THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI-CJ, ODER, TSEKOOKO, MULENGA AND KANYEIHAMBA - JJ.S.C.)

CIVIL APPEAL NO. 2 OF 2002

B E T W E E N

ERUKANA KUWE: ***APPELLANT***

A N D

VASRAMBHAI DAMJI VADER: ***RESPONDENT***

(Appeal from the decision of the Court of Appeal at Kampala (Mpagi-Bahigeine, Engwau and Kitumba, JJ.A.) dated 21-09-2001, in Civil Appeal No. 42 of 2000).

JUDGMENT OF ODER JSC.

This appeal is against the decision of the Court of Appeal which upheld the judgment of the High Court dismissing the appellant's suit and granting the respondent relief against forfeiture.

The facts of the case, briefly, are these:

The appellant was the registered owner of land comprised in Block No. 29, Plot No. 123, Mulago, in Kampala (referred to hereinafter as "the suit property").

By an agreement dated 15-02-68, the appellant leased the suit property to the respondent for a period of 49 years. The property was undeveloped at the time. Thereafter the respondent, built a residential house on it.

The lease agreement contained covenants binding on the respondent. Relevant to this appeal are the following clauses:

"2. *The yearly rent for the land hereby demised shall be Shs. 600= (Shillings six hundred) and shall be paid every year in arrears.....*

4. *The lessee hereby covenants with the lessor as follows:-*

(a) .....

(b) ***To pay the rent reserved at the appointed time and all existing and future rates, taxes, assessments and outgoings payable by law in respect of the land agreed to be leased.***

(c).....

(d) ***To keep the land agreed to be leased and any building erected thereon in good and tenantable repair and in clean and tidy condition.***

(e) ***Not to assign, sublet, or part with the possession of the whole or any part of the land without the consent in writing of the lessor such consent not to be unreasonably withheld in the case of a respectable and responsible tenant or tenants.***

5. The lessor hereby covenants with the lessee as follows:-

(a) .....

(b) PROVIDED ALWAYS and this lease is made upon this express condition that if the rent or part thereof is in arrear for the space of thirty days, although no legal or formal demand has been made for payment thereof, or in case of any breach or non-observance, of any of the covenants expressed herein and such breach or non-observance continue for the space of thirty days, it shall be lawful for the lessor or his transferees to re-enter upon and take profession of the demised property."

The respondent, an Asian, was expelled from Uganda in 1972. Consequently, the suit property vested in the Departed Asian Property Custodian Board under the Assets of

Departed 'Asians Decree, 1973. On 15-09-93, the respondent repossessed the property under the Expropriated Properties Act, 1982, through a property agent called Anglo African Ltd. Through the same agent, the respondent entered into a one -year tenancy agreement with one Mamtaz Hassan (PW2) as a tenant on 20-03-95, at a monthly rent *of* Shs. 200,000-.

Thereafter, Mamtaz occupied the suit property. On 25-05-95, the appellant gave the tenant one month's notice to vacate it. The tenant, who had apparently spent some money to renovate the suit property with the consent of the respondent's agent, complained. The appellant had by then declared himself the rightful owner of the suit property. He offered Mamtaz a tenancy to rent it from him (the appellant). A tenancy agreement was made between them on 27-09-95.

On 29-09-95, the appellant applied to the Commissioner of Land Registration to note the appellant's re-entry in the register. However, the Commissioner refused to do so, for the reason, as he put it in a letter to the former (Annexture 'C' to the amended written statement of defence) that:

> ***"Upon re-examination of the application I have found nothing on Oath to prove that the lessor has physically entered the premises or otherwise got possession thereof."***

Thereupon, the appellant instituted a suit against the respondent, praying for, inter alia, a declaration that he had lawfully re-entered and terminated the respondent's lease of the suit property; a permanent injunction to restrain the respondent from evicting the appellant's tenant; and an order for the Registrar of Titles to note the appellant's re-entry in the register.

The respondent defended the suit. In his amended written statement of defence, he admitted the lease agreement with the appellant, but denied the appellant's claims. He averred, inter alia, that between 1972 and 1993, he was not supposed to pay ground rent when the suit property was in the hands of the Departed Asians Property Custodian

Board,; and that after the suit property was repossessed on his (the respondent's) behalf by M/s. Anglo African Ltd., the company wrote letters to the appellant for him to inform the company where to pay the ground rent, but no response was received from the appellant. The respondent made a counter-claim in his amended written statement of defence to the effect that if it was proved that he had acted in breach of the covenants in the lease agreement, then he was prepared to pay up all outstanding rent, and any costs so far incurred by the appellant. The respondent claimed for relief against forfeiture under s.27 of the Judicature Statute 1996 J.S. The respondent then prayed for judgment in his favour relieving him from forfeiture and for an order allowing him to have possession of the suit property.

At the end of the trial of the suit, the learned trial judge found that the respondent had been in breach of the lease agreement by failure to pay the annual rent; and by sub-letting without the written consent of the respondent. The learned trial judge also found that there had been a breach of the covenant to keep the suit property in good and tenantable condition. She held, however, that since the property had been in the hands of persons not privy to the lease agreement, the respondent was not responsible for that breach. The breaches found to have occurred notwithstanding, the learned trial judge dismissed the appellant's suit. She granted the respondent a relief against forfeiture. The appellant appealed to the Court of Appeal, which dismissed his appeal upholding the High Court decision. Hence, this appeal.

Three grounds were set out in the memorandum of this appeal, namely that:

1. *The learned Justices of Appeal erred in law in holding that the trial judge had discretion to grant relief from forfeiture to the respondent after finding that the respondent had breached lease covenants other than non payment of rent.*

2. *In the alternative, the learned Justices of Appeal erred in law and in fact when they failed to evaluate and assess the evidence as a first appellate court should have done and erred when they therefore held that the trial judge properly exercised her discretion in granting relief against forfeiture to the respondent.*

3. *The learned Justices of Appeal erred in law in holding that s.184 of the Registration of Titles Act (Cap. 205) was not applicable to the matter before court.*

Mr. Denis Wamala, the appellant's learned Counsel first took the third ground and subsequently argued the first and second ground together. I shall deal with them in the same order.

In his submission under the third ground of appeal, the learned Counsel contended that the provisions of s.184 of the Registration of Titles Act {RTA} applied to this case because: *the appellant was the registered proprietor of the suit property as evidenced by the lease between him and the respondent; because the appellant was in constructive possession of the suit property at the material time; because the respondent sued the appellant by way of a counter claim, praying for possession thereof, thereby, in effect, conceding that he (the respondent) did not have possession; and because the trial court found that the appellant did re-enter the suit property although the Registrar of Titles refused to perfect the re-entry by noting it in the register.* The learned Counsel, contended that the respondent's counter - claim was an action for ejectment which was resisted by the appellant by his reply thereto.

For the reasons aforesaid, the learned Counsel contended, the Court of Appeal erred to have found that s.184 of the RTA did not apply to the instant case. He relied on the case of ***Francis Butagira -vs- Deborah Namukasa, Civil Appeal No. 6/89 (SCU)*** (unreported), and criticized the Court of Appeal for distinguishing it from the instant case.

He further submitted that the lease between the appellant and the respondent was terminated the moment the appellant re-entered, and that the lawful re-entry, learned Counsel contended, was not nullified by the Registrar's refusal to note it in the register. The learned Counsel relied on the case of ***The Executrix of the Estate of the Late Christine Mary Namatovu Tebajjukira and Another -vs- Noel Grace Shalita Stanzi, Civil Appeal No. 2/88 (SCU)*** (unreported).

Mr. Augustine Kibuka Musoke argued the respondent's case in opposition to the appeal. His submission under the third ground of appeal was brief. He referred to s.184 of the RTA and contended that the respondent's counterclaim was not a suit against the appellant. The section therefore, did not apply to the instant case.

In so far as it is relevant, Section 184, RTA provides as follows:

> ***No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as a proprietor under the provisions of this Act, except in any of the following cases. -***
>
> ***(a).....***
>
> ***(b) the case of a lessor as against a lessee in default;***
>
> …….
>
> ***and in any case other than as afore said the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the grantee, owner, proprietor or lessee of the land therein described, any rule of law or equity to the contrary not with-standing".***

The application of section 184 of the RTA has been considered by this court in the recent past in the cases of - ***The Executrix of the Estate of the Late Christine Mary Namatovu Tebajjukira and Another -vs- N. G. Shalita Stananzi*** (supra); and ***Francis Butagira -vs- Deborah Namukasa*** (supra).

The facts in the former case were briefly as follows:

The second appellant Deborah Namukasa was the administratrix of the estate of her late grandmother, Christine Mary Namatovu Tibajjukira. It was in that capacity that she was sued as the first defendant. The respondent was the registered propriety of the

suit property which was comprised in L.H Vol. No. 380 Folio 4. The freehold interest comprised in F.H.R. Vol. 30 Folio 18, was registered in the names of the deceased until 10-03-86, when it was transferred to the second appellant as the Administratrix of the deceased's estate and as proprietor in succession. Soon after obtaining title the second appellant re-entered the respondent's leasehold and took physical possession of one of the houses therein. It was then that the respondent sued for trespass. His case was that as his lease was still subsisting, he was entitled under the covenants of that lease to quiet enjoyment of the property. The second appellant's defence was that she had a right of re-entry as she had a freehold interest in the land. The trial court gave judgment for the respondent, ordering that the second appellant should give vacant possession, and pay mense profit and damages to the respondent.

The appellant's appeal to this court in that case was allowed' mainly, on the ground that in view of the provisions of Section 184, a lessee has no right to bring action for ejectment or recovery of land against the lessor since under those provisions only the lessor is permitted to sue the lessee who has defaulted in complying with the terms of the lease. Wambuzi, CJ, said:

> **"It *seems to me that paragraph (b) of the section simply means that a lessor may bring an action of ejectment or recovery of land against a lessee who is in default notwithstanding that the lessee is registered as proprietor of the lease. There is no provision for the converse. In other words there is not provision that in the case of a lessee as against a lessor in default, that is to say when it is the lessor who is in default and not the lessee. Accordingly, in my judgment, the case of a lessee purporting to bring an action in ejectment or recovery of land against his lessor falls under,*** *"any case other than as aforesaid"* ***in s.184 in respect of which the production of a registered certificate of title is an absolute bar and estoppel to any such action. The expression*** *"any rule of law or equity to the contrary not-withstanding"* ***must have been designed to rule out relief against forfeiture where the registered proprietor has re-entered."***

The interpretation of s.184 of the RTA made in that case, in my view, is still valid. What Wambuzi, CJ said in ***The Executrix of the Estate of the Late Christine Mary Namatovu Tebajjukira*** (supra) was cited with approval in ***Francis Butagira -vs- Deborah Namukasa*** (supra). In the latter case Odoki, J.S.C. (as he then was) said.

> ***"This court considered the above provisions in the*** *Tebajjukira* ***case (supra) and came to the conclusion that a lessee has no right to bring an action of ejectment against his lessor under those provisions. Wambuzi, CJ, had this to say on this point:***
>
> ***..... I concurred with that decision and I am still of the same view. In the instant case, the appellant did bring an action for repossession of land which was being occupied by the respondent. It is clear, therefore, that the appellant was seeking ejection of his lessor or recovery of land from him which is not permitted by the provisions of section 184. The learned trial judge was therefore, in error in holding that these provisions were inapplicable to the present case."***

In the instant case, the learned Justices of Appeal upheld the learned trial judge's finding that s.184 of the RTA did not apply.

Kitumba, J.A., wrote the lead judgment, with which the other members of that court agreed. She said, inter alia:

"It is appreciated that under the provisions of section 184 of the Registration of Titles Act, a lessee has no right to bring an action of ejectment against his lessor. See ***Francis Butagira -vs-Deborah Namukasa*** *(supra). The authority of* ***The Executrix of the Estate of the Late Christine Mary Namatovu and Another -vs- Noel Grace Shalita Stananzi*** *(supra) which Counsel for the appellant has relied upon is distinguishable from the instant appeal. In the present case the lease had not yet been voided and the appellant has not physically re-entered the land. The learned trial judge found that the appellant simply told Hassan, P.W.2, that he was the rightful owner of the premises and*

not the respondent. The appellant made a tenancy agreement with Hassan. This, in the judge's view, did not amount to physical re-entry. She held that the appellant just took advantage of the situation created by the respondent's agent.

In my view, the learned trial judge considered all the circumstances of the case and properly came to the right conclusion that section 184 of the Registration of Titles Act was not applicable. I am unable to fault her on this finding."

With great respect, I am unable to agree with the conclusion of the learned Justice of Appeal in the passage of the judgment I have just reproduced.

It is common ground that the respondent as lessee had been in breach of the lease agreement by failing to pay rent, by failing to keep the suit property in good and tenantable repair and clean condition, and by sub-letting it without the consent of the appellant. It was also not in dispute that the appellant as lessor was by reason of those breaches entitled to re-enter the suit property. The learned trial judge found in that regard as follows:

> ***"Was the lessor entitled to re-enter the demised premises? Under clause 5****(b)* ***of the lease agreement, and section 102 of the Registration of Titles Act the lessor had a right of re-entry upon the breaches being committed because if breaches occur the lease becomes voidable and not void at the option of the lesser."***

The Court of Appeal did not expressly uphold that finding, but there can be no doubt that if it had considered it, it would have done so.

In my view, the appellant determined the respondent's lease of the suit property by terminating the respondent's sub-leasing of the same to Mumtaz (PW2), as he did, and

also by making a new sub-lease agreement with PW2. From the moment the appellant gave notice to end Mumtaz's occupation as the respondent's tenant, which notice Mumtaz apparently accepted, that, in my view, amounted to termination by the appellant of his lease of the suit property to the respondent.

In my opinion, the consequences of what the appellant did in that regard were the same as if he had terminated the respondent's lease by sub-letting it to a complete stranger who had not been the respondent's tenant. Further, the appellant's action amounted to a lawful re-entry of the suit property. He did not take physical possession of the property, but I think that by putting his tenant in possession thereof, he thereby took constructive possession of the suit property. The respondent was thereby put out of possession of the suit property.

As regards the Registrar's refusal to act on the appellant's application for his re-entry to be noted in the register the case of ***Lugogo Coffee Co. Ltd. -vs- Singo Combined Growers Ltd. (1976) H.C.B.92,*** appears to support the view that where the Registrar of Titles declines to note a re-entry and advises that the dispute be resolved by court action, the lease does not remain subsisting as between the lessee and the lessor. It is terminated notwithstanding a refusal by the Registrar of Titles to note the re-entry, as happened in the instant case. This is what Wambuzi, C.J. said in ***The Executrix of the Estate of the Late Christine Mary N. Tebajjukira*** (supra):

"In *Lugogo Coffee Co. Ltd. -vs- Singo Combined Growers Ltd. (1976) H.C.B. 92*, ***the plaintiff company brought an action against the defendant company for possession and general damages for trespass. Before the action the land in question had been leased to the defendant. The vendor re-entered for non-payment of rent and applied to the Registrar of Titles to mark the re-entry in the register book on the ground of non-payment of rent. The Registrar declined to mark the re-entry and advised that the dispute be resolved by court action. The vendor did not refer the matter to court but instead sold the land to the plaintiff company. Nyamuchoncho J., as he then was, held inter alia, first that as between the lessor and the lessee the lease is determined by the lessor's lawful re-entry. I think this is a correct proposition in law.***

Secondly, the learned trial judge held that refusal by the Registrar of Titles to make an entry did not have the effect of keeping the lease subsisting. The lease was terminated by the lessor's re-entry for all intents and purposes as between the lessor and the lessee although the law had not recognized the re-entry. I think by this the learned Judge meant that the lessee could pass title of the leasehold to some third person who was unaware of the re-entry. I do not know whether this is or is not correct in law but quite clearly it is the duty of the court to say whether or not the re-entry was lawful and if so, issue proper orders to give effect to the re-entry such as rectification of the register. As I have already observed the main issue before the lower court was whether or not there was a lawful re-entry. Instead the court was preoccupied with determining whether the respondent was lawfully registered as proprietor of the lease held."

In my view, the principles expressed by Wambuzi C.J. in the passage of his judgment in ***The Executrix of the Estate of the Late Christine M. N. Tebajjukira*** (supra), to which I have just referred, apply to the instant case. The lease agreement between the appellant and the respondent was terminated by the appellant's re-entry for clear breaches of covenants by the respondent. It only remained for the High Court to order the

Registrar of Titles to perfect the re-entry by noting in the register, a remedy which the appellant sought by his suit.

Finally, in my view, the respondent, by his counter-claim in which he prayed for relief against forfeiture and possession of the suit property sought to eject the appellant from the suit property within the meaning of s.184 of RTA.

Black's Law Dictionary, 5th Edition, defines ***"counter claim"*** as a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff. If established, it will defeat or diminish the plaintiffs claim.

In the instant case the respondent's counter-claim was intended to defeat the appellant's suit reversing his re-entry of the suit property. As it happened the counter-claim succeeded in the trial court and was upheld (wrongly in my view) by the Court of Appeal. The appellant was thereby dispossessed of the suit property contrary, in my judgment, to the provisions of s.184 of the R.T. A.

The third ground of appeal should therefore succeed. This disposes of the appeal but I shall, nevertheless, proceed to briefly consider the other two grounds, although the second is an alternative to the first.

The appellant's learned Counsel next took the first and second grounds together. In his submission, learned Counsel criticized the Court of Appeal for upholding the trial judge's decision of granting to the respondent the remedy of relief against forfeiture on the basis of equity He contended that the trial court had no discretion to grant such a remedy to the respondent under sections 16(2)(c) and 35 of the Judicature Statute, 1996 for breaches other than non-payment of rent in view of the provisions of section 27 of the same Act.

The Court of Appeal, therefore, erred to have upheld the learned trial judge's decision in that regard. Contrary to the Court of Appeal's decision, there are written laws to the effect that the respondent was only entitled to relief against forfeiture for non-payment of rent. He was not entitled to relief against forfeiture for breach of the other covenants.

In the circumstances, learned counsel contended, sections 16(2)(c) and 35 of the J.S. were not applicable to the instant case. The learned counsel also relied on the case of ***Butagira,*** (supra) in support of his view that the trial court, whose decision the Court of Appeal upheld, should not have granted the respondent relief against forfeiture.

The learned counsel's other reason why the Court of Appeal should not have upheld the granting by the trial court of the remedy of relief against forfeiture under equity to the respondent is that the Court of Appeal did not properly evaluate the evidence in the case as a whole. Had it done so, it was contended, it would have found that the respondent was not entitled to that relief, because his hands were not clean. He had acted contrary to the maxim of equity that he who comes to equity, must have clean

hands. The appellant's objectionable conduct was that he had sublet the suit property without the consent of the appellant, in breach of covenant 4(e) of the lease agreement. For this submission, the learned counsel relied on ***Gill & Another - vs - Lewis & Another (1956) I.All.E.R. 844;*** and ***Barrow -vs - Isaacs & Son (1891) IQB, 412;***

In opposition to the first and second grounds of appeal, the respondent's learned counsel submitted that the learned trial judge was justified in the exercise of her discretion to relieve the respondent from forfeiture because she had jurisdiction to do so under the law of equity provided for by section 16 (2)(c) of the J.S. She also had jurisdiction to do so by virtue of the provisions of section 35 of the same Statute. Further, an appellate court does not normally interfere with the exercise of discretion by a trial court.

The learned Counsel further contended that the provisions of section 27 of the J.S. do not restrict relieving lessees against forfeiture to breach of the covenant for payment of rent only. The section is not exhaustive. Its provisions are wide enough to permit relief for breaches other than for non-payment of rent. Learned Counsel submitted that under section 16 of the J.S., the High Court has jurisdiction to administer equity and common law. In common law, and equity, courts have jurisdiction to grant relief for breaches of covenants other than for payment of rent as well. Learned Counsel relied on ***Bilson and Others -vs - Residential Apartments Ltd. (1992) AC 494.***

As I have said already in this judgment, the appellant, by his suit in the High Court sought to enforce his right of re-entry against the respondent for breach by the latter of covenants in the lease agreement between them. One of the covenants breached by the respondent was for payment of rent. By his counter-claim pleaded in his w.s.d. the respondent sought to be relieved from forfeiture under section 27 of the J.S., which provides:

> ***"27(1) Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry, or forfeiture for non-payment of rent, the lessee may in the lessor's action or in action brought by himself or herself apply to the High Court for relief.***
>
> ***(2) The High Court, under sub-section (1) of this section may:***

(a) ***grant any relief it considers fit on such terms as to costs, expenses, damages, compensation, penalty, or otherwise including the granting of an injunction to restrain any future non-payment of rent as it thinks fit; or***

(b) ***refuse the relief sought as it thinks fit."***

The learned trial judge granted the respondent relief against forfeiture under section 27 of the J.S. on the ground that the section gives the High Court unrestricted discretion to grant to a lessee relief against forfeiture for non-payment of rent and for breaches of other covenants in a lease.

The Court of Appeal, rightly so in my view, criticized the learned trial judge for relying on s.27 for that decision. Kitumba, J.A., with whose judgment the other members of the court agreed, said:

> ***"With due respect to the learned trial judge she misinterpreted section 27 of the Judicature Statute when she held that she could use the section to grant relief against forfeiture for breach of other covenants in the lease apart from non-payment of rent. The marginal note of the section is*** *"Relief from forfeiture for non-payment of rent"*

The learned Justices of Appeal, nevertheless, proceeded to hold that the learned trial judge properly exercised her discretion in equity under sections 16(2) and 35 of the J.S. in favour of relieving the respondent from forfeiture for breaches of covenants other than for payment of rent. The following reasons appear to be their justification for upholding the learned trial judge's decision.

First, section 16(2) of the J.S. imposes a duty on the High Court to use equity where there is no written law.

Second, contrary to the appellant's contention in his appeal to the Court of Appeal, section 35 is not in general terms. It can be used to provide any remedy.

Third, the learned trial judge rightly relied on the authority of ***- Hyman and Another -vs- Rose (1912) A.C.632.*** That case considered section 14(1) of the Conveyancing and Property Act, 1881 of England which provided for relief against forfeiture for breaches of covenants in leases generally. In the instant case Kitumba, J.A. referred to the authority and said:

> ***"It is not restricted to non-payment of rent. However, I would like to add that she was right in as far as she followed the reasoning of that authority with regard to section 27 of the Judicature Statute to grant relief against forfeiture for non-payment of rent. She observed in that authority how the courts should exercise discretion when the statute allows it. What is stated in that case is not different from our law. I am inclined to hold that in the circumstances, the trial judge properly used her discretion."***

Fourth, it is well established that the Court of Appeal will not interfere with the exercise of discretion by a trial court unless it is satisfied that the trial court misdirected itself on some matter and as a result arrived at a wrong decision, or unless it is manifested from the case as a whole that the judge was clearly wrong in the exercise of the discretion and that as a result there has been injustice. The learned Justices of Appeal followed ***Mbogo and Another -vs- Shah (1968) E.A.93.***

I shall deal with the reasons given by the learned Justices Court of Appeal, in the same order.

S.16(2) of the J.S. provides:

"16(2) Subject to the provisions of the Constitution and of this Statute, the jurisdiction of the High Court shall be exercised:

a) ***in conformity with written law including any law in force immediately before the commencement of this Statute.***

b) ***subject to any written law and in so far as the written law does not extend or apply, in conformity with:***

i) the common law and the doctrines of equity;

ii) any established and current custom or usage; and

c) Where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience."

(The underlining is mine).

The effects of the provisions of this section as I understand them are that the jurisdiction of the High Court shall be exercised, firstly, in conformity with written law, including any law in force immediately before the commencement of that Statute; Secondly, subject to any written law and in so far as the written law does not extend or apply, in conformity with the doctrines of equity, and thirdly, where no express law or rule is applicable to the matter in issue before the Court, in conformity with the principles of equity. In the first and second cases, the doctrines and principles of equity apply only in so far as express law or rule does not extend or apply to the matter in issue before the High Court. In the instant case, the issue before the High Court which tried the suit and now an issue in this appeal, was whether the respondent was entitled to the equitable remedy of relief against forfeiture for breaches which he committed of the covenants in the lease.

In my view since section 27(c) of the J.S. is written and an express law which applied to the matter in issue before the High Court, the jurisdiction of that Court could be

exercised only in conformity with that written law. Consequently the High Court had no jurisdiction to apply the doctrines or principle of equity to the issue at hand. With the greatest respect therefore, I do not agree that the provisions of section 16(2) (b)(i) and (c) were applicable. It was therefore an error to grant the respondent the equitable remedy of relief against forfeiture for breach of the covenant by him not to sub-lease the suit property without written consent of the appellant lessor and to keep the suit property in a tenantable condition.

Section 35 of the J.S. provides:

> ***"The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Statute or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicities of legal proceedings concerning any of those matters avoided."***

With great respect, my view is that the section cannot be used by the High Court to grant a remedy different from the one already provided for by another written law. In the instant case, the High Court had no jurisdiction to grant to the respondent the equitable remedy of relief against forfeiture for breach of the covenants of not to sub-lease the suit property without the lessor's written consent, and to keep the same in good and tenantable condition, in view of the provisions of section 184 of the RTA, and section 27 of the J.S.. For these reasons it was, with respect, an error by the learned trial judge to grant the equitable remedy of relief against forfeiture as he did, a decision which, with respect, the Court of Appeal wrongly upheld.

As regards the authority of ***Human and Another -vs- Rose (1912) AC. 632*** (supra), my view is that that case is not relevant to the instant case. The provisions of section 14 of the Conveyancing Act, 1881, of England upon which the decision of that case turned, concerning granting of relief against forfeiture, appear to be wider than the provisions

of sections 27 and 16(2) of the J.S. In any case, the provisions of the English Statute are different from those of the Ugandan Statute in question, and do not apply in Uganda.

Under the provisions of sub-section 27(2) of the J.S. the High Court has discretion under sub-section (1) thereof to grant relief sought against forfeiture for non payment of rent. It may grant any relief it considers fit. It may also refuse the relief sought as thinks fit. In the instant case, the High Court purported to exercise a discretion of granting relief against forfeiture for breaches of covenants where it did not have jurisdiction to do so. Consequently, with respect, the question of the Court of Appeal declining to disturb the exercise of discretion by the trial court did not arise.

In the circumstances the first and second grounds of appeal must also fail.

In the result, I would allow this appeal with costs here and in the Courts below. I would also set aside the judgments and orders of the High Court and of the Court of Appeal and substitute therefore a judgment allowing the appellant's suit with orders that:

(a) ***It is hereby declared that Erukana Kuwe, the plaintiff, has lawfully re-entered the suit property and terminated the defendant's lease thereof;***

(b) ***The Vasrambhai Damji Vader be and is hereby restrained by a permanent injunction from evicting the plaintiff's tenant from the suit property;***

(c) ***The Registrar of Titles be and is hereby ordered to note Erukana Kuwe's re-entry of the suit property in the Register.***

(d) ***Erukana Kuwe shall have the costs of the suit.***

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment delivered by Oder JSC and I agree with it and the orders he has proposed.

As the other members of the court also agree with the judgment and orders proposed by Oder JSC, this appeal is allowed with orders as proposed by Oder.

JUDGMENT OF TSEKOOKO JSC:

I have had the benefit of reading in draft the judgment of my learned brother Oder JSC, and I agree that this appeal should be allowed with costs to the appellant here and in the two Courts below.

JUDGMENT OF MULENGA, JSC

I had opportunity to read in draft, the judgment prepared by my learned brother Oder JSC. I have come to the same conclusion as he did, that the appeal ought to succeed, and I concur in the orders he proposes. I wish, however, to state in brief my reasons for coming to that conclusion, albeit for emphasis only.

The facts and background of this appeal are so well set out in the judgment of Oder JSC, I need not repeat them. It will suffice to summarise only what is necessary to put in context what I wish to say. The case arose out of a lease by which the appellant leased the suit property to the respondent's late father. During the subsistence of the lease, the lessee breached three of the lessee's covenants. On basis of those breaches, the appellant terminated the lease, and in exercise of his right of re-entry, he rented out the suit property to a third party, one Hassan. Apparently, at that material time, Hassan to whom the property was previously sub-let by the lessee's agents without the consent of the appellant as lessor, was under notice to vacate, as his sub-tenancy had been terminated by the same agents. The appellant's application for the re-entry to be noted in the register under the Registration of Titles Act ***("RTA")*** (Cap.205), was turned down. He filed suit in the High Court, praying for, ***inter alia :-***

a declaration that he had lawfully re-entered and terminated the lease

an order directing the Registrar of Titles to note the re-entry.

The respondent's late father was cited as defendant, but in the course of the trial, when it was disclosed that he had died, the respondent, as administrator of his estate, was substituted. The suit was defended with a denial of the breaches of covenant, and in the alternative, a counter- claim was pleaded praying for, ***inter alia***-

relief against forfeiture of the lease possession
of the suit property.

The learned trial judge dismissed the appellant's suit, and granted to the respondent unconditional relief against forfeiture of the lease. The Court of Appeal, upheld her judgment. Although it accepted the criticism that the trial judge erred in purporting to grant the relief against forfeiture under section 27 of the Judicature Statute, 1996, it held that she had properly exercised her discretion to grant the relief under undisclosed principles of equity.

In this Court, counsel for the appellant placed much reliance on the third ground of appeal, and argued it first. It reads:-

> ***"3. The learned Justices of Appeal erred in law in holding that S.184 of the Registration of Titles Act (Cap.205) was not applicable to the matter before Court"***

It is well settled that, by virtue of the provisions of section 184 of the RTA, a lessee is precluded from bringing to court any action of ejectment or recovery of land against a lessor who is registered as proprietor of the land. In the case of the ***Executrix of the Estate of the late Christine Mary Namatovu Tebejjukira and another vs Noel Grace Shalita Stananzi*** Civil Appeal No. 2 of 1988 (S.C.) (unreported) ("***Tebejjukira's Case"),*** this Court held that a lessee seeking relief against forfeiture is also so precluded *"where the registered proprietor has re-entered"* lawfully. The rationale behind that is that a lawful re-entry terminates the lease. In the circumstances therefore,

the issue framed at the trial, whether there was *"a re-entry of the premises in law by the plaintiff* (appellant)" was critical, and it had to be answered unequivocally. Unfortunately, the courts below were far from clear in the manner they dealt with the issue.

With due respect to the learned trial judge, she was equivocal in her answer to the issue. Initially, after holding that the appellant was entitled to re-enter on strength of the breaches of covenants by the lessee, she noted the argument, supported by several authorities, that the plaintiff had exercised the right of re-entry by renting the premises to Hassan. After reciting those authorities she held:-

> ***"The above authorities state the proposition of the law correctly and I have nothing to add. The plaintiff in this case re-entered by letting the property to Hassan".***
> (emphasis is added).

Subsequently, while considering whether a case for the grant of relief from forfeiture had been made out, she made a couple of observations which are not reconcilable with that holding or consistent with each other. First, in reference to the renting of the premises by the appellant to Hassan, she observed that the *"only interest currently subsisting on the property"* was the tenancy between the appellant and Hassan. In passing, she said that the re-entry was *"not yet complete since the register is still intact"*, and opined that the appellant's interest in the land was *"equitable not legal"*, citing as authority, ***Lugogo Coffee Ltd. Vs Singo Combined Coffee Growers Ltd.*** (1976) HCB 92. She however, overlooked the holdings in that case, which in my view are correct statements of the law, to the effect that a lawful re-entry terminates the lease, and that refusal by the Registrar to note the re-entry in the register does not have the effect of keeping the lease subsisting. Instead, after reviewing Hassan's evidence as the only evidence on how his tenancy came about, she observed that the appellant *"did not physically gain possession of the property* ***[but]*** *merely took advantage of a situation created by the lessee's agents."* Here again, it seems to me that she overlooked the evidence of the appellant supported by that of his witness, Samuel Bayizi, to the effect that he had taken over the the house and started renovating it. Be that as it may, the learned trial judge's holding as I understand it was in summary, that by renting the premises to Hassan, the appellant had re-entered the property, but that the re-entry was

incomplete, because it was not noted in the register, and was not effected by the appellant taking physical possession of the property.

The Court of Appeal, however, endorsed the trial judge's observations understanding them to mean that there had been no lawful re-entry on the part of the appellant. In the leading judgment, Kitumba J.A., seeking to distinguish the decision in ***Tebejjukira's Case*** (supra) said this:-

> ***"In that case the lessee brought an action in trespass..... against a lessor who had lawfully re-entered the land. In the present case the lease had not vet been voided and the appellant has not physically re-entered the land. The learned trial Judge found that the appellant simply told Hassan that h e was the rightful owner of the premises and not the respondent The appellant made a tenancy agreement with Hassan. This, in the judge's view, did not amount to physical re-entry. She held that the appellant just took advantage of the situation created by the respondent's agents. In my view, the learned trial judge considered all the circumstances of the case and properly came to the right conclusion that section 184 of the Titles Act was not applicable. I am unable to fault her on this finding."*** (emphasis is added).

With due respect, I am unable to agree with the holding that the respondent's "lease ***had not yet been voided".*** It is correct that the breaches of the lessee's covenants rendered the lease voidable at the option of the lessor. In order to void it he had to terminate it by reentry or otherwise. To my mind he clearly did this when he effectively rented the property to Hassan. The respondent's lease and Hassan's tenancy, both granted by the same landlord, could not in law subsist together. If the tenancy was lawful then it terminated the lease. Neither court below suggested, and I do not see any ground on which it could be suggested, that the appellant acted in breach of the terms of the lease or otherwise unlawfully, when he let the suit property to Hassan. Even if I do not take into account the appellant's evidence that he had taken over the property and started renovations, which evidence was overlooked by the courts below, I still would agree with counsel for the appellant that when the appellant let the property to Hassan, he assumed constructive possession.

In my view, the question on which the case turns is whether there was lawful re-entry and termination of the lease, rather than whether section 184 of RTA, is applicable to the case. However upon answering the former question in the affirmative as I do, it follows that under s.184 the respondent is precluded from seeking, by counter-claim or otherwise, to **dispenses** the appellant. For that reason the third ground of appeal ought to succeed.

The other two grounds of appeal are concerned with the grant of relief from forfeiture. I have two brief comments to make. The first is on the Court of Appeal holding that the trial judge properly exercised her discretion in granting the relief. In the leading judgment, Kitumba J.A., correctly pointed out that the trial judge had relied on an English authority which dealt with a provision of an English statute that vested much wider discretion in the court for granting relief from forfeiture, than was the case under section 27 of the Judicature Statute, 1996, which was under her consideration. Indeed the difference between the two statutory provisions is glaring. The English provision, under section 14 of the Conveyancing Act,1881 covered the right of re-entry_for ***"a breach of any covenant or condition in the lease",*** and provided in sub-section (2) thus:

> ***"Where a lessor is proceeding, by action or otherwise, to enforce such a ri2ht of re-entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the court for relief;"***

In contrast section 27 of the Judicature Statute, provides:

> ***"Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture for non-payment of rent, the lessee*** (or successor in title) ***may in the lessor's action or in an action brought by himself or herself apply to the High Court for relief."***

Nevertheless, it is apparent that the said English authority ***(Hyman vs Rose,*** 1912 AC 632), persuaded the learned trial judge to the view that she had unfettered discretion to grant the relief, for after quoting from that authority, she said:

> ***"Essentially what the court said in this case, is that the power given to court to grant or refuse relief against forfeiture is a discretionary one and no conditions were imposed on how that discretion is to be exercised".***

Later, notwithstanding authorities to the effect that the relief under the said section 27, may be granted to a lessee whose only default is non-payment of rent, she said that the discretion given to court by Parliament *"under section 27 is wide and no conditions were imposed"* for its exercise. So, although she had held that the respondent had breached other covenants, she proceeded to grant the relief under that mistaken view. How then can it be said that she properly exercised her discretion when she exercised a discretion she did not have?

Lastly I should comment on the view expressed in the leading judgment of the Court of Appeal about the application of equity to the case. If I understood the judgment correctly on that point, I would sum it up as follows:

Under section 16(2) of the Judicature Statute, 1996, the High Court is enjoined to exercise its jurisdiction in conformity with the doctrines of equity *"where written law does not extend or apply"*. Under section 35 of the same Statute, the High Court is also enjoined to grant to a party such remedy as the party is entitled to in respect of any legal or equitable claim properly brought before it. No written law extends or applies to re-entry for sub-letting without the lessor's consent.

On that premise, the learned Justice of Appeal, held that ***"the learned trial judge's resort to equity in this matter was right".***

With due respect the foregoing reasoning is flawed from its premise. It is not correct that there is no written law applicable to the matter in question, within the meaning of section 16 of the Statute. The applicable law is section 27 of the Statute, which creates the remedy of *"relief from forfeiture"* and renders it available only lessees threatened with re-entry or forfeiture *"for non-payment of rent"*. In my view, to make it available to lessees in breach of other covenants also, would be tantamount to amending the

statute which cannot be what is envisaged under section 16(2) of the Statute. I do appreciate that on surface the respondent appears to have ended up with a raw deal. It must be remembered however, that it is incumbent on the court to enforce the terms of an agreement freely and lawfully entered into by the parties. I have always wondered why a developer would readily accept to include in a building contract a forfeiture clause when, to protect his investment, he could contract out of it or bargain to make it difficult for the clause to be invoked. Where however the clause has been agreed upon, as in this case, with the full knowledge of its effect, then the principles of the law of contract have to be upheld.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have read in draft the judgment of my brother, Oder JSC, and I agree with him that this appeal should be allowed for the reasons he has given. I also agree with the orders he has proposed.

Dated at Mengo, this 18th Day of September, 2002.