THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL N0. 34 OF 2008

BETWEEN

JOVER BYARUHANGA ::APPELLANT

AND

OKULLU SILVER COHENS::RESPONDENT NO. 1

DR. AMOS OKENY:::RESPONDENT NO. 2

(An appeal from the judgment and decree of the High Court of Uganda (Okumu Wengi, J.), dated 4th April 2006)

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my brother Egonda-Ntende, JA. I agree with his findings on all the grounds and the conclusion that this appeal be dismissed with costs here and below.

Dated at Kampala this......19th day of......Sept......2019.

....

Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke and Obura, JJA)

CIVIL APPEAL NO. 034 OF 2008

(Arising from High Court Civil Suit No. 400 of 2002)

BETWEEN

JOVER BYARUHANGA :: APPELLANT

AND

1. **OKULLU SILVER COHENS**
2. **DR. AMOS OKENY :: RESPONDENTS**

(An Appeal from the Judgment and Decree of the High Court of Uganda, [Okumu Wengi,J] dated 4th April 2006)

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the judgment of my brother, Fredrick Egonda- Ntende, JA with which I agree. I have nothing useful to add.

Dated at Kampala this ......19th...... day of ....Sept.......2019

Elizabeth Musoke

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

Civil Appeal No. 034 of 2008

(Arising from High Court Civil Suit No. 400 of 2002)

BETWEEN

JOVER BYARUGABA=====================================APPELLANT

AND

OKULLU SILVER COHENS==========================RESPONDENT NO. 1
DR. AMOS OKENY================================RESPONDENT NO.2

(An Appeal from the Judgment and Decree of the High Court of Uganda, [Okumu Wengi, J.], dated 4th April 2006)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

1. The respondents instituted High Court Civil Suit No. 400 of 2002 against the appellant seeking to enforce their right of way over an access road. The respondents' case was that the appellant had deprived them of their right of way by blocking the access road to their respective plots of land. They sought for a declaration that they are entitled to a right of way and use of an access road from their plots of land to the public road, an injunction against the appellant to refrain from blocking the access road, general damages and interest.

2. The background of this case is that a one Tomusange originally owned a big parcel of land which he subdivided and sold to different individuals including the parties.

The parties bought adjoining plots of land. The appellant is the registered proprietor of land comprised in Kyadondo Block 244 plots 6073, 6074, 1515 and 1516. The respondents are the registered proprietors of the land comprised in Kyadondo Block 244 plots 5740 and 5739. The deed plan on the title deeds of the respondents indicated an access road that traversed the respondents and appellant's land to connect to Muwayire Road. The access road was a residual plot known as Plot 3994. It had not been opened. The respondents started constructing double storeyed houses on their plots of land while the appellant set up a school on plots 5515 and 5516 that she originally acquired. For purposes of expansion, the appellant acquired plots 3970 and 5963 in 1999. She consolidated these titles which became Plot 6073 that cut across the access road.

3. Upon amalgamation of her plots of land, the appellant erected a structure that cut across the segment of the access road that traversed her land thus blocking the access road. This prompted the respondents to take steps to halt the actions of the appellant through the relevant local council authorities. The appellant also sought protection from the authorities. Upon failure to reach an amicable solution, the respondents sought for redress in the High Court by instituting HCSC No. 400 of 2002. On 3rd March 2006, the trial court entered judgment in favour of the respondents and granted them an alternative remedy of a new access road.

4. The appellant being dissatisfied with the decision of the trial court has appealed to this court on the following grounds:

> '(1) The learned trial Judge erred in law and in fact when he failed to properly evaluate the entire evidence thus reaching a wrong decision inter alia that:
>
> a) The Appellant had closed an access road to the Respondent's premises
>
> b) The Appellant's premises were water logged as a result of blocking drainage channel(s).
>
> (2) The learned trial Judge erred in law and in fact when he granted a remedy of creating a new road in an area that was not in dispute and was not pleaded.
>
> (3) The learned trial Judge erred in law and in fact when he ordered the Appellant to demolish dormitories on rented

premises and to create a road for the respondents which is not planned as a road by any planning authority.

(4) The learned trial Judge erred in law and in fact when he failed to find that there was already an existing road through which the respondents use to access their homes and used while constructing their property.

(5) The learned trial Judge erred in law and in fact when he condemned the Appellant to pay damages.'

5. The respondents oppose the appeal.

Submissions of Counsel

6. At the hearing, the respondents were represented by Mr. George Omunyokol. The appellant did not appear in court. However, in light of the fact that there were written submissions on record we decided to consider the same. The respondents opted to adopt their written submissions on record.

7. In relation to ground 1, counsel for the appellant submitted that the learned trial Judge did not refer to the evidence of DW3 and DW4 in arriving at its decision and that it equally failed to evaluate the evidence of the witnesses referred to in the judgment. Had the trial court evaluated the evidence in the exhibits adduced in evidence, it would have found that PW1 lied to court. And that the parties did not buy their plots from Tomusange as the trial Judge stated. PW1 failed to produce their purchase agreements in court and an approved plan to construct a house on plot 5740. Counsel for the appellant further contended that it is also not true that there was a road reserve created by one Tomusange for the plots. The plots of the respondents are not adjacent to those of the appellant as stated by the learned trial Judge. Counsel for the appellant argued that exhibits P. 13 and P.3 that were adduced in evidence by the respondents contradict each other and ought to have been rejected by court.

8. It is further contended that the trial court did not refer to Exhibit D9 which summarizes and puts into context chronologically all the letters written by the respondents on the matter otherwise it would have found that no access road existed or was blocked by the appellant. Counsel for appellant submitted that court did not put into consideration the evidence of DW1 and DW2 in that respect and that the

evidence of DW3 and DW4 shows that the respondents used an existing road through Plot 194 which had existed for more than 25 years. This evidence is corroborated by the evidence of DW3. Counsel for the appellant relied on Mukumbi & anor v Puran Singh Ghana [1962] E.A 630

9. It was the appellant's counsel submission that had the learned trial Judge visited the *locus in quo*, he would have ascertained that there was an existing road that the respondents used. Counsel for the appellant wrote to court requesting to visit the *locus in quo* but this was not put into consideration. Instead the court sent the registrar to visit the *locus in quo* way after submissions were closed and it is not indicated in what capacity he was sent and what transpired at the scene. Since the respondents are on the upper side of the slope on Kisugu hill, it is inconceivable that their plots of land which are not adjacent to the appellant's land could be water logged yet there is another plot between 5740 and the appellant's plot 6073. The owner of that plot has not raised a complaint. In conclusion, counsel for the appellant prayed that the first ground be answered in the affirmative.

10. In reply to ground 1 counsel for the respondents submitted that the learned trial Judge properly evaluated the evidence on record. The respondents' counsel contended that there existed a planned and surveyed access road to serve the plots which included those of the respondents. The access road was surveyed and approved by the Kampala City Council and is on plot 3994. DW1 in her testimony admitted that there was a planned access road which was subsequently amalgamated with the appellant's land. The evidence of PW1 in cross examination confirmed that an access road is indicated on the respondents' deed plans. PW3 confirmed that he opened boundaries and made a report (exhibit P.13) which confirms that there was an access road planned and surveyed to serve these plots. Counsel for the respondents further contended that the construction of the storied block for dormitories across the access road blocked the access road and the flow of storm water causing unnecessary discomfort to the respondents.

11. Counsel for the respondents further submitted that the mother title for all the plots was in the name of Tomusange who was the original proprietor of the entire land, notwithstanding that the actual person who sold the land to respondents and appellants is Edward Musoke Jaggwe, a son of Tomusange as shown in exhibits P1, P2 and D1. Counsel for the respondents argued that if the appellant contends that the

respondents told lies in respect of whom they bought the land from, then the appellant too told a lie to court in that respect.

12. Counsel for the appellant handled grounds 2, 3 and 4 jointly. Counsel submitted that the remedy granted against the appellant providing an alternative route to the respondents was unnecessary in the circumstances. He further contended that another road already existed which the respondents use to access their homes and they used it during construction. He referred to the evidence of DW3 and DW4 and Order 13 Rule 6 of the Civil Procedure Rules. Counsel for the appellant argued that the respondents admitted to the existence of an access road though it does not solve all their problems in their letter to court Ref. GO/CV/02/296 dated 22nd December 2004. The respondent no.2 admitted to this in his supplementary affidavit.

