IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Nyarangi Ag JA)

CIVIL APPEAL 45 OF 1983

BETWEEN

RUTH WAMUCHI KAMAU.....APPELLANT

AND

MONICA MIRAE KAMAU.....RESPONDENT

(Appeal from the High Court at Nairobi, Scriven J)

JUDGMENT

Ruth Wamuchi Kamau, the appellant, was married to Gregory Githera (or Gicharu) Kamau, the son of Michael Kamau Wa Ngori (or Nguri) and Monica Mirae Kamau, the respondent. Michael, the father, died sometime in 1968 and Gregory, the son, on January 8, 1973. During their lives, they seemed to have lived in reasonable amity as father and son should. They each owned and farmed land on the opposite sides of the river Karamaino by mid-1956 on which they had their houses.

At the beginning of June 1956, Michael, the father, owed Gregory, the son, a balance of Kshs 9,000 for a judgment debt (Nairobi High Court Civil Suit 153 of 1950) and by a written agreement of June 4 that year, Gregory, the son, was given by Michael, the father, one acre, or 0.44 of a hectare of his 4.12 hectares Chania/Makwa/789. This acre was subdivided and registered as Chania/Makwa/792 and belonging to Gregory.

This small plot which Michael gave to Gregory was in the middle of Michael's land and to get to it, Michael gave him access over a path across his own land. There was a building on this plot and in it, a turbine which operated a machine to grind maize to sell to their neighbours but whether Michael and Gregory owned the mill and its machinery before June 1956 is not made clear in the agreement or the rest of the evidence in the trial.

The turbine for the maize grinder was worked by water from the river Karamaino, when it flowed, which runs past Michael's land and down past that of Gregory on the other side. Michael was upstream and Gregory was downstream so far as their farms were concerned. Michael, by the same agreement, allowed Gregory to take water in the furrow from the river across his Chania/Makwa/789 to Gregory's Chania/Makwa/792. The path across Michael's land gave Gregory access to his smaller plot and it went

across a bridge over the furrow.

On the other side of this river, Gregory had some coffee trees on his land and to pulp the coffee berries, he needed water from the same furrow so Ruth, the appellant, installed a diesel pump in November, 1973 to push water from the furrow back to their coffee farm. She swore she did this after the bridge over the furrow was destroyed.

When Michael died in 1968, his wife Monica, the respondent, claimed all his property including the 4.12 hectares Chania/Makwa/789 upstream, but various relatives put in their claims to succeed to Michael's estate and among these was Ruth, the appellant, the wife of Gregory, who claimed the right to the use of the path and bridge to Chania/Makwa/792 downstream and the furrow and the water running along it to work the turbine for the maize grinder. Ruth inherited the estate of Gregory according to the terms of Gregory's will of which she was the sole beneficiary and executrix when she obtained the grant of probate of his will.

Sometime later, about the middle of November 1973, two brothers, who were sons of Monica, the respondent, were alleged to have destroyed the bridge which took the footpath leading to what was now Ruth's plot in the middle of Michael's land which Monica claimed over the furrow and smashed the turbine in the building while Monica was elsewhere. Someone blocked up the furrow at the point where the water from the river enters it to flow down it to the turbine. The consequence was Ruth lost the use of the path and of the furrow which took the water to her land where the maize grinder and the diesel pump were.

Ruth filed a plaint on June 9, 1978, asking the High Court in Nairobi to declare that she had a right of way to Chania/Makwa/792 over Chania/ Makwa/789, the right to have and use this furrow to it across the same land and the right to the flow of water from the river in the furrow to the same land because they were easements. She prayed for orders that Monica should put back the bridge and allow Ruth access to where the maize grinder was and not to block the furrow but allow the water to pass along it as before and that the Land Registrar, Kiambu was to register these rights of hers against Monica's title to Chania/Makwa/789. Ruth also claimed general damages, costs and interest on both for the loss she had suffered because Monica or her servants or agents had denied her access to her land, the use of the furrow and the water from the river to her maize grinder and machine that pulped coffee. A sketch plan dated January 14, 1978, prepared by her advocate was attached to her plaint.

Monica's advocate filed her written statement of defence on June 22, 1978. She denied any contract between her husband and her son and required Ruth to prove it, privity of contract between herself and her daughter-in-law Ruth, she or her agents had destroyed the bridge, blocked the furrow or denied access to her land or water from the river, these rights were easements or covenants, Ruth had enjoyed them for 18 years or at all, they were covenants they ran with the land, Ruth had suffered any loss or damage and she pleaded limitation for any claim for any tort she might have committed.

So the issues in the High Court were, whether or not the agreement between the father and son could be proved on the balance of probabilities by Ruth. If she could, was her mother-in-law Monica bound by it? This involved whether or not Monica had inherited Michael's land and, if she had, was she bound to give Ruth access along the path and over the bridge to where the maize grinder was in the building in the one acre Michael gave to Gregory together with the flow of water along the furrow to it? And, if so, had Monica blocked the river, wrecked the bridge and denied Ruth access or had this or any of it been done by her servants or agents? If she did, what loss did Ruth suffer?

The trial began before Scriven J in the High Court at Nairobi on October 19, 1979, and he recorded evidence from Ruth and John Kamau Gicharu who was then about 34 years old and the son of Ruth which meant that Monica was his paternal grandmother. Monica did not give evidence or call any witness.

On all that, Ruth's advocate, Mr Morgan, submitted to Scriven J she had proved she owned the right of access across the bridge and to water along the furrow to her parcel across that of Monica. Mr Gatimu, for Monica, took these points in the High Court. Monica was wrongly sued because she was not the personal

representative of Michael. The agreement between Michael and Gregory was not proved and in any event, Monica was not a party to it. The right of access and of water across Michael's land to that of Gregory's acre could not be identified with any parcel of land because these two were not demarcated in 1956 which was said to be the year of the agreement. If rights granted by the agreement were not easements, they expired with the life of the grantor, Michael. Finally, if these rights were wrongly abrogated, then it had not been shown that this was the fault of Monica for she was not responsible for what her sons did in her absence.

The learned judge believed Ruth and her son John Kamau.

He found no covenant had been proved, and if it had been, it was not one that ran with the land because it was not a negative or restrictive one. He declared that none of these rights was an easement.

He held that each was a licence which was terminable at will since it was not coupled with any interest in Monica's land which was the dominant one. (He meant, with respect, the servient one.)

Then he turned to the issue of whether or not Ruth had any prescriptive right to access to her one acre over Monica's land and bridge and to a share in the flow of the water along the channel. He pinpointed the relevant date as mid-November, 1973, which was when the furrow was blocked and Ruth's rights to the water and access over the bridge and land of Monica to her own one acre plot were infringed. They were, he maintained, enjoyed under the terms of a licence which is the opposite of any right that accrues by prescription. Suppose, he continued, Ruth began to enjoy them after her husband's death on January 8, 1973? Ten months later, it was interrupted by Monica and or her sons. The judge had no abstract of the title of these plots or any evidence of them but it was clear these rights, of whatever sort they were, he said, had not been registered against the title of Michael, the father, to his land when it was first registered, the date of which was not specified. He also found that the evidence showed it was a son or sons of Monica who interfered with the flow of the water and there was nothing to suggest either was her agent.

The upshot was that he dismissed Ruth's suit with costs but before doing so he dealt with the claim for damages lest he be found to have erred on the finding of (no) liability. He awarded her Kshs 9,000 because he accepted Kshs 3,000 a month as her net loss in not being able to work the mill but limited it to the period of 3 months from November 1, 1973 to February 1, 1974 (the date of the judgment in the court of the third class district magistrate, Gatundu) when Joseph Ngare was convicted and sentenced for wrecking the maize grinder and bridge, and so hindering access along the footpath to Ruth's acre because from that date Ruth was entitled to restore the bridge, use the footpath and unblock the furrow without fear of further trouble from Monica and or her sons.

The trial judge's assessment of the credibility of the appellant and her son John Kamau has not been challenged and on a fresh review of their testimony in the record it was obviously right. The facts he found to have been proved on the balance of probabilities included that there had been no evidence to show Monica cut off the water from the river to the mill but in examination-in-chief, Ruth said Monica and her sons had done this which is imprecise. Joseph Ngure, her son, destroyed the bridge in her absence as the judge noted and she could not be liable for this.

So much for the facts in this appeal. The relevant law concerns Ruth's claim against Monica for a right of way including the right to cross the bridge over the furrow and a right to take water by an artificial watercourse across a neighbour's land.

So at this point it is necessary to set out some simple legal definitions. An easement is a convenience to be exercised by one landowner over the land of a neighbour without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement.

Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose

occupation these tenements respectively come. So, also in equity, do restrictive covenants because they are in the nature of negative easements.

A licence or dispensation, unless coupled with a grant, does not bind its assignors or assignees because it does not pass any interest in land. A licence not coupled with an interest in land is revocable unless the contract for it contains a term express or implied, that it shall not be revoked. A right of way and a right to take water are affirmative easements for they authorise the commission of acts which are injurious to another and can be the subject of an action if their enjoyment is obstructed.

How are they created? At common law only by deed or will. Writing under hand or parol grant with or without valuable consideration creates no legal estate or interest in land but only a mere licence personal to the licensor or licensee coupled with an interest or grant if it needs the latter to give effect to the common intention of the parties.

At equity, however, if there is an agreement (whether under seal or not) to grant an easement for valuable consideration equity considers it as granted as between the parties and persons taking with notice, and will either decree a legal grant or restrain a disturbance by injunction. *Dalton v Angus* (1881), 6 App Cas 765, 782.

A right of way is an obvious example of an easement and for the purpose of this appeal there is no need for elaboration of the law, apart from the statute relating to it. Any right to the flow of water through an artificial watercourse, however, has these further principles applied to it. It must rest on some grant or arrangement, either proved or presumed, from or with the owners of the land from or over which the water is artificially brought or some other legal origin. *Rameshur v Koonj*, (1878), 4 App Case 126 (PC).

Here, in this instance, the artificial watercourse was constructed for directing water from a natural stream for use at a mill not itself situate at or on the natural stream and, as usual, it is for a temporary purpose because its continuance depends on the convenience of the mill owner requiring it. *Arkwright v Gell*, (1939), 5 M & W 203.

A temporary purpose is not confined to a purpose that happens in fact to last for a few days only, but includes a purpose which is temporary in the sense that it may in the reasonable contemplation of the parties come to an end because it is limited to the period for which the owner uses his mill. So, the course (or furrow) is not meant to be a permanent alteration of the face of nature, but a temporary aberration for the purpose of and coexistence with the carrying on of a particular business which here is that of a miller which is a temporary business according to the authorities. Farrell J in *Burrows v Lang* [1901] 2 Ch 502, 508.

So far, then, we have a right of way and a right of the flow of water through an artificial watercourse across Michael's land to a mill on Gregory's land created by a written agreement for valuable consideration and taken with notice by Ruth and Monica. The right of way was a necessity for Gregory on his acre in Michael's land and both men knew this was so. The right to the flow of water along the artificial watercourses was not and was for a temporary purpose, namely to work a temporary purpose, the mill. Both knew that too. The consideration was the forgiveness of the debt once and for all so it was not recurrent, which means Gregory enjoyed access and flow of water as of right cf *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229.

But now, I must turn to the relevant statute law. At the trial, it was not clear to whom Chania/Makwa/789 belonged for the matter was the subject of a succession suit in the court of the resident magistrate, Thika. Monica could not even be deemed to be the proprietor of the land of her late husband, Michael, because she had not followed the provisions of section 52 of the Registration of the Titles Act (cap 281) by applying as his representative in writing to the Registrar of Titles of the registration district within which his land was situated to be registered as proprietor and produced to him the probate or letters of administration. If she had, then because the footpath (and bridge) over the land of Michael to that of Gregory was a way of necessity and an easement by operation of law on the subdivision of his property, it would continue to exist for as long as the necessity existed, notwithstanding that it is not referred to in the

certificate of title to Michael's tenement (the servient tenement) *Barclays Bank DCO v Patel* [1970] EA 88, 93F-94A, 95H (CA-K) and Ruth would have been entitled to her declaration and orders relating to this.

Not so, however, for the furrow and water from the river to the land of Gregory (the dominant tenement) for these were not easements of necessity and do not arise by operation of law but were created and must be reflected in the certificate of title or else they are not legally enforceable (*ibid*). See also sections 23, 34, 35 and 36 of the Act (*ibid*).

Ruth had not acquired either right by prescription because when she inherited Gregory's estate, each had been abrogated by Monica and or her sons for about a year and the qualifying period preceding the institution of the action in which the claim to which the period relates is contested which in this one would be after June 8, 1976; section 32 Limitation of Actions Act (cap 22) and this is so even for registered land; section 37 (*ibid*); but no period of prescription as against the title shown in a certificate of ownership can begin to run prior to the date of the grant of the certificate: *Tayebali Adamji Alibhai v Abdulhussien Adamji Alibhai* (1938) 5 EACA 1 (CA-K); and Monica had no certificate of title to the servient tenement then.

Suppose the parties to this appeal are, however, both the registered owners of her plot? Monica's advocate in the appeal conceded they were. Then, each is the absolute owner of it together with all rights and privileges belonging or appurtenant thereto: section 27(a) The Registered Land Act (cap 300).

Monica's rights, so far as they concern her land, are free from all other interest and claims unless they are shown on the register or do not require noting on it, section 28 (*ibid*); and among those that do not require noting on it are rights of way and rights of water subsisting at the time of first registration under this Act and rights acquired or in the process of being acquired by any written law relating to the limitation of actions or by prescription: section 30(a) and (f) (*ibid*).

So Monica's rights are subject to Ruth's rights of way and rights of water, if they subsisted at the time of first registration or they had been acquired or were in the process of being acquired by virtue of The Limitation of Actions Act (cap 22) or by prescription.

Where any way or watercourse or the use of any water has been enjoyed as an easement peaceably and openly as of right, and without interruption, for twenty years, the right of such way or watercourse is absolute and indefeasible according to the written law on the limitation of actions. This period of twenty years is a period beginning before or after December 1967, which is the date of the Limitation of Actions Act (*ibid*) began, ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested. So far as Ruth is concerned, she began to enjoy them after her husband's death on January 8, 1973, and ten months later they were interrupted by Monica's son, Joseph Ngure, so far as the way is concerned, and by the respondent and her sons, so far as the watercourse and water supply are concerned in mid-November, 1973. This action was instituted on June 9, 1978, so there was no twenty-year period ending within the two years immediately preceding the institution of this action (section 32 (*ibid*)).

If Ruth's rights were acquired under section 32 (*ibid*), they would not come into being until a copy of the judgment establishing the right to them was registered against the title to Monica's plot, but until it was, they would be held by Monica in trust for Ruth section 37(b) (*ibid*).

So much for the facts and the law in this appeal. Returning to the suit, the correct answers, in my view are these. The agreement and its terms between Michael and Gregory were satisfactorily proved by Ruth because in the end, Monica's advocate in the appeal hearing conceded an authentic photostat copy of the original had been produced to the trial judge and that would do. The original was mislaid together with the High Court file. Monica, by the time this appeal was heard, had established her title to Michael's land except for the acre which Michael gave Gregory for valuable consideration by that agreement and to which Gregory was the first registered owner and Ruth the second. When Monica was registered as the proprietor of her parcel, she was vested with absolute ownership of it, free from all other interests and

claims except those shown in the register or not required to be noted on it against her title: section 27 and 28 Registered Land Act. Gregory or Ruth's right of way and right of water flowing along the furrow across Monica's land to the one acre in it hived off Michael for Gregory in early June 1956, did not have to be noted on the register in order to diminish Monica's absolute ownership if they were subsisting at the time of the first registration under that Act of her tenement.

The footpath and the bridge over the furrow across the land of Michael to the acre he ceded to Gregory was a way of necessity which arose by operation of law when Michael subdivided his property and would continue to exist as long as the necessity existed notwithstanding that it was not referred to in Michael's or Monica's title to the servient tenement. *Barclays Bank DCO V Patel*, [1970] EA 88, 93F, 94A, 95H (CA-K).

Neither Gregory nor Michael had his parcel registered before September 16, 1963, which is the date the provisions of the first Registered Land Act (No 25 of 1963) came into force and by June, 1956, Gregory's right of way and to the furrow and the bridge taking the right of way over it and the right of water along the furrow from the river (when it flowed) all across Michael's land, were subsisting and affected the same as overriding interests or, in other words, Michael's land was subject to them. Section 30, Registered Land Act (cap 300).

The learned judge in effect found that Monica was not responsible for the flow of water along the furrow from the river or damaging the bridge over the furrow and, in my judgment, this was the only finding he could make because the evidence was too weak to support any other.

Therefore, for these reasons, I would allow this appeal, set aside the judgment of the High Court and instead give judgment for Ruth against Monica for a declaration that Ruth is entitled to a right of way over the land reference Chania/Makwa/789 registered in the name of Monica to Ruth's land reference Chania/Makwa/792 for herself, members of her family, her servants, agents, invitees and or licensees on foot (Ruth asked for the declaration to include motor vehicles and other conveyances and this should be included if, in fact, there was a right of way large enough for motor vehicles and other conveyances granted by Michael to Gregory in the written agreement of June 4, 1956. If not, then, Ruth will have to negotiate with Monica about this because it is not something that this court can now grant for Ruth). Furthermore, Ruth must have her declaration, that she is entitled to have a furrow over Monica's land to Ruth's land with a bridge over that furrow carrying the right of way mentioned in the previous declaration. Ruth must also have her declaration that she is entitled to half the flow of water along the furrow (Monica is entitled to the other half) from the river Karamaino when it is flowing. Ruth must also have an order directing the Land Registrar, Kiambu to register these rights relating to a way to the furrow, the bridge carrying the right of way over the furrow, and the water form the river Karamaino along the furrow, when there is water from the river to flow along it, against the title of Monica's parcel Chania/Makwa/789.

Ruth will also have orders against Monica to remove whatever it is preventing Ruth from using the right of way, the bridge, furrow and the half of any water that flows along the furrow to the mill.

She has failed to prove that Monica was responsible for Ruth being unable to pass along the right of way and across the bridge over the furrow or the blocking up of the furrow or for water not flowing from the river along it to the mill or the destruction of the turbine and the diesel engine, so Ruth is not entitled to any damages or interest on them. Hancox JA and Nyarangi Ag JA agree so these now become the orders of the court.

The appellant, Ruth, has succeeded so far as half the real issues in the suit and appeal were concerned so I would propose that she be given half the costs in the High Court and half the costs in this court.

Hancox JA. In 1956, Michael Kamau, in consideration of foregoing a debt due to his son, Gregory Kamau, agreed to give the latter one acre of his land on which was said to stand his turbine and building. In addition, for the same consideration, Michael agreed to allow Gregory access to the one acre of land and to allow him to run a water furrow through his (Michael's) existing plot. This was set out in an

agreement between the parties to it dated June 4, 1956, and witnessed by the then district officer in the office of the district commissioner.

It appears that the turbine operates, or did so until 1973, a *posho* mill which was also on the one acre of land transferred, and the flow of water along the furrow to the *posho* mill was necessary for the purpose of running the turbine. The source of the water is the Karameno river, which flows past both pieces of property, Michael's existing property being, as it were, upstream from that of Gregory. Michael died in 1968, leaving Monica as his widow. She is the respondent to this appeal.

All seems to have gone well until 1973 when Gregory also died, and, in November of that year, Monica's son, Joseph Ngure Kamau, maliciously damaged the diesel pumping machine in the *posho* mill, for which he was convicted by a third class district magistrate's court in February, 1974. It was also said in evidence in this case that he broke the bridge where the furrow intersected the pathway leading across that which was formerly Michael's land, and that either then or subsequently the furrow was blocked with earth so that the water from it no longer powered the *posho* mill. It would seem therefore that there was no interference with the rights given under the 1956 agreement until about five years after Michael died.

In 1978, the appellant, Ruth, as Gregory's widow, executrix and devisee brought an action against Michael's widow, Monica, her mother-in-law, alleging interference with the easement she said existed over Michael's former land, and claiming declarations as to the right of way and the water furrow, orders as to the removal of obstructions thereto, registration of the alleged rights and damages for the closure of the posho mill. The trial judge, Scriven J dismissed Ruth's claim for the declaration and consequent orders, though he assessed the damages, in the event of an appeal against his decision being allowed, at Kshs 9,000.

For the reasons given by Kneller JA, whose judgment I have had the advantage of reading, I would uphold the validity of the agreement of the June 4, 1956. I would also hold that the right of access along the footpath and bridge over Monica's (formerly Michael's) land, and the right to run a water furrow through that land, constituted rights in favour of the dominant land, which is now Ruth's land, (but had been ceded to Gregory) which subsisted, not as mere licences terminated by the deaths of the parties, but as overriding interests by virtue of section 30 of the Registered Land Act (cap 300). Accordingly, I disagree with the learned judge that these rights required registration against the respective titles. Clearly, they did not need to be so registered in order to be valid.

Again, I do not think the evidence was sufficient to establish that Monica had blocked the furrow or had damaged the bridge. The damage done by her son was not attributable to her in law. However, as, in my judgment, the rights over Monica's land subsisted without the need for registration, I would grant the declarations prayed in the plaint, with the exception of the right to pass over the servient land in motor vehicles, as set out in the judgment of Kneller JA. I would also, in the interests of certainty for the future, direct registration Ruth's rights against Monica's title in accordance with the proviso to section 30. For the reasons given by Kneller JA I would not award damages to Ruth.

I would, accordingly, allow the appeal to the extent stated by Kneller JA, and I agree with the order as to costs proposed by him.

Nyarangi JA. During the month of June, 1956, a written agreement was made between Gregory Gicheru Kamau, the deceased husband of the appellant and the late Michael Kamau, the deceased husband of the respondent in the following terms:

That Gregory Kamau would forego the balance of the judgment debt owed to him by his father Michael Kamau in Supreme Court of Kenya Civil Case No 153 of 1950 namely the sum of Kshs 9,000 (nine thousand shillings) in consideration of the following:

(i) His being given one acre of land on which stood and stands his turbine and buildings and posho mill hereinafter referred to as land reference LR Chania/Makwa/792 or Gregory Kamau's (now Ruth's) plot.

(ii) That Michael Kamau would allow access across his own land Chania/ Makwa/789 (now Monica) to Gregory's aforesaid one acre plot.

(iii) That Michael Kamau would also allow Gregory Kamau to run a water furrow through his own said land to Gregory Kamau's said plot.

The district officer of the area witnessed the agreement. There is a plan attached to the plaint showing that the parties are riparian occupants of adjacent land along the banks of Karameno river in the Thika area. A dispute arose on the terms and extent of the written agreement after Gregory Kamau died. The women started trouble. The flow of water mentioned in the agreement was stopped and the bridge was destroyed. The son of the respondent deliberately damaged the diesel pumping machine, was prosecuted and convicted by a third class magistrate.

On the evidence as set out by Kneller JA, the basic issue before the High Court was whether the respondent could, on the balance of probabilities, prove the written agreement and if the respondent was bound by it and therefore under an obligation to give the appellant an access on the path and across the bridge.

The trial judge heard and saw the various witnesses and there is nothing to indicate that his assessment on the credibility of the witnesses was erroneous.

It was shown that the respondent had no hand in stopping the flow of water from the river to the *posho* mill.

There was credible evidence before the trial judge to show that there was a right of the flow of water through a furrow over the land of Michael Kamau and across to Gregory Gicheru Kamau's land. Moreover, the right was created by the written agreement for valuable consideration. The parties to this appeal had notice of that right. The trial judge was right in finding that the written agreement was valid. I would agree with Kneller JA, whose judgment I have had the advantage of reading that the right of access along the footpath and the bridge over the respondent's land were in favour of the appellant's land. And so was the right to run a furrow through the land. These rights were not licences determinable at will but overriding interests within the meaning of section 30 of the Registered Land Act (cap 300). There was no need for the registration of the rights.

I would allow the appeal to the extent stated by Kneller JA. I agree with the order as to costs proposed by him.

Dated and Delivered at Nairobi this 13th day of February 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

AG. J.O.NYARANGI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR