal ought to have reevaluated but did not. In my view, counsel who frame memoranda of appeals and other legal documents which are ultimately presented to court should comply with the requirements of the rules and forms for framing memoranda and such other legal documents.

The appeal before this court was argued by Mr. George Emesu, learned counsel for the appellant, while Mr. Mukumbya Musoke, learned counsel for the respondent, opposed the appeal. The grounds of appeal were argued consecutively by both counsel.

On ground I, Mr. Emesu submitted that the learned Justices of Appeal erred in law and fact in confirming the findings of the High Court that Ms. Mumtaz Kassam, P.W.2, had been acting on behalf of the respondent when she claimed to have communicated with the Minister responsible for Custodian Board and obtained a Certificate of Repossession in relation to the suit property.

Mr. Emesu contended that without the authority of the board of directors or of an authorized director of the company, no one else can authorize a person to act on behalf of a company. Counsel submitted that, according to the articles of association of the respondent company, only its chairman had authority to delegate the powers of the company and there was no evidence that he had done so. In his absence, the remaining directors could only act through a resolution of the board. There were only two surviving directors and no evidence was adduced to show that they had passed the necessary resolution. Counsel therefore contended that it was not possible that the company or its directors could have authorised the obtaining of the Certificate of Repossession by anyone and consequently, its alleged acquisition by Ms. Mumtaz Kassam was not valid. Counsel relied on the decisions in **British Estate Coffee Ltd, And Two Others v. S. Lutabi And Another,** (1962) E.A. 328, and **Bugerere Coffee Growers Ltd. v. Zulubebri Kikuvu** (1970) E.A. 149, for his submissions, and distinguished **United Assurance Co. Ltd v. Attorney General,** Civil Appeal No. 1 of 1986, (C.A.), (unreported), on which the learned trial judge based his decision, from the facts of this case.

Mr. Mukumbya-Musoke contended that ground 1 was misconceived as it was not based on the findings of the courts below. He submitted that, with regard to company affairs, any directors or designated officer such as a managing director or secretary can act on behalf of the company and authorise an agent or an advocate to act on behalf of that company. In the opinion of the respondent's counsel, this is precisely what both the learned trial judge and the Justices of Appeal recognised and applied in their respective judgments. Mr. Mukumbya- Musoke further contended that, in any event, the Expropriated Properties Act, 1982, as amplified by Statutory Instrument No. 1 of 1994, was intended to be remedial and its effect cannot be defeated by the technical arguments advanced by counsel for the appellant. Mr. Mukumbya - Musoke contended that there was no merit in ground I of the appeal and it should be dismissed.

I agree with counsel for the respondent that there is no merit in this ground of appeal. Kassamali R.S. Verge, PW1, testified that he was a shareholder and director in the respondent company at the time he instructed Mumtaz Kassam, PW2, to repossess the suit property. The latter testified about the authority given to her by Kassamali R.S.

Verge. The trial judge believed these two witnesses as truthful and the Court of Appeal agreed with the trial judge as to their credibility. Clearly, PW1 had authority not only as a director of the respondent company but also as its manager to grant powers of attorney to PW2 to apply and obtain a Certificate of Repossession on the principle established in United Assurance Company Ltd. (supra). That principle is that any director who is authorised to act on behalf of a company, unless the contrary is shown, has the powers of the board of directors to act on behalf of that company. With regard to ground 2 of the appeal, once ground 1 is disposed of in the manner I have suggested, it follows that PW2 had the authority to instruct counsel to act on behalf of the respondent company. Confirming the findings of the trial judge, the learned Justice Okello, J.A, who delivered the lead judgment in the Court of Appeal said,

> "***I cannot fault the learned trial judge on the above findings. He stated the position of the law regarding authority for filing a suit in the name of the company accurately. The decision in Bogere Coffee Growers Ltd*** v. ***Zulubabari Kikuyo (1970) E . A . 147 is no longer good law. It has been overturned in United Assurance Co. Ltd (supra). Any authorised director can give the necessary authority to institute such a suit"*** I agree that PW2 was clothed with authority of the respondent company to authorise advocates in Uganda to bring the suit in the name of the respondent company. Consequently, ground 2 of the appeal fails.

With regard to grounds 3 and 4 of the appeal, I have already expressed the view that the two grounds are interrelated and ought to have formed one ground of appeal, namely, that the learned Justices of Appeal erred in law and fact in not subjecting the evidence of PW1, PW2, PW3, DW1, DW4, DW5, DW6, and DW7 to reevaluation to enable them come to their own conclusions on the matter. I will therefore consider both grounds together. In ground 3 of the appeal, the complaint is that the Justices of Appeal did not reevaluate the evidence of the witnesses listed therein to accurately determine for themselves the amount of money the appellant had spent on the reconstruction of the suit property and therefore allow adequate compensation thereof as opposed to what the trial judge awarded and which was confirmed by the Justices of Appeal without themselves having done reassessment as required of them as a first appellate court.

In its amended written defence, the appellant counterclaimed the sum of Shs 120,000,000 as compensation for the moneys it spent on the reconstruction of the building. The appellant also counterclaimed that earnings in rent from the premises had been in the sum of Shs. 400,000 daily. The appellant also counterclaimed for loss of goodwill in the sum of Shs. 100,000,000 There were several prayers accompanying the counterclaim including damages for loss of business for the period of the subsisting lease, inconvenience, costs of the counterclaim and interest at 35% per annum on the amount of compensation counterclaimed and on the other moneys claimed. The case for the appellant was that it had reconstructed the whole of the suit property. Thus, Tatu Naiga who traded under the appellant's name of Tatu Naiga Emporium, testified,

> ***"The war of liberation was the cause of the destruction of the building. After the bombing, the building was erased to the ground. There was stock when the building was bombed. We had ran away. I stopped paying rent to K.C.C. They did not ask me for rent. After the destruction of the building I got an alternative place at home at Kazo where I operated temporarily. I then approached K.C.C. and requested them to continue paying rent. I wanted them to allow me rebuild the building. K.C.C. told me not to pay rent since the building had been destroyed."***

Another witness to give evidence on the reconstruction of the suit property was Francisco Joseph Amin Maluka, PW4, the engineer and architect employed by the appellant in the reconstruction of the suit building, He testified,

"When I visited the location, it seemed there was a building standing but destroyed during the war. I found only the floor without any walls. We had to start the building afresh from the ground up to the top. After getting approval of my plan I handed my plans to Tatu Naiga. Tatu Naiga built. I had to supervise the buildings in order to ensure it followed the plan." On cross examination, PW4 emphasized:

> ***"The plan covered the entire plot No.7A. The building constructed covered the entire plot. The construction was on the entire plot 7A having 11 shops. This is the plan for which construction was carried out as it is"***

The evidence of Nuruddin Katende, DW6, the son of Tatu Naiga, DW1, supports that of the latter. However, the evidence of Rachel Ruth Namirembe, DW5, is

to the effect that the suit building had only been partially damaged. Namirembe testified that:

> ***"I know the status of Plot 7 Burton Street. The registered proprietor is Verjee Brothers Uganda Ltd. In 1972, there was a building on the premises. The premises were extensively damaged during the war and part of the building was bombed and walls were left standing..... I am aware of some developments which had taken place on the premises. There was a company, Tatu Naiga & Co., which had been authorised to reconstruct the premises. There is a report available on record to show whether the valuation was carried out. At a meeting held on 26th March. 1992 and chaired by Minister in charge of Custodian Board, the late Moses Kintu. the improvements made by Tatu Naiga were brought to the attention of Verjee Brothers who were asked to compensate Tatu Naiga. The Executive Secretary wrote on 1 11th January,1993."***

It is clear therefore that whereas the appellant's counterclaim is for an entire new building in the place of the one destroyed by the 1**979** war, the evidence which the courts found credible and accepted was to the effect that the appellant only reconstructed a damaged part of the building which is the suit property. In fact both the High Court and the Court of Appeal assessed and reassessed the value of compensation on the basis that there had been reconstruction of an existing building and not the building of an entirely new one. Thus, the learned trial judge having reviewed all the evidence stated in his judgment.

> ***"During the now famous liberation war of 1979, part of the premises on the suit property was extensively damaged as a result of bombing. For a long time, some of the tenants could not carry on any business on the premises. In 1984, the defendant requested the Departed Asians Property Custodian Board to permit her to reconstruct the damaged part of the commercial building on the suit property."***

Justice Okello, J.A. in his lead judgment also observed, ***"During the liberation war of 1979, part of the suit property was extensively damaged by bombs. In 1984, the appellant requested the DAPCB for permission to reconstruct the damaged part"***

Neither in the trial court nor in the Court of Appeal was the fact that it was only part of the suit premises which was damaged and reconstructed challenged. Consequently, all other things being as stated, the appellant's counterclaim which is founded on the premise that the whole suit property was totally destroyed and rebuilt by the appellant cannot be sustained in light of the evidence on record and the findings of both the High Court and Court of Appeal. Normally, this Court, as a second appellate court, should accept the findings of fact as determined by the trial court and confirmed by the Court of Appeal unless it can be shown, that either court or both erred in law or in fact or mixed law and fact. There are no such errors in this case which have been shown to my satisfaction.