13. Concerning the drainage, counsel for the appellant submitted that the appellant created a trench through the school to solve the problem. The court made an order that a new road be opened between a one Kyomukama's fence and the defendant but there is no evidence as to whether Kyomukama owns the property adjacent to the appellant. Hence it would be impossible to open such a road. Counsel for the appellant further contended that the remedy granted by court was not prayed for or pleaded. In conclusion, counsel prayed that grounds 2, 3 and 4 be answered in the affirmative.

14. In reply to ground 2 and 3, counsel for the respondents submitted that the visit to the *locus in quo* by the registrar and the testimony of PW3, confirmed that there was already a building where the planned access road was to pass. Counsel for the respondents contended that the order of court was proper in the circumstances. In reply to ground 4, counsel for the respondents submitted, relying on the evidence of PW1, that the allegation that there was an access road serving the respondents which they used to ferry construction materials was false. The respondents lodged a complaint to the L.C.1 Chairman complaining of the deliberate blockage of access by the appellant on 25th January 2000. The L.C.1 chairman wrote a letter stopping the appellant from constructing the pit latrine in the access road. This was proof that there was only one access route to their properties. Mr. Kiyimba Hood only allowed them temporary access through his land for the purposing of ferrying building materials and what existed was merely a footpath. Counsel for the respondents concluded that the learned trial Judge was right in holding that the appellant blocked the planned access road which the respondents could use to access their homes.

15.In relation to ground no.5 counsel for the appellant submitted that there was no need to grant aggravated damages in this case. The respondents had never passed through what is now Plot 6073 as they used another route. They were never inconvenienced and failed to prove where their alleged right of way was prescribed.

16.In reply to ground 5, counsel for the respondents submitted that an award of general damages is at the discretion of court. That the law will presume general damages to be the natural and probable consequences of the appellant's acts or omission. The courts are guided by the value of the subject matter and economic inconveniences a party may have been put through. General damages should be compensatory in nature. Counsel for the respondents argued that the learned trial Judge was right in awarding the respondents damages because they suffered loss and damage as they were greatly disturbed in the enjoyment of their right.

Analysis

17.As a first appellate court, it is our duty to re-evaluate the evidence as a whole and arrive at our own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses and we have not. See Banco Arabe Espanol v Bank of Uganda, (S.C.C.A No.8 OF 1998) [1999] UGSC 1, Rwakashaija Azarious and others v Uganda Revenue Authority, (S.C.C.A No. 8 of 2009), [2010] UGSC 8; and Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123. I now proceed to do so.

Ground 1

18.The respondents are the registered proprietors of land comprised in Kyadondo Block 244 Plots 5739 and 5740. The appellant is a co-registered proprietor of land comprised in Kyadondo Block 244 Plots 5515, 5516, 6074 and 6073 (formerly 5740 and 5739). Exhibits P.1, P.2 and D.1 confirm this and indicate that the parties bought the land from Edward Musoke Jagwe, son of J.A. Tomusange. PW1 and DW1 testified that they bought the land from Mr. Tomusange though he does not appear on their respective certificates of title as the previous proprietor. DW1 at page 48 of the record of proceedings of the trial court stated that he bought Plot 6073 from Tomusange except 5515, 5516 though it is indicated on the certificate of title of Plot 6073 that he bought the land from Edward Musoke Jagwe. PW1 stated that the

residual title is in the names of Tomusange who was the original proprietor of the land but the person who sold the land to the parties was Edward Musoke Jagwe. It is clear that at one-point PW1 dealt with Tomusange while purchasing his land irrespective of who is indicated as the previous owner on the certificate of title.

19. PW1 in his testimony stated that before undertaking any development on their land, they made applications to Kampala City Council for approval of site and location plans. They were issued commencement permits that were subsequently renewed and it's upon issuance of these permits that they commenced construction. Exhibit P3 is the site and location plan for plot 5739. It was approved on 30th December 1998 by City Council and shows an access road connecting the respondents' plots of land to a road leading to Namuwongo. In the deed plan for the certificates of title, the same access road is indicated and identified as Plot 3994. According to PW1, this is a residual title in the name of Tomusange. It was left as a residue to serve as an access road. In exhibit D1, the certificate of title to Block 244 Plot 6073, formerly Plots 3539 and 5963 before amalgamation, the deed plan shows that Plot 6073 cuts off the access road by cutting off part of Plot 3994.

20. PW1 stated that he was shown this access road by Mr. Tomusange, who was the previous owner of the land. During cross examination at page 51 of the record of proceedings in the trial court, DW1 (appellant) stated that there was a planned access road though no road had been set up yet. On cross examination at page 51- 52 of the record of proceedings of the trial court, she admitted having blocked the access road with the permission of respondent no.2. At page 54, DW1 stated that she surrendered back part of her land to Tomusange and took up the strip he owned in the middle of the land. This strip constituted part of plot 3994. At page 45 of the record of proceedings, PW3, a surveyor who opened the boundaries stated that there was an access road planned and surveyed to serve the plots. However, there was a big building over the planned access road.

21. DW2 in his testimony to the trial court explained the process of road planning. It is the duty of the planning department of Kampala City Council to prepare a road scheme in consultation with the community. The scheme has to go through the District Council and finally approved by the Town and Country Planning Board which takes a considerable time. There was a prepared scheme for Wabigalo area (the area in which the parties' land is located), but the scheme hadn't yet been finalised. Hence the area did not have a planned scheme in accordance with the law.

He stated that in lieu of a legally binding scheme, they adopt the road plans of the land owners made by the land surveyors and what exists on the ground as roads. That his office cannot approve a land survey with no access to the land.

22. By a letter dated 7th September 1999 (exhibit P.12), addressed to the L.C.1 of Kalina Zone, the respondents and a one H. Kiyimba notified the Local Council of the intention to open the access road leading to their respective plots. This letter was copied to the KCC office. This was followed by a letter from the Chief Town Planner, John Musungu dated 8th September 1999 (exhibit P.8) that was copied to the various stake holders on the above matter. In this letter the Chief Town Planner recommended that the section between plot nos. 5516 and 3987, 3970 and 5963 be closed for efficient and safe utilization of the land. This in essence would close off the access road. The Chief Town Planner recommended another access road which was indicted in the annexure to the letter. By a letter dated 14th June 2004 (exhibit P.14), Ssali Bacon wrote to DW2 informing him of the steps they had taken following his recommendation. DW2 denied having approved the actions of the agents and stated that it was an oversight.

23. It appears that earlier on, by a letter dated 25th May 1999 (exhibit D.4), the appellant had written to the Chief Town Planner requesting to remove the proposed access road for convenient development of the school that was undergoing expansion. She noted that at the time the access road was not in existence and the affected owners were using an alternative road on the upper side of the plots. In a letter dated 20th August 1999 (exhibit D.5), the Chief Town Planner granted the appellant's application to amalgamate her plots of land and close the proposed and surveyed access road on condition that the land taken up in the amalgamation is surrendered at the edge of plots Nos. 3970 and 5963. It should be noted that the proposed access road was to pass at the edges of plots 3970 and 5963 to connect to Muwayire road. By this letter, an agreement had to be reached between the affected parties to surrender the land that had been portioned off from plots 5963 and 3970 to act as part of the proposed access road. However, this permission was not obtained and neither was it granted from the evidence on record.

24. The appellant was granted permission to commence construction of the school on plot no. 5515, 5516, 5963, 3970 Block 244 Kyadondo on February 2000, a year after the respondent no.1 had secured approval. The appellant commenced construction of a dormitory block across the access road which prompted the respondents to lodge

complaints with the local authorities and other relevant authorities. A letter from the Principal Ass. Town Clerk of Makindye, Noor Bukenya dated 8th June 2000 (exhibit P.9) is addressed to respondent no.1 inviting him to attend a meeting for the purpose of resolving the conflict of the blocked surveyed access to plots 194, 5739, 5740 and 3539. The Division Town Planner, Division Building Inspector, Senior City Law Officer and the Parish Council Agent were to attend. This meeting was to take place on 13th June 2000. According to PW1, respondent no.2 attended the meeting. However, nothing was resolved. In a letter dated 21st June 2000 (exhibit P.10), the respondents together with other concerned residents of Kisugu sought permission from the City Engineer & Surveyor to open the access road. The reason advanced for the urgent need to open the access road was because of encroachers who were threatening to block the access road to the detriment of the developments on the plots of land it serves. They also indicated that blockage of the access road would lead to a severe drainage problem.

25.On 4th July 2000 (exhibit P.11), the department of City Engineers and Surveyors granted the permission on condition that the residents were to bear the cost of opening the road under the supervision of Makindye Division. However, it appears that the LC111 chairman, Makindye Division wrote to the LC11 chairman Kalina Zone in a letter dated 6th July 2000(exhibit D.8) to stop the development of the access road. Further, the Department City Engineer & Surveyors in a letter dated 6th July 2007 (exhibit D.12) addressed to the residents of Kalina LC1 Zone- Kisugu revoked the permission to open the access road. The permission was withdrawn because the appellant had approached their office with evidence that there was ongoing construction on the plots on which the access road was to pass. There was already an arrangement for a meeting between the appellant, the residents and the relevant Local Council members to resolve the issue. In the letter, the respondents were advised to wait for the outcome of the meeting before opening the road. The appellant was required to suspend the development proposed on the actual access road until the issue was resolved in the meeting to be held. This meeting was never held according to PW1.

26. From the evidence above, there was a planned and surveyed access road created by the previous land owner upon subdivision that the appellant had no right to block.

27.On whether the respondents' premises were water logged as a result of blocking drainage channel(s), PW1 at page 27 of the record of proceedings in the trial court

stated due to the continued encroachment by the appellant when she started putting up structures in the access road, they experienced a serious drainage problem from storm water flowing down the hill. On cross examination at page 46 of the record of proceedings, PW3 stated that he went to Plots 5739 and 5740 during the rainy season and found the ground was wet and that rain water floats in the plots. DW2 at page 60, stated that when he visited the area he saw pounded (*sic*) water at the loop-silage from bathrooms. He was of the view that the water should be allowed to flow naturally through the school. DWI also stated that she created a trench through her school for the purposes of solving the drainage problem that had been created.

28. The foregoing evidence on record amply supports the findings of the learned trial Judge. Ground no.1 has no merit.

Grounds 2 and 3

29. The respondents in the plaint sought for a declaration that they are entitled to the right of way and use of an access road from their piece of land to a public road leading to Namuwongo. They also sought an injunction to restrain the appellant from obstructing the road of access to their houses which traversed the appellant's plot, general damages, interest and costs for the suit. The learned trial Judge decided the case in favour of the respondents and held that the respondents are entitled to the declarations sought but, on the understanding, that the access road could not pass through the middle of the appellant's school but had to be redirected in an alternative path on the boundary of the appellant's plot.

30. This alternative access road was to serve as compensation for the segment of the access road blocked by the structure that had been erected by the appellant. The learned trial Judge went ahead to mark out the alternative route which was to pass along the border of the appellant's land. He thereafter issued an injunction against the appellant to restrain her from ever blocking or in way truncating the alternative route.

31. The learned trial Judge at page 12 of the judgment held as follows:

> 'I have concluded that the defendant was the cause of the deprivation complained of by the plaintiffs in this case. She did so in a creeping manner as she came upon the land lawfully and manipulated a consolidation or amalgamation which effectively cut out the plaintiffs of passage including

> drainage. The plaintiffs are entitled to judgment against the defendant in this suit, and are accordingly entitled to the declaration sought with the clear understanding that any such access cannot now in the circumstances pass through the defendant's school building but must be re routed in an alternative path. The defendant is directed to provide the plaintiffs access by making available immediately by way of compensation for the swallowed segment of the access road a part of her land from the point where the claimed access preferred by the plaintiffs touches on her land at the area where she sank a pit latrine. The road would then pass at right angles in an east west fashion east along Mr. Kyomukama's perimeter wall. In this regard therefore an injunction would issue to prevent the defendant from ever blocking or in any way truncating this segment as by building a wall, another pit latrine or structure etc. over it.'

32. In my opinion there is no reason to fault the decision of the learned trial Judge. To unconditionally grant the declaration sought by the respondents would amount to destruction of the structure raised by the appellant and creation of a road in the middle of the school to the detriment of the appellant. However, the respondents were deprived of their right of access by circumstances which were orchestrated primarily by the appellant to the disadvantage of the respondents. No order was made for the appellant to demolish dormitories to create the alternative access road. In the interest of justice, the respondents are entitled to the remedy granted by the learned trial Judge.

33. Grounds 2 and 3 fail in my view.

Ground 4

34. The appellant contended that another road already exists which the respondents use to access their homes and that they used this road during the construction of their houses. DW4 Yosia Kizza in his testimony stated that there is a road on Hood's land used by all the residents in the surrounding area. That it is the same road the respondents used to ferry their construction material. On cross examination, he stated that at one point Hood protested the use of the road by the residents but later the road was opened. It should be noted that DW1 was the first signatory to Exhibit P.10, the letter from the residents to the City Engineer seeking permission to open

the access road. On the other hand, PW1 in his testimony at page 31 of the record of proceedings in the trial court stated that no part of Hood's land had been demarcated as a road reserve. That what existed was a mere footpath. That Mr. Hood, out of a mutual understanding, allowed them temporary access through his land for the purpose of ferrying their building materials before they used their own access road.

35. DW1 at page 54 of the record of proceedings stated that they negotiated with Mr. Hood Kiyimba to allow the respondents access through his land at a cost of UGX 6,000,000 at the suggestion of the IGG. However, Mr. Kiyimba refused the money and closed off the access. She stated that an access road was later opened through Plot 194 and cars can pass through it. That this road was opened by the City Council. However, DW2 Charles Kyamanywa, the Town Planner upon cross examination denied the contents of the letter dated 14th June 2004 (exhibit P.14) which purported to effect his directive in a letter dated 8th September 1999 to close the access through the appellant's land and set up an alternative route of access to the respondent's land. He stated that the letter was an oversight and whatever was done by the agent at Wabigalo area after 1999 was without his knowledge and approval.

36. From the above evidence, there is no other access road surveyed and demarcated to serve the needs of the respondents' plots of land. This ground therefore fails.

Ground 5

37. The trial court awarded a sum of UGX 11,000,000 as general damages for the suffering the respondents had endured. As rightly submitted by counsel for the respondent, the purpose of general damages is generally to compensate the injured party. In Uganda Revenue Authority Vs Wanume David Kitamirike [2012] UGCA 3, this court held;

> 'General damages are awardable by court at large and after due assessment. They are compensatory in nature and should offer some satisfaction to the injured plaintiff'

38. In Byabalema & Others v Uganda Transport company (1975) Ltd [1990-1994] EA 59 at page 61 it was held, inter alia, that:

> 'It is now a well settled principle that an appellate court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low'

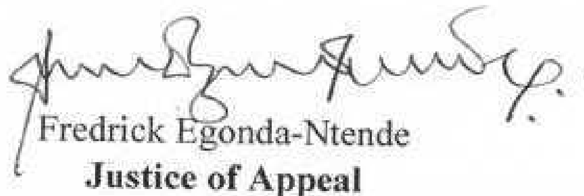
39. The Supreme Court was also of the view that general damages are compensatory and the person injured must receive a sum of money that would put him in as good a position as obtained before the wrong was committed.

40. In light of the above, I find no reason to interfere with the decision of the trial court. Clearly the trial court premised its award on the suffering and inconvenience experienced by the respondents resulting from the actions of the appellant. This ground lacks merit.

Decision

41. As Musoke and Obura, JJA, agree, this appeal is dismissed with costs here and below.

Signed, dated and delivered at Kampala this 19th day of Sept 2019.



Fredrick Egonda-Ntende
Justice of Appeal