

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)  
CIVIL SUIT NO. 358 of 2014

5      JOSEPH SSOZI NTAMBI.....PLAINTIFFS

VERSUS

1. ESTHER NAKAYENGA  
2. DAVID KIRABIRA  
10      3. MALCOM INVESTMENTS LTD  
4. HASSAN KAWEESA.....DEFENDANTS

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT

Introduction:

15      The plaintiff is the registered owner of land comprised in **Kyadondo plot 305 at Kirinya, Bweyogerere at Wakiso**, measuring 2.13 hectares (suit land). Through his duly lawful attorney Ms. Eva Konde, he filed this suit seeking:

- 20      1) a declaration that all the land comprised in the suit land belongs exclusively to him as the registered owner ;
- 2) A declaration that the defendants are trespassers on the suit land;
- 3) Vacant possession ;
- 25      4) A permanent injunction against the defendant restraining them, their agents/servants and any others deriving title from the defendants from entering dealing, transacting or otherwise dealing with the land; and
- 5) General damages.



**Facts of the case:**

The facts in brief are that the plaintiff is a grandson of the late Jacob Ssozi Kyaligamba, claimed to have been the original proprietor of the land comprised in **Kyadondo Block 234, plot 305, Kirinya**, since 1972.

- 5 The plaintiff claims that the late Kyaligamba purchased the suit land measuring approximately 10 acres from the late Paul Kibi upon which Paul Kibi had given up all his interests in the said land to the late Kyaligamba.

Upon acquiring the land he had entrusted it to the late Byomere Joseph, the son of the late Paul Kibi and that Byomere Joseph never used the land as his own; and never sold the suit land.

- 10 The 1<sup>st</sup> and 2<sup>nd</sup> defendants who are children of the late Byomere and grandsons of the late Paul Kibi, without authority of the plaintiff held out as owners of the suit land and sold part of the land as *bibanja* to the 3<sup>rd</sup> and 4<sup>th</sup> defendants who also in turn sold to other unsuspecting members of the public.

- 15 The 1<sup>st</sup> and 2<sup>nd</sup> defendants in their defence however refuted the claims by the plaintiff, claiming that their grandfather Paul Kibi owned the suit land as a customary tenant. That they had inherited it from him and that since 1960s Kyaligamba had recognized Paul Kibi as owner of that land. They further claimed that they were born on that land and lived thereon throughout their lives.

**Issues:**

- 20 The parties came up with separate issues which I chose to condense, and frame as follows:.

- 1) ***Whether the defendants have protectable interests on the suit land;***
- 2) ***Whether the defendants were trespassers there on.***
- 3) ***Whether the suit was time barred;***
- 4) ***Remedies.***

- 25 **Representation:**

- 30 The plaintiff was represented by **M/s Ssebunya & Turyagenda Co. Advocates**. The suit was originally filed against seven defendants. However on 23<sup>rd</sup> June 2016, the names of three defendants: Kasirye Francis, Nanziri Emirina, and Mugumba Abbey had been withdrawn by consent in the presence of respective counsel and endorsed by court, thus leaving only four defendants.

Only the 1<sup>st</sup> and 2<sup>nd</sup> defendants however filed their defence. They were represented by **M/s LUKA ADVOCATES**, jointly with **M/s Luswata- Kibanda & Co. Advocates**.



The 3<sup>rd</sup> and 4<sup>th</sup> defendant were initially represented by **M/s Kasumba Kugonza & Co. Advocates**. However on 26<sup>th</sup> June, 2019 they wrote to **M/s Ssebunya and Turyagyenda Advocates**, the firm representing the plaintiff, pointing out their frustration with the 3<sup>rd</sup> and 4<sup>th</sup> defendant's failure to appear in their chambers as promised to give their written statements concerning their defence. A copy of that communication was filed in court by the firm on the same day, together with a notice to withdraw instructions.

**Issues No. 1 and No. 2:**

**Issue No. 1: Whether the defendants have protectable interests on the suit land;**

**And**

**Issue No. 2 : Whether the defendants were trespassers on the suit land.**

Having carefully looked at the pleadings and considered all the points raised by counsel in their respective submissions I will not reproduce each argument in this judgment.

I will also deal with **issues No. 1 and No. 2** jointly since they are interrelated.

**Analysis of the evidence:**

**Section 101 of the Evidence Act** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist and the burden of proof lies on that person.

**Section 103** further stipulates that:

***"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence."***

The burden of proof therefore lies upon the person who alleges and question the burden of proof lies squarely on the plaintiff. (***Sebuliba versus Co-operative Bank Ltd [1982] HCB 129***).

In ***Sheik Muhammed Lubowa versus Kitara Enterprises Ltd C.A No.4 of 1987, the East African Court of Appeal*** noted that in order to prove the alleged trespass, it was incumbent on the party to prove that the disputed land belonged to him; that the defendant had entered upon that land; and that the entry was unlawful in that it was made without his permission; or that the defendant had no claim or right or interest in the land. (***Ref also: H.C.C.S No. 118 of 2012, Tayebwa Geoffrey and Anor Vs Kagimu Ngudde Mustafa; Justine E.M.N. Lutaaya Vs Sterling Civil Engineering Co, SCCA No. 11 of 2002***).

The plaintiff, Mr. Joseph Ssozi Ntambi testified as **Pw1**. **Pw2** John Expedito Kyaligamba, his paternal uncle was his second witness.





His point was that at all material times he was and still is the registered proprietor of the suit land measuring 2.13 acres out of a total area of 10 acres which were purchased by the late Jacob Ssozi Kyaligamba, his grandfather. Upon his death in 1966, Kyaligamba's son, Edward Galabuzi, the father of the plaintiff had been installed as his heir.

5 That sometime in 1995 during the distribution of the estate of his late father the Administrator General had given him the suit land as part of his father's share in the estate of his grandfather. At the time of the handover of the suit land, there was only one old house belonging to his father, Galabuzi which the defendants' father Byomere Joseph was occupying and continued to occupy till his death. According to the plaintiff, there were no *bibanja* owners at the time.

10 The plaintiff had entrusted the said land in Byomere's care since he had had been his father's friend and also bedridden at the time. However that when he passed on, the defendants who were in occupation at the time refused to vacate the old house on the suit land.

The plaintiff claimed that Kyaligamba had bought the land from Paul Kibi in 1959, for a consideration of **UGX 5200/=** and according to him, Kibi had given up all his interest in the land to Jacob Ssozi Kyaligamba.

15 He relied on a transfer form dated 19<sup>th</sup> September, 1959 which was attached to **PExh 1**, his certificate of title for the suit land which had been registered in his names on 22<sup>nd</sup> March, 1996. The form indicated Paul Kibi as the vendor and Kyaligonza as the purchaser. Under that transaction, Paul Kibi had sold 10 acres of his land in Kirinnya. The details of the plot number at that time were however not provided.

20 He referred to a letter dated 6<sup>th</sup> April, 1999 by his counsel then, **M/s Mugerwa & Matovu Advocates, (PExh 3C')**, addressed to the relatives of the late Byomere. That despite his written warning as stated in that letter, the family had proceeded to bury Byomere on the suit land.

25 In a bid to defeat his interests however the defendants had also begun partitioning the land selling parts to the 3<sup>rd</sup> and 4<sup>th</sup> defendants; renting out part to third parties carrying out brick making, an activity that resulted in degrading the land value, all done without his consent/authority.

This had frustrated his efforts to develop the land and derive income from or gain possession thereof since 1995. The plaintiff denied having given authority to the defendants to deal with the land and denied having ever sold that land.

30 **Pw1**, Mr. John Experito Kyaligamba, aged 90 years a brother to Edward Galabuzi, the plaintiff's father also confirmed that the plaintiff had acquired the land from Kyaligamba which had transferred into his (Kyaligamba's) names in 1972: **vide Instrument No. KLA 67316**.

**Pw1** had received 0.80 acres as his share from his father Kyaligamba, which he had disposed of. That upon the death of Kibi, his heir Byomere took possession of the house on the suit land, taking advantage of Galabuzi's disappearance. The witness denied the defendants' claim that Kyaliganza his father ever received *busuulu* or any rent payment from Paul Kibi or his family.

- 5 The 2<sup>nd</sup> defendant, Mr. David Kirabira however testifying as **Dw2**, refuted the above claims. He told court that Paul Kibi his late grandfather who was recognized as a customary tenant on the land had died testate. Under his will he had bequeathed the *kibanja* with the residential and commercial buildings thereon, to his Joseph Byomere who was the deceased's son.

- 10 **DExh 1** was a copy of that will dated 25<sup>th</sup> January, 1969 which indicated that the late Kibi had left 21 children and among whom was their father Byomere whom he had appointed as his heir. Kibi bequeathed all his houses together with the land described as *kibanja at Kirinya parish, Kireku Kyadondo* to the heir. The said will, the authenticity of which was never challenged, was attested by three (3) people, none of whom however was produced a witness at the trial.

- 15 **Dw2** referred to a letter dated 20<sup>th</sup> April, 1964, **DExh 2**, where the plaintiff's grandfather Kyaligamba had threatened to evict Kibi. That owing to the fact that no eviction ever took place till the time of his death on 5<sup>th</sup> October, 1969, that implied that his interest had been recognized by Kyaligamba.

- 20 Byomere their father had died in 1999 having lived on the *kibanja* for 78 years and that he lies buried on the same land which they inherited as customary tenants/ tenants by occupancy and have continued to live on that land to date since it had been bequeathed to him.

- 25 **Dw2** claimed that he had no knowledge that the Administrator General ever gave away the *kibanja* since the office had never interfered with their possession and rights over the land. That the children of the late Byomere including himself have since built other commercial and residential premises which they have occupied for over 20 years, without encountering any interruption from the plaintiff or the estate of his father.

Kibi and Byomere their late father were both buried on the suit *kibanja* which court noted at the *locus* visit also had other graves. That by the time the plaintiff acquired that land it was subject to their existing rights and interests. His prayer was to have the suit therefore dismissed.

- 30 The defendants also relied on **DExh 3**, a copy of the plaint **HCCS 507 of 1999**. In that suit the plaintiff had sued the 1<sup>st</sup> and 2<sup>nd</sup> defendant jointly with Paul Kibi claiming that his late father had given Joseph Byomere temporary and exclusive license to stay on the suit land. that since he was ailing after his father's demise, the plaintiff gave him temporary permission to exclusively stay thereon until death.

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That the defendants in that action for trespass, despite several notices issued to them refused to vacate his land therefore depriving him of ownership and use of his land. He further contended that Byomere never became a tenant by occupancy as the conditions and duration of his interest on the said land were clearly stipulated.

- 5 His prayer in that suit which was similar to the instant suit was for a declaration that he was rightful owner of suit land; eviction of the defendants and general damages for trespass. The plaintiff however abandoned this suit and filed the present suit some 15 years later.

Ms Esther Nakayenga, the 1<sup>st</sup> defendant and a sister to **Dw2**, testified as **Dw1** in support of **Dw2**. She maintained that the *kibanja* belonged to her and named a number of relatives including  
10 grandchildren who were currently in occupation of the land, also indicating that some of her relatives had been buried on that *kibanja*, as indeed confirmed during the *locus* visit.

**DExh 4** were the receipts for *busuulu* in Paulo Kibi's names which indicated dates as early as 1943 implying Kibi had a *kibanja* dating as far back as 1943 several years before Kyaligamba acquired the land.

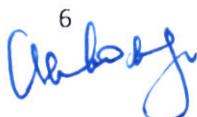
- 15 According to **Dw1** whose evidence tallied with that of her brother, **Dw2**, Kyaligamba was a money lender who had kept on dodging their grandfather until he fraudulently took away the land. The truthfulness of her claim on that point however could not be verified since the witness was a minor at that time and court found nothing to back up that claim.

The only document supplied to court by the defendants to that effect was **DExh 3** which indicated  
20 that Kyaligamba had called Kibi in his office at one point over the *kibanja*. This was an eviction notice dated 20<sup>th</sup> April, 1964. The defendants therefore relied on this document to give weight to their claim that Kibi was known and recognized by Kyaligamba as the *kibanja* owner.

Information is scanty on whatever could have taken place in respect to that land between Kyaligamba and Kibi prior to Kyaligamba's death in 1966 and later on between Galabuzi and  
25 Kibi, prior to Kibi's death in the late 60s.

What is clear is that the intended eviction against Kibi was never executed by Kyaligamba. It was never followed up by Galabuzi's when he was still alive. The 1<sup>st</sup> and 2<sup>nd</sup> defendants presented a will to prove that Kibi had died testate.

He had bequeathed the land which he described in his will as *land located in Kirinya Parish*  
30 *Kireku Kyadondo* (translated version) to his heir, Joseph Byomere, the father of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Neither was the will proved in court but nor was it ever challenged.

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This court also noted from *paragraph 9* of the plaintiff's witness statement that his grandfather Kyaligamba had passed on in 1966. In the certificate of title **PExh 1**, the deceased however got registered on the suit land on 1<sup>st</sup> November, 1972. This was six years following his death.

5 Equally strange to court, on 22<sup>nd</sup> March, 1996 decades after the death of both his father and grandfather, the plaintiff somehow acquired registration on that land. According to him, the Administrator General had given him the 2.13 acres as his share from his father's estate.

Court noted that neither the letters of administration ever been issued to any person in respect of either of those estates nor was the Administrator General's representative invited to testify in court.

10 In 1996, when he got registered onto the title, Kibi who was a *kibanja* owner had already passed on but members of his family were already in occupation, and to date, remain in occupation of the old house **PExh2**, which house from the unchallenged evidence by **Dw1** belonged to Kibi.

15 There is no documented evidence that the plaintiff's father Galabuzi ever acquired interest in the suit land or occupied the old house at any time during his life time; and none whatsoever that he ever occupied it as its rightful owner. Equally, I find no evidence to prove that the house at any one time was acquired by or belonged to Kyaligamba.

20 The plaintiff's claim was that his late father Galabuzi had allowed Byomere to remain in the house since the two had been friends and Byomere was ailing at the time. Furthermore that the plaintiff left the said Byomere in his father's house for the same reasons but that this was only a temporary arrangement. According to him therefore, Byomere being a mere licensee has no interest in the suit property and therefore had nothing to pass on to the defendants.

**Section 29(4) of the Land Act, Cap.227** stipulates that a person who is the land on the basis of a license from the registered owner shall not be taken to be a lawful or *bonafide* occupant.

25 The purported undertaking between Galabuzi and Byomere on the one hand and the plaintiff and Byomere on the other hand suggesting that Byomere could only remain in the old house temporarily was never reduced into writing. The plaintiff whose burden it was to present other evidence to prove that assertion failed to avail any such evidence in court.

30 The plaintiff also failed to prove that Kyaligamba upon acquiring the 10 acres had subdivided that land giving it to his family, leaving 2.13 acres to him. There was no area schedule in the first place to prove that such subdivisions were ever made. He relied on **PExh4**, a survey report which evidence was not found to be helpful to his case.



The circumstances therefore under which the plaintiff had acquired the suit land as his inheritance and legal ownership after his grandfather's death raised serious questions of authenticity.

5 The plaintiff was able to show that his grandfather had interest in the suit land but failed to show how he himself had acquired the same as an inheritance and how he got registered on the title after his demise.

The office of the Administrator General was not in court to explain the circumstances under which the land had been allocated to the plaintiff as his father's inheritance since there were no such evidence from that office and no letters of administration issued by court to that office.

10 In the event that such distribution was ever carried out, there was nothing to prove how and when it had been done and which other persons had benefitted from it.

Counsel for the plaintiff's submission that Kyaligamba's estate had been distributed by the Administrator General among the beneficiaries and one of the beneficiaries was Galabuzi Edward was therefore not supported by any such evidence. All in all, there was no proof adduced by the  
15 plaintiff indicating that this was his land, exclusive to the rest of the members of Galabuzi family.

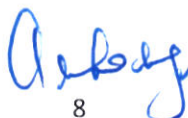
Kyaligamba according to the plaintiff died in 1966. This was seven (7) years after he had acquired the land from Kibi. The plaintiff failed to adduce evidence that his grandfather had evicted Kibi or replaced him, or that Galabuzi who took over from him challenged his continued stay on that land.

20 The plaintiff did not explain why Kibi had been buried on land which he no longer owned. No explanation as to why his widow and Kibi's relatives as established from the *locus* visit still lived on that land.

During the visit court noted that the family utilized the suit land by cultivation, brick laying and rentals for small commercial enterprises, which were activities carried out over the years Kibi  
25 and the 1<sup>st</sup> and 2<sup>nd</sup> defendants had been in occupation.

In the Supreme court decision ***Lutalo Moses (Administrator of the estate of the late Lutalo Phoebe vs Ojede Abdalla Bin Cona (Administrator of the estate of the late Cona Bin of Gulu: SCCA 15 of 2019)***, the concept of adverse possession which I found applicable to this case was discussed. The court provides preconditions that must be satisfied before court can  
30 consider one to be an adverse possessor.

These are:

  
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1) *Factual possession of the land. There must be physical control of the land in issue. The person in occupation must be dealing with the land as owner might be expected to, and no one must be doing the same;*

2) *The possession must be a continuous period of at least 12 years uninterrupted.*

3) *Animus possidendi; an intention to possess the land to the exclusion of all others, including the legal owner.*

4) *The possession must be adverse, ie without legal entitlement or without the owner's consent;*

5) *The possession must be peaceful, exclusive, open and notorious so as to put the owner of the land on notice of the possessor's intention;*

6) *The possession must start with a wrongful disposition of the rightful owner.*

The title of adverse possessor rests on the infirmity/failure of the right of others to eject him. The owner is therefore under duty to protect his interest in the land; not just look on when his rights are either infringed or threatened by third parties such as squatters and trespassers occupying his or her land.

Failure to do so would mean that the owner of the land has abandoned the property to the adverse possessor or has acquiesced to the hostile acts and claims of the person in possession.

**Section 35 (8) of the Land Act, Cap.227** in any case clearly states that a change of ownership of title effected by the owner by sale, grant and succession or otherwise shall not in any way affect the existing lawful interests or *bonafide* occupant; and the new owner shall be obliged to respect the existing interest.

A *bonafide* occupant is defined under **section 29(2) of the same Act** as a person who before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner.

By virtue of **section 29(5)**, any person who has purchased or otherwise acquired the interest of a person qualified to be a *bona fide* occupant is also taken to be a *bonafide* occupant and therefore equally derives protectable interest under the Act. This section applied to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

After 1972 when the land was registered under **Registration of Titles Act, Cap. 230 (RTA)** in the names of Kyaligamba, neither Kyaligamba nor his predecessors in title including the plaintiff ever challenged the use and occupation of the land by Kibi. Not until 1999 some 27 years later, when the plaintiff filed this suit against him, only to abandon it later.

He filed the present suit in 2014, some 15 years later.

  
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The implication of **section 35 (8) of the Land Act, Cap.227** as cited earlier is that the party holding legal interest was obliged to respect the *existing* equitable interest found on land. From the findings above the plaintiff's attempt to disguise this action for recovery of land as an act in trespass failed dismally since at the time he entered on land in 1996 Kibi and his family were already in occupation; and acknowledged by the plaintiff's predecessor in title as *bona fide* occupants.

In those circumstances, the issue of statute limitation as raised by the defendants therefore becomes pertinent.

**Section 5 of Limitation Act (supra)** which governs the limitation period for recovery of land provides as follows;

**"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."**(emphasis added).

A cause of action is established where pleadings disclose that there is a right, a right is violated and that the defendant is liable. A reasonable cause of action is one which in light of the pleadings has some chance of success. (**H.C.M.A No. 111 of 2013: Harriet Fowler & Anor vs Arthur Busingye**).

For court to satisfy that there is a cause of action, three essential elements must be satisfied: that the plaintiff enjoyed a right; the right was violated and that the defendant was liable. (**Ref: Auto Garage Vs Motokov (1971) E.A 519**).

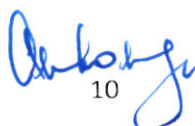
**Section 6 of the Limitation Act (supra)** of the same Act provides;

**"The right of action shall be deemed to have accrued on the date of the dispossession."**

The direct import of **section 5 and 6** is, first, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued, which is the date of dispossession.

In the case of **F. X Miramago v. Attorney General [1979] HCB 24**, it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed.

Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff. If by reason of disability, fraud or mistake the operative facts were not discovered immediately.

  
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It is the established law that a suit which is barred by statute where the plaintiff has not pleaded grounds of exemption from limitation in accordance with **Order 7 r.6 Civil Procedure Rules S.I 71-1** must be rejected because in such a suit the court is barred from granting a relief or remedy. **See: Vincent Rule Opio v. Attorney General [1990 – 1992] KALR 68; Onesiforo Bamuwayira & 2 Others v. Attorney General (1973) HCB 87; John Oitamong v. Mohammed Olinga [1985] HCB 86.**

The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims. **See Dhanesvar V. Mehta v. Manilal M Shah [1965] EA 321; Rawal v. Rawal [1990] KLR 275, and Iga v. Makerere University [1972] EA 65.**

Time limits set by statutes were matters of substantive law and should be strictly complied with. Furthermore, statutes of limitation are in their nature strict and inflexible enactments. Their overriding purpose is *interet republicae ut sit finis litum*, meaning that litigation shall be automatically stifled after a fixed length of time, irrespective of the merits of the particular case.

Thus once the axe falls it falls, and the defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled of course to insist on his strict rights: **(Muhammad B Kasasa vs Jasper Bayongo Sirasi Bwogi, Civil Appeal No. 42 of 2008; Hilton vs Sulton Steam Laundry (1946) 1 KB 61, at page 81.)**

The law is basically a defence, a shield but not a sword. It simply means the extinction of stated claims and rights of actions are limited in periods of time and once not pursued, they are lost since delay defeats equity. It is only the vigilant whom the equity helps to enforce their rights not the indolent, as proved in this instant case.

As argued by the defence counsel, Kyaligamba himself died before filing a suit against Kibi. His right to recover the land accrued in 1972 when he got registered on the title. Within the spirit of **section 5 of the Act**, as cited, the right of action first accrued to the plaintiff through Kyaligamba as early as 1972.

From the plaintiff's evidence he had in any case already passed on in 1966. So one wonders how he could have obtained registration without letters of administration. The administrators of his estate or that of Galabuzi, his son, (if they did exist) never followed up with any action against Kibi who had been buried on that land upon his demise.

The plaintiff who claims to have acquired the land as his inheritance filed this suit in 2014 yet had already obtained the title to the land in 1996, eighteen years earlier. He filed a suit in 1999 but abandoned it. As the registered proprietor of the suit land, he sat on his rights and was therefore barred under the statute from bringing an action for recovery of land.

- 5 In the premises, the action in trespass must fail since the defendants clearly acquired interest as *bonafide* occupants and their occupation and possession on the registered land remained uninterrupted for decades.


Accordingly this suit is dismissed with costs, to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

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**Alexandra Nkonge Rugadya**

**Judge**

**7<sup>th</sup> July, 2022.**

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Delivered by email  
  
7/7/2022.