IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, AKIWUMI & SHAH,JJ.A.)

CIVIL APPEAL NO.150 OF 1993

Between

CAPTAIN PATRICK KANYAGIA ………....…….APPELLANT

ROSEMARY WAMBUI KANYAGIA……....…….APPELLANT

AND

DAMARIS WANGECHI……………………..RESPONDENT

JOHNSON MUTURI MUCHEMI…....………..RESPONDENT

SAVINGS & LOAN KENYA LIMITED …..…..RESPONDENT

(Being an appeal from the ruling of the high court of Kenya at Nairobi (Mr. Justice Shields) dated 20th May, 1992

In

H.C.C.C. NO. 5329 of 1988)

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JUDGMENT

SHAH JA. The appellants are husband and wife. They were desirous of purchasing a property.

Property known as LR 7022/42 Kiambu (hereinafter referred to as the "suit property") was advertised for sale by public auction, which auction sale did take place (as hereinafter shown) on 24th November, 1988.

In December, 1988 the first respondent (hereinafter referred to as "Wangechi" filed suit in the superior court seeking (*inter alia*) an injunction "to prevent the transfer of the said property LR 7022/42 into the name of the third defendant or any third party on her undertaking to deposit the money, owed by the first defendant to the second defendant into this honourable Court".

For the sake of clarity, I would point out that the first defendant is the second respondent in this appeal. I will refer to him as Muchemi hereinafter.

The plaintiff also sought "an order of specific performance directed to the first defendant to perform his obligations pursuant to the said sale agreement". The first defendant as I said is Muchemi.

On 12th April, 1984, Wangechi filed a suit (being HCCC No 1136 of 1984 OS) against Muchemi seeking determination of following questions:

> (i) whether or not Johnson Muchemi became a constructive trustee on execution of agreement of sale on 27th October, 1978;
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> (ii) whether or not Muchemi is entitled to refuse to transfer to Wangechi LR 7022/42 if Wangechi reimburses to Muchemi the monies Muchemi has paid to Savings & Loan Kenya Ltd since January 1, 1979;
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> **(**iii) whether or not Wangechi is entitled to a credit for Shs 48,575.60 if the answer to (ii) is in the negative;
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> (iv) whether or not Muchemi holds to the use of the applicant Shs 500,000/= plus interest at 12% per annum from January 1, 1979, if the answer to (ii) above is in the affirmative;
>
> (v) whether or not Muchemi should pay Wangechi costs of this summons.

This was a most unusual way of seeking what Wangechi probably wanted, eventually, that is transfer to her the title to the suit property.

This suit (HCCC No 1136 of 1984 OS) I understand is not yet finalized.

Muchemi filed against Wangechi a suit (being HCCC No 743 of 1985) seeking declarations to the effect that the sale agreement between Muchemi and Wangechi, and dated 27th October, 1978, was void by virtue of section 6 of Land Control Act (cap 302) or that Muchemi has effectively rescinded the same. Muchemi also sought orders for ejection and eviction of Wangechi from the suit property. That suit is also not yet finalized.

The agreement of sale dated 27th October, 1978 which I have already referred to, is in respect of the proposed sale of the suit property by Muchemi to Wangechi at an agreed price of Kshs 730,000/= of which sum Wangechi paid Kshs 500,000/= to Muchemi. By virtue of this agreement Wangechi was to take over payment of the balance of mortgage monies due to Savings & Loan (Kenya) Limited (hereinafter referred to as "Savings & Loan") by Muchemi and which balance was to be paid on terms as agreed between the parties. The completion date was to be 31st December, 1978. The said agreement is silent as to whether or not the suit property is agricultural land.

I do bear in mind the undisputed fact that Wangechi contributed quite considerably to the repayment of Muchemi's indebtedness and that Savings & Loan knew of the proposal and was willing to accept Wangechi as its mortgagee in lieu of Muchemi; it is also not in dispute that Savings & Loan was aware of the contract between Wangechi and Muchemi. But Muchemi became greedy; he repudiated the contract; Savings & Loan could not hold him to his contract with Wangechi when he (Muchemi) himself repudiated the contract.

It is also not in dispute that Savings & Loan, pursuant to a court order, paid out the excess amount recovered at the auction of the suit property (that is the amount in excess of what was due to Savings & Loan) to Muchemi.

It is also not in dispute that Wangechi instead of coming to Court to stop the proposed sale invoked the assistance of the provincial administration, extra-judicially, to attempt to stop the auction.

Whilst the parties (Muchemi, Wangechi and Savings & Loan) were yet to come to anything near completion of the contract of sale dated 27th October, 1978 the mortgage debt was mounting as indeed it

would. Muchemi decided not to sell to Wangechi, as, as the learned judge has pointed out, he became greedy. He wanted more money. It appears Wangechi was not willing to pay more. She had, she thought, an unassailable agreement for sale but obviously she was not properly advised as to how to go about enforcing her rights from 31st December, 1978 onwards.

Eventually Savings & Loan after due notice and advertisements put up the suit property for sale. Muchemi's arrears of payments were mounting. The sale by public auction took place on 24th November, 1988. On 29th December, 1988 Pall Ag J (as he then was) granted to Wangechi an *ex-parte* injunction. It is not clear from the record what the precise terms of that injunction were.

The fact which still remained and which is not disputed is that the first appellant who attended the auction sale on 24th November, 1988 was declared the highest bidder. He paid 25% of the bid price as was stipulated by one of the conditions of sale. He signed the contract of sale. He was to pay the balance of the purchase (bid) price within 60 days which he did. He (and his wife) were purchasers in good faith without notice of any right or title (if any) of Wangechi. The appellants (the Kanyagias) had seen the suit property before auction. They were aware that there was an occupant but they did not find out what the occupant was doing there.

I see no duty cast, in law on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. I will come to this factor later. I note at this stage that by her *ex-parte* application dated 31st May, 1989, Wangechi was seeking an injunction to restrain Muchemi, Savings & Loan and Captain Kanyagia by themselves, their agents or servants from registration of the transfer of the suit property until the payment directly to her or until deposit was made in Court of the purchase price (emphasis mine); this was when the transfer was in fact registered in favour of the Kanyagias. By the same application Wangechi also sought an *ex-parte* injunction restraining Savings & Loan from "registration of the transfer" to Captain Kanyagia unless the sum of Kshs 155,000/=, with interest was paid to her. At the same time she sought (alternatively) orders to the effect that the defendants do jointly and severally deposit Kshs 1.1 million as security in Court forthwith. It is obvious from this application of 31st May, 1989 that her interest then was in the money she had paid as opposed to the property. Probably she was correctly advised in view of the factual situation then obtaining.

Whilst Wangechi was still armed with court orders restraining the Kanyagias from registering the suit property in their favour, the latters' lawyer did not attempt to register the suit property in their clients' names. Once such orders lapsed the suit property was registered in the names of the Kanyagias, on 22nd August, 1989.

It is common ground that the suit property was so registered in the names of the Kanyagias under Government Lands Act (GLA) (cap 280 Laws of Kenya) and consequently the suit property is governed by the provisions of the Transfer of Property Act of India (TPA) as applicable to Kenya.

Again it is not in dispute that Muchemi was indebted to Savings & Loan and that Savings & Loan had at the material time a duly arisen power of sale under GLA.

Mr Githu Muigai appearing for Wangechi conceded as much to say that it is not for the purchaser at an auction sale to inquire into the legality or otherwise of the sale.

Mr Muigai posed four questions of law (the facts not being in dispute) to the Court on which he expounded his arguments.

The first was: Did Wangechi have any rights over the suit property? She had, he argued, been in actual possession of the suit property pursuant to a contract for sale which was substantially performed. Therefore, argued Mr Muigai, pending registration Muchemi became a trustee for Wangechi, with an equitable obligation to conduct his affairs not to injure the interests of Wangechi as beneficial owner. Mr Muigai was unable to produce a single authority for this, I would say, novel proposition and I am always ready to consider such a proposition if the law allows me to do so. But I am afraid the law does not allow me to do so.

S 54 of TPA defines "sale" as transfer of ownership in exchange for price paid or promised or part-paid and part-promised.

This section also says:

> "Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards or in the case of a revision or other tangible thing, can be made only by a registered instrument"
>
> "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties".
>
> "It (contract of sale) does not, of itself, create any interest in or charge on such property."
>
> The words 'contract of sale' in brackets above are introduced by me to show what the word "it" refers to.

It was held in no uncertain terms by the then Court of Appeal for Eastern Africa in the case of *El Subhi vs El Miskinia* [1955] 22 EACA 273 that the principle of decision in *Walsh vs Lonsdale* [1882] LR 21 Ch D 9 does not apply when statutes regulate the matter in issue. Sir Newham Worley Vice-President said at page 276 of that case:

> "Mr Rahim would have done better to have consulate later works which are also in the library of this court eg *Mulla's Transfer of Property Act* 2nd (1936) edition, page 265. Two decisions of the Privy Council are there cited, which have made it quite clear that the equity of *Walsh vs Lonsdale* was excluded by the statutory requirements of registration prescribed both in the Transfer of Property Act and the Registration Act. The two cases cited are *Arif vs Jadunath* [1931] 58 IA and *Mian Pir Bux vs Sardar Mohamed Tahar* [1934] 64 IA 388".

In the face of this law (and where the law makes a particular provision, equity cannot be invoked in aid to lessen its rigours. I am unable to accept Mr Muigai's said argument. In any event trust or equitable obligation was not even attempted to be pleaded. There is no legal ownership or interest unless by registration. S 99 of the GLA says:-

> "All transactions entered into affecting or conferring or purporting to confer, limit or extinguish any right, title or interest, whether vested or contingent, to in or over land registered under this Act (other than a letting for one year only or for any term not exceeding one year), and all mutations of title by succession or otherwise, shall be registered under this part."

The only way Wangechi could have preserved her interest in the suit land, as I see it, was by registering against the title of the suit land a caveat claiming a purchaser's interest, a step which all prudent conveyancing advocates keep in mind and act upon to protect their clients' interests. The buyer's duty is to check the register and see if the title of the vendor or the mortgagee exercising its/his power of sale is clear. Section 116 of TPA expressly provides for lodgment of caveats to protect such interest. It is hence my view that Mr Muigai's arguments on trust and equitable obligation of the vendor to the purchaser do not affect the position of a purchaser of property without notice of such interest. His advocates' duty is to check the register of documents under the GLA before presenting the transfer for registration in favour of the purchaser.

It may well be that discretion is the better part of valour in a case involving auction sale or yet again such a purchaser, in prudence only, may well make such inquiries as to put him on guard not to buy a law suit. But in my view a purchaser for value without notice and not being involved in any fraud stands on a different footing.

Mr Muigai also argued that the conduct of Savings and Loan and Muchemi estopped Savings and Loan from taking a different position. At this stage I make no comments on what the effect the conduct of

Savings and Loan and Muchemi *vis-a-vis* Wangechi has on the claim in the superior court. That will be an issue for the superior court to decide later on. But that particular conduct, to which the Kanyagias are not a party, does not affect their rights as purchasers for value, without notice of registered encumbrances (emphasis mine).

Mr Muigai did say quite frankly that he was unable to find an authority for the proposition that the purchaser at an advertised auction sale is bound to inquire into the occupier's rights. He simply stated that the Kanyagias were aware of the interest of Wangechi. I see no evidence of such fact. If indeed there was any such evidence it was not brought to the notice of the learned judge.

Mr Muigai then went on to argue as to when the interest in the suit land passed to the purchaser at or after the auction and whether the learned judge's interpretation of law departed from the correct legal position.

When does the title pass; or putting it another way: when does the right of redemption vested in the mortgagor come to an end?

Section 60 of TPA as amended by Act No 20 of 1985 sets out the right of a mortgagor to redeem. This section says where relevant:

> "60. At anytime after the principal money has become payable, the mortgagor has a right, on payment or tender .... or to execute .... that any right in derogation of his interest transferred to the mortgagee has been extinguished: Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a court and is exercised before the mortgagee has under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property". (emphasis mine).

It is to be noted that the emphasised part was brought in by way of amendment in 1985. Until then the equity of redemption remained in the mortgagor until the date of registration of the transfer in the name of the buyer.

It is clear therefore that Muchemi's equity of redemption came to an end when the Kanyagias signed the contract of sale and not later. However, it is not in dispute that even registration of the title of the suit property in favour of the Kanyagias has also been effected.

Mr Ibrahim for the Kanyagias relied on the case of *Mbuthia vs Jimba Credit Finance Corporation & another* Civil Appeal No 111 of 1986 (unreported) to say that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale. Although Apaloo, JA (as he then was) differed with Platt, JA and Masime Ag JA (as they then were) in the end result, all three judges were *ad idem* on the issue as to the extinguishment of the equity of redemption upon the execution of a valid contract of sale in the exercise of statutory power of sale. That was and is the law when the land is held under Registered Land Act (cap 300), despite that Act (RLA) expressly applying English doctrines of equity per section 163 of RLA.

As TPA expressly so provides, the answer to Mr Githu's question is clear. In my view, Muchemi's equity of redemption was extinguished when the contract for sale was signed on the date of auction sale.

The next issue that arises is: did Muchemi's right of redemption vest in Wangechi? Yet again Mr Githu was not able to find an authority to say it did. I do not see how a right of redemption which is peculiar to a mortgagor can vest in a purchaser of that property when such right can only be extinguished by the mortgagor himself. I have found nothing to say that a purchaser of a mortgaged property *ipso facto* acquires or takes over the vendor's (mortgagor's) right to redeem. It is a right *in personam*, not *in rem*. Unless there is proper transfer of such right duly registered and agreed tri-partite I do not see how Wangechi could acquire any such right.

Another question Mr Muigai posed was: Does a registration under the GLA foreclose an inquiry into the legality of the processes preceding the registration? It is a general poser. Yes, if fraud is discovered, the

Court can go into the process preceding registration. In this particular case there is no allegation of fraud. Some attempt was made to allege fraud as against the Kanyagias but without any particulars of fraud. Effectively even the proposed amended plaint did not involve the Kanyagias in any manner with the problems between Muchemi, Wangechi and Savings & Loan.

What did the learned judge do? Having correctly granted an order for vacant possession to the Kanyagias on 28th day of September, 1989 he proceeded to set aside those orders "2 (two) months from the date of this ruling if the applicant has paid all costs of all defendants taxed and demanded 1 (one) week before that date".

Whilst I see what the learned judge had in mind it was not one of his usual expressive clear orders. What he meant was that there would be stay of execution of the eviction order provided the plaintiff paid taxed costs of all the defendants within one week of demand and that the bills of costs ought to be taxed one week at least before the expiry of the said two month stay order. I understand Mr Ojiambo's anxiety about the efficacy of this order. But it is there and that order effectively attempts to stay the eviction on terms as stated.

Nothing however turns on it now. I have come to the conclusion that the learned judge used his discretion (if he had any in this particular matter) wrongly. I am satisfied that had the learned judge properly applied the principles of law involved he would have not have granted stay of eviction order made correctly earlier by him. I am also satisfied that the learned judge arrived at a wrong decision by not properly considering the effect of sections 54, 60 and 69B of TPA. Section 69B (2) of TPA clearly states:

> (2) Where a transfer is made in the exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground -
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> (a) that no case had arisen to authorize the sale; or
>
> (b) that due notice was not given; or
>
> (c) that the power was otherwise improperly or irregularly exercised,
>
> and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorised or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

So the remedy, for Wangechi, if any, lies in my view, in damages as against Savings & Loan and/or Muchemi. The Kanyagias have obtained a good title.

