

5 He thus sought for the following orders;

- A declaratory order that he was the owner of the suit land,
- An eviction order against the respondents,
- A permanent injunction against the respondents,
- Special damages,
- 10 - General damages,
- Exemplary damages,
- Punitive damages,
- Interests and;
- Costs of the suit.

15 The respondents denied the plaintiff's claim and contended that they acquired the land by way of inheritance from the late Isimu Ocam Ayom, father to the 1st Respondent, the 1st respondent being the husband to the 2nd respondent and father to the 3rd respondent and the late Erabu Elwelu who is the grandfather to the 4th to 7th Respondents.

20 The learned Magistrate heard the suit and delivered judgment in favour of the plaintiff. He found that the suit land located in Areban Village, Alito Parish, Obalanga Sub-county, Amuria District belonged to the appellant with exception of a piece of 5 acres occupied by the 2nd Respondent (Acuru Elizabeth) and the 10 acres bought by the 3rd Respondent (Okwi Alfred)
25 and the current portion occupied and utilized by the 4th Defendant Erabu Michael and the 6th respondent Elasu Lawrence, not beyond the road to Iyalakwe Primary School.

The Learned Magistrate then gave an eviction order and permanent injunction against the 5th Respondent Osege John Bosco and any other
30 person in occupation of the rest of the land.

5 General damages of Ugs. 3,000,000 were awarded to the appellant to be paid by the 1st, 2nd, 3rd, 4th and 6th Respondents while the 5th Respondent was ordered to pay the costs of the suit.

The appellant being aggrieved and dissatisfied with part of the judgment and decree of the lower court, appealed on the following ground;

- 10 1. The learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence regarding the root of ownership to part of the suit land, thus arriving at a wrong conclusion that the 2nd, 3rd, 4th and 6th Respondents own the Respective portions of the suit land, hence occasioning a miscarriage of justice to the Appellant.

15 Duty of the first appellate court.

The duty of a first appellate court is now well established as was pointed out in *Kifamute Henry vs Uganda SCCA No. 10 of 1997* where it was held that;

20 *“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.”*

25 According to *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236;*

30 *“... a first appeal, ... is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.”*

5 The above legal positions and command are taken into account in dealing with this appeal.

Submissions:

Parties were directed by court to file through their counsels, final written submissions which would help in the disposition of this appeal, 10 unfortunately only the appellant's counsel did so. This court will, however proceed to determine this appeal on the materials which were before the lower court and at the same time assess the submissions of the appellant for its worthiness.

For the appellant, Counsel submitted that the suit land is governed under 15 customary laws and rules and the appellant simply made emphasis to its well-known principles of law as was pointed out in ***Atunya Valiryano Versus Okeny Delphino (Civil Appeal 51 of 2017) [2018] UGHCLD 69 (06 December 2018)*** when he stated unchallenged at page 20 lines 127 to 145 of the record of Appeal that;

20 ***“I know the Defendants in this case...I am in court because those people have encroached on my land. The land in issue was for my grandfather called Ogwal Nyagatum. He settled in this land in 1917. When my grandfather died, my father took over the land...at line 25 137 – 138 Page 20.***

Counsel further pointed out that the trial magistrate ought to have considered the following corroborative evince adduced by appellant when he stated that;

30 ***“... it was in 2006 when D1 and DII crossed to my side... D1 having inherited DII who was on the five (5) gardens (not in issue) given by appellant's family.... ref to line....***

5 ***on record - when DI came as a visitor in the area.... Ref....
both DI and DII illegally crossed beyond the 5 gardens
given to DII....***

That at line 140 of the record of proceedings, he told court that

10 ***“DWIII came in 2006 to stay with his mother in my land.
That DWIII followed his mother when her marriage
broke down. DIII at some point lived with DI who had
also inherited mother of DIII. DIII then forcefully entered
Plaintiff land to settle with his mother, part of which DIII
claims to have bought from Otiija.”***

15 Again that at line 142 – 144 the Appellant stated that;

20 ***“Erabu, Osege, Elasu used force to grab my land in
2008...The Defendants have constructed houses...and
destroyed graves of late children...” This is the homestead
of the plaintiff/appellant as confirmed to the satisfaction
of court, but the same Magistrate apportioned this very
homestead with graves of children to D4, D5 and D6”***

That During cross examination at Page 21 lines 171-172

Line 172 the Appellant stated that

25 ***“... in 2009 you used force (D.4) to burry Osege in my
land. I reported to police.”***

Counsel also pointed that PW 3 Okello Yuventino, an adult aged 81 and
who is brother of the Appellant at Page 28 – 30 at Line 364 – 371 told court
that;

30 ***“..... I know the land in dispute, the land is in Aberan
village, Alito Parish in Obalanga sub county, the land in***

5 ***dispute is over 10 acres..... The land belongs to the plaintiff. The land is a customary land originally owned by our late father called Stephano Oguma. Our father Oguma also inherited the land from our grandfather Ogwal Nyangatum.....”***

10

That this position was further reiterated by PW3 at Page 30 during cross examination by D.4 at line 420 when PW3 told court upon being asked that

“You entered in our land in 2008”.

15 Corroboration

According to counsel for the appellant, DW I Icegu Aloni corroborated the testimony of the Appellant when at page 35 line 542 – 543 he stated that “...he caused our arrest on a number of times.” and that at Page 53 line 121-124 of the record the learned trial Magistrate made a finding that;

20 ***“The plaintiff’s father once had on the land evidence by the Old homestead he showed to court, though invisible but it was confirmed by DW4. Erabu Micheal in cross examination that it is true the plaintiff had a home near Elizabeth”.***

25 Still at Page 53 line 131 – 132 the learned Trial Magistrate in his judgment confirmed that the suit land belonged to the Appellant, when he stated that

“... I found the land originally belonged to the plaintiff evidenced by their former home on the land.....”

5 Accordingly, counsel submitted that despite the learned Trial Magistrate coming up with the correct finding that the suit land belongs to the Appellant, what is shocking was that at page 54 from lines 147 to 150 of the record of appeal, the learned Trial Magistrate apportioned the same land he had declared to belong to the Appellant to D4, D5 and D6 when
10 he stated that,

***“In regard to the land occupied by D4, D5, & D6 though they had settled on the plaintiff’s land, but taking into consideration the period they have been there on it I allow them to own it with exception of the portion beyond
15 Iyalakwe Primary School.”***

Counsel submitted that the above finding by the learned Trial Magistrate clearly shows that he did not evaluate the evidence on record as a whole and did not pay attention to the principles governing rules of customary law with respect to the nature of ownership of the suit land.

20 That had the Trial Magistrate evaluated all the evidence on record, he would have found that the evidence of PWI was unchallenged.

Additionally, counsel submitted that in the instant case, the customary law under which the respondent D4, D5, and D6 claimed to have acquired the land as terra nullius. Proof of mere occupancy and user of unregistered
25 land, however long that occupancy and user may be, without more, is not proof of customary tenure.

***(See: Bwetegeine Kiiza and Another v. Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009; Lwanga v. Kabagambe, C.A. Civil Application No. 125 of 2009; Musisi v. Edco and Another, H.C. Civil Appeal No. 52 of 2010; and Abner, et al., v. Jibke, et al., 1
30 MILR 3 (Aug 6, 1984).***

5 Counsel further submitted that possession or use of land does not, in itself, convey any rights in the land under custom.

That occupancy should be proved to have been in accordance with a customary rules accepted as binding and authoritative. In the instant case, the exclusive possession proved by the respondent was of a nature that
10 established rights of use by use of 6 gardens but there was no evidence of his inheritance.

The according to the court's judgment, it was **indicated** therein that D4, D5, and D6 were just using land to cultivate.

Therefore, based on the evidence adduced during the trial, counsel argued
15 that it should be found that it was more probable than not that the land in dispute belonged to the plaintiff, and not the D4, D5, and D6 whose grant of the suit land by trial court of ownership of land subject matter of this case are part of this appeal.

According counsel, it was, therefore, erroneous for the court below to have
20 decided in the defendant's favour.

Further that since the lower court judgment did not indicate that there was evidence adduced in regard to Dw7 Mr. Etenu and neither did he appear in court to give evidence, then as far as the land in issue was concerned, he equally should not have been awarded any land since Okello
25 Yuventino and PW4 Ogwal Micheal all confirmed that the respondents had trespassed on the suit land between 2006 to 2009.

Indeed, that the illegal entry into the Appellant's land caused the arrest of the Respondents (encroachers) as per the testimony of DWI (Icegu Aloni) who told court thus;

30 ***"He caused our arrest on a number of times."***

5 Counsel submitted that it was therefore erroneous for the learned Trial Magistrate to hold that the suit land belongs to plaintiff but proceed to recognize the illegal entry of D4, D5 and D6 on the suit land and conclude that the portion they illegally occupied should now belong to them. Yet D4, D5 and D6 were persons not protected by the 12 years' rule under
10 Section 5 of Limitation Act, since they trespassed on the Appellant's land between 2006 – 2009 for the Appellant did not look on but continuously caused their arrest on a number of times as was confirmed by DWI.

The Appellant further filed the original suit challenging the respondent's occupation of his land on the 29/8/2011.

15 That all these took place in less than 12 years from the time they illegally entered the Appellant's land.

Accordingly, therefore, counsel surmised that since exclusive possession as testified to by the respondents was of a nature that established rights of use of 6 gardens there was no evidence of their inheritance since the
20 judgment of the lower court indicated that DW1 is just using land to cultivate.

On the other hand, apart from pleading that the land in dispute belongs to him (DW1) Occegu Aloni, that he inherited 6 gardens in issue from his father Esimu Ocamayom after his death in 1983, and stating so in their
25 testimony, the defendants and his witnesses did not adduce evidence to show it in this regard.

Based on the evidence adduced during the trial, it is more probable than not that the land in dispute belongs to the plaintiff, and not the private property of the respondent. It was therefore erroneous for the court below
30 to have decided in the appellant's favour but still went ahead to apportion part of appellant's land to the respondents.

5 Counsel submitted that further, the learned Trial Magistrates gave away ten acres of the suit land to D3 even when he held prior that the entire suit land belongs to the plaintiff.

In Ocan Ensio Wanyama v Okeny Ceasor (Civil Appeal 19 of 2018) [2018] UGHCCD 59 (11 October 2018)

10 ***“ In some communities sales of communal land are more or less sill banned since ownership doesn’t confer any personal individual right of ownership (see for example Tefele Liamatua v Mose American Samoa, Pacific Law Materials, 1988), while in others such transactions are***
15 ***strictly regulated by members of the family, the clan or the chiefs, where an ‘owner’ may sell land if the next of kin agree or approve (see for example, the Pacific islands case of Tereia Timi v Meme Tong Kiribati Land Appeals No. 1 of 1996). In the instant case, the learned chief***
20 ***magistrate erred in law and fact when he failed to evaluate the evidence on record.”***

The defendant D3 claim to have bought land, yet there are no clear records that the purported sale was Okayed by the family, or clan of the plaintiff. The judgment indicates that the Magistrate found out that D3 bought 10
25 acres of from somebody other than the plaintiff and his not in occupation of the land though previously he stayed thereon. Counsel submitted that the learned Trial Magistrate recognized the stranger called Otija Aloysius who purportedly sold the land that belongs to the plaintiff, more so without even locating where this particular land is situate, who the
30 neighbours to the land are, and whether such a purported seller had any color of right to deal in the suit land. This is an error of law, because Otija had no right to sell the land of Elem Bulasio the appellant.

5 Counsel finally prayed that this Honourable court holds that the learned
Trial Magistrate erroneously gave the appellant's land to D3, D4, D5, D6
and that upon evaluating evidence on record, unlike the former Trial
Magistrate who chose not to make a finding on land occupied by D7, this
10 court proceeds to declare that the same land forms part of the suit land
and therefore, it belongs to the appellant.

Evidence on record:

PW1, Elem Bulasio (84 years at the time) testified that the land in issue
was for his grandfather Ogwal Nyagatum who settled on the land in 1917.
When his grandfather died his father took over where Erabu(DW4) and
15 Osege(DW5) have built, this was the land of his step mother as his father
had two wives.

That his step mother stayed there from 1943 then she separated with his
father. That his father in 1958 gave land to Ojuru the husband of DWII but
she crossed to his side.

20 That when Ojuru died. DW1 took over and stayed on the same land with
DWII in 1968. In 2006 DW1 AND DWII crossed to his side. That Ojuru
married from the same home with his father and that is why they gave
them the land. DWIII came in 2006 to stay with his mother and they're in
his land.

25 That Elabu, Osege, Elasu used force to grab his land in 2008 while he was
in Lira. The respondents have constructed houses, they are ploughing and
destroyed the graves of late children.

That Erabu, Osege and Elasu are on one side while Aloni, Ocuru and Okwii
are on another side. During cross-examination he testified that the 1st
30 respondent's land is in Olilim Atira Village and he was born in Anyara
Kaberamaido while the appellant was born on the land.

5 That he does not dispute the land given to Ojuru by Ogwal the dispute is because they have crossed the boundary. He testified that DWIII doesn't have land and only followed his mother.

That there aren't 20 mango trees on the land and the tamarind tree is at the borehole given to the community in 2006. That DWIV was not born
10 on the suit land.

When cross-examined by DWV, he testified that he got about 10 acres and has never litigated with his father. That DWV used force to enter the land of Opudo and his.

That DWVI does not neighbour him, he entered his land and there is a
15 boundary of the road which goes to Iyalakwe. That in 2009 he used force to bury Osege on the appellant's land and he reported to the police.

PW2, Opudo Alexander (68 years at the time) testified that he knew the appellant and respondents very well. That there was insurgency in Teso Sub-region and people left their respective lands for security
20 purposes.

That around 2008 when peace returned, the defendants encroached on the suit land by destruction of graves and ploughing the land that belonged to the plaintiff. That the respondents cut trees seriously and settled on the suit land that is situated at Abelangan village, Alito Parish,
25 Obalanga Sub County. That the suit land is divided by 4 roads and some of the respondents settled on these 4 lands on different times between 2008 and 2009.

That there are mango trees which mark the boundaries of the suit land. That the appellant inherited the suit land from his late father Stephano
30 Oguma when he died. The neighbours to the suit land are Alexander Opudo to the west, the late Oluge to the east, the northern part is a district

5 boundary marking Alebtong district with Amuria District and on the south there is a valley known as Agwenyi.

That the respondents were also neighbours to the suit land and they have crossed the boundary between themselves on the suit land. That the suit land is approximately 10 gardens. He is a neighbour to the appellant and
10 the respondents. During cross-examination he stated that where the 2nd respondent is staying is not the suit land.

That the 3rd respondent is the nephew to the appellant. The respondents trespassed on the southern part and where the respondent's homesteads are in their land and not the suit land. The appellant's father planted the
15 mango trees where the 6th respondent stays.

When asked by Court he stated that the appellant inherited the estate from his father after his death in the 1970s and the suit land was part of the estate.

PW3 Okello Juventine (81 years at the time) testified that the appellant
20 is his elder brother and he knows the 5th respondent because they are from the same village. He knew the land in dispute to be in Areban village, Alito Parish in Obalanga Sub-County and about 10 acres.

That the respondents are currently using the land for cultivation and settlement. The land is customary land originally owned by their late
25 father Stephano Oguma who inherited it from their grandfather Ogwal Nyangatum.

That the grandfather died while in Iyalakwe and he was buried there while the father died in Areban village while on the disputed land and was buried thereon.

30 That the appellant has used the land for cultivation and settlement. That there are many graves on the suit land and there is a mango tree planted

5 by their father and he was buried near it. He stated that in 1980 due to the
insurgency due to the insurgency caused by the Karamojongs they left the
suit land and went to Loro in Oyam District, but the appellant remained
in Lira and returned to the suit land before him.

10 That the respondents left their original land and they crossed to the
appellant's land. Before their father died he gave part of their land to Aculo
Elizabeth and he was present. That their father got to know Aculo through
her brother (Egunyu Matthias) who married from the same home as their
father.

15 That Egunyu requested for the land for Aculo. Aculo was given about 5
acres and it is demarcated by a big tree from their land. That the mother
of the 3rd respondent Alibi Luzarba came to stay with the 1st respondent.

20 During cross-examination he stated that his grandfather first settled in
Iyalakwe. That Aculo was given land after the death of her father in 1964.
That his father was not buried on the suit land but where the plaintiff
currently stays.

That the respondents encroached on the land and their grandfather Erabu
was not living on the suit land.

25 **PW4, Ogwal Michael** (64 years at the time) testified that he knew the
appellant as his cousin brother and he knew the respondents, the 1st
respondent is a husband to his sister Alibi Luzarba, the 3rd respondent is
his nephew, the 4th and 6th respondents are sons to the 1st respondent's
brother.

30 He stated that he knew the land in dispute and its currently being used by
the respondents but it belongs to the appellant and is more than 10
gardens.

5 That the land originally belonged to the appellant's father who passed on in 1973 in Areban Village and was buried in his father's old homestead about 1/2 Km from the suit land.

That the respondents entered the suit land in about 2006 and since the 1st respondent has two wives they both left their original land and entered the
10 suit land. That by the time the respondents entered the suit land the appellant had taken refuge in Lira.

That all along he thought the respondents had got permission from the appellant to use his land. During cross-examination he stated that there is no dispute where the appellant's mother and some of his relatives were
15 buried.

That the remains of the appellant's grandfather were exhumed and brought to Areban in 1999 from Iyalakwe where he was originally buried.

That the respondents have their land but the problem is they are moving beyond it.

20 That the respondents never lived on the suit land but were only neighbouring it.

The respondents on the other hand testified thus;

DW1, Icegu Aloni (80 years at the time) testified that the appellant is his neighbour and brother in law as he married his cousin sister. That he
25 knows the suit land and it is approximately 6 gardens. That the land is his having inherited the same from his father Esimu Ocamayom who died in 1983 during the insurgency.

That he inherited more than 6 gardens but the other land is on the other side of the road. That the land across the road is not in dispute save where
30 the appellant has crossed and he encroached in 2010.

5 That the appellant is cultivating the land and using it by force. That the matter was originally handled by the LC 1 and 2 but the appellant refused to leave the land and has caused their arrest a number of times.

During cross-examination he stated that his father found the land abandoned and built thereon in 1942 on the advice of other neighbouring
10 people.

That the land was not given to his father by Ojur, his father never came from Lango but from Otuboi Kaberamaido.

DW2, Aculo Elizabeth (75 years at the time) testified that 1st respondent is her brother in law and the 3rd respondent is her grandson,
15 the rest of the respondents are neighbours.

That her home is separated from the appellant's by a road. Her home is on the side of the suit land which is approximately 10 acres. Her home is about 1km away from the suit land.

That the suit land was owned by her grandfather Esimu and by the time
20 she got married she found him there so she cannot tell how he acquired it.

She is currently in occupation of the suit land for cultivation and the appellant is not cultivating it.

That she lived on the suit land without any problem when her husband was still alive. During cross-examination she stated that if the appellant's
25 father had built on the suit land in 1927 she did not know because she was not married by then.

DW3, Okwir Alfred (50 years at the time) testified that the 1st respondent is his paternal uncle who inherited the 2nd respondent after the death of her husband. That the suit land is approximately 44 acres and

5 out the 44 he bought 10 acres, the 1st respondent stays on 24 acres and the 2nd respondent stays on 2.

That the 10 he bought share a common boundary with his ancestral land and he bought it from Otija Aloysius. That he uses the land for settlement and cultivation.

10 That he was originally staying on the portion claimed by the 1st respondent. That the defendant is using part of the suit land and his land is on the other side of the road but he has crossed to theirs to cultivate.

He did not know how Esimu acquired the suit land.

15 During cross-examination he stated that he did not know how Otija got the land he sold to him and there was no dispute over it. That Esimu was buried in Otuboi because he had many brothers. That it was the decision of the elders to bury Esimu in Otuboi and Ojur on the suit land.

DW4, Erabu Michael (53 at the time) testified that the appellant is claiming about 6 gardens, that the land in issue originally belonged to his 20 grandfather Erabu Elwelu who had children.

That when he died the land was inherited by his wife.

That he inherited the land in dispute from Osege and his father Umasa calls him nephew.

That the appellant's land is distinguished from his by a tree and an anthill.

25 **DW5, Elasu Lawrence** (31 years at the time) testified that he has approximately 8 acres. He and Eragu own the same land which they inherited from Erabu Elwelu who was buried in Anyara in Kaberamaido. There is a road that separates their land from Aloni. Their land and that of the appellant are on the same side of the road.

5 That the appellant is not cultivating all the side of his land. That the 1st, 2nd and 3rd respondents are not cultivating on the side of the appellant.

He did not know how Erabu acquired the land on which they are now settled but was informed by his mother that she found him there by the time of her marriage.

10 **DW6, Otengo Ignatius** (70 years at the time) testified that he knew the land in dispute since he was once a leader there and its about 30-40 acres.

That Esimu had three children Eganyu, Ojur and Aloni. That Aloni is a neighbour to the appellant and their land is separated by a road.

15 That during the insurgency both parties fled and many people died including Esimu and Erabu his neighbour. That the land is for the respondents. During cross-examination he stated that he grew up and found Esimu on the land though he did not know how he acquired it and it is not true that Esimu came to stay with his son in 1968.

20 **DW7, Etengu Bosco**, (51 years at the time) vice chairman of Areban Village testified that the appellant is his in-law and that he had a land dispute with the 1st respondent and it ended in favour of the respondents but unfortunately the LCI Chairman refused to give the proceedings.

Evaluation of evidence on record and Conclusions:

25 From the evidence adduced above, it is clear to me that the land in dispute indeed originally belonged to the appellant as recognised by the trial Magistrate.

The land was owned by the appellant's father who inherited the same from his father. The appellant's grandfather as seen in the evidence above gave land to the 2nd respondent's husband and upon his death the 1st

5 respondent inherited the land and the wife. The 3rd respondent then followed his 2nd respondent to the suit land.

The 1st and 2nd respondents' claim that they inherited the land from Esimu Ocamayom has not been proved in evidence because none of them could trace how he got to the suit land furthermore as confirmed by DW1 he was
10 from Otuboi and was buried there.

None of the respondents knew how Esimu acquired the suit land. DW3 claimed he bought 10 acres from Otija Aloysius but the 1st respondent is his paternal uncle.

The 3rd respondent did not know how Otija acquired the land, however,
15 the appellant failed to prove that the land was unlawfully sold.

The 2nd respondent on the other hand, has five acres as seen in evidence. The appellant's evidence was that she was given five acres and these are not challenged however, she had started moving out of her boundary.

I find that the 2nd respondent is entitled to only the 5 acres originally given
20 to her by the appellant's grandfather Ogwal.

The 4th to 7th respondents have not proved their claim to the suit land.

In their Written Statements of Defence, they claimed that they inherited their suit land through late Erabu Elwelu their grandfather. In their testimonies none of them proved how the late Erabu came to the suit land.

25 DW6 stated that the Erabu and Esimu were neighbours and all fled during the insurgency and that as he grew up he found Esimu on the suit land though he doesn't know how he acquired it.

The trial magistrates finding that because of the period the 4th to 6th respondents spent on the land they should own it is untenable. The suit
30 was filed in 2011 and it was the unchallenged evidence of the appellant

5 that the respondents encroached on the land in 2008, the limitation period prescribed by **section 5 of the Limitation Act** does not apply to the 4th to 6th respondents.

It was therefore erroneous for the Trial Magistrate to give them the land on that ground.

10 The 7th respondent on the other hand failed to prove his claim to the land and is not entitled to the same.

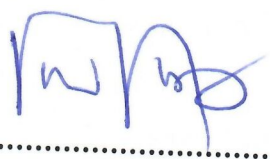
Accordingly, this appeal would succeed on all grounds.

Orders:

This appeal is therefore allowed with the following orders;

- 15 i. The appellant is decreed to be the owner of the suit land with exception of the 5 acres given to the 2nd respondent and the 10 acres bought by the 3rd respondent.
- ii. The 1st respondent is only entitled to the 5 acres the 2nd respondent was given by the late Ogwal Nyangatum.
- 20 iii. An order of vacant possession is given against the 4th to 7th respondents.
- iv. A permanent injunction is issued against the 4th to 7th respondent.
- 25 v. The cost of this appeal and in the court below is awarded to the appellant in any event.

I so order.



.....
Hon. Justice Dr Henry Peter Adonyo

Judge

18th August 2022