IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Muli & Omolo JJ A)

CIVIL APPEAL NO. 50 OF 1988

BETWEEN

CHATUR RADIO SERVICE...APPELLANT

AND

PRONOGRAM LIMITED..RESPONDENT

(Appeal from a judgment/decree of the High Court of Kenya at Nairobi (Shaikh Amin, J) dated 4th May, 1986

in

HCCC No 3380 of 1980)

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JUDGMENT

Gicheru JA. In the case of *Mayers and another v Akira Ranch Ltd (No 2)* [1972] EA 347, hereinafter referred to as the *Mayers* case, a consent judgment had been entered in certain proceedings in the High Court of Kenya at Nairobi pursuant to which Akira Ranch Ltd, hereinafter referred to as Akira, executed a chattels mortgage over 1,200 head of cattle in favour of Mayers and another. Subsequently, Akira and another sued the latter two in the same Court for a declaration that the chattels mortgage and the other instruments were void and unenforceable.

In a purported exercise of the powers conferred by the chattels mortgage, Mayers seized the cattle and removed them from the ranch. Akira and another then applied *ex parte* for a temporary injunction to prevent the sale of the cattle and to order their return to the ranch. That injunction was granted as prayed on 18th December, 1969 but as soon as Mayers and another became aware of it, they moved the Court to have it set aside with the result that the same was immediately suspended but was eventually discharged on 1st April, 1971. The application for the discharge of the injunction was *inter alia* headed with a reference to section 97 of the Civil Procedure Act, the Act, which latter section was the precursor to section 3A of the Act. That application contained a prayer for such further or other order as the justice of the case may require and at the hearing thereof a specific request for an order for inquiry into damages and the consequential orders were made. It was quite apparent from the affidavit annexed to the application that a very large sum would be claimed. The Court, however, refused to order an inquiry as to damages and for that reason declined to make the consequential orders flowing therefrom. Against that refusal, Mayers and another appealed to the Court of Appeal for East Africa, the predecessor of this

Court.

At the hearing of that appeal, the granting of the injunction referred to above was criticised partly because the affidavits supporting the application for the same did not establish the essential requirements prerequisite to the grant of an injunction and therefore the order granting the said injunction should not have been made and partly because the applicants were not required to enter into an undertaking as to damages. As regards the latter, Spry, V-P, in a judgment with which the other two members of the Court concurred made the following observations:

“there does not appear to be any East African authority laying down any rule of practice. In England, such undertakings are invariably required, save in certain special circumstances, such as applications on behalf of the Crown. I do not know the practice in India, but o 39, r 2 (2) in the First Schedule to the Civil Procedure Code, 1908, allows the Court, when granting an injunction, to impose terms, and it appears from the commentaries that this power had been used to require an undertaking as to damages. When that rule was reproduced in the Kenya Civil Procedure (Revised) Rules, 1948, the words “an enquiry as to damages” were inserted, which suggests that the intention was that the English practice should be followed. Be that as it may, I am firmly of the opinion that, save in exceptional circumstances, such an undertaking should always be required when an interlocutory injunction is granted.”

He then proceeded to say that:

“An undertaking is given to the Court, not to the other party, and a suit cannot be founded on such an undertaking. In England, the breach of such an undertaking is dealt with in the same way as the breach of an injunction ...... by proceedings for committal. In Kenya, the procedure is by attachment or committal, under o 39 r 2(3).”

The Vice-President then continued:

“The Court has power to enforce undertakings given to it and to punish the breach of such undertakings: the power comes into being when the undertaking is given,

and it is only in this sense that the word jurisdiction should be read.”

Concerning the reference to suits in section 64(2) of the Act, the Vice-President said that in his opinion, such reference:

“can only be to suits in tort for abuse of civil process.”

He could not think of any other cause of action that could be invoked. In this regard therefore, he concluded by saying that:

“The only action for abuse of civil process is only available where both absence of reasonable and probable cause and malice can be proved and this will obviously only be in the exceptional case.”

According to him:

“The position in Kenya would seem to be that a defendant can recover damages from the plaintiff in respect of a temporary injunction wrongly granted-

(a) On a breach of any term contained in an order made under o 39, r 2(2) and enforceable under r 2(3);

(b) Summarily, up to a maximum of Kshs 2,000/- under section 64;

(c) Under s 91 where a decree was issued and has been subsequently varied or reversed; or

(d) In a suit brought for abuse of civil process.

The question is whether the High Court may, and should, invoke its inherent power so as to award damages which could not be awarded in any of those ways. In my view, it cannot. The inherent power could only be invoked in the proceedings in which the injunction was discharged, but that is precisely the situation for which s 64 provides. In providing that the Court may award compensation not exceeding Shs 2,000/-, the statute is, in effect, saying that the Court shall not in such proceedings award more than Shs 2,000/-. The inherent power cannot be invoked so as to defeat the express provisions of a statute."

A little later in his judgment he said:

"I think s 64 governs all interlocutory applications made to the Court for damages for injury suffered through the improper grant of a temporary injunction. An application should properly be headed with a reference to the section, but it applies whether or not it is so cited."

Evidently, from the foregoing, it is plainly obvious that Spry, V-P was of the view that save in exceptional circumstances, an undertaking as to damages should always be required when an interlocutory injunction is granted and that the words "an inquiry as to damages" in order XXXIX rule 2(2) of the Civil Procedure Rules, the Rules, indicate that their intention in this regard is that the English practice is to be followed.

