THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 16 OF 2013

Coram: *Cheborion Barishaki, Stephen Musota, Christopher Madrama, JJA.*

SERUFUSA RONALD::APPELLANT

VERSUS

1. **ZIRIMENYA JIMMY**
2. **MARY FRANCIS WASSWA**
3. **REGISTRAR OF TITLES::: RESPONDENTS**

(An appeal from the decree and judgment of Hon. Justice Faith Mwondha delivered on 28th September, 2012 in Civil Appeal No. 45 of 2010.)

JUDGMENT OF CHEBORION BARISHAKI, JA.

The appellant and 14 others brought a claim against the respondents in the Chief Magistrate's Court of Nakawa for declaratory orders seeking cancellation of the title of land comprised in Block 216 plot 2899 located at Buye, Kyandodo, general damages and costs. The defendants denied the claim.

Background

The appellant and 14 others were beneficiaries of the estate of the late Chrisestom Waswa who died intestate on the 6/5/06. The defendants, now respondents, also children of the deceased, are said to have fraudulently forged a power of attorney purporting that the deceased had given the

disputed land to the 1st respondent. The 1st respondent is said to have fraudulently signed transfer forms in favour of his biological mother the 2nd respondent which resulted in the cancellation of the name of the deceased from the register and the subsequent entry of the 2nd respondent made on 15th-9-06 by instrument No. KLA 305893.The appellant averred that the Powers of Attorney and transfers were forged and fraudulent.

On their part, the respondents averred that the suit property was bought by the 2nd respondent and the late Chrisestom Waswa in form of kibanja and later mailo interest was acquired by the 2nd respondent. That the deceased acquired several pieces of land in other parts of Kampala and the suit land was given to the 2nd respondent by her late husband. That the appellants and their mother got plots in other parts of Kampala and that the 1st respondent was given powers of attorney by the deceased. The respondents used the Powers of Attorney to transfer the suit land into the names of the 2nd respondent and the 1st and 2nd respondents denied any fraud on their part. The respondents further denied that the suit property belonged to the estate of the late Chrisestom Waswa and argued that the appellant and 14 others were not entitled to share in the same.

The learned trial Magistrate decided in favour of the appellant. She declared and ordered that; the transfer was fraudulently done for cancellation of the respondent`s name from the title of the suit land and that the file be sent to the High Court for implementation, general damages of UGX. 5,000,000/= and costs of the suit.

Being dissatisfied with the above decision, the respondents appealed to the High court on the grounds that;

1. *The learned trial Magistrate erred in law and fact when she accepted the opinion of the hand writing expert to the effect that the signature on the power of Attorney the subject of the suit was not the true signature of the deceased Chrisestom Waswa, when the said opinion was based on questionable photocopies of documents.*
2. *The learned Trial Magistrate erred in law and fact when she accepted the report of the handwriting expert to the effect that the power of attorney the subject of the suit was forged, when there was before court another, unquestionable power of Attorney, with a similar signature, which the deceased Waswa had also thumb- marked.*
3. *The Learned Trial Magistrate erred in law and fact when she found that the Power of Attorney was forged.*
4. *The learned trial Magistrate erred in law and fact when she entertained a claim for and made an order of cancellation of a certificate of title to the land comprised in Kyandodo Block 216, plot 2899 at Buye, when such a matter was outside the scope of her jurisdiction.*
5. *The learned trial Magistrate erred in law and fact when she disregarded the explanation of the defendants that the suit land was, in any event, not one which the respondents were entitled to claim an interest.*
6. *The trial Magistrate erred in law and fact when she purported to order the transfer of the case file to the High Court.*

7. *The learned trial Magistrate erred in law and fact when she awarded the respondent general damages in excess of Ushs. 5,000,000/= without basis.*

8. *The learned trial Magistrate erred in law and fact when she sealed a decree that was not drawn and presented in compliance with the law.*

9. *The learned Magistrate erred in law and fact when she found for the 14 plaintiffs who, in the pleadings and up to close of the hearing were never disclosed.*

The first appellate court decided in favour of the respondents and found that;

1. *The plaintiff/ respondent didn`t have the locus standi to sue for reasons already given in the judgment.*

2. *Even if he had locus standi, which was not the case, his case fell short of the standard of proof of fraud in a claim like this which had to be slightly higher than mere balance of probabilities.*

3. *That the learned trial magistrate prejudiced the case of the defence when she failed to strike out the other plaintiffs whose identity had not been disclosed and or mentioned anywhere in accordance with Order.1 r.10 (2) of the Civil procedure rules.*

4. *There was evidence that the plaintiffs were merely seeking for ways of enriching themselves unjustly when they frustrated the process started by defendant 2 of obtaining letters of administration and yet they had no interest in the suit land, legal or otherwise. The title of the 2nd defendant could not be impeached under the law.*

The learned appellate judge allowed the appeal and set aside the decision of the learned trial magistrate with costs of both the appellate court and the trial court.

Being dissatisfied with the decision of the 1st appellate court, one of the respondents, Serufusa Richard, appeals to this court on the following grounds;

1. *The learned trial Judge erred in law and fact when she failed to make a finding that the transfer of the Suit land by the 1st defendant into the names of the 2nd defendant was ultravires the powers of Attorney.*
2. *The learned trial Judge erred in law and fact when she failed to make a finding that upon the demise of the Late Tom Waswa, the Power of Attorney signed on 6th May 2006 automatically lapsed and could not be used to transfer property post humously in August 22, 2006.*
3. *The learned trial Judge erred in law and fact when she held that the plaintiff had no locus standi to institute the suit against the defendants/ respondents.*

At the hearing of the appeal, the appellant was present in court and his lawyer was not. Mr. Saadi Ssengendo Rashid appeared for the 1st and 2nd respondents. The appellant prayed that court hears the appeal since it had delayed despite the absence of his lawyer. To this end, Court at the request of the parties adopted conferencing notes of both parties as their submissions which have been relied on to determine the appeal.

Appellant's Submissions.

On ground 1, it was submitted for the appellant that it was erroneous for the learned trial judge to make a finding that the 1st respondent rightly and lawfully used the power of attorney signed by the deceased to transfer the suit land into the names of the 2nd respondent because the Power of Attorney expressly mentioned that it could only be used for monetary benefit to the donor and did not include powers to donate and since the transfer form executed by the 1st respondent in favour of the 2nd respondent indicated that there was no monetary gain in favour for the donor, it was not effective because the donee could only act within the ambit of the powers given to him.

On ground 2, it was submitted for the appellant that the powers of attorney became ineffectual upon the demise of the donor. That the same was executed in 2004 and the donor died in May 2006 and yet the transfer premised on the power of Attorney was effected in August 2006, 3 months after the death of the donor. Counsel argued that a person cannot continue to be an attorney of the deceased and the powers cannot be used post humously. He contended that at the time the transfer was effected, the 1st respondent had no powers at all.

On ground 3, counsel submitted that the appellant was a beneficiary of the estate of the late Waswa because he was a linear descendant of the deceased. He contended that it was erroneous for the learned trial judge to hold that the appellant had no locus standi to institute the suit because he had not yet obtained letters of administration.

Respondent's Submissions

In reply, it was submitted that the appellant`s grounds raised no specific issues alleged to have been wrongfully decided by the Judge and sought no order for court to make as required in Rule 86 (1) of the Judicature Court of Appeal rules directions. That the ground is not hinged on a matter that was ever raised by any party in the courts below. He cited **John Ken Lukyamuzi v. Attorney General & EC, SCCA No.2 of 2007 page 17** for the principle that all efforts by the respondents to raise new issues on appeal which were not canvassed anywhere in the earlier court were futile.

Counsel further contended that the issue regarding the power of attorney in the 1st appellate court was whether the power of attorney was forged and the learned appellate judged decided that the appellant had not led evidence to prove fraud. That the ground that the transfer of the suit land into the names of the 2nd respondent was ultra vires the power of attorney, was never traversed in the courts below. That the ground also raises a matter of fact in the 2nd appeal contrary to the clear provisions of section 72 (1) of the CPA and Abdu Mugenyi v Getu Tumuhairwe SCCA No.27 of 1994, Kobusinge vs Nyakana SCCA 5/04, Mitwalo Magyeno vs Medadi Mutyaba SCCA 11/96 which restrict 2nd appeals to only matters of law.

On ground 2, it was submitted for the 1st and 2nd respondents that the learned appellate judge correctly found that the power of attorney was made in 2004, 4 years and a half before the death of the late Chrisestom and that the appellant`s claim that the same lapsed upon his death is unfounded in law and fact. That this issue was never traversed in the trial and in the first

appellate court where the issue was whether the power of attorney was forged or not which was resolved in the negative. That the appellant`s arguments hereunder are misplaced and misconceived as it also raises points of mixed law and fact.

On ground 3, it was submitted for the 1st and 2nd respondents that the appellant failed to prove that he was a customary heir and a beneficiary to the estate of Chrisestom Waswa in general and in relation to the suit land. Counsel submitted that the first appellate judge distinguished the facts in **Israel Kabwa v Martin Banoba Musega, Civil Appeal No.52 of 1995** to the instant case. That in Israel Kabwa the respondent proved that he had inherited his father`s land and had gone ahead to obtain a certificate of no objection in line with the provisions of section 191 of the Succession Act unlike the appellant who did not lead any evidence.

Analysis

This is a second appeal and the role of this court is laid down in Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions S.I. 13–10, which provides that on any second appeal from a decision of the High Court acting in the 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 inferences of fact drawn by the trial court.

Section 72 of the Civil Procedure Act on Second appeal provides;

(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;(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*.

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

Section 72 (supra) restricts grounds on which a second appeal may be preferred. The Supreme Court in **Henry Kifamunte v Uganda Criminal Appeal No.10/97** explained that on 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; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law.

Under grounds 1 and 2 of the appeal, the learned appellate judge is faulted for failing to make a finding that the transfer of the suit land by the 1st respondent into the names of the 2nd respondent was ultra vires the powers

of attorney which powers became ineffectual upon the demise of the donor because they were executed in 2004 and the donor died in May 2006. Counsel argued that a person cannot continue to be an attorney of the deceased and powers of attorney cannot be used post humously. He contended that at the time the transfer was effected, the 1st respondent had no powers at all.

It was the 1st and 2nd respondents` submission that the issue of lapse of Powers of Attorney was never traversed at trial and by the first appellate court. The issue in that Court was whether the Powers of Attorney were forged or not which was resolved in the negative. Counsel contended that the appellant`s arguments were misplaced and misconceived because they also raised points of mixed law and fact.

The trial Court found that the powers of Attorney were fraudulently obtained through forgery.

The appellant Judge failed to find any act of dishonesty on the part of the defendants because the Powers of Attorney were made in 2004, almost 4 ½ years before the deceased passed on.

It is clear from the record that issues regarding the learned judge`s failure to make a finding that a transfer of the suit land by the 1st respondent into the names of the 2nd respondent was ultra vires the powers of attorney and on the allegation that the Powers of Attorney became ineffectual upon the demise of the donor and could not be used to post humously, were never raised or traversed both during the trial and in the 1st appellate court.

It is trite that on a second appeal, the grounds of appeal should specifically point out errors observed in the course of the trial of the 1st appeal, including the decision of the 1st appellate court, which the appellant believes occasioned, a miscarriage of justice. In the instant case, the appellant raises new issues for determination which neither arose in the trial Court nor in the 1st appellate court.

The Court of Appeal of Ontario in **Kaiman v Graham, 2009 ONCA 77, 245 O.A.C. 130** while dealing with a similar issue observed that the general rule is that appellate courts will not entertain entirely new issues on appeal. The rationale for the rule is that it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal: The burden is on the appellant to persuade the appellate court that all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial. This burden may be more easily discharged where the issue sought to be raised involves a question of pure law. However, the decision of whether to grant leave to allow a new argument is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties.

I am persuaded by the above finding of the Court that although a matter may not have been conversed in the lower Court, if it touches on a part of the law then the appellant Court has discretion to consider it. In this case, the facts necessary to address the points are before the court and the grounds are hinged on questions of law.

The two points of law to be addressed are; whether the power of Attorney can be used to do things beyond what it provides and whether it can be used after the death of the donor.

According to the **Osborn's Concise Law Dictionary 11th Edition page 315,** a power of attorney is a deed by which one person empowers another to represent or act in his stead generally or for specified purposes. It is a document which grants authority of the Principal to an agent to act on behalf of the principle. See: **Gold Trust Bank (U) Ltd vs Josephine Zalwango Nsimbe HCCS 226/1992.**

In **Fredrick Zaabwe vs. Orient Bank Ltd and 5 Others SCCA 04/2006** court held that a donee of a power of Attorney acts as an agent of the donor.

In **Halsbury's Laws of England, Fourth Edition: Re issue: Volume 1(2) Butterworth's, paragraph 46**, a power of attorney has to be construed strictly by the Courts.

In **Midland Bank Limited v Reckitt [1933] AC 1 at 16; Bryant, Powis, and Bryant Limited v La Banque du people [1893] A.C 170 at 177**, it was held that in instances where there is need to determine whether an act was done in excess of authority conferred under a Power of Attorney, the construction of the whole instrument of authority has to be restricted to the four corners of the instrument.

The Privy Council in **Bryant, Powis, and Bryant Limited V. La Banque Du Peuple [1893] A.C.170 at 177** held that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority

conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

In **Jacobs versus Morris, [1902] A.C. 816**, a loan to an agent was made on the basis of a Power of Attorney that did not confer powers to borrow, and the principal was held not liable for the same. Their Lordships of the Court of Appeal, England, expounded that there must be strict adherence to the authority conferred by a Power of Attorney. If the agent in pretended exercise of his authority acts in excess of and outside the reasonable scope of his special powers, the third party will be unable to make the principal liable.

The Powers of Attorney in issue were issued by Chrisestom Wasswa of Kiwatule Sabadoa Kira, registered proprietor of the land who irrevocably appointed Jimmy Zirimenya as his Attorney with the following powers;

i) To mortgage, sale or pledge in whole or in part, the property to any person or financial institution either himself or jointly with others to secure monies, advances or other banking facilities for the benefit, use and purpose of the Attorney and to execute all documents required for the purpose.

ii) To commence, prosecute or compromise legal proceedings of all kind in connection with the property.

These powers of Attorney were issued in 2004 with specific power to the donee to mortgage, sale or pledge in whole or in part, the property to any person or financial institution either himself or jointly with others to secure monies,

advances or other banking facilities for the benefit, use and purpose of the Attorney and to execute all documents required for the purpose.

The evidence on record is to the effect that on the 22nd August 2006 the donee/attorney signed and executed transfer forms in favour of the 2nd respondent Mary Francis Wasswa. There was no indication that the transfer resulted from a sale.

There is nothing in the Power of Attorney vesting the Attorney with powers to transfer the land, the subject of the power of Attorney, to some other party. This transfer was not because of the exercise of the special powers like sale or consequently from failed payment of a mortgage or a pledge.

The Power of Attorney donated to the 1st respondent as donee/attorney never authorized him to transfer ownership of the property to the 2nd respondent as the donor`s wife. For any transfer to be lawful it had to arise from a mortgage, sale or pledge of the property and if the donor intended that the property be transferred to his wife, the power of Attorney would have expressly stated so. The power of attorney did not expressly nor by necessary implication authorize the 1st respondent as an attorney to transfer the property to the 2nd respondent. The transfer was therefore ultra vires the Powers of Attorney.

As to whether the Powers of Attorney can be used post humously, the record shows that the Powers of Attorney were executed in 2004 and the donor, Mr. Chrisestom Wasswa died in May 2006. The transfer of the suit property in the names of the 2nd respondent occurred on 22nd August, 2006, 3 months after the demise of the donor.

The position of the law is that a Power of Attorney terminates upon the death of the Principal and an agent can only act for a living person. When an agent carries out an act, he carries it out as though it was the Principal carrying it out. Therefore, if the Principal is dead, then they obviously cannot carry out the act. A Power of Attorney can only be effective after the Principal's death where the Agent effects an act without actual knowledge of the principal's death.

A donee of powers of Attorney cannot be seen to hold out and act on behalf of donor who is dead especially where the Power of Attorney did not authorize the Attorney to act in that capacity after the donor`s death. The 1st respondent`s authority as an Attorney lapsed upon the donor's death in May 2006 and therefore the act of transferring the suit land into the names of the 2nd respondent, after the donor`s death was illegal and void.

A power of Attorney cannot act post humously. There are laid down procedures in the law of succession which provide for succession where a person either dies testate or intestate and a power of attorney, which automatically lapses upon the death of the donor, cannot replace the said law. The best procedure would have been for the 1st respondent to obtain the grant of letters of probate or administration to warrant him to dispose of the suit property.

In view of the foregoing, the transfer of the suit land in the names of the 2nd respondent by the 1st respondent as a donee of powers of attorney acting after the death of the donor was not only ultra vires the specific powers of attorney but was also illegal and thus void.

The appellant submitted under ground 3 that he is a beneficiary to the estate of the late Chrisestom and his interest in the property was not conferred by letters of administration but by the virtue of the fact that he is a linear descendant of the deceased.

The respondents replied that the appellant lead no evidence to prove that he was the customary heir and a beneficiary to the deceased`s estate and the case of **Israel Kabwa v Martin Banoba Musega** (Supra) which he had relied on to buttress his argument was distinguishable from the instant case.

In dealing with this issue, the learned trial Magistrate held that The defendants do not deny the plaintiff`s being beneficiaries of the late chrisestom Waswa `s estate. They only contested to the property in question being part of the estate since they all admit to be step brothers and sisters with their step mother, the biological mother to D1 but the learned appellant Judge held that there is no evidence adduced by the respondent to prove that he had tangible interest if any in the suit land other than claiming to be one of the many children of the deceased. He said his father had houses for rent on the suit land where he was getting money for the family. He did not state how he obtained that customary heirship. On the contrary DW2`s evidence was very clear and narrated very well how she first cohabited with the deceased and that the first Kibanja/land was there before the same became registered.

The case of ***Israel Kabwa vs. Martin Banoba Musiga Civil Appeal NO.52 of 1995*** recognized legitimate beneficiaries' right to protect their interest in

an intestate's estate. In that case, the respondent was a customary heir and son to an intestate, and had developments on the land in question. Although he did not possess letters of administration at the time, he successfully instituted legal proceedings for the cancellation of the appellant's title to the suit land on account of fraud. The appellant's first ground of appeal was whether or not the respondent had *locus standi* to institute legal proceedings against him. It was held:

Court held that in that case that the respondent's *locus standi* was founded on his being the heir and son of his late father. In terms of section 28(1)(a) and 28(2) of the Succession Act as amended, the respondent could very well be entitled to 76% or more of the estate of his father. He is thus defending his interest. His position as heir has been enhanced by the belated grant of letters of administration in that way. Kotham's case is irrelevant. Therefore, I think that ground one should fail. It would still fail, in my view, even if no letters of administration had been obtained because the respondent's right to the land and his developments thereon do not depend on letters of administration.

The above decision indicates that a son and customary heir to the deceased is a legally recognized beneficiary to his estate by virtue of Section 27 of the Succession Act. The respondent in that case had an interest in protecting or preserving the deceased's estate and therefore did have *locus standi* to sue without first obtaining letters of administration. The principle therein is that a beneficiary of an estate as prescribed under section 27 of the Succession Act does have *locus standi* to institute legal proceedings for purposes of

protecting or preserving an estate. Beneficiaries of an estate of a male intestate, as is the case presently, include lineal descendants of the intestate. **See: Section 27(1) of the Succession Act.**

In the instant case the applicant as a son to the late Enock Mugisha, who was the 1st defendant in the trial Court, is in the direct descending line of the deceased and therefore a lineal descendant. He has all the reasons to protect this estate. I find this ground sustainable."

The law is clear that a son as a beneficiary can sue. In the instant case, the appellant was not required to prove that he was a customary heir and needed to obtain letters of administration. A customary heir needs no grant of letters to prove his interest since his right is inherent as long he/she proves to be the heir. The appellant brought this action against the respondents as a son thus beneficiary. He was a son of the deceased who died intestate which fact the respondents did not dispute. He had all reasons to protect his interest in the estate. This ground succeeds.

In light of the above, this appeal succeeds and since Musota and Madrama, JJA also agree, the appeal shall succeed with the following orders;

1. The judgment of the lower Court is hereby set aside.
2. The respondents shall pay the costs of the appeal and in the Court below.

Dated at Kampala this ..... 10th ..... of..... Nov .....2022.

Cheborion Barishaki
Justice of Appeal

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION BARISHAKI, STEPHEN MUSOTA, CHRISTOPHER MADRAMA, JJA)

CIVIL APPEAL NO 16 OF 2013

SERUFUSA RONALD} ..... APPELLANT

VERSUS

1. ZIRIMENYA JIMMY}
2. MARY FRANCIS WASSWA}
3. REGISTRAR OF TITLES} .....RESPONDENTS

(*Appeal from the decree and judgment of Hon. Justice Faith Mwondha delivered on 29th October 2012 in Civil Appeal No. 45 of 2010)*

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Cheborion Barishaki, JA.

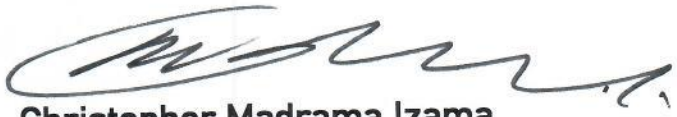
I concur with the judgment and orders proposed that the appeal succeeds with the orders he has proposed.

I wish to add that the plaintiff suit as a person who could be entitled to distribution in the estate of his father as a beneficiary but this is a matter to be considered and determined under the law of succession.

Secondly even where the registration of the second respondent is cancelled as ordered, this does not take away the right of the second respondent, as a surviving widow, to the estate of the deceased and the property, the subject matter of the suit, has to be administered in accordance with the law of succession.

In the premises, I concur that the appeal succeeds with costs in this court and in the Court below and I have nothing further to add.

Dated at Kampala the 10th day of Nov 2022



Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 16 OF 2013

SERUFUSA RONALD :: APPELLANT

VERSUS

1. **ZIRIMENYA JIMMY**
2. **MARY FRANCIS WASSWA**
3. **REGISTRAR OF TITLKES :::::::::::::::::::::::::::::::: RESPONDENTS**

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Cheborion Barishaki, JA.

I agree with his analysis, conclusions and orders he has proposed.

Dated this 16th day of Nov 2022

Stephen Musota
JUSTICE OF APPEAL