bench draft.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODER J.S.C., KAROKORA, J.S.C., MULENGA J.S.C., KANYEIHAMBA, J.S.C, MUKASA-KIKONYOGO, JS.C.

CIVIL APPEAL NO: 9 OF 1998

B E T W E E N

DEPARTED ASIANS PROPERTY CUSTODIAN BOARD ..... APPELLANT

A N D

JAFFER BROTHERS LTD ....RESPONDENT

(An appeal from the judgment and orders of the Court of Appeal (Okello, J.A., Berko J.A and Engwau J.A.) in Civil Appeal No: 43 of 1997 dated 3rd July, 1998)

JUDGMENT OF KANYEIHAMBA , J.S.C.

This is an appeal from the judgment and orders of the Court of Appeal allowing the appeal with costs by the Respondent from the decision of the High Court presided over by Kato J., as he then was, dated 18th August, 1997, in Civil suit No: 31 of 1995. The learned judge dismissed with costs the Respondent's suit on the grounds that it was time barred, Respondent had no locus standi and, in any event, the suit did not disclose a cause of action. Respondent appealed to the Court of Appeal which allowed the appeal and ordered that the case be remitted to the High Court for hearing on merits, with costs. The appellant is now appealing against the orders of the Court of Appeal.

The background to this appeal may be briefly stated as follows:

The Respondent is a Ugandan incorporated company with limited liability and owned by persons of Asian origin. With

the expulsion of Asians in 1972 by the military regime of Id Amin the owners fled the country the same year. At the time of the expulsion, the Respondent was the registered proprietor of Plot

No. 9 Hill Lane, Kololo Kampala, comprised in Leasehold Register Volume 354, Folio 17, which, for convenience, I shall henceforth refer to as the suit property. Subsequently, the Government of Uganda took over the suit property and vested it for management purposes in the Departed Asians Property Custodian Board by virtue of the provisions of Decree No. 27 of 1973. This decree came into force on 7/12/1973. Sometime in 1977, the Departed Asians Property Custodian Board purportedly sold the suit property to one Francis Nyangweso who in turn transferred it to one Mohammed Magid Bagalaaliwo. On 21/4/1980, Bagalaaliwo was registered as the new proprietor of the suit property. With the coming into force of the Expropriated Properties Act No. 9 of 1982, the suit property reverted to Government which took possession of it until Mohammed Magid Bagalaaliwo obtained a consent judgment in his favour from the Uganda Attorney-General, dated 8th November, 1991.

On 7/12/1993, the Respondent obtained from the Minister of State for Finance and Economic Planning in charge of the Departed Asians Property Board, a Letter of repossession of the suit property. Following some correspondence between the parties and the Registrar of Land Titles, the Minister in a letter dated 25.9.94, clarified that the Respondent was entitled to repossess the suit property. Armed with the letters authorising repossession, the Respondent filed the original suit against Mohammed Magid Bagalaaliwo and Ronald Muwenda Mutebi to secure, inter alia, vacant possession of the suit property. At the instance of the Respondent, Ronald Muwenda Mutebi was dropped from the suit and at the instance and application of Mohammed Magid Bagalaaliwo and with the consent of the appellant and the

Attorney - General, the latter two were joined in the suit as 2nd and 3rd Defendants. In his amended written statement of Defence, Mohammed Magid Bagalaaliwo countered the Respondents' claim by a counter claim in which he sought, inter alia, compensation from the 2nd and 3rd defendants as an alternative remedy.

At the hearing of the suit, Mr. Sekandi for the appellant raised three preliminary objections, namely:-

(1) That the suit was time barred

(2) that the plaintiff had no locus standi

and (3) that the suit disclosed no cause of action against all the defendants.

The trial judge heard submissions and arguments on all the three grounds with which both counsel for the 1st and 3rd co-defendents agreed. The learned trial judge upheld all the grounds, and dismissed the Respondent's suit, with costs to the appellant and the other two defendants. The Respondent appealed against the judgment and orders of the trial judge on seventeen grounds which in substance revolved around the three issues of objection upheld by the trial judge and the effect of the Expropriation Properties Act No. 9 of 1982 on the suit property. The Court of Appeal allowed the appeal with costs to the Respondent and the dismissal and other consequential orders made by the trial judge were set aside. The case was remitted to the High Court for hearing on merits and the appellant together with the other respondents in the Court of Appeal were ordered to pay the Respondent's costs of the appeal.