In his judgment, the learned trial judge clearly assessed the evidence of the appellant's witnesses, referring specifically to the evidence of DW1 which he ejected and of DW4, DW5, DW6 and DW7. Thus, in his judgment, he said,

> ***" I must also state that I am not duly satisfied with the evidence available to support the claim that the defendant rebuilt the damaged building anew and the improvements were not merely renovations. DW1 claims the building was built anew. Her evidence is supported by DW4, who claims that he drew up the plans and supervised the building. DW4 is an obvious liar. He is contradicted by both DW5 and DW6. DW5 says (that) the effecting of the improvements was supervised by officers from the maintenance section of the Board. DW6 says there was no supervisor and that different builders were used at various times. But the plaintiff's witnesses. P W 1 and PW2. refute the claim of the building having been wholly reconstructed. I tend to agree with them."***

In my view, the learned trial judge adequately evaluated this part of the evidence which related to the appellants" counterclaim.

With regard to the actual moneys claimed, having reviewed the evidence presented before him, the learned trial judge said,

> ***" I must, however, record my difficulty in ascertaining the actual prayers from the counterclaim. They are not well laid out***
>
> ***.....The second prayer relates to monetary compensation. The***

defendant prays for a sum of Shs. 120,000.000 = as value of improvements the defendant made on the suit property. Compensation under section 11(2) of the Expropriated Properties Act, just like special damages must be strictly proved. The defendant produced the evidence of DW6, the defendant herself, DW4, F.J. Muluka, DW6 Murudin Katende and DW7, Steven Nyarukuma. I have closely examined the evidence of all these witnesses, together with the contents of the relevant numerous exhibits. I am unable to agree that the defendant's improvements on the suit-property are worth 120m = as claimed. There are various reasons for that conclusion."

The learned trial judge then proceeded to enumerate and explain those reasons which included DW1's stark confession that she did not remember how much she used to renovate the premises for as she claimed, all the documents relating to that subject matter got lost. Murudin Katende's evidence was also to the effect that the documents relating to the amounts of money used in renovating the suit building were not known. The only document which Katende produced in court to justify some of the money used on reconstruction was declared by the trial judge to have been fraudulently prepared for the purpose of the counterclaim. In other words, it was made up and not genuine and the learned trial judge vividly illustrates in his judgment how the so called bill of quantities is false. Thus, the learned trial judge adequately reviewed and assessed the evidence of PW1, PW2 and PW3 given on behalf of the respondent and in support of the claim for ***mesne profits*** and that of DW1, DW4,DW5,DW6 and DW7 relating to the appellant's counterclaim.

I will next consider whether the Court of Appeal as a first appellate court reevaluated the same evidence to enable it to reach its own conclusions on the matter. In my view, the learned Justices of Appeal evaluated the evidence which was given on the grounds of appeal and which were argued before them.

The Memorandum of Appeal presented in the Court of Appeal contained the staggering number of 20 grounds. Most of them were concerned with whether or not there was a cause of action, whether or not the powers of the respondent company had ben validly exercised and whether it was the appellant or the respondent who were the owners of the suit property. Many of these grounds of appeal offended against Rule

85 (2) of the Rules of that Court in that they were not precise, they were repetitive, and argumentative. Be that as it may, an analysis of the contents of those grounds in so far as it is possible, shows that only two out of the 20 grounds of appeal required the learned Justices of Appeal to reevaluate the evidence relating to the appellant's counterclaim and the respondent's claim. In his lead judgment, Okello, J.A, refers to the issue of compensation as provided for under section 11 (2) of the Expropriated Properties Act which reads as follows:

> ***"Where property or business is returned to a former owner or transferred to a joint venture company or retained by the government in accordance with the provisions of this Act, the former owner or the company or the government, as the case may be, shall be liable to pay for the value of any improvements in such property or business, to the person or body that effected such improvements."***

