

UGANDA / JUDGMENT

Okwonga George and Anor vs Okello James Harrison (Miscellaneous Civil Application No. 132 of 2021) [2022] UGHC 29 (21 October 2022)

[2022] UGHC 29

COURT

High Court of Uganda

BEFORE

Okello, J

CASE / FILE NUMBER

Miscellaneous Civil Application No. 132 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU MISCELLANEOUS APPLICATION NO. 132 OF 2021 (ARISING FROM CIVIL APPEAL NO. 031 OF 2015)

1. OKWONGA GEORGE OCAKA JULIUS.....

VERSUS

OKELLO JAMES HARRISON.....

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BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING**Background**

This is an application seeking to hold the Respondent in contempt of court, and that he be committed to civil prison, and punitive/exemplary 30 damages, fine and costs are imposed on him. The background facts deducible from the pleadings are that; the applicants and a one Acaa Filda (now deceased) sued the Respondent in the Chief Magistrates Court of Gulu, *vide* civil suit no. 031 of 2015, over customary land situate in Cubu 35 village, Tegwana parish, Pece Division, Gulu District, measuring approximately 1.4 to 1.5 square kilometres. In that suit, the applicants

and Acaa Filda sought to be declared exclusive owners of the land, and that the Respondent is a trespasser. The trial Chief Magistrate dismissed

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$\mathbf{S}$ the suit with costs. The Applicants appealed to the High Court, which upheld the decision of the trial court, thereby dismissing the appeal with costs. A disagreement arose as to the interpretation of the judgment of the appellate court, prompting a Judge of the Court to summon parties, to offer clarity. The clarity given is not recorded and remains contentious. It is apparent that, following his successful appeal, the Respondent did carry out some activities on the suit land. The Applicants made allegations that the respondent threatened violence against some persons whom the respondent allegedly chased from the suit land, restraining them from cutting trees therefrom. It is also alleged that the applicants and others have been stopped from using the suit land. There are also claims that the High Court allowed both parties to use the suit land.

Grounds in support of and in opposition to the Application

In their contempt application before court, founded under Article 23 (1) (a) 20 of the Constitution, 1995, section 14 (1), 2 (b) of the Judicature Act. Cap.13, section 98 of the Civil Procedure Act, Cap. 71, and Order 52 rules 1, 2 and 3 of the CPR, the Applicants aver and contend that, in its Judgment, the High Court decided that the suit land belongs to the clan (to which all parties belong) and should be freely and jointly used. That, the Respondent denied the applicants from using the land, yet he is still cultivating the same, and encroaching on other part, which is contempt and an abuse of court process. They contend that the respondent ignored

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- $\mathbf{S}$ the applicants' request to halt any activities on the land, as per the 'court order'. That, the respondent instead chases away other family members from using the land, and such acts constitute contempt. The Applicants make prayers stated before. Each of the applicants swore affidavits in support of their averments.
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In his replying affidavit, the Respondent denies the allegations of contempt. He contends that the application is bad in law, a disguised appeal to this court, and a disguised review application, over which this court lacks jurisdiction. The Respondent contends that whereas he was sued, he emerged successful and the appeal to this court was dismissed, and no further appeal was preferred by the applicants, who are bound by the decisions. It is also contended that the Applicants did not extract the decree of the High Court and at any rate, if it was ever extracted, none was brought to the respondent's attention. The Respondent avers that, no court order stopped him from using the suit land, and he never violated any. He denies the allegations that he threatened violence, contending that, the applicants continue to rear animals on the suit land and have not been stopped from doing so, and the respondent does not intend to do so or evict

them or anyone from the suit land. He asserted that, his cultivation of the land, now complained about, commenced long before the decisions of the trial court and the High Court were given in his favour. He prays for dismissal of the application with costs.

To the respondent's reply were affidavits in rejoinder lodged by each applicant. I found some paragraphs of these affidavits badly drawn. In there, the applicants were literally quarrelling and attacking the respondent. In my view, that conduct is uncivil and not tenable in court. To drive the point home, a few examples would suffice. In paragraph 13 of the affidavit of the 1st applicant, it is deposed, "in reply to paragraph 9 of the affidavit in reply, you were part of the appeal hence none of my business to serve you."

15 In paragraph 14 the 1st applicant deposes, "that in specific reply to paragraph 10 of the affidavit in reply, refer to the annexures A, C, D, E & F attached with the affidavit in support of my application and see if they don't refer to you and confirm that you are a real parent of law abiding character if not a warrior."

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In paragraph 15, the 1st applicant asserts, "That in specific reply to paragraph 11 of the affidavit in reply, it's a choice to make hence I can't be condemned for not taking that advice (of appealing if dissatisfied with the decisions of the two courts)."

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To crown his attacks, in paragraph 18, the first applicant deposes, "in specific reply to paragraph 14 of the affidavit in reply, if the issues are mere

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2nd assertions why did you fence the suit land and refer to the final decision of the judgment (sic) and instead of understanding the entire finding of court.

Similar depositions are also made by the 2nd applicant, word for word. An affidavit is a statement or a declaration in writing, on oath or affirmation,

- 10 before a person having authority to administer an oath or affirmation. See: Sarkar on Evidence, 14th Ed. 1993, vol.2, page 2183; Dr. Runumi Mwesigye Francis Vs. The Returning Officer, the Electoral Commission & another, Election Petition No. 02 of 2002.
- 15 An affidavit therefore should contain true facts, being statement on oath, designed for use as proof in a Court of Law. See: Yoakim Mwene Habyene Vs. Attorney General, SCCA No. 4/1996, [1996] III KALR 23.

Order 19 rule 3 of the CPR gives a guide on what an affidavit ought to contain. It shall be confined to such facts as the deponent is of his or her knowledge able to prove. The exception is in interlocutory matters, in which statements of his or her belief may be admissible, provided there

are grounds for belief. Affidavits must not unnecessarily set forth matters of hearsay or be argumentative, or reproduce extracts from documents. Offending paragraphs of such affidavits can be struck out/ severed, and \$25\$ costs occasioned may be ordered against the offending party. See: Rtd. Col.

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\$\mathsf{S}\$ Dr. Kizza Besigye Vs. Electoral Commission & Yoweri Kaguta Museveni, Election Petition No. 1 of 2006.

This court deprecates the unorthodox manner of drafting affidavits by some practitioners before court. Whereas counsel has a duty to carry out the client's best instruction, counsel owes a higher duty to court, not to reduce court into a market place or theatre where the kind of exchanges, as has obtained in this case, is allowed to reign, without restraint. Counsel should not allow the steam of their client's disputes to cloud their judgment, so much so that counsel end up carrying out instructions which constitute rules infraction. A lawyer cannot for instance, accept to abuse his client's adversary, simply because the client has asked him/her to do so. This would be dishonourable of court and of the noble and honourable profession. This should be discouraged.

Given the above state of the affidavit in rejoinder, I decided, in the exercise 20 of my judicial discretion under section 98 of the Civil Procedure Act, Cap.71, to strike out/sever the offensive paragraphs of the impugned affidavits, for being argumentative, and for constituting abuse of court process.

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\$\mathsf{S}\$ Representation

The Applicants were represented by Deric Advocates and Solicitors, while the Respondent was represented by \$M/s\$ Odongo and Co. Advocates.

Issues

\$10\$ The Applicants' learned counsel raised two issues in their joint submissions. On their part, the Respondent's counsel did not raise issues for court's determination but proceeded to address the ingredients of civil contempt, and made prayers. Court agrees with the first issue framed by the Applicants' learned counsel, but will modify the second issue on \$15\$ remedies, to make it broader, under court's powers, under Order 15 rule 5 (1) of the CPR. This course is supported by judicial decisions. See: Odd <u>Jobs Vs. Mubia [1970] EA 476, Victoria Tea Estates Vs. James Bemba &</u> another, SCCA No. 49 of 1996; Bashir Ahamed Arain Vs. Uganda Kwegata Construction Ltd, HCCS No.692 of 1999.

Therefore, the issue for court resolution are;

- 1. Whether the Respondent is in contempt of court?
- 2. Whether the parties have any remedies?

\$25\$ Arguments

Both counsel filed written submissions which court has considered. I will only refer to matters relevant in the determination of the application.

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Determination

On issue one, the law on Contempt have been stated in various decisions of courts, some of which were cited by both learned counsel. I will refer to just a few from the apex court in this country.

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In *Ssempebwa and others Vs. Attorney General*, [2019] 1 EA 546, the Supreme Court of Uganda made a detailed exposition of the contempt principles. Court drew a distinction between civil and criminal contempt. Referring to Black's Law Dictionary, 10th Ed., page 385, court stated that criminal contempt is "an act that obstructs justice or attacks the integrity of the court, the criminal contempt proceedings are punitive in nature." The Court noted, criminal contempt is recognized under article 28 (12) of the Constitution of Uganda, 1995.

20 Regarding civil contempt, the Court adverted to Black's Law Dictionary (*supra*) where it is defined as "the failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he complies with the court order."

The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its

previous order, as well as to compel performance in accordance with the S previous order.

Common law has classified contempt into various categories, namely, civil and criminal, in *facie curiae* (before a court) or *ex facie curiae* (outside of a court). The contempt outside court can be commenced by parties, or by a \$10\$ court acting on its own accord, or by public prosecutors. So, civil contempt is contempt outside court and relates to where there is disobedience of a court order. Civil contempt can lead to criminal prosecution and punitive sanctions may issue. A contemnor may however avoid the imposition of a sentence by complying with the coercive order. At the origin of the crime being denounced via contempt action, is the crime of disrespecting the court, and ultimately the rule of law.

Civil contempt action is also buttressed by article 128 (2) of the Constitution, 1995, which provides for the exercise of judicial powers by 20 courts, which is derived from the people, and the exercise should be in the name of the people, and in conformity with the law, values, norms and aspirations of the people. Therefore, when a court gives orders, the same ought to be respected, implemented and should take effect and nobody should interfere with court orders, and State agencies are obliged to assist the courts, to ensure they are effective.

Given that the Constitution has vested judicial powers in the people, the public expects court orders to be obeyed, and court orders should never be given in vain. Civil Contempt thus serves the object of empowering courts to enforce court orders and punish those that wilfully and unlawfully disobey it.

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In the Ssempebwa case (supra), the Supreme Court set down the ingredients of civil contempt, which an applicant must prove in order to succeed, namely; the order; service or notice thereof; non-compliance; and willfulness and *malafide* beyond reasonable doubt.

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Therefore, once the Applicant has proved the first three requisites of civil contempt, the respondent will bear the evidential burden in relation to willfulness and *malafides*. If the respondent fails to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and *malafide*, then contempt would have been established beyond reasonable doubt. A declaratory and other appropriate remedies may then be available to a civil applicant, on proof, but on a balance of probabilities.

In summary therefore, for one to be held in civil contempt, the following requisites must be proved;

\$i)\$ That an order was issued by court;

- That the order was served or brought to the notice of the alleged ii) <pre>contemnor (respondent);</pre>
- iii) That there was non-compliance with the order by the respondent:
- \$iv)\$ That the non-compliance was willful and *malafide*.
- \$10\$ As observed, the first three elements must be proved on the balance of probability while the fourth ingredient must be proved beyond reasonable doubt.

In <u>Betty Kizito Vs. Dickson Nsubuga & 6 others, Civil Application Nos. 25</u> and 26 of 2021, the Supreme Court considered local and foreign persuasive authorities on contempt principles, and further expounded on the ingredients of contempt as below;

With regard to the ingredient of existence of a valid order, court observed that the order must be obeyed in totality, and that a party who chooses to disobey the order without good reason risks being held in contempt. It was stated that, the court order must state clearly and unequivocally what should and should not be done. Court will be reluctant to punish or condemn an alleged contemnor for an order whose terms are unclear and ambiguous.

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On the requisite of an alleged contemnor having actual knowledge of the court order, common law leans towards the requirement of personal

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service or actual knowledge of existence of the court order. Thus in some $\$S$ instances, knowledge of the court order may be inferred even in cases of willful blindness.

In contempt, the alleged contemnor must have intentionally done that act $\$10$ that the order prohibits, or intentionally failed to do the act that the order compels.

In conclusion on the requisites, there is need for proof beyond reasonable doubt, of the alleged contemnor's deliberate conduct that has the $\$15$ consequence of disobeying the court order in issue. An applicant is however not required to prove that the alleged contemnor intended to bring court into disrepute. Where the breach of the court order is unintentional and accidental, then court may exercise discretion to impose no penalty.

$\$20$ It should be noted that even where an applicant satisfies all the requirements of civil contempt, a court may still decline to make a finding of contempt, where the alleged contemnor shows that he/she acted in good faith and was taking reasonable steps towards compliance with the order. The remedy of contempt is therefore a remedy of last resort and should be $\$25$ used with great restraint. Citing the dictum in the Canadian case of *Carey Vs. Laiken*, 2015 SCC 17, the point is more lucidly put thus,

$\$S$ "If contempt is found too easily, a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect. As this Court has affirmed, contempt of court cannot be reduced to a mere means of enforcing judgments."

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I am bound by the wisdom of the Supreme Court, clearly expressed in the above judgments. Turning to the present matter, I will deal with the ingredients of civil contempt concurrently.

\$15\$ Regarding whether or not a lawful order exists and whether it was served on the respondent or whether he had notice of, it was argued for the respondent that, no order exists, as the applicants lost both civil suit no. 31 of 2015 in the Chief Magistrates Court and on appeal, civil appeal no. 080 of 2018 in the High Court, with costs. It was contended, nowhere in 20 the judgment of the High Court was the respondent stopped from cultivating the suit land.

On their part, the applicants submitted that the High Court on appeal "informed" the applicants that they are all beneficiaries of the land in dispute. The Applicants thus argue that, in total disregard of the judgment/ court orders, the respondent re-entered the land and cultivated, and further extended his authority to the part being occupied

and in use by the children of Akera Tom-Boya. The Applicants therefore $\$S$ maintain that, a lawful order exists, and that the respondent knows about it.

In resolving the rival contentions, court has perused the Judgments of the trial court, the then learned Chief Magistrate, His Worship, Matenga Dawa Francis (now Deputy Registrar High Court) dated 12th October, 2018, and that of the appellate court (Hon Justice Stephen Mubiru), given on 27th February, 2020.

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In his Judgment, the learned appellate Judge was required to resolve three grounds of appeal. The first ground complained that the court below had \$15\$ erred in law and fact in holding that the applicants (appellants) had failed to prove that the disputed land is part of what the applicants had inherited from their parents. The trial court had held that the applicants could not inherit land that was not given to their parents. The second complaint related to the trial court's holding that the fencing of the suit land was for 20 precautionary reasons (to prevent animals from straying to the railway line) and not to demarcate the boundaries of the land. The third and last complaint was that the trial court erred in law and fact when he held that the respondent was not a trespasser on the suit land. The court had held that the respondent had beneficial interest in the land as a son of the 25 original owner and could not be held to be a trespasser.

$\$S$ On appeal, the High Court dismissed all the three grounds of appeal, upholding the decision and orders of the trial court in their entirety, with costs of the appeal going to the respondent.

It is common ground that no order of dismissal of the appeal was extracted \$10\$ by the respondent who was the successful party, under Order 43 rule 28 of the CPR, which requires a decree of the High Court, sitting as an appellate court, to be drawn in accordance with Order 21 rules 6, 7 and 8 of the CPR, with modifications.

15 In the instant matter however, the fact that the decree was not extracted is not relevant in the resolution of the issue whether a valid order exists, for contempt purposes. An order, in contempt action, is not confined to that extracted/ drawn from Judgment/ Ruling. An order of court can be discerned from the Judgment/ Ruling of court, in the absence of a drawn copy. It is therefore not always necessary that the order of court must first 20 be drawn, before contempt action can be

commenced. To suggest otherwise would create room for disregard of court orders, with reckless abandon, as litigants or persons expected to comply, could hide under the shelter of a non-extracted order, to avoid what is commanded by the orders \$25\$ manifest in the Judgment/ Ruling of court.

Having perused the High Court Judgment, I find that the court made \$\mathsf{S}\$ orders in its judgment in civil appeal no. 080 of 2018. In the Judgment, the court dismissed the applicants' appeal, with costs to the Respondent. In conclusion on the point, I hold that a valid order exists and was issued by court, as is discernable from the Judgment of Hon. Justice Stephen \$10\$ Mubiru.

On the second consideration whether the order was served on or brought to the notice of the alleged contemnor (respondent). This point is not strongly contested, in my view. The respondent thought erroneously, that, an order of court must be drawn/ extracted from Judgment, before contempt action can be commenced. I therefore find that the respondent was a party to the proceedings and was aware of the Judgment of the court. In his affidavit evidence, the respondent admits that Judgment in civil appeal no. 080 of 2018 was given by court. I therefore find that the respondent had notice of the orders of court.

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Regarding whether there was non-compliance with the order by the respondent, the applicants averred and submitted that the respondent reentered the suit land and cultivated it (and perhaps is still cultivating it), and extended his authority to the part being occupied and used by the children of the Late Tom-Boya. I have carefully perused the Judgment of court and found nothing in it to suggest that court made some orders

\$\mathsf{S}\$ against the respondent, requiring compliance, or which he has flouted. On the contrary, the applicants' appeal was dismissed with costs. There is no second appeal against the dismissal. Regarding the allegations of violence, the applicants have not adduced evidence to show what kind of right the family of the late Tom-Boya have in the suit land. They were not parties to the proceedings mentioned. The land said to be occupied by the said family \$10\$ is also not described by the applicants. Court is therefore unable to tell whether the land occupied by the children of the Late Tom- Boya is within the grazing area or outside it. I am unable to tell whether the area that is being claimed on behalf of that family is exclusive to the family. Court also 15 wonders why the administrator of the estate of the said deceased person, if any, has not taken up the matter legally, if at all the allegations are true. No nexus has been established between the claims being pressed on behalf of the children of the late Tom-Boya and the decision of this court in civil appeal no. 080 of 2018 (supra). The Applicants lack standing to make such allegations, which are, at best, hearsay. At any rate, such allegations are \$20\$ best dealt with within the bigger scheme of criminal law, as they do not fit within the realm of civil contempt of court orders.

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I should add that, the use of the grazing area (the suit land) was found concurrently by the two courts not to be exclusive to the applicants, who had, by their action, sought to bar the respondent from using it. The two courts held that, the respondent's act of cultivating part of the grazing land

(suit land) was not an act of trespass on land, he having beneficial interest S in it, by virtue of being a son of the original owner, a one Latee. Both courts therefore confirmed the respondent's rights in the suit land (grazing area) and the applicants' attempt to alienate the land to their exclusive use, to the prejudice of the respondent, was rejected by both courts. In the $\$10$ circumstances, I hold that there is no court order which the respondent has violated, by the alleged user of the suit land. He cannot certainly be in contempt of an order which was wholly given in his favour.

In light of my findings on the third requirement of civil contempt, I find it $\$15$ unnecessary to deal with the issue of whether the non-compliance was willful and **malafide**, because there is no proof of non-compliance with the order of court. It is thus my conclusion that no contempt has been established, on the balance of probability, against the respondent, and the application is accordingly dismissed.

On the issue of costs, the general rule is that, costs follow the event, that is, the outcome of the case, unless there is good reason for court not giving costs, which must be stated. It is trite that in all matters of costs, courts do exercise discretion, and this must be done judiciously. See section 27 of the CPA. See also: Uganda Development Bank Vs. Muganga Construction Company & 2 others [1981] HCB 35.

In Monica Ntarumbana Ibingira & 3 others Vs. Muriel Baingana & 3 others S [1997] 1 KALR 41, Musoke- Kibuuka, J., considered the matter of costs in a case where parties were very close relatives and noted that, ordering the defendants to pay costs would be failing to help the process of reconciliation amongst them. Court concluded that, the case was a proper $\$10$ one for refusing to order the losing party to pay costs of the suit.

The matter before me concerns parties who are known members of the extended family, and who have co-existed and had happily used the suit land for long since the days of their fathers and grandfathers but for the ill calculated suit by the applicants. This court would have awarded costs, given the defective affidavits in rejoinder, and the impression on court that the Motion was lodged as a matter of course, without much thought and circumspection. However, on a careful consideration, given the strong family ties between the parties, I have decided that each party bears its own costs. This will hopefully allow for healing and engender reconciliation between the parties, which is court's duty to promote, under article 126 (2) (d) of the Constitution, 1995. I have also considered the fact that the applicants must have suffered some costs before, both in the trial court and on appeal. Those awards have not been challenged. I will therefore not fan the burning fire in the already frosty relationship of the parties. It is court's hope that the parties can now mend their relations and leave the

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judicially settled land question well behind them, and move on with their S lives, as before.

Obiter: Court has noted that the applicants had sought the intervention of my brother Judge, Hon. Justice Ajiji Alex Mackay, to help interpret the appeal Judgment of this court. It appears the applicants still feel that the \$10\$ respondent should not use the suit land (grazing area) for cultivation, yet both the Chief Magistrates Court, and this court, on appeal, clearly held that the disputed area are equally available to the respondent to put to use. The Respondent's preferred user (cultivation) was held as not \$15\$ constituting an act of trespass and that decision stands. The applicants' exclusive area, are limited to their homesteads, the gardens and the burial area, where the respondent cannot interfere. The grazing area however belongs to everyone within the extended family of the parties to this litigation. The applicants cannot therefore stop the respondent from using 20 the grazing area, if he chooses to cultivate. The respondent cannot also stop the applicants from grazing or cultivating that area (suit land), if they so wish. It is clear that the land is vast enough (measuring approximately 1.4 to 1.5 square kilometers), for the extended family to co-exist. The Respondent has assured court (in his affidavit) that he has not stopped the applicants from using the grazing area and that he does not harbor 25 any intention of evicting the applicants or anyone from the suit land. Court hopes the respondent will honour this undertaking to court, lest the law

could take its course. Likewise, court hopes the applicants will respect the S decision of the court given in civil suit no. 031 of 2015, upheld in civil appeal no. 080 of 2018, and seek to normalize their relations with the respondent, as was at the time before they started litigation in courts. If their parents and ancestors lived on the disputed land in harmony and without squabbles, then the generation of the applicants and the \$10\$ respondent and those who claim under them can do better. It serves no body to live with hard feelings towards one another.

I so order.

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Delivered, dated and signed in chambers this 21st October, 2022.

Huroum 21.10-2022 George Okello **JUDGE HIGH COURT**

Ruling read in chambers in the presence of;

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1:45pm \$\mathsf{S}\$

Attendance

Ms. Grace Avola, Court Clerk

The Applicant in Court.

The 2nd Applicant is absent - in Entebbe: (got short notice: unable to travel).

Respondent is in Court.

1st Applicant: My Lawyer is absent, he asked me to receive the Ruling of Court.

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2nd Respondent: My Lawyer was here before: He says I receive the Ruling.

Ruling read. Court:

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\$m.21.10.2022\$ Henro George Okello **JUDGE HIGH COURT** 21st October 2022

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