The Memorandum of Appeal to this court contains the following grounds of appeal:-

1- The learned Justices of Appeal having declined to uphold the Respondent (then Appellant) claim that it had a cause of action against the Appellant (then 2nd Respondent) erred in law in failing to dismiss the Appeal against the Appellant with costs.

2- The learned Justices of Appeal having found no cause of action against the Appellant erred in law in condemning the Appellant to pay the Respondent the costs of the Appeal.

3- The learned Justices of Appeal erred in law to have set aside the dismissal of the suit and other consequential orders made by the trial judge in favour of the Appellant.

The Appellant asks the court for the following orders - (i) Allow the Appeal (ii) Set aside the Court of Appeal order allowing the Appeal against the Appellant with costs (iii) Allow the appellant costs of this Appeal and in the courts below.
(iv) Reinstate the orders made by the High Court in favour of the Appellant including the dismissal of the suit against it and the award of costs.

I will make three preliminary observations at this stage. In my opinion, the nature and manner in which the grounds of appeal have been framed coupled with the orders prayed for are tantamount to appealing against the whole judgment and orders of the Court of Appeal with the purpose of hoping to reverse all the decisions and orders of that court. Secondly, it is apparent from the memorandum of appeal and the written submissions, that all the parties in this case have been full participants in the arguments and submissions on merits of this case, from the beginning to the end. Thirdly, it is to be appreciated that the Court of Appeal merely ordered that the case be remitted to the High Court for a trial and did not finally dispose of it on merits.

In his written submissions, counsel for the appellant, Hon. Sekandi, starts with ground one of appeal and submits that the Appellant raised a preliminary objection that there was no cause of action against the appellant, to which Mr. Bamwine, counsel

for the Respondent, responded with the following:

> *"As to the 2nd and 3rd Defendants there is a cause of action against them in case the first defendant is declared to be the lawful owner of the suit property otherwise there is no cause of action against them as per ruling of this, court in this same case on 17.1.96"*

Counsel for Appellant further observed that the trial judge upheld the objections and said,

> *"Having said all that,I find that the Preliminary objections raised by the Defendants were validly raised and they are upheld. I have no doubt over the fact that this suit is time barred and the Plaintiff has no locus standi as he does not hold any valid certificate of repossession nor does he have cause of action against the 3 Defendants. For those reasons the suit is dismissed with costs to the 3 Defendants."*

From this, Hon. Sekandi wonders why the Respondent did not accept the ruling of the trial judge that it had no cause of action and instead decided to drag the appellant to the Court of Appeal. Counsel points out that following his own submission, the learned Justices of Appeal were right, to have refused to uphold the Respondent's claim that it had a cause of action against the Appellant. Counsel cited Auto Garage And Others v. Motokov (No.3), (1971) E.A. 514 and Cottar v. Attorney General for Kenya (1938) 5 EACA 18 to emphasize what constitutes a cause of action.

Counsel further contended that the Court of Appeal having found that the Respondent had no cause of action against the appellant it was duty bound to dismiss the appeal with costs to the appellant as there was no justification for continuing with the appellant in these proceedings in which it had caused no wrong.

In counsel's opinion, the order for a trial on merits of the case should not have been applied to the Appellant or the Attorney-General. Counsel submitted that the appellant ought to have been rewarded with the right medicine for litigation which are costs and damages.

In his supplementary written submissions, Counsel for the Appellant further submits that the fact that it was not the Respondent who joined the appellant in the suit as defendant is

immaterial as far the cause of action is concerned. While citing Mera Farmers Co-operative Union v. Abdul Aziz Suluman (No.1), (1966) E.A. 436, per Daffus, Ag. V.P., at page 439, Counsel submitted that there are no exceptions to the rule that there must be a cause of action before a party can proceed against another in any court.

For the Respondent, Messrs. Bamwine and Walubiri of Kwesigabo, Bamwine and Walubiri & Co. Advocates, lodged the Respondent's written submissions On ground 1 of appeal. It is the Respondent's submission that whereas Respondent filed a suit against Mohammed Magid Bagalaaliwo and Ronald Muwenda Mutebi whose name was later withdrawn on the initiative of the Respondent, it was counsel for Mr. Bagalaaliwo with the consent of counsel for the subsequent 2nd and 3rd Defendants who insisted that they be joined. After an order to join the two parties as co- defendants, it was counsel for the Appellant who proceeded to submit on the grounds of objection. Counsel for the other two defendants concurred with Mr. Sekandi's submissions on the objection.

According to counsel for the Respondent, the three grounds upon which counsel for the appellant and the other two defendants made submissions were intertwined and inseparable. Counsel for the Respondent further submitted that it is on the understanding that the preliminary objections were interlinked that the trial judge stated,

> *"The whole issue seems to revolve on one question which is when did the cause of action, if any, arise and when did time begin to run against the plaintiff ?"*

Counsel for the Respondent emphasized that it was because the three Defendants insisted or agreed to be joined that Respondent was forced to amend the pleadings to include them notwithstanding that it had objected through Counsel that it had no case either against the Attorney-General or the Departed Asians Property Custodian Board.

Counsel pointed out that the 2nd and 3rd Defendants were joined not as "any person who ought to have been joined as Defendants"

rather as parties "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit." Counsel cited Order 1, rule 10 (2) of the Civil Procedure Rules. It was counsel's contention that where a plaint is amended to conform with the requirements of the subrule, it does not need to conform with 0.7 r 11 (a) or 0. 6r. 29 of the C.P.R. provided that such a plaint discloses a cause of action against the original Defendant as in this case. On this point Counsel for the Respondent concluded that therefore it was not necessary for the Justices of the Court of Appeal to pronounce themselves on the question of whether or not there was a cause of action against the 2nd and 3rd Defendants.

Counsel further submitted that since the Appellant and the Attorney-General had been joined at the instance of the 1st Defendant, it was not necessary for the High Court or the Court of Appeal to consider whether there was a cause of action as between the Plaintiff and the 2nd and 3rd Defendants.
Counsel for the Respondent submitted that as the reason for joining the Appellant and the Attorney-General was to claim compensation from them in the event that the property was decreed to belong to the plaintiff, the issue of cause of action should only have arisen as between the 1st Defendant, Bagalaaliwo and the 2nd and 3rd Defendants. Counsel believed that this is the reason why the Justices of Appeal declined to make a finding on the existence of a cause of action between the Appellant and the Respondent. Counsel argued that in any event, the plaint discloses a cause of action against the Attorney-General as was contained in paragraph 15 & 16 of the amended plaint.

Counsel for the Respondent, cited the cases of Dollfus Mieg Et Compagne S.A - v. Bank of England (1951) ICH. 33, and Montgomery v. Foy, Morgan and Co. (1895) 2 Q B. 321 in support of their submissions. In addition, counsel submitted that if no

cause of action is disclosed against the added defendants their costs should be paid by the party which brought them into the suit. He cited the cases of Norbury Natzi & Co. Ltd v. Griffiths (1918) 2K.B. 369, at 380, and Scheren v. Counting Instruments Ltd (1986) 2 ALLER, 529, at p. 536 and S. 27 of CPA to support the submission. After wandering in the realm of statutory interpretation, counsel for the Respondent returned to ground one of appeal by making submissions on what is meant by the phrase" effectually and completely to adjudicate upon and settle all questions involved in the suit." Counsel then cited a number of decisions including Santana Fernandes v Kara Arjan & Sons & Two Others. (1961) E.A 693 Tanzania (sic); Horwell v. London General Omnibus Co. Ltd, (1877) 2 EXD 365, to show the meaning and effect of similar circumstances as of this appeal. Counsel further distinguished the present case from those cited by learned counsel for the appellant such as Mera Farmers Co-operative Union v. Abdul Aziz Suluman (no.1) (1996) E.A. 436 and Auto Garage v. Motokou (No.3) (1971) E.A. 514 in which other defendants were joined in the respective plaints by the plaintiffs themselves as opposed to this appeal where the plaintiff actually opposed the application to join in the 2nd and 3rd Defendants.

Thereafter counsel for the Respondent reiterated the same reasons as before citing additional authorities such as Iron & Steel Wares Ltd v. C.W. Martyr Co. (1956) 23 EACA, 175, and Hamilton v. Seal (1904) 2K.B.262 at p. 263, to reemphasize the same points. Counsel further submitted that since the 1st Defendant applied to have the 2nd and 3rd Defendants to be joined in the proceedings and undertook to pay their costs, it was not incumbent upon the Respondent to determine whether and when this joint enterprise should cease.

There can be no dispute that the 2nd and 3rd Defendants were joined in the suit on the application of the 1st Defendant, Mohammed Magid Bagalaaliwo. In a Notice of Motion filed by his counsel, Mr. John Katende, under Order 1 Rule 10 (2) and 13 and

Order 48 Rules 1 & 3 of the Civil Procedure Rules. Counsel for 1st Defendant asserted,

> *"Take further note that (a) The presence of the Attorney -General of the Republic of Uganda and the Departed Asians Property Custodian Board in this suit is absolutely necessary in order to enable this Honourable Court to effectually and completely adjudicate upon and settle all questions involved in this suit, and (b) the interests of both the applicant and justice shall be jeopardised without the presence and full participation of the Attorney - General of the Republic of Uganda and the Departed Asians Property Custodian Board".*

In her affidavit the wife of the 1st Defendant stated in paragraphs 13 and 14 that she believed that both the Departed Asians Property Custodian Board and the Attorney-General should be added as co-dependants. Mrs Bagalaaliwo's affidavit was supported by another affidavit sworn and filed by Mr. Samuel, S. Serwanga, counsel for the 1st Defendant, in which learned counsel asserted,

> *"I thus verify and believe that the Attorney-General should be made a party to this suit"*

and concluded,

> *"wherefore I swear this affidavit in support of the applicant's application to join the Attorney-General of the Republic of Uganda and the Departed Asians Property Custodian Board as co-defendants to this suit".*

In response, the Respondent presented an affidavit sworn by Mr. Anwar Jaffer in which he objected to the inclusion of the Attorney-General and the Departed Asians Property Custodian Board as defendants, except if they came in by way of third party proceedings. On his part, the Attorney-General, through an affidavit sworn and filed by State Attorney, Caroline Mayanja, initially objected to being joined as a party. However, when the matter came up before the Hon. Musoke-Kibuuka, Ag.J., the Attorney-General and Departed Asians Property Custodian Board did not object to being joined as parties. It is therefore clear that the Appellant and the Attorney - General were joined in the plaint on the instance of the 1st Defendant and his counsel. Thereafter, the Respondent was forced against his will as expressed in his written objection, to include both

co-defendants in his subsequent pleadings. In the amended plaint, the Respondent prayed for costs in the suit.

Surprisingly, when it came to the hearing of the substantive claim, both the Attorney-General and the Departed Asians Property Custodian Board took the initiative to argue the substantive grounds going to the merits of the case instead of contending themselves with a stand of objecting to being parties to the suit.

Thus, Mr. Sekandi for the 2nd Defendant made the first submission on the merits of the plaint by arguing that the suit was time barred, the plaintiff had no locus standi as a letter of repossession is not the same thing as a certificate of Repossession and that there was no cause of action. Counsel for the other two defendants supported the submissions of Mr. Sekandi. It is on the strength of these submissions that the trial judge founded his final judgment which reads, in part,

> *"Having said all that I find that the preliminary objections raised by the defendants were validly raised and they are upheld. I have no doubt over the fact that this suit is time barred and the plaintiff has no locus standi as he does not hold any valid certificate of repossession nor does he have cause of action against the 3 defendants. For those reasons the suit is dismissed with costs to the three defendants".*

It is at this stage that the Respondent decided to appeal against the judgment and orders of the High Court. I do not agree with the submission of counsel for the appellant that the Respondent should have preferred an appeal only against the 1st defendant.

I agree with the submission of counsel for the Respondent that a clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all

questions involved in the suit.

Order I r.10 (2) reads as follows:

> *"The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added"*

This rule is similar to the English R.S.C Order 16 r. 11 under which the case of Amon v. Raphael Tuck & Sons Ltd, (1956) IALLER p. 273, was considered and decided and in which it was said that a party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.

In my opinion, the settling of all questions involved in the suit did not cease with the judgment of the trial judge nor, indeed, that of the Court of Appeal. In the latter court the appellant continued to take initiative in having the Respondent's suit dismissed on the same grounds and with the same reasons advanced in the High Court.

When the Respondent first sought leave to appeal to the Court of Appeal, Appellant through its counsel did not object or complain. Court granted leave to appeal in respect of the first and second grounds of preliminary objection and for which Mr. Sekandi, counsel for the Appellant had so ably argued and convinced the trial judge. In my opinion, had the Respondent dropped the appellant from the defendants it would have been

taking a very big risk in its quest to have the Court of Appeal reverse the decisions of the trial judge on the same grounds of objection which counsel for the appellant had advanced.

When it came to the submissions on the merits of the case in the Court of Appeal, again Counsel for the Appellant was a full participant in the attempts to have that court confirm the findings and judgment of the High Court. On 1/6/99 counsel for the appellant filed written submissions. From page 146 paragraph 22 to page 151 paragraph one, it is the learned counsel for the Appellant who is taking the court through case law and arguments on the merits of the case. The record of proceedings show that Mr. Sekandi on 2/6/99 was still addressing court on the merits of the case and citing cases such as Civil Appeal No. 36 of 1996, Makerere Properties Ltd v. Attorney General, and Civil Appeal No. 49 of 1993 , Victoria Tea Estate Ltd v. James Bemmba and Another, in pages 151 to page 156 of the proceedings before the Court of Appeal and lastly praying that the whole appeal should be dismissed. In fact, in the Court of Appeal it was the appellant rather than the other defendants who carried the burden of making submissions and arguments for the whole appeal to be dismissed. For instance, at page 156 of the record of proceedings, paragraphs 30 and 34 show the learned counsel for the appellant as the main actor in the proceedings. Mr. Serwanga for the 1st Defendant and Mr. Bukenya for the Attorney-General merely associate themselves fully with the submissions of their learned friend, Sekandi who was for the 2nd appellant and who made submissions for dismissal of the Appeal. The court was unanimous in rejecting Counsel's submissions. In his leading judgment of the Court of Appeal , learned Okello, J.A. said,

> *"Failure by the 1st defendant to comply with the quit notice gave the appellant a cause of action against the 1st Respondent. The appellant therefore has locus standi to bring the suit and has a cause of action against the 1st respondent".*

Nowhere in the judgment of their Lordships in the Court of Appeal, is there any mention that there is no cause of action

against any of the other defendants. In my opinion, it was not necessary to so find nor can their Lordships' silence on the matter be taken as a finding. The court further decided that the counter-claim did not automatically abate with the dismissal of the main suit by the trial judge. In other words, it survived. It is my view that with the order of the Court of Appeal that the case be remitted to the High Court for trial and that the counterclaim in which the appellant and the Attorney-General are defendants, was not extinguished by the judgment of the trial judge, the joining of the Appellant whose "presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit", need not have been addressed either by the Respondent in this appeal or the Court of Appeal. It is my opinion, that the effect of the judgment and order of the Court of Appeal, is that questions involved in the suit have yet to be effectually and completely adjudicated upon. If the Appellant or either of the other Defendants felt that they were no longer needed, they should have specifically raised the matter before court. Seeing that they did not, no ground or reasons have been advanced to convince me that the Respondent had any obligation to drop any of the defendants especially those who were joined against its will as expressed by the affidavit of Mr. Jaffer and with their consent as the evidence clearly shows.

It is also true that the Respondent won his appeal on all the seventeen grounds, even if the Court of Appeal was silent on part of ground 16. Although courts have discretion as to the awarding of costs, it is a general rule of law and practice that costs should normally follow the event in the suit.
I am persuaded by the principle established in J.B. Kohli and Others v. Bachulal Popatlal (1947) E.A. 219 at pp 230 -231 where the court said,

> *"Having regard to the above authorities it seems to be that where a discretion as to costs has been exercised by a*

judge his discretion is "impeachable unless he can be shown to have taken into consideration matters which are irrelevant to the issue in the case or non-existent. Further an appeal would be entertained from the exercise of discretion as to the costs where the Court of Appeal is satisfied that the lower court applied a wrong principle of law"

The ground advanced on behalf of the Appellant that the Court of Appeal by not stating categorically that there was or there was not a cause of action against the Appellant, the appellant had won that aspect of the appeal is in my opinion, not convincing. As I have endeavoured to show, the appellant was joined for a different reason and on a different criterion. Therefore ground one of appeal must fail.

On ground two of appeal I can see no merit in separating it from ground one which I have already disposed of. The joining of the appellant and the Attorney-General had no relevancy to the cause of action. In any event, the appellant placed the whole of its submissions at the disposal of the fortunes of the 1st Defendant and it is my opinion that it either succeeds or fails with him. Counsel for the appellant cites the provisions of section 27/ (1) of CPA, (Cap.65) which only re affirm the wide discretion a court has in awarding costs. Counsel further argued that if the Justices of Appeal had properly directed themselves in that they were considering each Respondent's case independently and at the end came to the conclusion that there was a cause of action against Mohammed Magid Bagalaaliwo which should be tried on merit, but there was none against Departed Asians Property Custodian Board or the Attorney-General, they ought to have allowed the appeal against Magid M. Bagalaaliwo, but dismiss the appeal against Departed Asians Property Custodian Board and the Attorney-General. In response, Counsel for the Respondent submitted that it was the 2nd and 3rd Defendants who abandoned the idea of submitting their individual defences and instead joined forces with the 1st Defendant for the joint endeavour of defeating the Respondent on every issue. Counsel for 1st and

3rd Defendants concurred with the submissions of Mr. Sekandi at every occasion both in the High Court and the Court of Appeal, thereby making it impossible for both the Respondent and the courts to know or indeed appreciate whether or not they had separate defences.

I will not join learned Counsel for the Respondent on the same voyage of condemning the 2nd and 3rd Defendants for what he calls " their illegitimate use of the machinery of justice" while quoting the words of Sir Barclays Nihill in Schanker Dar Mayer and Ors v. Trustees of the Rahimtulla Lalji Hirji Charitable Trust, (1955) XXII EACA 18, at p. 20, last paragraph. However, it is my opinion that the manner and the fashion in which counsel made submissions and argued the case, left no other option to the Court of Appeal in finding as they did.
Therefore ground 2 also fails.

Ground three of appeal is to say the least peculiar. It states:

> *"The learned Justices of Appeal erred in law to have set aside the dismissal of the suit and other consequential orders made by the trial judge in favour of the Appellant"*

Counsel for appellant wishes this court to set aside the judgment and orders of the Court of Appeal which were based on submissions and reasons upon which the entire plaint was founded and yet the same counsel's submissions in this appeal has been primarily on costs. In my opinion, this approach is unacceptable. However, it is also my view that this ground of appeal opens for this court an opportunity to comment upon the judgment and orders of the trial judge. It is my opinion that bearing in mind the manner in which the 2nd and 3rd Defendants came to be joined in the plaint and against the wishes of the Respondent, the trial judge erred in awarding costs to all the three defendants against the Respondent. In Kiska Ltd v. Augelias (1969) E.A.6 , Sir Clement De Lestang, Ag. P, observed,

> *"Thus where a trial court has exercised its discretion on*

costs, an Appellate court should not interfere unless the discretion has been exercised unjudicially or on a wrong principle. Where it gives no reason for its discretion the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute" good reasons" within the meaning of the *rule".*

I am also aware of the principle enounced in the case of Scherer v. Counting Instruments Ltd (1986) 2 AER. 529 where at p. 533 it was said :

> *"if therefore, in the present case the judge had material before him, however slight, on which he could base the exercise of discretion in ordering the plaintiff to pay the Defendants costs of the motion to dismiss, we cannot interfere"*

In my opinion, the trial judge was wrong in principle and in the justice of the case when he awarded costs to the defendants who had been joined in the suit against the wishes of the Respondent. In the result, the Third and last ground of appeal must fail.

As the Appellant has failed on all grounds.this appeal fails.In Consequence I would dismiss this appeal. I would confirm the orders of the Court of Appeal and award costs to the Respondents in this court and in the court below.

~~I would also allow costs for two counsel for the Respondent.~~

DATED AT MENGO 17th ....THIS DAY OF ..... May 1999

HON. JUSTICE E.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, J.S.C.; KAROKORA, J.S.C.; MULENGA, J.S.C.; KANYEIHAMBA, J.S.C AND KIKONYOGO, J.S.C.)

CIVIL APPEAL NO.9 OF 1998

B E T W E E N

DEPARTED ASIANS PROPERTY CUSOTODIAN BOARD .....APPELLANT

A N D

JAFFER BROTHERS LTD.....RESPONDENT

(Appeal from the judgement of
the Court of Appeal
(Okello, J.A; Berko, J.A. and Engwau, J.A)
dated 3rd July, 1998
in
Civil Appeal No.43 of 1997.)

JUDGEMENT OF ODER, J.S.C.

I have had the benefit of reading in draft the judgement of Kanyeihamba, J.S.C. I agree with his conclusions and the reasons. The appeal should be dismissed. I also agree with the orders proposed by him.

Since Karokora, J.S.C; Mulenga, J.S.C and Kikonyogo, J.S.C. also agreed there will be an order in those terms.

Dated at Mengo this 27th day of May 1999.

A. H. O. Oder
JUSTICE OF THE SUPREME COURT.

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODER, J.S.C, KAROKORA, J.S.C., MULENGA, J.S.C.
KANYEIHAMBA, J.S.C. & KIKONYOGO, J.S.C.

CIVIL APPEAL NO. 9 OF 1998

BETWEEN

DEPARTED ASIANS PROPERTY
CUSTODIAN BOARD :::::::::::::::::: :::::::::::::::::::: APPELLANT

AND

JAFFER BROTHERS LTD. :::::::::::::: :::::::::::::::::: RESPONDENT

(Appeal from judgment of the Court of Appeal (Okello, JA, Berko, JA and Engwau, JA) in Civil Appeal No. 43 of 1997 dated 3rd July 1998)

JUDGMENT OF MULENGA, J.S.C.

This appeal arises from a decision of the Court of Appeal in the above mentioned case wherein the Departed Asians Property Custodian Board to which I shall refer as *"the Custodian Board"* was one of three Respondents, and the above named Jaffer Brothers Ltd., was Appellant. The Court of Appeal allowed the appeal which was from a High Court order dismissing a suit on a preliminary objection. It was ordered that the suit be remitted to the High Court for hearing on merits, and that *"the Respondents shall pay the Appellant's costs of the appeal."*

The Custodian Board alone, appealed to this Court against the decision of the Court of Appeal, contending in three grounds of appeal that the Court of Appeal erred in failing to dismiss the appeal as against the Custodian Board, in condemning the Custodian Board to pay costs of the appeal and in setting aside the orders of the trial court. All the grounds are premised on the

virtually undisputed point of mixed law and fact that Jaffer Brothers Ltd. had no cause of action against the Custodian Board.

The facts and general background to this appeal are ably set out in the judgment of my learned brother Justice Kanyeihamba, J.S.C. which I had advantage of reading in draft. There is no need to repeat them here. I agree that all three grounds of appeal have no merit. They ought to fail. I only wish to make two observations.

The first observation is that I think, with all due respect, that the Custodian Board with its legal advisors appears not to have appreciated the status in which it was joined to the suit along with the Attorney-General. The two were joined as defendants, not because Jaffer Brothers Ltd. had any cause of action against them. They were joined because, on application of Mohamed M. Bagalaaliwo, the original lone defendant in the suit, the trial court accepted and ordered that their presence in the suit was necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit, in accordance with 0.1 r.10 (2) of the Civil Procedure Rules. Initially, by Affidavit sworn on 16th January,1996, by Caroline Mayanja, a State Attorney, on behalf of both the Attorney General and the Custodian Board, and in reply to Mohamed M. Bagalaaliwo's application it was averred that the presence of both in the suit was not necessary because the issues in the suit were between Jaffer Brothers Ltd. and Mohamed M. Bagalaaliwo only. However, according to the court record, when the application came up for hearing the following day 17th January 1996, Mr.Katende counsel for Mohamed M. Bagalaaliwo, stated to court, in the presence of Ms Mayanja and Mr. Ssekandi, Counsel for the Attorney General and the Custodian Board respectively, that he had been informed by the said Counsel that their clients had no objection to being joined to the suit

as co-defendants. No protest was raised by either counsel and consequently the order for joinder was granted by consent, as it were. There is no indication why the stand suggested in the Affidavit of Calorine Mayanja referred to above was abandoned or not pursued, but in that failure, the Custodian Board lost its first opportunity to resist being made party to the suit by showing that its presence in the suit was not necessary. This is what gives me the impression that there was a lack of appreciation of the special status the Custodian Board, and Attorney General, were put in by that consent order. They became co-defendants not on basis of a cause of action against them, but on the premise that their presence in the suit was necessary, a premise that could have been challenged, but was not challenged, to test whether the criteria for such order was satisfied.

I have not laid my hands on any reported decision in East Africa directly on the point of criteria for determining that the presence of a person is necessary under 0.1 r.10(2) of the Civil Procedure rules. ***Nirmal Singh Vs Ram Singh*** (1961) EA 168 does not appear to me to be helpful, as it is concerned with misjoinder as plaintiff of a person held to have no capacity to sue. However taking leaf from authorities in other jurisdictions having similar, and even identical rules of procedure, I would summarise the position as follows: For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies, (on application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set up a defence he desires to set up

unless that person is joined in it, or unless the order to be made is to bind that person. (See *Mulla On the Code of Civil Procedure* (of India) 14th Ed. By J.M. Shelat, Vol.II pp. 858 and 864 – 5; and ***Amon vs Raphael Tuck & Sons Ltd***. (1956) 1 All ER 273 at p.290).

For my part I would hesitate to take amiss a strategy, by counsel on the same side of the divide in the litigation forum, for joining hands and utilising together all lawful argument, to not only advance their clients' cases, but also to defeat the case of their common adversary. In the instant case however what was submitted by counsel for the co-defendants both in the High Court and in the Court of Appeal, on the contention that Jaffer Brothers Ltd., had no cause of action, was relevant, material, and of direct benefit only to Mohamed M. Bagalaaliwo's defence. It did not advance what could have been the case of the Custodian Board and Attorney General that their presence in the suit was not necessary. Accordingly when the Court of Appeal came to decide the issues before it, the question as to whether the Custodian Board should continue to be co-defendant was not among the issues for determination. The Court of Appeal, therefore, could not have dismissed the appeal, let alone the suit, as against the Custodian Board. It follows that under the general rule that costs follow the event, Jaffer Brothers Ltd. as the only successful party had to be awarded costs of the appeal, to be paid by the unsuccessful parties who opposed the appeal. It also follows that the orders of the trial court, except the order for joining the co-defendants, (which was not in issue),had to be set aside.

My second observation is related to the course adopted by the original defendant to seek redress in form of damages/compensation by way of counter-claim against co-defendants. For obvious reasons I must refrain from pre-emptive comments. Suffice to say that it has resulted into

unauthodox complexities in the pleadings, which may have been avoided by filing a separate suit, if seeking redress by way of indemnity through third party proceedings was inappropriate.

I concur in the order proposed by Kanyeihamba, J.S.C.

Dated at Mengo this.....27th..... day of .....May.....,1999.

J.N. MULENGA,

JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CIVIL APPEAL NO. 9 OF 1998

BETWEEN

DEPARTED ASIANS PROP. CUST. BOARD ..... APPELLANT

AND

JAFFER BROTHERS LIMITED ..... RESPONDENT

(Appeal from the judgment and Decree of the Court of Appeal at Kampala before Okello JA, Berko JA, and Engwau JA, in Civil Appeal No. 43 of 1997)

JUDGMENT OF KAROKORA, J.S.C.

I have had the benefit of reading in draft, the judgment prepared by Kanyeihamba, J.S.C., and do agree with his conclusion that the appeal must fail. I wish only to add that although right from the commencement of the suit the plaintiff was aware that he had no case against the appellant and the Attorney-General and although it was made clear that the costs that might arise from the proceedings of the case would be paid by the defendant/M.M. Bagaalaliwo, Hon. Mr. Ssekandi, Counsel for appellant fully and actively participated in the suit right from the High Court and fully addressed the Court of Appeal on the merits of the appeal and invited the Court to dismiss it. He cited the cases of *Makerere Properties Ltd v A.G Civil Appeal No. 36 of 1996* (unreported) and *Victoria Tea Estate Ltd v James Bemba & Another Civil Appeal No. 49/93* in an attempt to persuade the Court of Appeal to dismiss the appeal.

In my opinion, since the appellant was joined in the suit not because the plaintiff had any cause of action against them, but because the 1st defendant considered that their presence was necessary to enable the Court effectually and completely to adjudicate and settle all questions involved in the suit under Order 1 r 10(2) which application the appellant never opposed, and the Court of Appeal has not yet effectually and completely adjudicated and settled all questions involved in the suit, it would be premature at this stage to hold that ground one of appeal succeeded when an order of retrial of the suit on merit was made.

In fact, considering the circumstances under which the appellant was joined, Hon. Ssekandi, Counsel for appellant, needed not to have involved himself in the merits of the case, since the plaintiff was claiming nothing from them.

In view of the above, ground one fails. The other grounds are adequately covered by my learned brother, Kanyeihamba, J.S.C., and so I have nothing to add.

Dated at Mengo this 27th day of May, 1999

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A.N. KAROKORA,

JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CIVIL APPEAL NO. 9 OF 1998.

BETWEEN

DEPARTED ASSIANS CUSTODIAN BOARD ::::::::::::::::::APPELLANT

AND

JAFFER BROTHERS Ltd.::RESPONDENT

Appeal from the Judgment and Decree of the Court of Appeal at Kampala before Hon. G.M. Okello JA, Hon.J. Berko, JA, and Hon. G. Engwau JA. In Civil Appeal No.43 of 1997.

JUDGMENT OF MUKASA KIKONYOGO, J.S.C.

I have had the advantage of reading the draft of the leading judgment prepared by Kanyeihamba, J.S.C. I agree with the reasons he gave for the conclusion he reached. I have nothing useful to add.

L.E.M. Mukasa-Kikonyogo
Justice of the Supreme Court