

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**COMMERCIAL DIVISION**  
**MISCELLANEOUS APPLICATION NO. 0928 OF 2023**  
**ARISING FROM CIVIL SUIT NO. 0505 OF 2023**  
**UGANDA MUSLIM SUPREME COUNCIL ::::::::::::::::::::::::::::::::::: APPLICANT**  
**VERSUS**  
**JUSTUS KYABAHWA ::::::::::::::::::::::::::::::::::: RESPONDENT**

Before Hon. Lady Justice Harriet Grace Magala

**RULING**

**[1] Background**

This application was brought under Order 36 rules 3(1) and 4; and Order 52 rules 1 and 2 of the Civil Procedure Rules as amended seeking for orders that the Applicant be granted unconditional leave to appear and defend civil suit no. 0505 of 2023; and costs of the suit.

The Respondent's/Plaintiff's claim against the Applicant /Defendant in HCCS No. 0505 of 2023 is for:

- (i) A declaration that the Defendant/Applicant is indebted to the Plaintiff /Respondent in the sum of Ugx. 18,909,184,000/= being the purchase price for land comprised in LRV 3693 Folio 12 Ranch No. 31A land at Ssembabule (*hereinafter referred to as "the Property"*) together with definite contractual interest; and
- (ii) Costs of the suit.

The claim against the Applicant /Defendant arises out of an agreement for the sale and transfer of land executed between Uganda Muslim Supreme Council (UMSC) the Vendor and Justus Kyabahwa the Purchaser on the 24<sup>th</sup> June 2020.

The salient provisions of the Agreement have been reproduced below:

**3.0 CONSIDERATION**

- 3.1 The Vendor hereby agrees to sell to the Purchaser and the Purchaser hereby agrees to buy from the Vendor, the Property for the full purchase



price of UGX 3,584,000,000/= [Uganda Shillings Three Billion, Five Hundred and Eighty-Four Million] only inclusive of all taxes payable in respect of this transaction.

- 3.2 The full purchase price agreed herein shall be paid at once upon execution hereof, receipt whereof. the Vendor hereby acknowledges by its own act of execution

#### **4.0 POSSESSION AND COMPLETION**

- 4.1 The Vendor shall upon execution hereof but in any case not later than 60 days from the date hereof secure and handover possession of the Property to the Purchaser. The Vendor shall be responsible and liable for all arrears in respect of rates, levies and charges, if any, incurred in respect of the Property prior to the execution of this Agreement.

#### **5.0 TRANSFER OF TITLES AND COMPLETION**

- 5.1 Upon execution hereof and payment of the full purchase price as herein agreed, the Vendor shall handover: -
- 5.1.1 the certificate of title to the land
  - 5.1.2 transfer instruments
  - 5.1.3 the vendor's resolution to sell the Property to the Purchaser
  - 5.1.4 national identity cards of the Vendors' signatories
  - 5.1.5 passport size photographs of the Vendors' signatories
  - 5.1.6 the Vendor's Constitution
  - 5.1.7 the Vendor's Certificate of incorporation
  - 5.1.8 all and any documents necessary for the transfer of the Property to the Purchaser
- 5.2 The Parties shall endeavor to use all lawful means possible and to assist each other to carry into effect the purpose for which this Agreement is entered into except that if the Vendor fails or refuses to comply with clauses 4 and 5.1 above and /or the Purchaser fails to obtain possession or transfer of the property within a period of 150 days from the date of execution hereof for any reason not being his default or for a reason being the default of the Vendor, the Vendor shall refund all sums that shall have been paid at that time together with interest of 12% per month from the date of execution hereof.



## **6.0 WARRANTIES AND REPRESENTATIONS**

- 6.1 The Vendor hereby warrants that it has the legal title to the Property, with an unfettered right to sell the same.
- 6.2 The Vendor further warrants and undertakes that:
  - 6.2.1 within a period of 60 days from the date of execution hereof, remove the caveat filed on the title to the Property by M/s Enterprise Handling Services Limited
  - 6.2.2 within 60 days from the date of execution hereof remove all and any physical encumbrances on the property
  - 6.2.3 by execution hereof, the Vendor confirms that all Muslim Supreme Council organs are in agreement with this transaction
- 6.3 The Vendor hereby warrants that he has entered into no contract with any third party, the terms and conditions of which may render the sale of the Property herein void and voidable.

## **9.0 DISPUTE RESOLUTION**

Save as herein provided, all disputes between the parties out of this Agreement shall be resolved through the Courts of Judicature in accordance with the laws of Uganda for the time being in force but after exhausting arbitration in accordance with the Arbitration and Conciliation Act.

The affidavits in support of and in rejoinder to the Application were deposed by Muhamadi Ali Aluma, the Acting Secretary General of the Applicant. The Affidavit in reply opposing the application was deposed by the Respondent and two affidavits in support of the Respondent were deposed by Kayanja Arthur and Dr. Ramathan Mugalu, the immediate former Secretary General of the Applicant who held the said position from 2016 to 8<sup>th</sup> May 2023.

## **[2] Appearance and Representation**

The Applicant was represented by Mr. Musa Kabega and Mr. Barikurungi Faisal both of M/s Kabega, Bogezi & Bukenya Advocates. The Respondent was represented by Mr. Kalule Ahmed Mukasa, Mr. Kibirige Ismail and Mr. Migisha Akleo all of M/s Crane Associated Advocates.

At the hearing, it was the consensus of the Parties that written submissions be filed in accordance with the court's schedules. The Parties filed their submissions



as per the court's schedules and the same together with the pleadings have been relied upon to determine the matter.

### [3] Issues

- (i) Whether the application raises triable issues
- (ii) What remedies are available to the Parties?

### [4] Preliminary objections

- (i) The Applicant's affidavit in support of the application was tainted with falsehoods and inconsistencies; and should therefore be struck out and the application dismissed.

The Applicant averred that she did not owe any money to the Respondent and that the Respondent made her believe that the Property had been purchased by Kayanja Arthur. The Applicant's evidence on record showed that the purchase price was paid to the Applicant by the Respondent. Learned Counsel for the Respondent citing and relying on the cases of **Sirasi Bitaitana – vs – Emmanuel Kananura (1977) HCB 34** and **Joseph Mulenga – vs – Photo Focus (U) Limited (1996) VI KALR 615** prayed that the application be dismissed because it was supported by an affidavit tainted with falsehoods.

Allen, J in **Sirasi Bitaitana (supra)** held that:

*“1. The inconsistencies in affidavits cannot be ignored however minor since a sworn affidavit is not a document to be treated lightly. If it contains an obvious falsehood, then it all naturally becomes suspect.  
2. An application supported by a false affidavit is bound to fail because the applicant in such a case does not go to court with clean hands and tell the truth”.*

The submissions of learned counsel for the Respondent notwithstanding, I am not in agreement that the entire affidavit in support of the application should be struck out thereby leaving the application without evidence. In the case of **Baryaija Julius- vs - Kikwisire Zaverio and Kabareebe Burazio CACA No. 324 of 2016**, the Court of Appeal held that:

*“where it is alleged that part of an affidavit is false, a Court can sever that part and rely on remaining paragraphs. This is also in line with*

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*Article 126 (2) (e) of the Constitution that enjoins Court to hear and substantively determine parties' dispute without undue regard to technicalities".*

Consequently, I sever paragraphs 3 and 12 of the Applicant's affidavit in support of the application and will not rely on the same.

- (ii) The Respondent's affidavit in reply contained provisions of the law and was therefore incurably defective

The Applicant raised a preliminary objection that the Respondent's affidavit in reply contained provisions of the Law and was therefore incurably defective. Counsel submitted that an affidavit ordinarily contained matters that the deponent was by his own knowledge able to prove and not matters of the Law. He relied on the decisions of **Re: Bukeni Gyabi Fred HCMA 63/99, (1999) KALR 918** and **Male H Mbirizi K. Kiwanuka –vs- Attorney General, Supreme Court Civil Application No. 7 of 2018**.

I do not find merit in this objection. Order 19 Rule 3(1) of the Civil Procedure Rules which governs the content and procedure by affidavit evidence provides that: -

*"Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated."* [emphasis mine]

First, this application by its nature, an interlocutory application. Secondly, the Respondent stated clearly in paragraph 16 of his affidavit in reply the source of the impugned information as his lawyers. This is permissible under the Law. In **Bankone Limited –vs - Simbamanyo Estates Limited HCMA No. 645 of 2020**, this Court held that: -

*"An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made in respect of an application for an interlocutory order, or by leave of the court (see Order 19 rule 3 (1) of The Civil Procedure Rules and The Co-operative Bank Limited v. Kasiko John [1983] HCB 72)."*

I overrule the Applicant's preliminary objection.

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## [5] Determination

### Law Applicable

An application made under Order 36 rule 4 of the Civil Procedure Rules as amended for leave to appear and defend a suit may be granted where the applicant shows that he or she has a good defence on the merits, or that a difficult point of law is involved, or that there is a dispute which ought to be tried or a real dispute as to the amount claimed which requires taking an account to determine or any other circumstances showing reasonable grounds of a *bonafide* defense ( see the case of **Africa One Logistics Ltd –vs – Kazi Food Logistics (U) Ltd. Misc. Application No. 964 of 2019**).

As to whether the Defendant/Applicant raises a triable issue and must not be shut out and should be granted leave to formulate their defence and adduce evidence of the triable issue(s) raised was settled in the cases of **MMK Engineering –vs- Mantrust Uganda Limited H.C.M.A No. 128 of 2021** and **Bhaker Kotecha –vs – Adum Muhammed [2002] 1 EA 112**. In the case of **MMK Engineering (supra)**, Hon. Mr. Justice Christopher Madrama (as he then was) cited **Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice Twenty-Second Edition pages 71 – 78** the principles for leave to defend to include the following:

- a) The Applicant must show the court that there is an issue or question of fact or law in dispute which ought to be tried.*
- b) Where the Defendant shows that there was such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the Plaintiffs claim, he ought not to be debarred of all power to defeat the demand made upon him.*
- c) Where the defence that is proposed is doubtful as to its good faith, the Defendant may be ordered to deposit money in court before leave is granted.*
- d) Whenever there is a genuine defence either in fact or in law, the Defendant is entitled to unconditional leave to defend.*
- e) General allegations however strongly may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.*
- f) The Defendant may in answer to the Plaintiffs claim rely upon a set off or counterclaim. A set off is a defence to the action. Where it is a*

*counterclaim, and there is no connection with the Plaintiff's cause of action, the Plaintiff may be given leave to obtain judgement on the claim provided that it is clearly entitled to succeed upon it and will be put to unnecessary expense in having to prove it. It is within the courts discretion to stay execution up to the anticipated amount of the counterclaim pending the trial of the counterclaim or further order.*

Raising a triable issue must be distinguished from mere denial and the defence raised must not be a sham defence that is intended to delay the Plaintiff from recovering money due. In the case of **Maluku Interglobal Trade Agency Ltd versus Bank of Uganda [1985] HCB 65**, the Court stated that:

*"Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the plaintiff is not entitled to summary judgement. The defendant is not bound to show a good defence on the merits but should satisfy court that there was an issue or question in dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage"*

In the same case, the court further stated that:

*"...the defence must be stated with sufficient particularity to appear genuine. General or vague statements denying liability, will not suffice" (emphasis is mine).*

### **Issue 1: Whether the application raises triable issues**

The Applicant raised the following triable issues

- (a) Whether the sale agreement dated 24<sup>th</sup> June 2020 is admissible in evidence

On this contention, the Applicant submitted that it is a requirement of sections 3(1) and (2) of the Stamp Duty Act that a sale of land agreement as in this matter must pay stamp duty and if the same is not paid, in accordance with section 32 of the Stamp Duty Act, it is not admissible in evidence. Counsel relied, among others, on the decisions of **Wasukira & 2 others –vs - Harmony Group Limited HCCS No. 40 of 2009** and **Rosemary Nalubega and another –vs - Jackson Kakayira CACA No. 40 of 2004**.

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In reply, Counsel for the Respondent submitted failure by the Respondent to pay stamp duty on the agreement did not give rise to a triable issue. Counsel submitted that the Law has long been settled to the effect that where stamp duty is required by Law to be paid and it is not, the procedure is not to dismiss the case or disregard the instrument, but determine whether duty is payable and allow the affected party to pay stamp duty, with any penalty if applicable. Counsel cited the decision of **Pesa Finance Limited –vs- Louis Ntale Civil Suit No. 470 of 2009**.

In the Court of Appeal decision of **Dieter Pabst –vs- Abdu Ssozi & Another Civil Appeal No. 116 of 2000**, Byamugisha JA (RIP) in her lead judgment clearly stated as follows: -

*“The decision of whether the instruments attracted duty or not ought to be made before the instrument is admitted. The party concerned ought to be given an opportunity to pay the duty so that the instrument can be used in evidence. I therefore agree with the submissions of Mr. Adriko and the authorities he cited, to the effect that the trial court should determine whether a document is dutiable or not before it is admitted in evidence. The rationale being to enable the party affected to pay the stamp duty and penalty...”*

I am bound by the above decision. It is also clear from that authority that all that the Court needs to do is to determine whether the agreement in question is dutiable or not and if it is dutiable then order the plaintiff to pay the requisite duty together with the penalty. Clearly, non – payment of stamp duty is not fatal to the instrument or its admission in evidence. Indeed, in the case of **Rosemary Nalubega & Anor – vs - Jackson Kakayira CACA No. 40 of 2004** relied on by the Applicant, the Court of Appeal held that: -

*“That error however, is not fatal to the case because of section 43 of the Stamp Act. This section prohibits challenging at any subsequent stage of the proceedings, on ground of non-payment of stamp duty, the order admitting in evidence of an instrument, except under section 68. This section requires appellate court to take into consideration the order made by the trial judge admitting an instrument in evidence, either as duly stamped, or as not requiring stamp or upon payment of duty and penalty under section 42. Upon that consideration, to declare its opinion thereon. Where it is of the*





*opinion that the instrument should not have been admitted in evidence without payment of duty and penalty under section 42, to determine the amount, to enable the party liable to pay. That declaration does not invalidate the lower court's order admitting in evidence, the unstamped instrument. I have considered the order made by the trial judge in the instant case admitting the sale agreement in evidence, as not requiring stamp duty. In my opinion, that agreement should not have been admitted in evidence without payment of duty and penalty under section 42. The amount payable is at least two shillings. That declaration does not invalidate the lower court's order admitting in evidence the unstamped instrument. Ground 3 would thus fail."*

I therefore, agree that it is now settled that Court cannot dismiss a suit merely because the stamp duty has not been paid on the document relied upon to bring the claim. I believe this is also in line with the provisions of Article 126 (2) (e) of the Constitution which enjoins this Court to administer substantive justice without undue regard to technicalities. I accordingly, find there is nothing to try in the main suit regarding this contention.

(b) The suit is not properly before court in light of a clear mandatory arbitration clause

The content of the clause on dispute resolution was reproduced above in the background to this ruling.

It was the contention of the learned counsel for the Applicant that the civil suit was not properly before court in light of clause 9.0 on dispute resolution.

**Section 5(1) of the Arbitration and Conciliation Act on Stay of legal proceedings states that:**

*"(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds—*



*(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or*

*(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*

This court finds that clause 9.0 of the agreement for the sale of land is inoperable and incapable of being performed. The clause is pathological or defective and it was poorly drafted. The clause implies or presupposes that parties must first refer the matter to arbitration and if the arbitration proceedings failed, the parties would resort to the courts of judicature. This is not how arbitration proceedings should be conducted as envisaged under the Arbitration and Conciliation Act (ACA).

The court therefore finds that this is not a triable issue.

(c) There was uncertainty as to whom the refund should be made

There is no dispute as to whom the refund should be made. The agreement for sale of the property was made or entered into on the 24<sup>th</sup> day of June 2020 between the Applicant and Respondent. On the same day, a sum of Ugx. 3,584,000,000/= was transferred from the bank account of the Respondent held with KCB Bank to the Applicant's Bank account held with Diamond Trust Bank – Old Kampala Branch. In the absence of evidence controverting the evidence on the court record the refund must be made to the Respondent. The Applicant did not prove or show that she received any payment from a one Kayanja Arthur thereby causing confusion or uncertainty. This is therefore not a triable issue.

(d) The interest claimed by the Respondent was not legally tenable

It was the submission of learned counsel for the Applicant that interest at a rate of 12% per month was untenable, against public policy, illegal and too harsh and therefore should not be enforced by court. He cited and relied on **section 26 (1) of the Civil Procedure Act** which states that:

*"Where an agreement for the payment of interest is sought to be enforced, and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just".*

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Learned Counsel also relied on the case of **Alice Okiror Anor – vs- Global Capital Save 2004 Ltd & Ben Kavuya –HCCS No. 0149 of 2010** where Hellen Obura, J (as she then was) held that interest charged at 12% per month would translate to 144% per annum which was harsh and unfair for a money lender to charge such amount of interest in disregard of the Moneylenders Act.

In response, learned counsel for the Respondent submitted that until the Respondent filed his claim in court, the issue of the interest rate being unconscionable never came to the fore. The Applicant's refusal to pay the Respondent on grounds that the interest rate was unconscionable was not tenable. He cited and relied on the cases of **Maruri Venkata Bhaskar Reddy & Others – vs – Bank of India (Uganda) Limited- Civil Suit No. 0804 of 2014** and **Sarah Kayaga Farm Limited – vs – AG, Civil Suit No. 0351 of 1991** where the courts upheld contractual interest. The Respondent also cited and relied on the case of **Ajay Indravadan Shah – vs- Guilders International Bank Limited [2002] 1 EA 269** where the court of appeal of Kenya while interpreting the provision of their civil procedure code that is identical to section 26 (1) of our Civil Procedure Act held that the discretion of the court to award and fix the rate of interest is applicable only where the Parties to a dispute have not, by their agreement fixed the rate of interest payable. If the parties by their agreement have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way that either that agreed rate is illegal or fraudulent. Lastly, the Respondent relied on the case of **Andrew Tumusiime – vs – Haji Mulamba Kassim, Civil Suit No. 0578 of 2012** which had similar facts like the matter before court where the Court declined to reduce the interest rate of 20% per month but instead upheld and enforced it.

As submitted by Counsel for the Respondent, this was an agreement that was freely executed between the Parties within the meaning of **sections 10 and 13 of the Contracts Act of 2010**. The Applicant submitted that she entered into the contract without the help of an advocate. This does not amount to defense that would render the contract void. I am therefore persuaded by the arguments of the Respondent that this court should

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enforce the clear intention of the parties. As such, the interest rate of 12% per month is not a triable issue.

- (e) The authenticity of the letter dated 30<sup>th</sup> March 2023 from the UMSC that was authored by the then Secretary General

The court ought not to waste its time on this matter. Other than the Applicant submitting that the letter in question was written after the Secretary General had vacated office, it was back dated and the stamp used was questionable, no effort was made by the Applicant to prove to this Court that it was deeply concerned by the utterance of such a document and she had therefore taken up the matter with police and engaged an expert to prove the authenticity of the document. **(see sections 60, 101 and 103 of the Evidence Act).**

In any event, letter in question is not central to the claim but rather incidental. The claim against the Applicant can stand without this letter by the Respondent relying on the executed agreement between the Parties. This is therefore not a triable issue.

- (f) The validity of the claim by the Respondent after a lapse of 150 days  
My understanding and interpretation of clause 5.2 of the Agreement is that in the event that the Respondent failed to take possession of the property and or transfer the said property within a period of 150 days (emphasis is mine) from the date of the execution of the agreement, he would be entitled to a refund of all the sums of money paid to the Applicant plus interest at rate of 12% per month. This simply means that the Respondent could not bring any claim against the Applicant before the 150 days had elapsed. He could only bring a claim after the 150 days and interest on the purchase price of Ugx. 3,584,000,000/= would continue to accrue on a monthly basis until the said moneys had been refunded. There is nothing that barred the Respondent from filing his claim against the Applicant vide Civil Suit No. 0505 of 2023 that was filed in this honorable court on the 13<sup>th</sup> June 2023. The Respondent acted within his rights to file the said suit and it was within a period of six (6) years **(see section 3(1)(a) of the Limitation Act).**

It was incumbent upon the Applicant to immediately make a refund of the purchase price to the Respondent once it came to her realization that the Property could neither be transferred in the name of the Respondent nor



could the Respondent take possession of the said property as a result of third party claims by M/s Enterprise Handling Services Limited (ENHAS) to whom the Applicant had leased the disputed for a period of fifteen (15) years from 2013 to 2028. The interest of the said entity in the disputed property also culminated into Civil Suit No. 20 of 2020 that was filed against Applicant by M/s ENHAS and the court decided in favour of M/s ENHAS.

This court therefore finds that the Respondent's act of filing a claim against the Applicant after 150 days is not a triable issue.

In the case of **Post Bank (U) Ltd. – vs – Abdu Ssozi- Civil Appeal No. 08 of 2015**, the Court stated that:

“Order 36 was enacted to facilitate disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart assisting the courts in disposing of cases expeditiously, Order 36 helps the economy by removing unnecessary onstructions in financial or commercial dealings”.

I associate myself with the sentiments of the Court of Appeal in the case of **Post Bank (U) Ltd (supra)**. The Respondent's claim in the main suit was for a declaration that Applicant was indebted to him in the sum of Ugx. 18,909,184,000/= being the purchase price for land comprised in LRV 3693 Folio 12 Ranch No. 31A land at Ssembabule (*hereinafter referred to as “the Property”*) together with definite contractual interest; and Costs of the suit. The Applicant has failed to show court that she has any triable issues that warrant the grant of unconditional leave to appear and defend the suit. The triable issued presented by the Applicant are frivolous.

Had the Applicant made a refund of the purchase price upon coming to the realization that the contract could not be performed as a result of claims and interest in the property by M/s ENHAS and the court decision in Civil Suit no. 20 of 2020 the matter would not have come before court. Because the Applicant was not vigilant and now finds herself in a position where the purchase price and interest on the same have to be paid from the time the Respondent failed to take possession of the property and/or transfer the sane into his names she is now clutching at straws.



This court also observed that the Applicant did not controvert the affidavit evidence of Dr. Ramathan Mugalu that the Applicant was sued by M/s ENHAS vide **Civil Suit No. 20 of 2020: Enterprise Handling Services Ltd. – vs – Uganda Muslim Supreme Council** claiming ownership to the same Property that had been sold to the Respondent. The Applicant lost this case, filed an appeal which she chose not to pursue but rather consented to abide by the Orders of the High Court which necessitated transferring the Property into the name of M/s ENHAS and this is why the Respondent had to hand back the Duplicate Certificate of Title of the Property to the Applicant thereby rendering the Applicant incapable of performing the Contract.

In conclusion, this court finds that the Application does not raise triable issues and is hereby dismissed with costs to the Respondent.

## **Issue 2: What remedies are available to the Parties**

The Court further orders the Respondent upon delivery of this Ruling to immediately pay stamp duty and any penalties as may be assessed by the relevant authorities on the Contract Agreement executed between him and the Applicant on the 24<sup>th</sup> June 2020.

Delivered electronically this 07 day of August 2023 and uploaded on ECCMIS.



**Harriet Grace MAGALA**

**Judge**

**7<sup>th</sup> August 2023**