Beyond the above acknowledgement of the provisions of the Act, the Court of Appeal did not deal with grounds 8 and 14 of the appeal as such. However, in my opinion, the thrust of the appeal was of such a nature as to make these two grounds ancillary to the other 18 grounds. In any event, as already shown, the learned trial judge very adequately, evaluated the evidence to a degree that should have satisfied the Court of Appeal should it have been asked or minded to do so. Regarding ground 4 of the appeal, again it is clear that the learned trial judge was mindful of the statement of claim by the respondent. Firstly, the judge granted an order of eviction against the appellant whom he regarded as a trespasser from the time it refused to vacate the suit premises in accordance with the terms of the Certificate of Repossession. Secondly, the learned judge dealt with the caveat which had been placed on the suit property by the appellant and ordered the Registrar of Titles in the Commission of Land Registration to remove it.

This Court has had opportunity to express an opinion on otherwise lawful tenants who overstay their welcome by refusing to vacate suit premises against notices to quit served by rightful owners. We have had occasion to consider a dispute somewhat similar to this one. In ***Joy Tumushabe And Another v. M/s Anglo-African Ltd. And Another,*** Civil Appeal No.7 of 1999 (S.C.), (unreported), we dismissed the

appellants'/tenants' appeal with the following remarks in the lead judgment of the court,

> ***"In my opinion, when the appellants refused to pay rent or acknowledge the title of the owner as landlord, they became trespassers. The argument of counsel for the appellants that since they did not at any time accept Laximides Delia as the true owner of the suit premises indicated that the relationship of landlord and tenant did not exist anywhere is true. At this juncture, the landlord could have chosen to legally evict the defaulting tenants. From the moment they defied the landlords lawful request they became trespassers."***

Now turning to this appeal, I note that the respondent's ***mesne profits*** were set out in Exhibit P.9 which consisted of a rental statement produced in court by Mr. Aggrey Muhwezi, P.W.3, who had been collecting rent from six other shops in the suit property. These were shops numbered 1 to 6 which were smaller than those under the control of the appellant. The appellant's own shop and the four others, that is shops 7 to 11 which were bigger would have together fetched the sum of Shs. 186,000,000 in rent for the period of five years in which the appellant refused to surrender possession to the respondent and continued in occupation and collecting rent from other tenants. In its counterclaim, the appellant claimed the sum of Shs. 400,000, as loss of daily income which it would have earned from the same shops for the remainder of the unexpired term. If its counterclaim had been accepted by the courts, it would have been awarded a sum in excess of Shs. 280,000,000 for the two years. Accepting its counterclaim as plausible, in a period of five years in which the appellant had resisted the repossession of its property, the respondent would have lost more than double that amount. Under the circumstances, the award by the courts of Shs. 186,000,000 for the five years appears to be generous to the appellant. In my view therefore, ground 3 and 4 ought to fail.

Notwithstanding the fact that counsel argued grounds 5 and 6 together, I will first consider ground 5 of the appeal on its own. It was contended on behalf of the appellant that once the court granted its prayer in the counterclaim and awarded compensation in the sum of Shs. 50,000,000, the court ought to have awarded costs

and interest to the appellant. Learned counsel cited **Giella v. Cassman Brown & Co. Ltd** (1973) E.A. 358, **Ecta (U) Ltd v. Geraldine Namirimu And Another,** Civil Appeal No. 29/94 (SC.), (unreported), **Patel v. Spear Motors Ltd.** Civil No.4/1999, and **ss 26(2) and 27(1) of the Civil Procedure Act,** in support of his submissions.

For the respondent, counsel submitted that the learned trial judge gave reasons why he did not allow costs or interest on the money awarded as compensation. In his judgment regarding the counterclaim, the learned trial judge said,

> ***"Be that as it may it remains certain that the defendant did carry out some improvements on the suit property. There is no doubt about that. In the circumstances, the defendant should receive what is fair in the opinion of this court, as the value of the defendant's improvement and taking into account the fact that the plaintiff has, at different times, considered various amounts as appropriate to be paid to the defendant as compensation for her on the suit property, irrespective of the rent collected by the defendant between 1989 and February 1992. those amounts being Shs 12m = - 25m =, and at one time Shs 40m,. I am of the view that a sum of Shs. 50,000,000 = will be very adequate compensation for the value of the defendant's improvements on the suit property."***

The trial judge rejected the appellant's other claims of Shs. 400,000/= per each day of the two years she claimed she had been deprived of business opportunities and the Shs. 100,000,000 claim for loss of goodwill. Nevertheless, it is clear that the appellant was successful in its counterclaim albeit for a reduced amount decided at the discretion of the trial judge. In my opinion, the appellant having proved its counterclaim to the satisfaction of the court, it was entitled to costs and interest unless the court found and gave sound reasons for denying the appellant those costs and interest on the sums awarded. In **Giella v. Cassman Brown & Co. Ltd** (1973) E.A. 358, it was held that the proper order in circumstances such as these where an application is successful, is that costs of the application should be in the cause. Similarly, in **Devra Nanji Dattani v. Haridas Kalida Dawda,** (1949), 16. E.A. 35, the Court of Appeal for East Africa held that a successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the

course of the suit, has led to litigation which, but for his own conduct, might have been averted. In a number of cases where there is a counterclaim or a set off, courts consider whether the excess between the claim and counterclaim or set off and, whoever gets a balance in the excess whether plaintiff or defendant or some other party, gets the costs. Thus in **Kiska Ltd v. De Angelis** (1969) E.A. 6, Spry, Ag V.P,. said,

> ***"Under Order VIII.,13 of the Civil Procedure (Revised), Rules 198., 13 where in any suit a set - off or counterclaim is established as a defence against the plaintiff's claim, the court may if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as may be entitled to upon the merits of the case."*** This principle was derived from English rules of the Supreme Court which were explained by Kennedy, **L**.J. in the case of **Provincial Bill**

Posting of V. Law Moor Iron CO., (1909) 2.K . B . 344, in this way,

> ***"Now, however a counterclaim may, in ordinary cases be established, and if it exceeds the amount recovered on the claim, the court has power to give judgment for the defendant for the balance, if it thinks it right to do so; and similarly, judgment for the balance may be given for the plaintiff if the amount recovered on the claim exceeds that recovered on the counterclaim. But the court must consider in each case whether it would be right to give judgment for the balance, as if it Mould not be reasonable or right to deal with the claim and counterclaim by a judgment for the balance, then judgment should be given for the plaintiff on the claim and for the defendant on the counterclaim, in each case."***

In this case judgment was given to the respondent on the ***mesne profits*** and to the appellant on the counterclaim. Had the conduct of the appellant of which the learned trial judge complained related to the matters of the counterclaim, the trial judge would, in the exercise of his discretion, have been justified in denying the appellant costs and interest. Appellate courts are most reluctant to interfere with the exercise of such discretion. However, it is my view that the acts and conduct complained of related substantially to other aspects of the case and not to the counterclaim itself. The learned trial judge acknowledged it, the respondent accepted it

and even offered as much as Shs. 40,000,000 in compensation which was less than what the trial court finally awarded.

Consequently, it is my opinion, that in relation to the counterclaim, the appellant correctly and legally pursued its rights and successfully obtained the award for which it should not be penalised. I am not satisfied that in relation to the counterclaim, the trial judge exercised his discretion judiciously. The Court of Appeal was in error to confirm his decision and deny the appellant its costs and interest on the award of Shs 50,000,000, I would allow ground 5 in part.

In light of my findings on the other grounds, it is not necessary for me to consider grounds 6 which in any case, concerned the exercise of discretionary powers by the learned trial judge, which, as already observed, should not be interfered with unless cause is shown, which has not been shown, that those powers were exercised injudiciously.

As ground 5 of the appeal has been upheld, this appeal ought to partially succeed. Consequently, I would award the appellant costs in this court and in the courts below on the counterclaim and the sum of Shs. 50,000,000 awarded to the appellant should bear interest at the same rate as that awarded to the respondent, from the date of the judgment in the High Court. I would also confirm the orders of the Court of Appeal in relation to the awards given to the respondent.

JUDGMENT OF TSEKOOKO, JSC:

This appeal is against the decision of the Court of Appeal. The,court upheld the judgment and orders of the High Court which confirmed the respondent as owner of a certain property known as plot 7, Burton Street, Kampala and also awarded mesne profits to the respondent. The High Court also made eviction order against the appellant but ordered the respondent to pay to the appellant shs. 50m/= as compensation for renovation of the building. I shall hereinafter refer to the said property as the suit property.

