

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(LAND DIVISION)**

**CIVIL SUIT NO. 184 OF 2017**

**MULONDO NASUR ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**1. NAMARA AISHA**

**2. KIWEEWA SHABAN :::::::::::::::::::::::::::::::::::DEFENDANTS**

**BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI**

**JUDGMENT**

**Background**

1. It was the Plaintiff's case that on or about 23<sup>rd</sup> March 2011, he bought a piece of land from Kyeswa Badiru measuring 55 feet by 105 feet out of land then comprised in Kyadondo block 262 plot 1179. He divided it from the mother title, registered it as Kyadondo block 262 plot 1190 situate at Makindye and transferred it into his names on or about 27<sup>th</sup> April 2011 under instrument No. KLA497218. By the time he bought his plot, the mother title had an access road stretching from the main Salama- Munyonyo road which was maintained even after the subdivision for purposes of serving the different plots.
2. However the 1<sup>st</sup> Defendant with the backing of the 2<sup>nd</sup> Defendant blocked the access road at the junction of plots 1156 and 1149 and also sealed off the Plaintiff's access at the upper part of his plot 1190 with the Defendants' second

gate. When the Plaintiff approached the Defendants about the same, he was informed that he either sells to them his plot at a consideration of their choice or his access would permanently remain sealed. The Plaintiff is unable to access his plot with building materials because the Defendants keep both gates through which he can access his land closed and the water channel dug in his access make it impossible to deliver any materials to the land.

3. The Plaintiff further averred that the water channel dug in the access road to his plot and the eucalyptus trees planted by the Defendants at the lower part of the access road have consistently caused water to flood around his plot and unless the access road is properly opened up to the end, his plot shall remain flooded with water diverted to it by the Defendant. It was also the Plaintiff's case that the 1<sup>st</sup> Defendant encroached on his land comprised in block 262 plot 1190 by about 1.64m at the right hand and approximately 1.92m at the left hand end of the plot
4. The Plaintiff therefore sought; a declaration that the Defendants' closure of the Plaintiff's access road to Kyadondo block 226 plot 1190 is illegal and unlawful; a declaration that the wall fence on the 1<sup>st</sup> Defendant's land encroached on the Plaintiff's land in commission of the tort of trespass; an order for removal of the gates blocking the Plaintiff's access to his land; a permanent injunction restraining the Defendants or any person claiming under them from any further trespass on his land; an order directing the Defendants to fill the water channel dug in the Plaintiff's access road and restore the same as provided for and indicated on the title; punitive damages; general damages; mesne profit; interest on all awards at the rate of 25% per annum from the date of filing the suit till payment in full; costs of the suit and any other, further and better remedy that this court may deem fit.

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5. In their written statement of defence, the Defendants averred that the alleged access road was the 1<sup>st</sup> Defendant's creation that leads her to her land from the main road. The claimed adjacent plot was declared a wetland by NEMA and the alleged blocking fence was put up by the 1<sup>st</sup> Defendant to protect her children from falling in the water channel immediately next to her fence. The 1<sup>st</sup> Defendant purchased the plot allegedly purchased by the Plaintiff but returned it to the original owners after discovering the same was a wetland and inhabitable with a water channel. The Defendants denied encroaching or trespassing on the Plaintiff's alleged plot and averred that the Plaintiff was not entitled to the remedies sought.

### **Issues**

6. The following issues were agreed upon for determination under the joint scheduling memorandum:
- i) Whether the Defendants' closure of the access road to the Plaintiff's land as comprised in Kyadondo block 262 plot 1190 was/is unlawful and/or illegal.
  - ii) Whether the Defendants trespassed on part of the Plaintiff's land as comprised in Kyadomdo block 262 plot 1190.
  - iii) What remedies are available to the parties.

### **Witnesses**

7. Hearing was by witness statements in lieu of examination in chief except for PW6. The Plaintiff testified as PW5 and led evidence through Mr. Kataabu Simon, a surveyor working with M/s. New Surveying Ltd as PW1; Mr. Kasagga Dan, the Councilor LC III of Luwafu Parish, where the suit land is situate was

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PW2; Mr. Broad Links Mukasa, the LC1 Chairperson of Bukejje village where the suit land situates as PW3; Mr. Abbas Muyinza Jjombwe as PW4 and No. 19226 Sgt Birungi Aisha as PW6. The Defendants only led evidence through the 2<sup>nd</sup> Defendant who testified as DW1. It is noteworthy that despite numerous adjournments to allow the Defendants lead more evidence, the Defendants failed to do so.

8. The Plaintiff bears the burden to prove to the satisfaction of Court the averments, if he is to succeed as provided for under section 101 of the Evidence Act. This burden is on a balance of probabilities.

### **Representation**

9. The Plaintiff was represented by M/s. Ambrose Tebyasa & Co. Advocates and the Defendants were represented by M/s. Nakachwa, Matovu & Co. Advocates.

### **Locus Visit**

10. The court made a locus visit on the suit plots on 17<sup>th</sup> March 2023 in the presence of the parties, their counsel and the local authorities and police. It was observed that although the gates erected by the Defendants had been removed on the orders of KCCA, there was clear evidence that they had been put in place to obstruct the plaintiff from accessing his plot through the access road that had been created at the tie of demarcation of the plots by the previous owners of the suit land. It was further noted that there is a flooding problem in the area and there was need to have joint solution to address the drainage through the water channel that cuts through the plots of both parties.

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**Issue No.1: Whether the Defendants' closure of the access road to the Plaintiff's land as comprised in Kyadondo block 262 plot 1190 was/is unlawful and/or illegal**

11. It was PW5' testimony that prior to buying the suit land, his predecessors in equitable and legal interests showed him a well demarcated access road to his plot comprised in Kyadondo block 262 plot 1190 situate at Salaama as the same existed since the inception of all the correspondent plots of land in the same area. He enjoyed quiet possession of his land until the Defendants whom he shares boundaries on the upper part of his plot with trespassed on his land and dug a water ditch in his access road where water from their home collects. This was done without his knowledge and consent and the ditch existed in his access road from around 2013 to 21<sup>st</sup> may 2018 when he closed it accompanied by local area leaders and police officers from Katwe Police Station. After he covered the hole, the Defendants sealed off the access road again and is unable to access it.

12. In cross examination, it was PW5's evidence that he bought the suit land on 23<sup>rd</sup> March 2011 and the gate which sealed off the access road was erected in 2013. The ditch was dug after the gate in 2013. He tried talking to the Defendants in 2013 and had brought building materials of culverts and marram but his access was blocked. He had a problem with the gates being erected and he reported to PW3, the LC1 Chairperson. The access road leads to Masajja and he refused the keys as offered by the 2<sup>nd</sup> Defendant because he would still be blocked when bringing in material.

13. In re- examination, it was his evidence that the water on his land comes from the property of the 2<sup>nd</sup> Defendant and it would not be there if the Defendant had not

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put culverts. The access road was to be used by PW5. In clarifying to court, PW5 stated that the amicable proposal was that since the Defendants had already built their home, they would pass through the middle of the access road but using culverts. The water is waste water from the 2<sup>nd</sup> Defendant's property mixed with sewerage water.

14. PW1 in his survey report of the land in dispute admitted in evidence as P. Exh 1 on page two observed that gate A belonging to the owners of plots 1150, 1156 and 1191 was constructed in the provided access road both on ground and on cadastral map. Gate B constructed by the owner of part or whole of plot 1172 is the only way to plot 1190 after going through gate labelled C. Gate C currently in the provided access road map was constructed by owners of plots 1150, 1156 and 1191. Thus to access plot 1190 according to the information gathered, one needs to access permission from the owner of plots 1150, 1156 and 1191. Owners of Plots 1150, 1156 and 1191 constructed a man hole measuring 1.5 by 1.3m in the provided access road.

15. In his cross examination, PW1 maintained that the access road is blocked and he was able to access plot 1190 because a gentleman opened gate B. further that PW5 is inconvenienced by the gate. In clarifying to court, it was PW1's statement that permission for gate B to be opened was sought before they could get to plot 1190.

16. It was PW2's evidence that the disputed access road existed for a long time as the same was created as an easement during the process of obtaining titles for the land in the area. There is therefore no other access road that can be used by the aggrieved person to get to their plots of land as the area is designed that the last plot after the one of the Plaintiff belongs to the 2<sup>nd</sup> Defendant and is the last plot

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next to the drainage water channel. The 2<sup>nd</sup> Defendant's home is enclosed in a perimeter wall and a gate in addition to the one placed in the access road and blocking the access area. He was among those who forced the Defendants to open the gates so that PW5 could fill the ditch the Defendants dug in his access road but after the ditch was filled, the Defendants sealed off the access road and the Plaintiff is still unable to access his land.

17. In cross examination, PW2's testimony was that there were meetings at the local level in which it was found that the Defendants blocked the access road and it was decided that they remove the gates. The access road existed before the plots were located and it goes straight to Masajja to the Channel. The security of the area is good. In re-examination, PW2 stated that the access road is used by Sentongo Meddie, the PW5 and other residents to reach their home.

18. In answering questions from court, PW2 stated that when the gate is locked, the residents use another alternate route but it is very far. Meddie Ssentogo is also affected. He is the son of the original owner of the land. The 2<sup>nd</sup> Defendant refused to open the road saying that it is his.

19. PW3 corroborated the above evidence of the Defendants blocking the access road, the meetings at the local level and the Defendants still closing the access road after PW5 was allowed to go and close the manhole. He added that the 2<sup>nd</sup> Defendant had promised to give the PW5 keys of the gate but the PW5 refused the same claiming that his visitors would not have free access. Further that they did not find the issue of keys reliable because many other people use that area  
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20. PW4's evidence was that he is a son the Late Hajji Juma Jjobwe Sentongo. After the division of the property according to Islamic law as willed by his late father, PW4 created an access road, after which he sold two plots of land to the 2<sup>nd</sup> Defendant. That even the 2<sup>nd</sup> Defendant physically inspected the said plots passing through the access road which PW4 created. He confirmed that the access road which the 2<sup>nd</sup> Defendant claims to be his is not, and he has no right to close it since he found it already created by the time he bought his land. The access road was meant to benefit owners of the other plots.

21. PW6's evidence was that she visited the scene and found that the 2<sup>nd</sup> Defendant constructed a gate which blocked an access road and dug a ditch in PW5's land. She took photos of the dispute admitted in evidence as Exh P.3,4,5,6 & 7.

22. It was DW1's evidence that he initially bought block 262 plot 1190 through their company Nask Stores Ltd before the alleged purchase by PW5 but returned it to the original owner because it always flooded whenever it rained. The said land was later declared a wet land by NEMA and he put up the alleged fence to protect his children from the water channel immediately after his fence. He denied ever preventing the Plaintiff from accessing his property and the gate was already in place at the time PW5 alleged to have bought his land as he even went through the gate to access the same. The said gate was put in place to prevent thieves from accessing their property from the wet land side and preventing playing children from falling in the water channel. After PW5 destroyed the said gate and part of their perimeter wall, he reported a case at Katwe Police station.

23. Further that DW1 does not own any land in the place but their company Nask Stores Ltd does. He denied digging the water channel and insisted that it was existing before. PW5 was free to go through the gate but refused. They even gave

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him a key but he refused them until he destroyed it. Further that there is no gate as alleged, the Plaintiff having destroyed it and blocking the water channel which is posing a great risk to all the neighbouring properties inclusive of theirs. He does not have a problem of having no gate if only PW5 can occupy his land so that it is not used as a hiding place for criminals and posing danger to his children. That the Plaintiff is simply using this court to justify his occupation of a wetland after being stopped by NEMA and even took the law into his hand by destroying the gate and water channel.

