THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT AMPALA

CIVIL APPEAL NO. 18 OF 2011

(Arising from the judgment and orders of the High Court (Commercial Division) by Mulyagonja J. dated 22-12-2011 in Miscellaneous Application No. 645 of 2010)

BETWEEN

MUWEMA & MUGERWA ADVOCATES & SOLICITOR :: APPELLANTS

AND

SHELL (U) LTD & 10 OTHERS :::::::::::::::::::: RESPONDENTS

CORAM:

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ
HON. JUSTICE C.K. BYAMUGISHA, JA
HON. JUSTICE A.S. NSHIMYE, JA

JUDGEMENT OF A.E.N. MPAGI BAHIGEINE, DCJ

This appeal arises from the judgment and orders of the High Court, (Commercial Division; [Mulyagonja J], dated 22-12-2011, in ***Miscellaneous Application No. 645 of 2010.***

The learned trial judge allowing the appeal issued the following orders:

> " i)…. *that the fee agreement entered into between the 1st and the 3rd respondent firm on 01/09/2009 for remuneration in OS 009/2009 was illegal and therefore null and void.*

ii) The charging orders issued by the Deputy Registrar of this court on the 15/11/2010 in ***Misc. Application No. 622 of 2010*** *based on the said fee agreement and in favour of the 3rd respondent firm are hereby set aside.*

iii) The 3rd respondent firm is not entitled to any fees per agreement, nor to costs in respect of prosecuting ***OS 009/2009*** *and* ***Misc. Application No. 622 of 2010****, due to the misconduct that they displayed before the filing of* ***OS 009/2009*** *and in the subsequent proceedings to recover their alleged fees, per agreement with the 1st respondent.*

iv) Mr. Fred Muwema is hereby suspended from practicing before the Commercial Court till a complaint about his misconduct in these proceedings and in respect of fees of ***OS 009/2009*** *is lodged by the Chief Registrar before the Disciplinary Committee of the Uganda Law Council, and heard to its final conclusion.*

v) The costs of this appeal and ***Misc. Appl. 625/2010*** *shall be paid by the 3rd respondent, in any event, and only shall be paid by the 3rd respondent, in any event, and there shall be a certificate for the costs of the 3 advocates who represented the appellants in this appeal, and in* ***Misc. Appl. 625/2010.***

The brief background to this matter as per conferencing notes is as follows.

The first 10 respondents and some other 40 companies are oil importers. **Rock Petroleum (U) Ltd** which is one of the other 40 companies was represented by the appellant law firm. It consequently obtained a court order to institute a representative suit for recovery of the excess ***Excise Duty***, from the 11th respondent, Uganda Revenue Authority, (URA) which it had wrongly collected from the companies via an expired ***Order under the Taxes and Duties (Provisional Collection) Act,*** for the period 2007/2008, in the sum of Shs. 56,184,191,050.

Under the circumstances the appellants filed ***OS 009/2009 – Rock Petroleum v URA*** seeking interpretation of provisions of the ***Excise Tariff Act 2008*** to determine the legality of composition and collection of excise duty.

Prior to this and unknown to the 1st – 10th respondents and the court, Rock Petroleum had entered into a remuneration of fees agreement with the appellants, i.e that the appellants would be entitled to costs of the suit and an additional fee which is equivalent to 16% of the decretal sum. Additionally that in the event of a protracted recovery process, the appellants would be entitled to a further 16% of the decretal amount.

On 20/07/2011, judgment was entered for Rock Petroleum (U) Ltd i.e in favour of the oil companies. URA was ordered to refund to the oil companies all the money collected, in excess, from them.

The appellant law firm thereupon demanded payment of 16% i.e. 8,900,000,000/= from the 11th respondent (URA) who refused to pay.

This prompted the appellant firm to file ***Misc. Application No. 622 of 2011*** before the Deputy Registrar to force URA to pay 8.9 billion from the funds they were to pay the oil companies, under ***OS 009/2009***. The Deputy Registrar granted the application, consequent upon which the 1st – 10th respondents filed ***Misc. Application No. 625 of 2011*** challenging the fee agreement and sought orders to be joined to ***OS No. 009 of 2010.*** They maintained that they were not bound by the Advocates' fee agreement with Rock Petroleum.

This application was heard by the Deputy Registrar who to date has not delivered her ruling as the file was taken over by the Judge.

The 1st – 10th respondents filed ***Misc. Application No. 646 of 2010*** seeking a stay of the Registrar's order in ***Misc. Application 622 of 2010*** until their appeal in ***Misc. Application No. 645 of 2010*** was heard and disposed of.

In the meantime the appellant firm sought and was granted an interim order by the Assistant Registrar of the Court of Appeal, on 10/11/2010 staying all proceedings before the learned judge until Misc. Appl. 193/2010 and 194/2010 were heard and disposed of.

The Judge granted a stay in Misc. Application No. 646 of 2010; heard and disposed of ***Misc. Application No. 645 of 2010*** in favour of 1st – 10th respondents with the resultant order as indicated above. Hence this appeal.

At the hearing of the appeal, Mr. Oscar Kihiika, Mr. Ebert Byenkya, Mr. Mulema-Mukasa, Mr. Siraji Alli and Mr. Herbert Kiggundu all appeared for the appellants, while the 1st – 10th respondents were represented by Mr. Enos Tumusiime, Mr. Denis Kabenge, Mr. Andrew Kibaya, and Mr. Enock Matade.

For 11th respondent, were Mr Habib and Mr. Ali Sekatawa. Mr. Bikair Shierdill, company manager for Gapco (U) Ltd and Mr. Wuna Griessel, General Manager for Kobil were all present in court.

This appeal is against the judgment in ***Misc. Application No. 645 of 2010*** which was an appeal against the ruling of the Deputy Registrar in ***Misc. Application No. 622 of 2010*** when she allowed a charging order on the decretal sum in OS 009/2009. ***Misc. Application No. 646 of 2010*** was for stay of execution of such order.

Seven (7) grounds of appeal were presented:

1. **The learned judge erred in law when she purported to convert Misc. Application No. 645 of 2010 into disciplinary proceedings against the appellant whereas the said application was filed only as an appeal against the orders of a taxing master made under the Advocates Act.**

2. **The learned trial judge erred in law when she purported to act as a court of original jurisdiction in a disciplinary matter against the appellants a jurisdiction reserved by law to the Disciplinary Committee of the Law Council.**

3. **The learned trial judge erred in law and violated constitutional principles and principles of natural justice when she ordered that Fred Muwema be suspended from practicing in the absence of any formal disciplinary proceedings against him in a competent form.**

4. **The learned trial judge erred in law in purporting to consider and set aside the fee agreement entered into by the appellant and its client on the 1st September 2009 in the context of Misc. Application No. 645 of 2010, an appeal against orders of a taxing master.**

5. **The learned trial judge erred in law when she purported to countermand or set aside the orders of another judge of the High Court regarding the payment of costs in OS 009 of 2009.**

6. **The learned trial judge exhibited bias and animosity to the appellant firm during the hearing and determination of Misc. Application No. 645 of 2010 thereby occasioning miscarriage of justice.**

7. **The learned trial judge erred in law when she proceeded to hear and determine Misc. Application No. 645 of 2010 in total disregard of an interim order issued by the Court of Appeal in Misc. Application No. 194 of 2010, on the 18th of November 2010, which had stayed proceedings in Misc. Application No. 646 of 2010.**

Mr. Kihiika argued grounds 7 and 5 (separately). Mr. Mukasa Mulema dealt with grounds 1, 2 and 3 together. Mr. Byenkya addressed ground 4 while Mr. Siraji Ali argued ground 6.

Ground 7, is to the effect that the learned judge erred in law when she proceeded to hear and determine ***Miscellaneous Application No. 645 of 2010*** in total disregard of an Interim Order issued by the Court of Appeal in ***Miscellaneous Application No. 194 of 2010,*** on the 18th November 2011, which had stayed proceedings in ***Miscellaneous Application No. 646 of 2010.***

The record of appeal indicates that on 18th November 2010 an Interim Order was issued by the Assistant Registrar of the Court of Appeal, Deo Nzeyimana Esq, staying proceedings in ***Misc. Application Nos. 645/2010 and 646/2010*** in the High Court, pending determination of ***Misc. Application No. 194/2010*** filed in the Court of Appeal.

This order is stamped received by the High Court Commercial Division on 18st November 2010. Furthermore on the 25th November 2010, the Court of Appeal received a number of ***Miscellaneous Applications including Nos. 193 and 194*** with a request from Counsel to place them before a panel of judges or a single judge for quick disposal on 29th November 2010. There is no subsequent request countermanding the earlier request.

It was vehemently submitted before us by the respondents' counsel that ***Misc. Appl. 194/2010*** had been withdrawn from the Court of Appeal, which assertion was strenuously denied by the appellants' counsel, who pointed out that there was no proof of such withdrawal, as none was indicated anywhere on record.

However, this issue becomes clear from the learned judge's remarks:

> *"The Interim Order dated 18th November 2010 stayed all proceedings in **Misc. Appl. Nos.645/2010** and **646/2010** in the High Court pending the hearing and determination of **Misc. Application No. 194/2010.***
>
> *I proceeded to hear the application for stay in **Misc. Appl. 646/2010** inspite of the interim order issued by the Registrar of the Court of Appeal to stay proceedings and the complaint about me to the Principal Judge. And with all due respect to the learned Assistant Registrar, his intervention in the matter at that premature stage was similar to the actions of the proverbial 'bull in a china shop…*
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> *I am constrained to point out not only is it embarrassing for a judge of High Court to receive an order from a Registrar, through the Court of Appeal, to stay all proceedings before him/her but it is a challenge by the Registrar of the judge's jurisdiction in his or her own court. No judge should be faced with a battle for his or her jurisdiction as such, as happened in this case, with any registrar…*
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> *…I am therefore of the opinion that the complaints raised by the 3rd respondent in **Misc. Application 194/2010** now before the Court of Appeal do not hold any water because the questions that were raised in **Misc. Application 625/2010** are no longer in issue in any pending suits or application in this court. If they were, they were conveniently overtaken by the decision of the Deputy Registrar that ordered the 2nd respondent to pay the monies that the 3rd respondent claimed under their remuneration agreement. It was the reasons above that I was not deterred from proceeding to*

hear this application either because the 3rd respondent firm's intended to appeal and/or by His Worship Nzeyimana's order staying these proceedings. In any event the intended appeal is without any doubt in my mind premature and incompetent."

It cannot be put any clearer that the interim order had not been withdrawn as argued by the respondents. The learned judge made it clear that she would not be deterred by orders issued by the Registrar of the Court of Appeal.

It is a little difficult to understand why the learned judge thought that way. This was not a safe attitude. It was prone to various interpretations including that of bias.

The ***Court of Appeal (Judicial Powers of Registrars) Practice Direction No. 1 of 2004 made under Section 41(1) (v) of the Judicature Act, 2000, Rule 5*** mandates Registrars to issue interim orders to ensure expeditious disposal of cases.

Needless to state that an interim order is made in all cases in which it appears to the court to be just or convenient so to do. This is for the protection of the court when it is overwhelmed with matters for disposal. Therefore such orders are given under compelling circumstances. Once they are issued they have to be obeyed. They are lawful court orders, disobedience of which would render the subsequent proceedings a nullity – ***Burundi Tobacco Co. S.A.R.L & Leaf Tobacco & commodity (U) Ltd v BAT (U) Ltd Civil Appeal Reference No. 22 of 2010, Lweza Clays Ltd & Anor vs Tropical Bank Ltd & Anor, Civil Application No. 129 of 2009.***

Once a party knows of an order, whether null or valid, regular or irregular, he cannot be permitted to disobey it. – ***Stanbic Bank (U) Ltd and Another vs The Commissioner General URA, Misc. Appl. No. 0042/2010.***

'Disregarding of an order of the court is a matter of sufficient gravity, whatever the order may be' Also see ***Amrit Goyal v Harichand Goyal & 3 Others, C A Civil Application No. 109/2004.***

In sum, there was nothing "embarrassing" for a Judge to be served with a lawful court order issued by a Registrar. The Registrar/Assistant Registrar is a very vital cog in the judicial machinery.

Additionally it was an error for the judge to try and prejudge the competence or otherwise of a matter before a superior court before it had been formally dealt with and pronounced upon either way by that court. Ignoring court orders especially with such impunity destroys their authority. Judicial orders are the reason why the judicial machinery exists.

In my view Ground No. 7 would succeed.
On this ground alone this appeal would be disposed of.

I however turn to Ground No. 5 which is to the effect that the learned judge erred in law when she set aside the orders of another judge of the High Court regarding the payment of costs in ***OS 009/2009***.

The learned judge issuing her orders stated inter alia:

……

"*iii) The 3rd respondent firm is not entitled to any fees per agreement, or to costs in respect of prosecuting* ***OS 009/2009*** *and* ***Misc. Appl. 622/2010****, due to the misconduct that they displayed*

before the filing of ***OS 009/2010*** *and in the subsequent proceedings to recover their alleged fees, per agreement with the 1st respondent."*

The learned judge was considering ***Misc. Appl. No. 645 of 2010*** as a taxation reference/appeal under ***section 62 of the Advocates Act.*** It was against the order of the Deputy Registrar in ***Misc. Appl. No. 622 of 20***10, allowing the charging of the legal fees, 16% on the decretal sum due to the respondents from the 11th respondent as decreed by ***Mukasa J in OS 009/2009.*** Mukasa J concluded:

10 *"…Unless court has reason to order otherwise costs follow the event.* ***See section 27 of the Civil Procedure Act.*** *I have no reason to order otherwise. So the plaintiff is awarded costs of the suit".*

Any grievance concerning this judgment could only be reviewed by the same judge under ***section 83 Civil Procedure Act and Order 46 Civil Procedure Rules.*** The exception would be when the original judge who dealt with it was not available. Apart from the foregoing this matter could only be set aside, or varied in any way by way of appeal by an appellate court, in accordance with ***section 10 of the Judicature Act, rule 32*** of the Court of Appeal Rules, and ***section 66 of the Civil***
20 ***Proceeding Act***.

The learned judge purported to act under ***section 69 of the Advocates Act*** to set aside an order for costs made by another judge. This reads:

"69. No costs shall be recoverable in any suit, proceedings or matter by any person in respect of anything done, the doing of which constituted an offence under this Act, whether or not any prosecution has been instituted in respect of the offence."

It is evident that there was no offence proved committed, or none declared by Mukasa J to have been so committed, during the proceedings in ***OS 009/2009***. ***Section 69*** presupposes commission of an offence proved against the Advocate in the face of court.

Section 69 does not confer jurisdiction where none exists. The proceedings of ***OS 009/2009*** were not before Mulyagonja J. They were properly completed by a different Judge who with definite finality and satisfaction awarded costs to the appellants.

The learned trial judge therefore was in error to interfere with that order of costs awarded in OS 009/2009.

With respect her order cannot stand.

Regarding the alleged misconduct during the prosecution of ***Misc. Appl. No. 622/2010*** – this matter was prosecuted before the Deputy Registrar and only came before the learned judge on reference. The judge however, remarked:

> *"The manner of which the 3rd respondent behaved with respect to the fees required to file the suit leads me to only one conclusion. The Advocates not only misrepresented the cost of disbursements to be paid by their client but they deceived her about it; and that prime facie, means that they were fraudulent..*
>
> *…. Therefore, just as the solicitor in* ***Re Trepia Mines*** *could not be, the advocates in this case cannot be assisted by the court to benefit from an illegal contract, for that would clearly be against public policy.."*

Fraud is undisputably a serious crime. I think the judge should not have taken it upon herself to allege/accuse, convict and punish the appellant firm by denying it costs. She should have left it to the Disciplinary

Committee to pursue the matter in accordance with the correct procedure under ***section 20 of the Act***. The misconduct she alluded to was supposed to have been committed before the Registrar i.e. before another court.

Fraudulent discharge of professional duty is an offence under ***section 74 (1) (k) of the Advocates Act.***

Section 69 relied on by the learned judge refers to offences committed in the face of court.

Section 20 mandates the Disciplinary Committee to deal with an advocate reported to it by the Law Council for professional misconduct and prescribes the procedure for dealing with such complaints.

The learned judge should not have let herself appear to be both prosecutor and judge for that is a role which does not become her very well.

I would also allow Ground 5.

Ground 6 is to the effect that the learned trial judge exhibited bias and animosity to the appellant firm during the hearing and determination of ***Miscellaneous Application No. 645 of 2010*** thereby occasioning miscarriage of justice.

Cited instances of bias by the learned judge include the following remarks:

> *"It is evident here from the proceedings that in particular Mr. Fred Muwema misbehaved in such a despicable manner throughout the proceedings. Most importantly, Mr. Muwema happens to be the author of the champetous agreement that was in*

contest in this appeal. And before that he was the mastermind behind a similar agreement which was subject of the proceedings in ***Misc. Appl. 367/2007, M/s Muwema & Mugerwa, Advocates vs URA,*** *and which arose out of a similar representative action,* ***OS 10/2007, Kagoro Friday Roberts & Sempa Ms "the Matovu B.E. vs URA,*** *"the road license fee refund case". The result of that suit was that Shs. 1,389,888,465/= which was part of monies meant for refunds of road license fees about 50,000 tax payers in Uganda, was erroneously paid to the 3rd respondent firm on the basis of a champertous agreement similar to that which was contested here".*

Learned counsel pointed out that OS 10/2007 was never appealed and nor did it form part of the proceedings before court.

The learned judge further remarked:

"*The advocates from the 3rd respondent firm engaged in a multiplicity of forms of professional misconduct. They entered into a champertous fee agreement and brought it to this court in a bid to enforce it. They almost succeeded, as they did in the previous applications that they filed against URA whose details were summarized above* ***(M/A 376/2007..)***

It appears that the 3rd respondent firm had purposed to make URA, through the large numbers of persons that sometimes have legal claims against it, their bananas plantation.

They had also perfected the art of using representative actions to unjustly enrich themselves…"

During the proceedings there were hard exchanges between counsel and the Bench. As a result the learned judge herself reveals the state of her mind at the time:

"*The hearing of this appeal was one where my skills as a judge were tested to their utmost limits. I had in the couple of years before that presided over numerous trials of murderous, robbers, rapists and child abusers, but I am constrained to admit that never before had I encountered as much cunning and decect in judicial proceedings as I did with the group of advocates that were being called to account in this appeal. Neither had I even suffered as much anxiety and stress as I had to endure during the hearing of this appeal. But I rest assured and do hope that the result of my perseverance, which is the planting of this judgment on what appears to be almost virgin terrain in Ugandan jurisprudence in the area being contested, will ease the work of my brothers and sisters …..*"

In trying to determine whether the learned judge could have been biased I would start off with the off-repeated saying of ***Lord Hewart CJ in R vs Sussex Justices, ex parte McCarthy (1924) 1 KB 256:*** "*It is not merely of some importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*" In expounding on the principle later ***Devlin J*** in ***Licensing Justices ex parte Barsley (1960) 2 A E R 703*** had this to say:

"… in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself/herself……. or whoever it may be, who sits in a judicial capacity.

It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit or

continue to sit. And if he does sit, the decision cannot stand: Nevertheless there must appear to be a real likelihood of bias: Surmise or conjecture is not enough.

There must be circumstances from which a reasonable man would think it likely or probable that the justice …… would or did favour one side unfairly at the expense of the other.

The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable might think he did. The reason is plain enough. Justice must must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

In applying the above principles in ***R vs Barnsley Licensing Justices*** (supra) it is clear that apart from the hard verbal exchanges in court, the learned judge recounts the considerable stress she was suffering at the time.

I am acutely aware that these days more and more new and vexing problems find their way before court than ever before. These call for the highest order and civility by both the Bench and the Bar. Yet all too often overzealous advocates tend to think that their zeal and effectiveness depends on how thoroughly they can annoy the judge or how close they can come insulting her.

As a result of such scenarious, trial judges are often under greater stress than other judges. The trial judge in this case owned up to this. She succumbed to the temptation to react in kind to counsel's taunts as her judgment reflects.

It was plain that the judge acted on extraneous considerations which ought not to influence her, making it apparent that she had ignored her duty to act fairly in the midst of taunts and unbearable stress.

I have the greatest sympathy for the learned judge for what she must have suffered though I am in no doubt that the impression created in open court as well as her own revelation would leave no one in doubt that she had let the stress take the better of her and consequently coloured her judgment as shown above.

Before leaving this ground, I feel constrained to point out that in the end all of us should comply with basic standards of good manners and professional decorum.

We should not forget the necessity for civility as an 'indispensable lubricant' that keeps our adversarial system functioning.

I would allow Ground 6.

Regarding ***Grounds 1, 2 and 3:*** that the learned judge turned ***Misc. Appl. No. 645 of 2010*** into disciplinary proceedings against the appellant; that she purported to sit as a court of original jurisdiction in a disciplinary matter against the appellants and that she violated all constitutional principles and principles of natural justice when she suspended Fred Muwema from practicing in the absence of any formal disciplinary proceedings against him.

The learned judge ordered:

> *"(IV) Mr. Fred Muwema is hereby suspended from practicing before the Commercial Court till a complaint about his misconduct in these proceedings and in respect of fees for* ***OS 009/2009*** *is*

lodged by the chief Registrar before the Disciplinary Committee of the Uganda Law Society, and heard to its final conclusion".

What was before the learned judge was the application to set aside the Registrar's ruling in ***Misc. Appl. No. 622/2010;*** issue a declaration that the fee agreement between the 1st respondent and the 3rd respondent was null and void, and unenforceable against the 1st respondent and not binding or enforceable against the appellants.

This matter was brought under ***section 62 (1)*** and ***(5) of the Advocates Act (Cap. 265) Regulation 3 of the Advocates (Taxation of Costs) Appeal and References) Regulation S.1 267-5).***

The fee agreement or remuneration agreement the subject of the application is governed by ***sections 50, 51, 54 and 61 of the Advocates Act.***

She had to examine it within the ambit of these sections. If it was found to be unfair or unreasonable and indeed she so found, she had to declare it void and could order for its cancellation and order the costs covered by it to be taxed as if the agreement had never been made and further make such orders as to the costs of the application. She was not supposed to sit as a disciplinary tribunal.

The learned judge, however, invoked section 17 of the Advocates Act to discipline Mr. Muwema. This provides:

"17. Saving of disciplinary powers of court...

Nothing in this Act shall supersede, lessen or interfere with the jurisdiction of any court, inherent or otherwise, to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during or in the course of, relating to, proceedings before the court."

This section is for purposes of maintaining law and order in court, where offences are being committed in the face of court

Section 74 lists the possible disciplinary offences by advocates. Apart from the offence of contempt of court 74 (k) which is the only offence the judge could summarily deal with the others including fraudulent professional misconduct are to be referred to the Disciplinary Committee of the Law Council with jurisdiction to try disciplinary offences, with an appeal to the High Court before a panel of three judges. ***(Sections 20, 25 of the Act).***

Suspension of an advocate for professional misconduct is a very serious matter albeit interim which could not be dealt with in a summary fashion. As I pointed out above, the judge could not be accuser, prosecutor and judge a role which does not become her; the procedure she adopted violated ***Articles 44 (c) and 28 of the Constitution***, the right to a fair hearing being non derogable.

I think I have said enough to show that, the judgment cannot be allowed to stand as it is a nullity and is hereby set aside.

In view of what I have stated in the main appeal, the cross-appeal suffers the same fate.

The record would be sent back to the Commercial Court for disposal before another judge.

Costs to abide the re-hearing ordered.

Since my Lords C.K. Byamugisha and A.S. Nshimye JJA both agree, the appeal succeeds as above stated.

Dated this …… day of …… 2012

A.E.N. Mpagi Bahigeine
DEPUTY CHIEF JUSTICE

JUDGMENT OF BYAMUGISHA, JA

…….

JUDGMENT OF A.S.NSHIMYE, JA

I have had the benefit of reading the judgment of A.E.N.Mpagi Bahigeine, DCJ and I agree with it.

Dated this …**19th**…day of …**October**…**2012**

…….
A.S.NSHIMYE
JUSTICE OF APPEAL

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