IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

Coram: Oder, Tsekooko, Karokora, Mulenga, and Kato JJSC

CIVIL APPEAL NO. 14 OF 2002

BETWEEN

MOHAN MUSISI KIWANUKA :: APPELLANT

AND

ASHA CHAND :: RESPONDENT

(Appeal from the judgment of the Court of Appeal of Uganda (Mukasa-Kikonyogo DCJ, Engwau, Twinomujuni JJA) at Kampala, dated 8th May 2002 in Civil Appeal No. 53 of 2001).

JUDGMENT OF MULENGA JSC

This appeal originates from a counter-claim in High Court Civil Suit No. 1/94. The main suit was instituted by Mohan Musisi Kiwanuka, *"the appellant"* claiming that he was lawful owner of Plot No. 2 Impala Avenue, Kampala, *"the suit property"*, and praying for, *inter alia* an order restraining Asha Chand, *"the respondent"*, from interfering with his rights over the suit property. The respondent defended the suit claiming *inter alia* that she was entitled to the suit property. She counter-claimed for vacant possession and *mesne profits.* The suit was dismissed for want of prosecution. Upon trial of the counter-claim, judgment was entered for the respondent for vacant possession, shs 183 million as *mesne profits* for the period up to 16 Sept.'02 and further *mesne profits*, at the rate of shs. 1.75 million per month, until vacant possession. She was awarded interest and costs. The Court of Appeal upheld that decision; hence this appeal.

The suit property is expropriated property under provisions of the Expropriated Properties Act, 1982, *"the Act"*. The dispute over the property centres on two competing certificates the Minister of Finance, *"the Minister"*, issued to the parties to the dispute.

First, on 24 June '91, the Minister issued Certificate of Purchase No 0039, *"the purchase certificate"*, to the appellant as purchaser of the suit property. Then on 16th Sept '93, the Minister issued Certificate Authorising Repossession No. 1643, *"the repossession certificate"*, to Karam Chand, as former owner of the same property. The respondent is widow and executrix of the will of Karam Chand. She was sued and she counter-claimed in that capacity. In the background to this appeal, are several suits and applications to which I have to refer because of their substantial impact on the out come of the counter-claim. For clarity I will first summarise the facts related to the issuance of the two certificates, and then refer to the said suits and applications.

The Certificates

On 16 May '83, the appellant, under provisions of the Act, lodged a claim of interest in the suit property, on the ground that in 1979 he had purchased and paid value for, and thereafter had incurred expenses in improvements on, the suit property. In response to that claim, the Minister wrote to the appellant on 12 March '91, informing him that Government had decided that he ***"may purchase the property under a new purchase contract with the Government",*** at shs. 50,000/=. The appellant accepted the offer and was issued with the purchase certificate. It was entered on the Certificate of Title on 26 July '91 as Instrument No 248784. Subsequently, the respondent applied for repossession of the suit property. On 2 Oct '92, the Departed Asians Property Custodian Board, *"the Custodian Board"*, a corporate body that manages expropriated properties under the Minister, wrote to the respondent to say that the property had been sold, and that ***"compensation will be paid in accordance with Government Policy".*** Later, however, the Minister issued the repossession certificate to her. But it appears that when the respondent submitted the repossession certificate for entry on the register it was not readily entered. Hence, on 21 Oct '93, the Minister wrote to the Commissioner for Land Registration (in response to the latter's letter not on record), explaining that the suit property had been repossessed by the former owner, and that "***Certificate No 0039.... was therefore nullified".***

The Commissioner conveyed the Minister's new stand to the appellant in a letter of 3 Nov '93, and intimated that he would cancel the appellant from the register and reinstate

the former owner unless within 21 days, the appellant showed good cause why he should not do so. I will shortly revert to the appellant's reaction and the Commissioner's response. It suffices at this stage to say that for nearly six years thereafter, the Commissioner did not alter the *status quo.* He eventually did however, on 30 April '99, when he cancelled the purchase certificate from the certificate of title and entered thereon the repossession certificate as Instrument No 301201.

Some Pertinent Suits and Applications

The main suit in the background, is High Court Civil Suit No. 693/92, which the respondent instituted against the Attorney General, *"appealing* against the rejection of her application for repossession. The Attorney General pleaded in response, that the suit property had been disposed of by the Minister under the Act, and that the Government was willing to compensate the respondent. The appellant applied to be joined to that suit as co-defendant in order to protect his interest. When subsequendy the Minister issued the repossession certificate, the respondent abandoned the suit as against the Attorney General, but proceeded against the appellant as sole defendant. She succeeded in the High Court. On appeal, by the appellant, the Court of Appeal in Civil Appeal No. 27/98, held that the trial in the High Court was a mistrial. The main ground for so holding was that after the Attorney General was dropped out of the suit, the proceedings became misconceived because the respondent had no cause of action against the appellant. For that reason no retrial was ordered. With due respect, I do not agree with that view as will become clear later in this judgment. Be that as it may, that decision of the Court of Appeal, while not giving rise to *res judicata,* it virtually had that effect in the decision of the counter-claim, both in the trial and in the first appeal. I will revert to that shortly.

Miscellaneous Application No. 183/93, is another notable case in the background. It was instituted by the appellant upon being advised by the Commissioner for Land Registration that he intended to deregister him. In it, he applied under provisions of the Registration of Titles Act, "*the RTA",* that the Registrar of Titles be summoned before the court to ***"substantiate the grounds upon which he intends to cancel"*** his registration. On 1 Dec '93, the Commissioner wrote to the appellant's advocates, (in response to their letter not on record, apparently explaining why the appellant should not

be deregistered), intimating that he was satisfied with their explanation, and advising thus:

"In the circumstances then you may have to save yourself the bother and expenses of prosecuting High Court Miscellaneous Application No. 183/93".

This appears to explain why for so long the repossession certificate was not entered on the register of titles. Meanwhile, the appellant appears to have heeded the Commissioner's advice not to pursue the application.

Instead, in early Jan.'94, the appellant instituted High Court Civil Suit No. 1/94 against the respondent. In the plaint, he claimed that he acquired ownership of the suit property in 1979, as *"bona fide purchaser for value without notice"* and in the alternative, that he acquired it by virtue of the purchase certificate under the Act. He prayed for, *inter alia*, a declaration that he is the lawful owner of the suite property, and for an order restraining the respondent from holding herself out as the owner, or from interfering with his possessory and proprietary rights over the same. The respondent filed a defence and counter-claim, contending in the defence:

- that by virtue of the repossession certificate she was entitled to possession, control and use of the suit property;
- that her certificate could be challenged only through an appeal under section 14 of the Act; and
- that the appellant's purchase certificate was bad in law

In the counter-claim she repeated the rights she claimed and pleaded that she suffered loss and damage because the appellant refused to vacate the suit property. She prayed for vacant possession, *mesne profits*, interest and costs. It is from that counter-claim that this appeal originates.

The appellant made several applications before the counter-claim was finally tried. The first was in March '94, asking that the Attorney General be joined to the main suit on the ground, *inter alia*, that it was necessary in order to enable the court to ***"effectually and completely adjudicate upon and settle all questions involved"*** in the suit. Ultimately that application was side tracked, and was never decided. When it came up before the learned Principal Judge, his attention was drawn to the existence of Civil Suit No. 693/92, and the fact that the same issues would arise in both suits. In the ensuing

arguments, the possibility of consolidating the two suits was glossed over, but was not pursued. Instead, the learned Principal Judge entered the following consent order on 20 June '94, ***"Civil Suit No. 693/92 shall proceed first and Civil Suit No. 1 of 1994 shall proceed thereafter."*** Two and half years later, on 11 Dec. '96, in absence of the parties, the Principal Judge addressed the following order to the Deputy Registrar (Civil): ***"Counsel for both parties undertook to proceed with an earlier suit to comply with S. 6 of the CPA. It is now more than two years since 24.6.94, and not anyone has tried to set this one down for hearing. I dismiss it for want of prosecution."*** However, the earlier suit, Civil suit No 693/92, was still proceeding in the High Court. It was completed a year later, on 19 Dec. '97. Even then, as I indicated earlier, it went on appeal, as Civil Appeal No. 27/98. It seems to me therefore, that the dismissal of Civil Suit No. 1/94 was premature. I am surprised that the appellant never moved the court to reinstate it.

The other applications were made after the appellant was deregistered on 30 April '99 and after the Court of Appeal had concluded Civil Appeal No. 27/98. On 3 Dec. '99 the appellant applied that the hearing of the counter-claim be stayed pending disposal of Civil Appeal No.223/99. He had apparently filed the latter against the Attorney General, challenging the Minister's decision. It was alleged that he filed it pursuant to a court order by Byamugisha J., extending time. Without purporting to review the order extending time, the learned Principal Judge rejected the application on the ground that " ***Civil Suit***

No.223/99 was illegally filed", since it was filed outside the time prescribed under section 14 of the Act, and Byamugisha J., had no jurisdiction to extend that time. In reaching that decision, the learned Principal Judge was clearly swayed by what he called ***"a pronouncement*** made by the Court of Appeal in Civil Appeal No.27/98. He said; -

"At page 11 of the Court of Appeal judgment a pronouncement was made in the last paragraph which in my view ruled out Mohan Musisi Kiwanuka's any chance of ever bringing a suit against the Attorney General over the suit property. The court stated:-

'Before the application was heard the Minister granted to the respondent a certificate of repossession. That gave to the appellant a distinct cause of action under S.14 of the E.P.A. He should have filed an appeal against it before the expiry of 30 days. This

was the only course open to the appellant in the circumstances. On the other hand if the respondent wanted to have the appellant's name (removed) from the register of the suit property and to recover mesne profits from the appellant this could not be done through an appeal filed pursuant to S.14 of the E.P.A., she would have to file a different civil suit in the High Court in order to enforce these rights. In my judgment the continuance of this suit after the Minister of Finance had issued a certificate of repossession (on 16/9/93) amounted to a mistrial.'

What I can gather from the judgment .....are the following:-

(a) ***That Asha Chand is ... the owner of the suit property;***

(b) ***That to obtain eviction of Mohan Musisi Kiwanuka, she should institute a civil suit for eviction; and***

(c) ***That Mohan Musisi Kiwanuka who should have brought an appeal against the Minister's decision to grant to Asha Chand the certificate of repossession.....lost the only chance he had*** *to wit* ***bringing that appeal against the Attorney General within 30 days from 16/9/1993."***

I have reproduced this long extract because, in my opinion, it provides an insight into the reasoning about, and treatment of, the counter-claim in the lower courts. Both at the trial and on first appeal, the so called pronouncement was treated as if it was a binding court decision.

The last two applications were heard by Arach-Amoko J., before she commenced the trial. In one of the applications, the appellant sought leave to amend his defence to the counter-claim by pleading expressly that he was in possession of the suit property by virtue of the purchase certificate issued to him under the Act. In the other he sought an adjournment with a view to apply, *inter alia* to join the Registrar of Titles as a party for having removed his name from the register. Both applications were rejected because, in each, the learned Judge considered that the appellant was seeking to revive the question of ownership raised in his dismissed suit. Additionally, in the former, she held that the amendment would have drastically changed the character of the counter-claim.

I am constrained to observe here, that this background demonstrates how undue regard to technicalities can obscure real issues, to the prejudice of substantive justice. It is a

cardinal principle in our judicial procedure, that courts must, as much as possible, avoid multiplicity of suits. Thus it is that rules of procedure provide for, and permit where appropriate, joinder of causes of action and consolidation of suits. Related to that, is the courts' duty to expedite dispensation of justice. I have no doubt that the dispute in the instant case would have been resolved expeditiously, but for the erroneous insistence that the competing claims could not be tried together. With due respect, there was no sound reason why the appellant's application in 1994, to join the Attorney General to Civil Suit No.1/94 was not allowed, or why that suit was not consolidated with Civil Suit No.693/92. Furthermore, I respectfully disagree with the opinion expressed in the so-called *"pronouncement"*, that the latter suit could not proceed as between the appellant and the respondent, after the Attorney General was dropped out of it. The suit involved not only the rejection of the respondent's application for repossession, but also the issuance of the purchase certificate to the appellant. The appellant was the registered owner in possession of the suit property. On his application, he was quite properly in my view, joined as a party, because the suit affected his vested interest. Clearly, there were triable issues as between the two parties, which issues were properly before the court.

Appellant's claim of ownership on appeal

In the written submissions, Messrs Nangwala, Rezida & Co Advocates for the respondent, contend and argue at length, that the appellant's claim of ownership of the suit property should be excluded from consideration in this appeal. There are two aspects of the contention, namely -

- that the arguments in support of the claim in the appeal, are an attempt to revive the appellant's claims in his dismissed suit; and
- that since those arguments constitute a challenge to the Minister's decision, the court cannot consider them, because the counter-claim is not *"an appeal"* under section 14 of the Act.

To the extent the contention relates to pleading and the court's competence, I find it appropriate to treat it like a preliminary point of law, though not so raised. I will dispose of it first. On the first aspect, counsel argue that the appellant's plea of ownership of the suit property did not survive the dismissal of his suit, and so it was not an issue in the trial of the counter-claim suit. In asking for adjudication on it now, the appellant seeks to ***"revive the dismissed suit through the backdoor".*** The argument on the second aspect

is that, because the claim conflicts with the issuance of the repossession certificate, it is a challenge of the Minister's decision, and can only be brought in an appeal under section 14 of the Act, in which the Attorney General is a party, and the issue to determine is whether the decision was correct or wrong. The counter-claim was no such appeal. The Attorney General was not a party in it, and the issues in it did not concern the Minister's decision but the respondent's rights over the suit property. Needless to say, these arguments are in line with the decisions of the courts below.

In her judgment, the learned trial judge stressed that the appellant had raised the question of ownership of the suit property, in his Civil Suit No. 1/94, which was dismissed, and that the only matter before her was the counter-claim. She held that because the counter-claim was not an appeal under section 14 of the

Act, she had ***"no jurisdiction to entertain issues challenging the decision or action of the Minister"*** *as* they were not brought ***"in accordance with procedures laid down by the Act".*** In upholding the trial court decision, the learned Justices of Appeal reiterated that the counter-claim was not an appeal against the decisions of the Minister, and concluded that the trial court did not err in refusing to consider the purchase certificate because, it ceased to be an issue upon the appellant failing to challenge its cancellation in time.

Messrs Buwule & Co., Advocates for the appellant, submit that in a suit for ejectment, a plaintiff in order to succeed, must plead and prove a title which is superior to that of the defendant. On the other hand, a defendant who is in possession may rely on such possession only, without pleading title. Counsel argue that the counter-claim, in the instant case, was such a suit for ejectment, and that the appellant was entitled to plead that in addition to being in possession, he had a superior title. He did so by the plea that he was granted the purchase certificate under the Act, and became registered proprietor when the certificate was duly entered on the title. That plea was a defence to the counter-claim, and it survived the dismissal of the main suit because the relevant averments in the suit plaint, were incorporated in the defence to the counter-claim by reference. Counsel maintain that the appellant, as defendant in the counter-claim, was not barred from pleading that his purchase certificate is valid, and even that the

respondent's repossession certificate was null and void. The trial court ought to have considered the defence and decided it on merit, rather than reject it on the technicality that the court lacked jurisdiction. On jurisdiction, counsel for the appellant submit that the High Court has inherent jurisdiction to investigate any illegality brought to its attention in any proceedings before it, and argue that in his pleading, the appellant challenged the Minister's act of issuing the repossession certificate as an illegality, which the court was competent and under duty to investigate.

I agree that the appellant's claim of ownership of the suit property, was incorporated in the defence to the counter-claim when, in paragraph 1 of the **"Reply to the Written Statement of Defence and Counter-claim"** he pleaded that: "***The Plaintiff repeats all the averments in the Plaint".***

The dismissal of the plaint did not wipe out or in any way affect that pleading. The pleading remained, albeit by reference. If the trial court had allowed the appellant to amend, as I think it should have, the averments would have been expressly incorporated, but as a defence. Neither would the dismissed suit have revived, nor would the counter claim have changed character. The claim ceased to be "*a sword" when* the main suit was dismissed, but it remained *"a shield"* in the counter-claim action. I should add, for emphasis, that although no appeal was taken against the ruling denying leave to amend, the defence remained as pleaded by reference, since it was not struck out. The appellant's two defences to the counter-claim therefore, were that he was in possession with a superior title, and that the respondent had not suffered the loss pleaded in the counter-claim. In reiterating the former defence on appeal, he does not depart from his pleadings.

In view of my finding, that appellant pleaded ownership in defence, it follows that the purchase certificate on which the plea is founded was in issue. Issues Nos.1, and 3 which were framed thus:

"1. Whether the Defendant* (appellant) *is liable to give vacant possession.

3. ***Whether the Defendant* (respondent) *is liable to pay mesne profits"***

could not be properly answered without considering the appellant's claim of ownership, and therefore, the validity of the purchase certificate on which the claim is founded. The existence of the certificate may well not have been in dispute as is implicit in the court's ruling on the objection to its being received in evidence during trial where the judge said that it was unnecessary as ***"It is already mentioned in Exh. P3".*** However, its validity and effect was an implied sub-issue.

The second aspect of the respondent's contention, like the holding by the courts below, that the trial court was not competent to consider the appellant's claim of ownership in the proceedings before it, is also untenable. While a court may properly hold-

- either, that as a matter of law, the defence pleaded is not available;
- or, that as a matter of evidence, the defence pleaded is not established;

it is not open to a court to hold that it has no jurisdiction or competence to try the defence case or part of it, and then proceed *"to try"* the plaintiffs case alone or with a reduced defence. Clearly, if a court has no jurisdiction over part of the case before it, it has no jurisdiction to try the case. But that was not the situation in the instant case. Counsel for the respondent seek to explain, notwithstanding the expression used by the courts themselves, that what was meant, was not lack of jurisdiction, but absence of proper proceedings, i.e. an appeal under section 14 of the Act. They liken the position to a court declining to invoke its criminal jurisdiction to make a penal code order in a civil suit.

The apparent basis of the respondent's contention, as well as the court holding, is the notion that the appellant's claim of ownership of the suit property, could only be pleaded under section 14 of the Act, in an appeal against the Minister's decision. With due respect, my considered opinion is that the notion is misconceived. First, section 14 of the Act neither vests a new jurisdiction in the High Court, nor lays down any special procedure for appealing against a decision of the Minister. I would reiterate what I said in **Habre International Co. Ltd. Vs. Ebrahim Alarakia Kassak & Others,** Civil Appeal No. 4/99, that *"an appeal"* under section 14 of the Act is not a judicial appeal. The minister, in exercise of power vested in him by the Act, makes administrative decisions. Section 14 of the Act directs that a person aggrieved by such a decision may appeal to the High Court, within a period of thirty days. Apart from that time limit, the Act does not stipulate any special procedure for instituting the appeal or challenge,

against the Minister's decision. The challenge can be done in an ordinary civil suit. Nor am I persuaded that the appellant's claim in defence that he had a superior title, is analogous to a litigant's prayer for a penal code order in a civil suit. The defence is a civil claim, in a civil suit. Secondly whether the appellant had needed to appeal under Section 14 of the Act depended on the status of his purchase certificate on which the claim was based. The court was competent to determine, after due trial, that the certificate was subsisting. It could also determine that it was not, either because the certificate was not lawfully issued, or because it was lawfully revoked or cancelled or otherwise annulled. Thirdly, the mere absence of the Attorney General from the counter-claim suit, could not render the court incompetent. Under Order 1 Rule 10(2) of the Civil Procedure Rules, the court has wide powers to order that a person

"whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added".

The pleadings in the instant case showed that the real controversy was on ownership of the suit property, with each party relying on a certificate purportedly issued by the Minister under the Act. The trial court could have invoked its powers, if it deemed the presence of the Attorney General to be necessary, to order that the Attorney General be added to the suit, instead of disclaiming jurisdiction or competence because of his absence from it. Ironically, as I pointed out earlier in this judgment, when the appellant formally applied to join the Attorney general to the suit, the application was never considered.

In summary my conclusion on the preliminary point is as follows: (a) The appellant was not precluded by any law, from pleading his claim of ownership based on the purchase certificate, (b) He pleaded it by reference as a defence to the counter-claim, (c) The validity of the purchase certificate, on which the claim is founded, was implicit in the issues framed for trial, (d) The trial court was competent, to determine if that certificate was valid, and it was a misdirection to hold that it was not so competent, **(e)** In pursuing the claim of ownership of the suit property in this appeal, as a defence which the courts

below refused to consider, the appellant has not departed from his previous case. I would, therefore, not exclude the claim from consideration in this appeal.

Grounds of Appeal

I now turn to the grounds of appeal. I will consider together, grounds 1 and 5 because they appear to be inter-related. The appellant complains in these grounds, respectively, that the learned Justices of Appeal —

- erred in law in failing to determine his rights in the suit property; and
- failed to properly evaluate all the pleadings and the evidence of the parties.

On ground 1, the core contentions are that upon entry of the purchase certificate on the title on 26 July 91, the title to the suit property was lawfully transferred to the appellant; and that issuing of the repossession certificate subsequently, did not affect his title because, in respect of that property, the Minister no longer had any power of disposal. The argument on ground 5, which is premised on those contentions, is that the appellant was not liable to give vacant possession or to pay ***mesne profits,*** because, by virtue of the said title his occupation of the suit property was lawful. Messrs Buwule & Co., Advocates, submit that the holding to the contrary resulted from the failure by the courts below to appreciate the appellant's interest in the suit property, as pleaded and as proved.

Let me put in summary form, the very lengthy arguments advanced by counsel in support of these contentions.

- The purchase certificate ***"clothed"*** the appellant with equitable title to the suit property and upon its registration, the legal title vested in him in accordance with Section 91(2) of the Registration of Title Act (RTA). The property thereupon ceased to be ***"expropriated property"*** under the Act. The appellant could only be divested through legal impeachment of the title e.g. for fraud under section 184 of the RTA;
- The Act does not empower the Minister to revoke a certificate issued in disposal of an expropriated property. The Minister becomes ***functus officio*** in respect of

any property he disposes of under sections 4, 5, or 8 of the Act. Besides, in the instant case, neither did the Minister purport to expressly revoke the purchase certificate, nor did the repossession certificate issued later, have the effect of annulling it; and

- The appellant, who was in possession on strength of having acquired the suit property in accordance with the Act, could not be liable to give to the respondent vacant possession of the same or to pay to her ***mesne profits.***

On the two grounds of appeal, Messrs Nangwala, Rezida & Co. Advocates for the respondent contend that, the appellant did not acquire any title or rights over the suit property by virtue of the purchase certificate, and that the lower courts correctly decided that the respondent was entitled to vacant possession, and ***mesne profits.*** I will also put in summary form, the arguments advanced in support of that contention.

- The purchase certificate is void and does not constitute a disposal of the suit property under the Act -

(a) because, the sale in respect of which it was issued was in error for being based on the nullified 1979 purchase; and

(b) because, the Minister did not comply with mandatory provisions of Section 8 of the Act, and Regulation 11 of Statutory Instrument No. 6 of 1983 governing the procedure for sale of properties under the Act.

- The purchase certificate was not produced in evidence;

- The evidence adduced, showed that its entry on the certificate of title was cancelled, and therefore, the appellant could not establish a defence to the counter-claim relying on the cancelled entry;

- Because the purchase certificate was not legally issued under the Act, it did not **"clothe"** the appellant with any interest in the suit property, or protect him against a suit for trespass; nor did it render the Minister ***functus officio*** under the Act;

- In contrast, the respondent adduced evidence, which proved, not only that she was issued with the repossession certificate under the Act, but also that she was

the registered proprietor of the suit property. Her certificate of tide was conclusive proof of ownership of the suit property, and could only be impeached if she was guilty of some fraudulent act;

- The basis of the respondent's claim for vacant possession and mesne profits was the repossession certificate under the Act, not the registration under the RTA. Accordingly, the respondent became entitled to vacant possession, and to ***mesne profits,*** from the time she obtained the repossession certificate, not from its entry on the certificate of title.

I am constrained to observe that the submissions from both sides underscore the point I highlighted earlier in this judgment, that the dispute underlying the counter-claim is not merely what remedy the respondent was entitled to, but the ownership of the suit property. Even counsel for the respondent, without conceding the point, recognise that it is imperative to ascertain which claim is superior to the other. They assert in their written submissions that this Court is not invited ***" t o make a finding on the propriety of the purchase certificate",*** yet they take a lot of time and space to strenuously argue that the appellant's certificate is not a valid purchase certificate and that the repossession certificate is lawful and has never been impeached.

The judgments of both courts below are premised on a silent presumption that upon issue of the repossession certificate, the appellant's title to the suit property, if any, ceased. They then conclude that it became irretrievable upon his failure to appeal under section 14 of the Act. With due respect, that is not a correct premise. The repossession certificate is not conclusive evidence that it was issued lawfully. In my view, from both the pleading and logical points of view, the correct entry point in this dispute must be the purchase certificate. It is not in dispute that the repossession certificate was issued more than two years after the purchase certificate had been issued and entered on the register of titles. When the respondent instituted her counter-claim suit, the respondent was not only in possession, but he was also still the registered proprietor of the suit property. Having regard to the pleadings and the evidence, the court, before deciding as it did, ought to have satisfied itself-

- either that the appellant did not lawfully acquire title to the suit property;
- or that the title was lawfully divested/transferred from him;

Neither court below did so. I think this Court can do so from the material on the record.

Did the appellant lawfully acquire title to the suit property or not?

Whether or not the appellant acquired the title lawfully, depends on the validity of the transaction leading to the issue of the purchase certificate to him. According to the respondent's counsel, the defects in the transaction are the regard that the Minister had for the nullified 1979 purchase and the Minister's failure to comply with mandatory statutory provisions on sale procedures. Section 8 of the Act vests in the Minister power to dispose of expropriated property where, neither joint venture under section 4, nor repossession under section 5, is realised. So far as is relevant to the instant case, section 8 provides-

"8. (1) Where

(a) a former owner of any property or business does not apply for repossession within the period specified under section 3 of this Act,.... the Minister may make an order that the property or business be retained by Government, or be sold or disposed of in such manner as may be stipulated in the Regulations made under the Act,

(3) The Minister shall issue a certificate to the purchaser or recipient of any property or business sold or otherwise disposed of under the provisions of this section and such certificate shall have the same effect as a certificate issued under sections 4 and 5 of this Act." (emphasis is added) Section 6 of the Act provides that a certificate issued under section 4 or 5 shall be sufficient authority for, ***inter alia,*** the Chief Registrar of Titles to transfer title to the person to whom the certificate is issued. Therefore, the purchase certificate issued under section 8, is such sufficient authority. Under Regulation 11 of the regulations made under the Act, (S.l No.5 of 1983), it is stipulated that where the Minister makes an order under section 8, that expropriated property be sold, the property shall be valued by a Board of Valuers; and shall be sold by competitive tender, subject to a reserve price determined by that Board. Counsel for the respondent maintain that this procedure was not complied with. That appears to be so, particularly in view of the Minister's letter to the appellant dated 12th March 1991. He wrote in part -

"Please refer to the claim of interest lodged with the Verification Committee on 15th May, 1983, in respect of the above property which you had purchased from Mr. Ibrahim Minawa prior to the commencement of the Expropriated Properties Act of 1982 ... This is to inform you that after careful consideration of your claim and the provisions of the... Act in so far as they relate to the property and the transaction between you, the former owner and Mr. I. Minawa, Government has decided that you may purchase this property under a new purchase contract with the Government at a consideration of Shs.50,000/= I am therefore advising you to pay the above sum and thereafter produce the evidence of such payment to the Ag. Executive Director to facilitate preparation of the necessary certificate of purchase." From this offer, it is obvious that the Minister deliberately decided to sell the property to the appellant without competitive tender or reserve price stipulated in Regulation 11. He had regard to the 1979 purchase but offered to sell to him, under ***"a new purchase contract with the government".*** In so doing the Minister did not purport to revalidate the 1979 purchase transaction as argued by the respondent's counsel. Rather he recognised that in absence of the former owner's claim, the appellant's claim of interest in the property equitably ranked next, and that it would be unconscionable to require him to pay full value a second time for the same property. To my mind that claim of interest was a legitimate consideration in the exercise of the Minister's discretion under section 8 of the Act. It did not vitiate the ***"the new contract".*** I should point out that the 1979 purchase was not an ***"illegality".*** The Act nullified it, but did not render it illegal or void ***ab initio.*** That is why the Act recognizes the interest of a purchaser such as the appellant, whose purchase it nullifies.

Regulation 11 directs that the stipulated procedures be followed in sales of expropriated properties. It does not however, preclude the Minister's discretion to dispose of property in any other way, including sale for nominal or token price. Counsel for the respondent forcefully argue that every disposal called ***"a sale"*** must strictly comply with regulation 11. On surface, that argument sounds attractive. However, I am not persuaded because the implication would be that the Minister, without involvement of a Board of Valuers and competitive tender, can lawfully dispose of property otherwise than by sale, but has no power to do the same if, as in the instant case, he asks for a nominal or token price. That cannot have been the intention of the legislature. In my view, the procedures were not intended to limit the Minister's discretion, in appropriate circumstances, to dispose of the property as he deems appropriate. I conclude that the purchase certificate was

lawfully issued under the Act, and that upon its entry on the register on 26 July '91 the appellant acquired the legal title to the suit property.

Was the appellant lawfully deprived of the title?

Both courts below avoided pronouncing themselves definitively on the appellant's interest arising from the purchase certificate. However, in their respective judgments, the thrust is that any interest the appellant had in the suit property, ceased when the repossession certificate was issued, and any right to claim it, was put beyond reach by his failure to appeal in time, against the Minister's decision to issue the repossession certificate. Both judgments revolve on the remarks made by Twinomujuni J.A., in **Mohan Musisi Kiwanuka vs Asha Chand,** Civil Appeal No. 27/98, which I reproduced earlier in this judgment. The learned trial judge reproduced them in part in her judgment, and the Court of Appeal re-echoed them in the lead judgment of Engwau J.A.

Secondly, both courts placed reliance on the fact that the respondent was in the end registered proprietor. In her judgment, the learned trial judge held that the respondent's case was based on the Act, not the RTA, but observed that under S. 56 of RTA, a certificate of tide is conclusive evidence of ownership. She went on to say -

"The evidence adduced before this court (Exhibit P3) shows that the registered proprietor of the suit property is Karam Chand that all other certificates issued prior to 30/4/99 have been

cancelled."

In the said lead judgment of the Court of Appeal, Engwau J.A., said -

"....the learned trial judge, in my view, was at no fault when she did not concern herself with the question of the Certificate of Purchase No.0039. In any case at the trial of the counter-claim, it was evident that the Certificate authorising repossession issued to the respondent ... had been Registered and the certificate of purchase No.0039 had been cancelled". Evidently both courts below were alive to the fact that the appellant was registered as proprietor of the suit property prior to the trial of the counter-claim. However, neither court discussed the subsequent change in the registration. The circumstances, which led the Registrar of Tides, six years down the road, to be convinced to change the status quo, are not disclosed in the record. For that

reason, I will not express myself conclusively on the matter, but I have to express my doubt about the propriety of the decision to so act, and thereby pre-empt the court's decision in a dispute pending resolution by court. Be that as it may, I must stress that certificates issued under the Act do not confer ownership as contended by respondent's counsel. To my mind their effect is no more than that of deeds of transfer or assignment under the RTA. That is the clear implication of Sections 6(a) and 8(3) of the Act. In order to provide ***"sufficient authority"*** for the Registrar to effect transfer of tide, therefore, they must be competently issued.

Three inter-related sub-issues arise from the submissions of counsel on both sides, in this regard, namely: -

- whether, as a matter of fact, the Minister revoked or, cancelled the purchase certificate;
- whether, as a matter of law, the Minister had power to revoke, cancel or annul the purchase certificate;
- whether property disposed of under section 8 can subsequendy be subject of repossession under section 5 of the Act.

The available evidence does not show that the Minister expressly revoked or cancelled the purchase certificate. The evidence related to that question is (a) the issuance of the repossession certificate by the Minister to the respondent, (b) the communication by the Custodian Board to the appellant, as occupier of the suit property, but without any reference to the purchase certificate, that a repossession certificate had been issued to the respondent, and (c) the statement by the Minister in a letter he wrote to the Commissioner of Land Registration on 21 Oct 93, that the purchase certificate was nullified. In the letter, the Minister, after summarising the earlier history of ownership of the suit property, wrote -

"..Ibrahim Minawa sold the property to Mohan Musisi Kiwanuka who was registered on 19th October, 1979. .....Mr. Kiwanuka's purchase was nullified by the provisions of the (Act). The property was duly repossessed on 16th September, 1993 by the registered proprietor Karam Chand. The certificate No 0039 issued to Mr Mohan Musis Kiwanuka was therefore nullified since the sale of the property was in error. You can therefore go ahead and register Karam Chand as the rightful owner of the property." (emphasis is added).

I cannot conclude from this evidence, that the Minister expressly revoked or cancelled the purchase certificate. The issuance of the repossession certificate ***per se*** is equivocal, as it could have been done in ignorance or disregard of the purchase certificate. This tends to gain weight from the fact that in its communication to the appellant, the Custodian Board made no mention of the purchase certificate, let alone its revocation or cancellation. Secondly, the Minister's statement in the letter, that the purchase certificate was ***"therefore nullified",*** is clearly a deduction from the issuance of the repossession certificate. It is not an assertion that the Minister consciously annulled the purchase certificate and then authorised the repossession. Significantly, the statement was made ***post facto,*** as an argument to urge the Commissioner of Land Registration to register the respondent. I would therefore hold that it was not shown that as a matter of fact the Minister revoked the purchase certificate. I will consider the other two sub-issues together.

In the courts below, as well as in this Court, counsel for the appellant relied on **Ravji Meghji Patel & 2 others vs Attorney General & another.** Civil Appeal No. 16/99 (C.A.) (unreported), as authority for his submission that the Minister did not have power to revoke or otherwise to annul a certificate issued by him under the Act. The facts of that case are virtually the same as those of the instant case. In 1982, A, the 2nd respondent, purchased expropriated property at a public auction. That purchase was nullified when the Act came into force in 1983. On 15 Nov. '92, the Minister issued a certificate of purchase to A, under section 8 of the Act. Subsequently, **BCD,** as former owners of the said expropriated property, applied for repossession. The Custodian Board informed them that the property had been sold and was not available for repossession. They appealed to the Minister protesting against the sale. Later, they filed the suit in the High Court against the Attorney General and A praying for, ***inter alia,*** declarations that the sale to A in 1992 was null and void for non-compliance with statutory sale procedure, and that the certificate of purchase was issued to him illegally. At the hearing, the defendants raised a number of preliminary objections to the plaint. The court upheld the objections and dismissed the suit. On appeal, the Court of Appeal held that the trial was defective owing to contradictory decisions by the trial court ***"in the same case and on the same points".*** It ordered a retrial. In the lead judgment, with

which other members of the court concurred, Berko J.A., had this to say about the sale of the property, and the certificate of purchase —

"It is plain ...that the Minister had dealt with the property by the issuance of a certificate of purchase in favour of the second respondent. Whether the Minister followed the statutory procedure and regulations laid down under the 1982 Act is beside the point. The 1982 Act itself contains provisions for resolving such issues. What is clear, however, is that the Minister has no power under the 1982 Act to cancel a certificate of purchase once he had issued it. His decision can only be challenged in the manner provided by 1982 Act. Therefore the appeal to the Minister as contained in their lawyers letter was misconceived."

Both courts below and the respondent's counsel in this appeal attempt to distinguish that case from the instant one. I do not share that view. The two cases are not distinguishable. It would have been sufficient for the courts to say that the observations of Berko J.A., are not binding since they were made ***obiter.*** Nevertheless, in my view, they are a correct statement of the law. I have already stated and explained my similar view, that failure in the instant case to comply with the statutory sale procedure, did not vitiate the disposal of the suit property to the appellant, as what was done was within the competence of the Minister. Secondly, I agree with Berko, J.A., that the Minister has no power to cancel a certificate issued under the Act. In providing, in section 14 of the Act, that a person aggrieved by a decision made by the Minister under the Act may appeal to the High Court, Parliament did not expressly reserve in the Minister, any power to review such a decision upon request by an aggrieved person. It only directed that such person should appeal to the High Court. I am also unable to construe from the Act, that the Minister retained any implied power to revoke his decision on the ground that it was made in error. In my view, to do so would perpetuate the very uncertainties about ownership of the expropriated properties, which the Act was, intended to eliminate. It would enable the Minister at anytime, ***ad infinitum*** to reverse earlier decisions, and cancel or annul certificates issued under sections 4,5 or 8 of the Act, merely because of change of mind or opinion, or because of other whims or considerations. If the legislature had intended to retain in the Minister concurrently with the High Court, any power to review his decisions, it would have done so expressly. The only intention I read from the provisions of the Act is to empower the Minister to decide and dispose of an expropriated property

once, and to let any grievance arising from the Minister's decision to be resolved by the High Court.

In the instant case, the purchase certificate was issued by a Deputy Minister of Finance, and subsequently, the repossession certificate was issued by the successor, a Minister of State of Finance, who asserted after the event, that the sale ordered by the predecessor was done in error. I have already given, and need not repeat here, the reasons for my conclusion that the sale was lawful and not made in error. However, even assuming for a moment, that the Minister had material, showing that the sale was in error, that material should have been availed to the court, which had the jurisdiction to determine the validity of the purchase certificate in the trial of Civil Suit No 693/92. In issuing the repossession certificate in respect of the suit property, the Minister purported to exercise power he no longer had. It follows that his act had no legal effect. It did not revoke or otherwise annul the appellant's purchase certificate.

From the foregoing, my conclusion is that at all material times, the appellant was lawfully in possession of the suit property. I would therefore hold that he was not liable to give vacant possession, or to pay ***mesne profits,*** to the respondent in respect of the suit property. In my view, grounds 1 and 5 ought to succeed, and that would dispose of the appeal, since grounds 2 and 3 are minor and would not affect the result substantially. Ground **4** was abandoned.

In the result, I would allow the appeal and order that the judgments and orders of the courts below be set aside, and be substituted by an order dismissing the respondent's counter-claim, with costs to the appellant in this Court and in the courts below.

JUDGMENT OF ODER.JSC.

I have had the benefit of reading in draft the judgment of Mulenga, J.S.C. and I agree with him that the appeal should succeed. I also agree with the orders proposed by him. As Tsekooko, JSC, Karokora, JSC, and Kato, JSC also agreed, the orders shall be as proposed by Mulenga , JSC.

JUDGMENT OF TSEKOOKO, J.S.C.

I have had the advantage of reading in draft the judgment which has been delivered by my learned brother, the Hon. Justice J.N.Mulenga, J.S.C and agree with his reasoning in the matter and I also concur in the orders he has proposed.

JUDGMENT OF KAROKORA, *J*SC

I have had the advantage of reading in draft the judgment prepared by Mulenga, JSC and 1 agree with him, that the appeal should succeed. 1 also agree with the orders he has proposed.

JUDGMENT OF KATO, JSC.

I have had the benefit of reading draft judgment of my learned brother Mulenga, **JSC.** I agree with it and his proposed orders. I would also allow the appeal with costs to the appellant.

Dated at Mengo this 16th of July 2003.