

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTIONS AND BAILIFFS DIVISION
MISCELLANEOUS APPLICATION NO 172 OF 2015
(ARISING OUT OF HCT - EMA - 2052 OF 2014)
(ALL ARISING OUT OF CIVIL SUIT NO. 540 OF 1990)**

**GREEN PASTURES
LIMITED}.....APPLICAN
T**

VS.

**THE COOPERATIVE BANK LTD (IN
LIQUIDATION)}.....RESPONDENT**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application citing as enabling provisions section 33 of the Judicature Act cap 13, sections 35, 92 and 98 of the Civil Procedure Act and Order 52 rules 1 and 3 of the Civil Procedure Rules for an order setting aside/ cancellation of execution by way of attachment and sale of property comprised in Kyadondo Block 85 Plot 5 land at Nase Wakiso. Secondly it is for consequential orders of restitution, compensation and damages under section 92 of the Civil Procedure Act Cap 71. Finally it is for costs of the application to be provided for.

The Applicant is represented by Messieurs Lubega & Co. Advocates while the Respondent is represented by Messieurs Mukiibi & Kyeyune Advocates. The matter initially proceeded before honourable justice Owiny Dolo (judge of the High Court as he then was before he was elevated to the Court of Appeal). A schedule was given for Counsel to address the court in written submissions and indeed the court was addressed in written submissions but the honourable judge did not have an opportunity to resolve the controversy before he was elevated to the Court of Appeal. The application was forwarded to me in August 2017 upon my transfer to the execution and

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bailiffs division and I have read the written submissions of Counsel which comprises primarily of submission on points of law.

The Applicants Counsel addressed the court on the following points of law namely:

1. Whether the recovery of a sum of Uganda shillings 17,985,690,618/= claimed by the Respondent is barred under section 35 of the Civil Procedure Act and section 3 of the Limitation Act?
2. What remedies are available to the parties?

The Applicant's Counsel relied on section 35 of the Civil Procedure Act and submitted that this section bars a fresh application for execution after 12 years from the date of the decree sought to be executed. Secondly where the order directs the payment of money subsequent to the decree, it bars a fresh application from the date of default of making payment or delivery of the property. In response to the Respondents assertion that there was no fresh execution but rather an application in fulfilment of the execution that was never completed in 1990, the Applicants Counsel submitted that to a limited degree the provision would not apply to this application. He relied on the decision of this court in LARB (U) Ltd and others vs. Greenland bank (in liquidation) & Sil Investments Ltd and Another HCMA No. 490 of 2010 arising from Civil Suit No. 253 of 2010 for the holding that section 35 (2) (b) of the Civil Procedure Act does not limit or affect the operation of the law of limitation for the time being in force in Uganda. Counsel submitted that the Respondent's application was for completion of execution but was never concluded in 1990 and it follows that it should have considered the balance that was due and not executed the decree as if no money had ever been paid. This is without prejudice that the auctioneers did not state how much money was paid in their letter and no return was ever made to court. In the case of LARB (U) Ltd and others vs. Greenland bank (in liquidation and others (supra) the court held that execution in that case was imperfect in that the decreed amount had not been realised in full. It followed that the defendant could only be pursuing the remainder of the outstanding amount on the decreed sums. This included the principal amount, plus accumulated interest and costs at the time of judgment. If section 35 of the CPA bars execution in the circumstances of the case after a period of 12 years, the rights if any which the defendant could have enjoyed had been barred by the statute from enforcement. Section 3 of the Limitation Act and section 35 of the Civil

Procedure Act bars execution after 12 years from the date on which the decree is issued or the date of default to pay the money or deliver the property ordered by the court.

The Applicant's Counsel further submitted that interest on the decreed amount was to take effect from 19th June, 1990 until payment in full and cannot be recovered by the Respondent after the expiration of six years. The Respondent had the right to recover its balance of Uganda shillings 3,495,126/= within a period of 12 years and six years for the interest. He relied on several other authorities on the question of limitation and I do not need to go into the authorities. The gist of the authorities is that the law of limitation is strictly applied and is not concerned with the merits of any particular case. Counsel relied on the Court of Appeal decision in **Mohammed B Kasasa vs. Jasphar Buyonga Sirasi Bwogi, Civil Application Number 42 of 2008; Hilton vs. Sutton Steam Laundry [1946] 1 KB 61 at page 81; John Oitamong vs. Mohammed Olinga [1985] HCB 86; RB Policies at Lloyd's vs. Butler (1949) 2 All ER 226** on the principles applied on limitation of actions and the case of **Gizamba Annas vs. Mugobera Massa Moses HCT - 04 - CV - CA 0096 - 2011** on the question of service of court process.

As far as remedies are concerned, the Applicant prayed for orders of restitution, compensation and damages under section 92 of the Civil Procedure Act. He prayed for restitution of the Applicants title as well as compensation in the sum of Uganda shillings 30,000,000/= and for costs of the application.

In reply the Respondent relied on the affidavit of Ms Evelyn Nanyonga which I have reproduced in my ruling below. Counsel then addressed the court on the provisions of section 35 of the Judicature Act (Civil Procedure Act) which he quoted in full.

He submitted that under the above provision, the definitive word is "fresh application". This section has been considered in a number of cases where it has been held that execution cannot be done after the expiration of 12 years from the date the judgment was enforceable. He relied on the decision of his Lordship Phadke J in **Bazirio Kivumbi vs. Ibrahima Ismail Civil Suit No 48 of 1957 reported in [1972] ULR 72** where it was held that the expression "fresh application" means a substantive application for execution and not merely an ancillary one made with the object of moving the court to

proceed in the matter of a substantive application already on the file. As a general rule where the previous application has been suspended or stayed or dismissed for no fault of the decree holder, and the second application is similar in scope and character to the previous one, the second application will be deemed to be an ancillary one in continuation to the previous one. Where the character of the second application is different from that of the former as for instance, where the relief claimed in the second application is against properties or persons different from those in the previous application. The second application would be deemed to be a "fresh application" within the meaning of section 35.

He contended that the subsequent attachment and sale of the property cannot be based on the fresh application within the meaning of section 35 of the Civil Procedure Act.

As far as the facts of the application are concerned, judgment in the sum of Uganda shillings 3,495,123/=; interest at the rate of 45% per annum calculated daily and compounded monthly with effect from 19th June, 1990 until payment in full and costs was entered in favour of the Respondent. The Respondent applied for and was allowed to execute by way of attachment of the subject property comprised in Kyadondo Block 85 Plot 5 land at Nase, Wakiso. Meanwhile, the property was offered to the judgment creditor (Respondent) as security by the Applicant. An order of attachment and sale was granted to Messieurs Luka auctioneers and court brokers, who advertised the property for sale on 15th September, 1990. In the intervening period, the judgment creditor went through a gradual process of liquidation until it was finally liquidated in the year 1998. Prior to the sale all properties and securities including the suit property were vested in the bank of Uganda and the receiver was accordingly appointed.

Subsequently, bank of Uganda sold of its loan portfolio to cooperative bank Ltd (in liquidation) to Messieurs Nile River Acquisition Company. The sale is dated 23rd December, 2014. Nile River Acquisition Company granted a power of attorney in favour of Messieurs Sil Investments Ltd which was appointed a debt collecting agent with the power to recover debts on behalf of the principal. In furtherance, over the years, the decretal sum had accumulated to Uganda shillings 17,985,690,618/=. On the first September, 2015, the warrant of attachment and sale of immovable property was issued in High Court Civil Suit No. 540 of 1990 and a notice to show cause in HCT - EMA

2052 of 2014 was personally served upon Dr. Kafumisi Mugombe and execution was completed by sale of the property to a third party.

Counsel sought to distinguish the decision in Larb (U) Ltd and two others vs. Greenland bank (in liquidation) and another High Court (commercial division) miscellaneous application number 490 of 2010 (arising from Civil Suit No. 253 of 2010) on the ground that the case was distinguishable because the bank sought interest on the claim whereas it was already in liquidation and therefore the court saw no justification to charge commercial interest when it was no longer trading. Additionally, no interest was granted upon the judgment. As far as this matter is concerned, Counsel submitted that the order for interest arises out of the judgment decree itself.

Counsel invited the court to hold that execution in HCT/EMA/2052/2014 was the continuation of the execution process which had started prior to the liquidation process and was legal.

As far as the Limitation Act is concerned, learned Counsel for the Respondent agreed with the Applicants Counsel that the period of limitation for an application for execution of any decree is 12 years and the time of limitation starts to run from the date when the decree/order becomes enforceable. This applies where there is interest recoverable in respect of any judgment date except that this is supposed to be recovered within the period of six years from the date on which interest became due. Section 3 (3) of the Limitation Act cap 80 laws of Uganda 2000 provides that an action shall not be brought upon the judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six years from the date on which the interest became due.

Notwithstanding the clear wording of section 3 of the Limitation Act, it should be read together with section 21 of the Limitation Act which provides for exceptions to applicability of the period of limitation on grounds of disability, acknowledgement, part payment, fraud and mistake enshrined under section 21 of the Act.

Counsel submitted that the word "disability" in the provision extends beyond mere infancy and mental disability but extends to all other instances of incapacity which would hinder a person from performing a required act such as detention/imprisonment. In **Fred Mungecha vs. Attorney General [1981] HCB 34** it was held that imprisonment is a disability. He submitted

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that the court ought to find that the Respondent was under disability owing to the ongoing liquidation process. The Respondent went into the process of litigation which was finalised in the year 1998 and all properties and securities including the suit property were vested in Bank of Uganda in exercise of its supervisory role. Pursuant to the liquidation the Bank of Uganda sold off its loan portfolio for Co-operative Bank Ltd (in liquidation) to Messieurs Nile River Acquisition Company, an international-based company. It was not until Messieurs Nile River Acquisition Company subsequently executed a power of attorney dated 31st of December 2007 that Messieurs Sil Investments Ltd was granted a power of attorney as a debt collector agent. The power of attorney was executed on 31st of December 2007 appointing it a debt collecting agent with the power to recover debts on behalf of Messieurs Nile River Acquisition Company. Additionally, Dr Kafumisi and Dr Barbara acting in the capacity as proprietors of the Applicant offered the subject property as security in execution of the judgment in **HCCS 540 of 1990**. The essential issue/question in the circumstances would be whether it could be claimed by the Applicant that upon the period thereafter the Respondent reneged upon its right to execute the fruits of the judgment. The facts are clear that when the Respondent continued the process of execution, the Applicant was aware of the same since its representatives kept on frequenting the Respondent's premises. It was only after the Respondent sold off the subject property to a third party that the Applicant suddenly laid claims against it. In the premises, Counsel prayed that the execution should be held by the court to be proper and to dismiss the application with costs.

In rejoinder, the Applicants Counsel submitted that section 98 of the Civil Procedure Act saves the inherent powers of this court for purposes of meeting the ends of justice. He submitted that the central theme of this section is the ascertainment of the ends of justice for the purpose for which inherent powers of the court have been retained. Counsel reiterated submissions that execution proceedings in Civil Suit No. 540 of 1990 was illegal and bad in law since it was done more than 12 years after the right to do so had accrued.

The Applicant's Counsel further submitted that for the decree holder to maintain that an application was a continuation of the previous application; two conditions have to be satisfied. Firstly, the previous application had still to be pending and secondly, the present application had to be similar in scope and ancillary to the previous application.

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He contended that in the current application, the original decree of 1990 was for Uganda shillings 3,495,126/= as if no money had been paid. The judgment debtor had paid some money during the auction. Secondly, the Respondent was recovering the decretal sum which had accumulated to Uganda shillings 17,985,690,618/= which is evidenced from the application. The interest is calculated for the period 1990 to 2014.

Section 3 (3) of the Limitation Act bars such an action as no arrears of interest in respect of any judgment shall be recovered after the expiration of six years from the date on which the interest became due.

With reference to the argument that the Respondent bank went into liquidation in 1998, the period 1990 - 1998 was more than six years within which to recover the arrears of interest on the judgment. So the Respondent bank was already caught up by the time under the Limitation Act. Consequently the execution for the amount of 17.9 billion Uganda shillings was illegal and time barred under section 35 of the Civil Procedure Act and section 3 (3) of the Limitation Act.

With reference to the submission of the Respondent's Counsel on the disability of the Respondent under section 21 of the Limitation Act, the Applicant's Counsel in rejoinder submitted that evidence in such an application is by way of affidavit and there is no deposition to the effect that the Respondent bank was under any disability in the affidavit in reply. Parties are bound by their pleadings (see **Lukyamuzi vs. House and Tenant Agencies Ltd (1983) HCB 74 - 75; Dhamji Ramji vs. Rambhai and Company (U) Ltd (1970) EA 515; Gandy vs. Caspair Air Charters Ltd; and the case of Aisha Nantume vs. Damulira Kitata James HCCS 77 of 2007**).

Going by the submission that the liquidation was finalised in the year 1998, then all properties and securities including the suit property were vested in the bank of Uganda. The presumption is that at this stage the Respondent bank was under receivership and the official receiver had a duty to recover the debts on the behalf of Bank of Uganda/Respondent which it never did and it cannot plead disability under section 21 of the Limitation Act.

Ruling

I have carefully considered the Applicant's application as disclosed in the pleadings. The Applicant's application is for an order setting

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aside/cancellation of execution by way of attachment and sale of property comprised in Kyadondo Block 85 Plot 5 land at Nase Wakiso. Secondly, it is for consequential orders of restitution, compensation and damages under section 92 of the Civil Procedure Act Cap 71. Finally it is for costs of the application to be provided for.

The grounds of the application are that the decree in **Civil Suit No. 540 of 1990** was partially executed in 1990 and no fresh application/action had ever been made by the Respondent since 1990 up to 2014. However, the High Court issued a notice to show cause in **Civil Suit No. 540 of 1990** on 27th August, 2014 after 24 years which is illegal and barred by law. Thirdly, there was a false affidavit of service of the notice to show cause filed as the Applicant Company was never served with any court document. Fourthly, an order of sale of immovable property comprised in Kyadondo Block 85 Plot 5 land at Nase Wakiso was granted, the property was advertised and sold. Fifthly, the warrant of execution is illegal, null and void because it was issued 12 years after the date of the last partial execution. On the 6th ground, the application for execution is time barred since the same property was advertised for sale on 15th September, 1990. On the seventh ground the Applicant avers that this court is obliged not to condone an illegality once brought to its attention. Lastly the Applicant averred that it is in the interest of justice that the execution and order of sale of immovable property in the suit should be set aside.

The application is supported by the affidavit of Dr Mugombe Kafumisi in which he deposed that he and Dr Barbara Mutaawe Mugombe are joint registered proprietors of the land comprised in Kyadondo Block 85 Plot 5 (the suit property) the subject of attachment and sale in Civil Suit No. 540 of 1990. That the decree in **Civil Suit No. 540 of 1990** was signed on 7th August, 1990 and a partial execution by attachment and sale of property comprised in the suit property was carried out around September 1990. Since 1992 to 2014 no further action was taken in respect of execution in **Civil Suit No. 540 of 1990** and it is now 24 years. He deposed that the actions leading to the order for the second attachment by way of sale of property comprised in Kyadondo Block 85 Plot 5 (supra) are tainted with fraud on the following grounds:

Kaweesi & Partner Associates on 29th, August 2014 made an application to the registrar High Court execution division for execution of the decree in **Civil Suit No. 540 of 1990** by way of attachment of land comprised in

Kyadondo Block 85 Plot 5. Prior to that, court had issued a notice to show cause on 27th August, 2014 and the file had been forwarded to the execution division on 26th August, 2014 in total abuse of court process as there is no evidence as to who moved the court and when. The deponent further stated that neither he nor the company was sound with a notice to show cause as stated in the affidavit of Baguma Badru filed on court record on 1st September, 2014. He is not a resident of Kyiwalabye Close rather Northern bypass link Bweyogerere industrial area. An order for sale was made on 8th October, 2014 and the property was advertised on September 2014 and the sale agreement was made on 20th October, 2014 between Tumuheirwe Jotham of Upright Associates and Badiru Kadala Mubiru. However receipts of payments show that payments were made on 10th October, 2014, 12th October, 2014, 30th October, 2014, 14th October 2014, 15th October, 2014 and 8th October, 2014 yet the agreement was executed on 20th October, 2014.

On the ground of information of his lawyers Messieurs Lubega Babu & Company Advocates through Counsel Babu Rashid, the execution of the decree as mentioned above after 12 years is illegal, unlawful, null and void and prohibited by the law of limitation. On 30th July, 2014 through his lawyers Messieurs Oscar associated advocates, the letter was written to Sil Investments Ltd inquiring about the status of the mortgage but a reply was only got on 23rd September, 2014 after a warrant in execution was issued. In the premises the Applicant deposed that it is in the interest of justice that the execution an order of sale and the sale of property comprised in Kyadondo Block 85 Plot 5 is set aside, nullified or cancelled by this honourable court for being time barred and an illegality. He further deposed that unknown people are essentially were seen in the disputed land trying to open boundaries and trying to evict his tenant.

In reply Nanyonga Evelyn, an agent of the Respondent Company deposed to an affidavit in reply in which he states as follows. She had read the notice of motion supported by the affidavit of the Applicant. She denies paragraphs 4 to the effect that no action has been taken in respect of execution in Civil Suit No. 540 of 1990 from 1990 to 2014. Co-operative bank Ltd (in liquidation) was the judgment creditor in Civil Suit No. 540 of 1990 against the Applicant (judgment debtor) for the sum of Uganda shillings 3,495,123/=, interest at the rate of 45% per annum calculated daily and compounded monthly with effect from 19th June, 1990 until payment in full and costs. The Respondent through its lawyers made an application for
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execution by way of attachment of property comprised in Kyadondo Block 85 Plot five which was offered to the judgment creditor as security by Dr Kafumisi Mugombe and Dr Barbara Mutaawe Mugombe, as proprietors of the judgment debtor. An order of attachment and sale of the property was granted to Messieurs Luka Auctioneers and Court Brokers, who advertised the property for sale on 15th September, 1990. Unfortunately, the property was never sold off as it had been ordered by court because Co-operative bank Ltd, the judgment creditor and the Respondent herein was liquidated in 1998. Upon liquidation, all the properties/securities including property comprised in Kyadondo Block 85 Plot 5 stated in Wakiso district was vested in the Bank of Uganda and the receiver was accordingly appointed. In exercise of powers in liquidation, bank of Uganda went ahead and sold off the debt portfolio for co-operative bank Ltd (in liquidation) to Messieurs Nile River Acquisition Company. Upon the sale of the co-operative bank Ltd (in liquidation) loans portfolio, Messieurs Nile River acquisition company as the purchaser thereon in turn executed the power of attorney dated 31st December, 2007 with Messieurs Sil investments Ltd as the donee whereupon Sil Investments was appointed a debt collecting agent with the power to recover a debt on behalf of Messieurs Nile Acquisition Company. The judgment debtors were aware about these developments. The decretal sum had accumulated to Uganda shillings 17,985,690,618/-. She denies that the proceedings leading to the order of the second attachment by way of sale of property was not tainted with fraud as alleged. On 1st September, 2015, a warrant of attachment and sale of immovable property was issued in **High Court Civil Suit No. 540 of 1990**. There was proper personal service of the notice to show cause in **HCT - EMA - 2052 of 2014** upon the Applicant by a process server of the High Court but there was no response to the same. A sale order was made in the same cause of Kyadondo Block 85 Plot 5 and the property was subsequently advertised in the newspapers. The second attachment by way of sale of property was legally made. Furthermore on the strength of information of her lawyers, she deposed that the execution of the decree in **Civil Suit No. 540 of 1990** is illegal, unlawful and is not in any way prohibited by the law of limitation. The execution was completed by the sale of property as attached to a third party thereon and this application has no legal basis as it has been overtaken by events according to the return of execution and the vesting order respectively. On the strength of advice of her lawyers, she deposed that it was not a fresh application but an application in fulfilment of the execution which was never completed in 1990. Having sold the entire property already

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to a third party, the Applicant cannot maintain an action against the Respondent. Furthermore the application is prejudicial, overtaken by events, made in bad faith and is an attempt by the Applicant to unjustifiably delay or debar the Respondent from enjoying the fruits of the judgment in **Civil Suit No. 540 of 1990.**

There are two provisions of law to be considered. The first is the Limitation Act section 3 (3) which deals with the limitations with regard to actions brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable as well as with the question of arrears of interest in respect of any judgment. The second provision is section 35 of the Civil Procedure Act which also bars enforcement of decrees after the expiration of 12 years.

Starting with the Limitation Act Cap 80 Laws of Uganda 2000, section 3 (3) which is the relevant provision provides as follows:

“3. Limitation of actions of contract and tort and certain other actions.

...

(3) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.”

The word "action" is interpreted by section 1 (1) (a) to include any proceeding in a court. The words of the section are: "“action” includes any proceeding in a court". It therefore means that what is barred is proceeding in a court of law for a remedy through an action such as an application or motion asking the court to invoke its powers to provide a remedy. In the context of this application it means execution proceedings. Interpreting the provision in context, proceedings in respect of execution shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable. More so, the provision means that the process of court will not be used after the expiration of 12 years from the date on which the judgment became enforceable. The word "enforceable" imports with it the process of court which may include coercion or compulsion. It cannot bar a debtor from paying if he or she chooses to do so. It only bars proceedings for enforcement. The expression "judgment"

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includes the award of interest in the judgment as well as the award of the principal amount.

The obvious question is when the judgment in High Court Civil Suit No. 540 of 1990 became enforceable? Taking the point of view from the affidavit in reply to the application by Nanyonga Evelyn deposed to on 16th March, 2015, paragraph 5 of the affidavit has attachment annexure "A" which is a copy of the decree dated 7th August, 1990. From further facts pursuant to the decree the court is supposed to consider facts which are relevant to the resolution of the question of when time begins to run from the perspective of the Respondent as far as the law of limitation is concerned. Attached to paragraph 7 of her affidavit is another attachment being an application for execution of the decree annexure "B" dated 14th August, 1990 wherein Messieurs Luka Auctioneers & Court Brokers were supposed to attach and sell the land at Kyadondo Block 85 Plot 5 at Nase, the subject matter of this application. The principal amount was Uganda shillings 3,495,128/= and interest at the rate of 45% until payment in full.

It can be submitted that the judgment was therefore enforceable by 14th of August 1990 and the limitation period of 12 years begun to run. It is not in contention and in ground (b) of the Notice of Motion, it is clearly averred that the High Court issued a notice to show cause in **Civil Suit No. 540 of 1990** on 27th August, 2014 about 24 years after the decree became enforceable. In ground (f), it is averred that the application for execution is time barred since the same property was advertised for sale on 15th September, 1990. In paragraph 3 of the affidavit of Dr Mugombe Kafumisi in support of the application, it is averred that the decree in **Civil Suit No. 540 of 1990** was signed on 7th August, 1990 and a partial execution by attachment and sale of property comprised in Kyadondo Block 85 Plot 5 was carried out around September 1990. Finally it is averred that since 1990 to 2014, no further action was taken in respect of the execution and it is now 24 years.

I have further considered paragraph 5 of the affidavit in support of the application where Dr. Mugombe deposed that Messieurs Kaweesi & Partners Associates on 29th August, 2014 made an application to the registrar High Court Execution Division for execution of the decree in **Civil Suit No. 540 of 1990** by way of attachment of land comprised in Kyadondo Block 85 Plot 5. The letter was attached as annexure "C" addressed to the Registrar, High Court of Uganda, and Execution Division. Part of the letter reads as follows:

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"As instructed, an order of attachment and sale of the said security was granted to Luka Auctioneers and Court Brokers who the advertised the property for sale on 15th of September 1990.

We note with concern that the property was never sold as had been ordered by the court because the judgment creditor was liquidated in 1998.

Upon liquidation which process started as early as 1994, all the properties/securities including the instant property vested in Bank of Uganda and a receiver was appointed accordingly.

In exercising its powers in liquidation, Bank of Uganda went ahead to sell the entire debt portfolio to Nile River Acquisition Co. Ltd and accordingly Sil Investments Ltd was appointed to realize the debt by selling the available securities and/or go for redemption. Hereto is a copy of the letter from the central bank releasing ownership of the legal ownership of all loans of all banks that went into liquidation including the judgment creditor.

In the premises the application for execution is made based on the above circumstances to secure a new order for attachment and sale of property comprised in Kyadondo Block 85 Plot 5 in satisfaction of the decree of court.

We appoint Tumuheirwe Jotham trading as Upright Associates to take on the process of attachment and sale as the subject certificate of title is already within the custody of our client.

By copy of this letter we confirm the move to waive the costs of the suit...."

The excuse given for failure to execute the decree until 2014 is the liquidation of the bank/Respondent. In paragraph 7 and 8 of the affidavit of Nanyonga Evelyn it is clearly deposed to that the property was as advertised for sale on 15th September, 1990 but unfortunately the property was never sold off as had been ordered by court because Messieurs Co-operative bank Ltd, the judgment creditor and Respondent was in liquidation in 1998. It was a submission that all the property vested in Bank of Uganda and a receiver was accordingly appointed. She relied on the release of legal ownership from bank of Uganda annexure "C". I have accordingly perused annexure "C" and

it is a letter dated 25th January, 2008 by the Bank of Uganda addressed "TO WHOM IT MAY CONCERN". From the facts in the affidavit in reply of Nanyonga Evelyn this was about 10 years from 1998 when the Respondent had gone into liquidation. The letter showed that Nile River Acquisition Company acquired the loan portfolios which constituted the subject matter of the debt purchase and transfer agreement between it and the bank of Uganda and was entitled to exercise all the rights and remedies with regard to the loan.

If the above letter is taken on its face value and assuming the facts therein are accurate, it means that another two years from 2008 would be the year 2010. As it turned out execution proceedings were commenced again in August 2014. An agreement was executed between Nile River Acquisition Company Ltd and Messieurs Sil Investments Ltd dated 31st of December 2007 and attached as annexure "E" appointing Sil Investments Ltd as an agent for the same purpose. By August 2012, it was more than 12 years from 1990 if the period between 1998 and January 2008 is excluded in the reckoning of time. This is without determining whether, this period can be lawfully excluded for purposes of reckoning time under section 3 (3) of the Limitation Act. Under the above cited section, an action or proceeding inclusive of applications for execution upon any judgment is barred after the expiration of 12 years from the date on which the judgment became enforceable. The second aspect is that no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

Judgment was enforceable by the end of 1990. By 1998, this was a period of eight years from the date the judgment became enforceable. If time started running again in January 2008, by end of 2009, a period of 12 years would have elapsed. It is even apparent from the above correspondence annexure "E" that Messieurs Sil Investments Ltd was appointed in December 2007. If time had begun to run again in January 2008, and after the presumed excludable period, judgment ought to have been enforced by January 2010. Execution proceedings commenced again in August 2014 more than two years after the period of limitation had elapsed and from that perspective of facts from the Respondents affidavit is time barred.

If one went by the provisions of section 35 of the Civil Procedure Act, the same result would be achieved.

“35. Execution barred in certain cases.

(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the decree shall be made upon any fresh application presented after the expiration of twelve years from—

(a) the date of the decree sought to be executed; or

(b) where the decree or any subsequent order directs any payment of money, or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the Applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

(a) to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the term of twelve years where the judgment debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of any law of limitation for the time being in force in Uganda.”

Section 35 (1) of the Civil Procedure Act caters for a situation where an application to execute the decree has been made, it provides that no order for the execution of the decree shall be made upon any fresh application presented after the expiration of 12 years from the date of the decree sought to be executed or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment in respect of which the Applicant seeks to execute the decree. In other words, from the facts and circumstances of this case, an application for execution of the decree had been made in 1990. Execution by way of attachment had commenced. A fresh application which was made in August 2014 after a period of 12 years has elapsed. The application order by way of warrant of attachment was barred by section 35 (1) of the Civil Procedure Act. The exceptions to section 35 (1) provided for under section 35 (2) do not apply because it deals with ordering execution of a decree upon an application after the expiration of 12 years where the judgment debtor has

by fraud or force prevented the execution of the decree at some time within 12 years immediately before the date of the application. It is not the Respondent's case that the Applicants by fraud or force prevented the execution of the decree at some time within 12 years immediately before the date of the application. Their defence simply is that the Respondent was in liquidation and its assets vested in the bank of Uganda and were subsequently sold to a debt collector. Last but not least section 35 (2) (b) does not limit the operation of any law of limitation. Section 35 of the Civil Procedure Act is to be read together with the Limitation Act section 3 (3).

The conclusion is that even if the judgment creditor or agent relied on exemption from the law of limitation by virtue of liquidation of the Respondent bank, the application for execution was commenced outside the limitation period and is therefore barred by both section 3 (3) of the Limitation Act cap 80 laws of Uganda as well as section 35 (1) of the Civil Procedure Act. I have further considered the precedent quoted of LARB (U) Ltd and another vs. Cooperative Bank (in Liquidation) and another (supra). In that case I quoted the statement of the policy behind the law of limitation from the case of **R B Policies at Lloyd's v Butler [1949] 2 All ER 226 at pages 229 - 230** per Streatfield J:

“I cannot think that that is the policy of the Limitation Act, 1939, or that to construe its words in favour of the plaintiffs would be to construe them in a way which harmonises with the intention of the legislature. I agree that one of the principles of the Act is that those who go to sleep on their claims should not be assisted by the courts in recovering their property. But another equally important principle is that there shall be an end of these matters, and that there shall be protection against stale demands. In *A'Court v Cross*, Best CJ referred to the policy of the Limitation Act, 1623, in this way (3 Bing 332):

“It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the Act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have heard it often called by great judges, an act of peace. Long dormant claims have often more of cruelty than of justice in them.”

I am not suggesting that the plaintiffs here are guilty of heartless or cruel conduct, but a claim made seven or eight years after the loss of the car against a perfectly innocent holder who has given good consideration for it without any knowledge that it was stolen does not seem just. I think that one object of this Act is to prevent injustices of that kind and to protect innocent people against demands which are made many years afterwards. In my view, the proper construction of the words “the action accrued” involves the finding that the cause of action here accrued in 1940 when the car was stolen from the plaintiffs. This preliminary point must, therefore, be decided in favour of the defendant.”

A claim or right of action barred by statute cannot be enforced through court process. According to Lord Goddard CJ **Jones vs. Bellegrove Properties Ltd [1949] 2 All ER 198** the statute of limitation bars an action but does not extinguish a debt. He said at page 201:

“The statute does not extinguish a debt. It only bars the right of action”.

What is barred is therefore the right of action as defined under section 1 (1) (a) of the Limitation Act. The conclusion is that the Respondent had no right to commence any execution proceedings after the expiration of 12 years as discussed above. Secondly, the registrar had no jurisdiction to issue an order for attachment and sale of the judgment debtor’s property after the 12 years limitation period. I will further consider whether the period of the liquidation and takeover by bank of Uganda before sale of the debt portfolio of Cooperative bank can be excluded in reckoning the limitation period of 12 years. To resolve the issue what should be considered is whether the vesting of property in Bank of Uganda in whatever capacity stipulated under the law (and what law) is a disability as advanced by the Respondent’s Counsel.

I have accordingly considered the provisions for winding up of a Company under the Companies Act cap 85 laws of Uganda (repealed) as well as provisions for taking over a bank by the Bank of Uganda in 1998 under the Financial Institutions Act Cap 54 laws of Uganda (repealed). I have particularly considered the powers of liquidators under the two relevant laws. The powers of a liquidator under the Companies Act cap 85 laws of Uganda (repealed) which was the applicable law in 1998 included under section 244 thereof a duty to take under his or her custody all the property and things in

action to which the company taken over appears to be entitled. Secondly under section 243 of the repealed the Companies Act, all the property of the subject company vested in the liquidator. Powers of a liquidator under section 244 (1) (a) in the winding up by the court include the right to bring or defend any action or other legal proceedings in the name and on the behalf of the company. These powers are extended to a liquidator in a voluntary or private winding up (without court order) under section 301 (1) (a) of the repealed Companies Act Cap 85 laws of Uganda.

By 1998 the powers of the bank of Uganda can be traced to and founded under the Financial Institutions Act Cap 54 laws of Uganda. Under section 31 of the said Financial Institutions Act cap 54 laws of Uganda (of 1993), where the central bank takes control of the management of the financial institution, it is vested with the exclusive powers of management and control which powers under section 31 (2) (e) include power to commence or continue with legal proceedings. Legal proceedings include execution proceedings. Section 31 is quoted hereunder for ease of reference:

“31. Management of a seized financial institution.

(1) The central bank shall, upon possessing a financial institution under section 30, be vested with exclusive powers of management and control of the affairs of the financial institution.

(2) The powers referred to in subsection (1) shall include power to—

(a) continue or discontinue its operations as a financial institution (notwithstanding the revocation of its licence);

(b) stop or limit the payment of its obligations;

(c) employ any necessary staff;

(d) execute any instrument in the name of the financial institution;

(e) initiate, defend and conduct in its name any action or proceeding to which the financial institution may be a party;

(f) reorganise or liquidate the financial institution in accordance with this Act; and

(g) do any other act which is necessary to enable the central bank to carry out its obligations under this section.

(3) The central bank shall, as soon as possible after taking possession of a financial institution, make an inventory of the assets of the financial institution and shall transmit a copy of it to the Minister.

(4) Where, as a result of its inventory under this section, the central bank determines that a financial institution is insolvent, the central bank may, in consultation with the Minister, close the financial institution on account of its inability to meet its obligations to its depositors and other creditors.

The Bank of Uganda (Central Bank) therefore had the authority to commence or continue with legal proceedings. Execution proceedings are legal proceedings in terms of section 31 (1) (e) of the repealed Financial Institutions Act cap 54 Law of Uganda. The central bank also had power to liquidate the financial institution. This included power to collect all assets of the Respondent bank and to sell it off. It also had power to become the receiver of the financial institution and carry out duties of the receiver under section 32 of the repealed Financial Institutions Act Cap 54.

The conclusion is that the central bank had all the powers to realise the assets of the Respondent bank through execution proceedings and the limitation period continued to run after the Bank of Uganda was in effective control at most within a period of 6 months which may be excluded under section 30 (2) of the Financial institutions Act cap 54. For ease of reference I reproduce the said section:

“30. Seizure.

(1) The central bank may take possession of a financial institution—

(a) which is insolvent;

(b) which is conducting its business in a manner contrary to this Act;

(c) when the continuation of its activities is detrimental to the interests of depositors;

(d) that refuses to submit itself to inspection by the central bank as required by this Act; or

(e) whose licence has been revoked under section 10.

(2) Where a financial institution is seized under this section, the following shall apply—

(a) any term, whether statutory, contractual or otherwise, on the expiration of which a claim of right of the financial institution would expire or be extinguished shall be extended six months from the date of seizure;

(b) any attachment or lien existing six months prior to seizure of the institution shall be vacated, and no attachment or lien except a lien created by the central bank shall attach any property or assets of the financial institution as long as the central bank continues to possess the financial institution; and

(c) any transfer of any asset of the financial institution made six months before the insolvency or seizure of the institution with intent to effect a preference shall be void.”