It was in all these aspects that the learned judge, with respect, went wrong, although he had anxiously considered the matter before him. I must do justice according to law and not conscience if conscience does not accord with the law and in this case it does not. There was miscarriage of justice in so far as the Kanyagias are concerned.

The learned judge in my view also erred in holding that the vendor must be given vacant possession of the property sold at an auction unless expressly absolved from such requirements by the contract. The purchaser buys such property subject to rights, if any, of sitting tenants or occupants and if the law allows him to obtain vacant possession he can do so by coming to Court.

I note that the second and third respondents are supporting the appeal.

I would propose that this appeal be allowed and the orders made by Shields, J on 20th May, 1992 be set aside and be substituted with the following orders:

> (1) That the appellants be and are hereby granted leave to execute the order for eviction before the

assessment of mesne profits and/or damages; such execution however not to take place before 30th September, 1995.

(2) That such mesne profits and/or damages be assessed by a judge of the superior court.

(3) That the first respondent do pay to the appellants their costs of the suit in the High Court.

(4) That the superior court do decide if the second respondent is liable to indemnify the first respondent in respect of costs of suit in the superior court.

(5) That the second and third respondents do bear their own costs of this appeal.

(6) That the costs of suit as between the third respondent and second respondent be decided by the superior court.

(7) That there shall be no order as to costs of this appeal.

AKIWUMI, J.A The background to this appeal has been fully set out in the judgment of Shah J.A. and I do not therefore intend to refer to it accept as it may relate to the legal points that have been argued in the appeal. It has been urged by counsel for the appellants that Shields J had been wrong to set aside his previous orders which he had made without benefit of hearing the respondent and vacating the temporary injunction granted her and, as claimed in the appellants counter-claim, for orders for the eviction of the first respondent from the suit land which its registered proprietor the second respondent, had mortgaged to the third respondent bank, Savings and Loan (K) Ltd, and which, the appellants being the highest bidders had bought at the public auction conducted on 24th November 1988, at the instance of the bank, and for mesne profits and damages claimed by the appellants against the first respondent. The reason for this submission were that although shields J. had been of the opinion that the conduct of the second respondent who had sold the suit land which he had already mortgaged to the bank, to the first respondent on condition that she repaid his loan to the bank, had been reprehensible in that he had, it appeared, with the connivance of the bank, frustrated the first respondent from being substituted in his place as the mortgagor, and that this set of circumstances "cry out for the full hearing of the plaintiffs ," the learned judge had nonetheless, so misdirected himself on the applicable basis law that the appeal by the appellants against his ruling setting aside his previous orders should be allowed.

By what is it that cries out for a full hearing? The first respondent had initiated the suit by suing the second respondent, the bank and the appellants to stop the transfer of the suit land to the appellants on her undertaking to deposit into court what the second respondent owed the bank and incidentally admitting thereby, his indebtedness to the bank which would entitle it to exercise its statutory right of sale; for an order or specific performance that the second respondent perform his obligations arising out of the agreement of sale of the suit land between him and the first respondent ; and for an injunction to restrain him, the bank and the appellants from evicting her from the suit land. The appellant's defense to this claim was as to be expected; that they had has **bona fide** purchasers for value without notice, fully paid the auction price as knocked down to them, in due time. In their counter claim, they sought the eviction of the first respondent from the suit land, mesne profits for her occupation of the land and general damages.

The first respondent first obtained a temporary injunction to restrain the second respondent, the bank and the appellants from evicting her from the suit land and the bank, from registering the transfer of the suit land in the name of the appellants unless what the first respondent had paid to the bank on behalf of the second respondent, the bank and respondent deposit in court Kshs.1.1 million as security. On 28th September, 1989, the appellants on their part, and there is no hint of any foul play, were able to obtain from shields J. who must have had pertinent pleadings before him and who did not seem to have had any difficulties doing so, orders striking out the plaint and vacating the injunction earlier granted to the first respondent which enabled the suit land to be registered under the name of the appellants.. the learned judge also granted orders for the eviction of the first respondent from the suit land and for the assessment of mesne profits and damages in terms of their counter claim. An attempt to evict the first respondent is

what prompted her to apply to shields J. to set aside his orders made on 28th September, 1989. This he did, and in expressing his opinion as to the applicable law, the learned judge was unable to agree with the submission that property sold at the public auction by a mortgage passed on the fall of the hammer. In his view:

"All that happens when the hammer falls is that there is a valid contract of sale between the Mortgagee as vendor and the purchaser. before the contract can be completed, the vendor must establish a good title and give vacant possession of the property to the purchaser (unless expressly absolved from such requirements by the contract.) in order for the vendor to give vacant possession he must eject not only those lawfully in possession but also any person who has no claim of right (see Halsbury, Laws of England 5th Edition vol. 42 sale of land pg.129) "

This statement of the law does not take into account certain statutory provisions of the laws of this country. The present legal position was enunciated in the celebrated case of **Mbuthia v Jimba Credit Finance Corp** and another civil appeal No.111 of 1986 in which the bench was unanimous on what happens on the fall of the hammer at a public auction where the mortgagee is exercising his statutory right of sale. Apaloo J.A. as he then was then stated the legal position as follows:

> "Since reporting this judgment, my attention has been drawn to the statute Law (Miscellaneous Amendments) Act 1985 (No.19 of 1985) which amends section 60 the Indian Transfer of Property Act 1882, by adding to the words "a Court" in the second paragraph of the proviso to the section of the following:
>
> "And is exercised before the mortgagee, has under the provisions of this Act, either by public auction or private contract entered into a binding contract for the sale of the mortgaged property."

This means that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. "

Masime J.A. also put the matter succinctly when he stated as follows:

> "In this regard I respectfully agree with Platt and Apaloo JJ.A. that the effect of the long line of English authorities and decisions of this court in respect of mortgages under the Indian Transfer of Property Act is that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale. "

These statements of the law reflect fully the purpose of the amendments to s. 60 of the transfer of Property Act which were expressed as follows in the memorandum of objects and reasons of the Statute Law (miscellaneous amendments) Bill, 198 which introduced the amendment:

"The amendment to the transfer of Property act will remove an anomaly where the right of a mortgagor to redeem the mortgage could be exercised even after the mortgagee had contracted to upon the foregoing, it is clear that the law as stated by Shields J. is wrong. Before concluding, however, it is worth noting that even though Shields J had expressed some criticism about the conduct of the second and third respondents, he had not characterized this as fraudulent. In the affidavit of the first respondent in support of her application to Shields J. to set aside his orders of 28th September, 1989, she has deponed that she had instituted proceedings for breach of contract by the second respondent and for an order of specific performance against him. It is also clear from this affidavit that notwithstanding certain inconsistencies in the matter, she was well aware that she had not been substituted by the bank in place of the second respondent with respect of the mortgage of the suit land, as well as bank's intention to exercise its right of sale. In paragraph 13 (g) of the affidavit, the first respondent deponed that:

> Savings and Loan (K) limited t5he second defendant has been assured by the said District Commissioner that I was still interested in the said property and do everything possible to salvage the said loan and redeem the property thereof ,"

Which could be said to epitomize the state of affairs at the time the suit land was auctioned and which cannot be said to amount to fraudulent action on the part of the bank or the second respondent. Furthermore, it has not been suggested that the price bid by the appellants is so far below the real value of the suit land as to taint its sale of the public auction with fraud. The ban k may like shylock have insisted on its pound of fresh, but it cannot be said that it acted fraudulently. In my view S.77 of the Registered Land Act which permits a sale to be set aside if there is fraud and provided relief is sought promptly, which was not so in this case, would not therefore apply even if, which is not the case here, the suit land had not been transferred and registered in the names of the appellants.

In the result, I would allow the appeal in the terms proposed by Shah J.A.

OMOLO JA. I have had the advantage of reading in draft from the judgment prepared by Shah, JA; I have also read that of Akiwumi, JA; I agree with them and have nothing useful to add. The orders of the court shall be as proposed by Shah, JA.

Dated and delivered at Nairobi this 11th day of August, 1995.

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B SHAH

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR