

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0003 OF 2007
(Arising from Adjumani District Land Tribunal Land Claim No. 0015 of 2005)

AMOKO EMILIANO **APPELLANT**

VERSUS

OKENY JOSEPH **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

Before the Adjumani District Land Tribunal, the respondent sued the appellant for recovery of land situate at Openzizi village, Openzizi Parish, Adropi sub-county in Adjumani District. He sought an order of vacant possession, a permanent injunction and costs. His case was that he is the customary owner of the land in dispute, having inherited it from his late father, Edeyi who in turn had obtained it from his uncle Payiru Oyuwi in 1963. When his father was nearing his death, he gathered all the family and anointed the respondent to be head of the family upon his demise. Upon the death of his father, the respondent took up the responsibility of looking after all property of his late father including the land in dispute. The appellant had trespassed on that land by building a hut thereon, beyond the land that had been given to his father.

In his written statement of defence, the appellant denied the respondent's claim. He contended that all his activities are on land that belongs to his father. It is the respondent who sometime before 1987 had encroached on the land only for the Local Council 1 of the area to direct him to vacate it.

In his testimony, the respondent stated that his father, Karulo Edeyi had occupied the land in dispute since 1963. During 1973, his father gave the appellant's father, Paulo Okello, a piece of land adjacent to that of the respondent's father and they lived peacefully as neighbours until the death of Paulo Okello in 1988. During the year 2004, the appellant exceeded the boundaries of

the land given to his father and encroached on the land in dispute and began cultivating it. The respondent reported to the LC. The appellant later constructed a hut on the land in defiance of directives of the LC that he should vacate the land. P.W.2 Obol Thomas testified that the appellant's father was in 1973 given land on which to settle temporarily and had never claimed the land in dispute. P.W.3 Evaristo Madrara testified that the respondent's father had come to the area during 1958 when he requested for land on which to rear his cattle. He was given the land in dispute. P.W.4 Okeny Richard testified that his father, Karulo Edeyi had given the respondent's father a piece of land next to his. P.W.5 Yosefu Wale testified that he did not know the land in respect of which the parties had a dispute and could not tell the boundaries between them since he lived far away from them. P.W.6 Alumai Ejidio testified that it is Karulo Edeyi who gave the appellant's father a piece of land in the area. The appellant had exceeded the boundaries of the land given to his father Paulo Okello and had encroached on that of the appellant. P.W.7 Ovuru Sebastian testified that Edeyi settled on the land in dispute during 1961 and upon his death, he was buried on the land. P.W.8 Itraru Benardo, testified that Edeyi settled on the land in dispute during 1961 and later permitted Paulo Okello to settle on a neighbouring piece of land but did not know the location of the boundary between the two pieces of land. That was the close of the respondent's case.

On his part, the appellant testified that the land in dispute belongs to his grandfather, Awira. In 1982, upon their return from exile, his father had allowed the respondent's father and his wife to stay temporarily on the disputed land. Later after the death of the appellant's father in 1988, the respondent encroached on the land and permitted several of his other relatives to occupy parts of it as well. In 2004, when he was cultivating part of the land he used to cultivate in the past when he was stopped by the respondent who claimed it was an area for his father's kraal yet there is a fig tree and a raised ground separating the two neighbouring pieces of land. D.W.2 Lucina Lapolo, widow of the late Paulo Okello testified that the land originally belonged to her father, Awira. It is Awira who in 1962 gave part of his land to the respondent's father whose boundaries the respondent exceeded and encroached onto the appellant's land. At the time of his death, Paulo Okello had a cassava garden on the land. After she had harvested the cassava in 1965, she was surprised to find the respondent had hired some people to till the land and he chased her off the land. D.W.3 Awira Mugonjo, testified that the land in dispute was given to Paulo Okello by

his father, Awira. He in turn gave part of it to the respondent's father Edeyi. D.W.4 Hwesi Paulino Wewe, testified that the land in dispute was given to Paulo Okello and the appellant was born on that land. It is separated from that of the respondent by a fig tree and a raised ground. D.W.5 Atanzio Mana, testified that the respondent trespassed on the appellant's land in 1965 during the lifetime of Paulo Okello. That was the close of the appellant's case.

The tribunal then visited the *locus in quo* on 14th June 2006, where it prepared a sketch map of the land in dispute, the features thereon and the surroundings. It also received evidence from a one Elvira Atoo who testified that the land in dispute belongs to Karlo Edeyi and the appellant was settled on land adjacent to it. Another witness, Juspina Achan testified that her father Karlo Edeyi settled on the disputed land in 1962. Later the appellant's father came and asked Edeyi to be permitted to settle on land nearby and the permission was granted. It is the land that the appellant occupies to-date. The last witness at the *locus in quo* was Alumai Simon Amos who testified that the land in dispute belonged to Paulo Okello Lagara who obtained it from Awira, his father in law. The common boundary between Paulo Okello's land and that of the respondent is marked by a big Elewu / Fig tree. In the year 2000, the respondent began encroaching on the land in dispute by erecting huts on it. He was stopped by the L.Cs but he ignored them. He went ahead to cultivate the land and graze his cattle thereon.

In the judgment delivered by the Grade One Magistrate on 1st March 2007, the Tribunal found that the respondent had proved his case since the evidence in court and at the *locus in quo* had established that he and his family had consistently used the land uninterrupted for a long time. There were discrepancies between the appellant and his elder brother, the last witness at the *locus in quo* Alumai Simon Amos, as regards the location of the common boundary between his land and that of the respondent and therefore his evidence could not be believed. There was no evidence that the appellant and his family had ever used the land in dispute. For that reason, the appellant was found to be a trespasser on the respondent's land. He was ordered to vacate the land immediately.

Being dissatisfied with the decision the appellant appeals the decision of the following grounds, namely;-

1. The learned trial magistrate erred in law and fact when he failed to judiciously evaluate the overwhelming evidence on record in favour of the respondent.
2. The learned trial magistrate erred in law and procedure when he failed to judiciously evaluate the evidence at the *locus in quo* thus disregarding the boundaries of the suit land.
3. The trial magistrate erred in law and fact by holding that the respondent was a trespasser on the suit land and ordered for his eviction when the appellant had lived on the suit land through generations from time immemorial.

In his submissions, counsel for the appellant Mr. Madira Jimmy argued that the proceedings at the *locus in quo* were irregular since the court opened the trial afresh and allowed witnesses to testify. The parties were not given the opportunity to cross-examine these witnesses and to demonstrate to court any of the features on the land. The court did not as well record its observations at the *locus in quo*. The parties were not given the opportunity to cross-examine the witnesses who showed court the features indicated on the sketch map. The finding in the judgment that the appellant had no presence on the land in dispute is not supported by the record of proceedings at the *locus in quo*, and contradicts the evidence of the respondent. There was inadequate evidence of trespass. The court further failed to evaluate the two versions in the history of ownership of the land in dispute, the one by the appellant and the other by the respondent. The respondent did not prove his claim of inheritance of the land in dispute. Its finding that the respondent had undisturbed use of the land is not supported by evidence since the dispute was taken before the L.Cs. The court should have found that the appellant was in possession from 1973 to-date. He prayed that the appeal be allowed with costs.

In his response, counsel for the respondent Mr. Paul Manzi argued that for procedural irregularities during the conduct of proceedings at the *locus in quo* to invalidate the entire trial, it must be demonstrated that they were of a fundamental nature and resulted in a miscarriage of justice. The record shows that the witnesses who testified at the *locus in quo* were cross-examined. The observations made at the *locus in quo* are indicated on the sketch map it drew thereat. The Tribunal came to the correct decision after a proper evaluation of the evidence before it. The appeal should therefore be dismissed with costs.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the District Land Tribunal to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000*; [2004] KALR 236 thus;

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

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

With regard to the second ground of appeal, the purpose of and manner in which proceedings at the locus in quo should be conducted has been the subject of numerous decisions among which are; *Fernandes v. Noroniha* [1969] EA 506, *De Souza v. Uganda* [1967] EA 784, *Yeseri Waibi v. Edisa Byandala* [1982] HCB 28 and *Nsibambi v. Nankya* [1980] HCB 81, in all of which cases the principle has been restated over and over again that the practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. Considering that the visit is

essentially for purposes of enabling trial magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony.

Upon such a visit a tribunal is susceptible to perceiving something inconsistent with what any of the parties and their witnesses may have alleged in their oral testimony or making personal observations prejudicial to the case presented by either party. The tribunal therefore needs to acquaint the parties with the opinion so formed by drawing it to their attention and placing it on record. This should be done not only for maintenance of its impartiality but also in order to enable the parties test or rebut the accuracy of its observations by making appropriate and timely responses to such observations. It would be a very objectionable practice for the Tribunal to withhold from a party affected by an adverse opinion formed against such a party, keep the adverse opinion entirely off the record, only to spring it upon the party for the first time in its judgment. Furthermore, in case of an appeal, where the Tribunal limits its judgment strictly to the material placed before it by the parties, then its judgment can be tested by the appellate court by reference to the same materials which are also before the appellate court. This will not be possible where the Tribunal's judgment is based on personal observations made off the record of proceedings, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court.

Upon examination of the original trial record, it is evident that confirmation of what transpired at the *locus in quo* is partly by way of a drawing or sketch map of the disputed land, which for some unexplained reason was not included in the record of appeal. On it is noted "both parties present." It indicates features such as; Emiliano's home, Emiliano's field, Acacia trees, Okeny's son's collapsed hut 1989 and field, a former bathing shelter, Ledu tree, Madarena 2003, Jospina 1996, Palong Akumu Okeny's sister's 1985, Elvira Atoo, sites of Okeny's mother's and father's grave, former pit latrine, remains of Okeny's house, collapsed hut of Okeny 1980 / 1988 left in 2000, incomplete house of bricks, two other Ledu trees within the area marked as "suit land", a communal grazing area, a road and number of paths, a natural stream by the name Rabinya and the names;- Acan Jospina, Evaristo Madrara.

Although a more detailed narrative of proceedings and observations made at the *locus in quo* would have been more desirable, and some of the features indicated such as the years inserted alongside some of the names are unexplained, I find the record sufficient to support the tribunal's finding at page 2 of the judgment that;-

When the Tribunal visited the *locus in quo* there was proof of settlement by the applicant and his family on the suit land. Both parties were in agreement that the applicant has ever buried his late father on the suit land. His family is settled on the suit land whereas the respondent and his family live elsewhere, cultivate elsewhere.

For that reason I am unable to agree with the submission of counsel for the appellant that the parties were not given the opportunity to demonstrate to court any of the features on the land and that the Tribunal did not record its observations at the *locus in quo*. The original trial record of proceedings taken at the *locus in quo* does not support that submission. Counsel for the appellant argued further that the parties were not given the opportunity to cross-examine the witnesses who showed the features indicated on the sketch map. Although the tribunal did not on its record attribute any of the features indicated on its drawing to specific witnesses, the record of proceedings of 14th June 2006 at the *locus in quo* indicate that both parties cross-examined Elvira Atoo, Juspina Achan and Alumai Simon who testified thereat. There is nothing to suggest that the features were shown to the Tribunal by persons other than the parties and the three witnesses who are on record as having been present at the *locus in quo*. This argument too is not supported by the material on the record.

However, upon further examination of the record of appeal, it is evident that during the visit to the *locus in quo*, the Tribunal permitted persons who had not testified in court, to testify during the *locus in quo* proceedings. The testimony of Elvira Atoo, Juspina Achan and Alumai Simon was admitted and recorded yet they had not testified in court. This was a procedural defect by the Tribunal. In cases where the High Court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order of a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence.

It is possible that the witnesses who appeared and testified during the first trial may not be available when the second trial is conducted and the parties may become handicapped in producing them during the second trial. In such situations, the parties would be prejudiced and greatly handicapped in establishing their respective cases such that the trial would be reduced to a mere formality entailing agony and hardship to the parties and waste of time, money, energy and other resources. Viewed in this light, the direction that the retrial should be conducted can be given only if it is justified by the facts and circumstances of the case. However, where the time lag between the date of the incident and the date on which the appeal comes up for hearing is short, and there occurred an incurably fundamental defect in the proceedings which affected the outcome of the suit, the proper course would be to direct retrial of the case since in that case witnesses normally would be available and it would not cause undue strain on their memory.

In *James Nsibambi v. Lovinsa Nankya* [1980] HCB 81, it was held that a failure to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relying on such evidence acquired and the observations made thereat in the judgment, is a fatal error which occasioned a miscarriage of justice. In that case the error was found to be a sufficient ground to merit a retrial as there was failure of justice (see also *Badiru Kabalega v. Sepiriano Mugangu* [1992] 11 KALR 110). However where, by the nature of the dispute to be adjudicated, the appellate court finds that the visit to the *locus in quo* was a useless exercise and that the case could have been decided without visiting the *locus in quo* such that without reliance on its findings at the locus, the trial court would have properly come to the same decisions on a proper evaluation and scrutiny of the evidence which was already available on record, a retrial will not be directed. The erroneous proceedings at the *locus in quo* will be disregarded. For example in the case of *Basaliza v. Mujwisa Chris, H.C. Civil Appeal No. 16 of 2003*, the court observed;

There was no dispute over boundaries. The visit to the locus was in the circumstances a useless exercise. This case could have been decided without visiting the locus. Without basing himself on his findings at the locus, the learned Chief Magistrate would have properly come to the same decisions on a proper evaluation and security of the evidence which was already available to him on record.

In that case, a retrial was not ordered. In the instant case, for reasons that the right to call witnesses at the locus in quo was reserved by the respondent, albeit irregularly, and considering

that both parties were able to cross-examine the three witnesses and by reason of the respondent's adverse possession to be explained later in the judgment, I am of the view that the defect was not of a fundamental nature and did not occasion a miscarriage of justice since the case can still be decided on basis of the available evidence without having to rely on comments and observations of the Tribunal made as a result of the impugned visit to the *locus in quo*. In addition, the original claim was filed in 2005. More than ten years have elapsed since then. To direct a retrial now would occasion serious hardship to the parties who will then be required to re-assemble their evidence in a situation where it is doubtful that the *status quo* on the land in dispute is still intact. A retrial would be most undesirable in the circumstances. For those reasons, ground two of the appeal fails.

Grounds one and three relate to the manner in which the Tribunal evaluated the evidence. At the trial, the burden of proof lay with the respondent. To decide in favour of the respondent, the Tribunal had to be satisfied that the respondent had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the appellant such that the choice between his version and that of the appellant would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the appellant, might hold that the more probable conclusion was that for which the respondent contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials.

The respondent's version briefly was that that he is the customary owner of the land in dispute, having inherited it from his late father, Karulo Edeyi who in turn had obtained it from his uncle Payiru Oyuwi in 1963. During 1973, his father gave the appellant's father, Paulo Okello, a piece of land adjacent to that of the respondent's father to settle temporarily and they lived peacefully as neighbours until the death of Paulo Okello in 1988. The appellant then in 2004 trespassed on that land by building a hut thereon, beyond the boundary of the land that had been given to his father.

The appellant's version briefly was that the land in dispute belongs to his grandfather, Awira. His father had allowed the respondent's father and his wife to stay temporarily on the disputed

land. Later after the death of the appellant's father in 1988, the respondent encroached on the land and permitted several of his other relatives to occupy parts of it as well. In 2004, when he was cultivating part of the land he used to cultivate in the past when he was stopped by the respondent who claimed it was an area for his father's kraal yet there is a fig tree and a raised ground separating the two neighbouring pieces of land.

The two versions are divergent as to the history of ownership. Whereas the respondent attributed it historically to his uncle Payiru Oyuwi from whom it passed to the respondent's father Edeyi and subsequently to the respondent through inheritance, the appellant attributed it historically to his grandfather, Awira, who gave part of it to Paulo Okello and it later passed to the appellant by inheritance. They are further divergent as to the circumstances in which the adversary's immediate predecessor in title settled on or in the neighbourhood of the disputed land. The respondent's version was that during 1973, it is his father Karulo Edeyi who gave the appellant's father, Paulo Okello, a piece of land adjacent to that of the respondent's father to settle temporarily. On the other hand, the appellant stated that it his father who had allowed the respondent's father and his wife to stay temporarily on the disputed land.

Faced with the divergent versions, the Tribunal had to determine which of them was more credible yet there was hardly any extrinsic, independent, objective evidence by which to distinguish the two. It was more or less a situation of the word of the appellant and his witnesses against that of the respondent and his witnesses. The Tribunal resolved this dilemma by examining the intrinsic cogency of the two versions and at page 2 of the judgment found that the appellant's evidence contained major discrepancies as to the location of the boundary while that of the respondent was consistent. Upon re-evaluation of the evidence, I find that the Tribunal misdirected itself on this point since nowhere on the record did the appellant or his elder brother Alumai Simon refer to any of the streams mentioned in the judgment as the boundary to the land in dispute. At page 14 of the record of appeal, Alumai Simon referred to a big Elewu / Fig tree while the appellant at pages 1 and 2 did not refer to any boundary. The finding on major inconsistencies is not borne out by the record.

Upon further re-evaluation of the evidence, I find that the respondent's claim that his father Karulo Edeyi obtained the land in dispute from his uncle Payiru Oyuwi in 1963 contradicts the testimony of P.W.3 Evaristo Madrara who testified that the respondent's father had come to the area during 1958 when he requested for land on which to rear his cattle and they (presumably the family of P.W.3) gave him the land. This contradiction was unexplained and it casts doubt on the veracity of the respondent's version. The appellant's version on the other hand does not suffer from similar weaknesses. Had the Tribunal properly directed itself, it would have been inclined to believe the appellant's version rather than the respondent's. For that reason I find that it is the appellant's father who permitted the respondent's father and his wife to stay on land neighbouring the disputed land.

That notwithstanding, the Tribunal went ahead to find that at page 2 of the judgment that the appellant and his family was in occupation and use of the land before the appellant entered thereon. This finding is consistent with the testimony of the appellant's mother D.W.2 Lucina Lapolo, widow of the late Paulo Okello who testified that at the time of his death, Paulo Okello had a cassava garden on the land. After she had harvested the cassava in 1965, she was surprised to find the respondent had hired some people to till the land and he chased her off the land. This was corroborated by D.W.5 Atanzio Mana, who testified that the respondent trespassed on the appellant's land in 1965. It would appear that the respondent remained in possession from then until 2004 when the appellant attempted to reclaim the land, sparking off this suit. The respondent therefore gained adverse possession of the land sometime in 1965.

Uninterrupted and uncontested possession of land for a specified period, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see *Perry v. Clissold* [1907] AC 73, at 79). In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of *The Limitation Act*. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v. Jingo Mukasa*, H.C. Civil Suit No. 508 of 2012). As a rule, limitation not only cuts off the owner's right

to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor is vested with title thereto.

According to the appellant in his testimony at page 6 of the record of appeal, the first challenge against the respondent's occupancy was made in 1987. He repeated this under cross-examination at page 7 of the record of appeal. The appellant's elder brother Alumai Simon at page 14 of the record of appeal too referred to the year 1987 as the year during which the respondent's possession was first challenged before the L.Cs. There is nothing to suggest that from 1965, the respondent had not been in open, continuous, uninterrupted and uncontested possession of the disputed land. Contrary to the submissions of counsel for the appellant, the Tribunal's finding to that effect cannot be assailed. From the evidence on record, there is nothing to suggest that the respondent had for 22 years not been in open, continuous, uninterrupted and uncontested possession of the disputed land. By 1987 when the dispute was first raised before the L.Cs, the appellant had not only lost the right to bring an action for the recovery of the land, but also the respondent was already by operation of the law, vested with title thereto.

Furthermore, P.W.7 Ovuru Sebastian testified that Karulo Edeyi (the respondent's father) settled on the land in dispute during 1961 and upon his death, he was buried on the land. At the *locus in quo*, the Tribunal was indeed shown Karulo Edeyi's grave and that of his wife on the disputed land. Sites of the remains of the respondent's house, and incomplete brick house were seen. This physical evidence corroborated the respondent's claim of long undisturbed occupancy as he was never challenged when he buried both his parents on the land. The big Elewu / Fig tree referred to by Alumai Simon in his testimony and indicated on the sketch map just before the communal grazing land marks the boundary of the land the respondent acquired by adverse possession from the family of the appellant. Within that area, the Tribunal did not find any evidence of activity by the appellant.

Trespass to land occurs when a person directly enters upon another's land without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). In order to succeed, the plaintiff must prove that; he or she was in possession at the time of trespass; there

was an unlawful or unauthorized entry by the defendant; and the entry occasioned damage to the plaintiff.

In the instant case, the respondent succeeded in proving that he owned and was in possession of the land in dispute. He further proved that the appellant had unlawfully and without his authorisation entered the land in 2004 by constructing a hut thereon. The sketch map of the *locus in quo* clearly shows that the appellant's home and gardens lie within the disputed area. The Tribunal's findings of trespass therefore are supported by the evidence on record and hence its order that the appellant vacates "the suit land with immediate effect and remove his hut from the suit land" is well founded. Construction of that hut was an apparent effort to reclaim the land from the respondent's adverse possession but unfortunately for him, the right to recover the land was lost way back in 1977 upon lapse of the twelve year period for a possible action for recovery of the land. His unauthorised activities therefore henceforth in law constituted trespass on the respondent's land.

In the final result, I find no merit in the appeal and it is accordingly dismissed with costs to the respondent of both the appeal and the trial.

Dated at Arua this 23rd day of March 2017.

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Stephen Mubiru
Judge