

5 THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MAKINDYE
(FAMILY DIVISION)

10 MISCELLANEOUS APPLICATION NO. 0504 OF 2023
(ARISING FROM CIVIL SUIT NO. 0031 OF 2023)

15 1. GAD TURYEINGANA
2. ROBERT NAKIBINGE } APPLICANTS/DEFENDANTS
3. CHARLES DAMULIRA }

VERSUS

WALUGEMBE WILLIAM DAVID RESPONDENT/PLAINTIFF

20 Before: HON. LADY JUSTICE DR. CHRISTINE A. ECHOOKIT

RULING ON PRELIMINARY OBJECTION

25 **BACKGROUND:**

The Applicants brought this application for orders that the Respondent/Plaintiff's plaint and/or suit be rejected, struck out and/or dismissed for being statute barred, frivolous and vexatious, and barred in law; and that costs be provided for. The application is brought under Section 3(3) of the Limitation Act, Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, and Order 7 Rule 11(d) and (e) and Rule 19 of the Civil Procedure Rules. The application is supported by the affidavit of Nakibinge Robert the 2nd Applicant sworn on behalf of the Applicants with grounds briefly that the Respondent filed Civil Suit No. 31 of 2023 on 2nd February 2023; that the action is time barred; and that it is just and equitable that the application is granted.

35 **REPRESENTATION AND HEARING:**

The Applicants were represented by Makokha Devon Benrox while the Respondent was represented by Bwesigye Enoch. The parties filed written submissions.

5 **ISSUES FOR THE DETERMINATION OF COURT:**

1. Whether counsel Makokha Devon is conflicted in his representation of the Applicants.
2. Whether the Respondent's suit is time barred, or frivolous, vexatious and bad in law.
3. What remedies are available to the parties?

10 **DETERMINATION OF THE ISSUES BY THE COURT:**

I have perused the affidavit evidence of the parties as well as their submissions and have taken them into account in the preparation of this ruling.

Issue 1: Whether counsel Makokha Devon is conflicted in his representation of the
15 **Applicants**

Before delving into the resolution of the substantive issues of this application, the issue of representation by counsel Makokha Devon has dogged the application.

20 The Respondent stated in his affidavit in reply that the Applicants' counsel Makokha Devon is his former lawyer in a case in Makindye Chief Magistrate's court for recovery of rent from the house sitting on the 2 plots and later started representing the 2nd and 3rd Applicants and has since taken prejudicial litigation as a way of defeating his entire interest in the estate.

25 The 2nd and 3rd Applicants in their affidavits in rejoinder stated that the Applicants' counsel Makokha Devon and M/s Nagemi & Co. Advocates have never been the Respondent's lawyer in any matter touching the suit land. The 3rd Applicant goes on to state that the said Makokha Devon and M/s Nagemi & Co. Advocates represented the estate in High Court Civil Suit No. 52 of 2017.

30 When this application first came up for hearing on 8th day of November 2023, counsel for either side vehemently submitted on the issue of counsel Makokha's representation of the Applicants. Counsel Makokha submitted then that for the advocate to be disqualified from representing his

5 clients, the subject matter must be the same and it must be proved that the information that the
impugned advocate has is confidential and prejudicial to the former client.

Counsel Makokha reiterated his submissions again on 22nd day of January 2024 when the
matter came up again after court-aided mediation failed. He submitted that on the issue of
10 whether he should continue representing the Applicants against the Respondent, rule 4 of the
Advocates (Professional Conduct) Regulations is clear. The party raising the issue must show
that the current and former subject matter in the suits in which counsel participated is the same.
The advocate cannot be stopped from going against his former client if the subject matter is not
the same. He submitted that the 2 matters are different.

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It is apparent to me that the issue revolves around legal representation in Civil Suit No. 153 of
2019 and Civil Suit No. 71 of 2007. The present application arises from Civil Suit No. 31 of 2023
and touches on the suit land Block 244 Plots 5341 and 5342 at Kisugu Kyadondo upon which
a consent judgment was entered in Civil Suit No, 71 of 2007. Civil Suit No. 153 of 2019 in the
20 Chief Magistrate's Court of Makindye at Makindye was in respect of Block 244 Plot 3349 land
at Kyadondo-Kisugu. The judgement of Mbabazi Edith May dated 11th day of June 2020 is
attached as annex JT to the 3rd Applicant's affidavit in rejoinder.