The object in insisting upon an undertaking as to damages is that if by misadventure through the judge not knowing all the facts, such as being misled by the affidavit evidence before him or by the arguments of counsel, an injunction is granted on an interlocutory application which ought not to have been granted, then the defendant is entitled to some remedy in damages; thus, the defendant becomes protected against the damage he may suffer by the wrongful issue of the injunction so that the whole purpose of such injunction, which is to preserve matters in status quo until the issue to be investigated in the suit can finally be disposed of, is not rendered nugatory. Save therefore in exceptional circumstances, an undertaking as to damages is required when an interlocutory injunction is granted in order that the Court granting such injunction may be able to do justice if the injunction was wrongly granted. See *Fenner v Wilson* [1893] 2 Ch 656 at page 658; *Noormohamed Janmohamed v Kassamali Virji Madhani* [1953] 20 EACA 8 at page 11; and *Smith v Day* (1882) 21 Ch D 421 at pages 424 and 425. In this regard, Turner, LJ had this to say in *Newby v Harrison* [1861] 3 De GF & J 287:

"The true principle appears to me to be this, that a party who gives an undertaking of this nature puts himself under the power of the Court, not merely in the suit but absolutely; that the undertaking is an absolute undertaking that he will be liable for any damages which the opposite party may have sustained, in case the Court shall ultimately be of the opinion that the order ought not to have been made."

Unless under special circumstances, the undertaking as to damages which ought to be given on every interlocutory injunction should be given effect: for if any damage has been occasioned by such an injunction, which on the hearing, is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, and not on the party who has been made a litigant without just cause. See *Graham v Campbell* [1878] 7 Ch D 490 at page 494.

The undertaking as to damages applies in all cases where the Court at the hearing determines that the plaintiff is not entitled to an interlocutory injunction. At that stage, the defendant becomes entitled on the plaintiff's undertaking, to an inquiry as to the damages sustained by him by reason of that injunction the purpose of which is to facilitate his obtaining full compensation for all the injury caused to him by the granting of such injunction. Unless therefore there are special circumstances to the contrary, whenever the undertaking as to damages is given by the plaintiff in an application for an interlocutory injunction, and the plaintiff ultimately fails on merits, the defendant will be granted an inquiry as to the damages occasioned to him by the grant of such injunction. See *King v Rudkin* [1877] 6 Ch D 160 at page 165 and *Griffith v Blake* (1884) 27 Ch D 474 at pages 476 and 477.

Compliance with an undertaking as to damages necessarily involves an investigation as to the damages sustained by the defendant on account of wrongful grant of an interlocutory injunction. Such investigation is no less than a judicial examination and determination of the issue of the damages the defendant is

entitled to. Indeed, it is in effect an interlocutory trial of that issue. On the establishment and assessment of such damages, the plaintiff who gave the undertaking is enjoined to comply therewith. This, I think is what is contemplated by the words in order XXXIX rule 2(2) of the Rules that the Court may by order grant a temporary injunction on such terms *inter alia* "as to an inquiry as to damages" as it thinks fit: for upon such term, the plaintiff who is seeking the injunction is undertaking to submit wholly to the power of the court granting such injunction to adjudicate on the issue of the damages sustained by the defendant by reason of an improper grant of the injunction. That, as is evident from what I have attempted to outline above, is what an undertaking as to damages is all about and the non-compliance with it is enforceable by the Court granting the injunction by attachment and/or committal under sub-rules (3) and (4) of the rule mentioned above.

In the *Mayers* case, Spry, V-P recognised that in this country a defendant

can recover damages from the plaintiff in respect of a temporary injunction wrongly granted on a breach of any term contained in an order made under order XXXIX rule 2(2) of the Rules and enforceable under sub-rules (3) and (4) of the said Rule quite apart from any interlocutory application made to the Court in that regard under section 64 of the Act. This recognition is obviously because in that event the Court granting the temporary injunction would simply be enforcing a term attaching to such injunction.

Under section 63 of the Act, the Court may grant a temporary injunction if it is so prescribed by the rules. In an application for such injunction under rule 2(1) of order XXXIX of the Rules, sub-rule (2) of the said Rule prescribes that the Court may by order grant the injunction, on such terms *inter alia* "as to an inquiry as to damages" which latter term as I have indicated above amounts to an undertaking as to damages. Giving effect to such term has nothing to do with any interlocutory application for compensation under section 64 of the Act the scope of which is limited to:

(1) The injunction having been applied for on insufficient grounds; or

(2) Where the suit of the plaintiff fails and there was no reasonable or probable ground for instituting the same.

Pursuant to an *ex parte* chamber summons taken out under order XXXIX rules 1, 2, 3 and 7 of the Rules and section 3A of the Act and dated 3rd December, 1980 the High Court at Nairobi by what is commonly known as an Anton Piller order dated 4th December, 1980 granted an interlocutory injunction to the respondent herein who was the plaintiff in that Court's Civil Case No 3380 of 1980 against the appellant herein who was the defendant in that case upon its undertaking as to damages. That injunction was in these terms:

"This Court doth order that:-

1. The defendant be and is hereby restrained until further order in the meantime from doing whether by itself, its officers, servants or agents or any of them or otherwise howsoever the following acts or any of them that is to say:-

(a) Infringing the copyright in any sound recording the copyright in which is owned by the plaintiff or of which the plaintiff is the exclusive licensee in Kenya;

(b) Manufacturing, causing, enabling or assisting others to manufacture copies of sound recordings the copyright in which was owned by the plaintiff or of which the plaintiff is the exclusive licensee in Kenya;

(c) Parting with possession, power, custody or control (otherwise than to the plaintiff or its authorised agents) of or in any way altering, defacing or destroying the following articles or any of them that is to say:-

(i) Infringements of the copyright in any sound recordings in which is owned by the plaintiff or of which the plaintiff is the exclusive licensee in Kenya;

(ii) All documents, files, articles or equipment relating to the recording, manufacture, sale or supply of infringements of the copyright in any sound recordings the copyright in which is owned by the plaintiff or of which the plaintiff is the exclusive licensee in Kenya.

2. The defendant whether acting by itself, its servants, agents or any of them or otherwise howsoever do permit such person not exceeding two as may be duly authorised by the plaintiff and members or employees not exceeding two of the plaintiff's advocates to enter forthwith the premises known as Chatur Radio Service or such parts thereof as shall be occupied or used by the defendant at any hour between 9.00 am and 6.00 pm for the purpose of:-

(i) Inspecting and photographing if they think fit all documents, files, articles or equipment relating to recording, manufacture or sale of equipment relating to recording, manufacture or sale or supply of infringements of the copyright in any sound recording the copyright in which is owned by the plaintiff or of which the plaintiff is the exclusive licensee in Kenya;

(ii) Listening to any tapes on the defendant's premises for the purpose of ascertaining what tapes including infringing copies of sound recordings the copyrights in which is owned by the plaintiff or of which the plaintiff is the exclusive licensee in Kenya;

(iii) Removing into the plaintiff's advocates custody:

(a) All original documents relating to the recording, manufacture or sale or supply of infringements of the copyright in any sound recordings the copyright in which is owned by the plaintiff or of which the plaintiff is exclusive licensee in Kenya;

(b) All infringing copies of any sound recordings the copyright in which is owned by the plaintiff or of which the plaintiff is the exclusive licensee in Kenya."

The respondent's advocates served this order together with the plaint and summons on the appellant and informed it of its rights to consult its advocate before entry into its premises in accordance with the said order. Thereafter and on the same day – 4th December 1980 – the respondent effected the order and took away various music cassettes, empty cassette boxes and documents after preparing an inventory of the same, a copy of which was left with the appellant.

On 15th January, 1981 the appellant filed its statement of defence to the respondent's suit. After that, no steps were taken to have the suit set down for hearing. By a notice of motion dated 18th March, 1986 the appellant applied to the High Court at Nairobi to have the said suit dismissed with costs under order XVI rule 5 of the Rules. On 2nd May, 1986 that suit was dismissed with costs to the appellant. Upon that dismissal, an inquiry as to damages in accordance with the respondent's undertaking as is referred to above was conducted by Shaikh Amin, J. In that inquiry, the learned judge observed that the evidence adduced before him indicated that by reason of the order granting the respondent the interim injunction set out above, the appellant had suffered damages in excess of Shs 2,000/-. According to him therefore, he would have assessed and granted such damages in excess of Shs 2,000/- but found himself bound by the very wide general principles laid down by Spry, V-P in the *Mayers* case. He in particular found himself unable to wriggle out of the statement in that case in which Spry, V-P said:

"I think s 64 governs all interlocutory applications made to the Court for damages for injury suffered through the improper grant of a temporary injunction. An application should properly be headed with a reference to the section, but it applies whether or not it is so cited."

This statement which I had set out earlier in this judgment appears to

have considerably disturbed the learned judge who said that he reluctantly had to accept and follow the decision in the *Mayers* case. In the result, he awarded the appellant damages in the sum of Shs 2,000/- which is the maximum permitted by section 64 of the Act.

The appellant's two grounds of appeal to this Court were basically a complaint against the learned judge's failure to appreciate that the *Mayers* case was distinguishable from the case that was before him for whereas in the former case there was no undertaking as to damages in the latter case there was and in the circumstances, damages under such undertaking were not limited to the maximum of Shs 2,000/- prescribed by section 64 of the Act. The rival submissions of both counsel for the appellant and for respondent gravitated upon whether or not the learned judge had jurisdiction to award damages in excess of the Shs 2,000/- limited by the aforesaid section in view of the decision in the *Mayers* case.

It is true that in the *Mayers* case there was no undertaking as to damages and as is outlined at the beginning of this judgment, at the hearing of the application for the discharge of the temporary injunction, which *inter alia* was headed with a reference to section 97 of the Act which latter is the predecessor of section 3A of the Act, an order for an inquiry as to damages was specifically asked for together with other consequential orders. That request was refused by the High Court of Kenya at Nairobi and against that refusal Mayers and another appealed to the Court of Appeal for East Africa. In the case from which this appeal arises, the respondent was required to and did enter into an undertaking as to damages and what followed after the same was dismissed for want of prosecution was an inquiry as to damages in compliance with that undertaking. In that regard therefore, the *Mayers* case was distinguishable from the case out of which the instant appeal has arisen. In the former case an inquiry as to damages was not possible without there having been an undertaking as to damages and the only recourse available to the aggrieved parties was to seek compensation in accordance with section 64 of the Act. In the latter case, however, with the undertaking as to damages attaching to the order granting the temporary injunction, an inquiry as to damages was, in the absence of special circumstances to the contrary, matter of course. A breach of such undertaking was enforceable under rule 2(3) and (4) of order XXXIX of the Rules as I have pointed out above. Such enforcement is independent of section 64 of the Act and the damages recoverable in that regard are not limited to the maximum of Shs 2,000/- provided for by that section. Otherwise, interlocutory applications to the Court for damages for injury suffered through the improper grant of a temporary injunction must be made within the purview of the above mentioned section.

It would appear therefore that in the circumstances of the case before the learned judge, the decision in the *Mayers* case did not restrict him to the Shs 2,000/- limited by section 64 of the Act since it was outside the scope of that section. It was within his power to assess damages in excess of Shs 2,000/- and grant the same to the appellant if he found the latter so entitled. In restricting himself to the Shs 2,000/- limit, the learned judge fell into error. For this reason, I would allow the appellant's appeal with costs and order that the case be remitted to the trial judge for the proper assessment of damages.

Muli JA. I have had the advantage of reading in draft the judgment prepared by my Lord Gicheru, JA. The facts are adequately outlined in that judgment and I need not recapitulate them in my judgment except where it will become necessary to do so.

The respondent, Phonogram Ltd was at the material time the copyright owner of many sound recordings and in particular the "Mary's Boy Child – Boney M" recorded on 11th November, 1989. It filed a suit at the superior court against the appellant, Chatur Radio Service, for alleged infringement of the respondent's copyrights praying for various orders including damages occasioned or suffered by the respondent following the alleged infringement of the copyright. Simultaneous with that suit the respondent filed a chamber summons for Anton Pillar injunction to restrain the appellant/defendant, among others, from infringing the respondent's copyright and entry into the appellant's premises to take possession of the materials of the copyright under dispute with a view to taking appropriate measures to prevent further infringement of the copyright. The superior court (AM Cockar J as he then was) granted the interlocutory injunction (hereinafter referred to as "the Anton Pillar injunction") with stringent terms amongst which the plaintiff/applicant gave an undertaking as follows:

"And the plaintiff by its counsel undertaking to abide by an order this Court may make as to damages in case this Court shall hereinafter be of the opinion that the defendant has sustained any by reason of this order which the plaintiff ought to pay."

The respondent suit was subsequently dismissed for want of prosecution whereupon the learned trial

judge proceeded to enquire as to probable damages and awarded the maximum damages of Kshs 2,000/- under section 64 of the Civil Procedure Act. Being aggrieved by the award of

those damages the appellant/defendant filed the present appeal limited only to the award of damages.

There are only two grounds of appeal and the rest are arguments. Mr Khanna who appeared for the appellant complained that the learned trial judge was wrong in applying the case of *Mayers & another v Akira Ranch Limited* [1972] EA 350 as absolutely binding on him, and further that he was wrong in applying section 64 of the Civil Procedure Act as also binding on him. Mr Ojiambo for the respondent, while opposing the appeal, submitted that there were only two options open to the appellant, namely the limited maximum damages under section 64 of the Civil Procedure Act or a separate suit altogether whether there be an undertaking or not.

There were several general points of law which arose in the course of the hearing both at the superior court and before this Court. Firstly, the application for the Anton Pillar injunction and the order thereunder were made under order XXXIX rules 1, 2, 3 and 7 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. Mr Khanna sought to invoke the inherent jurisdiction of the court to award damages which the Court thought were reasonable in the interest and ends of justice. The inherent jurisdiction of the court could not properly be invoked since it is trite and settled law that where there exists a statutory procedure, like in this case, the inherent jurisdiction of the court cannot properly be invoked to circumvent the statutory procedural provision. Secondly, on the nature of the undertaking by a party in an application for the interlocutory Anton Pillar injunction *vis a vis* the Court and the parties to the suit, Mr Khanna maintained that the undertaking by the respondent's counsel took the appellant's claim from the ambit of both sections 63 and 64 of the Civil Procedure Act and the *Mayers* authority. That the appellant's suit was based on the above undertaking and not under sections 63 and 64 of the Civil Procedure Act.

I consider the undertaking to be one of the main core of this appeal. The undertaking was given to the Court by the respondent/plaintiff to abide by the order the "Court may make as to damages" payable by the respondent if the Court was of the opinion that the appellant sustained damages by reason of the said order. It was not an undertaking between the appellant and the respondent. It was an undertaking to the Court and it gave the Court jurisdiction to award damages suffered by the respondent/defendant as a result of the wrong order at the instance of the plaintiff/respondent.

If I understood Mr Khanna's complaint and indeed his memorandum of appeal, he does not complain about the propriety of the issuance of the

Anton Pillar injunction, but his complaint in this appeal is limited to the award of damages which he considers to be inordinately inadequate. It follows, therefore, that the granting of the Anton Pillar injunction with stringent terms is not a ground in the present appeal. I assume therefore that the superior court was seized with the principles laid down in the *Anton Pillar v Manufacturing Processes* [1976] 1 All ER 779 following *EMI Ltd v Pandit* [1975] 1 A11 ER 418. The only issue before the Court was, and indeed in the present appeal is, the quantum of damages. The Anton Pillar order contained the undertaking and this fact is not in dispute. Mr Khanna contended that the appellant's claim was based on the undertaking. This cannot be so. Firstly, because the respondent's regular suit was based on the infringement of their copyrights and sought damages flowing from that infringement. Secondly, the undertaking was contained in the interlocutory order for Anton Pillar injunction in the said suit. As such the undertaking cannot be said to be a separate suit. Thirdly, the undertaking was to the Court to give it jurisdiction to award damages to the injured appellant/defendant if the Court was of the opinion that the appellant/defendant suffered damages by reason of wrongly granted Anton Pillar order. As such there was no cause of action based on the undertaking. Once the appellant/defendant opted to make the application following the dismissal of the suit, for inquiry of damages and an order having been granted awarding damages, the appellant cannot now institute another regular suit because the order awarding damages had the effect of *res judicata* of any subsequent suit in respect of the same cause of action. In the exceptional cases, an action is sustainable for abuse of civil process where absence of both reasonable and probable cause and malice are proved. His other option, is now barred, unless he can prove abuse of the civil

process. I for one do not agree with Mr Khanna, that the inquiry held by the learned trial judge following the dismissal of the respondent's suit for want of prosecution was a claim for general damages based on the undertaking in the Anton Pillar order. I also do not agree with him that the undertaking in the Anton Pillar order was for the benefit of the appellant. The undertaking by the respondent/plaintiff was to confer jurisdiction to the Court to award damages to the injured appellant/defendant by reason of the Anton Pillar order should the Court subsequently be of the opinion that the appellant/defendant suffered damages. The penalty for the breach of the undertaking would be tantamount to contempt of court punishable by committal to prison.

I will now turn to the two main grounds of appeal. Mr Khanna submitted that the authority in *Mayers v Akira* [1972] EA 348 was bad law and the learned trial judge was not bound to follow it. With greatest respect I do not agree. Spry V-P, as he then was, in the predecessor of this Court, in

his leading judgment, dealt with matters which Mr Khanna raised again during the hearing of the present appeal. After considering the points raised by counsel Spry VP went on at p 350:

"Speaking of undertakings in damages the judge said 'it is difficult to see how in the absence of such an undertaking, the defendant could recover from the plaintiff the damages which were really sustained by him by reason of the improper order of the court.' The action for abuse of civil process is only available where both absence of reasonable and probable cause and malice can be proved and this will obviously only be in the exceptional case. The position in Kenya would seem to be that a defendant can recover damages from the plaintiff in respect of a temporary injunction wrongly granted;-

(a) On a breach of any term contained in an order made under s 39, r 2(2) and enforceable under r 2(3);

(b) Summarily, upto a maximum of Kshs 2,000/- under section 64;

(c) Under s 91 where a decree has issued and has been subsequently varied or reversed; or

(d) In a suit brought for abuse of civil process."

There are therefore four causes of action founded on the improper grant of interlocutory Anton Pillar injunction. These causes of actions are not cumulative in the sense that they can be invoked and applied together in the same suit or claim. They are disjunctive and the claimant has the option to choose which cause is best suited in a particular case. If, for instance, the claim for damages is based on section 63 of the Civil Procedure Act, the section should be cited although not mandatorily so. Section 63 of the Civil Procedure Act is as follows:

"S 63. In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed-

(a) Issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;

(b) Direct the defendant to furnish security to produce any property belonging to him and to place the same

at the disposal of the Court or order the attachment of any property;

(c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

(d) Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property.

(e) Make such other interlocutory orders as may appear to the Court to be just and convenient."

It is clear from this section that supplemental proceedings are statutorily founded in order to prevent ends of justice from being violated in any manner as provided for in (a) to (e) thereof. Section 64 provides for compensation for arrest, attachment or injunction granted on insufficient grounds. For all claims founded under section 63 of the Act, the Court may award compensation to the statutory maximum of Kshs 2,000/- under section 64 of the Act. The present case would have been founded under section 63(c) of the Act if the applicant/defendant opted to claim compensation under that section and his compensation, if any, would have been limited to the maximum of Kshs 2,000/-. He did not do that but instead he opted to claim under another cause of action, namely under “order XXXIX of the Civil Procedure Rules.

With regard to ground two of the appeal, Mr Khanna argued that the learned trial judge was wrong in awarding summarily Kshs 2,000/- under section 64 of the Civil Procedure Act which he describes as archaic. With greatest respect I do not agree. What Mr Khanna urged us to do was to constitute ourselves as Parliament to effect an amendment to the existing Act of Parliament in the statute books of this country. I would have forgiven Mr Khanna for this blatant misconception of the law if he held a junior standing in this Court.

Section 64 of the Civil Procedure Act (cap 21 Laws of Kenya) provides:

“64(1) Where, in a civil suit in which an arrest or attachment has been effected or a temporary injunction granted under section 63:

(a) it appears to the Court that the arrest, attachment or injunction was applied for insufficient grounds;

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court and the Court may, upon such application, award against the plaintiff, by its order, such amount not exceeding two thousand shillings as it deems a reasonable compensation to the defendant for the expense or injury caused to him provided that, a Court shall not award under this section an amount exceeding the limits of its pecuniary jurisdiction.”

As I have observed earlier the five options of causes of action are not cumulative but disjunctive. The Anton Pillar order of temporary injunction was granted under o XXXIX r 2 of the Civil Procedure Rules *intra vires* and separate from sections 63 of the Civil Procedure Act. The above sections of the Act remain in the statute books and no one else can change them except Parliament itself. Section 64 of the Act shall remain in force until such time that Parliament shall deem it necessary to amend it. No amount of persuasion shall influence me to circumvent the provisions of the sections I have referred to. The learned trial judge, no doubt, found himself in same predicament although he misdirected himself by not appreciating that the applicant’s application was not founded under sections 63 and 64 of the Act. If he so directed his mind to the basis of the applicant’s claim he would not have fallen into the error. The claim was not under sections 63 and 64 of the Act and the statutory maximum of compensation (Kshs 2,000/- did not arise. If, on the other hand, the claim was founded under sections 63 and 64 of the Act there would have been no intendment and no matter how ridiculously low the award of compensation or the injustice which appeared to be inflicted by the Act of Parliament may be, that was the law of the land and the learned trial judge would have been bound to apply the law as it stood.

Order XXXIX of the Civil Procedure Rules provides as follows:-

“1. Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording

reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any

decree that may be passed against the defendant in the suit,

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same.

(2) The Court may by order grant such injunction, on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court thinks fit."

The respondent brought the application under rules 2, 3 of order XXXIX specifically simultaneously with suits for alleged, *inter alia*, infringement of the copyrights. This was perfectly in order under order XXXIX r 9 which provides that applications under rule 1 and 2 must be by summons in chambers. There is no mention of sections 63 and 64 of the Civil Procedure Act in the chamber summons. The suit and the chamber summons were as prescribed by the Civil Procedure Rules and this was not in dispute. Once the applicant claimant files the application for a temporary injunction under r 2 of order XXXIX, then the Court is bound to follow the elaborate procedure laid under the said order and in particular under r 2(3) which requires the Court in its discretion to grant the temporary injunction on "such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise as the Court thinks fit."

These requirements are not provided for claims founded under sections 63 and 64 of the Act, the fact which goes to strengthen my belief that sections 63 and 64 of the Act are specifically for claims founded under

the said sections. Applications founded under XXXIX rules 2, 3 and 9 are quite separate and distinct causes of actions independent from causes of actions under sections 63 and 64 of the Act. The result is that the learned trial judge fell into error in failing to follow the elaborate procedure and to order an inquiry as to damages which would not be limited to the maximum provided for claims or applications made under sections 63 and 64 of the Act. He had unfettered discretion to order the inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise as the Court thought fit.

The respondent's application was for a temporary injunction which the Court granted. The respondent's suit for, *inter alia*, infringement of the copyright was dismissed for want of prosecution. The respondent had given an undertaking to abide by an order the Court might make as to damages in case the Court was of the opinion that the appellant sustained damages by reason of the Anton Pillar injunction which the respondent ought to pay. The learned trial judge found that the Anton Pillar injunction was improperly granted and the appellant has suffered damages. He should have proceeded to assess damages or compensation which would be justifiable to meet the appellant's injury. He had unfettered discretion to award unlimited damages without regard to the maximum provided for under sections 63 and 64 of the Act. This was a misdirection.

The remaining two causes of action are not applicable in this case. Similarly they are separate and distinct from each other as well as the other two I have discussed in the preceding paragraphs. Section 91 of the Act provides for causes of action consequential upon variation or reversal of decrees. The quantum of damages or compensation for consequential variations or reversal of decrees are unlimited and may be awarded without regard to the maximum damages for claims under sections 63 and 64 of the Act.

Finally the cause of action may be founded for abuse of civil process. This again is a separate cause of action which may be brought as prescribed for civil suits. Similarly the damages or compensation are not

limited and may be awarded without regard to any other causes of action I have already discussed and certainly without regard to the maximum provided for under sections 63 and 64 of the Act.

In the result, I would allow this appeal with costs to the appellant. I would remit the case to the superior court for assessment of damages by another judge.

Omolo JA (Dissenting)**.** My Lords, on or about the 3rd December, 1980, Phonogram Ltd, the respondent, instituted a suit against Chatur Radio Service, the appellant, and the respondent claimed in its plaint that it was the owner of the copyright as defined in section 13 of the Copyright Act in very many sound recordings including and in particular the work known as “Mary’s Boy Child” by “Boney M” recorded on the 11th November, 1978, that the appellant was running and operating a record shop situate at Muranga Road and was supplying records and tapes both to the general public and to other retailers of records, that at its Muranga Road premises, the respondent had a considerable quantity of recording equipment which it was using and threatening to use for the manufacture of unlicensed copies (in the form of tapes) of sound recordings the ownership of which was in the respondent and that the respondent was selling the said copies in its shop. The respondent had then prayed for an injunction to restrain the appellant, whether by itself, or its servants or agents or any of them or otherwise howsoever from doing certain acts, namely:-

(i) Infringing the copyright in any sound recording for the time being belonging to the respondent or of which the respondent was, for the time being, the exclusive licensee;

(ii) Converting to their own use the infringing copies of such sound recordings.

The respondent had also prayed for an order for delivery up of all such infringing copies as might have been in the appellant’s possession, power, custody or control. There were other prayers which are not relevant for the purposes of this appeal.

On the same day the respondent filed the claim, it also moved the Court by way of a chamber summons under order 39 rules 1, 2, 3 and 7 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act for what is commonly known as an Anton Piller injunction and the respondent sought very wide and extensive orders in that application. The orders sought were for an injunction to restrain the appellant from doing various acts, namely:-

1. Infringing the copyright in any sound recording the copyright in which was owned by the respondent or of which the respondent was the exclusive licensee in Kenya;

2. Manufacturing or causing enabling or assisting others

to manufacture copies of sound recordings the copyright in which was owned by the respondent or of which the respondent was the exclusive licensee in Kenya;

3. Parting with possession, power, custody or control or otherwise than to the respondent or its authorised agents of or in any way altering, defacing or destroying the following articles or any of them that is to say:

(i) Infringements of the copyright in any sound recordings the copyright in which was owned by the respondent or of which the respondent was the exclusive licensee in Kenya.

(ii) All documents, files, articles or equipment relating to the recording, manufacture, sale or supply of infringements of the copyright in any sound recordings the copyright in which was owned by the respondent or of which the respondent was the exclusive licensee in Kenya.

The respondent had also sought orders that it be allowed, either by itself, its servants, agents, or any of them or otherwise howsoever, to inspect various items in the appellant’s shop, listen to any tapes in the appellant’s premises, remove to the custody of its (respondent’s) advocates, various documents,

infringing copies and so on. It was also prayed that service of the application upon the appellant be dispensed with. A draft order was attached to the application and the application first came up for hearing before Cockar, J, as he then was, on the 4th December, 1980. It was heard *ex parte* and the drastic orders sought in the chamber summons were all granted. There was in the order however, an undertaking by the respondent through its counsel:

"to abide by any order this Court may make as to damages in case this Court shall hereafter be of the opinion that the defendant (appellant) has sustained any (*sic*) by reason of this order which the plaintiff (respondent) ought to pay."

Pursuant to the High Court order of 4th December, 1980, the agents of the respondent visited the appellant's premises, not along Muranga Road as they had alleged, but the one along River Road. It would appear from the record that the respondent's search was not blessed with an enormous success which the respondent had apparently expected. The appellant

subsequently filed its defence on the 13th January, 1981 and the appellant denied virtually all the allegations contained in the plaint. Summons for directions were taken out and heard on the 16th March, 1981. Eventually the case was set down for hearing on the 11th, 12th, 13th and 14th July 1983 but it is not at all apparent from the record what happened on those dates. The respondent thereafter took no steps in the matter and it was the appellant who on the 18th March, 1986 moved the Court that the suit be dismissed under order 51 rule 2(1) and order 16 rule 5 of the Civil Procedure Rules for want of prosecution. That application was heard by Shaikh Amin, J on the 2nd May, 1986; despite having been served with the application, neither the respondent nor its counsel attended the hearing and the suit was, in my respectful view, rightly dismissed for want of prosecution. For my part, I have not the slightest doubt that the respondent behaved in a highly oppressive and high-handed manner to the appellant and if there is any way by which I can increase the paltry sum of Shs 2,000/- awarded to the respondent, I would gladly do so.

Having had the case of the respondent dismissed for want of prosecution, the appellant then set down the case for hearing for the purpose of inquiring into what damages the appellant had sustained as a consequence of the Anton Piller injunction granted to the respondent by Cockar J on the 4th December 1980. A full hearing as to such damages was conducted before Shaikh Amin J on the 1st, 2nd and 10th July 1986 and on 4th November, 1986, the learned judge gave his considered judgment in which he found that though the appellant had sustained damages far in excess of Shs 2,000/-, that was the only amount he could award in view of the decision of the Court of Appeal for East Africa in the case of *Mayers and another v Akira Ranch Ltd (No 2)* [1972] EA 347. The judge was of the view that this decision was absolutely binding on him and that consequently he could only award to the appellant Shs 2,000/- which is the maximum amount provided by section 64(1) of the Civil Procedure Act. That section provides:

"Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under section 63-

(a) It appears to the Court that the arrest, attachment or injunction was applied for on insufficient grounds; or

(b) The suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same.

The defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such an amount, not exceeding two thousand shillings,as it deems reasonable compensation to the defendant for expenses or injury caused to him:

Provided that, a Court shall not award under this section an amount exceeding the limits of its pecuniary jurisdiction

(2) An order determining an application under subsection (1) shall bar any suit for compensation in

respect of the arrest, attachment or injunction."

Mr RN Khanna for the appellant contended that the trial judge was wrong in relying on section 64 of the Act because the appellant had not relied on that section in asking the Court to hold an inquiry into the damages suffered by the appellant as a consequence of the injunction granted to the respondent. If the appellant had intended to rely on section 64, all they would have asked the judge to do was to award to them Shs 2,000/- provided for under the section and there would not have been any need to call the elaborate evidence as was done before the judge. Mr Khanna's contention appeared to be that they were not relying on the section but on the undertaking which the respondent had given as a precondition for the grant of the Anton Piller injunction. It appears Mr Khanna was also arguing that the injunction such as the one which was granted to the respondent was a final injunction and not an interlocutory one and further that the judge was wrong in relying on the *Mayers* case, *supra*, because in that case no undertaking to pay damages had been given before the injunction was granted as was the case in the present appeal.

Let me deal with some of these arguments before I proceed any further. As to the question of whether an Anton Piller injunction can only be a final and not an interlocutory one, I do not think there is any legal support for that proposition. It is to be remembered that there is nothing either under the Civil Procedure Act, or under the Civil Procedure Rules called an Anton Piller injunction. Section 63(c) of the Act merely empowers the Court to grant a temporary injunction. There is nothing like an Anton Piller injunction. Injunctions are to be applied for and the High Court can only issue one under the provisions of order 39 of the Civil Procedure Rules. Again, there is no mention of an Anton Piller injunction or any other such like description. The only description given to the injunctions

under order 39 is- "Temporary Injunctions and Interlocutory Orders." So that an Anton Piller injunction is merely a species of one of the temporary or interlocutory orders the Court may make under order 39. Order 39 rule 3(1) empowers the Court for reasons to be recorded, to grant an *ex parte* temporary injunction if the object of granting the injunction would be defeated by delay. Rule 3(2) provides that such *ex parte* injunction shall last for no more than fourteen days. And rule 4 provides that any order for an injunction may be discharged, or varied, or set aside by the Court on an application made thereto by any party dissatisfied with such an order.

So that under this order, the Anton Piller injunction granted *ex parte* to the respondent would have automatically lapsed under rule 3(2) if it was not extended before the expiry of 14 days. Again if the appellant had been dissatisfied with it, there was absolutely nothing to prevent it applying to the Court, even after one day, to discharge it under rule 4. I am myself of the clear view that though its effects are drastic an Anton Piller injunction can only be issued under the provisions of order 39 and accordingly it is temporary and interlocutory; it is equally subject to the provisions of the order under which it is issued. I would, accordingly, reject Mr Khanna's contention that such an injunction can only be final in nature.

The issue of whether the judge was right in relying on section 64 of the Act is, in my view, at the core of this matter for if the judge was right, then this appeal, subject to what I shall say later must fail. As I have set out elsewhere, Mr Khanna contended that if they were relying on section 64 of the Civil Procedure Act, then there would not have been any need for them to call evidence in the way they did but would simply have asked the judge to award to them Shs 2,000/-. I think this argument is fallacious. The Shs 2,000/- set out in the section is the maximum amount, the Court can give where it is satisfied that an injunction ought not to have been granted at all in the first place. The purpose for the inquiry as to damages is to determine, in the first place, whether the wrongful issue of the injunction has resulted in a loss to the person against whom it was issued and secondly if loss has occurred, the extent of that loss. A Court may well find that no loss has in fact, occurred despite the wrongful issue of the injunction, in which case no damages at all would be awarded. Again a Court may well find that the damages sustained were in fact less than Shs 2,000/- and in that case it is the actual amount of loss sustained that would be awarded. But in no case is a Court entitled to award more than Shs 2,000/-. That must be the basis on which the judge received the extensive, evidence namely to determine if the appellant had sustained damages and the extent of the damages. In the event the judge found as a fact that the appellant had in fact suffered damages and that such damages were in fact far in

excess of the Shs 2,000/- set out under section 64; the judge, however, failed to determine the actual loss which he thought the appellant had sustained. It was his duty to determine the actual loss suffered and he was wrong in not doing so.

Was the judge, however, right in relying on section 64 and on the *Mayer* case? Mr Khanna contended that the judge was wrong, while Mr Ojiambo for the respondent contended that he was right. As far as I can see the only provision giving the High Court jurisdiction to award damages for the wrongful issue of an injunction is section 64 of the Act. This is the basis of the court's jurisdiction in that kind of situation. The inherent powers of the court conferred by section 3A of the Civil Procedure Act cannot be invoked in such a situation because section 64 specifically provides for the situation. Nor can the unlimited jurisdiction of the High Court conferred by section 60(1) of the Constitution be called in aid because there is really nothing unconstitutional in an Act of Parliament, limiting the amount of relief the High Court can grant.

That was the position taken by Spry, VP (as he then was) in the *Mayer* case and for my part I would respectfully agree with him. I did not, in fact, understand Mr Khanna to content that he was relying either on section 3A of the Civil Procedure Act or section 60(1) of the Constitution. Mr Khanna's contention was that they were relying on the undertaking to pay damages given by the respondent when the injunction was granted to it *ex parte*. Counsel contended that that undertaking was extremely wide and did not limit the damages undertaken to be paid to any amount. He criticised the judge for relying on the *Mayers* case because in that case, there was no undertaking to pay damages as was the case in the present dispute. Mr Khanna is undoubtedly correct in saying that the undertaking to pay damages was unlimited as to the amount of such damages and again he is undoubtedly right in the contention that in the *Mayers* case there was no such undertaking at all. But though there was no form of undertaking at all in the *Mayer* case Spry VP, whose judgment the other members of the Court agreed with, specifically dealt with the issue of an undertaking. He said at page 349 letter I and at page 350 letters A to G.

"Mr Slade, for Akira, argued that the High Court has jurisdiction to award damages in respect of an injunction wrongly obtained only on one of three bases: under s 64 in which case it is subject to the limit of Shs 2,000/-: under s 91, which he submitted would apply only to perpetual injunctions; and where an undertaking has been given. Section 64(2) provides

that an order on an application under the section bars a suit for compensation and this implies that a suit may otherwise be brought. Mr Slade submitted that such a suit could only be a suit founded on an undertaking. With respect, this cannot be so. An undertaking is given to the Court, not to the other party, and a suit cannot be founded on such an undertaking. In England, the breach of such an undertaking is dealt with in the same way as a breach of an injunction (see the Supreme Court Practice, 1967, notes under o 29 r 1 and o 45 r 5) by proceedings for committal, under o 39 r 2(3). Mr Slade sought to support his argument by reference to various English cases and he drew our attention to the use by Cotton, LJ, in *Smith v Day* (1882), 21 Ch D 421 at p 430 of the expression "jurisdiction founded on the undertaking." Mr Khanna, in reply, submitted that jurisdiction could not be based on the undertaking, as consent of parties can never confer jurisdiction. This argument again is based, I think, on a misconception. The matter is not one of consent. The Court has power to enforce undertakings given to it and to punish the breach of such undertakings; the power comes into being when the undertaking is given, and it is only in this sense that the word jurisdiction should be read. In this connection, in arguing that the reason for an undertaking is not to confer jurisdiction, Mr Khanna submitted that the reason for it is to avoid necessity of a fresh action, a submission which seems to me inconsistent with his main argument.

In my opinion, the reference to suits in s 64(2) can only be suits in tort for abuse of civil process. I cannot think of any other cause of action that could be invoked. I am reinforced in that opinion by an examination of the judgment of in *Nanjappa Chetatiar v Ganapathi Gounden* [1912] I LR 35 Mad 598 and the commentaries of Mulla and Chitaley and Rao, which show that s 95 of the Indian Code is so interpreted. I do not think this is necessarily inconsistent with the remark of North, J, in *Attorney General v Albany Hotel Co* [1896] 2 Ch 696 to which Mr Slade referred us. Speaking of undertakings in damages, the judge said "it is difficult to see how in the absence of such an undertaking, the defendant

could recover from the plaintiff the damages which were really sustained by him by reason of the improper order of the court." The action for abuse of civil process is only available where both absence of reasonable and probable cause and malice can be proved and this will obviously only be in the exceptional case."

What Spry, VP, was saying in this passage was that an undertaking to pay damages for wrongful issue of an injunction is given to the Court, not to the party against whom the injunction is issued and that the undertaking thus having been given to the Court, the Court has jurisdiction or power based on the undertaking to punish for its breach. The expression "jurisdiction founded on an undertaking" accordingly refers to the jurisdiction of the court to punish for the breach of the undertaking, not jurisdiction to award damages to the person against whom the injunction was issued. The power to award damages to the person against whom the injunction was wrongly issued is conferred by a statute, namely section 64(1) and the undertaking cannot by itself confer upon the Court additional jurisdiction separate and distinct from that conferred by section 64.

I am, myself, in respectful agreement with this position and I cannot see how the parties can by the simple devise of an undertaking be allowed to defeat the provisions of a statute by conferring upon the Court more extensive powers than those conferred by section 64. Mr Khanna thinks that the section is unjust in the sense that the Shs 2,000/- provided by the section was put there way back in 1948 when the Act was first introduced and that consequently the Act sets out a figure which is totally unrealistic and does not take into account the fall in the value of money. I entirely agree with Mr Khanna in this contention and I would, also urge that the section be amended to increase the sum of Shs 2,000/- even to Shs 300,000/-, bearing in mind the frequency with which *ex parte* injunctions are now sought in the High Court and also the case with which they are granted by that Court.

But having said that it must not be forgotten that a party against whom such injunction has been wrongly granted and who has sustained damage thereby, is not totally helpless in the matter. Section 64 provides a summary procedure to such a party where he has suffered only a minor loss. He can then recover it summarily and with speed under the section. But where it is alleged that the person against whom an injunction was wrongly issued has sustained huge losses as a consequence thereof, the proper thing to do is to proceed by way of a separate suit. That possibility is clearly recognised by section 64(2) which bars the bringing of such a suit where

such a party has proceeded under section 64(1). Spry, VP, thought such a suit could only be based on abuse of civil process and for my part, I would contend myself by saying simply that whatever the nature of suit that can be brought, one can in fact be brought.

Nor do I agree with my two learned and eminent brothers that the provisions of order 39 rule 2(2) of the Civil Procedure Rules would entitle a Court to award damages in excess of the Shs 2,000/- provided for in section 64 of the Act. The orders and rules are subsidiary legislation under the Act and while rule 2(2) provides that:

"The Court may by order grant such injunction, on such terms as to inquiry as to damages ...."

such damages cannot exceed the maximum provided under the parent Act. It is clear to me that the whole of order 39 is made pursuant to the provisions of sections 63 and 64 of the Act and the order cannot create rights which are prescribed by the Act, and with profound respect, it (order) does not and cannot create any cause of action separate and distinct from that created by the Act itself. If the order were to purport to allow the assessment of damages in excess of Shs 2,000/=, then it would be in conflict with its parent Act and to the extent of that conflict, the order would be void. For my part I am satisfied that order 39 rule 2(2) does not authorise a Court to assess damages in excess of the Shs 2,000/- prescribed by section 64 of the Act.

Finally, Mr Khanna quoted to us various passages from the books of Lord Denning dealing with the question of procedural technicalities barring the Court's way to substantive justice. Mr Khanna pointed out to us that the High Court was satisfied that the appellant's damages were in excess of Shs 2,000/- and

yet section 64(1) is barring the Court from doing substantive justice to the appellant by limiting the amount to be awarded to him to only Shs 2,000/-. Mr Khanna invited us to adopt the approach he thought Lord Denning would have adopted and either ignore or find our way around section 64(1) so as to do substantial justice to the appellant. Mr Khanna asked us not to be slaves to technical provisions where they stand in the way of justice. My simple answer to

these submissions shall be that I do not think even for one moment, that even the legendary Lord Denning would have treated an Act of Parliament as a procedural technicality to be either ignored or circumvented in order to arrive at a result thought to ensure substantial justice. Faced with the clear and unambiguous provision of an Act of Parliament, I am myself perfectly content to be branded a slave to the provision. It is for these reasons that I would myself dismiss this appeal with costs. My Lords are, however, of a different view and the orders of the Court shall be as proposed by them.

Dated and Delivered at Nairobi this 20th day of May 1994.

J.E.GICHERU

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JUDGE OF APPEAL

M.G.MULI

....

JUDGE OF APPEAL

R.S.C.OMOLO

....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR