IN THE SUPREME COURT OF UGANDA

AT MENGO.

CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND KANYEIHAMBA. JJ.S.C.

CIVIL APPEAL NO. 9 OF 2001

BETWEEN

HALLING MANZOOR:: APPELLANT *AND*

SERWAN SINGH BARAM ::: RESPONDENT

(Appeal from the judgment of the court of Appeal (Okello, Mpagi-Bahigeine and Kitumba, JJ.A.) at Kampala, in Civil Appeal No.40 of 1999, dated 23rd February 2001).

JUDGMENT OF MULENGA J.S.C.

This is a second appeal arising out of a suit for breach of contract. The appellant sued the respondent in the High Court, seeking *inter alia,* specific performance of a contract made between them for the sale of two plots of land, by the latter to the former. The appellant's suit was dismissed, as was his subsequent appeal to the Court of Appeal.

Both the appellant and the respondent are Asians who lived in Uganda up to the time Asians were expelled from the country by the military regime. Until he left the country in 1973, the respondent was the registered owner of leasehold titles in the two plots of land known as Plot No.684 Kibuga Block 12, and Plot 176 Sixth Street, in Kampala. I will hereafter refer to the two plots as *"the suit property"* It is not in dispute that subsequent to the respondent's departure from the country, the suit property became expropriated under the Assets of Departed Asians Decree, 1973. It is also common ground that when the Expropriated Properties Act, 1982, which I will hereinafter refer to as "the Act", came into force, it applied to the Suit property.

On l8th April 1994, the respondent and the appellant who were then residing in London entered into a written agreement concerning the suit property. There were two sets of main terms of the

agreement in form of undertakings. On the one hand the appellant was to pay to the respondent the sum of £5000.00, and to process in Uganda, as respondent's attorney, application for repossession of the suit property. On the other hand the respondent was to grant to the appellant power of attorney to enable him to deal with the suit property and to assist the appellant in every way *'to acquire'* the suit property 'w*ithout am further consideration or payment'*. The appellant made the payment, and the respondent granted the power of attorney contemporaneously with the execution of the agreement. On strength of that, the appellant came to Uganda and processed application for repossession of the suit property. On *5th* July 1994, the Minister of Finance issued in the names of the respondent, two certificates authorizing repossession of the suit property. However, thereafter, far from assisting the appellant to acquire the property, the respondent decided to repudiate the agreement. His advocates notified the appellant of the decision, by a letter dated *5th* September 1994, claiming that the respondent had been induced into the agreement by the appellant's misrepresentations, and forwarding a cheque refunding the £5000.00, with an offer *'to settle reasonable expenses... incurred in repossessing the property"*. The appellant refused to accept the repudiation and the refund, hence the suit.

At the trial in the High Court, four issues were framed for determination, but I need not reproduce three of them here, save to mention in passing, that in answer to one of them, the learned trial judge held, quite rightly in my view, that the respondent had not been induced into the agreement by any misrepresentation, as he claimed in his defence, but had entered into it voluntarily. The only issue which I need refer to, and on which the fate of the suit turned, was framed thus:

> ***"2. Whether the agreement was illegal and the plaintiff acquired no interest in consequence."***

The learned trial judge held that at the time the agreement was executed the respondent had *'no interest of any description'* in the suit property, and that therefore, the question of illegality did not arise since **'***there was no contract at all'*. On that ground alone the appellant's claim failed.

At the hearing in the Court of Appeal, counsel for the appellant summarized the six grounds of appeal, which all focused on that holding, into a single issue which he stated to be:-

> ***"Whether there** was **a valid and enforceable agreement of sale between the appellant and the respondent."***

It would appear, however, that in his presentation there was change of emphasis, so that the issue as stated by counsel, became over-shadowed by the question of the respondent's interest in the suit property. The main arguments counsel advanced were: (a) that the Expropriated Properties Act created a contingent interest capable of being sold by a former owner, (b) that the Act did not bar the former owner from selling that interest before repossession, and (c) that the court should apply equity to supplement the written law in order to uphold that interest. In her judgment, with which the other learned Justices of Appeal agreed, Kitumba J.A., considered and rejected all the three arguments. Accordingly, the appeal was dismissed.

Before turning to the grounds of appeal filed in this Court, I find it expedient to dispose of a legal point which this Court, on its own initiative, decided to consider though the parties had overlooked it in this appeal. The respondent had in both courts below, canvassed that legal point to the effect that the agreement was illegal, as it contravened the Land Transfer Act (Cap.202), and section 2 of which so far as is relevant here, provided:

> ***"No non-African or** any **person acting as his agent shall without the consent of the Minister occupy or enter into possession of any land of which an African is registered as proprietor…. or make any contract to purchase or take on lease…any such land or any interest therein other than as security for money."***

Neither trial court nor the Court of Appeal decided whether or not the agreement contravened that section, and at the hearing of this appeal neither party took up the point. This Court, however, could not overlook it as an abandoned issue. Under section 4 of the same statute, contravention of section 2 constituted an offence. It follows that overlooking the point would amount to condoning a criminal offence, if the agreement indeed contravened the section. For

that reason counsel was, subsequently invited to address us on:

"***Whether the suit agreement or*** *any* ***part thereof*** is ***subject to the*** *Land* ***Transfer*** **Act?"**

In counsel's respective written submissions in response, the following are common ground and/or not in dispute: -

(a) that the question concerns only part of the suit property, namely Plot No. 684 Block 12 off Rubaga Road ("the Rubaga plot") in respect of which the respondent's leasehold title had been curved out of private maim land the registered proprietor of which is a Muganda African:

(b) that the Land Transfer Act, (Cap.202), the Public Lands Act, 1969, and the Land Reform Decree,1975, all of' which were repealed by the Land Act, 1998, were in force at the time the agreement was made:

(c) that by virtue of the provisions of the Land Reform Decree, the aforesaid private mailo land was converted into "public land", and the title thereto was converted into leasehold; and

(d) that the agreement between the appellant and the respondent was made without the consent of the Minister for the purposes of the Land Transfer Act.

Counsel for the appellant answered the question in the negative, in a nutshell he argued that the agreement relates to "public land", and that by virtue of section 50 of' the Public Lands Act, the provisions of' the Land Transfer Act do not apply to it. He referred to the decision in **Adam Vassiliadis vs. Libyan** Arab (U) **Bank.:** Civil Appeal No. JO of' 1990, (unreported) (SC), and

impliedly asked us not to follow it because in deciding that case, the Supreme Court had failed to take into account provisions of section 50 *of'* the Public Lands Act. On the other hand, counsel for the respondent answered the question in the at'tirmative. In briet the thrust of his submission was that the Land Reform Decree onk conerted the mailo tenure into leasehold tenure. It neither repealed the Land Transfer Act, nor abolished ownership of land by the then mailo owners, and therefore, the provisions of' the Land Transfer Act continued to apply to leases on conversion being *"land of which an .-1/rican is registered as proprietor"*. He maintained that the agreement in the instant case contravened section 2 of the Land Transfer Act because it was made without the Minister's consent. Counsel relied on the decision in Adam Vassiliadis' case (supra) in which, (at p.24 of the leading judgment) it was held. *inter a/ia.* that:

> "***the abolition of mailo land system did not affect the operation of section 2*** **(of the Land Transfer Act)** ***because the section applies to 'any land'."***

It is correct, as observed by counsel for the appellant, that in so holding, the Court did not consider section 50 of the Public Lands Act, which provided:-

> ***"50. The provisions of the Land Transfer Act shall not apply to grants in freehold or leasehold made by a controlling authority."***

In order to appreciate the impact of that provision it is important to refer to the provisions by which the mailo tenure was converted to leasehold. Sections 1 and 2 of the Land Reform Decree provided:-

> "***1. (1) With effect from the commencement of this Decree, all land in Uganda shall be public <u>land to be administered b the Commission in accordance with the Public Lands Act, 1969, subject to such modifications as ma be necessary to bring that Act into conformity with this Decree.</u>***

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(2) Without prejudice to the generality of sub—section (1) of this section, the following provisions of this Decree shall have effect with respect to the ten are and use of land in Uganda.

2. (1) There shall be no interest in land other than land held by the Commission which is greater than leasehold, and accordingly all freeholds in land anti any absolute ownership, including mailo ownership, existing immediately before the commencement of this Decree are hereby converted into leaseholds.

***(2) <u>Any interest converted b subsection (1) of this section shall be deemed, with effect from the said commencement, to be a leasehold granted by the Commission</u> without the payment of a premium and accordingly,* any *other interests purchased, derived or otherwise held by grant under the interest so converted, are hereby also converted into sub-leases, subject to such terms and conditions which the Commission may impose in relation thereto tinder the Public Lands Act, 1969:....”* (emphasis added)**

It is evident from the foregoing provisions that upon the commencement of the Land Reform Decree, on I June *1975,* the interest of the Muganda African registered proprietor of the Rubaga plot was converted into a <u>*leasehold deemed to he granted by the Commission,*</u> which Commission was <u>*a controlling authority,*</u> within the meaning of the Public Lands Act. It follows that by virtue of section 50 of that Act, the provisions of the Land Transfer Act did not apply to the Rubaga plot, and consequently, that the suit agreement is not subject to that Act. I would therefore, not follow the holding in **Adam Vassiliadis' case** (supra) on that point because in my view, the decision was, to that extent, *per incuriam.*

I now turn to the grounds of appeal, which I would paraphrase thus:

“The learned Justices of Appeal erred in law and* fact *when they held that -

I. the respondent had no interest in the suit property;

2. the Expropriated Properties Act nullified all dealings in property before repossession...
3. Possession of an equitable interest is dependent on prior repossession of a legal interest… thus failing to recognize that the Act created vested interest by the right of expectancy capable of being assigned.
4. equity was not applicable to the instant case; and
5. when they failed to appreciate the evidence and to correctly construe the Act"

Mr.Lule. counsel for the appellant chose to argue the five grounds together, again on the premise that they all related to one issue which he stated to be: -

"Whether the Expropriated Properties Act created in the former owner an interest in the expropriated property, and if so, what interest?"

Counsel did not dispute that the legal title to the suit property was vested in Government. His submissions centered on his contention that the Act created in favor of' *"a former owner"*, an interest in his expropriated property, which counsel called an *"equitable interest of expectancy"*. He submitted that the interest is discernable from the long title, as well as from provisions of sections *3.* 5(1) and 14, of the Act, the combined effect of which is to confer on "a former owner", the right to re-acquire his expropriated property. He argued that the right constitutes an equitable interest of expectancy in the expropriated property, until repossession under the Act, when the former owner re-acquires the legal title. He maintained that the equitable interest of expectancy in land is capable of being assigned for valuable consideration; and that therefore, subject to other requisites being in place, a contract for sale of an interest of expectancy can be enforced with the remedy of specific performance. On the legality of the contract in question, counsel submitted that the transaction did not contravene the provisions of the Act in sections 1 and/or 7. He argued that section I nullified past not future, dealings in expropriated properties; and pointed out that the Minister had given consent for purposes of section 7 of the Act.

In support of his submissions, counsel referred the Court to **Snell's Equity** 9th Ed., **Wakeham vs. Mackenzie** (1968)2 All ER *783;* **Tailby vs. Official Receiver** (1886-90) All ER 486; **Dennin** vs. **Edwardes** (1960) EA *755;* and **Re Lind** (1914-15) All ER 527.

Mr. Nangwala, counsel for the respondent, submitted that the Judicature Statute 1996 empowers the courts to apply common law and equity in the administration of justice, but subject to the written law, and only where the written law does not apply. He stressed that the suit property was governed by statutory namely the Assets of Departed Asians Decree No. 27 of 1973, and the Act. Counsel argued that in the instant case, the Act provides for the manner of acquiring, and the procedure of selling, expropriated property, and that therefore, equity cannot be invoked to legitimize a sale that does not conform to the statutory' provisions. He maintained that the holding by the courts below that the appellant had had no interest in the suit property to sell to the respondent, was correct in law. Secondly, he contended in the alternative, that under sections 1(2) (a) and 7 of the Act, no expropriated property can be validly sold by the former owner, before repossession. The former section renders a dealing of whatever kind, in such property a nullity; while the latter section provides for sale only after repossession and with consent of the Minister. He submitted that therefore, since the contract in issue was entered into before the suit property was repossessed, the contract was a nullity. In support of that submission, counsel relied on the decision in **Noordin Charani Walji vs. Drake Ssemakula Civil Appeal No.40 of 1995 (SC) (unreported).**