As to the 3rd Applicant averment that the said Makokha Devon and M/s Nagemi & Co.
25 Advocates represented the estate in High Court Civil Suit No. 52 of 2017, the details of that
case and the implication of the legal representation has not been pursued further in relation to
the present application. Accordingly, I will not pick it up and will not interrogate it in this ruling.

The 2nd and 3rd Applicants' rejoinder affidavits stated that Civil Suit No. 153 of 2019 names a
30 one Willy Davies Walugembe as the 1st Plaintiff and not the Respondent in the instant case
who is Walugembe William David. It is apparent that use of different names is also an issue,
rendering Applicants' counsel to submit that it is an offence under the Registration of Persons

5 Act for a person to alter his name without following the proper procedure of informing the registrar of births and deaths. Counsel went on to submit that the names of the Respondent in the affidavit in reply in the instant application do not relate to the Respondent in Civil Suit No. 153 of 2019, and that the Respondent has failed to prove that he has ever been represented by counsel Makokha or even that the 2 subject matters are the same.

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It is indeed true as submitted by counsel for the Applicants that for rule 4 of the Advocates (Professional Conduct) Regulations to apply, the party raising the issue must show that the current and former subject matter in the suits in which counsel represented a party are the same or that counsel is aware of any matter that may be prejudicial to his former client.

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The present application arises from Civil Suit No. 31 of 2023 and touches on the suit land Block 244 Plots 5341 and 5342 at Kisugu Kyadondo upon which a consent judgment was entered in Civil Suit No. 71 of 2007. The judgement of the magistrate in annex JT to the 3rd Applicant's affidavit in rejoinder is in respect of Civil Suit No. 153 of 2019 in respect of Block 244 Plot 3349 land at Kyadondo-Kisugu where the 1st Plaintiff in that matter is indeed indicated as Willy Davis Walugembe.

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That perusal has also shown that the Respondent in the present application is known as Walugembe William David whereas in Civil Suit No. 153 of 2019 the 1st Plaintiff is called Willy Davies Walugembe. On the face of it, it could be said that indeed the 2 names are different and that potentially these could be 2 different persons. The subject matter in Civil Suit No. 153 of 2019 is land comprised in Block 244 Plot 3349 in Kyadondo, Kisugu, whereupon the 1st Plaintiff and the 2nd Plaintiffs claim to be registered owners. The Plaintiffs alleged that the 1st Defendant in that case entered an oral tenancy agreement with them but without their consent she sublet the premises to the 2nd Defendant. The claims in Civil Suit No 153 of 2019 and Civil Suit No. 71 of 2007 are different. However, just because the 1st Plaintiff in Civil Suit No. 153 of 2019 is called "Willy Davies Walugembe" as opposed to "William David Walugembe" in Civil Suit No.

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5 71 of 2007 and indeed Civil Suit No. 31 of 2023 and in the present application, cannot be said to be the only determinant of whether or not the said names refer to 2 different persons. It is trite law that whilst interpreting a document, the whole document should be taken as a whole. An appreciation of who exactly the said Walugembe Willy Davies is in Civil Suit No. 153 of 2019 can only be gleaned by reading the entire pleadings of that case, and comparing them to the
10 affidavit evidence in the present application. Accordingly, it is apparent to me that the 2 names variously used in the 2 suits actually refer to the same person.

The real question should be whether the subject matter of the 2 suits is the same so as to conclude that if counsel Makokha represented the 1st Plaintiff in Civil Suit No. 153 of 2019 he
15 would be conflicted if he then represents the Applicants as against the Respondent in the instant application and Civil Suit No. 31 of 2023. As stated above, whereas the Plots of land in the 2 suits are on the same Block 244, they are nevertheless 2 different plots and the claims in respect of those plots totally defer. I can only summarize that counsel Makokha is not conflicted in the present application.

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Issue 2: Whether the Respondent's suit is time barred, or frivolous, vexatious and bad in law

The 2nd Applicant swore an affidavit in support of the application to the effect that the Respondent filed Civil Suit No. 31 of 2023 on 2nd February 2023 against the Applicants, seeking
25 cancellation of the 1st Applicant's certificate of title to suit land comprised in Block 244 Plots 5341 and 5342 at Kisugu, Kyadondo, and cancellation of sale agreements between the Applicants on grounds of illegality relating to a breach of a consent judgement of this honourable court; that the consent judgement was endorsed by court on 25th of April 2010; and that the suit was instituted after 12 years and nine months after the judgement and is therefore time barred.
30 Applicants' counsel in his submissions highlighted that the Respondent did not specify in his plaint any grounds of exemption as required by the law that would stop the 12 years from running, which makes the plaint in the main suit defective and an illegality.

The Respondent's affidavit in reply is to the effect that it is true there was a consent judgement but it was endorsed by court on 25th day of August 2010 and not 25th April 2010 as alleged by the Applicants; that clause 3-5 of the consent are clear, entitling the Respondent/Defendant to 8 million shillings from the sale of the estate property after the demarcation, survey and transfer to the Plaintiff of approximately 5 meters of the land; that the Applicants did not respect the consent judgement but instead the 2nd and 3rd Applicants got registered in the suit land comprised in Block 244 Plot 5341 on 9th day of November 2017 and the 1st Applicant got registered on the same Plot 5341 on 6th December 2022 while the 2nd and 3rd Applicants got registered in Block 244 Plot 5342 on the 19th day of June 2017 as "administrator of the estate of the late Anjerina Nabada Gujalla Muzana" and the 1st Applicant (3rd Defendant in the main suit) registered on the title on 15th day of November 2021 and registered a mortgage on the land with Equity Bank Ltd; that he knows that the 2nd and 3rd Applicants sold the said land to the 1st Applicant although he the Respondent has never seen any sale agreement between them and the amount paid.

The Respondent filed an affidavit in reply to the effect that he has never sued the 2nd and 3rd Applicants in their individual capacity and he does not know the basis of their application. The 3rd Applicant in his rejoinder stated that the present application is independent of the main suit and that matters concerning expiry of the limitation period within which to bring an action and whether a particular court already adjudicated upon the subject matter in question between the parties do not require adducing evidence but looking at the pleadings and judgement of court, if any. The 2nd Applicant's affidavit in rejoinder is also to the effect that administrators of the estate sued in Civil Suit No. 52 of 2017 and on 27th day of August 2019 court issued an injunction; that the basis of his instant application is that the Respondent sued him in Civil Suit No. 31 of 2023 and court issued him summons to file a defence; that he verily believes the Respondent's Civil Suit No. 31 of 2023 was filed outside the limitation period; that the Respondent's remedy lies in taking out execution proceeding to enforce his rights under the

5 alleged breached judgement and there is a pending application for execution of the decree vide
EMA No. 71 of 2020 arising from Civil Suit No. 71 of 2007; that the Respondent's cause of
action in Civil Suit No 31 of 2023 is wholly premised on the consent judgement of 25th August
2010; and that there is a consent decree in Civil Suit No. 71 of 2007 on the suit land with a
pending application for execution in respect thereof vide EMA No. 74 of 2020 (arising from Civil
10 Suit No. 71 of 2007).

Counsel for the Respondent submitted that his client's cause of action arose in 2017 after the
1st and 2nd Defendants in the main suit got registered on the suit property; and that it is only
after the act of registration that the Plaintiff/Respondent could assert his interest contained in
15 paragraph 5 of the consent judgement. He also submitted that the Respondent's interest as a
beneficiary would not expire upon the alleged expiry of the consent judgement.

The Applicants' counsel submitted that an illegality once brought to the attention of court
overrides all questions of pleadings including admissions made therein as per the case of
20 Makula International Vs. Cardinal Nsubuga Wamala [1982] HCB 12. The Applicants' counsel
also cited the case of Iga vs. Makerere University (1972) 1EA 65, where the Court of Appeal of
East Africa sitting in Kampala held that a plaint barred by limitation is barred in law and shall be
rejected under Order 7 Rule 11(d). He also submitted that it is trite law that for court to determine
whether the suit is time barred, court looks only at the plaint and documents attached thereto
25 and not at any other evidence; and that court does not need to go into full trial where the nature
of evidence is specified.

On whether the Respondent's suit is frivolous and vexatious, the Applicants' counsel cited the
case of R Vs. Ajit Sinah s/o Vir Sing (1957) EA 822 at page 825 where the term frivolous and
30 vexatious was defined to mean "paltry, trumpery, not worth of serious attention: having no
reasonable ground or purpose". He also cited Black's Law Dictionary that defines a frivolous
4 suit as one that lacks legal basis or merit, and submitted that the Respondent's suit was indeed

5 frivolous and vexatious since the subject matter of the main suit had already been adjudicated upon in Civil Suit No. 71 of 2007 and the matter was res judicata. Hence, the only remedy available to the Respondent was execution proceedings, which were taken out in EMA No. 22 of 2022 arising from Civil Suit No. 71 of 2007 and notice to show cause had been served on the Respondent in respect of the same. Counsel for the Respondent stated in regard to the
10 execution proceedings, that the Applicants who commenced the said proceedings had abandoned them without reason.

Counsel for the Respondent submitted that the Preliminary objection being raised in the present application cannot be entertained without first entertaining evidence from both sides. He cited
15 the decision of the Supreme Court in Uganda Telecom Ltd Vs. ZTE Corporation SCCA No. 003 of 2017 on how preliminary objections are handled in preliminary or after first entertaining evidence.

Counsel for the Respondent stated that a careful review of the proceedings of the parties clearly
20 reveal various accusations and counter accusations that require clarification by evidence. For example, the Applicants' defence admits that they sold the land as administrators but they have never shown court of the Defendants copies of the sale agreements. Counsel for the Respondent also submitted that whereas the Applicants state that the consent judgement on which the Respondent/Plaintiff bases his cause of action has expired, they themselves do not
25 explain where they got authority to sell.

The Respondent's affidavit in reply is to the effect that on 3rd day of May 2021 he the Respondent received a copy of a Notice of Motion issued by the Registrar of this court requiring him to appear in court on 17th day of May 2021 to show cause as to why the 2 suit properties
30 should not be sold pursuant to the decree in civil suit No. 71 of 2007; that on 17th day of May 2021 the Registrar declined to order the sale since clause 5 of the consent judgement had not been complied with (the said clause 5 was about demarcation, survey and transfer to the

5 Plaintiff of approximately 5 meters of the land) and ordered the 2nd and 3rd Applicants to return
to court once that clause was fulfilled; that to the best of his knowledge the 2nd and 3rd Applicants
did not return to court as directed by the Registrar; that he has been advised by his lawyers
that his cause of action regarding the sale of the properties in dispute arose from the various
dates when he discovered the sale and not in 2010. The 2nd Applicant in his affidavit in
10 rejoinder, however, stated that the registrar never declined to order the sale of the property as
alleged by the Respondent as the judgement of court had already ordered the sale.

The Respondent stated in his reply that he has not seen any certified copy of a judgement or
decree from a court of competent jurisdiction involving all the parties in the main suit regarding
15 the "illegality" or "propriety" of the sale as well as the creation of the mortgage by the 4th
Defendant Equity Bank over the property; that matters of "fraud" and "illegality" can be
investigated through ordinary suits where all parties are given a chance to present their
evidence. Counsel for the Respondent submits that the preliminary objection can be resolved
alongside the main suit. And as to whether the main suit was the best way to proceed, counsel
20 for the Respondent argued that it is, since third parties like the 3rd and 4th Defendants had
already acquired interest in the suit property.

In rejoinder, counsel for the Applicants stated that the Applicants did not raise preliminary points
of law but filed an application under order 7 rule 11 of the Civil Procedure Rules; and that the
25 said application is independent of points of law and ought to be heard and determined. He relied
on the case of Wycliffe Kiggundu Kato vs. Attorney General, Civil Appeal No. 27 of 1992 in this
regard. He also submitted that the case of David Tinyefunza vs. Attorney General sought to be
relied on by the Respondent is distinguishable from the present case in the sense that in that
case, the points of law were raised at the hearing of the main case and were not about rejection
30 of an application/plaint under Order 7 rule 11(d) and (e) of the Civil Procedure Rules; and that
Court in the Tinyefunza case had discretion to defer its ruling on the preliminary points of law
in its full judgement.

Section 3(3) of the Limitation Act requires an action upon any judgement to be brought within 12 years from the date when the judgement became enforceable. Counsel for the Applicants cited the case of Muhamad Kasasa vs. Jasphar Buyonga Sirasi Bwogi Civil Appeal No. 42 of 2008 where the Court of Appeal held that statutes of limitation are by their nature strict and inflexible enactments. Where limitation applies, the action cannot be maintained and no amendment can cure the defect.

I have read the consent judgement of 25th August 2010 under Civil Suit No. 71 of 2001 that apparently triggered the issue of cause of action, limitation and res judicata argued upon by the parties. Indeed, the said consent. The parties to the said consent included the Respondent in this application (then known as Walugembe David in the suit as opposed to Walugembe William David in this application), the 2nd and 3rd Applicants in this application. All the 3 signed the said consent. The 4th person also known as Eleanor Namukasa Mamulimbe did not sign and it is not indicated as to why she did not. It is indeed true that the said consent in paragraphs 3 and 4 indicated that the suit property would be sold and the proceeds apportioned to specific persons as named, one of whom was the Respondent who was entitled to 8 million. It is also true that the consent in paragraph 5 stated that before the sale, *"a small portion measuring approximately 5 meters on which part of the 1st Plaintiff's house stands shall be demarcated and surveyed off in favour of the 1st Plaintiff and transferred to him accordingly."* The 1st Plaintiff in the said suit is the Respondent in this application.

An important question to assist in the determination of the issue before this court is whether the consent judgement referred to above was actualized. It is the Respondent's averment in his affidavit in reply and in his submissions that it was not, specifically in regard to paragraphs 4 and 5. The Respondent asserts that a sale was occasioned by the 2nd and 3rd Applicants who were party to Civil Suit No. 71 of 2007, who sold to the 1st Applicant after the said 2nd and 3rd Applicants had gotten registered onto the suit land in November 2017. I have perused annex

5 BB2 to the Respondent's affidavit in reply and have seen that the said annex is a search record dated 28th day of December 2022 in respect of suit land comprised in Kyadondo Block 244 Plot 5341 and indicating that the 2nd and 3rd Applicants were registered on the said land as executors of the estate of the late Nabada Anjerina on 9th of November 2017 at 10.58am under instrument No. KCCA-00044761. I have also seen annex BB2 and BB3 to the Respondent's affidavit in
10 reply which is a search record of 19th September 2023 indicating that the 1st Applicant was registered onto suit land comprised in Kisugu, Kyadondo Block 244 Plot 5341 on 6th day of December 2022 at 3.07pm. Annex BB1 of the Respondent's affidavit in reply is a photocopy of the certificate of title in respect of land comprised in Kisugu, Kyadondo Block 244 Plot 5342. The record shows that the 2nd and 3rd Applicants got registered on the said title on 19th day of
15 June 2017 at 8.39am as administrators of the estate of the late while the 1st Applicant got registered onto the same title on 15th day of November 2021 at 3.40pm.

Annex CC1 to the Respondent's affidavit in reply also Annex DEC to the affidavits of the 1st and 2nd Applicants is a consent decree endorsed on 8th day of June 2020 by Festo Nsenge a Deputy
20 Registrar of the Family Division of the High Court. The said decree mirrors the consent judgement endorsed by the trial judge on 25th day of August 2010 but with minor variations. The said consent decree was signed by the 2nd and 3rd Applicants as well as the Respondent in this application, leading to a notice to show why execution of the decree by way of attachment and sale of the suit land should not issue. The notice to show cause was endorsed by the
25 deputy registrar on 3rd day of May 2021 and attendance in court was required on 17th day of May at 10.00am on a year not indicated in the notice.

Without going into the merits of the argument as to whether or not the registrar declined to order the sale of the suit property, it is imperative to emphasize that the consent judgement did state
30 that demarcation of the small portion of the suit land for the benefit of the Respondent had to take place before the sale. The said demarcation does not seem to have been done. Instead,
the sale and transfer of the suit land to a third party the 1st Applicant in this case was undertaken.

5 It is obvious to me that the trigger to the cause of action by the Respondent is when he
discovered that the sale of the land had been undertaken and not when the consent judgement
was endorsed by the trial judge. It is the act of selling the suit land that could show whether the
condition antecedent had been fulfilled. The Applicants cannot be heard to say that the date of
the consent judgement is the determinant of the action. To agree with that argument would be
10 tantamount to rendering paragraph 5 of the consent judgement redundant and inoperative.

In other words, the question is; when exactly would it be prudent to say that the judgement
became enforceable and therefore the limitation period began to run under section 3(3) of the
Limitation Act? Should it be 25th day of August 2010 when the consent judgement was endorsed
15 by the trial judge? Certainly not. Instead it is at the earliest 2021 when the first transfer of title
to the suit land was made to the third party the 1st Applicant. If the date of sale of the land was
known, it would be that date of sale; however, the sale date was not indicated by the Applicants
and the Respondent stated that he never saw any sale agreements. In the premises, the action
by the Respondent is not time barred.

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As to whether the said action by the Respondent is res judicata, I have perused Civil Suit No.
31 of 2023 from which this application arises. I see that the parties to the said suit are; the
Respondent who is the Plaintiff, the 1st – 3rd Applicants in the present application are the 2nd,
3rd and 1st Defendants, respectively together with Equity Bank Uganda (4th Defendant) and the
25 Commissioner Land Registration (5th Defendant). The Respondent/Plaintiff's claim against the
Defendants is for prayers, inter alia that; the alleged sale of the estate property comprised in
Kyadondo Block 244 Plot 5342 and Plot 5341 land in Kisugu, Makindye as between the 1st and
2nd Defendants on one hand and the 3rd Defendant on the other hand, is illegal and fraudulent;
a declaration that the 4th Defendant acted fraudulently and negligently in entering mortgage
30 transactions as regards Block 244 Plot 5342 land in Kisugu; an order for the cancellation of the
sale transaction between the 1st and 2nd Defendants on one hand and the 3rd Defendant; and
a declaration that the 5th Defendant acted negligently and illegally in effecting changes on the

5 titles in the suit property comprised in Kisugu Block 244 Plots 5341 and 5342. I note that these
claims though related to those in Civil Suit No. 71 of 2007 are indeed different as submitted by
counsel for the Respondent. I find from the aftermath of the consent judgement and decree in
Civil Suit No. 71 of 2007 that the illegality or otherwise of the sale of the land comprised in Block
Kisugu Block 244 Plots 5341 and 5342 could only be challenged after that sale and not at the
10 time the consent judgement was concluded.

Accordingly, I do not find that the matter is res judicata; nor do I find that it is frivolous and
vexatious as claimed by the Applicants.

15 As to whether the issues raised by the Applicants could be determined together with the main
suit, I find that it was correct for the Applicants to file this application under Order 7 rule 11 and
12 of the Civil Procedure Rules as the issues are best disposed that way.

Issue 2: What remedies are available to the parties?

20 The Applicants' counsel submitted that the Respondent's suit is barred in law, frivolous and
vexatious and an abuse of court process. He also submitted that the matter is res judicata and
offends the law and ought to be dismissed. He relied on the case of Kamunye & Ors vs The
Pioneer General Assurance Society Ltd (1971) E.A 263.

25 Counsel for the Respondent submitted that the issues raised in the main suit do not in any way
relate to Civil Suit No. 71 of 2007 and so Civil Suit No. 31 of 2023 cannot be said to be raising
matters that are res judicata.

As I have observed in my ruling above, the action of the Respondent is premised on when the
30 alleged sale of the property occurred or when the Respondent first discovered that the 1st
Applicant had transferred the suit land into his land. It, it is indeed right that the Respondent
can proceed to enforce his rights under the alleged breach of the consent judgement, and/or in

- 5 the proceedings for execution of the decree vide EMA No. 71 of 2020 if it is still alive and accommodates the interest of the Respondent.

CONCLUSION:

In the premises, I order that;

- 10 a) The application is denied.
b) Costs will be in the cause.

I so order.

15 **Dated** at Kampala this 28th day of February 2024.


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Hon/ Lady Justice Dr. Christine A. Echokit
20 **Judge.**

Right of appeal explained.