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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL No.35 OF 2011**

10 **JOHN BWIZA ..... APPELLANT**

**VERSUS**

**PATRICK YOWASI KADAMA .....RESPONDENT**

*(An appeal from the decision of His Lordship Honorable Mr. Justice V. F. Musoke Kibuuka in High Court Civil Suit No. 0751 of 1995 delivered on 12<sup>th</sup> December, 2010)*

15 **CORAM: Hon. Mr. Justice Kenneth Kakuru, JA**

**Hon. Mr. Justice F.M.S Egonda Ntende, JA**

**Hon. Mr. Justice Remmy Kasule, Ag. JA**

**JUDGMENT OF COURT**

20 This is an appeal arising from the decision of *V. F. Musoke Kibuuka J*, delivered on 12<sup>th</sup> December, 2010 in which he entered Judgment in favour of the respondent.

**Background**

25 In 1986 the appellant as a sitting tenant is said to have purchased House No. 14 of Leasehold Register, Volume 829, Folio 1, Block 15, Plot 268 at Nsambya Estate from one Patrick F. Kunya now deceased husband to the late Sarah Kibuuka Kunya. The appellant had agreed to purchase the said property at Ug. Shs 100,000,000/=, (One hundred million Uganda shillings only). He paid Ug. Shs. 9,000,000/= (Nine million

5 Uganda shillings only) as the first installment to the deceased before the agreement was executed. In the said agreement the deceased agreed to execute a Power of Attorney in favour of the appellant authorising him to borrow money on security of the suit property in order to pay the balance of the purchase price. He also gave the appellant signed blank transfer forms.

10 The vendor died testate in 1991, naming his wife Sarah Kibuuka Kunya and Dr. Patrick Yowasi Kadama the respondent as executors of his will in which he bequeathed the suit property to his wife and daughters. After his demise, his wife demanded from the appellant the balance of Ug. Shs. 91,000,000/=, in return the appellant produced signed copies of the transfer and application for consent to  
15 transfer or sub-lease forms claiming to have paid off the entire purchase price to the late Patrick F. Kunya. On 25<sup>th</sup> August, 1992, Sarah Kibuuka Kunya lodged a caveat upon the title of the suit property, this prevented the appellant from registering the transfer. The appellant filed a suit by way of originating summons against Sarah Kibuuka Kunya requiring her to show cause why the caveat should not be vacated.  
20 She passed away before the matter could be heard and her name was substituted with that of Patrick Yowasi Kadama who was a co-administrator with her of the estate of the late Patrick Kunya. The appellant sought for orders to have the caveat vacated, and be registered as the rightful proprietor of the suit property. The learned trial Judge found in favour of the respondent, and accordingly dismissed the  
25 suit.

The appellant being dissatisfied with the decision of the trial Judge filed this appeal on the following grounds:-

1. *The learned Judge erred in law and in fact in framing the issues as he did.*
2. *The learned Judge erred in law and in fact in placing the burden of proof the  
30 way he did.*
3. *The learned Judge erred in law and in fact holding that:*

5        *“In the circumstance, court has to agree with Dw2 that the documents met his professional requirements satisfactorily.”*

4. *The learned Judge erred in law and in fact in holding that money paid to the deceased prior to 3<sup>rd</sup> November, 1986 was recorded in exhibit P7 as having been paid on 15<sup>th</sup> and 16<sup>th</sup> December greatly erodes the credibility in the genuineness of exhibit D7.*

10        5. *The learned Judge erred in law and in fact in relying on what he called “the more fundamental question of why did the deceased leave the suit property bequeathed to DW1 and two of his daughters up till the date of his death on 3<sup>rd</sup> January 1991” and relying on it to decide against the appellant.*

15        6. *The learned Judge erred in law and in fact in holding that DW3 should not have merely physically witnessed the payments without signing anywhere as a witness.*

20        7. *The learned Judge erred in law and in fact in relying on the following “Lastly, there is the question as to why the plaintiff had to wait for all those years until the death of the deceased in order to try to enforce his claim to the suit property” to decide against the appellant.*

8. *The learned Judge erred in law and in fact in his evaluation of the evidence.*

### **Representations**

25        At the hearing of the appeal, Mr. Albert Byamugisha learned Counsel appeared for the appellant while Ms. Evelyn Sewaya holding brief for Mr. Joseph Balikuddembe appeared for the respondent. Both Counsel, with leave of the Court, adopted to proceed on the basis of their written submissions and conferencing notes. They made no oral submissions to Court. It is on the basis of the written submissions and the conferencing notes that this appeal has been determined.

### **Appellant’s Case**

30        Ground 1

5 In his written arguments Counsel submitted that, the learned trial Judge wrongly framed the issues for determination at the trial. He submitted that the issues framed which to wit; *“Whether the plaintiff paid the balance of Shs 91,000,000/= to the late Patrick F. Kunya and Whether the plaintiff is entitled to the reliefs he seeks”* did not arise from the pleadings and as such it was an error on the part of the trial Judge to  
10 have framed those issues at all.

On ground 2, Counsel submitted that the learned trial Judge wrongly shifted the burden of proof to the appellant instead of the respondent who had the duty to show cause why the caveat should not be removed from the suit property.

On grounds 3, 4, 5, 6, 7 and 8, Counsel contended that the learned trial Judge failed  
15 to properly evaluate all the evidence on record. He submitted that there was sufficient evidence on record in favour of the appellant. This evidence he submitted, included a sale agreement, an application for consent to transfer signed by the deceased and a duly signed transfer forms which were all acknowledged by the respondent. There were also letters written by the deceased acknowledging receipt  
20 of payment, which payments were witnessed by Pw3 Counsel submitted that the above evidence was further corroborated by the witnesses’ testimonies at the trial proving that the appellant had paid the whole purchaser price for the deceased’s property and as such he was the rightful owner of the suit property.

Counsel faulted the learned trial Judge for having relied upon the will of the  
25 deceased in which he had bequeathed the suit property to his wife and children, as evidence for non-payment of the purchase price by the appellant. He argued that, the appellant took long to enforce his claim over the suit property because it had been mortgaged by the deceased. He prayed Court to allow the appeal, set aside the High Court Judgment and make an order for the caveat on the suit property to be  
30 removed/vacated and to award costs to the appellant in this Court and the Court below.

### **Respondent’s reply**

5 Counsel for the respondent opposed the appeal and supported the findings of the learned trial Judge. On ground 1, he submitted that the issues framed arose from the pleadings and clearly depicted what was in contention between the parties. In the first issue the question for determination was whether the transaction was genuine and whether the whole purchase price had been paid. The second issue was about  
10 the reliefs available to the party depending on the determination of the first issue. Therefore, he submitted that the issues had been properly framed by the learned trial Judge.

In reply to ground 2, Counsel submitted that the learned trial Judge properly placed the burden of proof upon the appellant. He argued that it is trite law that he who  
15 alleges must prove. The respondent testified that the appellant had not paid the whole purchase price and this was sufficient reason for not vacating the caveat she had lodged on the suit property. Therefore it was upon the appellant to prove otherwise, hence the burden rested upon him.

In respect of grounds 3, 4, 5, 6, 7 and 8, Counsel submitted that the learned trial  
20 Judge properly evaluated and considered all the evidence on record thereby arriving at a right decision. He further contended that, the learned trial Judge rightly denied the reliefs sought by the appellant because a fundamental breach vitiated the sale agreement. He asked Court to dismiss the appeal with costs to the respondent.

### **Resolution**

25 This Court is required under *Rule 30* of the Rules of this Court to re-appraise the evidence of the trial Court and come to its own decision. *Rule 30 (1) (a)* provides as follows:-

*"Power to reappraise evidence and to take additional evidence.*

*(1) on any appeal from a decision of the High Court acting in its original  
30 jurisdiction, the court may-*

*(a) reappraise the evidence and draw inferences of fact"*

5 In the case of *Fr. Narcensio Begumisa & others vs Eric Tibebaga*, Supreme Court Civil Appeal No. 17 of 2002, Mulenga JSC in his lead Judgment put this obligation of the first appellate Court in the following words:-

10 *"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. This principle has been consistently enforced, both before and after the slight change I have just alluded to. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of*

15 *Appeal (of England) put the matter as follows -*

*"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and*

20 *considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong ... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there*

25 *may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not*

30 *seen."*

In *Pandya vs R (1957) EA 336*, the Court of Appeal for Eastern Africa quoted this passage with approval, observing that the principles declared therein are basic and

5 applicable to all first appeals within its jurisdiction. See: *Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry vs Uganda, Supreme Court Criminal No. 10 of 1997*.

We shall keep the above principles in mind while resolving the grounds of appeal. We have listened to the submissions of Counsel and carefully perused the Court  
10 record. We now proceed with our duty of evaluating the evidence.

### Ground 1

The appellant contends that the issues framed by the learned trial Judge did not arise from the pleadings.

Issues ordinarily arise when a material proposition of law or fact is affirmed by one  
15 party and denied by the other. Under *Order 15 Rule 3* of the Civil Procedure Rules, Court may frame issues from all or any of the following materials;-

(a) *allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties;*

(b) *allegations made in the pleadings or in answers to  
20 interrogatories delivered in the suit; and*

(c) *the contents of documents produced by either party.*

The object of an issue is to bring down the evidence, arguments and decision to a particular question so that there may be no doubt as to what the dispute is. This is in  
25 order to pin-point the real and substantial points in controversy. The correct decision in any civil litigation largely depends upon the correct framing of issues. They are framed to clearly identify the main areas of controversy between the parties and for the Court to be able to focus on them. The object of framing issues is also to shorten the arena of dispute by leaving out matters that are either agreed  
30 upon, irrelevant or undisputed. It is in the interest of all the parties that appropriate issues encompassing the entire controversy and focusing on the material aspects thereof are framed at the earliest stage of the trial. Ultimately however, the duty to

5 frame issues lies with the trial Court. In *Odd Jobs vs Mubia (1970) EA 476*, Court held as follows:-

10 *"It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from these provisions, the court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties."*

15 In *Jovelyn Barugahare vs Attorney-General, Supreme Court Civil Appeal No. 28 of 1993* (unreported), Court stated that:-

20 *"The trial court may frame issues on matters not raised in the pleadings but which arise from matters stated by the parties or their advocates on which a decision is necessary in order to properly determine the disputes before the court. In this Court it was argued that the matters complained of by the appellant were directly raised by the pleadings of the parties."*

In the appeal before us issues framed by the learned trial Judge were:-

25 1. *Whether the plaintiff paid the balance of Shs 91,000,000/= to the late Patrick F. Kunya.*

2. *Whether the plaintiff is entitled to the reliefs he seeks.*

30 It is clear from the pleadings that the caveat was lodged on the suit property because the appellant had wanted to transfer the suit property into his names, yet it was contended by the respondent that the appellant had not completed the payment of the whole purchase price and that there was an outstanding sum of Ug. Shs. 91,000,000/= due and owing. Therefore, the learned trial Judge correctly framed the



5 first issue the way he did, because the whole matter in controversy was whether or not the whole of the agreed purchase price had been paid. This was the main issue for Court to determine. We find no merit in this ground and we dismiss it.

## Ground 2

10 It was the appellant's contention that the learned trial Judge erred when he shifted the burden of proof to him, whereas it was upon the respondent to show cause why the caveat she had lodged should not be vacated.

It is trite law that a fact is said to be proved when Court is satisfied as to its truth. The general rule therefore is that the burden of proof lies on the party who asserts  
15 the affirmative of the issue or question in dispute. *Sections 101,102 and 103* of the Evidence Act Cap 6 all provide for the Cardinal rules of proof in that:-

*"whoever asserts a fact must prove it." "Whoever wants court to believe in the existence of a given set of facts, must have the burden to prove their existence."*

The standard of proof in all civil cases is such on the "*balance of probability*."The  
20 burden lies on the applicant to prove his or her case on the balance of probabilities.

According to *Section 103* of The Evidence Act, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. See: *Jovelyn Barugahare vs Attorney General (Supra)*. The onus is on a party  
25 to prove a positive assertion and not a negative assertion. See also: *Lancaster vs Blackwell Colliery Co. Ltd 1918 WC Rep 345*.

The law also rests the evidential burden upon the party who asserts the affirmative of the issue in dispute. Evidential burden means the obligation to show that there is sufficient evidence to properly raise an issue at trial and to show the existence or  
30 non-existence of a fact in issue, failure to satisfy the evidential burden shows that an issue cannot be raised at a court of law.

5 The supreme Court in *Amama Mbabazi vs Yoweri Kaguta Museveni & 2 others No. 1 of 2016* while discussing the issue on evidential burden cited the case of *Wavel John Charles Ramkalawan vs the Electoral Commission and 2 Others* where the Court held that:

10 *"In an Election Petition, as in a civil case, it is the Petitioner who has to convince the Court to take action on the allegations in the Petition. The legal burden remains with the Petitioner throughout. The evidential burden initially rests upon the party bearing the legal burden (that is the Petitioner), but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail*  
15 *without further evidence (See:- Halsbury's Laws, 4th Edition, vol. 17, para. 15)."*

The Constitutional Court of Seychelles further held that the evidential burden shifts constantly as a ball-game with the evidential burden as the ball which is continuously bounced to and fro between contenders but that nevertheless,  
20 the burden of proof remains ultimately with the Petitioner.

The Court also cited with approval the holding of Lord Hoffman In *Re B (Children) (Fc) [2008] UKHL 35*, where he said that:

25 *If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact*  
30 *is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.*

5 In conclusion the Supreme Court in *Amama Mbabazi vs Yoweri Kaguta Museveni (Supra)* held that:-

10 *"In our view, therefore, each and every element of the allegations made by the Petitioner has to be proved by him and by him alone. It is only when he has discharged that legal burden that the evidential burden shifts onto the Respondents."*

See also: *Col.(Rtd) Dr. Besigye Kizza Vs Museveni Yoweri Kaguta & Another, Supreme Court Election Petition No. 1 of 2001, Babu Edward Francis vs The Electoral Commission & Elias Lukwago, Election Petition No. 10. Of 2006 and Haji Muluya Mustapha vs Alupakusadi Waibi Wamulongo, Election Petition No. 22 of 1996*

15 In this case, the respondent had to show cause why the caveat lodged on the suit property should not be vacated. Once a notice to show cause is issued as per *Section 139(1)* of the Registration of Titles Act, to the caveator who is then obliged to show cause why the caveat should not be removed. *Section 139(1)* provides:-

20 *"Any beneficiary or other person claiming any estate or interest in land under the operation of this Act or in any lease or mortgage under any unregistered instrument or by devolution in law or otherwise may lodge a caveat with the registrar in the form in the Fifteenth Schedule to this Act or as near to that as circumstances permit, forbidding the registration of any person as transferee or proprietor of and of any instrument affecting that estate or interest until after*  
25 *notice of the intended registration or dealing is given to the caveator, or unless the instrument is expressed to be subject to the claim of the caveator as is required in the caveat, or unless the caveator consents in writing to the registration."*

30 This position was considered in the case of *Boyes versus Gatheru (1969)*, followed in *Hunter Investments Ltd. Vs Simon Lwanyaga; Misc. Application No. 034/2012 (unreported)*, which held that:-

5 . "one primary objective of a caveat is to give the caveator a temporary protection. Therefore it will not be equitable to allow the Respondents to sit back and 'twiddle their fingers' for an undetermined future to the detriment of the Applicant..."

10 The respondent in her testimony contended that the appellant had not paid the whole purchase of the suit property and as such she, as administratrix of her late husband's estate, had an interest in that property which she still required to protect by the caveat. She presented evidence to back up her case. For all intents and purposes she had shown cause why the caveat should not be removed. At that point  
15 the evidential onus shifted to the appellant to prove that indeed the whole of the purchase price had been paid to the deceased who was the registered proprietor.

The learned trial Judge noted as follows at page 11 of his judgment:-

20 *"There was some dispute as to who bore the burden of proof. It is trite law that as a general rule, the plaintiff has to prove his or her case at a balance of probabilities. In this case where the defendant was required to show cause why the caveat should not be vacated, once the defendant put forward the reason of failure by the plaintiff to pay the balance of the purchase price, then the burden shifted upon the plaintiff to prove on the balance of probabilities that the balance of the purchase price had been paid"*

25 We agree with the learned trial Judge's holding above and as such we find no merit in this ground, which accordingly fails.

**Grounds 3, 4, 5, 6, 7 and 8,**

30 It is the appellant's contention that, the learned trial Judge failed to properly evaluate the evidence on record and as a result reached a wrong conclusion. The question we are required to determine is whether or not the learned trial Judge properly evaluated the evidence presented before him at the trial. The appellant presented four witnesses plus documentary evidence, while the respondent

5 presented three witnesses. The appellant Pw1 in his testimony stated that, he paid all the money he owed the deceased, he further stated that he paid the said money in installments which were all acknowledged by the deceased in an exercise book and the same were witnessed by Pw3, Christopher Kahigi, who however did not sign on any of the documents as a witness. Pw2, Paul Byaruhanga testified to having signed  
10 on the transfer form which was not prepared by him. And Pw4, Appollo Mutaswera Ntariwa, testified as a handwriting expert, and in his testimony in chief, he stated as follows:

15 *"...from the above, there are features to suggest to me that the questioned signatures in the exercise book were the work of one writer who wrote the specimen. There are also indications to suggest to me that the same writer wrote the signatures on the letters from a writer of Mulago and on the land transfer form of Plot 268 Folio 1, Block 15 West Buganda, of 5<sup>th</sup> August, 1987"*

In cross examination he stated as follows:-

20 *"In all these exhibits the letter F either slightly touches the upper loop of letter P in the loop. I used exhibits P8, P9 and P10 as specimen signatures. That variation therefore is of no remarkable importance during examination"*

In re-examination he stated as follow:-

25 *"There are two signatures of Mr. Kunya on this exhibit. The letter F touches the loops of the Ps but not in the same manner. Because the sizes of the Ps are not the same. One tends to enter the loop. The other does not. That is normal variation in a person's handwriting."*

From the above evidence we note that the appellant's evidence lacked sufficient corroboration, Pw3 did not sign on any of the exhibits, Pw4 noticed some discrepancies in the signatures and Pw2 was of little value.

30 On the other hand, Dw1 Sarah Kunya, testified that, the only money she was aware of having been paid by the appellant was only Ug. Shs 9,000,000/=. (Nine million

5 Uganda shillings only). She stated that when she questioned the appellant about the balance of the purchase price, he did not show her any proof of payment except a photocopy of the transfer form, application for consent to transfer plus three letters purported to have been written by the deceased. When she was presented with the various exhibits indicating receipt of money by her husband from the appellant, she  
10 contested the signatures contained therein on the said exhibits. Her testimony in respect of the signatures was supported by the testimony of Dw2 John Patrick Mujuzi. In his testimony in chief he stated as follows:

15 *"...I have made a comparison of signatures. P. F. Kunya which are found on annexure B and compared them with writings of signatures found on annexures D2, D4, A, K4 & K3 and differences in the writings are about writing skills, excellency in the latter design which clearly indicated that the writer of the signatures found on D2, D4, A, A3 and K4 was not the same person who wrote the signatures appearing on annexure B.."*

20 He goes on to explain in depth the variations in the signatures. We note that Pw4 also noticed the variations but tried to explain them away. Dw3 Andrew Ssengooba testified as the person who drafted the sale agreement, but never witnessed the appellant paying money to the deceased. From the above, we find the exhibits adduced by the appellant confirming receipt of money were forgeries, as was explained in length by the handwriting expert.

25 We have carefully perused the High Court Judgment and found that the learned trial Judge dealt exhaustively with issues before him at the trial. In order not to repeat ourselves, we are constrained to reproduce in *extenso* excerpts of his Judgment.

While resolving the issues raised in grounds 3, 4, 5, 6, 7 and 8 the learned trial Judge noted as follows:-

30 *"The plaintiff put forward exhibit P7 as the key documentary evidence showing that the deceased received full payment for house No.14, Nsambya Estate. Dw1*

5     *disputed exhibit P7, saying that the signatures on exhibit P7 merely resembles that of her late husband but were not his...*

10     *Exhibit P7, appears to Court to be clearly a forgery. When the plaintiff was confronted by Dw1, after the demise of the deceased, he only showed her the transfer form in addition to claiming verbally that he had paid the balance to the deceased. If exhibit P7, had been in existence then, the plaintiff would most probably have showed it to Dw1 as he did the transfer form.*

15     *It was only after failing to effect registration of the transfer because of the caveat lodged by Dw1, that the plaintiff thought out exhibit P7, purporting that he had paid the balance.*

20     *Both expert witnesses, Pw2 and Dw3 disagreed as to the authenticity of all the documents put by the plaintiff. Pw2 gave the opinion that exhibit P7 was not forged and the signatures on it and on the other documents were genuinely those of the deceased, Dw2 disagreed. He gave the opinion that exhibit P7 was not genuine and the signatures on the other documents (letters) were not written by one person. They were, therefore, not reliable...*

25     *Court prefers to take the opinion given to it by Dw2 and reject that of Pw4 for several reasons.*

30     *First, the opinion of Dw2 is corroborated by the evidence of Dw1, which fall squarely within the ambit of the provisions of Section 45 of the Evidence Act...*

35     *Dw2 was the wife of the deceased. They had been married for many years. She, no doubt, had seen the deceased write on several occasions and was well acquainted with his writing and signature and how the deceased appended his signature on documents written or signed by him*

40     *Secondly, there are several facts and circumstances, which if considered would lead to the conclusion that the documents purporting to show that the plaintiff paid the balance to the deceased are not genuine but were forgeries...*

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All those factors and circumstances considered together with the expert opinion of Dw2 on the documents produced by the plaintiff, point to one inevitable conclusion that the plaintiff's claim that he paid off the balance of Shs. 91, 000,000/= in respect of the suit property is neither genuine nor credible..."


We entirely agree with the findings of the learned trial Judge and find that he properly and carefully evaluated all the evidence and arrived at the correct conclusion. Grounds 3, 4, 5, 6, 7 and 8 also fail.

This appeal accordingly fails and is hereby dismissed with costs to the respondent.

Dated at Kampala this 25<sup>th</sup> day of Oct. 2018.

  
.....  
**Kenneth Kakuru**  
**JUSTICE OF APPEAL**

  
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**F.M.S Egonda Ntende**  
**JUSTICE OF APPEAL**

  
.....  
**Remmy Kasule**  
**AG. JUSTICE OF APPEAL**