



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 78 OF 2017
(Arising from Labour Dispute No. KCCA/NDC/LC/27/2017)

KAMUKAMA EDISON:.....CLAIMANT

VERSUS

SUMMIT PROJECT LTD:.....RESPONDENT

BEFORE:

1. The Hon. Mr. Justice Anthony Wabwire Musana

PANELISTS:

1. Hon. Jimmy Musimbi,
2. Hon. Robinah Kagoye &
3. Hon. Can Amos Lapenga.

AWARD

Introduction

- [1] Mr. Edison Kamukama brought this claim for a declaration that he was unlawfully, unfairly, and wrongfully dismissed from employment by the Respondent. He sought statutory and other remedies.
- [2] The Respondent opposed the claim contending that it was frivolous and vexatious.
- [3] The background facts common to both parties is that the Respondent initially engaged the Claimant to conduct supervision works at the Respondent's sites at Mayuge for two months, from June to July 2014. It was agreed that the Claimant would be paid UGX 4,000,000/= over the period. He was also further engaged from August to December 2014 and November 2015 to December 2016.
- [4] It was the Claimant's case that he was an employee of the Respondent, while the Respondent contended that it retained the services of the Claimant as an independent contractor.
- [5] On the 3rd day of November 2023, the Joint Scheduling Memorandum dated 9th February 2022 was adopted with three issues for determination:

- (i) Whether the Claimant was an employee of the Respondent?
- (ii) Whether the Claimant was unlawfully/unfairly terminated?
- (iii) What remedies are available to the parties?

Issue One: Whether the Claimant was an employee of the Respondent?

The Claimant's submissions

- [6] Ms. Shelia K. Tumwine, appearing for the Claimant, submitted that he was an employee of the Respondent under Sections 2 and 25 of the Employment Act, 2006, and that this was an oral contract. Counsel submitted that no written contract of employment was adduced in Court. Learned Counsel relied on the vouchers exhibited to support salary payments and other entitlements. Counsel prayed that the Court finds in favour of the Claimant.

The Respondent's submissions

- [7] Mr. Felix Ampeire, appearing for the Respondent, submitted that the Claimant was not an employee of the Respondent; therefore, this Court did not have jurisdiction to entertain his claim. Counsel cited the Labour Disputes (Arbitration and Settlement) Act, 2006 (*from now LADASA*) and the case of *Kyaka Fred & Koma Lee Noel v A.G LDR 128 of 2016* for the proposition that this Court's jurisdiction is limited to labour disputes connected or arising from the employment relationship. The Respondent's case was that the Claimant was an independent contractor on three separate projects and had been overpaid, for which there was a counterclaim. Counsel submitted that the evidence demonstrated a contract for services and that the Claimant did not discharge the burden of proving the existence of an employment relationship.

Analysis and Decision of the Court

- [8] The first issue, as framed, invites the question whether this Court has jurisdiction to entertain the dispute. In the case of *Owners of Motor Vessel Lillian "s" v Caltex Oil Kenya Limited*,¹ Nyarangi JA, opined that a Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. The Appellate Division of the East African Court of Justice², was more expansive on the effect of a question on jurisdiction. The Court observed that jurisdiction is a most, if not the most, fundamental issue that a Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the foundation from which springs the flow of the judicial process. Without jurisdiction, a Court cannot take even the proverbial first Chinese step in its

¹ [1989]KLR 1

² *Attorney General of the United Republic of Tanzania v African Network of Anima Welfare* Appeal No. 3 of 2011 EACJLR 2005-2011 395 at 399

judicial journey to hear and dispose of a case. It is, therefore, imperative that we resolve the issue of jurisdiction first.

- [9] In the case of *Okullu Paul & Kana John Bosco V Ocepa Andrew*,³ we posited that a Court of law derives its jurisdiction from its establishment statute or constituent law and that under **Section 8 of LADASA**, the Industrial Court is mandated to arbitrate on labour disputes referred to it and adjudicate upon questions of law and fact arising from references to the Industrial Court by any other law. In the case of *Kyaka Fred & Others V Attorney General Labour Dispute Reference No. 128 of 2016*,⁴ the Industrial Court held that it is a specialized Court dealing with matters to do with employees and employers regarding the Employment relationship between them. Its jurisdiction extends only to labour disputes directly connected with employment and arising from the employment relationship as provided for under the Employment Act, 2006 (from now "EA").
- [10] The primary question for determination is whether the matter before us is a labour dispute. Under **Section 2 of the LADASA**, a labour dispute is defined as any dispute between an employer or employers and an employee or employees; or between labour unions connected with employment or non-employment, terms of employment, the conditions of labour of any person or of the economic and social interests of a worker or workers. Ms. Tumwine submitted that the Claimant was an employee of the Respondent, while Mr. Ampeire contended that the Claimant was an independent contractor.
- [11] The distinction between an employee and an independent contractor rests on whether there is a contract of service or a contract for services. In the *Ready Mixed Concrete v Minister of Pensions*⁵ case, which was cited with approval, in the case of *Godfrey Kamukama v Makerere Business School*,⁶ Mackenna J held that;

"there were three conditions for a contract of service: first that the employee undertakes to provide his or her own work or skill to the employer in return for a wage or other payment, secondly the employee agrees to be subject to the employer's control to a sufficient degree" to make that other master" and thirdly that the other provisions of the contract are consistent with it being a contract of service in the end"

By this passage, a contract of service involves work for wages and control by the employer. It is a master-servant relationship. The master decides what needs to be done, how the task is to be performed, the means to be employed, and the

³ LDR 09 of 2022(Unreported)

⁴ The case was cited by the Respondent.

⁵ (1967)QBD 433

⁶ LDR 147/2019

time and place in which it is to be executed. In the Kamukama case (ibid), the Industrial Court, citing the case of **Charles Lubowa and Scovia Ayikoru v Victoria Seeds Ltd**,⁷ held that the distinction between an employee and an independent contractor is primarily governed by the control test. That an independent contractor is a person who works under a contract but is not in the same state of dependence on the employer as an employee is. Whereas the independent contractor controls the means and the manner in which work is performed, the employee, on the other hand, is subjected to the organization's procedures, is expected to perform part of the regular business of an employer, and he or she must follow specific instructions on how to perform work. An independent contractor usually has a fixed task and is paid on completion of the said task, and is free to delegate work to other workers of his choice without the knowledge and consent of the employer.

- [12] The documentary evidence presented to the Court was the payment vouchers supporting various payments to the Claimant. CEXH1 was a voucher for supervising works. It was dated 5th May 2014, and it bore the words;

"Being advance payment regarding the ongoing Mayuge Town Water Supply Project as Site Agent. The total cost-4,000,000, Deposit 1,000,000, Balance 3,000,000. To supervise and finish project in 2 months (End 30th July 14)".

The primary voucher CEXH 1, was written in contractual language. It was a contract for supervision. The fixed task was to supervise the ongoing Mayuge Town Water Supply works. Both parties admit to an initial fixed period and fixed sum of UGX 4,000,000/=, which period was extended. This means there was to be a fixed payment for a fixed task within a specified timescale. However, no direct evidence was led to show that the Respondent had no control over how the supervision works would be done. We would therefore be compelled to consider the nature of work or the tasks to be done in order to ascertain how the control test affects the employment relationship in the present case.

- [13] In CEXH 1 and the subsequent documents, the Claimant was referred to as a site agent. According to the Building Law Encyclopedia,⁸ a site agent is a person-in-charge, a foreman. It is written of a site agent that;

"a contractor is required to keep a competent person - in - charge on the site at all times. The person is clearly intended to be and is to be capable of receiving instructions from the architect, such instructions being deemed to have been given to the contractor

⁷ LDR 185/2016

⁸ Building Law Encyclopedia by David Chappell, Michael Cowlin and Michael Dunn at page 517

itself. Supervision of Works implies constant inspection and direction. In building contracts that duty lies principally with the contractor, which will normally carry out this duty through its site agent or foreman. Supervision is clearly a more onerous obligation than inspection, and one that can only be carried out by someone who has control over the workforce."

From the description above, a site agent is clearly in a position of considerable responsibility as far as the employer's contractor is concerned. From the evidence adduced before this Court, the Respondent submitted the Claimant's curriculum vitae for the approval of its clients. The site agent's qualifications and suitability were essential to the Respondent's compliance with the main contract. The site agent, referred to as a site manager, is responsible for ensuring the delivery of a construction project within a specified time and cost. While the exhibits admitted by this Court did not include any written contract of employment, the Claimant suggested that he was an oral contractor. The Respondent submitted that there was a contract, in writing, in the form of vouchers—these vouchers, as with CEXH1, set up the term and task. We agree with this proposition. It is consistent with the parole evidence rule that oral evidence should not be admitted to controvert a document. For this reason, we would have to make inferences from the documentary evidence submitted to this Court.

- [14] From an evaluation of this voucher which was admitted as CEXH1, it is clear that there was a fixed task, term, and payment. The initial contract was for the period June 2014 to July 2014. However, this was extended to December 2014. According to Ms. Tumwine, during this period, the Claimant attended meetings as a chief representative, made requisitions on behalf of the Respondent, and coordinated site activities and general management. From the definition of site agent spelled out in paragraph 13 above, the Claimant would be a supervisor of the Respondent as a contractor of the Mayuge Water Supply Works. Additionally, RW1 had admitted that the Claimant was a worker of the Respondent and that the Claimant had sought a job as an engineer. Mr. Ampeire argued that the Respondent was an independent contractor. In the case of *Emin Pasha Ltd v Soedi B. Barigye*⁹, the Industrial Court observed that the Employment Act did not define an independent contractor. Still, the Court¹⁰ had adopted the description between an employee and an independent contractor as stated in *Charles Lubowa and Scovia Ayikoru v Victoria Seeds*¹¹. In the case before us, the Claimant was on a fixed term, fixed task, and fixed payment contract, which are features of independent contracting. However, from the facts, the designation

⁹ Labour Dispute Appeal No. 10 of 2019 [2022] UGIC 44 (10 May 2022)

¹⁰ In *Godfrey Kyamukama vs Makerere University Business School* LDR NO. 147 of 2019,

¹¹ LDR 185/2016. The case is discussed in paragraph 11 of this award.

of the Claimant as site agent means that his role was central to the Respondent's main business, which was to complete the Mayuge Water Works. Under the integration test as set out in the Charles Lubowa case, the question is whether the work is done as an integral part of the employer's business. To answer this question, the Court will analyze whether the work being done is an integral part of the business operation of the person hiring the services of the worker or is merely an accomplice to it.¹² In our view, a site agent's work is integral to the contractors' work. It is neither accessory, ancillary, nor peripheral. Accordingly and considering the evidence before us, we find, as a fact, that as site agent, the Claimant's role was integral to the Respondent's business and he was therefore an employee of the Respondent.

[15] Beyond the integration test, the English Courts have also applied mixed or multiple tests. The authors of Galbraith's Building and Land Management Law for Students¹³ posit that it is a matter of looking at all the surrounding circumstances. The Courts will balance the factors for a contract of service against those for a contract for services, considering as they do so a range of factors, including the employer's powers of selection and dismissal, the measure of control is exercised by the employer, agreements about the method and amount of remuneration, arrangements for the payment of tax, supplies of tools and equipment, who bears the economic risk in the enterprise, hiring of helpers, responsibility for investment and management, whether the employee can profit from sound management in the performance of a task, how do the parties themselves view their relationship and how are the employees usually engaged in the trade or industry. The two contending positions in the matter before us are that the Claimant viewed himself as an employee while the Respondent argues that he is not. Further to our finding on the integration test in paragraph 14 above, we are also inclined to the view that applying a mixed test to the evidence before us and considering all circumstances, the industry standard for the construction industry would be that a 'site agent' is an employee of the contractor.

[16] Further, it can be surmised that whether a person is an employee or an independent contractor is a question of fact.¹⁴ The Court will examine all the facts. It is a question of form versus substance. In other words, a Court invited to consider the question will be interested in various questions ranging from the control and integration tests to the mixed or multiple test. The question of whether the parties have arranged their affairs in such a manner as to be regarded as a contract for services as opposed to a contract of service will be

¹² The test was first developed in the case of *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101

¹³ 6th Edn by Michael Stockdale PHD LLB et al Butterworth-Heinemann, Oxford UK, 2011

¹⁴ In *Meera Investments Ltd v Andreas Wipflear t/a Wipflear Designers and Co. Ltd.* MA 163 of 2009, Mulyagonja J posited that "the

question whether a party to a contract is an independent contractor or not is, no doubt, one of fact and not law merely law"

necessary. We are mindful that the test set in ready Mixed Concrete case were set in 1967. Today, the Courts deal with and will deal with elements of the future of work, including home, remote and online working, cross-border employment, artificial intelligence, the impact of technology on work and work methods, and knowledge workers, where the totality of circumstances must be considered. The world of work has evolved. There has to be a multipronged and multifaceted approach. We are convinced that a multiple or mixed approach would be helpful, as Galbraith's treatise espouses.

- [17] In the case before us applying a multipronged and mixed approach, the payment voucher read **site agent**. In paragraph 13 above, we extracted a site agent's standard engagement terms and role. We believe the Mayuge Water Works as engineering works would be expected to conform to specifications under a parent engineering contract. The supervision works by the site agent would be expected to follow the main specifications. The idea of a site agent having a free hand to execute a supervisory duty as they please is the polar opposite with the engineering and construction trade. The Claimant, as site agent, would therefore be under the direct control of the Respondent as the contractor, despite the Contractor and Mr. Ampeire's insistence that the Claimant was an independent contractor. We are therefore unable to accept the view that Mr. Edison Kamukama was not an employee of the Respondent. The Claimant was an employee of the Respondent, and we so find. Issue one would be answered in the affirmative.

Issue Two: Whether the Claimant was unlawfully/unfairly terminated?

- [18] It is the Claimant's case that he was constructively dismissed by non-payment of wages. Under Section 65 1(c) of the Employment Act, termination of employment occurs:

"Where the contract of service is ended by the employee with or without notice as a consequence of unreasonable conduct on the part of the employer towards the employee"...

It was the Respondent's case that the claim for termination was amorphous. That the Respondent had 'put the cart before the horse'. That would undoubtedly have been the case if we found that the Claimant was an independent contractor. However, having found that the site agent was an employee, the claim is tenable. In terms and using Mr. Ampeire's analogy, the Claimant was sitting astride the horse. In the case of *Nyakabwa J. Abwooli v Security 2000 Limited*,¹⁵ the Industrial Court held that for the conduct of the employer to be deemed unreasonable within the meaning of Section 65 (1) (c) of the

¹⁵ LDC 108/2014

Employment Act, such conduct must be illegal, injurious to the employee and make it impossible for the employee to continue working. The Court also held that the conduct of the employer must amount to a serious breach and not a minor or trivial incident.

- [19] In the matter before us, the evidence was that the Claimant did not return to work due to non-payment of wages. He did not have transport to return to work. For the initial two-month period, the Claimant claimed he was paid only UGX 4,100,000/=, leaving outstanding UGX 6,500,000/=. We have reviewed CEXH1, CEXH3, to CEXH9, which cover the period from June 2014 to December 2014. Assuming a monthly salary of UGX 2,000,000/=: the Claimant would be expected to have earned UGX 12,000,000/=. Our computation shows that he was paid a total of UGX 7,400,000/= leaving outstanding UGX 4,600,000/=. We are of the persuasion that nonpayment of wages is unreasonable conduct on the part of an employer. It is also illegal and contrary to Sections 41 and 43 EA, entitling an employee to wages. Non-payment of wages is also injurious, and as evidenced by the facts before this Court, the Claimant could not attend work. For these reasons, we find that the Respondent constructively dismissed the Claimant. Issue 2 would be answered in the affirmative.

Issue Three: Remedies

Declaratory Orders

- [20] By reason of our findings in issue two above, we declare that the Claimant was constructively dismissed from employment with the Respondent.

Salary Arrears/Unpaid Allowances

- [21] It is trite that salary arrears are special damages and must be specifically pleaded and strictly proven. The Claimant claimed he was paid only UGX 4,100,000/= for the initial two months, leaving outstanding UGX 6,500,000/=. We have reviewed the exhibits as follows:

• CEXH1 dated 5/05/2014	UGX.	1,000,000/=
• CEXH3 which was dated 21/06/2014	UGX.	500,000/=
• CEXH4	UGX.	500,000/=
• CEXH 5	UGX.	1,000,000/=
• CEXH 6	UGX.	505,800/=
• CEXH 7	UGX.	3,000,000/=
• CEXH 8	UGX.	600,000/=
• CEXH 9	UGX.	300,000/=
TOTAL	UGX.	7,405,000/=

The above sums cover the period from June 2014 to December 2014. Assuming a monthly salary of UGX 2,000,000/=: the Claimant would be expected to have

are acknowledged in CEXH18. Accordingly, under Sections 41 and 43 EA, we would award the Claimant the sum of UGX 4,600,000/= as unpaid salary or wages for this period.

- [22] For the subsequent periods, the Claimant needed to make more specific pleadings and prove the claim. In the amended memorandum of claim, in paragraph (k), it is pleaded that the Claimant was entitled to a gross salary of UGX 5,000,000/=. In Section (m), the Claimant argues that when the site works began, he was sent to Jinja at a monthly salary of UGX 1,250,000/=: accommodation allowance of UGX 300,000/=: transport allowance of 200,000/= and airtime of UGX 30,000/=. He pleads that he was only paid UGX 1,920,000/= for all his services. CEXH 18 shows that the agreed contract sum was UGX 15,000,000. The schedule of payments indicates that UGX 16,500,000/= was paid to Rebates Ltd on behalf of the Claimant. He did not controvert this in cross-examination. The payment schedule shows six payments between 20th January 2015 and 6th April 2015, totaling UGX 17,150,000/=. At a monthly pay of UGX 1,250,000/=: the Claimant would have been paid a total of 13.72 months' salary. In his pleadings and evidence, the Claimant testified that he had worked until December 2016, when he abandoned the site. Mr. David Mishereko testified that the Claimant had been given three short contracts. It was common to both parties that the 1st contract was between June 2014 and December 2014 and until November 2015. Mr. Mishereko stipulated that the 2nd contract was for four months from 18th March 2016 at a rate of UGX 5,000,000/=. The third contract was not specified. Taking January 2015 until December 2016, when the Respondent claims the Claimant abandoned the site, would be a period of 23 months. If we were to deduct the sum of UGX 17,150,000/= for 13 months, the Claimant would be entitled to UGX 12,500,000/=: which we hereby award as unpaid salary for January 2015 to December 2016.

Severance Allowance

- [23] The Claimant sought severance allowance under Section 89EA. Citing *Donna Kamuli v DFCU Bank Ltd LDR 002/2014*, the Claimant sought one month's pay for each year of service. The Claimant is awarded UGX 1,250,000/= as severance pay.

Unpaid Leave Pay

- [24] The Industrial Court has held that if the employee does not prove that they asked for leave and was denied, they shall not be entitled to leave pay. The Claimant did not lead any evidence to prove that he applied for leave, which was denied. Accordingly, the claim for leave pay is denied.

Repatriation

- [25] The Claimant sought a repatriation allowance of UGX 1,490,000/= to his home district of Fort Portal/Kabarole. Under Section 39(1)EA, an employee recruited at a place that is more than one hundred kilometers from their home shall have the right to be repatriated at the expense of the employer to the place of engagement on expiry of the contract period, on termination of the contract because of employee's sickness or accident, by agreement of the parties or on termination of the contract by the labour officer or the Industrial Court. Under this provision, to qualify for repatriation, the employee must demonstrate recruitment from a place one hundred kilometers from home. In the case before us, the evidence common to both parties is that the Claimant approached the Respondent for a job. There was no recruitment from his home district. In our view, the Claimant does not qualify for a grant of repatriation allowance, and we decline to grant the same.

Certificate of service

- [26] We have held¹⁵ that a certificate of service is a statutory right of every employee under Section 61EA. We order the Respondent to issue the same within 21 days of the award date.

General Damages

- [27] General damages are those damages such as the law will presume to be the direct natural consequence of the action complained of¹⁶. In the case of *Stanbic Bank (U) Ltd v Constant Okou*¹⁷ Madrama, JJA (as he then was) held that general damages are based on the common law principle of *restituto in integrum*. Appropriate general damages should be assessed on the prospects of the employee getting alternative employment or employability, how the services were terminated, and the inconvenience and uncertainty of future employment prospects. The Industrial Court has held that general damages are assessed depending on the circumstances of a given case and at the Court's discretion.¹⁸ In determining an appropriate quantum of damages in an employment dispute, the Industrial Court considered the earnings of the Claimant, the age, the position of responsibility, and the duration of the contract¹⁹. In this case, the Claimant would be entitled to general damages. In our assessment, the Claimant was earning UGX 1,250,000/= per month. He had worked for the Respondent for about two and a half years. Comparative jurisprudence by the Industrial Court in

¹⁵ LDR 121 of 2021 Mandela Sulaiman v Royal Mabati Ltd

¹⁶ *Stroms v Hutchinson*[1950]A.C 515

¹⁷ Civil Appeal No. 60 of 2020

¹⁸ LDC No.33 of 2015 Dr. Omona Kizito v Marie Stopes Uganda

¹⁹ LDC No. 002 of 2015 Donna Kamuli v DFCU Bank Ltd

the case of *Olweny v Equity Bank (U) Limited*²¹ where the Claimant was earning UGX 850,000/= as a credit officer and had worked for about 1 .5 years he was awarded UGX 15,000,000/= in general damages. In *Matovu and 4 Others v Stanbic Bank Uganda*,²² the Claimant was earning UGX 930,000/=, had worked for one year, and was awarded UGX 10,000,000 in damages. Considering all circumstances, we determine that based on his monthly salary, the sum of UGX 3,750,000/= as general damages will suffice.

Costs

- [28] We have held that in employment disputes, the grant of costs to the successful party is an exception on account of the nature of the employment relationship except where it is established that the unsuccessful party has filed a frivolous action or is culpable of some form of misconduct.²³ We think the Respondent's had a duty to issue the Claimant with a clear service or services contract. Under Section 51EA, an employee would be entitled to written particulars. This entire dispute would have been unnecessary had there been clear terms of the contract. The defence was frivolous, and we award the Claimant's costs of the claim.

The Counterclaim

- [29] The Respondent's counterclaim was for UGX 6,150,000/= being an overpayment on the three contracts. The Claimant did not prefer a defence to the Counterclaim. That notwithstanding, having found that the Claimant was an employee of the Respondent, the claim for overpayment would not be tenable as it would only arise out of a contract for services and not a contract of services. The counterclaim is hereby dismissed.

Final orders of the Court

- [30] In the final analysis, it is ordered as follows:
- (i) It is declared that the Claimant was constructively dismissed from employment with the Respondent.
 - (ii) The Respondent is ordered to pay the Claimant the following sums:
 - a) UGX 17,100,000/=as unpaid salary,
 - b) UGX 1,250,000/=as severance pay and;

²¹ LDC No. 225 of 2019 [2021] UGIC 45

²² LDC No.159 of 2015

²³ JOSEPH KALULE VS GIZ LDR 109/2020(Unreported)

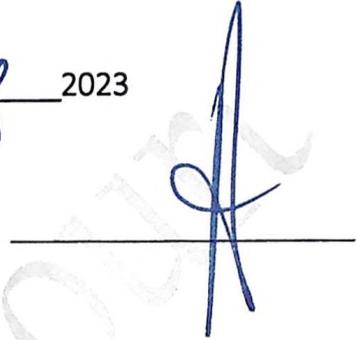
- c) UGX 3,750,000/= as general damages.
- (iii) The Respondent shall deliver a certificate of service to the Claimant within 21 days from the date of this order.
- (iv) The Claimant shall have the costs of the claim.

It is so ordered.

Dated & delivered at Kampala this 20th day of May 2023

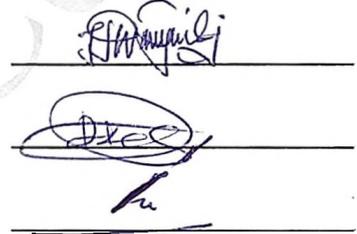
SIGNED BY:

Anthony Wabwire Musana,
Judge, Industrial Court



THE PANELISTS AGREE:

1. Hon. Jimmy Musimbi,
2. Hon. Robina Kagoye &
3. Hon. Can Amos Lapenga.



Delivered in open Court in the presence of:

For the Claimant: Claimant in court.

For the Respondent: Mr. Felix Ampeire.

No representative of the respondent in Court.

Court Clerk: Mr. Samuel Mukiza.