

UGANDA / JUDGMENT

Balbinder v Departed Asians Property Custodian Board (Civil Suit 34 of 2012) [2023] UGHC 234 (4 December 2023)

[2023] UGHC 234

COURT
High Court of Uganda

BEFORE
Bukirwa, J

CASE / FILE NUMBER
Civil Suit 34 of 2012

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT JINJA CIVIL SUIT
NO. 34 OF 2012

BALBINDER SINGH GILL:.....

VERSUS

DEPARTED ASIANS PROPERTY CUSTODIAN BOARD:.....DEFENDANT BEFORE: HON.
LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI JUDGMENT

Introduction

Balbinder Singh Gill (hereinafter referred to as the "Plaintiff") instituted Civil Suit No. 34 of 2012 against the Departed Asians Property Custodian Board (hereinafter referred to as the "Defendant") seeking a declaration that the Defendant is not the landlord of the land comprised in Plot No. 2, Bell Avenue, Jinja, LRV 168 Folio 11; a declaration that the Plaintiff, being the legal representative of Indar Singh Gill, is the lawful landlord of the suit property; a permanent injunction be issued against the Defendant refraining her from claiming the suit property and further restraining the Defendant and/or her agents from disturbing the occupants of the suit property; costs of the suit and any other relief that the Court shall deem fit.

Background.

The Plaintiff's claim is that in 1973, the suit property to wit, Plot No. 2, Bell Avenue, Jinja, LRV 168 Folio 11 was registered in the name of Indar Singh Gill, the Plaintiff's father and was expropriated and put under the management of the Defendant. That the said Indar Singh Gill died testate on

03/12/1992 and the Plaintiff obtained probate to his estate in Kenya and the same was resealed in Uganda. That before the late Indar Singh Gill's death, he had applied to the Defendant to repossess the said suit property and after several correspondences to the Defendant, he was granted a repossession certificate. The occupants on the suit property were notified that the property had been repossessed by the Plaintiff's father and that the Defendant had ceased to be their landlord. However, by a letter dated 25/3/2011 authored by M/s Wafula & Co. Advocates, the Plaintiff's tenants were notified that the Defendant was still the landlord of the suit property and that the same had been allocated to a one, Amuge Muzei. That the Defendant continued to harass and threaten the Plaintiff's tenants despite several protests from the Plaintiff and his attorneys.

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The Defendant in her Written Statement of Defence contended that the Plaintiff does not have any cause of action against her and further that the suit property is still under the Defendant's control as it was never repossessed by the former owner. That the purported repossession documents relied on by the Plaintiff are forgeries since the Defendant has never issued them to the former owner. The Defendant further contended that that the suit property was still under her control on behalf of the Government of Uganda. The Defendant prayed that the Plaintiff's suit had no merit and should be dismissed with costs.

Representation

At the hearing, the Plaintiff was represented by Mr. Usaama Sebuufu. No representative of the Defendant appeared in court neither was she represented by legal counsel.

Service and order for exparte hearing

On court record, the Plaintiff filed two witness statements on 4th July 2017 and an additional one on 20th September 2023 and two trial bundles one filed on 14th September 2017 and another on 20th September 2023. The Defendant filed her witness statements on 15th August 2017. A joint scheduling memorandum was filed in Court on 21st June 2017.

When the matter came up for hearing on the 27th August 2023, Counsel for the Plaintiff informed Court that Counsel for the Defendant, Mangeni Ivan Godfrey had withdrawn his legal services from the Defendant. Consequently, the Defendant was served personally at her offices in Kampala and he had filed an affidavit of service as proof of service on the Defendant. Counsel prayed to the court for the matter to proceed exparte against the Defendant which prayer was granted by this court. Counsel also prayed to Court to admit the additional witness statement and trial bundle and the exhibits therein marked from PEX1 to PE11 filed by the Plaintiff on 20th September 2023 as the Plaintiff's evidence in chief. This prayer was granted by court.

Burden and standard of proof

The general rule is that he or she who alleges must prove and the burden of proof therefore rests on solely on that person. 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."

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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. This being a civil suit, the burden of proof lies with the Plaintiff. To decide in his favour, the court has to be satisfied that the Plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that the more probable conclusion is that for which the Plaintiff contends, since the standard of proof is on the balance of probabilities / preponderance of evidence (see Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345 and Sebuliba v. Cooperative Bank Ltd [1982] HCB 130). The burden of proof is on the plaintiff to prove on the balance of probabilities that he has a better claim to the land than the one made by the defendant.

In the case of Prof. Oloka Onyango & others Vs Attorney General Constitutional Petition No. 6 of 2014, it was stated that;

"If a party does not specifically deny a pleading, it shall be taken to be admitted."

The Defendants, in the instant suit, by virtue of their failure to appear in court to contest the claims in the Plaint in effect admitted all the claims. Be that as it may, court will determine if the Plaintiff's evidence satisfies the required standard.

Determination of Court:

The following issues were proposed for determination by the parties in the Joint Scheduling Memorandum:

- 1. Whether the suit land was repossessed.
- 2. Whether the Plaintiff is the lawful owner of the suit property.
- 3. Whether the Plaintiff is entitled to the remedies prayed for.

I will now adopt them as the issues for determination and will resolve them in the order of their proposition by Counsel for the Plaintiff.

Issue 1: Whether the suit land was repossessed?

Counsel for the Plaintiff submitted that the Plaintiff's late father, Indar Singh Gill being the former owner of the suit property, applied to repossess the suit property and on account of a certificate of repossession dated 1st April 1992 that was issued by the Minister for Finance to the Plaintiff's father, the suit property was re-vested into the Plaintiff's hands.

Counsel relied on Section 4 of the Expropriated Properties Act (E. P. A), Cap 87, which provides that:

'Any former owner of property or business vested in the Government under section 2 may, within ninety days of the commencement of this Act, apply to the

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Minister in writing, and in such form as may be prescribed, for repossession of

Section 1(c) of the E. P. A, Cap 87 defines a former owner to mean and include;

'any person who was either the registered owner or proprietor of any real or movable property in Uganda...and who was either expelled or forced to flee from Uganda during the period of the military regime or was in any other way dispossessed of the property or business; and anybody who is the legal heir or successor of that person;'

Counsel argued that it was the Plaintiff's evidence exhibited through PEX 1 on pages 1-4 of the Plaintiff's additional trial bundle that the late Indar Singh Gill obtained a crown lease for a term of 80 years on the property comprised in Plot No. 2 Bell Avenue, Jinja, Volume 168, Folio 11 (hereinafter referred to as the suit property) for which he was consequently registered as the proprietor on the certificate of title which was marked as PEX 11.

Counsel for Plaintiff also relied on Section 3(1) and 6(1) of the Expropriated Properties Act, Cap 87, which grants powers to the Minister to transfer expropriated property back to the former owner and also grant a certificate of repossession. Counsel argued that the uncontroverted evidence of the Plaintiff's witness in paragraphs 4, 5 and 6 of his additional witness statement that his deceased father being a former owner, applied to repossess the suit property and by virtue of the certificate of repossession issued by the Minister of Finance on 1st April, 1992 to the Plaintiff's father, the Minister of Finance re-vested the suit property to the Plaintiff. The certificate of repossession was annexed as PEX2 and indicated that it was copied to several officers including the Chief Registrar of Titles and the occupants of the suit property.

Counsel for the Plaintiff submitted that the Defendant issued a notice dated 16th of April 1992 marked as PEX4 to all the occupants of the suit property and informed them that Plot No.2, Bell Avenue East, Jinja had been returned to the registered proprietor Indar Singh Gill. Consequently, in the same notice, it was indicated that the Defendant was no longer the landlord of the suit property and the occupants were advised to negotiate new tenancy arrangements with the registered proprietor, the Plaintiff's deceased

Counsel for the Plaintiff also submitted that whereas PEX2 may be said to be different from a Certificate of Repossession "in form", PEX2 is a Certificate of Repossession "in substance" as it was issued by the Finance Minister in clear and unequivocal terms and was then copied to various authorities (including the Registrar of Titles) in order to give substantial effect to the Finance Minister's action of returning the property to its former owner. Counsel relied on the case of Jaffer Brothers Ltd Vs Muhamed Magid Bagalaliwo & 2 Others CACA No.43 of 1997, in which case the Court of Appeal considered this question and held thus;

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"...those letters authorising the Appellant to repossess his property have the same legal effect as repossession certificates issued by the same Minister of Finance to the former owners pursuant to the provisions of the No.9 Act of 1982."

Counsel for the Plaintiff submitted that the substance of PEX2 had the effect of restoring the proprietorship of the said property in the hands of the Plaintiff's deceased

Counsel for the Plaintiff argued that following the issuance of PEX2, the letter authorizing the repossession by the Late Inder Singh Gill, the Defendant wrote the letter marked as PEX 4 to all the occupants on the suit property recognizing the late Indar Singh Gill as the new landlord of the suit property and requiring them to pay all rents

With regard to the aspect of physical possession, Counsel for the Plaintiff argued that Section 3(2) of E. P. A required the former owner to effectively manage the repossessed property. Counsel relied on the case of Attorney General Vs Mitha Misc. Cause No.10 of 2010 wherein Eva Luswata J. held that;

"I am not persuaded that the spirit of the Act is such that a former owner could not manage a repossessed property through an agent for as long as such agent was legally appointed in a manner that would give him/her full powers of the principal, going by the principle with provision that the property is put under effective management."

Counsel for the Plaintiff argued that it was the Plaintiff's uncontroverted evidence that his father, the late Indar Singh Gill died on the 3rd December 1992 as indicated in the Death Certificate marked as PEX5. That the Plaintiff subsequently obtained a grant of probate from the High Court of Kenya and the same was resealed in Uganda marked as PEX6. It is then that the Plaintiff took over the administration of the estate of his late

Counsel for the Plaintiff contended that is the Plaintiff's evidence contained in his witness statement that he returned to Uganda, took possession of the suit property, managed it through his appointed property managers and entered into tenancy agreements with several tenants whilst continuously paying property rates to the Jinja Municipal Council. The Plaintiff indeed returned to Uganda proof of his travel history is contained in the documents in the Plaintiff's trial bundle marked as PEX 10.

Counsel for the Plaintiff submitted that the Plaintiff's evidence confirmed that the property was repossessed and managed by the Plaintiff through his agents/ appointed managers who collected rent uninterrupted until 2011 when the Defendant through her lawyers notified the Plaintiff's tenants that the Defendant was still the landlord of the suit property in a letter marked as PEX 8.

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Counsel for the Plaintiff therefore submitted that the suit property was duly repossessed by his late father, whose estate is administered by the Plaintiff himself and as such, he is the lawful owner and landlord of the suit property. Counsel further invited this Honourable Court to find that the property was lawfully and validly repossessed by the Plaintiff.

In Jaffer Brothers Ltd versus Magid Bagalaaliwo & 2 Other CACA No.43 of 1997, cited in, Firdoshali Madatali Keshwani & Anor v Departed Asians Property Custodian Board & 2 Ors (Miscellaneous Cause No. 11 of 2019) [2019] UGHCCD 17 (21 June 2019) Court stated that;

"It is clear from the above that the minister intended in the letter dated December 7th, 1993 which is annexure 'B' to return the property to the Appellant. That is what the purpose of the act is and that is what Section 5(1) of the Regulations 1983 (S. I No.6 of 1983) are intended to accomplish.

Deviation of annexure 'B' from form (3) prescribed in Regulation 10(3) above should not render annexure 'B' void since its substance is not affected. It meant to return the *property to the former owner.*"

In the case of Firdoshali Madatali Keshwani & Anor v Departed Asians Property Custodian Board & 2 Ors (Miscellaneous Cause No. 11 of 2019) [2019] UGHCCD 17 (21 June 2019) Hon. Justice Ssekaana Musa stated that: -

Section 43 of the Interpretation Act provides that;

"Where any form is prescribed by Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead"

"The letter of the Minister was conclusive in determining the applicants' repossession exercise and the same would ably suffice even without the form specifically provided for under the Expropriated Properties Act. Therefore, it was illegal for the 1st respondent to try and reopen the repossession exercise concluded 26 years ago under the guise of the same having not been concluded." (Emphasis added).

In this case, the Plaintiff's late father Indar Singh Gill was notified of the conclusion of the repossession exercise and the Minister's letter dated 16/4/1992 was conclusive as noted in the case of *Mabale Growers Tea Factory* -vs- *Noorali Mohamed SCCA No.* 2 of 2015 the Supreme Court in which case Court clearly stated that;

"Whatever the minister did on this land that led to the applicants repossessing the same was in line with the powers granted to the minister by the expropriated properties Act."

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I agree with Counsel for the Plaintiff that the only logical conclusion that can be drawn from the document that was tendered in by the Plaintiff as PEX2 is conclusive in determining the Plaintiff's repossession of the suit land. Therefore, the suit land was duly repossessed by the Plaintiff's deceased father.

Issue 2: Whether the Plaintiff is the lawful owner of the suit property.

Counsel for the Plaintiff submitted that the position of the law is that possession of a Certificate of Title in one's name is conclusive proof of ownership of the respective land in accordance with Section 59 of the Registration of Titles Act Cap 230 and also as stated in the case of *Kasifa Namusisi & Others Vs Ntabazi*, SCCA No. 4 of 2005 Odoki CJ, (as he then was) held that the cardinal principle of registration of title is that a Certificate of Title is conclusive evidence of title. Thus, the Plaintiff is the lawful owner and registered proprietor of the suit property.

Counsel for the Plaintiff argued that this principle was given judicial reinforcement by the Supreme Court in *Kampala Bottlers Ltd v Damanico (U) Ltd* (Civil Appeal No. 22 of 1992) [1993] UGSC 1 (11 January 1993) in which case Wambuzi CJ observed that the production of the certificate to title in the names of the appellant is sufficient proof of ownership of the land in question [See *Transroad Uganda Limited v Commissioner Land Registration* (Civil Suit No. 621 of 2017) [2019] UGHCLD 6 (14 March 2019); See also *Mpungu & 4 Ors v Ddamulira & 2 Ors* (Civil Suit No. 73 of 2018) [2019] UGHCCD 121 (14 June 2019)].

Counsel for the Plaintiff submitted that in the instant case, the Plaintiff is the registered proprietor on the certificate of title in respect of land comprised in Plot No. 2 Bell Avenue, Jinja, Volume 168, Folio 11 marked as PEX11 and is therefore the lawful proprietor of the suit property.

Regarding the aspect of the Defendant's allocation of the suit property to a one Amuge Muzei, counsel for the Plaintiff argued that this allocation was void, unlawful and illegal. That it was the testimony of the Plaintiff in his witness statement that the Defendant, through her lawyers, M/S Wafula & Co. Advocates notified the Plaintiff's tenants that the suit property was purportedly allocated to another person, Amuge Muzei. Counsel relied on the case of *Victoria Tea Estates Vs James Bemba* CACA 49 of 1996, in which case Court held inter alia that;

"the suit property became the statutory property until the Minister of Finance dealt with the property as provided for by the Act 9 of 1982. Any other purported dealings in such property would be null and void."

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Counsel argued that this implied that only the Minister for Finance has the power to deal with the suit property and that the Departed Asians' Property Custodian Board (the Defendant) only possesses power to manage the property. He submitted that it is trite law that once the Minister for Finance has dealt with the expropriated property, he becomes functus officio, and cannot again deal in the same property and to do so would be unlawful rendering the transaction null and void. This is the position of the Supreme Court in the case of *Mohan Musisi Kiwanuka v Asha Chand* Supreme Court Civil Appeal No. 14 of 2002.

Counsel for the Plaintiff submitted that the Defendant does not have any authority over the suit property which was finally dealt with by the Minister for Finance who issued a certificate of repossession to the former owner. Therefore, the Defendant had no authority to write to the Plaintiff's tenants claiming that DAPCB was still the landlord to the suit property.

Counsel for the Plaintiff argued that by the time of the purported allocation of the suit property to a one Amuge Muzei vide a letter dated 25/03/2011 from the lawyers of Amuge Muzei to the tenants on the suit property marked as **PEX 8**, the proprietorship of the suit property in dispute had by virtue of the action taken by the Minister of Finance under the Expropriated Properties Act Cap 87 been divested from Government and reverted to the Plaintiff's late father as from 1st of April, 1992 pursuant to **PEX 2**.

Counsel for the Plaintiff argued that in view of the fact that the Minister of Finance in accordance with the Expropriated Properties Act Cap 87 had on 1st of April, 1992 issued a certificate authorizing the Late Indar Singh Gill's repossession of the suit property, the land was not available for any allocation by the Defendant. That allocation to the 3rd party, Amuge Muzei was therefore made in error and was consequently null and void.

Counsel for the Plaintiff invited this Honorable Court to find and declare that the purported allocation by the Defendant of the suit property was void illegal and arbitrary.

On the aspect of trespass to land, Counsel for the Plaintiff submitted that Court in the case of *Suleiman Adrisi v Rashida Abdul Karim & Anor* (Civil Suit 8 of 2017) [2018] UGHCLD 31 (9 April 2018) defined trespass to land to occur when a person without permission of the landlord remains upon the land where the entry was initially lawful (See Salmond and Heuston on the Law of Torts, 19th edition (London: Sweet & Maxwell, (1987) 46).

Counsel also relied on the case of *Aisu Godwin Isaac vs Komuhendo Bertha Akiiki* Civil Suit No. 18 of 2014, which defined trespass as:

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'an act where a person makes an unauthorized entry upon land and thereby interferes or portends to interfere with another person's lawful possession of that land. A person with valid title to the land can sue for trespass.'

Counsel for the Plaintiff submitted that the property having reverted to the former owner by virtue of PEX 2, the Defendant, if anything, required the Plaintiff's authorization to remain on the land. Counsel for the Plaintiff submitted that it was the testimony of the Plaintiff that upon securing repossession of the premises, the Defendant duly notified the tenants of this fact in a letter dated 16th of April, 1992

Counsel for the Plaintiff further submitted that it was the Plaintiff's testimony that the Defendant, through a law firm, M/S Wafula & Co. Advocates, continued to harass and threaten the Plaintiff's tenants as evidenced in the letter to the tenants on the suit property marked as PEX8. That the Plaintiff further testified that the Defendant, through her agents, trespassed on his property and intentionally interfered with his right of quiet enjoyment having been fully aware of the repossession of the suit property by the Plaintiff's deceased father.

Counsel for the Plaintiff submitted that in the circumstances, once a certificate of repossession (PEX2) was issued to the Plaintiff's deceased father, the property was revested in the Plaintiff who enjoys a right over the suit property and any attempt to hinder the enjoyment of his right by the Defendant was unlawful, arbitrary and illegal. Counsel invited this Honorable Court to find that the Defendant is a trespasser on the suit property.

I fervently agree with Plaintiff's Counsel's submissions and the evidence as presented by the Plaintiff. The evidence is cogent and consistent in proof of the facts as pleaded that the Plaintiff, as the administrator of the estate of his late father, is the lawful owner of the property comprised in Plot No. 2 Bell Avenue, Jinja which was lawfully repossessed by his late father, Indar Singh Gill.

In the case of Jaffer Brothers Ltd Vs Hajj Majid Bagalaliwo & 2 others SCCA 43/1997, the Supreme Court stated that upon issuance of a certificate of repossession, one is clothed with an equitable right over the suit property pending the transfer of the legal right by the government on repossession. However, in the instant case, the transfer was effected in favour of the Plaintiff as the lawful registered proprietor.

Further, in the case of Manharlal Thakkar Vs Departed Asians Property Custodian Board HCMC No. 379/2019, Justice Musa Ssekaana stated that;

"having issued the certificate of repossession, the Minister is functus officio according to the Act as it did not leave a window for which the Minister's decision would be changed or amended."

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In the instant case, PEX1 is the Certificate of Title comprised in LRV 168 Folio 11 for Plot No.2 Bell Avenue East, Jinja clearly indicated that the Plaintiff's father Indar Singh Gill was the registered proprietor of the suit land having been granted a lease in respect of the suit property for 80 years effective 28th June 1938 before the expulsion of the Asians by the military regime. I am convinced that the letter dated 1st April 1992 (PEX2) is evidence that the suit property was lawfully repossessed by the Plaintiff's deceased father. The evidence presented by the Plaintiff as the administrator of the estate of his late father annexed as PEX6, the resealed

probate is convincing enough for this Court to find that the Plaintiff has the powers to administer the estate of his deceased father in Uganda in accordance with the Succession Laws of Uganda. Following the expiry of the lease in respect of the suit land, the Plaintiff obtained a renewal of the lease and was registered on the certificate of title as proprietor the suit land, The Certificate of Title is marked as PEX11. Resultantly, from the above evidence, there is no doubt that the Plaintiff is the lawful owner of the suit property.

It is this Court's finding that upon the Minister handing over the suit property to its former owner by the issuance of the certificate of repossession, the Defendant divested herself of any rights regarding the suit property and as such, could not again, at a later date and without the knowledge and consent of the Plaintiff purport to reallocate the same to Amuge Muzei.

On 26th October 2023, court conducted a locus in quo visit of the suit property. Court observed that the suit property is occupied by the Defendant's tenants. Some of the tenants informed court that the Defendant is their landlord to whom they are paying rent. Court observed that the Defendant is in physical possession of the suit property.

Deduced from the above evidence, I accordingly find this issue in favour of the Plaintiff and hold that the Plaintiff is the lawful owner of the suit property. The Defendant had no legal justification whatsoever to temporarily allocate the suit property to a one Amuge Muzei, well knowing that that she was *functus officio*, the suit property having been dealt with by the Minister for Finance. This Court finds that this allocation by the Defendant was illegal and the Defendant's physical possession of the suit property for twelve years amounts to trespass.

Issue 4: Whether the Plaintiff is entitled to the reliefs sought?

Section 27 of the Civil Procedure Act, Cap 71, provides that a successful party is entitled to costs unless for good cause court order otherwise. It is trite law and a general principle that costs shall follow the event and a successful party should not be deprived

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of costs except for good cause. The court may not only consider the conduct of the party in the actual litigation but matters which led up to the litigation.

In this particular case, I have not encountered any legally justifiable reason as to why costs should not be awarded, I hereby award costs of the suit to the Plaintiff.

Resultantly, the suit by the Plaintiff succeeds. I therefore enter judgement in favour of the Plaintiff against the Defendant with the following orders:

- 1. The Plaintiff is the legal representative of the late Indar Singh Gill and the lawful owner and landlord of the suit property situate in LRV 168, Folio 11 Plot No.2 Bell Avenue, Jinja.
- 2. The Defendant is not the landlord of the suit property and the Plaintiff is entitled to quiet possession of the suit property as the lawful proprietor.

- 3. The Defendant should hand over vacant possession of the suit property to the **Plaintiff**
- 4. A permanent injunction is hereby issued restraining the Defendant, her agents, servants or any person deriving authority from the Defendant from claiming the suit property.
- 5. General damages of UGX 100,000,000 (one hundred million shillings).
- 6. Costs of the suit.

I so order.

Dated, signed and delivered by email on 4th December, 2023.

FARIDAH SHAMILAH BUKIRWA NTAMBI JUDGE

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