

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL NO. 26 OF 2002

1. **IGNATIUS WILLIAM KAJUBI}**
2. **ADAH NAMBASA }::::::::::::::::::::::::::APPELLANTS**

VERSUS

CANAN WANYAMA::::::::::::::::::::::::::RESPONDENT

[Appeal from the Judgment of His Worship S. L. Musimbi Muse (Chief Magistrate) in Mukono Civil Suit No. M41 of 1997]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This is an appeal from the judgment of Mr. Musimbi Muse sitting as the Chief Magistrate at Mukono where he ruled that the defendant (now the respondent) was not in breach of the lease agreement between him and the plaintiffs (the appellants) and dismissed the suit. He also ordered that the plaintiffs pay the costs of the suit.

The facts from which the appeal arose can be summarised as follows. The appellants were the son and daughter of, and the administrator and administratrix of the estate of David Kagolo Kajubi who died in 1991. Sometime in the 1960s the late Kagolo Kajubi (also referred to as “the deceased”) entered into an agreement to sub-lease land known as Plots 75-77 at Kauga Mukono to the respondent. There was no formal written agreement. Records about the sub-lease indicate that the rent was originally shs 200/= per month for each plot. The deceased had also entered into negotiations to lease Plot 149, also at Kauga in Mukono, to the respondent. However, the transaction fell through after the respondent had paid him shs 11,206/= being premium, ground rent and the fee for a building plan meant for the property. On the 16th January 1975, the deceased and the respondent entered into another contract where it was agreed that the sum of shs 11,206/= would be defrayed towards the payment of rent for Plots 75-77 at Kauga starting August 1974 to August 1984 (a period of 10 years). Thereafter, the respondent would resume payment of rent for the

latter property at the rate of shs 100/= per month. The agreement which was written in Luganda and its translation into English were admitted in evidence as **DExh.1**.

It was the appellants' case that the respondent had not paid any rent to them since their father died in 1991. They demanded for it but the respondent failed or neglected to pay. Instead he offered to purchase the property and they agreed to sell it to him at shs 4 million. The respondent paid shs 2.2 million but refused to pay the balance of shs 1.8 million and instead offered to pay shs 0.8 million only. The appellants were not agreeable to this proposal. They instead rescinded the agreement and filed this suit for orders for eviction of the respondent from the property, general damages for breach of contract and costs.

The respondent's case was that after the death of the deceased he did not know who to pay rent to. When the appellants approached him to demand for it he entered into negotiations with them to purchase the reversion at a price of shs 3 million. He paid shs 2.2 million towards the purchase price leaving a balance of shs 800,000/= outstanding. He contended that he was always willing to pay the rent due and had it not been for the negotiations to buy the appellants' interest he would have paid it all. That having received part payment of the purchase price, the appellants could not turn round and sue him to forfeit the lease for non-payment of rent. He therefore raised a counterclaim for the sum of shs 2.2 million paid to the appellants for the purchase of their interest.

The trial court framed four issues for determination as follows:

- i) Whether the unwritten lease agreement was breached by the defendant.
- ii) Whether there was a binding agreement *inter partes* to sell the suit premises to the defendant.
- iii) Whether the sale agreement was breached and by who; what was the effect of the breach.
- iv) Remedies available to the parties.

The trial magistrate found for the respondents on the first issue. With regard to the second issue he found that there was no binding agreement between the parties. That however, the appellants had refunded the deposit paid to them. In conclusion, the trial magistrate found that the appellants were not entitled to the remedies that they sought since the respondent was not in breach of any of the agreements between them. He thus dismissed the suit with costs.

The appellants appealed and framed 4 grounds in their memorandum of appeal as follows:

1. The learned trial magistrate erred in law when he failed to find that there was a breach of the lease of agreement by the respondent's failure to observe the covenant to pay rent.

2. The learned trial magistrate erred in law not to find that due to non payment of rent, the appellants were entitled to a re-entry.
3. That the trial magistrate erred in law when he did not properly evaluate the evidence regarding the payment and non payment of rent and thereby wrongly found that the transferees of the lease had the duty to collect rent from the lessee.
4. That the trial magistrate erred in law when he failed to make any finding regarding the counterclaim and dismiss (sic) it as disclosing no cause of action against the appellants.

The appellants prayed that this court allow the appeal with costs to the appellants in this court and in the court below.

The parties' advocates filed written submissions in the appeal. It appears that counsel for the appellants filed his submissions with the record of appeal on 28/08/08. The respondent's advocates filed a reply on 7/10/08 and the appellants' advocates filed a rejoinder on 12/12/08. It is not evident how the parties came to file written submissions because the record of proceedings in this court shows that the parties first appeared before the registrar in my absence on 13/11/08. There is no law that allows parties before this court to file written arguments and opt out of appearing for the hearing without leave as is the case in the Supreme Court and Court of Appeal (Rules) Directions (Rules 68 and 94, respectively). Arguments in writing are therefore only presented at the discretion of the judge presiding and with his/her leave. However, this is a very old appeal that was filed in 2002; I will dispense with the requirement for leave not to appear and consider the appeal on the basis of the written arguments.

The duty of this court, as the first appellate court, is to rehear the case on appeal by reconsidering all the evidence before the trial court and come with its own decision. The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law [**Pandya v. R [1957] EA. 336; Father Narsension Begumisa & Others v. Eric Tibekinga, SC Civil Appeal No. 17 of 2002 (unreported)**]. In his submissions counsel for the appellant proposed that the questions to be determined in the appeal are four, namely:

- i) Whether the respondent was in breach of the covenant to pay rent.
- ii) Whether the appellants were entitled to re-entry upon breach of the covenant to pay rent.
- iii) Whether there were valid grounds for the respondent's non payment of rent.
- iv) Whether the trial magistrate ought to have dismissed the counterclaim with costs to the applicant.

Counsel for the respondent agreed with this proposal and so both advocates addressed the four questions as framed above. However, I have closely examined the pleadings and the record of proceedings before the lower court and find that in order to answer all the issues that were raised in the suit the questions for determination by this court would be better framed as follows:

- i) Was the respondent in breach of the covenant to pay rent? If so,
- ii) Was there a valid legal agreement for the appellants to sell their interest in the suit property to the respondent? If so,
- iii) Was the respondent in breach of the agreement? If not,
- iv) Would the respondent be entitled to relief against forfeiture?
- v) What are the remedies available to the parties?
- vi) Did the trial magistrate properly dispose of the respondent's counterclaim?

I shall address these questions in the same order as they appear above.

i) Was the respondent in breach of the covenant to pay rent?

The trial magistrate found in favour of the respondent on this issue. He ruled that s. 191 of the Succession Act applied to the case and that the respondent was right when he waited for the appellants to obtain letters of administration before he could pay rent. The trial magistrate also found that the appellants were not vigilant when they failed to apply for letters of administration immediately after the death of the deceased and as a result that the respondent could not be blamed for the appellants' delay. He also found that the appellants' agreement with the respondent to sell him their interest in land and the respondent's subsequent part payment of the purchase price were impediments to the respondent's payment of rent. That as a result the respondent was not in breach of the written lease (Annexure F1 or **DExh.1**).

In answer to this question, Mr. Mbogo for the appellants contended that there was ample evidence on record to show that the respondent had failed to pay rent. He further submitted that as administrators of the estate of Kagolo Kajubi and the registered proprietors of the suit property, the appellants were entitled to collect rent from the time of the death of the deceased. He relied on s. 192 of the Succession Act. It was also his submission that instead of waiting for the appellants to be appointed administrators of the estate, the respondent ought to have had recourse to the provisions of s. 218 of the Succession Act and set the law in motion to have a general administrator of the estate appointed under that provision.

Mr. Mbogo further submitted that though the respondent testified that he had always been ready and willing to pay the rent due, his testimony was not truthful he did not try to make any contact with the deceased's family even though he was informed he had died. That even after he found out that the appellants were the administrators of the estate through the pleadings in this action, the respondent still refused to recognise them as his landlords and instead purported to pay rent into court. Mr. Mbogo contended that the purported payment of the rent into court was an admission that the respondent was in breach of the sub-lease. Further that the attempts to buy the property could not be a valid reason for his failure to pay rent because he made no further efforts to pay the rent from 1998 onwards

after he deposited the rent arrears for the period 1991 to 1998 in court. He thus concluded that the respondent was and still is in breach of the covenant to pay rent and the lease should be forfeited.

In reply, Mr. Nyanzi for the respondent proposed that there were two periods that ought to be considered when considering the covenant to pay rent, i.e. the period between 1984 and the death of the deceased, and the period after his death to the time of filing suit. It was his view that there was unchallenged evidence that the respondent had duly paid rent to the deceased before his death. The respondent testified that the deceased was his friend and he paid rent to him, sometimes casually and sometimes formally and adduced evidence of the formal acknowledgments of rent in the form of receipts. In Mr. Nyanzi's view the testimony of the respondent in this regard was not challenged by the appellants.

With regard to the period after Kagolo Kajubi's death, Mr. Nyanzi submitted that the respondent had good reason not to pay rent because the appellants took six years to obtain letters of administration. Further that the appellants could not claim any rights from the estate of their father because of the provisions of s. 191 of the Succession Act. Further that the appellants also had no right to come to court before obtaining letters of administration. Mr. Nyanzi also contended that the respondent did not even know that the appellants were beneficiaries to the estate of the deceased. That as a result they could not risk payment to the appellants and the absence of letters of administration constituted a legal impairment in fulfilling the respondent's obligation to pay rent.

It was further submitted for the respondent that the attempts to enter into an agreement to purchase the appellant's interest also resulted in non payment of rent. The respondent made payments to the appellants pursuant to the agreement and as a result he could not pay rent as well because it did not make sense for him pay rent for property that he was buying. Mr. Nyanzi thus prayed that the first question be answered in the negative.

I would first of all point out that the trial magistrate was not clear in his judgment whether he was addressing the written agreement (DExh 1) or the unwritten sublease agreement between the deceased and the respondent. The issue that had been framed was to do with the "*unwritten lease agreement.*" The trial magistrate started off his discussion with the sub-lease generally and ended up with a conclusion about the written agreement (**DExh.1**) only. With due respect this was quite confusing. For clarity in resolution of this question, I shall address the two periods during the subsistence of the sub-lease as proposed by Mr. Nyanzi; i.e before death and after the death of Kagolo Kajubi. I shall do this without undue regard to the technicality that the appellants brought the suit on the specific claim that rent had not been paid since the deceased died because elsewhere it has been held that the parties may make a matter not pleaded an issue in the trial, if the court agrees [**Francis Butagira v. Deborah Namukasa, S/C Civil Appeal No. 6 of 1989**, Judgment of Plat JSC at page 2]. It is of course better to amend the plaint but this did not happen.

The record shows that the 1st appellant (PW1) stated that his father died in 1991 but he first got to know that the respondent had a sub-lease on the land in 1997. He then through his lawyers met with the respondent's son, Okumu Wanyama (DW1), and discussed issues to do the suit property at length. They agreed with DW1 that the respondent would purchase their interest in the land for shs 4 million. After that DW1 paid up to shs 2.2 million to the appellants in instalments and it was agreed that the balance would be paid in a months' time. The respondent later failed to pay the balance as agreed and instead offered to pay a further sum of shs 0.8m to make shs 3m, only. At that point the appellants' agreement to sell their interest in the property to the respondent fell through. PW1 further

testified that he did not know how much was due from the respondent in arrears of rent by the time the suit was filed; it was therefore not indicated in the plaint. PW1 also did not know whether the respondent had deposited any money in court on account of rent since the filing of the suit.

The 2nd appellant testified as PW2. Her testimony was not very different from that of the PW1 except that she gave details about the process that led to their meetings with DW1. She stated that after their father's death they embarked on a process to find out who the tenants on his land were. They discovered that all tenants had written sub-lease agreements except the respondent. In order to verify who the tenants were the appellants went to Mukono Land Office which forwarded them to the LC1 Kauga who gave them all the names and plot numbers of the tenants on deceased's land. Through their lawyers the appellants wrote letters to the tenants. While all the other tenants showed up to introduce themselves to the appellants, the respondent did not. They sent him a reminder through his son (DW1) and (DW1) informed them that M/s Price Land were the managers of the respondent's property. When the appellants approached M/s Price Land, they received no help.

PW2 also admitted that at some point both appellants agreed to sell their interest in the suit property to the respondent at a purchase price of shs 4m but he refused to pay that amount and instead offered to pay shs 3m and the agreement fell through. They then decided to file this suit against the respondent. Similar to the PW1, PW2 did not know how much was outstanding in rent when they took over management of the estate. However, she recalled that they had started following up the matters relating to the suit land in 1992 before they obtained letters of administration in the estate.

Lameka Mugarura (PW3) was the brother to the deceased. He testified that he was aware that the respondent held a sub-lease on his brother's land. He too testified that the respondent had not paid rent in respect of the lease since the death of the deceased. Further that the respondent had also not paid rent since 1984 till the death of the deceased. However, it appears to me that this witness had no real knowledge of the facts about the transactions in respect of the suit land. His testimony was inconclusive and some of his statements were hearsay evidence that could not be relied on to make a decision.

On the other hand, DW1 testified that his father authorised him to deal with matters concerning the land in 1996 when the appellants approached him. After the appellants approached him, he sought advice from lawyers who advised him to only deal with a legal representative of the deceased with letters of administration. DW1 admitted that he went to the appellant's lawyers' chambers and the appellants agreed to sell him their interest in the land at shs 4m but that he offered to pay shs 3m. He stated that after he offered shs 3m he paid shs 2.2m leaving a balance of shs 0.8m. DW1 testified that the respondent had always been willing to pay the rent due but got confused the transaction when the appellants offered to sell their interest in the property him.

In cross-examination DW1 stated that he did not know when the respondent last paid rent for the sublease. Further that there was no written agreement, or agreement at all about the amount that was to be paid by the respondent in consideration for the appellants' interest in the suit property. Also that he had paid the outstanding ground rent in court. That when the appellants sued the respondent he demanded for shs. 2.2m that he had paid upfront to the appellants for purchase of their interest in the property.

The respondent (DW2) testified that the sub-lease agreement resulted from his friendship with the deceased. That the agreement was made sometime in the late 1960s and he was to pay shs 100/= as rent. It was also the respondent's testimony that the payments were sometimes formal and sometimes informal. He produced a bundle of receipts (**DExh3**) as proof of some payments. According to the respondent, he last got in touch with the deceased in 1986 or 87 after he retired from the Uganda Police and was on in the process of going to live in Busitema. He stated that at the time he paid shs 30,000/= to the deceased which he thought could have taken care of ground rent up to 1991 or 1992. He further testified that he came to know about the death of the deceased in 1990 or 1991 through one called Haji Ali Nseko, a joint friend to the deceased and he, but none of the deceased's family members informed him about the death. The respondent admitted that he had authorised his son Okumu Wanyama (DW2) to take charge of the property and it was he that told him that the appellants had sued him. He gave the documents in respect of the suit property to Wanyama and authorised him to defend the suit. The respondent further testified that Wanyama informed him that he had entered into negotiations to buy the appellant's interest in the suit land and the appellants wanted shs 4 m for the property but he (DW1) had offered shs 3m. The respondent authorised DW1 to pay the amount required in instalments and DW1 went ahead and paid some money.

In cross-examination the respondent stated that he also entered into an agreement with the deceased to rent another plot within the vicinity of Plot 75/77 and he had paid premium and ground rent for it. That when the agreement fell through the deceased took back the plot and it was agreed that the money that he had paid be defrayed for rent for Plot 75/77. That agreement was in writing and it was admitted as PExh1. The respondent further asserted that after 1984, the deceased did not issue him with any receipts but he paid rent to him after 1984 by cheque. He confirmed that he did not have any documents to show that he paid any rent after 1984. He also confirmed that the Kajubi family wanted him to pay shs 4m for their interest in the property but he was "*in favour*" of paying them shs 3m. He also stated that at the time he testified he did not know who his landlord was.

I closely examined the bundle of documents that the respondent presented as DExh3. It comprised of 31 receipts signed in acknowledgement of rent for various months between 1968 and 1974. The bundle included 2 receipts in respect of premium and various invoices demanding for payment of rent. The period August 1974 to August 1984 was represented by one lump sum payment which was the refund of premium and ground rent for plot 147 or 79, the subject of DExh1. There were no receipts to show that any rent was paid to the deceased when the amount of shs 11,260/= mentioned in DExh1 got exhausted. Though the respondent testified that he paid shs 30,000/= in 1986/87 before he left for Busitema, there was no receipt to prove that the said amount was paid. And though he stated that he paid rent by cheque after 1984, there was not an iota of evidence among the bundle of documents to show that he had done so.

The documents comprised in DExh1 impressed it upon me that the deceased was a meticulous man who liked to keep records. Having reviewed them, I was not convinced that Mr. Kajubi could have taken as hefty a sum as shs 30,000/= from the respondent and not issued him with a receipt in acknowledgment thereof. If it was true that he paid some money by cheque, the respondent ought to have had some evidence that he did so. A stub from his cheque book would have been sufficient to prove this. I also did not believe the respondent's testimony that because he and the deceased were friends, the deceased treated rent payments in a casual manner and issued no receipts on many occasions. I therefore find that the respondent was in breach of the agreement to sublease the land in dispute even before the death of Mr. Kagolo Kajubi.

I now turn to the period after the death of the deceased. The evidence on record clearly showed that no rent was paid after the death of the deceased. Both the appellants and the respondent himself testified so. Therefore, what needs to be established is whether the respondent was justified in his failure to pay ground rent.

It was argued for the respondent that s.191 of the Succession Act applied to this case. Mr. Mbogo countered this by arguing that s. 218 of the Succession Act applied and that the respondent should have had recourse to it. Mr. Mbogo also submitted that s. 192 of the Succession Act applied to the case and entitled the appellants to collect rent from the time of the demise of the lessor, even before they obtained letters of administration. I shall therefore examine the effect of these three sections of the Succession Act to this case.

In his consideration of the provisions of s. 191 (now s.192) of the Succession Act the trial magistrate ruled:

“I find that the submissions (sic) that s.191 of the Succession Act was applicable to this case since it provides that the grant of letters of administration goes down to the time the deceased intestate passed away. The deceased passed away on 4th January 1991 and the grant goes so. It is not to be interpreted that the defendant would have paid ground rent to the anticipated administrator even before he had obtained the letters. It means that he (had) taken charge of the estate up to the time of death whatever accrued between there in its respect (sic). The defendant was right to wait for (the) Administrator to the estate and he pays (sic) the rent. The plaintiffs were not vigilant and cannot blame the defendant for the period between 1991, 4th January, and 19th February, 1996.”

S. 191 (now s.192) of the Succession Act provides as follows:

“192. Effect of letters of administration.

Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death.”

Simply put the provision means that letters of administration relate back to the time of death of the deceased. The administrator is entitled to all the rights of the deceased from the time that he/she died till the grant is made, as well as after the grant. Section 180 of the Succession Act provides for the character and property of the executor or administrator as follows:

“180. The executor or administrator, as the case may be, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such.”

My understanding of the provision above is that the administrator or executor of the will of the deceased can collect the just debts of the deceased before his death. He/she can also collect his just debts between the time of death and obtaining the grant of probate or letters of administration, as well debts that accrue to the deceased after the grant.

The question that arose in this case was whether the administrator could collect the debts before the grant of letters of administration because the deceased died intestate. It was argued for the respondent that he/she could not because of the provisions of s. 191 of the Succession Act.

Section 191 of the Succession Act provides as follows:

“191. Except as hereafter provided, but subject to section 4 of the Administrator General’s Act, no right to any part of the property of a person who has died intestate *shall be established in any court of justice*, unless letters of administration have first been granted by a court of competent jurisdiction.”

[Emphasis supplied]

My understanding of this provision is that it only applies to actions on behalf of the deceased that require bringing court proceedings in respect of his/her property. Simply put, the right to bring an action in respect of the estate of an intestate deceased only arises after one has obtained letters of administration. I am therefore of the opinion that s.191 of the Succession Act does not preclude a person from dealing with the property of an intestate deceased without first obtaining letters of administration. This interpretation is fortified by s. 268 of the Succession Act which provides for intermeddling as follows:

“268. A person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself or herself an executor of his or her own wrong; except that—

a) intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his or her funeral, or for the immediate necessities of his or her own family or property; or

b) dealing in the ordinary course of business with goods of the deceased received from another, does not make an executor of his or her own wrong.”

[Emphasis supplied]

The 2nd appellant testified that the deceased was the proprietor of several pieces of land in Mukono. That after his death, she and the 1st appellant dealt with several of his tenants who approached them to pay rent as they had paid to the deceased. Judging from the manner in which the deceased dealt with his property, as is evident in the bundle of documents admitted as DExh3, the sub-leases on the land were his business. It was therefore incumbent on

responsible members of his family to receive rent from the premises as he had done, i.e. in the ordinary course of his business. And this, according to s.268 (b) Succession Act, would not make them executors of their own wrong.

I find that this interpretation is reinforced by s. 192 of the Succession Act which provides that Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death. This means that some actions of the administrator before the grant of letters of administration are valid and lawful. I think that the collection of rent in a businesslike manner would be one of those. For how would the family of the deceased go about arranging a funeral, providing for dependant children and other relatives and maintaining properties if they did not collect rents in the ordinary course of business as he/she had done?

I therefore do not agree with Mr. Nyanzi's submission that the appellants had no right whatsoever to collect rent before the grant of letters of administration. The appellants had the right to collect rent subject to the provisions of s. 268 of the Succession Act. If they did not follow the exceptions therein they would become executors of their own wrong and be liable under the provisions of s. 269 of the Succession Act. They would be answerable to the rightful administrator or any creditor of the deceased to the extent of the assets that may have come into their hands, after deducting payments made to the rightful administrator and payments made in due course of administration. The learned trial magistrate therefore erred in law when he ruled that members of the deceased's family could not collect rent before the grant of letters of administration.

I now turn to Mr. Mbogo's argument that persons that are in the respondent's position would have recourse to s. 218 of the Succession Act. That section provides as follows:

"218. Administration pendente lite

The court may, pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate, and every such administrator shall be subject to the immediate control of the court, and shall act under its direction."

Osborn's Concise Law Dictionary defines "*pendente lite*" as the period "*after an action has been commenced and before it has been disposed of.*" S. 218 of the Succession Act therefore provides for situations where the grant of letters of administration or probate has been delayed because of litigation. This may occur when the application for the grant is opposed by other persons with interest in the grant which may result in a suit that might take a long time to dispose of. If no grant is made to take care of the period between the filing of the suit and its conclusion, the assets of the deceased may go to waste. They may be exposed to the illegal or fraudulent acts of beneficiaries and others. The grant made under s. 218 is therefore specifically meant to protect the estate of the deceased pending distribution by will or letters of administration and not any other situation.

The administrator appointed under s.218 may collect rents and manage other general affairs of the deceased. But I do not agree with Mr. Mbogo that the case at hand required the appointment of an administrator *pendente lite*. There was no suit pending in court to justify the grant of letters of administration under s. 218. The only reason that seems

to have delayed the application for letters of administration was the holding of the last funeral rites for the deceased and that was not envisaged by s.218 of the Succession Act.

I also do not agree with the submission that the respondents could have applied for such a grant. The persons entitled to such a grant are the very same persons who may apply for letters of administration under the provisions of s. 201 and s. 202 of the Succession Act. And while creditors may become entitled to apply for letters of administration under s. 206 of the Succession Act, debtors are not provided for. Suffice it to add that it would have been a waste of time to obtain such a grant due to delay of an application for letters of administration because the process of obtaining this specific grant is similar to that for obtaining a final grant of letters of administration or probate. The two processes would take the same amount of time to complete.

The other question that arises is whether the respondent was under the obligation to pay rent to the estate of the deceased before the grant of letters of administration. When the 2nd appellant was re-examined she testified that the 1st appellant and she started following up the sub-lessees on their father's land in 1992. That they were able to trace the respondent in 1993 and they demanded that he pays rent through their lawyers. That the other tenants of the deceased responded to the lawyer's letters and they introduced themselves to the appellants but the respondent did not. Instead the respondent's son directed them to M/s Price Land, the care takers of the respondent's property but the caretakers did not co-operate with the appellants. The long and short of it is that the respondent resisted all attempts by the appellants to collect rent from him. Indeed he did not even acknowledge them either as interested parties or beneficiaries to the estate. He simply would not pay them, neither would he meet with them but sent his son (DW1) who did not even have any formal or written authority of the respondent to represent him.

I have already ruled that the appellants could under the law demand for payment of rent in the ordinary course of the deceased's business. They duly introduced themselves to the respondent but he refused to pay them, ostensibly waiting for them to obtain a grant of letters of administration. In this regard, it is important to note that s. 102 of the RTA provides as follows:

“102. Covenants to be implied in every lease against the lessee.

In every lease made under this Act there shall be implied the following covenants with the lessor and his or her transferees by the lessee binding the latter and his or her executors, administrators and transferees—

- (a) that he or she or they will pay the rent reserved by the lease at the times mentioned in the lease;**
- (b)**
- (c)”**

S.103 of the RTA then goes on to provide as follows:

“103. Powers to be implied in lessor.

In every lease made under this Act there shall be implied in the lessor and his or her transferees the following powers—

(a) that he or she or they may with or without surveyors, workers or others once in every year during the term, at a reasonable time of the day, enter upon the leased property and view the state of repair of the property;

(b) that in case the rent or any part of it is in arrear for the space of thirty days, although no legal or formal demand has been made for payment of that rent, or in case of any breach or non observance of any of the covenants expressed in the lease or by law declared to be implied in the lease on the part of the lessee or his or her transferees, and the breach or non observance continuing for the space of thirty days, the lessor or his or her transferees may re-enter upon and take possession of the leased property.”

In addition to this, s.112 of the RTA provides that the provisions as to leases apply to sub-leases with such modifications and exceptions as the difference between a lease and sublease, and in the mode of registration of each require. It is therefore the law by virtue of the provisions of s.103 and 112 RTA that rent for a sub-lease has to be paid whether it is formally demanded or not. It was not therefore for the appellants in this case to look for the respondent and demand that he pays the arrears of rent or the rent that had been reserved but rather his obligation to look for the right person to pay after the death of the deceased. That had to be done as soon as the respondent heard about the death because s. 102 provides that rent should be paid within 30 days of its becoming due and owing. According to his testimony, the respondent was made aware of the death of the deceased by one Haji Ali Nseko in 1990 or 1991. For all the time between 1991 and 1996 when the appellants got letters of administration, he made no efforts to find out where he had to pay rent. He also made no efforts during that time to deposit the rent due in court as he purported to do when the appellants sued him. Neither did he approach the Administrator General as Public Trustee and offer to pay the rent. Instead, even after he was made aware that the appellants were the administrators of the estate, he pretended not to know who the administrators of the estate were and instead made an attempt to pay arrears of rent in court.

I am mindful of the fact that there was no written agreement or registered agreement in respect of the sublease. It is however very clear from the records of past payments that the tenancy was a monthly tenancy and rent was due every month even without having recourse to s. 102 RTA. I therefore find that the respondent was also in breach of the covenant to pay rent for the period 1991 to the time of filing the suit and thereafter. Grounds 1 and 3 of the appeal therefore succeed.

ii) Would the appellants be entitled to exercise their right to forfeit the lease?

Though there was no written agreement in this case the deceased was a lessor from C. M. S. Kisosonkole and he entered into a contract with the respondent to sublease part of the land under his lease. Section 109 RTA allows the lessee to sub-let to another as follows:

“109. Lessee may sublet.

The proprietor of any lease under this Act may, subject to any provisions in his or her lease affecting his or her right to do so, sublet for a term not less than three years by signing a sublease in the form in the Tenth Schedule to this Act; ...”

Though s. 109 RTA provides that the lessee of land under the Act may enter into an agreement to sublease it in the form in the Tenth Schedule, that requirement is not mandatory for all leases but only for subleases that are above the term of three years. There is no doubt that the sub-lease in the instant case fell under the provisions of the RTA because the head lease was registered under the RTA in LRV 581 Folio 4. In addition to the covenants implied in leases stated in s. 102 RTA, the sub-lessee is also under the obligation to perform the covenants implied in the sublease that are provided for in s. 113 of the RTA. By virtue of that provision, there is implied in every sublease a covenant with the sub-lessee and his or her transferees by the sub-lessor binding the latter and his or her executors, administrators and transferees,

“... that he or she or they will, during the term granted by the sublease, pay the rent reserved by and perform and observe the covenants and agreements ***contained in the original lease***, and on his or her or their part to be paid, performed and observed.”

A landlord’s right to forfeit a lease (i.e. enforce a forfeiture of it) may arise under three heads: i) It may arise under a forfeiture clause, ii) by breach of condition or iii) by denial of title. (See Megarry’s Manual of the Law of Real Property, 4th Edition by P. V. Baker at pages 354-355).

As opposed to a breach of a condition, the landlord has no right to forfeit a lease for breach of a *covenant* unless the lease has an express provision for forfeiture for breach. But in this case, clause 4 of the head-lease was a forfeiture clause which provided as follows:

“4. Provided always that in case the rent or any part thereof is in arrear for the space of 30 days although no legal demand has been made for the payment thereof or in case of any breach or non-observance of the covenants and conditions expressed in the lease on the part of the lessee or of his transferees and such breach or non-observance continuing for 30 days it shall be lawful for the lessor or his transferees to re-enter upon and take possession of the demised premises.”

By virtue of the provisions of s. 113 of the RTA the respondent was bound by this provision of the head lease because it was a condition of the sub-lease that he pays rent as agreed. The obligation to pay rent was also by force of law. Section 103 (b) of the RTA provides that in every lease made under the RTA, it shall be implied in the lessor and his transferees that in case the rent or any part of it is in arrears for the space of 30 days, although no legal or formal demand is made for payment of it, among breaches other of covenants, then the lessor or his or her transferees may re-enter and take possession of the leased property.

In the instant case, the rent for the sub-lease had been in arrear for the space of more than thirty days both before the death of the deceased and after it. The landlord was therefore entitled to forfeit the sub-lease on breach of the covenant to pay rent as well as any other condition named in the head-lease. According to Megarry's Manual on the Law of Real Property (op cit, at page 356) one of the normal methods for enforcing forfeiture is by issuing a writ for possession. Such writ must contain an unequivocal demand for possession so that the mere service of the writ operates to determine the lease. Alternatively, unless the premises are let as a dwelling house on a lease and some person is lawfully residing in it or in any part of it, the landlord can enforce his right of forfeiture by making peaceable entry onto the land.

In the instant case, having failed to get the respondent to pay the rent, the appellants brought this suit. In the amended plaint they stated in paragraph 3 as follows:

“3. The plaintiff's claim against the defendant is for general damages for breach of contract and eviction of the defendant from land comprised in Mailo Register Volume 316 Folio 16 Kyaggwe Block 530 Plot 75-77 land at Kauga – Mukono.”

In paragraph 7 of the plaint they prayed that judgment be entered against the defendant and orders be made for his eviction or his servants and or agents from the suit land, general damages for breach of contract, costs of the suit and any other alternative relief. I find that service of this plaint on the respondent operated to determine the sub-lease without much ado (See **Elliot v. Boynton [1924] Ch. 236**). So not only were the appellants entitled to re-enter upon the demised land but they actually re-entered and the lease was brought to an end by the writ for possession. Ground 2 of the appeal is therefore also answered in the positive.

iii) & iv) Was there a valid legal agreement between the appellants and the respondent to sell him the appellant's interest in the suit property, and if so was there a breach of the agreement by either party?

The trial court considered the findings on this point important because the respondent pleaded that he did not pay the rent due to the appellants because he had entered into an agreement with them to purchase their interest in the property. To the respondent, that and the absence of an administrator for about 5 years after the death of the deceased was sufficient reason for non-payment of rent. The trial magistrate's findings on this point were as follows:

“The agreement was existing (sic) and could be binding if it was not frustrated by the mistake of shs 3 millions (sic) instead of shs 4 millions (sic). The (sic) PW2 told court that shs 4 millions (sic) was the same nature that they had sold (sic).

I do find the contract agreement was not binding as each party had not known that the other knew a different figure. It so required fresh agreements. It bound none of the parties and in the premises the plaintiff has complied with the refund of the deposit. If it was not binding due to mistake, it was not breached.”

It was argued for the respondent that there were negotiations for sale of the appellants’ interest in the suit land and he deposited payments that were accepted by the appellants but a disagreement arose thereafter. The appellants could not rebut facts that they admitted when they refunded the deposit. That it would not make sense for the respondent to pay rent in respect of an interest that he had bought and so the 3rd issue framed for the appeal should be answered in the positive.

In reply, Mr. Mbogo for the appellants contended that the respondent could not excuse himself from paying rent by saying he had negotiated with the appellants to buy the remaining term of their lease. That the contract did not materialize and the money that had been advanced was refunded. Hence the *status quo* prevailed that the respondent was in default of payment of rent.

A review of the evidence shows that when the appellants finally got in touch with the respondent, he arranged for them to work with his son Wanyama (DW1) to ensure that rent was paid because it was he that was in charge of the building. PW1 testified that they held a meeting at the chambers of Mbogo & Co., Advocates wherein they agreed that they would sell the remaining term of their lease to the respondent. They proposed that he pay shs 4 million. There was no written agreement because it was also agreed that after the payment of the purchase price, the parties would draw up an agreement. After the meeting, DW1 paid shs 2.2 million in instalments. Receipts were issued to him by M/s Mbogo & Co. on behalf of the appellants and they were admitted in evidence as DExh4, 5, 6 and 7.

When M/s Mbogo & Co. insisted that the price was shs 4 million and not shs 3 million, DW1 refused to pay and argued that the original agreement was for a purchase price of shs 3 million. The appellants then instructed Mbogo & Co. to rescind the contract and return the down payment. The 2nd appellant confirmed the 1st appellant’s testimony. In cross-examination she clarified that the parties had agreed that instead of continuing to pay rent, the respondent would pay the purchase price of shs 4 million.

According to Wanyama (DW1) when they met at the Chambers of Mbogo & Co. Advocates, there was no agreement about the purchase price. The appellants wanted to sell the land at shs 4 million but he made a counter offer to buy it at shs 3 million. He asserted that he did not agree to pay shs 4 million at which the offer was made by the appellants. That he first paid up to shs 2.2 million but his lawyer later advised that the land was worth only shs 3m. In cross-examination DW1 stated:

“After paying the 1 million, I told my father that I had deposited 1 million. It is my lawyer who advised that the land was worth 3,000,000/= not my father, I just told him.”

The respondent's testimony was that his son informed him that the land was for sale at shs 4m but he had agreed to pay shs 3m. In cross-examination the respondent stated as follows:

*"I know it was shs 3,000,000/= not shs 4,000,000/=. I do not know whether my son paid the shs 3,000,000/= or not. I was surprised that the matter was again in court. The family wanted shs 4,000,000/= **but I was in favour** of shs 3,000,000/=".*

The 2nd appellant's testimony bore this out when she stated thus in cross-examination:

*"Later after we had received the shs 2,200,000/=:, he (DW1) went to our lawyer and said his father would only pay shs 800,000/= more. We didn't accept this since we had already agreed that he pays shs 4,000,000/= and **he accepted totally.**"*

[Emphasis supplied]

When the appellants insisted they would only sell for shs 4 million the agreement fell through. The appellants then sued for the rent and the respondent counterclaimed for the deposit of shs 2.2 million. The evidence adduced by both parties clearly shows that there was no agreement about the price and the parties were working at cross-purposes. It appears the information relayed by DW2 between the appellants and the respondent was not consistent. DW2 may have agreed to pay shs 4 million but he backtracked on the original agreement when his lawyer advised that the value of the land should have been shs 3m. When he reported back to his principle, the principle refused to pay the price of shs 4m originally agreed upon.

In light of the evidence, I came to the conclusion that though the respondent's son had authority to deal with the matter, he did not have full authority to settle the price. He also probably relayed the message about the price after he had already paid the shs 2.2 million. Since his principle, the respondent who was a necessary party to the agreement did not accept the price the agreement had to fail. I therefore find that the trial magistrate made a correct finding on that point. There was an agreement between DW1 and the appellants but the same was vitiated for mistake. There could be no breach of agreement because there was no consensus between the parties right from the beginning. The appellants were therefore not entitled to damages and the trial magistrate correctly found so.

v) Would the respondent be entitled to relief against forfeiture? If not, what are the remedies to the parties?

The issue whether the respondent would be entitled to relief against forfeiture was not dealt with in the court below. Rather, the court occupied itself with deciding the question whether the respondent had valid reasons for not paying the rent due. But in that regard, Mr. Nyanzi argued for the respondent that re-entry is not a permanent remedy. That once it is shown that the lessee is willing to pay rent but he/she was prevented by a valid reason, the courts would set aside a re-entry even when it has already been effected. Further that s. 25 of the Judicature Act applied to this case. Mr. Nyanzi relied on the decisions in the cases of **Francis Butagira v. Deborah Namukasa, S/C C/A No. 6 of**

1989; In the Matter of C. G. Kiwanuka & Another [1973] HCB 167, Haji Musa Magala v. Martin Andowa [1971] HCB 144; and Matiya Kagiri v. Bugerere Dairy Farm Ltd. [1976] HCB 142.

Mr. Nyanzi further argued that if the appellant's action for re-entry had been placed before the High Court it would have failed because the respondent had shown that he was prevented from paying ground rent for sufficient reason. He concluded that the respondent would have then been entitled to relief from forfeiture.

Mr. Mbogo submitted that the respondent did not apply for relief against forfeiture in his counterclaim but the trial magistrate denied the appellants their right to re-entry without any lawful grounds. The respondent on the other hand continued to enjoy possession of the property without paying rent even up to the date of the suit, to the great financial loss of the appellants. I believe that the respondent continues to so occupy the premises even up to today and the appellants thereby continue to suffer loss. It was Mr. Mbogo's further argument that the respondent could not excuse himself from paying rent by saying that he had negotiated a contract to buy the respondent's interest in the land. Further that the High Court could not grant relief against forfeiture of the sublease in this appeal because it was a matter that was not decided by the lower court which had no jurisdiction to grant such relief.

Though the issue whether the respondent would be entitled to relief against forfeiture was not addressed by the trial magistrate, I find that the issue was raised in the trial court. The original record of proceedings shows that the first proceedings in the case before the lower court were before a different magistrate from Mr. Musimbi Muse. The record shows that on 16/11/98, Mr. Nyanzi raised an objection on behalf of the defendant (respondent) that the Magistrate Grade 1 had no jurisdiction to hear the appellants' suit because s.24 of the Judicature Act provided that the defendant was entitled to apply to the High Court for relief against forfeiture within the plaintiffs' action for re-entry. That because the suit was filed in the Magistrates Court the defendant could not exercise that option. He thus prayed that the suit be dismissed. Mr. Mbogo opposed the application because it was his view that the defendant could apply for relief against forfeiture in the High Court under the same provision of the Judicature Act (which is now s. 25) even if the plaintiffs' action for re-entry was before the Magistrates' Court.

On 8/01/99 the magistrate delivered his ruling. He found that s.25 of the Judicature Act did not oust the jurisdiction of the magistrates' court in the matter. He ruled that the defendant could seek for relief against forfeiture in a separate action in the High Court without prejudice to the plaintiffs' action in the Magistrates' Court. Further that the Magistrates' Court had the jurisdiction to entertain the prayers for breach of contract in this action but the court would be notified if the defendant applied for relief against forfeiture in the High Court. Court would then stay the action for breach of contract awaiting the result of the application for relief against forfeiture. In that event the magistrate would only decide the other issues in the suit apart from relief against forfeiture. The defendant's objection was therefore overruled and the action proceeded to decide whether the defendant was in breach of the agreement to sublease the land. It seems that in spite of this ruling, the defendant did not apply for relief against forfeiture in the High Court. Instead, on 6/11/98 M/s Nyanzi, Kiboneka & Mbabazi Advocates purported to deposit shs 9,600/= into court on his behalf as arrears of rent due to the plaintiffs.

In their written submissions to the lower court, both counsel for the plaintiff and the defendant addressed the possibility of relief against forfeiture under the 4th issue. Mr. Nyanzi submitted that the respondent was entitled to relief because forfeiture was an equitable remedy that could not be granted where there were other remedies available to the defendant which would relieve him from the harsh effects of forfeiture. That since the defendant

(now respondent) had shown willingness to pay the arrears of rent and tendered it in court, his offer should be accepted plus a reasonable amount to cover expenses incurred by the plaintiff in prosecuting the suit as well as inconveniences caused by the failure to pay rent in time. Further, that the court should not deny the defendant relief on extraneous matters because under the law they were irrelevant to the court considering a grant of relief from forfeiture. Mr. Nyanzi cited several authorities including those cited in this court. He then concluded that the plaintiffs'/appellants' only remedy was recovery of the rent due, which the defendant/respondent had already paid into court.

Mr. Mbogo opposed the defendant's submissions for relief. He submitted that the magistrates' court could not entertain the an application for relief against forfeiture because the Judicature Act vested that jurisdiction in the High Court. That the defendant's options under s. 27 Judicature Act were two: he could apply to the High Court for relief during the pendency of the lessors' action or wait for judgment in favour of the lessor and then apply for relief in the High Court within 6 months of the decision of the lower court.

It had already been decided by the trial court that the respondent could not apply for relief against forfeiture in that court because the court lacked the jurisdiction to entertain such an action and I agree with that finding of the trial magistrate's predecessor. I also agree with Mr. Nyanzi's submission that re-entry is not a permanent remedy. The rule set down in Volume 20, Halsbury's Laws of England (2nd Edn.), para 264 is instructive. It is there stated that:

“The proviso for re-entry on non-payment of rent is regarded in equity as merely security for the rent, and accordingly, provided the lessor and other persons interested can be put in the same position as before, the lessee is entitled to be relieved against the forfeiture on payment of the rent and any expenses to which the lessor has been put.”

The same passage (though from the 3rd Edition of Halsbury's Laws) was cited with approval by the Supreme Court in **Francis Butagira v. Deborah Namukasa, Civil Appeal No. 6 of 1989** (unreported). Megarry and Wade's re-edition of the principle at page 63 in the treatise *The Law of Real Property*, 2nd Edition was also cited with approval where it is stated:

“The law leans against forfeiture and a landlord suing for it is put to strict proof of his case. Moreover, both equity and Statute have intervened so as to allow tenants to rescue themselves from liability to forfeiture in certain cases. There are different sets of rules for forfeiture for non-payment of rent and forfeiture for others. This is because equity would very commonly relieve a tenant against forfeiture to pay rent but as a general rule refused relief in all other cases. Accordingly, relief in case of non-payment of rent is given by equitable jurisdiction, as amended by statutes; in other cases there is purely statutory jurisdiction which is quite distinct.”

In **Francis Butagira v. Deborah Namukasa** (supra) the Supreme Court further cited with approval the decision in **Gill v. Lewis (1956) 1 All E.R. 844**, at 852 where it was held:

“In my view, as the conclusion of the whole matter, the function of the court in exercising equitable jurisdiction is, save in exceptional circumstances, to grant relief ***when all that is due for rent and costs has been paid***, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he had got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant are generally speaking irrelevant. ...”

[Emphasis supplied]

I therefore agree with Mr. Nyanzi’s submission that in an action for re-entry, if the lessee tenders payment of the rent due, as well as the costs and other expenses incurred he is entitled to relief and the court may order so. What needs to be determined now is whether the respondent tendered payment of the rent due to the appellants in court in such a manner as would entitle him to relief against forfeiture of his sublease.

On the 4/11/98, about 3 months after they filed a reply to the amended plaint, M/s Nyanzi, Kiboneka & Mbabazi wrote to the Chief Magistrate at Mukono as follows:

“Your Honour,

RE: PAYMENT OF GROUND RENT INTO COURT WITHOUT PREJUDICE

C. S. NO. 41/97 KAJUBI & ANOTHER V. WANYAMA K.

The plaintiff filed the above suit alleging that the defendant refused to pay ground rent since 1991, paragraph 4 (b) (c) and (d) of the plaint are relevant to this.

The defendant was supposed to pay shs 100/= per month which today stands at shs 9,600/=. We therefore forward herewith the said shs 9,600/= being ground rent for the period 1991-1998, to be paid in court strictly without prejudice till the decision is made in the suit.

We also indicate that at the trial we shall object to the jurisdiction of this court to entertain the above suit as judicature Act provide (*sic*) for relief against forfeiture to be under the High Court jurisdiction (*sic*).

Much Obligated,

NYANZI, KIBONEKA AND MBABAZI

Advocates

c.c. Client

c.c. Mbogo & Co, Advocates”

The alleged deposit of rent came up in the evidence adduced by the respondent. It was the testimony of Wanyama (DW1) that he paid the rent due in court. In cross-examination DW1 stated thus:

“I have also said I paid the due ground rent in court. I can’t recall when I paid but I can check the receipt I was given by the court.”

Although this was a very important aspect of the dispute, Mr. Nyanzi did not re-examine DW1 or seek to have the receipt admitted in evidence. Instead, at that point he chose to close the defendant’s case. The alleged receipt issued by court was therefore never produced in evidence. Neither was the letter that purported to tender payment of the rent in court produced in proof thereof. And unfortunately, according to the testimonies of the appellants, they were never informed that the respondent deposited rent in court pending the determination of the suit. In cross-examination the 2nd respondent stated that she was not aware that the respondent had deposited the rent in court. She was also did not know whether a copy of the letter forwarding the rent to court had been received by her lawyer. Indeed there was not an iota of evidence produced to show that such a letter was received by Mbogo & Company, Advocates.

Order 27 rule 1 of the CPR (then Order 27 rule 1) provides for payment into court and tender as follows:

“Where any suit is brought to recover a debt or damages, any defendant may before or at the time of filing his or her defence, or at any later time by leave of the court, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; ...”

Order 27 rule 12 then goes on to provide that applications under rules 6 (1) (c) and 2, 10 and 11 shall be by summons in chambers. Impliedly applications under the rest of the rules of order 27 are to be made by motion on notice.

I closely examined the typed record filed in this court and the original record of the lower court. The respondent's lawyers did not make an application to deposit the rent due in court as was then required by Order 24 rule 1 CPR yet they purported to make the payment after they filed his defence. And unlike other the payments made on the file for fees which were evidenced by a stamp to show the amount paid, the date on which it was paid and the number of the general receipt issued, there was no stamp to show that shs 9,600/= had ever been received by the court. Neither was there a copy of the general receipt on file. I therefore find that the mode of payment adopted by the respondent to deposit the arrears of rent in court was in contravention of the known procedure for such payments. The evidence adduced in court about the alleged payment was also insufficient to prove that the payment was received by the court. It is unfortunate that the trial magistrate did not even consider it worth establishing whether the rent had been tendered in spite of the volume of submissions on the question of relief against forfeiture.

In addition to the above, the evidence on record and the proceedings in the lower court established that not only was rent due for the period 1991-1998, it was also due for the period 1985-1991. I found so while answering the first ground of appeal because though not framed by court, the issue was inadvertently agreed upon by counsel for both parties. The respondent purported to deposit only rent for the period 1991-1998 because this is what had been claimed in the suit without addressing all the arrears that were due. He also tendered no payment for costs and other inconveniences caused to the appellants for non-payment of the rent as is required under the equitable principles stated above.

Moreover, though the respondent purported to deposit the arrears of rent in court, he failed or neglected to apply for relief against forfeiture at the appropriate time, i.e. within the action of the plaintiffs/appellants for forfeiture. After he deposited the arrears of rent in court, if at all he did, and after the dismissal of the objection to the jurisdiction of the court, the respondent could have applied to the High Court for relief against forfeiture. But instead of this guidance given by the court, his advocate went on to submit that he would be entitled to relief because he tendered the rent due in court. I find that the relief against forfeiture could not be availed because the court had no jurisdiction. But I think that the court did not consider it at all because it was also not pleaded.

In the circumstances, I am unable to find in the respondent's favour. Not only did he fail to pay the arrears of rent due to the appellants before the action for re-entry was lodged but he also failed to redeem the sub-lease by neglecting to file an application for relief against forfeiture in the High Court. The respondent was therefore not entitled to relief within the appellants' action for re-entry.

Turning to the remedies available to the parties, it will be recalled that the appellants sought for an order for eviction of the respondent and/or his agents and general damages for breach of contract. Though the sub-lease was determined by the appellants' action for forfeiture, the respondent is still in possession of the suit property. In my opinion, whether an order for his eviction should be made or not depends on the mode that was adapted for the forfeiture. In the matter of **The Executrix of the Estate Christine Mary Namatovu Tebajjukira** (supra) the appellant had re-entered by taking possession of the leased property for non-payment of rent. Court found that making an order for relief would amount to making an order to evict the appellant from the premises. It was therefore held that the re-entry had effectively determined the lease and the lessee could not bring an action against the appellant (lessor) for eviction. No relief was granted to the lessee and he lost the property altogether.

Similarly in **Francis Butagira v. Deborah Namukasa** (supra) the lessor re-entered by taking possession of the leased property. The appellant sued her for vacant possession, mesne profits and an injunction restraining her from entering the suit property. The respondent counterclaimed seeking declarations that the appellant obtained the property illegally, had been in breach of conditions and covenants of the lease and that he was thus a trespasser on the suit property. The respondent also sought for an injunction to restrain the appellant from entering the suit property. It was found that not only was the appellant in breach of the covenant to pay rent but also in breach of other conditions of the lease. The appellant was denied relief from forfeiture because his action against the respondent was a denial of her title as lessor. It was also found that the court had no power to grant relief for breach of other conditions other than the covenant to pay rent. The appellant lost the property altogether.

I find that the case at hand is substantially different for the two cases above that were cited by counsel for the respondent. The appellant herein sought to re-enter upon the sub-lease by a writ. On its being issued, the tenancy came to an end for failure to pay ground rent. The respondent did not avail himself of the remedy for relief against forfeiture within the appellants' action in the lower court. He failed to pay the rent due then and did not petition the High Court for relief as is required by s.25 of the Judicature Act but he remains in possession of the suit premises. The sub-lease stands at an end for non-payment of rent but there was no formal sublease agreement and the terms under which the parties related remain unclear. In addition and the ground rent payable has been so much diminished by inflation over the years as to become completely meaningless in view of the value of land in that area. That may have been the reason why the appellants sought to sell off their interest in the property to the respondent.

In the circumstances, rather than ordering that the respondent be evicted from the suit premises, it would be just and equitable that the parties enter into a new sub-lease agreement under the RTA. That would enable the appellants to recoup their loss because the new sub-lease would take into account the current value of the land while assessing the premium to be paid, i.e. without the respondent's developments thereon.

Regarding the award of damages for breach of contract, the appellants have been inconvenienced for a long time. This dispute has been in the courts since 1997, a period of 11 years. Even during the trial the respondent could not acknowledge the appellants as his landlords but callously told court that he did not know his landlords. The appellants are therefore entitled to damages for inconvenience caused to them by the callous behaviour of the respondent.

vi) Did the trial magistrate properly dispose of the respondent's counterclaim?

This question arose from Ground 4 of the appeal which was that the trial magistrate erred in law when he failed to make any finding regarding the counterclaim and dismissed it as disclosing no cause of action against the appellants. The trial magistrate's finding on the counterclaim was that the agreement was vitiated by mistake and the appellants had already refunded the deposit of shs 2.2m paid to them.

Mr. Mbogo submitted that the counterclaim should have been dismissed with costs because it did not disclose a cause of action against the appellants. He was also of the view that the agreement was binding because the respondent's agent (DW1) could not have paid the deposit of shs 2.2m when there was no agreement about the price. Mr. Mbogo inferred that a breach occurred because the amount to be paid was agreed upon by the appellants and DW1 until DW1's lawyers advised that the land was worth shs 3m and not shs 4m. That as a result the counterclaim

was frivolous and vexatious and ought to have been dismissed with costs to the appellants. Mr. Mbogo further contended that since it was the respondent that failed to come up with the contract price, the appellants should not have been penalised in costs for the respondent's failure to pay. He concluded that the trial magistrate was right when he did not award costs for the counterclaim and that this court ought to dismiss the counterclaim with costs to the appellants.

In reply, Mr. Nyanzi contended that it was not true that the trial magistrate did not make any finding with regard to the counterclaim. He argued that the trial magistrate correctly reasoned that the appellants complied with the refund which was the gist of the counterclaim. That as a result ground 4 of the appeal (issue 4 framed in the disposal of this appeal) did not reflect the true record of proceedings. However, Mr. Nyanzi further contended that the trial magistrate should have awarded the respondent costs on the counterclaim since the appellants admitted it and refunded the amount claimed. He thus prayed that this court award costs to the respondent on the counterclaim.

I have already held that the trial magistrate was correct when he found that the agreement to sell the appellants' interest in the land to the respondent was vitiated by mistake and thus the deposit was correctly refunded by the appellants. I therefore do not agree with Mr. Mbogo's submission that the counterclaim should have been dismissed with costs to the appellants. I find so because the appellants did not deny the counterclaim but instead refunded the amount claimed. In the circumstances judgment should have been entered in favour of the appellants on the counterclaim under what was then the equivalent of Order 9 Rule 6 CPR. Suffice it to add that the trial magistrate should have dealt with the counterclaim specifically as a substantive issue to be determined and not just as a by-the-way, as he did. What now remains to be decided of ground 4 is whether the trial magistrate should also have awarded the costs of the counterclaim to the respondent.

The general principles regarding costs in civil suits are found in s. 27 CPA. Section 27 (1) provides that courts have the discretion to determine which party should pay costs of the proceedings as well as the amount to be paid. S. 27 (2) provides that costs follow the event unless the court or judge for good reason orders otherwise. A successful party is thus entitled to the costs unless he or she is guilty of misconduct or where there is some other good cause for not awarding them to him/her. In determining this, the court may consider the conduct of a party during the course of litigation as well as matters which led to the litigation [**Kiska Ltd. v. De Angelis [1967] E.A. 6**].

In the instant case, the appellants filed their suit in the magistrates' court on 4/4/97. They served the respondent with summons to enter an appearance under the repealed CPR on 5/6/97. The respondent did not enter an appearance as was required of him; neither did he file a defence. It appears from the record that the parties tried to settle the matter out of court by having the respondent pay the balance due on the proposed agreement for sale to him of the appellant's interest in the suit property. This was evident from a letter from Mbogo & Co. Advocates to the Magistrate dated 25/3/98 which was received by the court on 25/3/98. On 24/4/98 Mbogo & Co. Advocates wrote to the respondents requesting for payment of the balance (most probably of shs 1,800,000/= to make shs 4m that had been set by the appellants for purchase of their interest) and threatening to revoke an earlier understanding and take the matter back to court. That letter was received in the court registry on 6/04/98.

However, settlement out of court failed and the suit was set down for hearing on 8/07/98 but it was on that day adjourned to 24/07/98 and subsequently to 31/07/98. On 31/7/98 Mr. Mbogo appeared before the magistrate in the absence of the defendant and his advocate and applied for leave to amend the plaint. His oral application was

granted and the suit was fixed for hearing on 17/8/98. The matter was to be heard *ex parte* since the defendant had not entered an appearance or filed a defence in the suit. I believe that was why there was no evidence on file that the plaintiff was ever served with the amended plaint.

On the 17/08/98 the plaintiffs were absent and so was their advocate. Mr. Nyanzi appeared for the defendant and informed court that he had to file some papers. The matter was on that day adjourned *sine die*. On the same day (17/08/98) a reply to the amended plaint was filed without leave of court to file it outside the time that had been allotted in the summons. A Written Statement of Defence (WSD) was then filed in which the defendant counterclaimed for shs 2.2 million and costs of the counterclaim. Fees of shs 67,000/= were paid vide receipt No. X1768689 entered on the court file cover.

The next entry on the file was on 12/10/98 when the appellants through their advocate refunded shs 2.2m by cheque dated 22/09/98 which was sent to Nyanzi, Kiboneka & Mbabazi Advocates under cover of a letter dated the same date. On 6/11/98, Nyanzi Kiboneka & Mbabazi, Advocates filed a bill of costs on the counter-claim. It appears they abandoned their quest for the costs because hearing notices that had been filed for taxation were not taken out. On the same day the respondent's advocates also purported to pay shs 9,600/= as arrears of rent due to the appellants on behalf of the respondent.

First of all, I find that the manner in which the counterclaim was filed was to say the least improper. After court made an order that the matter should proceed *ex parte* for the defendant's failure to file a defence, Mr. Nyanzi appeared and filed what amounted to a WSD and a counterclaim without any order of the court extending time within which to do so. This contravened the provisions of order 9 rule 1 CPR because the respondent had been required to enter an appearance within 15 days of service of summons on him. He had not done so since the 5/6/97 when he was served with summons to enter an appearance and more than a whole year had gone by, by the time court allowed the appellants to amend their plaint on 31/7/98.

The failure to apply for leave to file a defence and the filing of the counterclaim out of time could have resulted in this court dismissing the defence and counterclaim altogether because the respondent's advocates tried to subvert the course of justice which was unethical. However, the appellant's advocates did not complain about the late filing of the defence. They instead proceeded to follow their clients' instructions to pay the amount claimed in the counterclaim, in effect waiving the irregularity. I see no reason to overturn the proceedings on the basis of this irregularity because the rules of procedure are handmaidens of justice. They are a guide to the orderly disposal of suits and a means of achieving justice between the parties. They should never be used to deny justice to a party entitled to a remedy {**Allen Nassanga v. M. Nanyonga [1977] H.C.B. 352**}. Further, Article 126 (2) (e) of the Constitution of the Republic of Uganda requires this court to dispense substantive justice without undue regard to technicalities.

Notwithstanding my observations and ruling above, though the respondent very well knew that he owed the appellants arrears of rent he refused to meet them. As a result, his son whom he authorised to transact business relating to the lease on his behalf without giving him full powers confused the proposed sale of the appellants' interest in the land to him. Had the respondent been present at the Chambers of Mbogo & Co., during the negotiations, probably the mistake about the price would not have occurred. I find that this too disentitled the respondent to an award of costs for the counterclaim.

Last but not least, the appellants admitted that they owed the respondent the amount claimed in the counterclaim and paid it as soon as they were informed about his claim. This was without prejudice to the fact that they could have retained the money since the respondent owed them arrears of rent for many years. Though he appears to have inadvertently failed to make an order that the appellants pay the respondent the costs for the counterclaim, I find that the trial magistrate did not base his decision on any wrong principle and it is hereby upheld.

In the end result, this appeal succeeds. The judgment and orders of the trial magistrate are hereby reversed and judgment is entered for the appellants as follows:

- a) The sub-lease between the appellants and the respondent over land comprised in Kyaggwe Block 539 Mailo Register Volume 316, known as Plots 75-77 Kauga, Mukono stands terminated.
- b) The respondent shall pay the appellants shs 1.5m being general damages for breach of contract.
- c) The respondent shall be given the first option to enter into a new lease agreement with the appellants with respect to Plot 75-77 at Kauga under the Registration of Titles Act within a period of 6 months of the date of this order; this shall be done after valuation of the suit land, excluding the value of the respondent's developments thereon.
- d) The respondent shall pay the appellants' costs for this appeal and in the costs in the court below.

It is so ordered.

Irene Mulyagonja Kakooza

JUDGE

21/01/2010