The facts of this case have been given by Lord, Kanyeihamba, JSC, in his judgment which I have had the benefit to read in draft. I agree that the appeal should succeed in respect of failure by the two courts below to award

(a) the appellant costs on the counter claim and

(b) interest on shs.50m/= which the trial court award to the appellant as compensation

As the two courts below found, prior to 1972, a company known as Verjee Brothers (U) Ltd., the respondent, was the registered proprietor of the suit property. Shareholders and directors of the respondent were Asians who had the misfortunate to be expelled in 1972, by Id Amin's Government. Subsequently, the suit property vested in the Government whose agent, the Departed Asians Property Custodian Board (DAPCB Board), managed the property under the provisions of the Assets of Departed Asians Property Decree, 1973 (Decree No. 27 of 1973). The appellant was among the allocatees of the shops which constituted the suit property. She eventually became a tenant of the DAPC Board until the advent of the 1979 liberation war during which the building was extensively damaged. In 1984, the appellant secured consent of the DAPC Board to renovate the building. It is clear from the evidence available, particularly that given by Namirembe (DW5), who was called as a witness by the appellant, that the appellant was verbally permitted to reconstruct the building and thereafter recoup itself by not paying rent to the Board and retaining rent from other tenants. The appellant renovated at his expense the portion of the building that had been damaged. Evidence available shows that the appellant does not appear to have any record, or reliable record, of the expenditure it incurred on the renovations or reconstruction.

After the appellant had completed the reconstruction, the appellant itself occupied and used one of the shops without paying rent to the DAPC Board to whom the Kampala City Council had given an occupation permit. The appellant let out the rest of the shops on the reconstructed building to other tenants who paid rent to the appellant.

In the meantime, during 1982, Parliament enacted the Expropriated Properties Act, 1982, (Act 9 of 1982), whose objective was to enable repossession of

expropriated properties by the former Asian owners. In 1992, the respondent repossessed the suit property under the provisions of Act 9 of 1982. Subsequently, the appellant resisted the respondent's claim to particularly 5 shops on the suit property. Therefore the respondent successfully challenged the appellant's resistance by action in the High Court. The appellant went to the Court of Appeal and lost. It has now come to this court by way of appeal which appeal contains six grounds.

I agree with the conclusions by Kanyeihamba, JSC, that overall this appeal has no merit. I would like to briefly indicate why I think so.

I agree that there is no foundation in the complaint to the effect that the Court of Appeal erred when it held that the suit property was lawfully repossessed by the appellant. Even if members and directors of the suit property had been expelled by the Amin Government in 1972, the respondent remained on the register as the registered proprietor. It was by operation of Decree 27 of 1973 that DAPC Board managed property. Act 9 of 1982 specifically provided the manner by which expropriated Asians could repossess their former property. The legal process was followed before the suit property was repossessed by the respondents. There is no basis whatever in the argument by the appellant's counsel that any of the two courts below erred in the interpretation of the relevant provisions of Act 9 of 1982. Ground one must therefore fail.

I also agree with the finding of the two Courts below that Kassamali R. S. Verjee (PW1) had been director and manager of the respondent Company and that on the authority of **United Assurance Company Ltd. Vs. Attorney-General** Uganda Court **of** Appeal Civil Appeal No. 1 of 1986 and **Marendrah K. Radia Vs. Kakubhai Kalidas &**
Co. Ltd - Supreme Court Civil Appeal 10 of 1994 (unreported), the authority given by Mr. Verjee (PW1) to Mamtaz Kassam (PW2) to process and repossess the property and to have the appellant removed from the property by court action is good in law for all intents and purposes. In the **United Assurance Co. Ltd. case** (supra), all the members of the Court of Appeal, the predecessor to **this** Court, **held that in** a private **company,** like the respondent, **under** the **Companies** Act, a **director and** manager of **that** company can

lawfully give instructions to a lawyer to institute court action on behalf of the company. I have not been persuaded that Verjee (PW1) had no such **authority.** Accordingly I agree that ground two must also fail.

As framed, ground three of the Memorandum of Appeal complains that the Justices of the Court of Appeal erred in law in not carrying out their own independent evaluation of evidence of DW1, DW4, DW5, DW6 and DW7 called by the appellant to prove the amount and value of her developments on the suit plot and for that reason they erred **in** upholding the finding of the learned trial judge that the appellant had failed to prove its counter-claim and they further erred in holding that the learned trial judge had sufficiently considered the appellant's counterclaim and that the amount of shs. 50m/= awarded by the learned trial judge to the appellant as compensation for the developments on the suit plot was reasonable.

I think that this ground offends Rule 85(2) of the Rules of this Court in that it is not concise and it is argumentative.

