



**Patel (As the Administrator of the Estate of Kanji Naran Patel) v Kiptoo & 8 others
(Civil Application E588 of 2024) [2025] KECA 446 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 446 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E588 OF 2024
P NYAMWEYA, AO MUCHELULE & GV ODUNGA, JJA
MARCH 7, 2025**

BETWEEN

**ARVIND KANJI PATEL APPLICANT
AS THE ADMINISTRATOR OF THE ESTATE OF KANJI NARAN PATEL**

AND

**DORCAS JOAN KIPTOO 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
THE DIRECTOR OF SURVEYS 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT
SMETH VALLEY LIMITED 5TH RESPONDENT
JAMES KARIUKI 6TH RESPONDENT
COUNTY GOVERNMENT OF NAIROBI 7TH RESPONDENT
INTERNATIONAL ANGEL KINDERGARTEN LIMITED 8TH RESPONDENT
ACUTY CAPITAL LIMITED T/A STEPPING STONES KINDERGARTEN &
SCHOOL 9TH RESPONDENT**

(Being an application for stay of execution, order of injunction and/or of further proceedings pending the hearing and determination of an appeal and/or intended appeal from the ruling, decision and order of the Environment and Land Court at Nairobi (Oguttu Mboya, J) delivered on 4th November, 2024 in Civil Application No. Nai E588 of 2024 2 | Page ELC Case No. E92 of 2024)



RULING

1. By an Amended Notice of Motion application dated 21st May 2024, filed before the Environment and Land Court in Nairobi ELC Case No. E92 of 2024, the applicant sought a raft of orders intended to restrain the 1st, 5th, 6th and 7th Respondents from demolishing or interfering with the applicant's structures, fence, perimeter wall, foundations, building and offices in the property known as LR Nos. 2255/1 and 2255/2 situated in Karen (the suit properties) pending the hearing of that case. It was also sought that the 2nd respondent and the Director of Surveys be restrained from issuing certificate of titles or deed plans in respect of the suit properties or any subsequent subdivision deed plans that may arise therefrom to the 1st, 5th, 6th and 7th respondents or to any other person in respect of the suit properties. The applicant also sought an order compelling the 1st, 5th, 6th and 7th respondents to remove structures and the perimeter wall erected on the suit properties. Further, the applicant sought that the suit be consolidated with ELC Case Nos 193 of 2024, E130 of 2024, E170 of 2024 and E92 of 2024.
2. The applicant's claim was based on the fact that the applicant was the administrator of the estate of Kanji Naran Patel, who was before his death the registered owner of the suit properties. It was however contended that the 1st, 5th, 6th and 7th respondents had illegally entered upon and trespassed onto the suit properties hence violating the plaintiff's proprietary rights under sections 24 and 25 of the [Land Registration Act](#).
3. The 5th respondent also filed an application dated 16th September 2024 substantially seeking the setting aside of the orders issued on 16th July 2024 in ELC Case No. E193 of 2024 striking out the 5th respondent from that suit and an injunction restraining the appellant, the 8th and 9th respondents from trespassing, entering, remaining upon, occupying, developing, dumping, encroaching, charging, disposing of, transferring, leasing, dealing or otherwise interfering with land parcel Nos. 2255/3 to 2255/15. The 5th respondent's case was that it was the registered proprietor of land parcel Nos. 2255/3 to 2255/15 which were subdivisions of the suit properties and that prior to purchasing the suit properties, it had undertaken due diligence and ascertained that Sirikwa Auto Spares Ltd was the registered proprietor thereof. After acquiring the suit properties and registering them in its name, it subdivided the suit properties into 13 parcels of land. Its case was that it was a bona fide purchaser for value without notice of any defect of the predecessor's title. Therefore, the suit properties were non-existent, having been subdivided hence the injunction sought by the applicant could not be granted.
4. There was yet a third application dated 6th May 2024 filed by the 1st respondent seeking that the court strikes out the 1st respondent from the suit.
5. In his ruling dated 4th November 2024, the learned Judge found that the affidavit sworn on 21st May 2024 in support of the applicant's application was invalid on the basis that the same was amended contrary to the provisions of the [Oaths and Statutory Declarations Act](#); that it was inconceivable that the deponent of the said affidavit who was said to have been out of the country, would at the same time present before a Commissioner for Oaths in Nairobi on 21st May 2024 for the commissioning of the said affidavit; that the suit properties having been subdivided and fresh titles issued, an injunction could not issue in the manner sought by the applicant; that without joining Sirikwa Auto Spares Ltd, the entity from whom the 5th respondent acquired the suit properties, no prima facie case could be said to have been established; that having found that the supporting affidavit to the applicant's application was invalid, the application could only be supported by the affidavit sworn on 7th August 2024 which did not advert to the question of ownership of the suit properties by the estate of the deceased; that in



those circumstances, the applicant failed to establish a prima facie case with probability of success; that the conditions for the grant of injunction being sequential, it was needless to address the question of irreparable loss; that the applicant failed to prove exceptional or peculiar circumstances to justify the award of mandatory injunction; and that the orders for permanent injunction could not be granted in an interlocutory application.

6. As regards the 5th respondent's application, the learned Judge found that subsequent to the acquisition of the suit properties and their subdivisions, the 5th respondent went into occupation and erected a perimeter wall; that based on the documents availed in support of the 5th respondent's ownership of the said properties, the 5th respondent demonstrated that it had some legal rights or interests in the resultant titles as the certificate of official searches are deemed to be prima facie evidence of ownership; that in light of the foregoing, the 5th respondent, who had filed a counterclaim, established a prima facie case with probability of success; that the denial of the 5th respondent to its right of entry, occupation, possession and use was a prima facie demonstration that irreparable loss would thereby be occasioned.
7. Regarding whether or not to set aside the orders made on 16th July 2024, the learned Judge was not satisfied that the order striking out the 5th respondent in Nairobi ELC Case No. E193 of 2024 was amenable to review; and that the 5th respondent having filed a counterclaim in which the reliefs sought in ELC Case No. E193 of 2024 were being sought, the review application was misconceived.
8. Addressing himself to the 1st respondent's application, the learned Judge found that there was no nexus between the 1st respondent and the suit properties and no claim could be discerned by the applicant against the 1st respondent; and that the 1st respondent was improperly joined to the proceedings.
9. In its disposition, the learned Judge dismissed the applicant's application with costs to the 1st and 5th respondents; allowed the 1st respondent's application by striking out the 1st respondent from the record and awarding it the costs of the suit to be paid by the applicant; and allowed the application by the 5th respondent dated 16th September 2024 in terms of the orders of injunction with costs to be borne by the applicant and vacated the interim orders that had been granted to the applicant.
10. It is that decision that is the subject of the Notice of Motion application dated 6th November 2024 in which the substantive orders sought are: that pending the hearing and determination of the appeal, this Court stays the said ruling; that pending the hearing and determination of the appeal, this Court issues an order of injunction restraining the 5th respondent from interfering with the peace and quiet enjoyment of the applicant or evicting the applicant, the 8th and 9th respondents from the suit properties; that pending the hearing of the appeal, the Officer Commanding Police Division (OCPD) Langata and the Officer Commanding Police Station (OCS) Karen Plains be restrained from enforcing the orders arising from the said ruling;

that further proceedings in ELC Case No. E92 of 2024 be stayed pending the hearing and determination of the appeal.

11. According to the applicant, until his death in 1995 the deceased, Jayanti Kanji Patel, was in possession of the suit properties and after his demise the applicant went into possession thereof; that the suit properties have never been disposed of or sold to third parties or the respondents; that the 1st and 5th respondents have never had uninterrupted peaceful enjoyment and possession of the suit properties; that the applicant leased the suit properties to the 8th and 9th respondents who have been running a school thereon for the last 30 years; that on 2nd March 2024, the 1st, 5th, 6th and 7th respondents illegally invaded the suit properties and demolished buildings and development erected thereon; that it was that action that provoked the suit in ELC Case No. E92 of 2024; that following the decision made



on 4th November 2024, an order was issued directing Officer Commanding Police Division Langata and the Officer Commanding Police Station Karen Plains to enforce the order of injunction issued against the applicant and the 8th and 9th respondents over the suit properties; that a Notice of Appeal was timeously filed and proceedings requested; that the applicant has arguable appeal arising from, inter alia, the making of final and substantive determinations at a preliminary stage in interlocutory application for injunction and failing to consider the original affidavit in his ruling after finding that the affidavit sworn on 16th September 2024 could not be amended and that the learned Judge erred in holding that the 5th respondent had established a prima facie case without any basis for doing so; that the execution of the said orders is likely to lead to the eviction of the applicant and the 8th and 9th respondents from the suit property and there is a likelihood of the ownership of the suit properties being transferred to third parties.

12. The application was supported by the 8th and 9th respondents who contended: that the 9th respondent operates a school known as Stepping Stones Kindergarten & School on the suit properties while the 8th respondent is an investor in the 9th respondent; that the said school hosts more than 198 children from 45 different nationalities including 89 Kenyan students and 40 British Students of tender ages between 2 to 8 years; that the 8th and 9th respondents acquired the school from the former owners who had been operating it for a period of more than 30 years and who had leased it from the applicant; that the school is held in high regard and has a strong local reputation; that on 1st September 2016, the 8th and 9th respondents entered into lease agreement in respect of LR No. 2255/2 for 5 years commencing from 1st September 2016 which was extended for a further period of 8 years from 1st March 2023 and that the 8th and 9th respondent have always adhered to the terms of the lease and enjoyed quiet possession thereof for more than 7 years; that the school has employed 46 staff members who solely rely on their salaries from the school for their livelihood; that profits realised from the school are directly channelled to affiliated charity foundations based in Kibera slums to cater for the less fortunate children; that following threats by the 6th respondent, purportedly acting on behalf of the 5th respondent, to evict the 8th and 9th respondents, the 8th and 9th respondents instituted ELC Case No. E130 of 2024 in which they were issued with interim orders of injunction but the suit was subsequently dismissed and they were ordered to join ELC Case No. E092 of 2024 as the 8th and 9th defendants; that the effect of the impugned orders is to evict the applicant along with the 8th and 9th respondents from the suit properties hence depriving them of the right to enjoyment of the suit properties; that the 8th and 9th respondents are apprehensive about the safety of the children should the order sought to be stayed be enforced; that the enforcement of the orders will also affect the livelihood of over 100 members of the society that the 8th and 9th respondents and their affiliates have employed as well as the feeding programs that supports more than 600 children and adults from the profits made from the running of the school; and that the grant of the orders of stay will not prejudice the 5th and 6th respondents who have never been in possession of the suit properties.
13. The gist of the 1st respondent's replying affidavit was that the applicant had not satisfied the conditions for the grant of the stay orders sought and that the applicant's application having been dismissed, the orders are incapable of being stayed.
14. The 5th respondent took the position that the suit properties having been subdivided into 13 parcels, the orders sought cannot be granted; that it is the 5th respondent who is in possession of the suit properties save for a three acre portion that has recently been encroached upon by trespassers; that the 5th respondent purchased the suit properties from Sirikwa Auto Spares Limited vide a sale agreement dated 10th January 2008 at a consideration of Kshs 120,000,000 and took vacant possession upon payment of the deposit and has retained peaceful, quiet and uninterrupted possession and occupation



thereof; that on 10th May 2024, the applicant with assistance of goons and police officers invaded and unsuccessfully attempted to obtain occupation of the suit properties; that the issuance of the orders sought would unnecessarily expose the 5th respondent to eviction without any regard to its rights to the ownership and possession of the suit properties; that despite the 5th respondent instituting Nairobi ELC Case No E193 of 2024, the applicant on 16th May 2024, once again with assistance of goons and police officers invaded the suit properties and attempted to violently evict the 5th respondent and destroyed its developments; that the order sought by the applicant should not be granted as the 5th respondent is in possession of the suit properties and the grant thereof is likely to expose the 5th respondent to danger of eviction; that the Court has no power to grant stay of execution of an injunction; that the applicant has not established an arguable case and since the 5th respondent is in possession and there is no risk of the suit properties being alienated, the applicant has not shown that the appeal will be rendered nugatory if the stay is not granted.

15. We heard the application on the Court's virtual platform on 13th November 2024 during which learned senior counsel, Dr Otiende Amollo appeared with Mr Anyango Opiyo for the applicants, learned counsel, Mr Elias Ouma, appeared for the 1st respondent, learned counsel, Mr Oscar Eredi, appeared for the 3rd and 4th respondents, learned counsel, Mr Victor Rapando, appeared with Mr Daniel Odunga, for the 5th respondent and learned counsel, Mr Koile, appeared for the 8th and 9th respondents.
16. Citing various authorities of this Court, the applicant submitted: that based on the Memorandum of Appeal dated 6th November 2024, it had set out numerous and tangible grounds of appeal including the violation of the right to fair hearing under Article 50 of *the Constitution*; that should the Court decline to grant the orders sought there is a likelihood of the suit properties changing hands hence divesting the applicant of its properties; that by taking possession, the 5th respondent is likely to demolish the structures set on the suit with the risk that the 5th respondents will not be able to compensate for the same.
17. In highlighting the submissions, Dr Otiende Amollo, SC, stated that the learned Judge, in granting the injunction sought by the 5th respondent failed to realise that the 5th respondent's counterclaim which was the basis of the injunction had been struck out; that the learned Judge misconceived the attaching of an affidavit to amount to filing an amended affidavit; that the learned Judge failed to appreciate the value of the applicant's title; that the learned Judge determined the ownership of the land without evidence; that the court can only strike out an amended part of an affidavit and not the entire affidavit; that unless the stay is granted the entire appeal will be rendered nugatory since the land which the applicant's family has held for many years is likely to be disposed of.
18. The 8th and 9th respondents, in their submissions reiterated the averments in their affidavit and, citing this Court's decisions, submitted that the applicant had made out a case meriting the grant of the orders sought. On behalf of the 8th and 9th respondents, Mr Koile relied on the submissions filed by the applicant and stressed that if the orders sought are not granted, the 5th respondent is likely to dispose of the suit properties together with the developments thereon in which event the 8th and 9th respondents would lose irreparably as the school faced eviction and the would-be disruption to school activities.
19. On behalf of the 1st respondent, it was submitted, based on authorities of this Court, that the applicant had failed to satisfy the conditions necessary to grant the orders sought. The 1st respondent further submitted that the applicant has no claim against the 1st respondent in the suit hence there is no arguable case against it and that the order sought to be stayed being negative orders, they cannot be granted. Mr Ouma, in his brief highlighting, reiterated the written submissions.



20. The 5th respondent similarly reiterated the averments in the affidavit and contended that a stay of injunction cannot be granted based on the decision in the case of Consolidated Bank of Kenya & 2 Others v Usafi Limited [2006] KECA 180. In the 5th respondent's view, the order sought to be stayed was a negative order which is incapable of being stayed.
21. In his oral address in Court, Mr Rapando submitted that the effect of granting the stay sought would be to nullify the order which is the subject of the appeal before the appeal is heard since an order of injunction takes effect immediately. While acknowledging that the Court has the power to grant orders of mandatory injunction, it was his submission that the same can only be granted in exceptional circumstances.
22. We have considered the application and the submissions made before us. The 1st and 5th respondents have raised two jurisdictional issues that we need to deal with before delving into the merits of the application. It is contended that this Court has no jurisdiction to grant a stay of an injunction and that the orders being sought to be appealed against, being negative orders, are incapable of being stayed.
23. The 5th respondent, based on the decision in Consolidated Bank of Kenya & 2 Others v Usafi Limited (supra), submitted that this Court cannot grant a stay of injunction. In that case there was only one substantive order which was framed as follows:

That the Order of the High Court of Kenya (Mutungi J.) dated 27th May 2005 be stayed pending the hearing and determination of the intended appeal.

24. The order that was sought to be stayed in that case was to the effect that:

“That the defendantsare hereby restrained by order of injunction from advertising, threatening to sell, offering to sell, selling or in any way dealing with the plaintiff's property known as Land Reference No. 36/VII/272 situated in Eastleigh.....currently advertised for sale on 4th July, 2003 or at any other time whatsoever pending the hearing and determination of this suit.”

25. This Court, in Consolidated Bank of Kenya & 2 Others v Usafi Limited (supra), while disallowing the application expressed itself as hereunder:

“A stay of an injunction” is not included in that provision. The omission may well have been intended by the Rules Committee since to grant a stay of an injunction would have the effect of nullifying the injunction before the appeal against its grant had been heard. We do not consider the submission of Mr. Majanja that what he is seeking falls within “a stay of execution”. We are unable to appreciate how one can stay an order for an injunction and yet at the same time sustain it on record. The word “injunction” is defined in the Glossary to the White Book 2003 as:-

‘A court order prohibiting a person from doing something or requiring a person to do something.’

We are of the view that once an injunction has been ordered it is in force and no further proceedings are required to give effect to it.

Having come to the conclusion that we have no jurisdiction under rule 5(2)(b) to grant the order sought we need say no more than that the Notice of Motion dated 12th July 2005 is



incompetent and we order that it be and is hereby struck out with no order as to the costs thereof.”

26. In the instant case, the applicant is seeking not only an order staying the decision made on 4th November 2024, but also seeks that:

“Pending the hearing and determination of the applicant’s application and appeal this Honourable Court be pleased to issue an order of injunction restraining the 5th respondent either by itself or agents in any way whatsoever [from] interfering with the peace and quiet enjoyment of the applicant (sic) or evicting the applicant, the 8th and 9th respondents from the suit property LR Nos 2255/1 and 2255/2.”

27. Whereas we agree that a stay of injunction is not contemplated under rule 5(2)(b) of this Court’s Rules, the said provision provides that:

“The Court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or a stay of any further proceedings.”

28. This Court in Consolidated Bank of Kenya (supra) recognised that:

“...that under the rule in its present form there are only three types of orders permitted to be made under rule 5(2)(b) namely;

- i. a stay of execution.
- ii. an injunction.
- iii. a stay of any further proceedings.”

29. In the present application, the applicant is not seeking stay of injunction but an injunction. Such an order is capable of being granted notwithstanding the fact that the order in question was a negative order. That was the position of this Court in Joyce Mutethya Kimanathi v Timothy Kimanzi Kiiva and others, Nai Civil Application No. E321 of 2021 where a distinction was made between a stay pending an appeal and an injunction pending appeal. The Court delivered itself thus:

“Applying the above principles to the rival positions herein, it is our position that considering the nature of the circumstances surrounding the litigation giving rise to the intended appeal, it is not only fair and just that the applicant be accorded an opportunity to be heard on her intended appeal but also that the suit properties be preserved pending hearing of the intended appeal.

The above conclusion now leads us to determine which of the two substantive prayers that is stay and injunction is the appropriate relief for us to grant herein. As correctly contended by the respondents, what the High Court issued as the final order is a negative order. It is now trite that a negative order is incapable of being stayed. See Nairobi Metropolitan PSV Saccos Union Limited and Twenty Five others vs. County of Nairobi Government and three others [2014] eKLR for the proposition that there is no jurisdiction to grant a relief under Rule 5(2) (b) of this Courts Rules where the High Court’s order either resulted in a dismissal or a striking out order; or alternatively where the court did not order either party to do or refrain from doing something capable of being restrained.



The above being the correct position in law, it is our position that it is only the injunction relief that can issue herein as an appropriate relief.” [Emphasis added].

30. We find that this Court has the jurisdiction to entertain the prayers sought.
31. This Court in its numerous decisions has crystallised the basis for the exercise of this Court’s jurisdiction under rule 5(2)(b) aforesaid. The exercise of this jurisdiction is original, independent and discretionary (see *Githunguri v Jimba Credit Corporation Ltd No (2) (1988) KLR 838*). It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see *Equity Bank Ltd v West Link Mbo Limited [2013] eKLR*. It only arises where the applicant has lodged a notice of appeal or the appeal itself (see *Safaricom Ltd v Ocean View Beach Hotel & 2 Others [2010] eKLR*).
32. The conditions to be met before a party can obtain relief under rule 5(2)(b), as enunciated in case law, are that the applicant has to demonstrate that the appeal is arguable on the one hand and, on the other hand, that if the stay sought is not granted, the appeal or the intended appeal, as the case may be, will be rendered nugatory (see *Githunguri v Jimba Credit Corporation Ltd No (2) (supra)*). By the term “arguable”, it is not meant an appeal or an intended appeal that will succeed, but one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 UR*). An appeal need not raise a multiplicity or any number of such points, and a single arguable point is sufficient to earn an applicant such a relief, subject to the satisfaction of the second condition (see *Damji Praji Mandavia v Sara Lee Household Body care (K) Ltd Civil Application No. Nai 345 of 2005 (UR)*). It is therefore trite that demonstration of one arguable point will suffice (see *Somak Travels Ltd v Gladys Aganyo [2016] eKLR*).
33. As for the second requirement, an appeal or intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible or, if it is not reversible, whether damages will reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui v Tonny Keter & others [2013] eKLR*).

Loss to the parties on both sides of the appeal plays a central role in the determination since it is what the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited v Kenya Revenue Authority [2013] eKLR*).
34. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2) (b) (see *Republic v Kenya Anti- Corruption Commission & 2 others (2009) KLR 31*; *Reliance Bank Ltd v Norlake investments Ltd (2012) I EA 22*); and *Githunguri v Jimba Credit Corporation (supra)*).
35. In the appeal, the applicants intend to argue that the learned Judge erred by determination the issues in the suit in an application for interlocutory injunction; in failing to consider the averments in the initial affidavit after finding that the averments in the affidavit sworn on 16th September 2024 were invalid and in violating the applicant’s rights to fair hearing; in granting an injunction to the 5th respondent after striking out its counterclaim; and in making decisions not based on the issues raised before the court. In our view the allegation of the failure to consider the initial affidavit if true amounts to an arguable ground. Similarly, the grant of an injunction after the counterclaim upon which the application was based, raises an arguable point. We accordingly find that the applicant has surmounted the first condition.
36. As regards the second condition, it is averred that the suit premises house a school for young children. If this allegation is true then it cannot be in doubt that an action that leads to the disruption of their education is likely to cause such loss that, in the event of the appeal succeeding, it cannot be repaired.



Whereas the 5th respondent contended that it is in occupation of the suit properties save for a portion of 3 acres, we were not informed who is in occupation of the said 3 acres. In those circumstances, it is clear that part of the suit properties is in occupation of parties other than the 5th respondent. We accordingly cannot outrightly dismiss the applicant's position that the school occupies the suit properties.

37. Apart from the two conditions, the Supreme Court appreciated in *Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, that the Court must consider whether or not it is in the public interest that the order of stay be granted. In this case, it is clear that the interests of children are at stake and as is provided in Article 53(2) of *the Constitution*:

A child's best interests are of paramount importance in every matter concerning the child.

38. We have said enough to show that this application is merited.

Accordingly, we issue an order that pending the hearing and determination of the appeal there be an order of injunction restraining the 5th respondent either by itself or agents in any way whatsoever from interfering with the peace and quiet enjoyment of, or evicting the applicant and the 8th and 9th respondents from the suit property being LR Nos 2255/1 and 2255/2, and/or the subdivisions arising therefrom.

39. The costs of the application will be in the appeal.

40. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

O. MUCHELULE

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

