THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 81/2004

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

SHAMSHERALI ZAVER VIRJI:::::::::::: APPELLANT

VERSUS

1. **F.L. KADIBHAI**
2. **L.K. HAJIMJI**
3. **G.R. KAPACEE**
4. **SHABEER H. KAPACEE :::::::::::: RESPONDENTS**

(An Appeal from the Decision of the High Court at Kampala by the Hon. Principal Judge Mr. Justice Herbert Ntabgoba, PJ in HCCS No. 415 of 1995 dated 19th August 2003)

JUDGEMENT OF HON A.E.N. MPAGI-BAHIGEINE, JA

This appeal arises from the judgement and orders of the High Court dismissing the appellant's claim and allowing the counter-claim (Hon. J.H. Ntabgoba PJ, as he then was) in **HCCS No. 415 of 1995** at Kampala.

The appellant had sued the respondents seeking the following reliefs:

1. ***"(a) Specific performance of the sale agreement dated 27-05-1994***

   (b) ***Liquidated penalty (damages) of Uganda Shillings equivalent of US $ 20,000.***

   (c) ***Interest on (b) above at Court rate from the date of filing till payment in full.***

   (d) ***Special damages of Ug. Shs 50,000,000/= (Fifty Million Shillings) as set out in paragraphs 13 and 14 herein above.***

   (e) ***General damages.***

   (f) ***Costs of this suit.***

   (g) ***Interest on (d) and (e) at Court rate from the date of filing till payment in full.***

   (h) ***Any further or alternative remedy as this Honourable Court deems proper and just."***

The respondents averred that upon repossession of the suit property the appellant without lawful authority did continue occupying the same without paying rent in respect thereof.

They thus counterclaimed the following remedies:

a) *General damages*

b) *An eviction order*

c) ……..

d) ……..

e) *Interest on (a) and (b) at bank rate of 25% from date of filing this suit till payment in full.*

f) *A permanent Injunction restraining the appellant from interfering in any manner with the suit property.*

g) *An order directing the appellant to hand over all the documents obtained by him upon repossession of the suit property.*

h) *Costs.*

The High Court ordered and decreed that:

1. ***The plaintiff/appellants' suit be dismissed and that the defendants/respondents' counterclaim be allowed.***
2. ***The appellant vacates the suit property.***
3. ***The appellant pays mesne profits in respect of the suit property to the 1st, 2nd and 3rd respondents at the rate of 1.3 million shillings per month from the date of repossession till vacation of Plot 25 Roseberry/Nasser Road.***
4. ***The appellant pays interest on mesne profits at the prevailing commercial bank rate.***
5. ***A permanent injunction issued against the appellant restraining him from interfering with the suit property after vacating it.***
6. ***The appellant hands over to the owners of the suit property all documents obtained upon repossession thereof.***
7. ***The appellant to render an account of his management of the suit property upon handing over of the same to its owners.***
8. ***The appellant pays ½ of the costs of the suit and counterclaim and any other costs he may have been adjudged to pay.***
9. ***The 4th respondent pays the remainder half (1/2) of the costs of the suit.***

Mr. Geoffrey Kandeebe appeared for the appellant while Mr. G. Lule SC assisted by M/S David Mpanga and Christopher Lwanga represented the 1st and 2nd respondents.
Mr. Jimmy Muyanja was for the 3rd and 4th respondents.

The agreed facts were as follows.

On 2-6-1992, the appellant, N H Verji was by a power of attorney authorized by the 1st respondent, F.L Kaderbhai to repossess the suit property on his behalf and to manage the same according to the same instrument. (p. 144, record of appeal)

On 9-5-1994, the 1st respondent F.L Kaderbhai appointed the 4th respondent, Shabeer Kapacee, by powers of attorney to manage his interest in the suit property (p. 140 record of appeal).

On the same date of 9-5-94, the 2nd respondent, N.H Valiji, by powers of attorney appointed the 4th respondent Shabeer A. Kapacee to manage his interest in the suit property (p. 135 – 139 record of appeal).

On 26-05-94, the 3rd respondent, G R Kapacee, by a power of attorney appointed the 4th respondent Shabeer A. Kapacee, to deal with the suit property (p. 122 – 128 record of appeal).

On 27-5-94 the 4th respondent executed a Memorandum of Agreement for sale of the suit property to the appellant which stipulated inter alia as follows: (p. 129-132 record of appeal).

> ***"1. In consideration of a sum of Uganda Shillings equivalent of one hundred and ten thousand United States Dollars (US $ 110,000) the vendors hereby convey to the purchaser all their interest in the said land as contained in the above described leasehold register TO HOLD UNTO the purchaser absolutely for all his interest therein.***
>
> **2.** ***The purchaser covenants with the vendors to discharge the purchase price on the dates and in the manner following:***
>
> **i)** ***Uganda Shillings equivalent of fifty-five thousand United States Dollars (US $ 55,000) immediately on the execution of these presents, receipt of which the vendors' attorney hereby acknowledges, having got the same by way of cheque No. 10047 OF BARCLAYS BANK, LEICESTER PLUS CASH US $ 10,000=.***
>
> **ii)** ***The balance of Uganda Shillings equivalent of fifty-five thousand United States Dollars (US $ 55,000) is payable to the vendors' attorney or to an account or person duly designated by the vendors attorney in that behalf after the vendors have obtained all the documents pertaining to the land***

and signing the transfer documents. PROVIDED that the seller shall obtain all the necessary documents and execute the transfer papers within a period not exceeding ninety (90) days from the date of execution of the agreement hereof.

3. ***It is hereby agreed between the parties that in the event of the vendors failing to obtain all the required documents and signing a transfer in compliance with the terms of clause 2 (ii) above the first installment aforesaid and all the attendant costs incurred till then shall forthwith become refundable to the purchaser with interest at the prevailing bank rate of the Barclays Bank (U) Ltd or its successor in title, till full payment. PROVIDED that the renovation expenses recoverable by the purchaser under the provisions of this clause shall not exceed the amount which the parties hereto shall have agreed upon prior to the incurring of such expenditure and/or carrying on such renovations on the property by the purchaser.***

4. ***The purchaser undertakes to pay the attendant stamp duty and other charges and expenses for and incidental to the process of transferring the demised property unto himself.***

9. ***It is hereby mutually agreed that in case of breach of the aforesaid covenants or any one of them a sum of Uganda Shillings the equivalent of United States Dollars twenty thousand (US $ 20,000) shall forthwith be recoverable as liquidate damages from the party who is guilty of such breach by the innocent party without prejudice to any other or further remedies provided in this agreement and/or under the laws in force in Uganda.”***

At the time of the said memorandum the property was still registered in the names Hasanah Valji Kadibhai, Lukmanji Kadarbhai Hakimji and Gulamabbas Rajibhai Kapaccee.

However, both Hasanah Valji Kadibhai and Lukmanji Kadarbhai Hakimji had died earlier and their estates were being administered by the 1st and 2nd respondents respectively (p. 296 record of appeal).

The appellant sought to enforce the agreement of sale against the 4th respondent as stipulated therein or else have the deposit of US $ 55,000,000 refunded. He thus filed HCCS No. 415/95.

In their defence, the 1st and 2nd respondents contended that they were not bound by the agreement since the contract was illegal. They denied ever having authorized the appellant or the 4th respondent, Mr. Kapacee to sell off the property. It was argued that the 4th respondent had exceeded the authority granted to him under the power of attorney. It was argued for the 3rd and 4th respondents argued that all the powers of attorney were never duly executed. There was therefore no basis for the purported sale.

The four respondents further counterclaimed general damages, eviction of the appellant from the suit house and an account of monies collected in respect of the repossessed property and payment of the balance and interest thereon (p. 24 -–27 record of appeal).

The memorandum of appeal raised eight (8) grounds:

1. *The trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and thereby came to a wrong conclusion.*
2. *The trial Judge erred in fact and law when he held that the 4th defendant did not have authority to sell from all the common tenants of the property comprised in Leasehold Register Volume 621 Folio 3 Plot No. 25 Roseberry (now Nasser) Road, Kampala.*

3. *The learned trial Judge erred in law and fact when he interpreted the Memorandum of Agreement between the Appellant and the 4th Respondent to be an agreement of sale of land comprised on Leasehold Register Volume 621 Folio 3 Plot No. 25 Roseberry Road instead of an Agreement to sell.*

4. *The learned trial Judge erred in law and fact by holding that the substitution of the 1st and 2nd defendants in the plaint was illegal when he was already "functus officio" as far as the substitution was concerned.*

5. *The learned trial Judge erred in law and fact when he held that the documents relied upon by the Appellant were not embossed with stamp duty.*

6. *The learned trial Judge erred in law and fact when he among other reasons dismissed the plaintiff's suit for having been commenced in the names of deceased persons and yet went ahead to grant Judgment on the counter claim brought under the heading of the deceased persons.*

7. *The learned trial Judge erred in law and fact when he proceeded to dismiss the plaintiff's suit on the basis of facts and issues not pleaded and or raised during the hearing of the main suit.*

8. *The trial Judge erred in fact and in law when he failed to make an Order against the 4th Respondent to refund the money had and received.*

At the scheduling conference, the grounds were considered into the agreed issues:

1. ***Whether there was a valid suit.***
2. ***Whether the powers of attorney authorized sale.***
3. ***Whether or not the Memorandum of Agreement for sale executed by the 4th respondent valid?***
4. ***What are the available remedies?***

Learned counsel, Mr. Kandeebe, when submitting also relied on the conferencing notes and submissions before the lower Court. (pp 254-283 record). He pointed out that the learned Principal Judge (PJ) did not properly evaluate the evidence on record. Had he done so, he would have entered judgement for the appellant and the counterclaim would have been dismissed with costs.

Regarding issue No. I, whether or not there was a valid suit, Mr. Kandeebe pointed out that the Hon PJ found that the suit had been brought in the names of deceased persons, that the 1st and 2nd respondents were dead people. He maintained that the appellant never sued dead people. Apart from merely having their names misstated, their initials and full names were only confused with those of their deceased fathers. That notwithstanding the correct defendants were properly described what they did and their addresses were correctly given. The appellant himself and the two respondents knew that their fathers were dead. It was common knowledge. The appellant therefore could not have reached a decision with the respondents' dead fathers regarding the suit property. In this regard the plaint refers to the negotiations the appellant had with the present respondents.

Learned counsel submitted that the Hon PJ should have looked at the written statements of defence for the 1st, 2nd and 3rd respondents (paras 3 and 4) where they admitted being the actual defendants. They also admitted their actual addresses and went on to counterclaim which would not have been possible if they had been wrongly sued.

Mr. Kandeebe asserted that the record (at pp 025) indicates that on 31st August 2000, Mr. Rukutana for the plaintiff/appellant applied in open Court and with the consent of all counsel he amended the respondents' names. Citing **A.N Phakery V World Wide Agencies (1948) 15 EACA I**, he argued that change of names was not a substitution of parties. Subsequent to that amendment the then counsel for the respondents, Mr. Lwere, had also applied to amend the written statement of defence (pp 019 of record) by inserting in correct names of the respondents.

He submitted that if the plaint could not survive for invalidity nor could the counter claim which the learned PJ allowed. He prayed Court to find the plaint valid.

Mr. Lule SC however, was of the view that the amendment made by Mr Rukutana was a substitution of the dead with the living and not a mere correction of names. It was not a minor correction of error. One cannot substitute the dead with the living. A new suit had to be filed and letters of administration ought to have been exhibited. He argued that pleadings can only be amended in that manner when a party dies in the course of proceedings and not otherwise. Learned SC submitted that to institute a suit in the names of a dead person rendered the suit a nullity.

He asserted that substitution of names (pp 45 record) was an acknowledgement that the suit was in names of dead persons. Citing ***Babubhai Dhanji Pathak V Zainab Mrekwe (1964) EA 24,*** Mr. Lule stated that the suit was a nullity which by the estoppel rule could not be validated despite any agreement/consent by the parties.

The learned P. Judge found:

> ***"It is worth noting, at this juncture, that the persons who granted the 4th defendant the powers of attorney are different from the persons in whose names the 4th defendant sold the property. The purported vendors may be children of the donors of the power of attorney but unless themselves administered the estates of the donors and by that virtue themselves granted powers of attorney to the 4th defendant, he can not sell the property on their behalf basing on the powers of attorney of the donors who it is said that they had, in any case died."***

The record indicates that on 31-8-2000 before the actual hearing had commenced, Mr Rukutana for the appellant told Court:

"I have a minor amendment to make, this is in respect of the proper names of the parties among from the written statement of defence.

1. ***Instead of H.V. Kadhibhai we substitute Nurudin Hassanah Valji who is the legal representative of H.V. Kadibhai who is dead. The rest of counsel agree to be the 1st defendant.***

2. ***Replace L.K. Hakimji with Fakrudin Lukmaanji Kadanbhai. The rest of counsel also agreed to be the second defendant. The 3rd and 4th as well as the 5th remain as before."***

On 15-02-2001, learned counsel for the 1st and 2nd respondents' amended their written statement of defence to reflect the amendment proposed by Mr. Rukutana but leaving the contents or items of their counterclaim intact.

In my view it would have been otherwise if the wrong parties had been sued. In **A.N. Phakey Vs World wide Agencies Ltd, (1948) 15 EACA I**, cited by Mr. Kandeebe, the plaintiffs, under ***order VI Rule 19 Civil Procedure Rules,*** amended their plaint by changing the name of the plaintiffs from ***"Traders Ltd"*** to **World wide Agencies,** trading as **Traders**. The defendant moved to disallow the amendment but the learned Judge rejected the motion.

On appeal by the defendant, it was held that the name of the plaintiffs was an integral part of the plaint and the change of name was not a substitution of parties. The justice of the case required such amendment. Furthermore, the original plaint was in the same terms as the amended plaint except that in the original plaint the name of the plaintiff was given as Traders Ltd.

It was pointed out that this was a mistake which did not mislead at all as the written statement of defence filed dealt specifically with all matters raised in the plaint and counterclaimed on the same basis.

Order VI rule 19 Civil Procedure Rules provides:

"The Court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

In view of the foregoing I consider the case of ***Babubhai D P v Vainab Mrekwe (supra)*** cited by Mr. Lule SC to be clearly distinguishable on the ground that the suit was filed in the name of the sole plaintiff 45 days after his death. There was no will. The process of legal representation for the administration of his estate had not yet been contemplated.

However, in the case before us, probate had already been taken out and resealed in Uganda. In their written statement of defence the respondents acknowledged the description assigned to them by the appellant in his plaint and even went on to clarify and confirm that they were legal representatives of their deceased fathers. Grants of probate had already been granted to them by the District Probate Registry of the High Court of Justice of England and probate had been duly resealed by the High Court of Uganda at Kampala.It is pertinent to point out here that the ***Succession Act (Cap 162), Section 189 provides:*** **"189**. Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor, as such."

I would thus find it difficult to agree with Mr. Lule's assertions. The circumstances of this case warranted such corrections. The respondents were clearly not misled. I would believe that the mix up in names was a genuine mistake as names from some ethnic groups are sometimes not very simple to other groups and vice versa. That notwithstanding filing a new suit as suggested by Mr. Lule would be a worthless task. The contentions in the pleadings on either side remained the same. Clearly there was a valid suit –

Issue No I would be in the affirmative.

I now move on to the 2nd issue which is whether or not the powers of attorney authorized the 4th respondent to sell the suit property to the appellant.

There are two aspects to this issue, namely whether the documents could be challenged for lack of stamp duty payable on them and secondly whether such documents authorized the 4th respondent to sell the property.

Regarding the aspect of stamp duty, Mr. Kandeebe pointed out that the powers of attorney were admitted in evidence by consent and marked as Ex P I, P II and P III. However, later, the new advocates, Mr. Muyanja for the 3rd and 4th respondents together with Mr. Lule SC and Mr. David F Mpanga for the 1st and 2nd respondents circumvented the already framed issues and decided to invite the Court to reject the powers of attorney on the ground that no stamp duty had been paid on them. This had not been an issue before Court.

Mr. Kandeebe asserted that under the **Stamps Act (Cap 202) SS 38-40** which is now **(Cap 342) S 42** and **43** once a document is tendered in evidence it cannot be challenged on account of lack of stamp duty except by way of appeal. He stated, nonetheless, that these documents were duly registered with the Registrar of documents who stamped them with the revenue certificates under **Section 2**, of the **Stamps Act (Cap 342).** Citing ***Butagira V Deborah Namukasa SCCA 6/1989,*** Mr. Kandeebe pointed out that the respondents could not plead their own default to hand over the documents in time to defeat the opponent's case. These Powers of Attorney had been in possession of the respondents all along as they would not release them to the appellant as stipulated under the Memorandum Agreement. It smacks of bad faith, let alone being strange that they would plead this omission on their part to defeat the appellant's case. The respondents were trying to escape their responsibility.

Learned counsel mainly relied on ***Yekoyada Kaggwa V Mary Kiwanuka & anor (1979) HCB 23,*** where Odoki Ag Judge (as he then was) (pp 275 record) ruled that the determination of whether or not a document is inadmissible in evidence for want of stamping must be made when the document is sought to be put in evidence or at some

stage before final judgement so as to enable the party producing it to pay the required duty and penalty thereon.

Mr. Lule SC, however, contended that under **Section 3** of the **Uganda Revenue Authority Statute, 1991** which came into effect on 5th September 1991 *(S I 25/1991),* it was only the URA which could give discharge that the duty has been duly paid and no other body. This case having been filed in 1995, the current legal position had to be complied with, he submitted. The appellant could not recover anything under unstamped documents. Furthermore, he argued that there was no application in Court to have them stamped. The stamps appearing on the face of the documents which are of the Revenue Authority, Ministry of Lands, Housing and Physical Planning were not envisaged under the law. The submissions of Mr. J. Muyanja for the 3rd and 4th respondent were substantially to the same effect as those of Mr. Lule.

The Hon PJ (pp 355 – 356) after reviewing the case of Yekoyada Kaggwa (supra) held:

> ***"A party cannot rely on an unstamped document as his evidence, tender it in as an exhibit and then after submissions decide, without leave of the Court, to seek to pay stamp duty on it. In this case counsel for the plaintiff never bothered to request to emboss the documents with the requisite stamp duty. They cannot, on receipt of submissions challenging the legality of the unstamped documents decide to say that they can, after all, pull out the exhibits and emboss them with the requisite stamp duty. I hold that also these documents are so incurably defective and cannot be admitted in evidence in this case. Therefore, even if I had not disqualified the sale of the suit property on the other aforementioned grounds, the ground on non-stamped documents would have vitiated the power to sale purported to be exercised by the 4th defendant on the basis of the powers of attorney and the Memorandum of Agreement ……"***

These documents seem to have been admitted in evidence by consent. No body raised any objection, not even the Court. The record indicates Mr. Rukutana having stated at page 048:

"We have had fruitful discussions and narrowed down issues. They are actually three that there is no need to call oral evidence, and that we can dispose of them by written submissions. The issues are:-

1. *Whether or not the powers of attorney given to the 4th defendant by the 1st and 2nd defendants authorized and empowered him to sell the suit property.*

   In the same spirit we have agreed that all the Powers of Attorney should be labeled Exhibits P1, PII and PIII. There are issues on which we agreed we should call evidence namely,

   ……

   ……

   NB. All documents each party wishes to use in the submissions are acceptable. The documents being referred to are:

   a) ***The memorandum of sale agreement.***

   b) ***The Powers of Attorney.***

   ……

   e) ***Power of Attorney granted by Fakurudin Lukumanji to the plaintiff dated 2-6-92.***

Crt " Hearing is adjourned to 16-10-2000 by consent.

Sgd J. H Ntabgoba

Principal Judge

31-8-2000

With the above in mind, the **Stamps Act, Section 43** stipulates:

"43 Where admission of instrument not to be questioned.

Where an instrument has been admitted in evidence, the admission shall not, except as provided in section 68, be called in question at any

stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

The gist of **Section 68** aforementioned is to the effect that a document admitted under **Section 43** without any objection from the opposite party can only be challenged on appeal. See ***Yekoyada Kaggwa V Mary Kiwanuka & anr (Supra).***

I consider the mischief of **section 43** is not to shut out material evidence but to afford the party an opportunity of paying the duty and a penalty where appropriate. This is to enable the ends of justice to be met.

Section 42 relied on by Mr. Lule SC envisages an unstamped document where parties agree/consent to put it in evidence with no intention of paying stamp duty on it. The import of this section differs from that of 43.

It is noteworthy that these documents were in the possession of the respondents all along. The appellant was therefore not in a position to pay stamp duty on the powers of attorney before tendering the documents in evidence, the crux of this suit being the respondents' failure to hand over all the necessary documents pertaining to the transaction, within the stipulated time frame of 90 days of the date of the Sale Agreement.
Furthermore, I conceive the fact that the duty paid was received by the Revenue Section of the Ministry of Lands, Housing and Physical Planning must have been a matter of expedience and should not be an issue since the collection eventually ended up in the intended government coffers.

I would therefore hold that the appellant, under the circumstances cannot be faulted. The stamp duty was duly paid on the Powers of Attorney and which were duly registered with the Registrar of documents as required by the Registration of **Titles Act (Cap 230) section 146 (2).**

I now move on to the question as to whether or not the Powers of Attorney authorized the 4th respondent to sell the suit property. Mr. Kandeebe pointed out that the Hon PJ found Ex PI and PIII authorized the sale. It appears that as for Ex PII, Hon PJ looked at the 4th Power of Attorney which was for repossession of the property only and mistook it for Ex PII. Learned counsel submitted that Ex PII and PIII are in pari materia. If Hon PJ found PII authorized the sale, he ought to have found likewise in respect of Ex PIII. He asserted that the two powers, Ex PII & III refer to English law and should accordingly be construed in accordance with English law. If Hon PJ had found there was no power to sell, then he should have found that the 4th respondent unreliable but he did not.

Mr. Lule SC having analyzed all the powers minutely found that Ex PII and PIII which are pari materia did not confer any power of sale. He pointed out that the three registered proprietors were tenants in common in which case their interests did not affect each other. In his view the learned PJ was correct in his assessment and evaluation of the evidence.

Mr. Jimmy Muyanja for the 3rd and 4th respondents was of a similar view as Mr Lule SC, needless to summarize his submissions. It is however remarkable that neither of these two attended Court nor testified.

The learned PJ held:

"The Power of Attorney (Exhibit PI) in my view authorises the 4th defendant to sell the donor's property. Clause of the Power of Attorney is as follows:-

> *'To take possession of all freehold property of or to which I may now or may hereafter become possessed or entitled and to manage and superintend the management of the same to cultivate and form the same for building purposes or otherwise to mortgage charge sell lease let and otherwise dispose of.'*

Ex P2, however, appears not to authorise the sale of the donor's property. As a matter of fact, the donor, Fakrudin Lukumanji Kaderbhai does show that he never

intended that his property be sold. This can be read in the Power of attorney he gave to the plaintiff Clause 2 thereof states:-

> ***"My Attorney will not be empowered to sign any documents in connection with the sale, mortgage or transfer of my properties."***

Exhibit P3, on the other hand, seems to authorise the sale of the donor's properties. Clause 10 thereof states:-

"To sign any name and set my seal to and as my act and deed to deliver any assignment conveyance transfer or other deed for the sale and transfer into my name of my land……..."

It is not really clear though, but the following extract from the clause tends to convince that the Power of Attorney Ex P3 intended to authorise the sale of the donor's property:-

> *"To sign my name and set my seal to and as my act and deed to deliver any assignment conveyance transfer or other deed for sale and transfer into my name of any land and generally to do all things necessary to complete any purchase."*

…….The question is, could the 4th defendant acting as the agent of his three principals, sell their property registered in their names as tenants –in-common?

My considered view is that unless all the three principals authorized him (4th defendant) to sell, he had power to sell the property (the suit property) my reason is that it is a joint tenancy that one or more of the tenants can contract or give authority to sell the property an behalf of other joint tenant or tenants. In a tenancy-in-common, all the tenants must each give the authority. In the instant case, only two principals authorized the 4th defendant to sell the common tenancy.

The third donor did not give his authority. Therefore the 4th defendant had no power to sell the suit property on behalf of all the common tenants. The sale, in Exhibit PIV was null and void?"

As pointed out by learned counsel some confusion appears as to the marking of the powers of attorney and therefore reference thereto. I thus propose for sake of clarity to refer in addition to names of donors/donees and pages of the record where they appear.

Regarding Ex PIII dated 9th May 1994 by which Nuruddin Hasanali Valiji did appoint Shabeer Hussein Kapacee (page 135 record), the donor invoked and conferred on the donee the powers of a tenant for life or a trustee under the **Settled Land Act 1925 (as amended).**

Ex PII (page 140 record) is a Power of attorney also made on 9th May 1994 by Fakrudin Lukmanji Kaderbhai in favour of Hussein Kapacee. The donee was similarly vested with the powers of a tenant for life under the **Settled Land Act 1925**. Ex PII and PIII are in pari materia.

The operative clauses in these two documents (PIII & II) are paras 10 which similarly read:

"In regard to land generally and without prejudice to the generality of the foregoing powers to exercise all powers which are by the Settled Land Act 1925 (as amended) conferred on a tenant for life and on the trustees of the settlement."

The foregoing powers referred to were for general management of the estate. In addition to which he granted the powers of a tenant for life. It is trite that wide powers of sale are conferred by this Act **– See SS 38** and **72** of the **Settled Land Act 1925**. These powers may be extended but not curtailed, ousted or hampered in any way. The powers are so wide that they have even removed the necessity of inserting express powers of sale and exchange. **'A tenant for life is king of the castle' See Law of Trusts, 2nd Edition – DJ. Hayton – Sweet & Maxwell –** ***Halsbury's 3rd Edition. Pp 219 para 389.***

A tenant for life may at any time either with or without consideration grant by writing an option to purchase or take a lease of the land or any part thereof. These same powers are given to the trustees. Where they do not apply, it is always expressly stated so.

It is only the Power of Attorney (pp 144) Ex PI given to Samsherali Mohamedah Zavervirji Tejan by Fakrudin Lukmanji Kaderbhai that specifically and unequivocally forbids ***"any sale, mortgage or transfer of any properties."***

It is only for repossession of the properties (para 2) registered in the name of Lukmanji Mulla Qaderbhai or under the name of Fakrudin Lukmanji Kaderbhai.

In view of the above I would respectfully think that the learned PJ erred when he failed to consider the Statutory Powers of the tenant for life and trustees, which vested the donees with vast powers of sale. The 4th respondent was therefore vested with the powers of sale.

Concerning issue No. 3 as to whether or not the Memorandum of Agreement for sale executed by the 4th respondent was valid.

Mr Kandeebe submitted that the defendants admitted the contract Ex P4 that it was between them and their agent. They further admitted that they could not fulfil their agreement (para 8 (c)) because they subsequently found out that the appellant intended to earn a secret profit.

Learned counsel pointed out that the 2nd and 4th respondents did not testify though they are trying to run away from their responsibility. The contract was admitted and they cannot run away from it. They are estopped from altering their position to the detriment of the appellant.

Mr. Lule SC contended that the contract was meant to survive for only 90 days. Certain documents had to be produced within 90 days otherwise it expired. The documents ceased

to have any effect after 90 days. There could be no specific performance where contract had ceased to exist.

In respect thereto the Minister's consent for the transaction was given 2 years later after the Memorandum of Sale. The property should not have been sold until after five years from date of such transfer. – He cited **section 7 (now 8)** of the **Expropriated Properties Act** and ***Mohibai Manji V Khursid Beguin (1957) EA 101*** in support thereof. The Minister's consent had to be given prior to the transaction of sale, and not after he argued. He asserted that it was a matter of public policy which could not be circumvented.

Mr Kandeebe replied that the transaction was executory. It was an agreement to sell, in which case lack of ministerial consent would not render the contract void abinition but voidable at the instance of the Minister.

Regarding the Memorandum of Agreement (Ex PIV) the learned PJ held:

> **"Whereas according to the Memorandum of Sale, (Exhibit PIV) the sale of the suit property was on the date of execution of the Memorandum which was 27-5-1994, the Minister's letter authorising the sale is contained in Exhibit P9 dated 26 - 4 - 96, two years after the sale of the suit property. The sale must be after the Minister's permission has been given. The Minister's letter could not be retrospective in effect. A sale without the Minister's authority is illegal rendered so by section 7 of the Expropriated Properties Act, 1982, nobody can authorise illegality and so, even if the Minister's letter had provided that he authorised the sale retrospectively, his authority would be ineffective. A nullity cannot be amended to validate it. The contravention of Section 7 of the Expropriated Properties Act, 1982, rendered the Memorandum of Agreement of 27 – 5 - 1994 a nullity and therefore the sale void."**

Under paragraph 2 of the Memorandum of Agreement the vendor covenanted to obtain all the necessary documents including the executed transfer within a period of 90 days of the date of execution of the Agreement. It is only then that the sale could be concluded.

Needless to say it was the vendor's responsibility to obtain the Minister's consent to transfer. In this regard Section 7 of the Expropriated Properties Act 1982 states:

> **"Any property or business, transferred to a joint venture company or to a former owner, under the provisions of this Act, shall not be sold or otherwise disposed of without the consent of the Minister until after 5 years from the date of transfer."**

Commenting on a similar **Provision in Section 22 (5) of the Public Lands Act, 1969 (Act No 13/69) in Francis Butagira V Deborah Namukasa SCCA No 6 of 1989**, Odoki JSC (as he then was) had this to say:

"……. The section does not provide for the effect or consequences of failure to obtain consent. It does not provide whether the transaction shall be null and void and therefore illegal, or that it will constitute an offence. Nor does it say that the transaction shall be voidable. But it says that the covenant shall be enforceable by the controlling authority."

Approving of the decision in **Samuel Kizito Mubiru and Anr V Byensiba (1995) HCB 106,** ***his Lordship ruled that the controlling authority has the option to enforce the requirement or covenant by either nullifying the lease or consenting to the transaction…."***

With the above in mind, the Minister gave his consent on 26-4-96, (Ex P6) two years later after the date of the agreement for sale. This power is an exclusively ministerial power and the Minister unequivocally gave it. This is a discretion which cannot be questioned.

I would therefore conclude that the Memorandum of Agreement dated 27-5-1995 was not a nullity and thus the sale was not void. It could be enforced.

Consequently I would allow this appeal with costs. The appellant is entitled to the remedies sought.

The respondents, however, counter-claimed general damages (mesne profits) and an eviction order on the ground that upon repossession the appellant without lawful authority continued occupying the property without paying rent in respect thereof. (pp 026 record).

In view of my findings above, the appellant was lawfully in possession of the property pursuant to the Agreement of sale. This claim therefore becomes superfluous. It would only arise if my findings were to the contrary and thus would be to redress profits lost to the owners by reason of their having been wrongfully dispossessed of their property. The counter-claim therefore stands dismissed with costs. The appellant would be entitled to the following remedies:-

(a) Specific performance of the sale agreement dated 27 - 5 - 1994.

(b) Liquidated penalty (damages) of Uganda Shillings equivalent of US $ 20,000-.

(c) Interest on (b) above at Court rate from the date of filing till payment in full.

(d) Costs of this suit here and below.

Since my Lords, C.N.B.Kitumba and C.K. Byamugisha JJA, both agree, the appeal succeeds with orders herein indicated.

The counter-claim also stands dismissed with costs.

Dated at Kampala this 12th day of November 2007.

……..

HON. A.E.N.MPAGI-BAHIGEINE

JUSTICE OF APPEAL