Be that as it may, in the Court of Appeal this complaint was discussed under what that Court treated as issues No.3 and No.4. Among the questions considered there was whether the appellant was legally justified to remain on the suit property until it was compensated for the improvements it made thereon. The Court of Appeal held that the answer was no. My perusal of the record shows that these complaints also arise from the consideration, by the trial Judge, of issues 4 and 5 framed for his determination. The learned trial judge found that the appellant was not entitled under Act 9 of 1982 or under the Constitution to retain possession of the suit property pending payment of compensation. But the learned trial judge found that the appellant was entitled to compensation of shs.50m/= and not of shs.120m/= as claimed for the renovation it carried out on the suit property. The judge rejected the appellant's evidence that it rebuilt the whole building. The judge also decided that the appellant was not entitled to the costs of its partial success on the counterclaim (i.e. in obtaining compensation of shs.50m/=).

Submitting on this ground, Mr. Emesu, counsel for the appellant argued that had the Court of Appeal re-evaluated the evidence of Tatu Naiga (DW1), Maluka (DW4), Namirembe (DW5), Katende (DW6) and Nyarukuma (DW7) that Court would have reached different conclusions from those of the trial judge. Counsel in effected admitted that there were inconsistencies and contradictions in the evidence of these witnesses but he contended that any such inconsistencies and contradictions in the evidence of these witnesses were minor. He argued that their evidence was corroborated by numerous documents tendered in evidence and also that in so far as the counterclaim was concerned the value of the claim was supported by the offer by the respondent to sell the property for $220,000 or Ug.shs.200m/= as reflected in exh.D 21. Counsel contended that the trial judge should have believed the evidence of N. Katende (DW6) who claimed to have supervised the reconstruction of the suit property on behalf of the appellant. Mr. Mukumbya Musoke, counsel for the

respondent, argued grounds 3 and 4 together. He contended and I agree with him, that the Court of Appeal re-evaluated the evidence on the record and found no reason to differ from the findings of the trial judge. He cited ***Peters Vs. Sunday Post Ltd.*** (1958) EA. 424 and ***Watt Vs. Thomas (1947) AllER 582*** *in* support of his view that the approach in the re-evaluation of evidence was proper. Learned counsel also submitted, and again I agree with him,that if the Court of Appeal agreed, as it did in this case, with the reasoning and conclusions of the trial judge, there was no need for the latter court to go into details in its own judgment.

In my view, the fact that the Court of Appeal did not go into details in the evaluation of evidence could possibly be described as inadequate evaluation but it cannot be described as lack of evaluation. As far as I am aware, there is no standard format of a judgment with which the Court of Appeal, as first appellate court, is expected to conform in its re-evaluation of evidence. In any case, it is my view that the evidence of most of the witnesses for the appellant was quite unsatisfactory. Tatu Naiga (DW1), herself the key witness in the case, at first denied that the respondent through Mamtaz (PW2) and Muhwezi (PW3) offered any compensation. She however later in her story agreed that she was offered shs.12m/= only. Originally Tatu Naiga occupied one shop as tenant. In the counterclaim she asked for the whole building.

Again as a key witness to the reconstruction of the suit property, she did not know how much money was spent on the reconstruction. The trial judge found Maluka (DW4) a liar. He had claimed that the original building was wholly destroyed. According to the evidence of Namirembe (DW5) it was the roof of the building which was damaged. Walls were not damaged. Yet Maluka, an Engineer and Tatu Naiga claimed that the whole building was damaged. Namirembe, who was called by the appellant to support its ownership, on the other hand confirmed that the Respondent was allowed to reconstruct the damaged part and thereafter to recoup itself from the rest of the tenants. Indeed Namirembe's evidence supported the case of the respondent. According to Namirembe in 1993 DAPC Board asked the respondent to compensate the appellant for the expenses incurred in the reconstruction. The Board could not ask the respondent to compensate the appellant unless the former was owner of the property.

Again the reliability of the evidence for the appellant was further put in doubt by what Katende said in the trial Court. Katende (DW6) who is the son of Tatu Naiga (DW1), supervised the reconstruction of the suit property from 1986 to 1992 yet he had no idea of how much money was spent on the reconstruction. It is also noteworthy that during the trial, the trial judge found Katende (DW6) to be a reluctant witness and therefore unreliable. The judge who saw that witness in the witness box did not rely on him. And so the Court of Appeal which had not seen the appellant's witnesses had no reason to disagree. Nyarukuma (DW7) prepared a valuation report (exh. D 28) dated 7/3/95 and valued the building at shs. 120m/= which was claimed as compensation. The value of the building for the period 1986 to 1992 was unknown. Whatever the value before 1995 was not properly presented to the trial judge. The judge considered the Nyarukuma valuation report to be unreliable.

In all these circumstances I think that the Court of Appeal would have had no justification to interfere with the view of the learned trial judge on the impressions he formed about the key witnesses and the conclusions he formed about the claims by the appellant.

I therefore think that ground 3 must fail.

In ground four, the complaint is that the Court of Appeal failed to re-evaluate the evidence of the plaintiffs witnesses, ie., Verjee (PW1) "Mamtaz Kassam (PW2) and Muhwezi (PW3) and that the Court erred in upholding the award of shs.238m/= as mesne profits. Mr. Emesu contended that the three witnesses (Verjee) PW1, Mamtaz Kassam (PW2) and Muhwezi (PW3) were not sworn because the record of the proceedings does not show that they were sworn. I find this argument a little puzzling. Mr. Emesu represented the appellant throughout the trial. The three witness testified in his presence and I have not come across any suggestion on the record of the trial court showing that he raised any objection to any of these witnesses testifying without swearing. He appears to have been content with whatever took place in the trial court and fully cross-examined the three witnesses and the rest of the witnesses. When we asked Mr. Emesu whether he knows what happened, he did not remember whether the witnesses were actually sworn or not sworn.

In these circumstances I do not think that his arguments on this ground have any merit. In any case, even if the witnesses were not sworn, and since they were properly cross-examined, it has not been shown that the evidence received by not swearing the three witnesses and relied on by the courts below caused any injustice or miscarriage of justice to the appellant. In my own assessment of the evidence, I do not think non-swearing per se would have caused the Court of Appeal to reverse the decision of the trial judge, as suggested by the learned counsel. It is my opinion that ***Omychund Vs. Bakers*** (1774) 26 ER 15 relied on by Mr. Emesu is not helpful to his client's case. The principal laws in this country which regulate the reception of evidence in courts are the Oath Act, the Evidence Act and the Civil Procedure Act and Rules made there under. I have not found therein a provision to support the contentions of Mr. Emesu. It is only section 12 of the Oaths Act which prohibits a conviction or giving judgment on evidence not given on Oath unless there is corroboration. The facts in this case do not call for invocation of that section.

Mr. Emesu contended that there was no admissible evidence on Mesne profits and cited ***Musis Vs. Scietco*** S.C. Civil Appeal 24/93 to support his contentions that the award of shs.238m/= was not based on evidence. That the evidence adduced was inconsistent with the pleading. This later part of his argument appears to have come in rather late and I am not persuaded that counsel's views on this matter are sound.

There is evidence from Namirembe (DW6) and Verjee PW1 and Mamtaz (PW2) that repossession was obtained in 1992. The judge believed this evidence as did the Court of Appeal. This means that from the date of repossession till the appellant was evicted, the respondents were entitled to get rent or earnings from their building. This must remain so even though the appellant cannot be treated as "a trespass", to use Mr. Emesu's words. The trial judge gave reasons to support its award. Therefore the trial court was justified in awarding mesne profits in the sum of shs. 186,000,000/=.

In my view ground 4 ought to fail.

I agree that ground 5 should succeed for the reasons given by Kanyeihamba JSC. But ground six should fail.

JUDGMENT OF KAROKORA, JSC.

I have heard the benefit of reading in draft the judgment prepared by Kanyeihamba, JSC and I do agree with him that this appeal must partially succeed and costs should be in the terms he proposed.

I have got nothing useful to add.

JUDGMENT OF JUSTICE ODER,JSC.

I have had the advantage of reading in draft the judgment of Kanyeihamba J.S.C. I agree with him that the appeal should partially succeed and the order for costs should be as proposed by Kanyeihamba,JSC.

As Tsekooko, Karokora and Mulenga JJ.S.C, also agreed the orders shall be as proposed by Kanyeihamba, JSC.

JUDGMENT OF MULENGA JSC

I had the advantage of reading in draft the judgment of Kanyeihamba JSC. I concur that ground of appeal No.5 ought to succeed. No reason was shown by the courts below why the appellant should be deprived of interest and **Costs** on the counter-claim.

The sum of Shs.50,000,000/= awarded to the appellant as compensation should carry interest at the rate **of** 25% p.a. from the date of the High Court judgment till payment in full. 1 also agree that the appellant should have the costs on the counter claim in this court and in the courts below.

Dated at Mengo the 22nd day of April 2002