Before I consider the respondent's interest in the suit property, I think it is imperative to examine the substance and nature of the agreement of which the appellant seeks specific performance. This is because the subject matter of the dispute between the parties is essentially, the agreement itself I need only reproduce here the following excerpts from the agreement, which I consider to be pertinent and material to what is in issue in this appeal:-

"WHEREAS:

Subject to the following, Bahra Surwan Singh is the registered owner of

(1) — (2) (the suit property)

(***3)*** ***The above properties were vested in Bahra Singh when he left Uganda.***

(4) ***The said Bahra Sarwan Singh wishes to sell his right***

Interest ownership in* the (suit property) *to Halling Manzoor Ahmed for an agreed sum of Sterling Pounds Five Thousand (£5000. 00)

AND WHEREAS:-

The said Bahra Sarwan Singh has stated that at the time of his departure he was forced to sign some papers and documents and honestly believes the said documents may relate to one of the above properties.

NOW THIS DEED WITNESETH AS UNDER:-

(I) In consideration of a sum of £5000.00 now paid by Halling Manzoor Ahmed to Bahra Sarwan Singh, receipt of which sum Bahra Surwan Singh hereby acknowledges the said Bahra Sarwan Singh hereby undertakes as under:

(1) ***To give Power of Attorney to Hulling Manzoor Ahmed in order to enable him to deal with the* (suit property) *as stated in the Power of Attorney <u>for his own use and benefit.</u>***

(2) ***Confirms that the said sum of £5000.00 is in full anti final payment of all sums due to him by Halling Manzoor Ahmed.***

(3) ***<u>That he will assist Ahmed in every way to acquire the (suit property) without any further consideration or payments.</u>***

And the said Halling Manzoor Ahmed confirms:

(i) ***That he will have no claim or claims against Bahra Sarwan Singh for refund or return of the said £5000.00 in any circumstances.***

(ii) ***That he will at his own expense travel to Uganda and stay there with a view to dealing with the attached Power of Attorney"***

In the instrument of the power of attorney which was executed on the same day as the agreement, the appellant was, *inter alia*, authorized *"to handle all dealings and affairs concerning the reclaim of "* the suit property; and for that purpose to *correspond* with the *"authority in Uganda… authorizing receipt of taking over possession"* of the suit property. It was also provided therein, that after taking over possession of the suit property, the appellant was to handle the same as directed by the respondent.

Two things are evident from the foregoing excerpts. First, although in the "witnessed" part of the agreement, no mention is made of the sale of the suit property a reading of the respective undertakings by the parties to the agreement, together with the recital, leaves no doubt that the intention of the parties, and the purpose of the agreement, was to bring about a sale of the suit property by the respondent to the appellant. Secondly, it is evident from the same reading, that the parties were alive to the fact that, to achieve that purpose, it was necessary to first repossess the suit property which was still vested in Government; and the appellant was to process the repossession as the respondent's attorney.

Needless to say, in any sale, the principal obligation of a purchaser is to pay the purchase price to the vendor and that of' a vendor is to transfer the ownership of the property sold to the purchaser. Pursuant to the agreement in the instant case, the appellant paid to the respondent, the agreed sum of £5000.00, when the agreement was executed. The respondent, however, did not transfer ownership of the suit property, as would be expected of a vendor, instead, in consideration of the said payment, he undertook, *inter* alia, to do two things. The first undertaking, was to grant power of attorney to the appellant to enable him to deal with the suit

property *“for* his *own use and benefit”,* which he granted contemporaneously with the execution of the agreement. The second thing he undertook to do, was *“to assist”* the appellant *“in even way, to acquire”* the suit property, which by implication was to be done at a later stage.

From the foregoing, I can safely make two conclusions, without much discussion. The first is that the sum of.5000.O0 pound paid by the appellant was the purchase price for the suit property alluded to in the recital. The stipulation that the respondent would assist the appellant to acquire the property *“without any further consideration or payment”* confirmed this.
The second conclusion is that the assistance which the respondent promised to give to the appellant to *acquire* the property was an undertaking to transfer or convey to the appellant, the legal title in the suit property, which was then vested in the Government but would be re-acquired through repossession. It is significant to note that the respondent did not, by the agreement, purport to sell, let alone to transfer, the suit property. He only undertook

(a) to give the appellant power to enable him deal with the suit property *”for his own use and benefit,”* and

(b) to assist him acquire the suit property, obviously after repossession.

In a nutshell, therefore, the core of the agreement is this: The respondent, in return for the £5000.00 paid to him by the appellant, agreed to sell the suit property to the appellant, and promised to transfer it to him after repossession, which the appellant undertook to process. The agreement was, to that extent, subject to an in-built contingent condition precedent, namely’ the repossession of the suit property. Ordinarily, such a conditional contract is not hilly binding until the contingent event occurs. Nevertheless, subject to the parties’ intentions, it may impose obligations or rights on the parties or either of them. In the instant case, the terms: (a) that the appellant pays the purchase price at the execution of the agreement, (b) that the price be non-refundable, (c) that the appellant deals with the property’ for his own use and benefit, and (d) that

the appellant processes repossession at his own expense, indicate to me, an intention, on the part of the parties, that the agreement be binding from the beginning. Clearly, by the agreement, they created a contractual obligation for the respondent to transfer to the appellant the suit property after repossessing it, and a contractual right for the appellant to acquire the suit property after its repossession. In my view therefore, the basic question before court, is whether that obligation and that right are enforceable.

In their respective judgments, however, the two courts below did not consider the parties' contractual obligations or rights under the agreement. As I have already noted earlier in this judgment, the learned trial judge held that there was no contract at all, on the ground that the respondent had no interest in the suit property. She said:

> ***"Before the repossession on 6/7/94 the defendant had no interest of any description in the suit properties. <u>More importantly so he did not have the legal interest in the properties which would have perhaps given the plaintiff an equitable interest in the same properties.</u> The <u>defendant would not have passed title or any interest over property which did not belong to him.</u> There was no land*** **(sic)** ***to sell to the plaintiff and, hence, there was no sale at all.***
>
> ***It is of course conceded that the defendant got his legal interest back on 6/7/94 after the issue of certificate of repossession. Further there is evidence that the plaintiff obtained the necessary minister consent to transfer but it is of no effect as there was no sale in law. <u>The issue of illegality, hence, does not arise, because there was no contract at all.</u> The plaintiff's claim must therefore, fail (on) that ground alone.*** **"(emphasis added)**

The Court of Appeal upheld these findings. The learned trial judge's conclusion was premised on the legal principle that a person cannot pass title that he does not have. In the context of the law

of contract, the premise would be that no consideration proceeded from the respondent. With due respect, however, that was an erroneous premise arising from misconstruing the agreement to be a sale agreement rather than an agreement for sale subject to a condition precedent. As 1 have already stated, the respondent did not, by the agreement sell or transfer the property'. Nor did he purport to do so. He did not attempt to pass title which he did not have. He obviously agreed to sell, but undertook to pass the title if and when he got it after repossession. That can be likened to the contract between a car dealer and a buyer who places an order, and pays the price in advance, for a car to be delivered in a month's time after it is imported. Conversely, it is comparable to a consumer taking groceries on credit, and promising to pay for them at the end of the month, when he expects to receive his salary. The respondent's undertaking to assist the appellant to acquire the suit property' in the instant case, is in law, as good a consideration, as the car dealer's promise to deliver the car, and the consumer's promise to pay for the groceries in the examples I have given.

It is trite that a promise can amount to valuable consideration in law. A good illustration is provided by the decision in **Qadasi vs. Qadasi** *(1963)* E.A. 142. In that case, the plaintiff and the defendant agreed on "a partnership" to run a bakery business in turns. Each party bound himself to run the baker for six months, and to hand it over to the other on expiry of that period: and also to take over the business again when his turn was due. After some years the defendant refused to hand over to the plaintiff when the latter's turn was due. The trial court upheld his defence that there was no consideration for the agreement because the defendant had given the partnership to the plaintiff gratuitously as his son-in-law and servant. On appeal, the East African Court of Appeal held that the reciprocal promises to run the business in turn, constituted sufficient consideration in law.

The consideration provided by the appellant in the instant case, was the contingent promise I have described. It follows that, upon the occurrence of the contingent event, namely the repossession of the suit property, if not before, the agreement became a fully binding and enforceable contract in law. With all due respect therefore. I would hold that the courts below erred in holding that the repossession of the suit property, and the Minister's consent to its transfer, had no effect. On the contrary, the repossession and the consent removed the only lawful

restrictions on the respondent's ability to fulfill his contractual obligation and principal undertaking as vendor.

In view of the foregoing, I do not consider the respondent's interest in the suit property, at the time the agreement was executed, as a crucial issue in this case. Contrary to the thrust of Mr.Lule's submissions, the respondent did not seek to transfer or assign any equitable interest in the suit property. Instead, he gave power to the appellant to reclaim and deal with the property in the capacity of the respondent's attorney, pending repossession when he would transfer to him the legal title in the suit property. Consequently, I have not found the several authorities referred to us by Mr.Lule, on assignment of equitable interest, helpful in deciding this case. Having said that, however, I will still briefly comment on the issue because it appears to be of general significance.

In my opinion, it is possible in appropriate circumstances, for a person to hold an equitable interest in a property governed by the Act, while the legal estate remains vested in the Government. 1 would reiterate the observation made by Oder JSC. In **Ismail Jaffer Alibhai and Others vs. Nandlal Harjivan Karia and Another Civil Appeal No.53 of *1995***, referring to legislation by which Asians property was expropriated. He said (at p.80) that the property was *vested in* the' *Government for* ***purposes of management*** *only by the Board under the Ministry of Finance".* That observation was made in respect of an interest derived from a sale prior to expropriation. In my view it is even more relevant under the Act which was enacted with a purpose, inter *alia,* to provide for the return of expropriated properties to former owners (see Long Title of the Act). Secondly, it is quite obvious that, unlike the previous legislations on the assets of expelled Asians, the Act gave to a "former owner" a special right to re-claim his expropriated property. It is also obvious that the right can give rise to a proprietary interest in the property. Thirdly, I agree with Mr. Lule's submission that equity recognizes an interest of expectancy. What is not so obvious, however, is at what stage the special right given by' the Act to the former owner, translates into the equitable interest of expectancy in the property. For example,does a former owner who takes no step to exercise that right, or the one who opts to pursue compensation instead of repossession, also have the equitable interest of expectancy? I would be inclined to answer that question in the negative. It seems to me, that in order to activate that interest, there must be a positive step taken to bring the former owner to the position of

expecting repossession of the property. That step, in my view, k taken when the former owner makes an application, under section *3* of the Act, for repossession. In the instant case that stage was attained and the equitable interest was acquired, subsequent to the execution of the agreement, but as I have indicated, that was immaterial. The subject matter of the contract was not assignment of an equitable interest in the suit property, but rather acquisition, albeit in future, of the suit property by' transfer of the legal estate therein.

I will next consider Mr. Nangwala's alternative contention that the suit agreement was a nullity by virtue **of** under section 1(2) (a) of the Act, which provides that -

> ***"any purchases, transfers and grants of**, **or any dealings of whatever kind in,*** (expropriated) ***property or business are hereby nullified:"***

He argued that this provision applies not only to transactions done prior to the Act, but also to those done after the Act came into force. In support of that proposition, he cited the decision in **Noordin Charani Walji vs. Drake Ssemakula** (supra). In that case, the suit property was leasehold from a mailo land. The lease was granted to the appellant, an Asian. in *1955* for a term ot49 years. When in 1972, the appellant abandoned the property, as a result of the expulsion of Asians, the term was still running, and the property became expropriated by virtue of Decree No.27 of *1973.* In 1980, following breach of a lease covenant on the part of the Departed Asians' Custodian Board as successor in title to the lessee, the respondent, as the lessor lawfully exercised his power of re-entry and took possession of the property, thereby terminating the leasehold title. The leasehold title was, however, revived by virtue of the provisions of section 1 (2) (b) of the Act. The appellant applied under that Act, for a repossession certificate which was issued to him on 31.10.88. On strength of the certificate he attempted to evict the respondent from the property. The latter resisted and tiled suit in the High Court, against the appellant for attempted trespass. The High Court entered judgment for him. On appeal, however, the Supreme Court held that the re-entry was a dealing in the expropriated property, and was therefore, nullified under section 1(2) a) of the Act. Counsel relied on the following sentence in the leading

judgment of Oder JSC, which, after careful scrutiny,
I have, with all due respect concluded, was an oversight. The sentence reads:

> "The *only* ***question is whether the appellant's re-entry having been subsequent to the*** *Act* ***it*** *was* ***one of the incidences*** *nullified by* **the Act."**

According to the facts summarized in the same judgment, however, the reentry was not subsequent to the Act. It occurred in 1980, long before the Act was enacted in 1982, and came into force in ***1983.*** Clearly the statement was an accidental slip. The decision therefore, is not authority for saying that dealings subsequent to the Act were nullified by the Act. In my view, there is no basis on which section l (2) (a) of the Act, should be construed to apply to *purchases, transfers, grants and/or oilier dealings* that had not occurred when it was enacted. When that provision is read together with provisions of the preceding subsection, it becomes obvious that it was enacted to clarify that expropriated properties which had been alienated through such dealings, had reverted under section 1(1) of the Act, and were also to remain vested in the Government. The two provisions, so far as is relevant, may be paraphrased thus:

"1. *(1) A property or business which was -*

(a) ***vested in the Government.... under*** Decree No.27/73

(b) ***acquired*** *by* ***Government under*** Decree No. I *1/75*

(c) ***in any other way appropriated or taken over by the Military Regime…***

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

(2) For the avoidance of doubt, and notwithstanding the

provisions of any written law governing the conferring of title to land, property or business and the passing or transfer of** such **title, it is hereby declared that -
***(a) any purchases, transfers and grunts** of, or any dealings of whatever kind in, such property or business are hereby nullified.”*

In my view therefore section I (2) (a) applies to purchases, transfers, grants and dealings prior to the coming into force of the Act and not to subsequent ones.

Secondly, it is evident from the wording of sub-section (2) that what was targeted for nullification were dealings concerned with *the con/erring **of title** to land, Property or business and the passing or transfer of such title.* I think that this basically explains the difference in the decisions of the Supreme Court on the *“dealings”* in **Ismail Jaffer Alibhai’s case (supra) and in Noordin Charani Walji’s case (supra).** In the former case the incomplete sale did not confer, pass or transfer title to the land. The Supreme Court held that the sale was not nullified by section l (2) (a) of the Act. In the latter case. On the other hand, the re-entry had the effect of passing the legal title from the Government to the lessor. The Supreme Court held that the re-entry was nullified by that provision. As I have explained the dealing in the instant case did not confer or transfer the legal title over the suit property. I would therefore conclude on those grounds, that the agreement between the appellant and the respondent was not nullified under section l (2) (a) of the Act.

The last question I will consider, is whether equity’ is applicable to the facts of this case. The learned trial judge had this to say:

“Having ruled that the defendant had not repossessed his legal interest in the suit properties at the time he purported to sell the same to the plaintiff on 1.4. 94_ (sic) ***<u>the plaintiff could</u>*** *<u>not</u>* ***<u>have acquired an equitable interest to entitle him in this case to</u>***

specific performance. It would not be available to him." (emphasis added)

In the Court of Appeal, Kitumba J.A., held, in the leading judgment, that the transaction between the appellant and the respondent was governed by written law, and after referring to sections 12 and 16 of the Judicature Statute, concluded:-

> "I ***am of the view that where there is written law which is clear and exhaustive, as it is in this case, the High court and this Court do not have to resort to equity to decide an issue."***

It is of course correct to say that principles of equity cannot be invoked to override written law or even common law. Indeed one of the maxims of equity is that *"Equity follows the /aw.'* But I would, with all due respect, reiterate that both courts were misled by the mistaken view they took of the nature of the Suit agreement. They viewed it without regard to the in-built contingent condition precedents and so construed it as if it were an empty or fake sale. Needless to say, if the learned trial judge had found, as in my opinion she ought to have found, that repossession, far from having no effect on the transaction as she held, was the contingent event, the happening of which made the contract fully binding and enforceable, she would have concluded that the appellant thereupon, to use her words, acquired an equitable interest to entitle him in this case to specific performance. The contract was partly performed. The appellant as purchaser performed his principal obligation of paying the purchase price. In addition, he performed the supplementary obligation of processing the repossession of the suit property successfully, and thereby acquired the equitable interest therein.

What remained for the contract of sale to be completed was for the respondent, as vendor, to perform the principal obligation he undertook to do, which I reiterate, is to convey the legal estate, so that the appellant acquires ownership of the suit property. The Act does not provide for acquisition of equitable interest in expropriated property, but it does not prohibit such acquisition. It also does not provide for protection of such interest when acquired as in the instant case. It is inaccurate therefore to say. as the learned Justice of Appeal stated, that the written law

is exhaustive. I would hold that equity is applicable to the scenario, such as is in the instant case. It was correct, however, to hold that at the time the suit agreement was executed, the respondent had no vested interest in the suit property. As I have indicated, my view is that the equitable interest of expectancy in the suit property arose upon the application for repossession under section *3* of the Act. That application was subsequent to the agreement. For that reason, in my opinion, ground I ought to fail. I would however hold that grounds 2, *3*, 4 and 5 ought to succeed.
In the memorandum of' appeal, apart from the prayers that the appeal be allowed with costs and that the judgments and decrees of the courts below be set aside, the appellant prays for an order that *"the* suit *property be decreed in* (his) *favour."* in my view, however, he ought to pray for specific performance which is what he had prayed for in the plaint. He had also prayed for damages, mesne profits, further or other relief' and costs.

Specific performance is an equitable remedy grounded in the equitable maxim that *'Equity regards as done, that which ought to be done'.* As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy, such as damages would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have for long considered damages inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case. I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the *equities* of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance.

I would not allow the appellant any other relief apart from costs. I am however constrained to briefly comment on a submission made by his counsel concerning mesne profits. At the trial, the appellant did not adduce any evidence to assist the court to determine the quantum of mesne

profits or damages. In his submission to the trial court learned counsel for the appellant/plaintiff said:-

> ***"It will be seen that in Matovu's case the assessment of*** *mesne*
> ***profits was made on the basis of a valuation report. None exists***
> ***yet in this case. I submit that if mesne profits were decreed, the court has powers to***
> ***order a valuation by the Government Valuer… The***
> ***value so assessed would be the amount decreed and can be settled***
> ***before the Registrar of the High Court".***

With due respect to counsel, this submission is strange and unacceptable. A party seeking relief from the court must present his case fully, not piece meal or in installments. The court does have power. in a matter before it. to direct investigation of any issue, and to postpone further hearing to await the result if it is satisfied that to do so would enable it to arrive at a just decision. In my view, however, it is not permissible for a plaintiff who fails to adduce necessary evidence, to ask the court to grant "a blank cheque" award of mesne profits or damages pending proof before the Registrar.

In the result, I would allow the appeal, and set aside the judgments and decrees of the Court of Appeal and the High Court, and substitute a judgment and decree of' specific performance of the suit agreement, ordering the respondent to transfer the suit property to the appellant. I would order the respondent to pay to the appellant costs of this appeal as well as costs in both courts below.

Dated at Mengo this 17th day of September 2002

J. N. Mulenga
JUSTICE **OF THE** SUPREME COURT.

JUDGMENT OF ODER, J.S.C.

I have had the benefit of reading in draft the judgment of Mulenga, J.S.C. with which I agree. The appeal should succeed.

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

Dated at Mengo *this 17TH* ***day of September 2002.***

A. H. O. ODER

JUSTICE OF THE SUPREME COURT

JUDGMENT OF TSEKOOKO, JSC. I have had the benefit of reading in draft the judgment prepared by my learned brother, the Hon. Justice Mulenga, JSC, and I agree that this appeal should succeed. I also agree with the orders which he has proposed.

Delivered at Mengo this 17TH day of September 2002.

J.N.**W. TSEKOOKO.**

Justice of the Supreme Court.

JUDGMENT OF KAROKORA, JSC.

I have had the benefit of reading in draft the judgment prepared by Mulenga, JSC. I fully associate myself with him that the appeal should be allowed with costs here and in the courts below. I also agree with him that the respondent be ordered to transfer the suit property to the appellant.

Dated at Mengo this 17th day of September 2002.

A.N. Karokora,
Justice of the Supreme Court.

JUDGMENT OF **KANY**EIHAMBA, J.S.C.

I have had the benefit of reading in draft the judgment prepared by my brother, Mulenga, J.S.C. and I agree that this appeal should be allowed for the reasons he has given in his judgment. I also agree with the orders he has proposed.

Dated at Mengo, this 17th Day of September 2002

G.W. Kanyeihamba

JUSTICE OF THE SUPREME COURT