

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**CIVIL APPEAL No. 0041 OF 2015**

**(Arising from Amuru Grade One Magistrate's Civil Suit No. 026 of 2012)**

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1. **OKEE BENJAMIN** }  
2. **OPOKA BENJAMIN** } ..... **APPELLANTS**  
3. **BAKIT IKARE KIYAK** }

**VERSUS**

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**OTIM ERONAYO** ..... **RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

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**JUDGMENT**

The respondent sued the appellants jointly and severally for recovery of approximately 15 acres of land, at Pakuba Baromal Lala village, Palwong Parish, Pabbo sub-county, Kilak County in Amuru District, general damages for trespass to land, a permanent injunction, and costs. His case was that his father, Eronayo Onyango, acquired the land in dispute in 1958 and the respondent and his siblings were all born while their father lived on that land. The respondent continued to live on the land peacefully following the death of his father in 1990 until the year, 2011 when the appellants began trespassing on the land by cultivation of crops thereon. The respondent sued them before the L.CII. Court which decided in his favour on 4<sup>th</sup> February, 2012. When he applied for the enforcement of that decision by the Chief Magistrate, it was decided that the decision was a nullity, hence the fresh suit.

In their joint written statement of defence, the appellants denied the claim in toto. They contended instead that the land in dispute measures approximately 36 acres and belonged to their father, Walter Opoka. The respondent has never been in lawful possession thereof but is a trespasser on that land. Although they did not file a counterclaim, they sought a declaration that they are the lawful owners of the land, an order of vacant possession, a permanent injunction, general damages and costs.

The respondent Otim Eronayo testified as P.W.1 and stated that he inherited the land in 1990 upon the death of his father. It is during the Kony insurgence in 1993 that the appellants moved from across the Ajok stream in Kal Goro and trespassed onto the land. Several people had settled on the land during the insurgency but when it ended, they all returned to their land except the  
5 appellants who refused to vacate. P.W.2 Atto Kerejina, the respondent's maternal auntie, testified that her father gave the land to the respondent's father, in 1958. The appellants took refuge on the land during the Kony insurgency, as part of a mini IDP Camp. After the insurgency the rest of the displaced people left save for the appellants who refused to vacate.

10 P.W.3 Laker Serena, the respondent's sister, testified that the respondent inherited the land from their late father Eronayo Onyango. It was given to him by his father in law. Being located in a Trading Centre, during the Kony insurgency people left the country side and settled onto the land. That is how the appellants came from across Ajok stream in Kal to settle on the land. P.W.4 Oringa David, the respondent's brother, testified that the land belongs to the respondent but the  
15 appellants are unlawfully occupying part of it. In 1997, a mini IDP Camp was created on the land but when the rest of the displaced people returned to their homes in 2009, the appellants returned onto the land in the year 2011. The respondent then closed his case.

In his defence, the third appellant, Bakit Ikare Kiyak, who testified as D.W.1 stated that he has  
20 known the respondent as a neighbour since 1984. The land measures approximately 36 acres but the respondent has since the year 2011 trespassed onto about half an acre of it. His father was buried at Kal Agoro because he had a home there. The land in dispute was never used as an IDP Camp. They lived with their grandmother on the land in dispute but it his step-grandmother who lives in Kal Agoro where their father was buried.

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The second appellant, Opoka Benjamin, testified as D.W.2 and stated that he inherited the land from his grandfather Obia Silvano but does not know how his grandfather acquired it. He was born on that land in 1985. The appellant used to live on the land of their neighbour Okello Apire on the other side of the road to Parunalwak Primary School. They used to live in the camp but  
30 cultivated the land in dispute until the end of the insurgency in the year 2003 when they re-occupied it. The dispute began in the year 2010 when the respondent began to cultivate the land.

His step-grandmother Acayo Janet lives in Kal Agoro where their father was buried. They live with their grandmother Julina Angom on the land in dispute.

D.W.3 Nyerere Gabriel Ikare, testified that the respondent is a neighbour. The land in dispute  
5 belongs to the appellants. They inherited it from their grandfather Obia Silvano who in turn  
acquired it from his brothers in 1957. His step-grandmother Acayo Janet lives in Kal Agoro,  
about two kilometres from the land in dispute. That is where his father and grandfather were  
buried. The respondent is using the land forcefully. The respondent resides on the land of Okello  
Apire a neighbour to the North. The trees on the land were planted by relatives of the appellants.  
10 The appellants then closed their case.

The court then visited the *locus in quo* where it took note of some material features on the land  
including home of Erinayo. It also recorded evidence from; (i) Pasotore Apire who stated that  
Bakit was his neighbour in 1957. Silvano had two wives living separately. Acayo was by the  
15 roadside; (ii) Banya Alex; (iii) Loum Franklin Makmot, who stated that the appellants' father had  
no house on the land in dispute. It was outside the land in dispute. It was the respondent who  
used the land for cultivation. The trees were planted by Erunayo; (iv) Oketcho Chon Alex who  
stated that there had not been any home on the land until 1992 when Bakhit constructed one  
thereon. All parties used to cultivate the land before that; (v) Okello Michael, who stated that it is  
20 during the 1990s that Kiyak constructed a house on the land; (vi) Ojera Alex, who stated that  
Kiyak constructed a house on the land in dispute in 1993; (vii) Labony John Bosco; (viii) Okeny  
Julius, who stated that the land belonged to Bakit and before him, his father; (ix) Bayuk Alex,  
who stated that Kiyak came onto the land in 1994; (x) Uma Albert, who stated that there are  
three graves of the relatives of the appellants on the land.

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In his judgment, the trial Magistrate found that there was no evidence at the *locus in quo* to show  
that the appellants ever occupied the land before the 1990s. This was consistent with the  
evidence of the respondent's witnesses to the effect that the appellants trespassed onto the land in  
1993. None of the witnesses at the *locus in quo* mentioned the appellants' father as a person who  
30 ever lived on the land yet they identified the appellants as their neighbours across the stream.  
The appellants' witnesses contradicted themselves as to the status of the respondent's stay in the

neighbourhood, some claiming he resided with another neighbour Okello Apire, yet some claiming they had never met him. The court therefore found that the land belonged to the respondent and the appellants began trespassing on it during the insurgency. The appellants are therefore trespassers on the land. The respondent was declared the lawful owner of the land, he  
5 was granted vacant possession, a permanent injunction was issued against the appellants and they were condemned in costs.

The appellants were dissatisfied with the decision and appealed to this court on the following grounds, namely;

- 10 1. The learned trial Magistrate erred in law and in fact when he decided that the suit land belonged to the respondent / plaintiff.
2. The learned trial Magistrate erred in law and in fact when he decided that the appellants / defendants were trespassers.
- 15 3. The learned trial Magistrate did not conduct a locus as required by law therefore occasioning a miscarriage of justice.

In his submissions, counsel for the appellant, Mr. Ocorobiya Lloyd, argued that the respondent in paragraph 4 (c) of the plaint stated that the appellants encroached on the land in dispute in 2011. In his testimony at the trial, he said the encroachment began in 1993. In the last paragraph of the  
20 judgment, the court found that the period of occupancy began in the 1990s. From then until 2012 is a period of more than 12 years. The respondent should have filed the suit by 2005 at most. No reason was given for the extra seven years. Under section 6 of *The Limitation Act*, a suit for recovery of land is limited to twelve years. It was therefore time barred.

25 Regarding departure, he argued that Order 6 rule 3 of *The Civil Procedure Rules*, binds parties to their pleadings. Rule 7 requires amendment before new material facts are introduced. The pleadings indicated 2011 as the commencement of the encroachment yet in evidence the respondent stated it was in 1993. The departure was material and the plaint should have been struck out. As a result of the decision of the lower court, the appellants were on 17<sup>th</sup> August, 2018  
30 evicted from the land and a lot of their properties were destroyed.

He argued further that many litigants use insurgency as a blanket cover. Section 56 (3) of *The Evidence Act*, does not cover that situation. The respondent stated his land was used as a camp and should have adduced evidence to that effect. The *locus in quo* was not conducted in a manner prescribed by law. At the locus, witnesses were made to give fresh evidence who had not testified in court. They were not cross-examined. There is no sketch map of the land. The purpose of locus visit is to verify the evidence adduced by both parties. It became crucial because the respondent alleged that his land was a mini IDP Camp. The court should have looked for some signs of settlement. By not conducting the locus visit properly, a miscarriage of justice was occasioned, there was no way the suit could be decided without verifying the claims. Execution was levied against the appellants based on the defective judgment. The appeal should be allowed and the judgment of the lower courts be set aside, the respondents restored on the land and the costs of the appeal and the costs of the trial be awarded to them.

In response, counsel for the respondents Mr. Ogenrwot Simon Peter argued that the suit was not time barred as the land in dispute was a temporary camp site. P.W.1 testified that the defendants had a home at Karogoro separated by a stream from the land in dispute. This was in 1993. After the war, several persons left but the defendants stayed. P.W.2 testified to that effect. Limitation would not apply because trespass began after the war. During the war, P.W.3 said that it was government which settled then there. It was not a re-settlement but a temporary occupancy. Insurgency is a matter that court can take judicial notice of. There was no departure from the pleadings as regards the date of intrusion. It was introduced by P.W.1 in his testimony without any objection and he was not subjected to cross-examination on this point. P.W.3 too testified to it and there was no objection. Under cross-examination, he re-iterated the same. The defence did not adduce evidence in rebuttal. This date was fully litigated.

The locus visit was conducted and for any errors or irregularities, the test is whether a miscarriage of justice was occasioned. With or without that evidence at locus, the trial magistrate would have found that the land belonged to the plaintiff. He saw only one home and this is supported by the witnesses. The appellants had gardens only which they continued to plough while in the camp. It is only on return from the camp that they trespassed onto the land in dispute. The locus visit was conducted in a proper manner and did not occasion a miscarriage of

justice. The appeal should be dismissed, the decision of the trial magistrate be upheld and the appellants should pay costs of the appeal and of the court below.

5 It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). 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 (see *Lovinsa Nankya v. 10 Nsibambi [1980] HCB 81*). 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 or she has clearly failed on some point to take account 15 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.

It is convenient for this court to consider ground 3 of the appeal first. It is argued that the court 20 below erred in recording evidence from persons who had not testified in court and that this occasioned a miscarriage of justice. Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during 25 the oral testimony in court and to testing the evidence on those points only. 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 (see *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*). It was an error for the 30 court to have recorded evidence from; (i) Pasotore Apire, (ii) Banya Alex, (iii) Loum Franklin

Makmot, (iv) Oketcho Chon Alex, (v) Okello Michael, (vi) Ojera Alex, (vii) Labony John Bosco; (viii) Okeny Julius, (ix) Bayuk Alex, and (x) Uma Albert.

That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or  
5 rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in  
any case, if it appears to the court before which the objection is raised that, independently of the  
evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if  
the rejected evidence had been received, it ought not to have varied the decision. Furthermore,  
according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for  
10 error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the  
court. Before this court can set aside the judgment on that account, it must therefore be  
demonstrated that the irregularity occasioned a miscarriage of justice.

A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the  
15 improper admission or rejection of evidence, or for any error as to any matter of pleading, or for  
any error as to any matter of procedure, only if the court is of the opinion that the error  
complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is  
reasonably probable that a result more favourable to the party appealing would have been  
reached in the absence of the error. The court must examine the entire record, including the  
20 evidence, before setting aside the judgment or directing a new trial. Having done so, I have  
decided to disregard the evidence of the ten additional witnesses, since I am of the opinion that  
there was sufficient evidence to guide the proper decision of this case, independently of the  
evidence of those ten witnesses. This ground accordingly fails.

25 Grounds 1 and 2 will be considered next and concurrently since they relate to the soundness of  
the decision. Whereas the appellants' case was that they inherited the land from their grandfather  
Obia Silvano and that they used to lived in the camp but cultivated the land in dispute until the  
end of the insurgency in the year 2003 when they re-occupied it, when the court visited the *locus*  
*in quo* it found only the home of the respondent's father, Eronayo Onyango on the land. The  
30 appellants had only gardens on the land. The appellants did not adduce evidence at the *locus in*  
*quo* to demonstrate where they lived before they migrated into the camp. This supports the

finding that the observations made at the locus in quo were consistent with the evidence of the respondent's witnesses to the effect that the appellants trespassed onto the land in 1993 and had not occupied it before then. The respondent's version that they began cultivation of that land only after they came to dwell in the IDP Camp is then more plausible.

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According to section 56 (1) (j) of *The Evidence Act*, a court may take judicial notice of the commencement, continuance and termination of hostilities between the Government and any other State or body of persons. In such cases, the court may resort for its aid to appropriate books or documents of reference. By virtue of that provision, this court takes judicial notice of the fact  
10 that from the middle of the year 2004 onwards, rebel activity dropped markedly in the entire Northern Region of Uganda, and in mid-September, 2005, a band of the active remnants of Lord's Resistance Army fighters, led by Vincent Otti, crossed into the Democratic Republic of Congo. Thereafter, a series of meetings were held in Juba starting in July, 2006 between the government of Uganda and the LRA (see Wikipedia, "*Lord's Resistance Army insurgency*" at  
15 [https://en.wikipedia.org/wiki/Lord%27s\\_Resistance\\_Army\\_insurgency](https://en.wikipedia.org/wiki/Lord%27s_Resistance_Army_insurgency), (visited 2<sup>nd</sup> December, 2018). The hostilities thus came to an end during or around the year 2006.

I find this time frame to be consistent with the respondent's version that the appellants were forced by insurgency onto the land during the year 1993, only to refuse to vacate during the year  
20 2011, after the disbanding of the I.D.P Camps at the end of the Lord's Resistance Army insurgency. P.W.2 Atto Kerejina, the respondent's maternal auntie, testified that the appellants took refuge on the land during the Kony insurgency, as part of a mini IDP Camp. P.W.4 Oringa David, the respondent's brother, too testified that in 1997, a mini IDP Camp was created on the land but when the rest of the displaced people returned to their homes in the year 2009, the  
25 appellants instead returned onto the land in the year 2011, hence the suit. This evidence of the existence of the mini-camp was neither challenged during the cross-examination of both witnesses nor refuted by evidence to the contrary adduced by the appellants. It is trite that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to it being assailed  
30 as inherently incredible or possibly untrue (see *James Sawoabiri and another v. Uganda, S. C. Criminal Appeal No. 5 of 1990* and *Pioneer Construction Co. Ltd v. British American Tobacco*



HCCS. No. 209 of 2008). Moreover, when testifying as D.W.2, the second respondent, Opoka Benjamin, admitted that they used to live in the camp but cultivated the land in dispute until the end of the insurgency in the year 2003. The trial court therefore came to the correct conclusion that there existed a mini IDP Camp on the land at the material time.

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It was argued further that having pleaded that the trespass began in 2011, it was a departure from his pleadings when the respondent adduced evidence to the effect that the occupancy began in 1993. Indeed it is true that a party is bound by his or her pleadings and that only evidence relevant to the pleadings may be received (see *Mohan Musisi Kiwanuka v. Asha Chand*, S. C. Civil Appeal No. 14 of 2002; *Lukyamuzi v. House and Tennant Agencies Ltd* [1983] HCB 74 and *Dhamji Ramji v. Rambhai and Company (U) Ltd* [1970] EA 515). However, not every inconsistency between the pleadings and evidence adduced during the trial constitutes a departure. When an inconsistency is a mere variation that is in essence only a modification or development of what is averred, then it is not a departure but if it introduces something new, separate and distinct, then it is a departure (see *Waghorn v. Wimpey (George) and Co.* [1969] 1 WLR 1764). The test is whether the opposing party's conduct of the case would have been any different had the adversary pleaded the impugned aspect of their case. The question is if the impugned allegations had been made in their pleadings in the first place, namely allegations based upon the facts as they eventually emerged in evidence, would the opposing party's preparation of the case, and conduct of the trial, have been any different?

I have considered the respondent's pleadings and the evidence he adduced during the trial. He pleaded that the trespass began in 2011. This is not inconsistent with his testimony and that of his witnesses to the effect that the appellants came onto the land in 1993. The concept of trespass contemplates a hostile possession i.e. possession which is expressly or impliedly without the consent of the owner. Although it was initially technically a trespass, the respondent acquiesced to the appellants' occupancy that occurred between the years 1993 to 2009 because of the insurgency. 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*, 19<sup>th</sup> edition (London: Sweet & Maxwell, (1987) 46). It consists not only in making an unauthorised entry upon private property of another, but also in refusing to

leave after permission to remain has been withdrawn. A trespass can thus take place by failing to leave another's property after permission to enter has been first given, then revoked or ended; or after the purpose for which permission to enter was given, has ended. Unauthorised entry and refusal to leave are of equal consequence.

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For example in *Rager v. McCloskey*, 305 N.Y. 75, 79 (N.Y. 1953), the defendant entered the plaintiff's law office, apparently for the purpose of serving process upon the plaintiff, and not finding the plaintiff there, he made "violent efforts" to open the doors into the inner offices, forcibly wrenched apart the glass partition into the typists' room, used abusive and profane language, and threatened the plaintiff's employees with jail unless they produced the plaintiff. Although he was repeatedly told to leave, he remained until removed by a police officer. It was held in that case that while the defendant's original entry may have been lawful, the fact that he refused repeated requests to leave and persisted in remaining there for an inconsiderable period sufficed for a finding of trespass.

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Similarly in the instant case, although the appellants' presence on the land between the years 1993 and 2009 was technically a trespass but could be justified by the defence of necessity due to the insurgency, their return to occupy the land in the year 2011 cannot. The purpose for which their entry onto the land had been acquiesced in had ended and by implication the tacit permission to remain had been withdrawn by the respondent. Although the appellants came onto the land in 1993, trespass began in 2011 when they had to vacate the land upon the disbanding of the IDP Camp. Testifying about their entry in 1993 did not introduce something new, separate and distinct, so as to constitute a departure but rather provided some background facts to the subsequent act of trespass that began in 2011. I have not therefore found any set of facts in the oral testimony that introduced something new, separate and distinct, from what the respondent pleaded so as to constitute a departure. The inconsistency highlighted is a mere variation, modification or development of what is averred in his pleadings. It did not constitute a material and radical departure from the case he pleaded. This part of the argument therefore fails.

30 The only question that remained was whether the sixteen year period of acquiescence to the trespass that occurred during the insurgency created any rights in the land in favour of the

appellants. At common law, acquiescence of a degree that amounts to passive encouragement, may by way of a proprietary estoppel, deprive an owner of land in favour of an occupier of land in possession under a mistaken belief in his or her own inconsistent legal right, when it is unconscionable for the owner to reassert his or her title (see *Willmott v. Barber (1880) 15 Ch D*  
5 *96* and *Taylor's Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1982] QB 133*). However, an owner of land is not to be deprived of his or her legal rights unless he or she has acted in such a way as would make it fraudulent for him or her to set up those rights.

This requires proof in the first place that the occupier made a mistake as to his legal rights.  
10 Secondly, the occupier must have expended some money or must have done some act (not necessarily upon the owner's land) on the faith of his or her mistaken belief. Thirdly, the owner of the legal right, must know of the existence of his or her own right which is inconsistent with the right claimed by the occupier. Fourthly, the owner the legal right, must know of the occupier's mistaken belief of his or her rights. Lastly, the owner of the legal right, must have  
15 encouraged the occupier in his or her expenditure of money or in the other acts which he or she has done, either directly or by abstaining from asserting his or her legal right. The principle requires an approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to deny that which, knowingly or unknowingly, he or she has allowed or encouraged another to assume to his or her detriment (see  
20 *Willmott v. Barber (1880) 15 Ch D 96*).

If the legal owner stands by and allows the claimant to, for example, build on his or her land or improve his or her property in the mistaken belief that the claimant had acquired or would acquire rights in respect of that land or property then an estoppel will operate so as to prevent the  
25 legal owner insisting upon his strict legal rights. It applies where the true owner by his or her words or conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and that other does so act. In the instant case, the evidence before the trial court did not show that the appellants occupied the land in dispute under a mistake as to their legal rights. There is no  
30 evidence that they expended money or engaged in some act on the faith of such a mistaken belief. There is no evidence that the respondent knew of the appellants' mistaken belief of their

rights and that his own rights over that land were inconsistent with any right claimed by the appellants during that period. Lastly, there is no evidence that the respondent encouraged the appellants in their expenditure of money or in any other acts they performed on the land, either directly or by abstaining from asserting his legal right. The status of the appellants on that land for the period from 1993 to 2019 was that of bare (or gratuitous) licensees since a trespass may shift into a bare licence, where the landowner has knowledge of the trespass and gives no objection to it (see *Canadian Railway Co v. The King* [1931] AC 414). A person with a licence is simply not a trespasser, unless or until he or she is asked to leave.

10 A bare licence may be created orally and may be express or implied, and very often may arise by circumstances or conduct as it did in the instant case. A licence does not create a property interest in the land. It cannot be transferred by one licensee to another, and neither can it bind a person who buys the land from the licensor. The only impediment on revocation of a bare licence is that the licensee must be given a reasonable “period of grace” or “packing-up period” since a bare licence may be revoked on reasonable notice. The licensee must leave within a reasonable time lest he or she becomes a trespasser and can be physically removed. There was no evidence to show that the appellants were not accorded reasonable notice to vacate the land. In the final result, the appeal has no merit. It is dismissed with costs to the respondent.

20 Dated at Gulu this 6<sup>th</sup> day of December, 2018

.....  
Stephen Mubiru  
Judge,  
6<sup>th</sup> December, 2018.

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