

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
[Coram: Egonda-Ntende & Musota, JJA and Kasule, Ag. JA]

Civil Appeal No. 173 of 2012

(Arising from High Court Civil Appeal No. 42 of 2003)

BETWEEN

John Kafeero Sentongo=====Appellant

AND


Peterson Sozi=====Respondent

*(On appeal from the Judgment of High Court of Uganda (Magezi, J.) delivered
on the 30th September 2009)*

Judgment of Fredrick Egonda-Ntende, JA

- [1] I have had the benefit of reading in draft the judgment of my brother, Musota, JA. I agree with it and have nothing useful to add.
- [2] As Kasule, Ag. JA, agrees, this appeal succeeds with costs here and below. The Judgment of the High Court is set aside. The suit land, comprised in Block 273 Plot No 1011, belongs to the appellant.

Signed, dated and delivered at Kampala this ^{14th} day of *May* 2021


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 173 OF 2012

(Arising from High Court Civil Appeal No. 42 of 2003)

5 *(Arising from Chief Magistrate's Court Mengo Civil Suit No. 124 of
1996)*

JOHN KAFEERO SENTONGO ::::::::::::::: APPELLANT

VERSUS

PETERSON SOZI ::::::::::::::: RESPONDENT

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CORAM: HON. JUSTICE F. M. S EGONDA NTENDE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, AG. JA

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JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

This is a second appeal from the judgment of the High Court (Land Division) before Hon Justice Anna Magezi dated 30 September, 2009.

Background

20 The appellant sued the respondent in the Chief Magistrates; Court of Mengo vide Civil Suit No. 124 of 1996 seeking for an order of eviction of the respondents from the suit land comprised in Plot 1011,

Kyadondo Block 273 situate at Nakinyuguzi, Luwafu, Makindye Division. The appellant also prayed for a permanent injunction to restrain the respondent from occupying the said suit land and general damages for trespass.

5 The Chief Magistrates' Court, after full trial, dismissed the suit with costs against the appellant on 22nd August, 2003. Thereafter, High Court Civil Appeal No. 42 of 2003 was lodged on 22nd September, 2003 by the appellant. The High Court (Anna Magezi J.) dismissed the appeal on 20th September, 2009 hence this second appeal in this
10 court.

The appellant's case is that he bought the suit land which was vacant comprised in Plot 1011 Block 273 LRV 2154 Folio 1 from one Rocky Kyambadde on 11th April 1995 at Ug. Shs. 4,300,000/=. The vendor, Rocky Kyambadde, executed transfers in his favor and both the
15 transfers and the certificate of title were admitted in evidence at the trial. The respondent on the other hand claims to have bought the suit land from one Mrs. Rose Tabby widow to the late Dr. Tabby, in August 1992. The respondent exchanged another piece of land with the vendor and topped up with 400,000/=. At the Chief Magistrates
20 Court, it was held that the suit was not *res judicata* since the LC Court of Nakinyuguzi had no jurisdiction, the subject matter being registered land. The trial Chief Magistrate found that the respondent did not acquire good title to the suit land having purchased from Rose Tabby, who had no letters of administration to the estate of the late
25 Dr. Tabby who had died as un registered as the owner of the suit

land. In addition, the learned Chief Magistrate found that the lease had expired by the time the appellant filed the suit and as such had no cause of action.

The appellant appealed to the High Court which remitted the file back to the trial court to determine whether Rose Tabby had capacity to sell the suit land without letters of administration to the estate of Dr. Tabby. The appellant was dissatisfied with the decision of the High Court and filed this second appeal to this Court on the following grounds;

- 10 1. The learned Judge on appeal erred in law when she failed to re-evaluate the evidence on record and thereby failed to make any decision on the Appeal.
2. The learned Judge on appeal erred in law in failing to reach a decision by not either allowing the appeal or dismissing it.
- 15 3. The learned Judge on appeal erred in law when she remitted the case to the Chief Magistrates Court to investigate the existence of the Letters of Administration to the estate of Dr. Tabby when the court was to determine the appeal on the available evidence.

The respondent filed a cross-appeal on grounds similar to the appellant's grounds of appeal.

Representation

At the hearing of the appeal, Mr. Nuwagaba Gilbert appeared for the appellant while Mr. Twesigire appeared for the respondent.