I do not therefore agree with the Respondents that the limitation period did not continue or was excluded by the process of the liquidation. At most the excludable period was only up to six months. In the absence of other evidence, the judgment debt became stale. Execution was commenced and continued after more than 24 years from the date of the judgment and was time barred.

In the premises, the application for execution of the decree in HCCS NO. 540 of 1990 in 2014 as well as any warrants of attachment issued thereafter were barred by the law of limitation.

Remedies

In the written submissions, the Applicant prayed for an order of restitution and compensation in damages. The Applicant’s grievance is that the suit property has been subdivided, cleared and the Applicants tenants evicted. The Applicant sought for restitution, compensation and damages under section 92 of the Civil Procedure Act. He prayed for a sum of Uganda shillings 30,000,000/= inclusive of damages.

On the other hand the Respondent’s Counsel prayed that the Applicant’s application is dismissed with costs.

I have carefully considered the question of remedies and it is not in dispute as contained in the submissions of the Respondents Counsel that the Respondent sold the property the subject matter of the suit to a third party. In paragraph 22 of the affidavit in reply of Nanyonga Evelyn, she deposed that having sold off the entire property to a third party, the Applicant had no right of action against the Respondent. The prayer in the application is inter alia for an order setting aside or cancelling execution by way of attachment and sale of property or any consequential orders of restitution, compensation and damages. The property was sold for Uganda shillings 310,000,000/= according to returns dated 20th October, 2014. The Applicant seeks a remedy under the provisions of section 92 of the CPA. Section 92 of the Civil Procedure Act provides as follows:

“92. Application for restitution.

(1) Where and insofar as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part of it as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on the variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).”

I have duly considered the law. Section 92 (1) deals with the variation or reversal of a decree of the court. It allows any party entitled to restitution to apply for restitution of the benefit taken away by the decree. A careful analysis leads to the conclusion that something can only be taken away pursuant to a decree of court through execution or compliance with the court order. Where the court reverses the decree, an order for refund or some kind of restitution can be made. The principal imports the doctrine of *restitutio in integrum*. In the East African Court of Appeal case of **Dharamshi vs. Karsan [1974] 1 EA 41**, it was held that general damages are awarded to fulfil the common law remedy of *restitutio in integrum*. The doctrine means that the aggrieved party has to be restored as nearly as possible to a

position he or she would have been in had the injury complained of not occurred. The doctrine imports the principle of compensation which is restitution. This principle is embedded in section 92 of the Civil Procedure Act. Where the court process has been used, and that the process has been reversed, a party suffering injury is entitled to restitution under section 92 of the Civil Procedure Act. The section further under section 92 (2) of the Civil Procedure Act bars any suit for restitution where an application could be made under section 92. The Applicants application was made under sections 92 and 98 of the Civil Procedure Act. An application is also a suit under section 2 of the Civil Procedure Act which defines a "suit" as any civil proceedings brought in a manner prescribed. The word "prescribed" is also defined to mean prescribed by the rules.

The only question for consideration on the issue of restitution to the extent of restoring the status quo before the execution is whether an order for cancellation or setting aside of the execution by way of attachment and sale of property comprised in Kyadondo Block 85 Plot 5 at Nase Wakiso district can be made.

An order for restitution in terms of cancellation or return of property to the judgment debtor cannot be made after the wrongful execution and sale of the suit property through court process. The law is that a purchaser who buys pursuant to execution of a decree acquires good title. Section 49 of the Civil Procedure Act protects a purchaser who buys land through court auctions or sale and provides that:

“Subject to the provisions of any law for the time being in force relating to the registration of titles to land, where immovable property is sold in execution of a decree such sale shall become absolute on the payment of the full purchase price to the court, or to the officer appointed by the court to conduct the sale”

Unless otherwise the property is acquired fraudulently the purchaser who buys from the court official under a warrant of attachment and sale of property acquires good title. Section 50 of the Civil Procedure Act even bars a suit against the purchaser on the ground that the property was sold on behalf of the plaintiff. In this case, the purchaser has not been made a party to these proceedings. In the submissions of Counsel, the plaintiff only seeks compensation by way of payment of damages. The usual principles for the award of damages pursuant to the wrongful act of the defendant/Respondent

is restitutio in integrum and as far as money is concerned according to the case of **Johnson and another vs. Agnew [1979] 1 All ER 883**, (per Lord Wilberforce) the award of general damages is compensatory and is meant to place the innocent party so far as money can do so, in the same position as if the contract had been performed. According to **Halsbury's Laws of England 4th Edition Reissue volume 12** (1) and paragraph 812 general damages are those losses which are presumed to be the natural or probable consequence of the wrong complained of. The consequence of the wrong is loss of property.

A sale under a warrant of execution of the court is absolute. What is material is that the purchaser has paid the full purchase price. Under those circumstances the court cannot look into the adequacy of the consideration or the justification for the execution.

I am careful about condoning illegalities but this competes with the protection of a sale by court.

In **Curtis v Maloney [1950] 2 All ER 982**, goods in possession of a judgment debtor were seized by the Sheriff and sold to a purchaser through the power of sale under section 15 of the Bankruptcy and Deeds of Arrangement Act, 1913 of UK reads as follows:

“Where any goods in the possession of an execution debtor at the time of seizure by a sheriff, high bailiff, or other officer charged with the enforcement of a writ, warrant, or other process of execution, are sold by such sheriff, high bailiff, or other officer, without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to the goods so sold, and no person shall be entitled to recover against the sheriff, high bailiff, or other officer, or anyone lawfully acting under the authority of either of them, except as provided by the Bankruptcy Acts, 1883 and 1890, for any sale of such goods or for paying over the proceeds thereof, prior to the receipt of a claim to the said goods unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor: Provided that nothing in this section contained shall affect the right of any claimant who may prove that at the time of sale he had a title to any goods so seized and sold to any remedy to which

he may be entitled against any person other than such sheriff, high bailiff, or other officer as aforesaid.”

Denning LJ at page 986 in interpreting the section held:

“This is yet another instance of a contest between the common law rule that no man can give a better title than he has got and the statutory exceptions in favour of innocent purchasers. I do not think we ought to whittle down the protection which Parliament has given to innocent purchasers. In a commercial community it is very important that their title should be protected.

The words of this section are clear beyond peradventure—“the purchaser shall acquire a good title”, and I think they should be given their full effect. The proviso is to be explained by the anxiety of the draftsman not to deprive the original owner of his remedy against the execution creditor, or against any wrongdoer who had converted the goods prior to the sale. If it were not for the proviso, the execution creditor might have argued that the original owner’s claim for money had and received was not preserved because the action for money had and received is only sustainable by a true owner who is claiming the proceeds in lieu of the goods themselves, and that it failed when he ceased to be the true owner. Any such argument, good or bad, is defeated in advance by the proviso.”

He held that the words in the section that “the purchaser of the goods shall acquire good title” should be given their full meaning. The proviso thereof does not whittle down the title of a bona fide purchaser. It does not deprive the original owner of the goods from suing any wrongdoer who had converted the goods. The principle was applied by the Privy Council in **Dyal Singh vs. Kenyan Insurance Ltd [1954] 1 All E.R 847 PC** where Reid LJ held at page 849 that a bailiff or other officer of the court is only entitled to seize goods that belong to the execution debtor, but it is often difficult for him to ascertain the ownership of the goods in possession of the debtor and he may without negligence sometimes seize and sell goods which do not belong to the debtor. Furthermore, it would be difficult for a buyer in an auction to inquire about title. He held that the law imputing constructive notice does not imperil the right of a purchaser in an auction. Such a constructive notice could have been presumed on the bailiff who is protected. Therefore the right of action with regard to an action by an

aggrieved person, aggrieved by the sale is so limited as not to extend to defeat the title of the purchaser.

In **Goodlock vs. Cousins [1897] 1 Q.B. CA 558**, it was held by Lord Esher M.R. and Lopes L.J. that where the claimant had an opportunity of preventing a sale under the section by making a deposit with the bailiff but fails to do so and the goods are sold and proceeds paid into court, the purchaser acquires a good title to the goods.

The case law upholds the statutory principle under sections 49 and 50 of the Civil Procedure Act that a sale by court under a decree of the court leads to the acquisition of good title by the purchaser. I have further considered the dictum of Lord Goddard in the case of **Jones vs. Bellegrove Properties Ltd [1949] 2 All ER 198** that the statute of limitation bars an action but does not extinguish a debt at page 201: "The statute does not extinguish a debt. It only bars the right of action". Where the judgment creditor has realised his money should that sum be refunded? In equity, while the illegality of execution should not be condoned, the judgment creditor cannot be faulted for receiving that which was his in the first place. The statute of limitation only bars the use of court process or the enforcement of the decree after it has gone stale because it leads to injustice as we have reviewed above. Specifically the injustice in this case is that colossal interest arising from a decree of about Uganda shillings 3,495,128/=. It was ordered that the interest thereon would be calculated at the rate of 45% per annum calculated daily and compounded monthly with effect from 19th June, 1990 until payment in full. I agree with the Applicants Counsel that arrears of interest of more than six years cannot be recovered under section 3 of the Limitation Act and section 35 of the Civil Procedure Act. In any case, the calculation of interest cannot be the subject of any judicial pronouncement after a period of 12 years when the judgment was due for execution or from the date of default on a warrant of execution ordering for payment. In the premises, where the Respondent through the debt collector realised a sum of Uganda shillings 310,000,000/=, when they were seeking for payment of Uganda shillings of 17,985,690,618/= according to annexure F attached to the affidavit of Evelyn Nanyonga in opposition to the application. The warrant indicates that the calculation was of compound interest at 45% per annum. The date of the decree is 7th August, 1990 it is clearly indicated that the date of the previous application was 9th August, 1990. The decretal sum ordered principal sum was Uganda shillings 3,495,128/=. Interest was therefore based on a period of 24 years. Even if interest was calculated for a period of

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six years, it could not be recovered after a period of over 12 years after the period of six years had elapsed. For that reason I do not need to calculate what the Respondent is entitled to.

In the application for a remedy, the Applicant does not indicate what amount should be restored. However in the submissions in support of the application, the Applicants Counsel prayed for compensation in the amount of Uganda shillings 30,000,000/= inclusive of damages.

Damages are awarded at the discretion of the court. I do not agree with the submissions of the defendants Counsel that Uganda shillings 30,000,000/= is adequate compensation. Article 126 of the Constitution enjoins the court to apply certain principles in the administration of justice. One of the principles is that adequate compensation shall be awarded to victims of wrongs.

The principle of restitution would require the entire amount of Uganda shillings 310,000,000/= to be restored to the plaintiffs after a stale decree was enforced against them 24 years after the right to enforcement had arisen. The property has been sold and the Respondent is the wrongful beneficiary of the illegal action. I am also mindful of the need of sending a clear message that the law of limitation is binding on the court and legal practitioners and the rationale is not to vex people with stale claims. Execution should be done in a timely manner. It is outrageous to enforce an interest of Uganda shillings 17,985,690,618/= arising from a decretal principal sum of Uganda shillings 3,495,123/= being the amount decreed as principal. Even if Uganda shillings 310,000,000/= was realised from the warrant of attachment, the implication is that the judgment debtor in HCCS 542 of 1990 is still liable to judicial process of execution to recovery the balance or face the consequences.

In the premises, the warrant of attachment of the suit land cannot be set aside but the execution, save, for the sale of property which cannot be impeached at this stage, is hereby set aside.

Taking into account the fact the Applicant is deemed to have waived its rights to full compensation or restitution by abandoning a suit for refund of the entire amount, I would award the Applicant Uganda shillings 200,000,000/= as adequate compensation in the circumstances of the case with costs of the suit.

Ruling delivered on 15th September, 2017

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Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Lwanga Richard Holding brief for Counsel Kyeyune Albert Collins for the Respondent

Jamila Nanyonjo holding brief for Mugisha Ronald for the Applicants

Namanya Frank: Court Clerk

Christopher Madrama Izama

Judge

15th September 2017