24. It was his evidence in the cross examination that plot 1191 is in the names of Nask Stores Ltd but did not state so in the written statement of defence because no one asked him about it. Plot 1191 had a residence of DW1 and Nava Aisha, the daughter. DW1 and his use plot 1191. He has never found out whether his wall fence on plot 1191 encroaches on PW5's plot 1190. The titles that were made indicate access roads. He is the owner of the access road but it does not have a plot number. He is the one who curved out the access road but have forgotten the plot. The access road starts from Salaama upto the PW5's plot 1190 and another plot of another person who is supposed to be using the same access road. It is his wife and himself who put gates on the access road. He did not seek the consent of the Plaintiff because he found the gates there.

25. The gates were put in 2008 but could not remember the exact month. He denied buying land from PW4 and claimed to have bought from Badru Kyeswa. It is not true as alleged by PW5 that the gate was put up in 2014. PW5 can access the land through the gates because they are currently open in the date time. He has a title to the land where the gates are but have forgotten the plot number. He does not have any agreement indicating that he bought the access road. He confirmed that

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the he had removed the gates and the PW5 was able to access his plot. In clarification to court, he testified that he had blocked the access roads from 2009 to 2021.

26. All the evidence above proves that the Defendants had blocked the access roads. The evidence also proves that the access roads were not created by the Defendants as alleged. The explanation by the Defendants that they put up the gates for security purposes pales in light of the evidence above as all the Plaintiff witness attest to the fact that there were no insecurity in their area. Therefore there was no justification for the Defendants to erect the gate. Therefore, their closure of the access road was illegal and unlawful. This issue is answered in the affirmative.

**Issue No.2: Whether the Defendants trespassed on part of the Plaintiff's land as comprised in Kyadondo block 262 plot 1190.**

27. The Supreme Court while defining trespass as per the case of *Justine E. M. N Lutaaya v. Stirling Civil Eng. Civ. Appeal No. 11 of 2002*, held that 'trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of the land'.

28. In *Sheik Muhammed Lubowa v. 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 appellant to prove that the disputed land belonged to him, that the respondent had entered upon that land and that the entry was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land’.

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29. The Defendants denied trespassing onto the PW5's land. However, PW5 insisted that the Defendants trespassed on his land by the Defendant by erecting part of their wall fence on his land, blocking his access and diverting rain water into his plot. On page 2 of P.exh.1, an observation was made that the perimeter wall along plots 1150, 1156 and 1191 encroaches onto plot 1190 by 1.64m at right hand end and approximately 1.92m at the left hand end of plot 1190. I find this evidence cogent and will rely on it because no other evidence was led to question the accuracy of P. exh.1. The submissions by the Defendant disputing the accuracy of P.exh. 1 are from the bar and are rejected on that basis.

30. Having carefully evaluated the evidence on record, it is my finding the PW5 has proved that he owns plot 1190 and the Defendants made entry thereon without his permission and authorisation. The Defendants therefore trespassed on PW5's land. This issue is answered in the affirmative.

### **Issue No.3: Remedies available to the Parties**

31. The Plaintiff sought; a declaration that the Defendants' closure of the Plaintiff's access road to Kyadondo block 226 plot 1190 is illegal and unlawful; a declaration that the wall fence on the 1<sup>st</sup> Defendant's land encroached on the Plaintiff's land in commission of the tort of trespass; an order for removal of the gates blocking the Plaintiff's access to his land; a permanent injunction restraining the Defendants or any person claiming under them from any further trespass on his land; an order directing the Defendants to fill the water channel dug in the Plaintiff's access road and restore the same as provided for and indicated on the title; punitive damages; general damages; mesne profit; interest on all awards at the rate of 25% per annum from the date of filing the suit till

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payment in full; costs of the suit and any other, further and better remedy that this court may deem fit.

32. Even though the Plaintiff prayed for an order for removal of gated blocking access to his land, the DW1 testified that he removed the gates in 2021. At the locus visit, it was established as stated in the submissions of the Plaintiff that the gates were actually removed on the orders of KCCA. Therefore, this prayer has been overtaken by events. Similarly, the prayer for directing the Defendants to fill the water channel dug in the Plaintiff's access road and restore the same as provided for and indicated on the title has been overtaken by events because the Plaintiff led evidence that proved that he closed it accompanied by local area leaders and police officers from Katwe Police Station.

33. Having found that the perimeter wall along plots 1150, 1156 and 1191 encroaches onto plot 1190 by 1.64m at right hand end and approximately 1.92m at the left hand end of plot 1190, an order is issued for the immediate demolition of the parts of this wall which encroach onto the Plaintiff's land.

34. **In Civil Appeal No. 0035 of 2016 Akena Christopher & Ors v. Opwonya Noah**, it was held that "it is settled law that a permanent injunction is a remedy for preventing wrongs and preserving rights so that by single exercise of equitable power an injury is both restrained and repaired, for the purpose of dispensing complete justice between the parties. Permanent or final injunctions are granted as a remedy against an infringement or violation which has been proven at trial. Such an injunction will be granted to prevent ongoing or future infringement or violations."

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35. Although the gates were removed, the history of this case as proved by the evidence adduced indicates that the Defendants for a long time blocked the Plaintiff's access and can easily erect other gates on their whim. Therefore, I find pertinent to issue a permanent injunction curb any further blockages of the access road by the Defendants. A permanent injunction against the Defendants or anyone claiming under them from erecting any gates or structure that would block the access roads is issued.

36. In **Civil Appeal No. 101 of 2014 Damara Agro Processing Co. Limited & Ors v. Nathan Tabahikiza**, the court held that "General damages are to compensate the injured person while punitive or exemplary damages are awarded to punish, deter, express outrage of Court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/ or malicious conduct. Unlike general and aggravated damages, punitive damages focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are awarded where the conduct of the Defendant was high handed, insolent, vindictive or malicious, and abuse of the plaintiff's rights or disregarding every principle which actuates the conduct of a gentleman."

37. In cross examination, it was DW1's testimony that the gates that blocked the access roads were put up in 2008. However in clarification to court, he stated that the gates were there from 2009 to 2021. These contradictions point to the DW1's dishonesty as to when the gates to put it. His evidence is therefore unreliable. I am more inclined to believe PW5 who testified that the Defendants erected the gates 2013 and never wavered in his evidence. From 2013 when the Defendants erected the gates, to 2021 when they were removed on the orders of KCCA, the

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orders of court indicate that PW5 and the different authorities engaged the Defendants to remove the gates to no avail.

38. It can be deduced from the evidence on record that the Defendants without consultations decided to block the access roads which was meant for usage by all the other plots in the area. The reasons adduced by the Defendants of insecurity and protection for their children were never proved. In fact the evidence led by the Plaintiff proved that the area was not insecure as the Defendants wanted to portray.

39. Secondly, the Defendants who could have chosen to buy land somewhere else chose to buy land in that area thus cannot use their personal reasons to inconvenience others. The gates blocking the access roads were in addition to other gates that the Defendants had. The Defendants erected the gates after PW5 had purchased his plot in 2011 and were aware that they had blocked his access reason for which they offered him the key. As explained by PW3, they did not find the issue of keys reliable because many other people use that area and if the Plaintiff is not there, they cannot access through. These access roads were not only used by people who owned land in that area but by others as well all the way to Masajja to the channel.

40. In total disregard to the rights of others, the Defendants erected these gates and refused to take them down even when directed by the different authorities. This was high-handed and insolent conduct by the Defendant, upon which I will award the Plaintiff punitive damages of Ug.shs. 20,000,000/= (Uganda shillings twenty million).

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41. From the evidence on the record, it has been proved that Defendants trespassed on to the Plaintiff land and was inconvenienced at the hands of the Defendants from 2013 when blocked his access road that he could not even deliver construction materials. It took the involvement of different authorities for the Defendants to allow PW5 access his plot to cover up the ditch that was there. He had to incur costs to buy materials to cover up the ditch. For this inconvenience, the Plaintiff is entitled to compensation of Ug.sh. 30,000,000/= (Uganda shillings thirty million).

42. Section 2(m) of the Civil Procedure Act (Cap.71) defines mesne profits as ‘..... those profits which the person in wrongful possession of the property actually received or might, with ordinary diligence have received from it, together with the interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession.’

43. In **George Kasedde Mukasa v. Emmanuel Wambedde & 4 Ors**, High Court Civil Suit No. 459 of 1998, Mukiibi J. stated that, ‘and correctly so in my view, as follows; it is settled law that wrongful possession of the Defendant is the very essence of a claim for mesne profits’.

44. In **Elliott v. Boynton [1924] 1 Ch. 236 [CA] Warrington, L.J**, at page 250 said that ‘now damages by way of mesne profits are awarded in cases where the Defendant has wrongfully withheld possession of the land from the Plaintiff.

45. In **Busiro Coffee Farmers & Dealers Ltd v. Tom Kayongo & 2 Others HCCS NO. 532/92**, it was held by this Court that ‘where a Defendant remains in wrongful possession, he is liable to pay mesne profits to the person entitled to

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possession., hence for a claim of mesne profits accrue, a Defendant must be in wrongful possession of the suit property as against the Plaintiff and deriving profits from the property.'

46. There is no evidence on record to show that the Defendants were ever in wrongful possession of PW5's land and derived profit therefrom. The Defendants blocked access to the PW5's land and trespassed on the same. There is therefore no evidence to support PW5's prayer for mesne profits and I will accordingly not award the same.

47. The Supreme Court in **Civil Appeal No. 06 of 2012 Omunyokol Akol Johnson v. Attorney General**, "it is well settled that the award of interest is in the discretion of the Court. The determination of the rate of interest is also in the discretion of the Court. I think it is also trite law that for special damages the interest is awarded from the date of loss, and interest on general damages is to be awarded from the date of judgment." Because of the prolonged, unjustified inconvenience caused by the Defendants to the Plaintiff, I will award interest on general damages at a court rate from the date of this judgment till payment in full. I find the rate of 25% per annum asked for by the Plaintiff to be on the higher side given that this was not a commercial transaction.

48. Section 27 of the Civil Procedure Act provides that a successful party is entitled to costs unless for good cause court orders otherwise. Costs of this suit are therefore awarded to the Plaintiff.

49. Based on the above, judgment is entered in favour of the Plaintiff with the following declarations and orders:

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- a) The Defendants' closure of the Plaintiff's access road to Kyadondo block 226 plot 1190 was illegal and unlawful.
- b) The wall fence on the Defendant's land encroached on the Plaintiff's land in commission of the tort of trespass. Accordingly;
  - (i) the parts of the Defendants' wall which encroach on the Plaintiff's land should be demolished at the Defendants cost under the supervision of the local authorities/police.
  - (ii) to rectify the flooding situation between the two plots the demolition process should cater for the drainage of water between the plots to allow free flow with costs for the drainage construction shared by the parties.
- c) A permanent injunction is issued restraining the Defendants or any person claiming under them from any further trespass on Plaintiff's land.
- d) The Plaintiff is awarded general damages of Ug. shs. 30,000,000/= (Uganda Shillings Thirty Million).
- e) The Plaintiff is awarded punitive damages of Ug. shs. 20,000,000/= (Uganda Shillings Twenty Million).
- f) Interest at court rate is awarded on the general damages from the date of judgment till payment in full.
- g) Costs of the suit are awarded to the Plaintiff.

It is so ordered.

**CORNELIA KAKOOZA SABIITI**  
**JUDGE**

**23<sup>rd</sup> August 2023**