Duty of a second appellate court

This is a second appeal. The role of this court as a second appellate court is laid down under **Rule 32(2)** of the **Judicature (Court of Appeal Rules) Directions** which provides that;

5 *“On any second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence.”*

This Court is therefore obliged to appraise the inferences of fact drawn by the trial court.

10 **Section 72** of the **Civil Procedure Act**, which is the applicable law concerning appeals from the High Court in the exercise of its appellate jurisdiction on second appeals provides;

72. Second appeal.

15 *(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—*

(a) the decision is contrary to law or to some usage having the force of law;

20 *(b) the decision has failed to determine some material issue of law or usage having the force of law;*

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred

which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

- 5 The effect of this provision is to bar second appeals from being filled on matters of fact or matters of mixed fact and law.

The duty of a second appellate court is intertwined with the duty of a first appellate court although the two are different. The Supreme Court has distinguished clearly the duties cast on each court in the
10 case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10 of 1997**, which is a criminal case but instructive even in civil cases on this point, thus;

*“We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court’s own
15 consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully
20 weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour, the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite
25 apart from the manner and demeanour, which may show*

whether a statement is credible or not, which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See **Pandya v. R [1957] EA 336, Okeno v. Republic [1972] EA 32** and **Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985** at page 5.

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 33(1) of the Criminal Procedure Act. It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles: See **P.R. Pandya v. R (supra), Kairu v. Uganda 1978 HCB 123.**"

Therefore, the duty of a second appellate court is to examine whether the principles which a first appellate court should have applied were properly applied and if it did not, for it to proceed and apply the said principles.

Both Counsel for the appellant and respondent argued the three grounds of appeal concurrently.

Appellant's submissions

It was argued for the appellant that the duty of a first appellate court is to weigh any conflicting evidence and draw inference of fact and

law. Counsel relied on the case of **Margaret Kato and Joel Kato Vs Nulu Nalwoga S.C.C.A No. 03 of 2013** in which it was held that;

5 *“Even where, as is in this case, the appeal turns on a question of fact, the Court of Appeal (as a first appellate Court) has to bear in mind that its duty is to re-hear the case and the Court must reconsider the material before the Judge with such other materials as it may decide to admit, the Court must make up its mind, not disregarding the Judgement appealed from but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration, the court*
10 *comes to the conclusion that the judgment is wrong.”*

In addition, counsel relied on the case of **Fr. Narsensio Begumisa & others Vs Erick Tibebaga S.C.C.A No. 17/20**. In that case, the Supreme Court held that; *“it is a well settled principle that in a first appeal, the parties are entitled to obtain from the Appeal Court its own*
15 *decision on issues of fact as well as of law.”*

It was contended that the High Court was sitting as a first appellate court but failed in its duty to re-hear the case and reconsider the evidence on record.

It was further argued for the appellant that had the learned trial
20 Judge read the judgment of the Chief Magistrate, she would not have made an order remitting the file for determination of an issue already determined by the Chief Magistrate. That the learned Chief Magistrate had already made a finding on the issue of the letters of administration which the appellate Judge should have re-evaluated

in evidence. Counsel prayed that this court re-appraises the evidence on record.

Counsel further argued that whereas this is a second appeal, where the first appellate court fails in its duty to re-appraise the evidence on record, this court is duty bound to re-appraise the evidence. To support this argument, counsel relied on the case of **Kifamunte Henry Vs Uganda S.C.C.A No. 10 of 1997** in which the Supreme Court held that; *“on a second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion...”*

Counsel prayed that this court be pleased to re-appraise the evidence on record and make findings of law and fact.

Respondent's submissions

Counsel for the respondent also argued the three grounds of appeal concurrently. Counsel argued that the High Court being a first appellate court, it had the duty to review the evidence on record and make its conclusions. Counsel relied on the case of **Gapco (U) Ltd Vs AS Transporters Ltd [2009]1 EA 145** in which the Supreme Court held that it is the duty of the first appellate court to re-appraise or re-evaluate the entire evidence on record and make its own finding of

fact on the issues while giving allowance for the fact that it had not seen the witnesses testify.

That the High Court failed to discharge its duty as a first appellate court and instead remitted the file back to the trial court. The learned appellate Judge had a duty to determine the point of law on the basis of the evidence on record and/or call additional evidence.

It was contended for the respondent that whereas **Section 80** of the **Civil Procedure Act** empowers the High Court to remit a file back for retrial or frame issues, the issue of existence of letters of Administration to the estate of the late Tabby had been investigated by the Chief Magistrate and a finding made thereon. Counsel prayed that this court allows both the appeal and cross-appeal and re-evaluates the evidence on record.

15 **Consideration of the appeal**

Ground 1

Ground one faults the learned appellate Judge for failing in re-evaluating the evidence on record.

The subject matter of this suit was first adjudicated upon by the Chief Magistrates Court at Mengo. The appellant (plaintiff) sued the respondent and sought for a declaration that the land comprised in Plot 1011 Block 273 Kyadondo belongs to the plaintiff/appellant. It was contended for the respondent/defendant that the suit land was purchased from one Tabby Rose in August 1992, wife of the late Dr.

Tabby. The learned Chief Magistrate held that the respondent had no authority to sell the suit land because she had no letters of administration to the estate of her late husband. The Chief Magistrate also held that the appellant's lease had expired and as such, the appellant/plaintiff had no locus to file the suit.

The appellant was dissatisfied with the finding of the Chief Magistrate and filed an appeal to the High Court on grounds that the learned Chief Magistrate erred in law and fact when he dismissed the appellant's suit for lack of a cause of action having resolved the issues in the appellant's favour.

The learned appellate judge held that;

“The submissions of the appellant indicate that perhaps Rose Tabby the widow to Dr. Tabby had no powers to sell the suit property because she had no Letters of Administration. This allegation should seriously be investigated because if the widow sold without letters of Administration such transaction was void ab initio. The succession Act 1906 constitutes the law of Succession in Uganda. It is applicable to all cases of intestate or testamentary Succession. S. 182 requires that probate for an appointed executor by the will afd subsequently through court. On the other hand, however letters of Administration are granted by court. It is required therefore that before disposing of any of the deceased's property either probate of Letters of Administration must

have been obtained from Court. If not done any disposal of such property is regarded as intermeddling. I therefore remit back this file to the trial court to determine whether Rose Tabby had capacity to sell the suit property.

- 5 As a first appellate court, the High Court had a duty to re-evaluate the evidence on record.

In **Father Narsensio Begumisa and 3 others Vs Eric Tibebaga Supreme Court Civil Appeal No. 17 of 2002**, Court held as follows;-

10 *“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and*
15 *conclusions.”*

In **Coghlan vs. Cumberland (1848) 1 Ch. 704**, the **Court of Appeal of England** put the matter as follows -

20 *“Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full*

consideration the court comes to the conclusion that the judgment is wrong.... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.”

Likewise, in **Kifamunte v Uganda S.C.C.A No. 10 of 1997** court stated that:

“The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”

See also the cases of **Pandya v. R [1957] EA 336, Bogere Moses v. Uganda SCCA No. 1 of 1997 and Rule 30(1) of the Court of Appeal Rules** that are to the same effect.

From the record, it is clear that the learned appellate judge erred in ordering that the file be sent back for determination at the Chief

Magistrates Court. Being a first appellate court, the High Court had a duty to re-evaluate and re-appraise the evidence on record and come to its own conclusion, which was not done. Therefore, ground one of the memorandum of appeal succeeds.

5 **Grounds 2 and 3**

I reiterate that this is a second appeal and the duty of this court is to examine whether the principles which a first appellate court should have applied were properly applied and if it did not, for it to proceed and apply the said principles.

10 The issues for determination in this appeal are two namely;

1. Whether the respondent acquired good title from Mrs. Rose Tabby without letters of administration to the estate of her late husband.
2. Whether the Chief Magistrate erred in law and fact in finding
15 that the appellant had no cause of action on grounds that the lease upon which he had acquired the suit land had expired.

Issue one

The appellant's case is that the suit land comprised in Plot No. 1011
20 Block No. 273 Kyadondo belongs to him. The appellant produced a copy of the sale agreement between himself and Kyambadde, a copy of the transfer forms and certified copy of the land title. In his testimony at the Chief Magistrates Court, he stated that he bought the land from Rock James Kyambadde and the agreement of sale was

witnessed by one Paul Mukasa. The appellant stated that after verifying the land title that Kyambadde had and proving from Kyambadde's wife that the land belonged to him and was unencumbered, he went ahead and paid the purchase price of 4.3m= 5 and received the land title from Kyambadde. At the time of signing the agreement, the lease for the land had not expired and was running for 7 years. The appellant testified that when he bought the land, there was no one on it.

The vendor, Kyambadde, died in June 1995 and thereafter, the 10 chairman of the area accused the appellant of trespassing on the land.

For the respondent, it was argued that the respondent bought the suit land from one Rose Tabby (now deceased) wife of the late Dr. Tabby on 19/8/92. Rose Tabby gave the respondent a letter from the 15 City Council for extension of the lease and transfer forms on which the couple had bought the land from James Rocky Kyambadde in 1989. The respondent testified during cross examination that the late Rose Tabby showed him the Letters of Administration but did not recall who signed them or which court granted them. The letters of 20 administration were never exhibited because the respondent claims not to have got a copy of them.

The first point of law in this regard is based on **Section 11** of the **Administrator General's Act Cap 157** which provides that;

11. Intermeddling with property of deceased.

(1) When a person dies, whether within or without Uganda, leaving property within Uganda, any person who, without being duly authorised by law or without the authority of the Administrator General or an agent, takes possession of, causes to be moved or otherwise intermeddles with any such property, except insofar as may be urgently necessary for the preservation of the property, or unlawfully refuses or neglects to deliver any such property to the Administrator General or his or her agent when called upon so to do, commits an offence; and any person taking any action in regard to any such property for the preservation of the property shall forthwith report particulars of the property and of the steps taken to the agent, and if that person fails so to report he or she commits an offence.

(2) Any person who commits an offence under this section is liable on conviction to imprisonment for a period not exceeding three months or to a fine not exceeding two hundred shillings or to both, but without prejudice to any civil liabilities which he or she may have incurred.

Under the above provision, it is an offence for a beneficiary to intermeddle with property of a deceased without authority or to transfer property of an intestate or testate without authority except to act in preservation thereof.

It appears to me that the late Rose Tabby sold the suit land to the respondent without letters of administration. Whereas the respondent claims to have seen the letters of administration, he did

not get a copy of the grant or the instrument under which the said Letters of Administration were granted. The learned Chief Magistrate held as follows;

5 *"In the instant case, there was no proof that Rose Tabby applied for and obtained letters of administration to administer the estate of her late husband Dr. Tabby. No letter of administration was tendered by the defendant in evidence to prove that the person from who he was buying this land had the powers to sell it in the eyes of the law. Both the defendant and his witness (the LC*
10 *official) claimed to have seen the letters of administration brought by the late Rose Tabby but a copy of such letters was not produced in court.*

15 *When asked which court issued the letters of administration, both witnesses did not know. The LC official told court that letters of administration were signed by one Owiny Dollo. To this court's memory, Mr. Owiny Dollo is a practicing advocate and no letter of administration can be signed by an advocate, but by either a Judge, Magistrate or Registrar. Even then no copy of that letter signed by Owiny Dollo was ever produced in court for*
20 *scrutiny.....*

25 *At this point, it cannot therefore, be said, and this court agrees with the submissions of the plaintiff's counsel that the defendant received good title from the late Rose Tabby because she did not have the legal capacity to dispose of her late husband's property for want of a grant from a competent court."*

From the above excerpt, it is my considered view that the above finding of the learned Chief Magistrate was a correct interpretation of the law. The respondent could not have acquired good title from the late Rose Tabby, having sold without letters of administration.

- 5 The second issue is whether the appellant had no cause of action on grounds that the lease upon which he had acquired the suit land had expired.

The appellant bought the suit land on 11th April, 1995 and produced a copy of the sale agreement between himself and Kyambadde, a copy
10 of the transfer forms and certified copy of the land title. In his testimony at the Chief Magistrates Court, he stated that he bought the land from Rock James Kyambadde and the agreement of sale was witnessed by one Paul Mukasa. The appellant stated that after verifying the land title that Kyambadde had and proving from
15 Kyambadde's wife that the land belonged to him and was unencumbered, he went ahead and paid the purchase price of Ug.shs. 4.3m= and received the land title from Kyambadde. By the time the appellant bought the land from Kyambadde, the lease had two months to expire.

- 20 Both the appellant and the respondent were seeking to have the lease extended by Buganda Land Board but the board informed them to await the outcome of this case. When the appellant's lease expired on 1st June, 1995, the appellant applied for an extension of the lease with Buganda Land Board which had taken over management from
25 Kampala Capital City. Buganda Land Board did not either renew the

lease or decline to renew but was awaiting the outcome of the suit in court.

The case of **Habre International Trading Co. Ltd Vs Francis Rutagarama Bantariza S.C.C.A No. 3 of 1999** held as follows;

5 *On the question of whether the expiry of the five years for which the plaintiffs lease was initially granted the lease expired by effluxion of time, the appellant showed that he had applied to have it extended. This is confirmed by the letter of one B.H. Byamugisha for Secretary, Uganda Land Commission, dated*
10 *22nd June, 1992 and reference ULC/1 22 on Uganda Land Commission's headed paper and reading as follows*
...It is obvious that for all intents and purposes, the lease was still considered by the relevant authorities as subsisting even though it required regularization. In fact, this phenomenon is
15 *quite common in statutory and other leases which are subject to planning regulations and development plans. They are subjected to periodical renewals, especially when the controlling authority has yet to approve whatever developments are authorized on the land. It does not, in anyway mean, that pending renewal,*
20 *leaseholders for short periods are expected to stop their developments or that overnight those developments, become illegal and owners thereof, trespassers. On the contrary, as earlier observed, before such leases can expire or become the subject of cancellation, elaborate procedures which may involve*
25 *court proceedings must be complied with...*

Whereas the facts in the Habre International case (Supra) are different from the present case, the principle enunciated in that case are applicable here. The appellant had a lease that had been granted to the late Kyambadde, sold to him (appellant) on 11th April, 1995.

5 The appellant was given a copy of the sale agreement between himself and Kyambadde, a copy of the transfer forms and certified copy of the land title. At the time of this purchase, the lease had two months to expire. The appellant applied for extension of the lease with Buganda Land Board but the grant remained pending the
10 determination of the court case.

There is an affidavit sworn by Mrs. Ruth Kyambadde, the wife of the late James Rocky Kyambadde on page 75 of the record clarifying the sale of the suit land. Paragraph 3 of the affidavit states that;

15 *"THAT on the 12th day of April, 1995, my said husband sold the aforesaid land to MR. JOHN SENTONGO KAFEERO in my presence at 4,300,000/= (Four million three hundred thousand) paid in full under a written agreement and on the same day handed over the title to the purchaser (SSENTONGO) and signed transfer forms authorizing the land to be transferred into the*
20 *names of the purchaser..."*

Owing to the above, it is my considered view that the appellant, having bought the suit land from the late Kyambadde, and received the land title and signed transfer forms thus awaiting the outcome of the civil suit in court before extension of the lease and transfer, had
25 *locus standi* to file the suit at the Chief Magistrates Court.

This appeal therefore succeeds in favour of the appellant. The judgments and orders of the High Court and the Chief Magistrate's Court are hereby set aside and substituted with the following orders;

- 5 1. The suit land comprised in Plot 1011, Kyadondo Block 273 belongs to the appellant.
2. The costs of this appeal, in the High Court and Chief Magistrate's Court are awarded to the appellant.

Dated this 4th day of May 2021

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Stephen Musota

15 **JUSTICE OF APPEAL**

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL APPEAL 173 OF 2012

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*(Arising from High Court Civil Appeal No. 42 of 2003)
(Arising from Chief Magistrate's Court Mengo: Civil Suit No. 124 of 1996)*

John Kafeero Sentongo ::::::::::::::::::::::::::::::::::::::: Appellant

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Versus

Peterson Sozi ::::::::::::::::::::::::::::::::::::::: Respondent

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**Coram: Hon. Mr. Justice F.M.S. Egonda Ntende, JA
Hon. Mr. Justice Stephen Musota, JA
Hon. Mr. Justice Remmy Kasule, Ag JA**

Judgment of Hon. Justice Remmy Kasule, Ag. JA

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I have had the privilege of reading through the draft Judgment of my brother, Hon. Justice Stephen Musota, JA, whereby he concludes that the appeal be allowed.

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I concur in the decision to allow the appeal and also with the declaratory order that the suit land belongs to the appellant.

I too agree that the appellant be awarded the costs of the appeal and those in the Courts below.

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Dated at Kampala this.....^{4th}.....day of.....^{May}.....2021.



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**Remmy Kasule
Ag. Justice of Appeal**

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