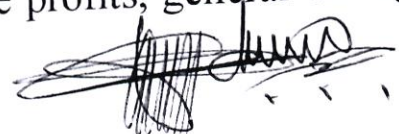


THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
HIGH COURT CIVIL SUIT NO. 378 OF 2018
JENIFER KIGGUNDU NABATANZI::::::::::::::::: PLAINTIFF
VERSUS
DENIS BYARUGABA BESIGYE::::::::::::::::: RESPONDENTS
BEFORE: HON: JUSTICE TADEO ASIIMWE

JUDGMENT

The plaintiff instituted this suit against the defendants for a declaration that the plaintiff is the owner of customary land/kibanja holding located at kiruddu-Buziga, Makindye division kampala or on land comprised in leasehold register volume 4287 folio 18 also known as plot 5, Luthli Link Road at Buziga, a declaration that the inclusion of the plaintiffs customary holding in the defendants application for a lease in leasehold register volume 4287 folio 18 also known at plot 5 luthuli link road at Buziga was fraudulent, a declaration that the defendant's acts complained of amount to trespass on the plaintiff's kibanja holding, an order cancelling the certificate for the land comprised in leasehold register volume 4287 folio 18 also known as plot 5, Luthuli link road at Buziga, an order of eviction, a permanent injunction restraining the defendants, his agents, servants and or representatives from interfering with the plaintiff's quiet enjoyment of the suit land./kibanja., mesne profits, general damages for



trespass, special damages, interest at the rate of 30 percent, costs of the suit.

The plaintiff's case is that she bought the suit land under customary tenure in 1993 from Eseza Zalwango and that her kibanja neighbors that of the defendant. That following her acquisition, she paid her contribution to the Kirudu Buziga development bank and used the suit land mainly for subsistence farming, growing crops like beans, maize, cassava. That she commenced construction and secured recommendations from the local council area leaders to get a lease from Buganda Land Board. That she enjoyed quiet possession until 2013, when the defendant laid claims on the suit land. That she later discovered that the defendant had fraudulently processed title including her kibanja. That the defendant demolished his structures and destroyed her crops. That the defendant's actions are fraudulent. That the procurement of the certificate of title for the land including the plaintiff's kibanja on the defendant's land title and the subsequent conduct of the defendant was fraudulent.

She listed the particulars of fraud as follows:-

1. Including the plaintiff's land kibanja in his application for lease
2. Ignoring obvious boundaries on ground separating the defendant's land from the plaintiff's
3. Not consulting with the local leaders who would have advised him about the plaintiff's ownership rights on the land.
4. Failing to consult with the plaintiff before applying for a lease in Buganda land board.
5. Cutting the plaintiff's crops on the land and also demolishing the perimeter wall that was separating the plaintiff's land from the defendant's

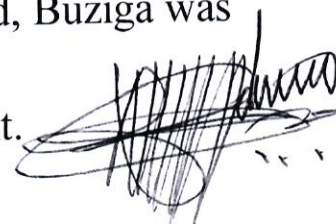


6. Instituting Makindye magistrates court civil suit no. 10 of 2014 and then withdrawing it clandestinely and taking the law in to his own hands.
7. Hoodwinking kampala capital city authority into issuing permission to demolish the plaintiffs un plastered shell structure on the plaintiff's land
8. Attempting to forcefully alienate the plaintiff.

On the other hand, the defendant denied the allegations of the plaintiff and stated that he is the owner of the land comprised in FRV 4287 Folio 18 plot 5 kyadondo block 273, Lukuli link. Buziga measuring 0.227 hectares. That the suit land originally belonged to his late, other Margaret kaberuka since 1989 granted her mother permission to obtain a lease on the same. That the land was handed over to Buganda land board in 1995 which granted the defendants late mother lease as the rightful lessee and was then transferred to the defendant in 1996. That both his mother and him have been paying Busulu. That the plaintiff took advantage of the defendant's absence and constructed an illegal structure on the suit land without his permission.

At scheduling the parties agreed on the following issues.

1. Whether the plaintiff has interest in the suit land.
2. Whether the defendants acts complained of amounted to trespass.
3. Whether the inclusion of the plaintiff's kibanja/customary land holding in the defendant's application for lease and or in lease hold register voume 4287 folio 18 plot 5 Lukuli Link Road, Buziga was fraudulent.
4. Whether the parties are entitled to the remedies sought.



At trial the plaintiff was represented by Counsel Sam Osongogol while defendant was represented by Counsel Adubango Richard and Edwin Tabaro.

Only counsel for the defendant filled written submissions which I will consider in this Judgement. The plaintiff's counsel adamantly refused defied court orders and did not file written submissions.

THE LAW

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

In Miller V Minister of Pensions [1947]2 ALL E R 372 Lord Denning stated:

"That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not."

It is also the position of the Law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.

In a bid to proof their case, the plaintiffs led evidence of 8 witness and closed while the defendants called 1 witnesses and court called one witness.

Pw1 Jenifer Kiggundu Nabatanzi testified in this court and stated that she bought the suit land in 1993 from Eseza Zalwanga and that the kibanja neighbours that of the defendant. That the boundaries of the suit land were East-Mr. Urban Tebamanya, in the West- is Mary Besigye the defendant's mother, in the South was Ntale and in the North was Dantal. That after purchase, she started utilizing the land and constructed unfinished structure which was later demolished by the defendant. That she opened up a file at Buganda land board and secured a recommendation from the LCI of the area to apply for a lease.

That the defendant without a claim of right entered suit land and destroyed crops and demolished the structure thereon. In cross-examination, she confirmed that the agreement of 1993 does not have the boundaries of the suit land defined and she does not have a copy of the 1993 agreement. That she got authority to build on the suit land but misplaced the same. She also said that she did not approved plans for constructing on the suit land. She further confirmed that she was not aware of kibanja holdings were outlawed in urban area. But when she bought in 1993 the land was under Buganda land board.

PW2 Urban Tibamanya testified in this court and stated that he is an advocate of the High Court and a resident of Serwadda Zone Kirudu-Buziga in Makindye Division. That his house neighbors the plaintiff's land which borders the defendant's land that originally belonged to his mother. He stated that he came to know the plaintiff owns part of the suit land in 1996 when he had boundary issues with her.

In cross-examination, he confirmed that he does not know the defendant but he knows the defendant's mother and that he does not stay in Buziga and only a caretaker stays in his house in Buziga. He also confirmed that he does not know the measurements of the plaintiff's land and doesn't

know whether the plaintiff's land was measured and also does not know who of the defendant's mother or the plaintiff built in the suit land first.

PW3 Ajio Hellen testified in this court that she is a resident of the area where the Suitland is located and stayed there for 32 years. That the suit land belongs to the plaintiff and borders that of the defendant. That she came to know that the plaintiff had bought land in 1994. She also confirmed that there was a barbed wire separating the plaintiff's land from the defendant.

In cross-examination she confirmed that she did not know how big the plaintiff's land was and that she only got to know that the plaintiff bought the land in 1994.

PW4 Bukenya Joseph testified in this court and stated that he was born in the area where the suit land is located and that his home is one plot away from the suit land. That his father Leo Mukasa was the original owner of the suit land and was present when his father sold a piece of land to the defendant's mother and sold another to Eseza Zalwango the plaintiff's predecessor in title. The two plots were separated by barbed wire.

In cross-examination, he confirmed that he was around when his late father sold land to the defendant's mother but did not witness the agreement. He however said that he does not know the size of the land its demarcations. He also confirmed that Zalwango was given a gift of land by his father but also does not know the boundaries to the land which was given to Zalwango.

PW5 Aryatujuna Geoffrey stated that he is a caretaker of the plaintiff's land and started taking care of the same in 2013. That when he came to work he found uncompleted structure and the rest of the land was used for cultivation of food crops. That during that same time, the defendant

started laying claims on the suit land and in 2018 the defendant came with men with pangas who chased him away, demolished the perimeter wall and claimed the suit land.

In cross-examination, he stated that he reported the incident to Kabalagala police station but lost the reference number.

Pw6 Kigundu Frank testified in this court and stated that he is a husband of the plaintiff and that in 1993 she purchased the suit land from a one Eseza Zalwango and witnessed on the agreement. That the land was bordered by the defendant's mother Mr. Danton, Mr. Urban Tebamanya, Mr. Mutebi and Mr. Ntale. That the plaintiff developed the suit land with an incomplete structure and cultivated the same for food crops. That in 2018 under the instructions of the defendant, unknown men destroyed the crops and the unfinished structure on the suit land.

In cross-examination, he confirmed that his wife, the plaintiff purchased a kibanja interest and that he is not aware that the kibanja interest in the city had been outlawed by law

PW7 Barbra Mugenyi testified in this court and stated that he is a certified registered surveyor that in 2019 he was instructed by the plaintiff to carry out a replacement cost of the demolished structure. When he went to the land the structure was already demolished and the plaintiff availed her with building drawings and photographs of the demolished structure. That he valued the demolished structure at 102,838,657.9/= Uganda shillings.

In cross-examination, he confirmed that he relied on photographs to come up with a figure. He confirmed that he did not see any approved plan and only saw a subdivision made in March. He also confirmed that he did not go into ownership of the suit property and therefore he does not know the owner of the suit property.

PW8 Gaster Namunnungu testified that in 1991-2000 he was a youth secretary of the suit area. That the suit property belonged to the late Leo Mukasa who gifted it Eseza Zalwango. That in 1993 Eseza Zalwango had reported to their office that she had sold her interest to the plaintiff. That they inspected the suit land and handed over to the plaintiff. He stated that the youth secretary he served for 10 years but did not know the defendant's mother. That the gift of Zalwango was through a letter of which he does not have a copy of. He also confirmed that PE2 was signed by him although the signature differs from his but both are his signatures.

On the other hand, **DW1 Denis Byarugaba** one of the sons of the late Margaret Kaberuka who died in 2003. That during her life time, she owned a piece of land in the suit area measuring 0.226 hectares. That she submitted her application to Kampala City Council over the suit land in 1991 and a lease offer of 49 years was made to her. That later when the Kabaka's land was returned to him in 1993, the suit land went under management of Buganda land board. That the commissioner of lands in 1995 informed Uganda land board about his late mother's lease over the suit land. That in 1996 the secretary of Buganda land board communicated to his mother a lease offer over the suit land measuring 0.227 hectares. That after the death of their mother, his other siblings assigned their interest to him and that in 2009, his mother's lease had been extended for 44 years with effect from January 2001. That he used the same deed of assignment from the siblings to be put on a lease hold title replacing his mother. That he was however surprising in 2014 when he found the plaintiff laying claims on the suit land.

In cross-examination, he confirmed that his later mother bought the suit land from the late Mzee Leo and does not have an agreement. That according to DW4 the suit land measures 0.227 hectares. And that according to DE9 that he is the registered owner of the suit property.

CW1 Mukwaya Edris an employee of Buganda Land Board testified that the department of land administration introduced the defendant's mother in 1995 as a person who Kampala city council had allocated the suit plot in 1991. That a file was opened in the names of the defendant's mother Margaret Kaberuka who submitted an application for lease in 1995. That the lease was given to the defendant's for an initial period of 5 years and was extended in 2000 for 49 years. That the land board was informed that she had passed away and presented her Will and letters of probate. That the executors of the Will of the late Margaret Kaberuka assigned all their interests to the defendant and the same was communicated to Buganda land board where after the registered proprietor became Denis Byarugaba, Besigye.

RESOLUTION

Issue No. 1. **Whether the plaintiff has interest in the suit land**

In this case the plaintiffs claim is based on kibanja/customary ownership having purchased the same from a one Ezesa Zalwango in 1993.

Customary tenure is defined under **Section 1 (l) of the Land Act Cap 227** as follows;

"(l) "customary tenure" means a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which are described in section 3..."

Section 3 (supra) to which above definition makes reference provides for incidents of forms of customary tenure as follows;

"3. Incidents of forms of tenure.

(1) Customary tenure is a form of tenure—

- (a) Applicable to a specific area of land and a specific description or class of persons;*
- (b) Subject to section 27, governed by rules generally accepted as binding and authoritative by the class of persons to which it applies;*
- (c) Applicable to any persons acquiring land in that area in accordance with those rules;*
- (d) Subject to section 27, characterized by local customary regulation;*
- (e) Applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land;*
- (f) Providing for communal ownership and use of land;*
- (g) In which parcels of land may be recognized as subdivisions belonging to a person, a family or a traditional institution; and*
- (h) Which is owned in perpetuity. ”*

Going by the definition of customary tenure, it is clear that customary tenure applies to a specific area and specific group of people and can be established by any activity on the land. It is, however, not sufficient for a person merely to carry out activities on land for however long the period, but a person claiming to be a customary tenant must prove that in that area, it is a custom that whoever carries out certain activities for a specific period of time becomes a customary owner. This position was re-affirmed by the Supreme Court in the case of **Kampala District Land Board & Another vs. Venansio Babweyaka & 3 Others SCCA No.2 of 2007**.

Furthermore, **Section 46 of the Evidence Act, Cap 6**, provides that *where a court has to form an opinion as to the existence of any general custom*

*or right, persons who would be likely to know of its existence, are relevant. A similar stance was taken in **R. vs. Ndembera S/o Mwandewale (1947) 14 EACA 58**, where it was held, inter alia, that native custom must be proved in evidence and cannot be obtained from assessors or supplied from the knowledge and experience of the trial judge.*

Section 101(1) and (2) of the Evidence Act also encapsulate the principle which has come to be that “he who alleges must prove”. In the instant case, the burden of proving that he occupied and or utilized the suit land as a customary tenant lies on the plaintiff who alleged the same having bought the same from a one Lwazango.

The plaintiff testified as PW1 and exhibited her agreement PEX1 to prove her purchase of the land. Although it would ordinarily not be in contention, the said agreement was not signed by the vendor. Secondly the same was not signed by the LC officials contrary to the evidence of the pw8 who confirmed that the LC officials participated in the purchase agreements of the plaintiff and inspected the land. What is suspicious is that all the witnesses of the plaintiff did not know the measurements of the suit land as they all failed to tell its size.

Further the plaintiff equally confirmed that she did not know the size of her land and that she never surveyed her land. She also confirmed that the structure on the suit land did not have an approved plan.

It is not surprising that all the plaintiff's witnesses who are her neighbors, including got to know that the plaintiff bought the suit land when they had boundary disputes from with them. It is also suspicious that even when the plaintiff acknowledges the defendants mother to have been her neighbor, she and all other neighbors did not witness her purchase agreement or took part in the boundary demarcation. All the neighbours could confirm is that they got to know of the purchase a year later when they had boundary issues with the plaintiff.

Thirdly there is no sufficient evidence on record to show that indeed the said late Leo Mukasa gifted the late Eseza Zalyango the suit property. Whereas the plaintiff and PW7 claims to have seen the late Leo Mukasa donate the land to the late Eseza Zalwango as a gift in a gift deed, no gift deed was exhibited by them exhibited it in court.

Be that as it may, the plaintiff fell short of her burden to prove her purchase. Further she did not lead evidence to show that it was the practice in the suit area that long her alleged long stay would amount to a customary interest.

From the definition of customary tenure, a Kibanja is not defined as one of the incidents of customary tenure. It should be emphasized that merely being a Kibanja holder does not perse establish customary tenure in the land. Cogent evidence must be adduced within the requirements of Section 46 of the Evidence Act (supra) for one to fall within the ambit of the legal definition of customary tenant.

As these principles apply to the instant case, the plaintiff has not shown court she that he falls within any of the incidents of customary tenure described under the law. There is no sufficient evidence to show that she was part of or that there was a class of persons who utilized the suit land under a certain particular custom or culture. The plaintiff's evidence totally failed to establish her interest in the suit land as a customary tenant.

Suffice to note even if the plaintiff had led sufficient evidence to prove her purchase, it is necessary also to point out that as an established fact, the suit land is located in an urban area in Kampala City. The plaintiff could not purport to have acquired land under a customary tenure on land in an urban area from his predecessors in 1993. The law in force at that time was the **Public Land Act 1969** and **Land Reform Decree 1975. Section 24(1) (a) of the Public Land Act** (supra) specifically prohibited customary tenure on land in urban areas. This prohibition could be

extended to other areas, especially rural areas by the Minister responsible pursuant to the Public Land (Restriction of Customary Tenure) Order 1969, SI 103 of 1969.

Most importantly, **Section 5(1) of the Land Reform Decree (supra) and section 23(3) of the public land act 1969** declared all land in Ugandan to be public land to be administered by the ULC in accordance with the **Public Land Act 1969**, subject to such notifications as may be necessary to bring that Act into conformity with the Decree. The Decree allowed the system of occupying public land by customary tenure only at sufferance. Any such land could be granted by ULC to anyone in accordance with the Decree.

On the same point, under the Land Reform Regulations 1976, a person wishing to obtain permission to occupy public land by customary tenure had to apply to the sub-county chief in - charge of the area where the land is situating, and after processing the application, it had to be sent to the sub-county Land Committee for approval.

In the instant case, even if the plaintiff had proved the acquisition of suit land in 1993, which is not the case, she could not have acquired customary ownership given the legal regime existing as at that time. The legal restriction on customary tenure under the Public Land Act (supra) and the Land Reform Decree (supra) continued to apply to all types of public land. For one to acquire fresh customary tenure, one had to apply to the prescribed authorities and obtain approval of his or her application.

In the instant case since, it is not in dispute that the suit land was part of land which was confiscated under the 1967 constitution and returned to the kabaka of Buganda pursuant to the **Traditional Rulers (restitution of assets and properties) act cap 2470**

The suit land was under the management the kabaka of Buganda. Although the plaintiff stated that she made an application for lease to the Buganda land board as per letter dated 18th January 2019 PEX4 addressed to Buganda land board, the same was denied by Buganda land board in a letter dated 26th September 2013 DEX 17. Even if PEX4 Was not denied, it would not amount to a lease offer/or a customary interest.

In the instant case, there is evidence of such an application to the prescribed authorities by the plaintiff or his predecessors to acquire fresh customary tenure. Similarly, there is no evidence of approval of the plaintiff's application or that of his predecessors to acquire fresh customary tenure in accordance with the land Reform Decree (supra) for them to have qualified as customary tenants in 1993.

Clearly, customary tenure being a form of tenure owned in perpetuity in accordance with Section 3 (h) of the Land Act (supra) it could not legally be held on a freehold tenure which is tenure also owned in perpetuity. The two are cannot legally co-exist, them being interest that are legally mutually exclusive. Therefore, the plaintiff could not have legally acquired customary tenure in an urban area in Kampala City on a freehold titled land prior to the enactment of the 1998 Land Act. She fails the legal test as a customary tenant.

I therefore find that the plaintiff does not have an interest on the suit land.

Issue one is answered in the negative.

1SSUE 2

2. Whether the defendant's acts complained of amounted to trespass.

According to Supreme Court case of Justine **E.M.N. Lutaaya vs Sterling Civil Engineering Co. SCCA No.11 of 2002** *trespass to land occurs "when a person makes an unauthorized entry upon land, and thereby*

interfering, or portends to interfere, with another person's lawful possession of that land". Court in that case added that the tort is committed not against the land, but against person who is in actual or constructive possession of the land. In order to succeed in this case, the Court of Appeal in Sheikh Muhammed Lubowa versus Kitara Enterprises Ltd CA No. 4 of 1987 observed that one must prove;

1. That the disputed land belonged to the Plaintiff
2. That the Defendant had entered upon it, and
3. That entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the disputed land.

In this case, it has already been found that the suit land does not belong to the plaintiff. On this basis alone, the allegation of trespass would be determined summarily in favor of the defendant.

However since this judgement like any other is in rem, it is important to determine the basis for the defendant's ownership of the suit land.

From the evidence on record as per DE9, the defendant is the registered owner on a lease hold title over the suit land.

The defendant testified as DW1 and stated that he is one of the sons of the late Margaret Kaberuka (original registered proprietor) who died in 2003. That during her life time, she owned suit land measuring 0.226 hectares at Buziga. That she submitted her application to Kampala City Council over the suit land in 1991 and a lease offer of 49 years was made to her. That later when the suit land was returned to the Buganda kingdom, was returned to him in 1993, the suit land went under management of Buganda land board. That the commissioner of lands in 1995 informed Buganda land board about his late mother's lease over the suit land. That in 1996 the secretary of Buganda land board communicated to his mother a lease

offer over the suit land measuring 0.227 hectares. That after the death of his mother, the other siblings assigned their interest to him and that in 2009, his mother's lease had been extended for 44 years with effect from January 2001. That he used the same deed of assignment from the siblings to cause registration in his names as a new registered proprietor.

His evidence was corroborated by the court witness, **CW1** Mukwaya Edris an employee of Buganda Land Board who testified that the department of land administration introduced the defendant's mother in 1995 as a person who Kampala city council had allocated the suit plot in 1991. That a file was opened in the names of the defendant's mother Margaret Kaberuka who submitted an application for lease in 1995. That the lease was given to the defendant's mother for an initial period of 5 years and was extended in 2000 for 49 years. That the land board was informed that she had passed away and presented her Will and letters of probate. That the executors of the Will of the late Margaret Kaberuka assigned all their interests to the defendant and the same was communicated to Buganda land board where after the registered proprietor became Denis Byarugaba, Besigye, and the defendant.

The defendant tendered in court several exhibits to substantiate his claim.

PE3 a will of the late Magret kaberuka, shows that indeed the defendant is one of the sons of the late Margarete kaberuka, who bequeathed the suit land to her children including the defendant.

The said Margaret kaberuka Sought for a lease from Kampala city council and Buziga resistance council recommended her to get a lease over the suit land as per DEX2, a letter dated 15th January 1991. She was given a lease offer as per DEX1 dated 28/04/1993 for an initial period of 5 years.

On 30th October, 1995, Uganda land commission wrote to Buganda land board in whose custody the land had shifted pursuant to the **Traditional**

Rulers (restitution of assets and properties) act cap 2470 which returned the suit land to the Kabaka of Buganda introducing the defendant's mother as one who had already been allocated a lease on the suit land as per DEX3. On the 2nd of January 1996, the said Margaret Kaberuka was given a lease offer by Uganda Land Board for an initial period of 5 years as per DEX4. In 2007 the beneficiaries of the late Margarete kaberuka's will by a deed of a signment assigned the suit land to the defendant as per DE6. On 1st may 2009 the lease offer was extended for 44 years as per DEX8. It is indeed not surprising that on 1st of December 2011 vide instrument A527007, the defendant was registered on the lease hold title of the suit land comprised in LRV 4287, Folio 18, Plot 5 Lukuli Link Road at Buzuka Kampala, as a Registered Proprietor of the suit land.

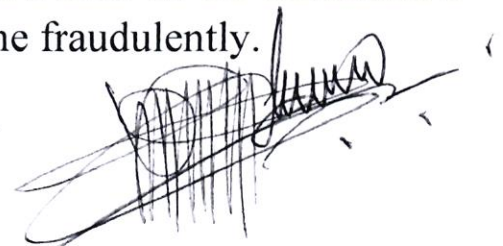
Therefore on the basis of the above evidence, it is the finding of this court that the suit land belongs to the defendant. Be that as it may the defendant could not have trespassed on his own land.

Issue two is answered in the negative.

3. Whether the inclusion of the plaintiff's kibanja/customary land holding in the defendant's application for lease and or in lease hold register volume 4287 folio 18 plot 5 lukuli link road, Buziga was fraudulent.

This issue has since become irrelevant since this court has already found that what was included on the defendant's tittle was rightfully his and there for there was no inclusion of the plaintiff's land on the defendant's tittle to require court to determine if it was done fraudulently.

Therefore, issue 3 is answered in the negative.

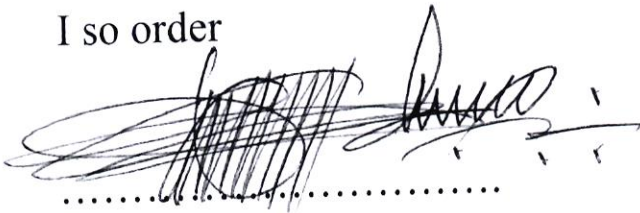
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Issue 4 whether the parties are entitled to any remedies.

The plaintiff sought for a host of remedies. However since all issues have been determined in favor of the defendant, the plaintiff is not entitled to any remedies.

In conclusion, I find no merit in this suit and the same is hereby dismissed with no order as to costs for reasons that the defendant defied court directives to file written submissions.

I so order

A handwritten signature in black ink, appearing to read 'Tadeo Asiimwe', is written over a horizontal dotted line. The signature is stylized with some loops and a long horizontal stroke.

TADEO ASIIMWE

JUDGE

16/06/2023