Kazungu & another v Omar (Civil Appeal E042 of 2021)
[2024] KECA 412 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 412 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E042 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

APRIL 26, 2024

BETWEEN

KADZO NAGORE KAZUNGU ..... 1ST APPELLANT

SAFARI KAZUNGU CHOME ..... 2ND APPELLANT

AND

ABDALLA SALIM OMAR ..... RESPONDENT

(Being an appeal from the judgment and orders of the Environmental and Land Court at Malindi (J. O. Olola, J.) delivered on 20{{^th}} September 2019 in Malindi ELC Case No. 205 of 2015)

JUDGMENT

1. By an Originating Summons dated 3rd November 2014 and taken out by the appellants against the respondent, the appellants sought orders that the respondent's interest in the portion of land occupied by the appellants in respect of sub- division No. 2348 (Original No. 1854/1) Section 11 MN comprised in a certificate of title dated 16th January 1998 in the Land Title Registry at Mombasa as CR 30925 as delineated, demarcated and described on the land survey plan No. 201691 (hereafter the suit land) has been extinguished; that the appellants be registered as the proprietors of the said portion which measures 589ft by 144ft by 30ft in place of the respondent; that the Registrar of Titles, Mombasa, do issue a Certificate of Title for the said portion in the names of the appellants; that the said order be registered against the suit land in terms of section 38(2) of the *Limitation of Actions Act*; and that the costs of the Originating Summons be provided for.

2. The Originating Summons was supported by two affidavits sworn by the 1st appellant, Kadzo Angore Kazungu, and the 2nd appellant, Safari Kazungu Chome, on 3rd November 2014.

3. According to the 1st appellant, she was married to Kazungu Chome during the presidency of the late Jomo Kenyatta, but could not recall the year; that, at the time of her marriage, her late husband together with his mother and her brother were living on the original portion of land before its subdivision that gave rise to the suit land; that, after the said subdivision, her deceased husband remained on the suit land; that there was no interference with her occupation of the land; that, in her view, the respondent had no title to the suit land; that the portion of land occupied by her homestead measured 589ft by 260ft by 150ft by 30ft since it had 5 sides; that, on the said land, there are three houses belonging to herself, her step-son, the 2nd appellant and her step-daughter, Fatuma Mwenda; that, whereas the 2nd appellant had since moved to his own place, he grew up on the said land, and that she did not know the respondent; that on the suit land are her cashew nuts, coconuts and mango trees which were planted a long time ago; that her late husband had on 21st July 1993 entered into an agreement with the owner of the original land, Mohammed Ahmed Kassim, in respect of the portion occupied by the appellants; that the respondent had always known that the appellants and their families were occupying the said land; that of her 7 children, were born on the said land, as was her 20 year old last born married daughter; that the respondent had initiated steps to evict her and her family based on a court order issued in Malindi ELC Land Case No. 2 of 2011 filed against Charo Kazungu Chome, Ngao Said, Kazungu Mweni Kawindi Ngonyo and James Ithale where all the respondents therein, save for the 4th respondent, were directed to give vacant possession of the suit land; and that she had been advised by her counsel that the respondent's right to recover the land occupied by the appellants had been extinguished by operation of law.

4. In cross-examination, the 1st appellant could not remember the year she got married, but insisted that her late husband was buried on the said land where she found him living with his mother and elder brother. It was her evidence that the land they were occupying belonged to Mzee Baadhi to whom her husband used to pay monthly rent; and that the other house in the photograph belonged to Fatuma but they did not take a photograph of the 2nd appellant's house.

5. On his part, the 2nd appellant, apart from reiterating the averments made by the 1st appellant, added that he was born on the suit land in 1983, but could not remember the year his father, Kazungu Chome, who was buried on the suit land, died; that his brother, Charo Kazungu, was the one who obtained the grant; that his brother, Charo Kazungu, was sued by some people over land though he was unaware of the outcome; that, in 1998 when the respondent claimed to have bought the land, they were occupying he never sought to evict them and no one had ever chased them from the land since the time he was born.

6. In cross-examination, he admitted that in his affidavit he disclosed that his father had a sale agreement in respect of the said land with Mohammed Kassim, but did not know the purchase price. He disclosed that they did not obtain the title deed and that, although the land was initially expansive, it was eventually subdivided, but he did not know its entire acreage. According to him, they sued the respondent because he sued their brother.

7. PW3, Katana Nzau, testified that he had known the appellants since 1969; that he had obtained a title to his own land, whose number he could not remember, while the appellants lived on their own land belonging to their father, but he did not know how they acquired their property since he did not reside on the land with them.

8. On her part, the respondent, apart from relying on his replying affidavit, testified that he was the owner of plot no. 1854/1, and produced his Certificate of Title as exhibit in his case; that he previously filed Case No. 2 of 2011 against Charo Kazungu and obtained judgement against him, and exhibited a copy of the same; that the appellants were related to the said Charo Kazungu; that the houses shown in the

photos relied upon by the appellants were not there when he obtained judgement; that, in his view, they must have been recent photographs as the land was previously vacant, but squatters had entered on the land around 2008 after which he filed the case seeking their eviction in Malindi ELC Case No. 2 of 2011.

9. In cross-examination, the respondent insisted that he bought the land on 21st June 2008, but did not fence it; that he did not sue the appellants in Malindi ELC Case No. 2 of 2011, and was yet to evict Charo Kazungu Charo from the said land; that he did not get judgement against the 4th respondent, Hahindi Ngome in that suit; that the court in that case referred to an agreement of sale, but that the said agreement was between different people; that he was unaware of when the houses were built on the land since he had not been there since 2014 when the present case was filed; that he was not the one who planted the trees in the photographs; that though his plot number was 1854/1, although it was indicated as 2348/III/MN in the certificate of search; and that the name of the person who sold him the land was disclosed in the agreement.

10. At the close of the case, the learned Judge delivered his judgement in which he found that, from the Certificate of Title produced in evidence, the suit land is a sub-division of Land Portion No. 1854/1 Section III MN; that the Deed Plan annexed to the Certificate revealed that the suit land land was, upon sub-division, created on 14th December 1995, and was initially registered in the name of one Mishi Juma Karanja who, according to the second entry, transferred it to Shaban Swedi on 25th February 1998; and that it is the said Shaban Swedi who transferred the said portion to the respondent herein later on 27th June 2008; that there was no evidence in support of the appellant's contention that the suit land was owned by one Mohammed Ahmed Kassim to whom they used to pay ground rent.

11. According to the learned Judge, if it was true that the appellants did not know the respondent until the time the respondent sued the said Charo Kazungu Chome and sought to evict them from the property, and that the appellants had never heard of or seen Mishi Juma Karanja who owned the land before the respondent herein acquired the same as well as Shaban Swedi, then it would follow that all the previous owners of the land were unaware of the alleged possession of the suit land land by the appellants; that the registered owner of the land is deemed to be in possession of his property as long as there is no invasion thereof by a third party; that the mere fact that the actual owner of the land has not used the land or any portion thereof for a period of 12 years or more does not of its own accord and without more affect title to the land; that, in order for a claim of adverse possession to mature, the hostile takeover of the property by a third party must be notorious and adverse to the extent that the owner can be assumed to have had knowledge thereof actual or otherwise; and that, where the registered owner of the land is unaware of the occupation of his land by a third party, the limitation period does not run against him.

12. In this case, the learned Judge found that there was no proof of knowledge either actual or constructive of the presence of the appellants on the suit land land by any of the owners registered in the Certificate of Title since 1995; that, from the material placed before him, the respondent acquired ownership of the suit land on 27th June 2008; that, if the appellants were in occupation at that time as they allege, then that is the period when the time for adverse possession began to run as against the respondent, and not earlier; that the suit was filed some six years later on 4th November 2014 and, by then, adverse possession of the suit land had not crystalized as against the respondent; that the appellants admitted that the respondent had tried to evict their family when he filed Malindi ELC Case No. 2 of 2011 against a member of their family one Charo Kazungu Chome; that, in the said matter, judgment was obtained for eviction of the said Charo Kazungu Chome on 11th July 2014; that no attempt was made by the appellants to distinguish the portion of land from which the said Charo Kazungu Chome was to be evicted pursuant to the said judgment from the portion being claimed as family land by the

appellants; that there was a whiff of possibility that this present suit was filed in abuse of the court process to circumvent the Judgment in Malindi ELC Case No. 2 of 2011.

13. When the appeal was called out for hearing on the GoTo Meeting virtual platform on 16th October 2023, learned counsel, Mr. Odhiambo, appeared for the appellant while learned counsel, Mr. Shujaa, appeared for the respondent. Both counsel relied entirely on their written submissions.

14. According to the appellants, the trial court did not properly consider the evidence of the appellants as regards the time/period they occupied the land before and after the respondent became the registered proprietor of the suit land; that the holding by the trial court that where the registered owner of land is not aware of the occupation of his land by a third party, the limitation period does not run against him is wrong; that what is required of a party claiming land by adverse possession is proof of peaceful and uninterrupted occupation for 12 years which occupation must be open, peaceful and uninterrupted, which the appellants proved in this case; that there was no corroboration of the respondent's contention that when he bought the land in 2008 the same was vacant; that the trial court failed to take into account the evidence on record that the 4th Defendant in Malindi ELC No. 2 of 2011 together with other squatters offered one Mr. Mohamed bin Ahmed Kshs. 120,000/= to purchase the land vide the agreement dated 21st July 1993; that the name of Kazungu Chome appears in the said agreement which was evidence that the late Kazungu Chome was in occupation of the suit land before the respondent acquired it; that the respondent's evidence and the trial court's findings that Magogo was not on the suit land when he became the owner contradicted the finding of the Court in ELC No. 2 of 2011; that, since the respondent admitted that the name of the person who sold him the land was in the said agreement, the interest of that person was extinguished as far the suit land occupied by the appellants is concerned; and that the trial court erred in holding that the period of 12 years began to run in 2008 contrary to the legal position that a proprietor of land whose interest therein is extinguished cannot pass a better title to a third party than his own interest.

15. It was further submitted that there was no evidence that Charo Kazungu Chome was sued as a legal representative of the estate of the late Kazungu Chome and, therefore, the attempt by the respondent to evict the family of the late Kazungu Chome was not a basis for dismissing the appellants' suit, and neither was there any evidence that the suit was filed by the appellants to circumvent the judgment in Malindi ELC No. 2 of 2011, nor was there evidence that the respondent, in execution of the decree in ELC No 2 of 2011, gave notice to the appellants to show cause why they should not be evicted from the suit land.

16. We were therefore urged to allow the appeal with costs.

17. On the other hand, the respondent submitted that the learned Judge did not err in law and fact in evaluating the evidence tendered in court, or in arriving at the finding that the appellants had not proved adverse possession of the respondent's land; that in the case of Wambugu vs. Njuguna (1983] KLR 171, this Court held that, in a claim for adverse possession, it is not enough for the claimant to show possession of the suit land for the statutory period of 12 years or more, what must be proved is that the proprietor of the land was either dispossessed of the land or that he discontinued his possession of the land for the entire statutory period; that a registered owner of land is deemed to be in possession of his land until an intruder enters upon the land and commences activities inimical to his title since it is dispossession of the respondent that defeats his title to the land it is inconsistent with his enjoyment of the land, and the purpose for which he intended to use it; that the onus was on the appellants to prove that they occupied the suit land openly, that is, without secrecy, without force, and with the knowledge of, but without the permission of, the respondent, continuously and with the intention to have the land as their own; that the onus was on the appellants to prove by evidence that the respondent was aware of the invasion of his land for a period of 12 years or more; that, in the case of Titus Kigoro

Munyi vs. Peter Mburu Kimani [2015] eKLR, the court held that actual or constructive knowledge of adverse possession by a third party on part of the registered owner must be proved, and that the statutory period starts to run when the registered owner becomes aware of the trespass.

18. The respondent submitted further that, although the appellants claimed that the portion of land in issue measured 589ft by 26 by 150ft by 144ft by 30ft, no factual evidence was adduced, for example, a survey report of the physical location of the plot showed that it was comprised within the boundaries of the land registered in the name of the respondent; that there was no concrete evidence of the period of occupation of the suit land by the appellants; that is also trite that in a case of adverse possession the appellants must acknowledge the fact that the respondent they have sued is the true owner of the suit land; that, in this case, the appellants did not recognize the respondent as the true owner of the land since, according to them, the land was either owned by one Mohamed Ahmed Kassim or one Mzee Baadhi; that the evidence adduced by the respondent showed that he was registered as the owner of the suit land on 21st June 2008 upon transfer from one Shaban Swedi, who acquired the suit land on 25th February 1998 from Mishi Karanja who had been registered as owner of the suit land on 16th January 1998; that, from the testimony of the appellants and their averments in their supporting affidavits, it was manifest that, for the entire period of their occupation of the suit land, they were unaware of the fact that the suit land was previously owned by Mishi Karanja, who transferred it to Shaban Swedi before it was transferred to the respondent; and that the appellants did not adduce any evidence showing that the suit land was previously registered in the name of Mohammed Ahmed Kassim or Mzee Baadi prior to the registration in favour of Mishi Karanja on 16th January 1998, or that the respondent's predecessors in title knew of the possession of the land by the appellants prior to the registration in favour of the respondent.

19. It was submitted that the learned Judge therefore correctly held that there was no proof of knowledge either actual or constructive of the presence of the appellants on the suit land by the registered owners; that the learned Judge correctly found that, by the time the respondent was taking steps to assert his rights over the suit land by instituting the former suit, the limitation period within which he was entitled to bring the suit for recovery of the land had not lapsed; that, since there was no evidence showing that the respondent's predecessors in title were aware of the appellants invasion of the suit land, time begun to ran against the respondent when he became aware of their presence on the land and that, by the time he filed the former suit, the limitation period within which he was entitled to bring the suit had not lapsed; and that the learned Judge also correctly found that the appellants had not in any way distinguished the portion of land from which their family member, the said Charo Kazungu Chome, was to be evicted from the portion of land they were claiming as family land pursuant to the judgment in that suit.

20. We were therefore urged to dismiss the appeal with costs.

21. We have considered the record of the proceedings and submissions placed before us.

22. This being a first appeal, this Court's mandate was espoused in Ng'ati Farmers' Co-Operative Society Ltd. vs. Ledidi & 15 Others [2009] KLR 331 as follows:

> " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence,

or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

23. This mandate was reiterated in the case of Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

24. We are, however, conscious as cautioned by the predecessor to this Court in Peters vs. Sunday Post Ltd [1958] E.A 424 that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

25. In our view, the only issue that falls for determination before us is whether, based on the evidence adduced before the trial court, the learned Judge erred in finding that the appellants had failed to prove that they were entitled to the suit land by way of adverse possession.

26. Section 7 of the *Limitation of Actions Act* provides that:

> An action may not be brought by any person to recover land after the end of 12 years from the date which the right of action accrued to him or if it first accrued to some person through whom he claims to that person.

27. What constitutes 'adverse possession' was described in the case of Jandu vs. Kirpal & Another [1975] EA 225 in which the court, while relying on the case of Bejoy Chundra v Kally Posonno [1878] 4 Cal 327 at p 329, held that:

> " By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner."

28. This Court in Mtana Lewa vs. Kahindi Ngala Mwamgandi (2005) eKLR explained that:

> " Adverse Possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years."

29. In Alfred Welimo vs. Mulaa Sumba Barasa, CA No 186 of 2011, this Court expressed itself thus:

> " It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry's manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...."

30. In Ndolo vs. Kitutu & 8 others (Civil Appeal 394 of 2018) [2022] KECA 1289 (KLR) (18 November 2022) (Judgment), the Court held that:

> " For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted use of the land. The physical fact of exclusive possession and the animus possidendi to hold as owner to the exclusion to the actual owner are important factors in a claim for adverse possession. The principles stated in the above holding are also encapsulated in the local legislation referred to elsewhere in this judgment. The direct import of these two provisions is, firstly, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued, which is the date of dispossession. Secondly, after the expiration of the said twelve years the title of the registered owner shall be extinguished. Thirdly, the person in adverse possession is entitled to a title by possession."

31. In this case, the appellants' claim that the suit land was in the occupation of the deceased until his death. Upon his death, the appellants as his widow and son continued in occupation thereof without interference, and were in the same position when the respondent sued.

32. From the evidence placed before the learned Judge, it is clear that the suit land is a sub-division of Land Parcel No. 1854/1 Section III MN. From the exhibited Deed Plan, it is apparent that, upon sub-division, the suit land was created on 14th December 1995 and was initially registered in the name of one Mishi Juma Karanja, who transferred it to Shaban Swedi on 25th February 1998. On 27th June 2008, the same land was transferred to the respondent herein. There was no evidence that the suit land was owned by Mohammed Ahmed Kassim or Mzee Baadi as claimed by the appellants.

33. The appellants' evidence was that they did not know any of the registered proprietors of the suit land before the respondent came into the picture. If that was the position, then one wonders at what point the appellants' occupation of the suit land started being adverse to the interest of the proprietors of the land. Even if their evidence that they were paying rent to the said Mohammed Ahmed Kassim was true, it would only mean that they were rightfully or wrongfully in the said property as tenants. There is no evidence as to when they stopped paying the rents and started exercising proprietary rights of the said land in order for the time to start running. This Court in Ndolo vs. Kitutu & 8 others (supra) cited AIR 2008 SC 346 Annakili v A Vedanayagam & Ors, a decision of the Supreme Court of India in which the essential elements of adverse possession were considered as follows:

> " Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession

for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now settled principle of law that mere possession of land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the prescribed period under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title."

34. As is clear from the above authorities, it does not suffice to simply aver that the claimant was in possession for more than 12 years. The claimant must adduce evidence of the steps taken with a view to asserting rights which must be shown to be adverse to the title of the true owner. Where the claimant's entry into the land was as a licensee, there must be evidence of the point at which the licence was terminated and the continued possession became adverse to that of the owner. Where entry into the land was, as the appellants contend, based on a tenancy arrangement with the perceived owner, the appellants ought to have adduced evidence showing the point at which payment of rent came to an end and that, thereafter, their occupation became adverse to that of Mohammed. There was no such evidence. In any event, the evidence placed before the trial court did not support the position that Mohamed had any interest in the said land. In our view, as long as the trespasser believes that he is on the land as a licensee, even if mistakenly so, such possession cannot be said to be adverse to that of the proprietor of the land.

35. However, we disagree with the learned Judge's position that time for adverse possession could only run as against the respondent from the time he became the proprietor of the land. That position may not necessarily be correct since the law on limitation period for the purposes of adverse possession is that if the owner of land losses title by way of adverse possession, it will not matter that a third party obtains title after the period of limitation has run its course. This is so since a party has lost its interest in land through adverse possession cannot pass a better title than the one he had lost to a third party who purchases the said land from him. See Eliud Nyongesa Lusenaka & Another vs. Nathan Wekesa Omocha Civil Appeal No. 134 of 1993; and Peter Thuo Kairu vs. Kuria Gacheru [1988] KLR 297; [1988-92] 2 KAR 111; [1986-1989] EA 215. However, nothing turns on this point.

36. In this case, it is not disputed that the respondent sued Charo Kazungu Chome in Malindi ELC Case No. 2 of 2011. The said Charo Kazungu Chome was a brother to the 2nd appellant and a step-son to the 1st appellant. According to the 2nd appellant's evidence in cross-examination:

> " My brother Charo Kazungu Chome is the one who got the grant...I know my brother Charo Kazungu was sued by some people over the land. I do not know what the decision was...We have sued the defendant because he had sued our brother."

37. It is clear that the appellants knew about the existence of Malindi ELC Case No. 2 of 2011 in which judgement was obtained for the respondent against the holder of the grant of representation for the estate of the deceased through whom the appellants herein claimed the land. The appellants cannot therefore plead ignorance of the said proceedings and, in effect, seek to obtain orders which would regularise possession of the land by the family of the late Kazungu Chome. As the learned Judge rightly held, no attempt was made by the appellants to distinguish the portion of land from which the said Charo Kazungu Chome was to be evicted pursuant to the said judgment from the portion being claimed as family land by the appellants. It was upon the appellants to present evidence clearly distinguishing the land they were claiming from that which Charo Kazungu Chome was directed to vacate in Malindi ELC Case No. 2 of 2011, which they failed to do.

38. After reviewing the evidence, we come to the conclusion that the findings of the learned Judge that the appellants failed to prove that they acquired interest in the suit land by way of adverse possession cannot be faulted. We find no reason to interfere with his findings of fact. As this Court held in Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja [1986] KLR 661; VOL. 1 KAR 982; [1986-1989] EA 183:

> " The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

39. In this appeal, we have not been persuaded by the appellants that the learned Judge took into account facts or factors which he should not have taken into account; or that he failed to take into accounts matters which he should have taken into account; that he misapprehended the effect of the evidence; or that he demonstrably acted on wrong principles in making his findings.

40. In view of the foregoing, we hereby dismiss the appeal with costs to the respondent.

41. We so order.

Dated and delivered at Mombasa this 26th day of April, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR