Kiki Investments Ltd & 2 others v Insurance Regulatory Authority (Civil Appeal 381 of 2017) [2024] KECA 1316 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KECA 1316 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 381 OF 2017

K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA

SEPTEMBER 27, 2024

BETWEEN

KIKI INVESTMENTS LTD .... 1ST APPELLANT

KIRAGU INVESTMENTS LTD .... 2ND APPELLANT

MUMBU HOLDINGS LTD .... 3RD APPELLANT

AND

INSURANCE REGULATORY AUTHORITY .... RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ochieng, J.) dated 20th February 2017 in HC Misc. C. No. 316 of 2016)

JUDGMENT

1. The three appellants, Kiki Investments Ltd., Mumbu Holdings Ltd., and Kiragu Investments Ltd., are the shareholders of United Insurance Company Ltd. (Under Statutory Management) (hereafter "the company"). The company was incorporated in 1983 under the *Companies Act* to carry out general business of insurance and was subsequently licensed as an insurer.

2. The respondent, the Insurance Regulatory Authority, is a body corporate established under the *Insurance Act*, Cap 487, among other things, to license all persons involved in the insurance industry and to ensure effective administration, supervision, regulation and control of the industry.

3. In the course of time, the company experienced debilitating cash flow problems and was unable to settle third party claims against its policy holders. Consequently, on 15th July 2005 and pursuant to the provisions of section 67 (c) of the *Insurance Act*, the respondent appointed Kenya Reinsurance Corporation as statutory manager of the company. The effect of the appointment was to handover the management, control and conduct of the affairs of the company to the statutory manager, who

henceforth assumed and exercised all the powers of the company, to the exclusion of its board of directors.

4. The tenure of Kenya Reinsurance Corporation as statutory manager was extended by the High Court from time to time until 26th September 2014, when it was replaced by Mr. Evanson Waruhiu Munene as statutory manager. Mr. Munene was in turn replaced as statutory manager by the Policy Holders Compensation Fund on 26th June 2015. The appointment of the statutory managers spewed a myriad of suits and applications, the details of which are not directly relevant to this appeal.

5. One such application was made by the respondent in High Court Miscellaneous Case No. 67 of 2012, in the Matter of United Insurance Co. Ltd. (Under Statutory Management), and by a ruling dated 25th September 2013, Mabeya, J. allowed the respondent to appoint a six-member caretaker board whose primary responsibility was to establish operational systems and structures in anticipation of the revival of the company. For convenience we shall refer to HC. MISC. C. No. 67 of 2012 as "the first suit."

6. On 23rd June 2016, the appellants took out an originating summons in the High Court, namely High Court Miscellaneous Applicati*on No. 316 of 2016* seeking among others, an order establishing a transitional board of directors for the company, made up of seven members. Of the seven, three were to be nominated by the respondent while four, of whom one was to be the chairman of the transitional board, were to be nominated by the shareholders of the company. The mandate of the transitional board was to deal with all issues pertaining to the company and to settle all genuine and verified claims payable by the company.

7. The appellants also sought a number of ancillary orders, among them an order for establishment by the board of a claims verification and settlement committee to complete verification, compromise claims, and recommend settlement of lawful and genuine claims payable by the company. The appellants proposed membership of the committee to include three advocates and a finance expert nominated by the shareholders, a member of the respondent, a member of the Law Society of Kenya and any other member or nominee that the court deemed fit to appoint. The committee was to present to the court quarterly reports.

8. Lastly, the appellants prayed that the remuneration of members of the board, the committee and their employees be fixed, presumably by the court, and that all subsisting claims against the company as well as all pending suits be stayed. Also sought was an order for suspension of the limitation period for claims by policy holders or creditors of the company.

9. Contemporaneously with the originating summons, the appellants filed a notice of motion seeking the prayers set out in the originating summons on interim basis, pending the hearing and determination of the originating summons.

10. On 6th September 2016, the respondent lodged a preliminary objection to both the originating summons and the motion, contending that the court did not have jurisdiction; that the matter was sub judice and res judicata, and that the summons and the motion were in blatant violation of the *Insurance Act*, the *Companies Act* and the *Civil Procedure Act*, and also an abuse of the process of the court. The respondent prayed that the summons and motion be struck out in limine.

11. The matter was heard by Ochieng, J., (as he then was) and by a ruling dated 20th February 2017, the learned judge struck out the originating summons with costs after finding that the issues raised in the summons had, in substance, been heard and determined by the court in the first suit. The appellants were aggrieved and filed this appeal, founded on 12 grounds, which their learned counsel, Mr. Mbabu, compressed into two issues, namely:

i. Whether the learned judge erred by holding that the originating summons was res judicata; and

ii. Whether the learned judge erred by dismissing the originating summons without hearing it on merits.

12. In support of the appeal, the appellants, relied on submissions dated 10th November 2021, in which they set out in great detail the history of the company's statutory management and the attendant litigation. As far as the issues raised in this appeal are concerned, the appellants submitted, as regards the first issue, that the summons was not res judicata. Relying on the section 7 of the *Civil Procedure Act* and the decision of this Court in Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others [2017] eKLR, the appellants contended that the issues raised in the summons were not directly or substantially in issue in the first suit because, whilst the first suit involved appointment of a caretaker board made up of six members to put in place operational procedures for the revival of the company, the originating summons sought appointment of a transitional board made up of seven members with a mandate to deal with all legal issues pertaining to the company and to settlement of genuine and verified claims. It was further contended that the two suits raised different issues and that the summons in particular, raised new and novel issues of law, namely the power of the High Court to appoint a transitional board which is different from a caretaker board. It was the appellants' position that the High Court erred by failing to appreciate the difference between the caretaker board and the transitional board and the fact that they were not conterminous.

13. Relying on Articles 165(6) and (7) of *the Constitution* and section 67 (c) of the *Insurance Act*, the appellants submitted that the High Court has supervisory jurisdiction over any person or authority exercising a judicial or quasi- judicial function and that the appointment of the statutory managers was a quasi-judicial function subject to the supervisory jurisdiction of the High Court. This was another of the new and novel issues of law that the appellants wished to urge before the court.

14. On whether the first suit and the originating summons were between the same parties or parties litigating under the same title, the appellants submitted that in the first suit the parties were the Commissioner of Insurance, Kenya Reinsurance Corporation and the company, whereas in the originating summons, the parties were the appellants, who were enlisting the assistance of the Law Society of Kenya. In the appellants' view, the parties were totally different.

15. Regarding whether the issues in the first suit were heard and finally determined by a court of competent jurisdiction, the appellants submitted that although the High Court had jurisdiction in the two suits, the issue of whether a transitional board should be appointed to take over the management of the company from the statutory manager is yet to be determined. Relying on the decisions of this Court in Suleiman Said Shabhal v. IEBC & 3 Others [2014] eKLR and Kenya Commercial Bank Ltd v. Benjoh Amalgamated [2017] eKLR, it was submitted that to constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.

16. Turning to the second issue as to whether the learned judge erred by dismissing the originating summons without hearing the same on merits, the appellants submitted that they had raised substantive and weighty issues which required determination on merit. It was submitted that the policy of the law under Articles 25 and 159 of *the Constitution* is to hear cases on merit rather to summarily dismiss them. In support of the submission the appellants relied on the decision of this Court in Kenya Ports Authority v. William Odhiambo Ramogi & 8 Others [2019] eKLR. They also contended that the originating summons raised issues that deserved to be determined, like whether the company was ripe for revival; whether the transitional board of directors should be appointed to take

over the management of the company and whether it was in public interest to terminate the statutory management.

17. On the basis of the foregoing arguments, the appellants urged the Court to allow the appeal with costs.

18. The respondent, represented by Mr. Milimo, learned counsel, opposed the appeal vide submissions dated 24th September 2020. Relying on the decision of this Court in Accredo AG & 3 others v. Steffano Uccelli & Another [2019] eKLR and that of the High Court in National Rainbow Coalition v. Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR, counsel submitted that the respondent's preliminary objection raised pure points of law regarding res judicata and jurisdiction and that there was no dispute between the parties as regards the existence of previous proceedings and the orders issued therein.

19. It was further submitted that the primary relief sought by the appellants in the originating summons was the creation of a transitional board of directors for the company, whilst that relief had already been granted in the first suit by the ruling dated 25th September 2013. Counsel urged that despite the terminology employed by the appellants, the issue in substance in both matters was the management and control of the company and creation of mechanisms to facilitate the verification of claims and payment of those found to be genuine. Counsel added that litigation must come to an end and that the court cannot be requested to determine issues that it had already determined.

20. Mr. Milimo continued to submit that the appellant's prayer in the originating summons for stay of all proceedings against the company had already been granted by the High Court on 23rd October 2009 in High Court Civil Suit No. 748 of 2009 and that the court had also suspended the running of time for purposes of the law of limitation of actions.

21. In addition, it was contended that the High Court had found in a ruling dated 29th April 2013 in the first suit, that the issues raised by the appellants in the originating summons regarding extension of the statutory managers' tenure, the alleged abuse of power by the statutory managers, removal of the statutory manager, and winding up of the company were already the subject of other pending suits and therefore, sub judice. It was the respondent's view that, in light of the rulings of the High Court, entertaining the appellant's originating summons would be in blatant violation of sections 6 and 7 of the *Civil Procedure Act*.

22. Lastly, the respondent addressed at length the contention that the appellants were trying to take over management of the company through the backdoor in violation of section 67C (2) of the *Insurance Act*. We need not belabour the point that the ruling of the High Court under challenge in this appeal did not address such issues and therefore there is no basis for engaging with them in this appeal.

23. We have considered this appeal. We propose to address the two issues as framed by the appellants. As we have already stated, the first issue is whether the learned judge erred by holding that the originating summons was res judicata. The doctrines of sub judice and res judicata are provided for in sections 6 and 7 of the *Civil Procedure Act*, as follows:

> " 6. Stay of suit
>
> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the

same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court…"

24. Starting with the doctrine of sub judice, it is codified in section 6 of the *Civil Procedure Act* and bars the courts from entertaining a suit where there is an earlier suit pending for hearing and determination before a court of competent jurisdiction and involving the same parties and substantially the same dispute. Where there is an earlier pending suit, the court is required to stay the hearing of the latter suit to await determination of the first suit in time. The rationale behind the sub judice rule is simply that a party cannot be allowed to file a multiplicity of suits on the same issue which is yet to be determined.

25. As for res judicata, the same comes into play where the issues raised in a later suit have already been heard and finally determined by a court of competent jurisdiction in an earlier suit between the same parties. The law bars the court, in absolute terms, from hearing the latter suit. The rationale here is that litigation must come to an end, and the court cannot be asked to determine the same issue again and again. Section 7 of the *Civil Procedure Act* codifies the doctrine of res judicata.

26. The doctrines of sub judice and res judicata have been the subject of consistent pronouncements by our courts, including by the Supreme Court. In Speaker of the National Assembly & Another v. Senate & 12 others [2021] KECA 282 (KLR), this Court held that:

> " Sub judice is a Latin word meaning "under judgment". It denotes that a matter is being considered by a court or judge. The doctrine is codified in section 6 of the *Civil Procedure Act*."

27. In Kenya National Commission on Human Rights v. Attorney General & 17 Others [2020] eKLR the Supreme Court expressed itself as follows on the doctrine:

> The term 'sub judice 'is defined in Black's Law Dictionary 9th Edition as: "Before the court or judge for determination." The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.'"

28. As regards res judicata, in Kenya Commercial Bank Ltd v. Muiri Coffee Estate & Another [2016] eKLR the Supreme Court explained that:

> "Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights…
>
> The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

29. Similarly, in John Florence Maritime Services Ltd & another v. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, this Court held:

> " The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."
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> (See also William Koross v. Hezekiah Kiptoo Komen & 4 others [2015] eKLR).

30. Another relevant aspect of the doctrine of res judicata is that the doctrine applies not only to the issues that parties required the court to decide in the first suit, but also to all issues which, by reasonable diligence, they ought to have raised in that suit. Parties are obliged to bring forward their entire cases rather than to submit the same to the court in instalments. Accordingly, if, from the nature of the case, an issue ought to have been raised in the first suit but due to accident, inadvertence or negligence it was not raised, the court will not allow it to be raised subsequently. (See Henderson v. Henderson [1843] 67 ER 313)

31. The doctrine of res judicata is not a mere procedural technicality that may be waved or ignored under Article 159 (2)(d)of *the Constitution*, which requires the courts to administer justice without undue regard to procedural technicality. In Kenya Commercial Bank Ltd v. Muiri Coffee Estate & Another (supra), the Supreme Court explained that res judicata is a substantive legal concept rather than a technicality limiting the scope of substantial justice, and applies even in constitutional litigation.

32. Lastly, a party cannot evade the doctrine of res judicata by merely introducing a new cause of action so as to seek the same remedy as that sought in the first suit. A party is not allowed to bring before the court in a different way or form, a cause of action which has already been resolved by a court of competent jurisdiction. Nor can such a party evade the doctrine of res judicata by cosmetic changes, such as adding other parties to the same cause of action. (See E. T. v. Attorney General & another [2012] eKLR and Njangu v. Wambugu, HCCC No. 2340 of 1991).

33. In Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others (supra), this Court identified the elements of res judicata as follows:

> "Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
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> a. The suit or issue was directly and substantially in issue in the former suit.
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> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."
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> (See also Uhuru Highway Development Ltd v. Central Bank of Kenya [1999] eKLR and Bernard Mugo Ndungu v. James Nderitu Githae & 2 others [2010] eKLR)

34. Turning to the merits of this appeal and the first issue raised by the appellants, it is common ground that on 25th September 2013, the High Court (Mabeya, J.) in the first suit, allowed the appointment of a body to set up modalities for the revival of the company. The terms of the order of the Court were as follows:

> "2. That notwithstanding the provisions of section 67C of the *Insurance Act*, the applicant, Commissioner of Insurance be and is hereby at liberty to constitute a Caretaker Board of six (6) members consisting of three (3) members appointed by himself, and the rest of the shareholders of United Insurance Company Ltd to put in place operational structures in anticipation of the revival of United Insurance Company Ltd.
>
> 3. That the terms of Reference of the Caretaker Board be provided by the Commissioner of Insurance.
>
> 4. That the appointment of the statutory manager of United Insurance Company Limited be and is hereby extended for a further period of one (1) year commencing 28th September 2013.
>
> 5. That a mention be within three (3) months from the date of grant of the orders herein to ascertain the steps taken by the Commissioner of Insurance in constitution of the Caretaker Board by the Commissioner and the realisation of the Company's assets by the statutory manager.
>
> 6. That the applicant to ensure compiling and filing in court of the statutory manager's report within ninety (90) days from the date of grant of the orders herein and in any event before the mention dates herein above granted.
>
> 7. That mention on 24th January 2014 to confirm the position and the report of the applicant to be filed on or before 20th January 2014."

35. The first suit in which the above orders were made was between the company under which the appellants are litigating as shareholders, the Commissioner of Insurance (an appointee of the respondent) and Kenya Reinsurance,

the statutory manager. The issue in the application to which the order of 25th September 2013 related was the appointment of a body to put in place mechanisms for ending the statutory management and revival of the company.

36. In the originating summons from which this appeal arises, the parties were the appellants as shareholders of the company and the respondent. The issue was appointment of a transitional board whose mandate was to deal with issues of the company and to settle claims payable by it, no doubt with the ultimate aim of taking the company out of the statutory management.

37. Notwithstanding the differences identified by the appellants in the names of the mechanism in the first suit and in the originating summons, the numbers of members of the two bodies and the procedures for their appointment, the substantive issue was the same in the first suit and in the originating summons, namely the creation of a mechanism with expanded members representing the interest of the shareholders of the company, to put in place procedures and mechanisms that would ultimately see the company out of the statutory management. Questions of the name of the mechanism, the number of members, the interests to be represented, and its precise mandate ought, by reasonable diligence, to have been raised in the first suit.

38. Further, the dispute in the originating summons was essentially between the same parties as in the first suit. Merely adding the Law Society of Kenya as one of the bodies to appoint a representative to the caretaker or transitional board did not change the real parties to the dispute.

39. We are accordingly satisfied that the High Court did not err in holding that the appellants' originating summons was res judicata.

40. The appellants have forcefully submitted that the originating summons raised new and novel points of law, such as the supervisory jurisdiction of the High Court over any person or authority exercising a judicial or quasi- judicial function like the statutory managers. Again, with great respect, that very issue was addressed and determined by Mabeya, J. in the first suit in a ruling dated 29th April 2013 where one of the issues was the extent of the powers of the High Court under section 67 C (3) of the Act. The learned judge concluded that Parliament had provided for the High Court as an independent body to supervise and review actions of the Commissioner of Insurance and the statutory manager. He also made reference to the supervisory jurisdiction of the High Court under Article 165 (6) and (7) of *the Constitution* and held that under section 67 C of the Act, the Commissioner of Insurance exercises quasi-judicial powers and the High Court has supervisory jurisdiction over him and the statutory manager. As far as we can tell from the record, there was no appeal from that decision.

41. Accordingly, the issue was raised, heard and determined by the High Court vide the ruling of 29th April 2013 and therefore, the court cannot be requested to determine the same issue in the originating summons.

42. We also note that the prayers by the appellants in the originating summons for stay of all subsisting suits and claims and against the company and for suspension of the limitation period had already been granted by the High Court in a ruling dated 23rd October 2009 in HCCC No. 748 of 2009.

43. In the same ruling of 29th April 2013, the High Court addressed the issue of sub judice and found that many of the issues raised in the first suit were sub judice. It is apt to quote in extenso what the court found and concluded:

> " I have critically looked at the pleadings filed in the following cases:
>
> a. HCCC No. 714 of 2007, Kiki Investments Ltd & 2 others v Attorney General & another;
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> b. HC Misc. Applicati*on No 1345 of 2005* (OS), Kensilver Express Ltd & another v. Commissioner for Insurance;
>
> c. Nbi. HCCC No. 1415 of 2005(OS), Kenya Reinsurance & another v. Jane W. Michuki;
>
> d. Milimani W.U. cause No. 22 of 2006, In the Matter of United Insurance Co Ltd.;
>
> e. HCCC No. 418 of 2008, KCB v John K. Mbuu; and
>
> f. Anti-Corruption Case No. 6 of 2009, Republic v. Johnson Jackson Gathara.
>
> Briefly stated, the issues raised in the pleadings therein are challenge to the extension of the continued management of UIC by Kenya-Re, that the winding up of UIC was based on wrong information, that Kenya Re had sold the assets of UIC without leave of the court, the issue of missing titles, monies and other documents of UIC, the inability or otherwise of UIC to pay its debts, the management of UIC by Kenya-Re and the alleged payment of moneys belonging to UIC under circumstances alleged to be corrupt...
>
> Indeed, my view of it is that the present application has but summarized all the issues in all the previous cases and agitated them in the present application. A determination of any of such issue will impact one way
>
> or the other, one or more of the previous cases. A careful consideration will show that all the issues raised in the present application are covered in the said cases. Whilst the parties vary from one case to the other, the parties in these proceedings are parties in some of those cases. Indeed, apart from the Anti-Corruption Case No. 6 of 2016, in all the other cases the Commissioner of Insurance or Kenya-Re is but a party. I am of the firm view that whilst some of the issues have already been determined and the matters are pending in the Court of Appeal, e.g. HC Misc. Appl. No. 1345 of 2005 (OS), or those issues are still pending in those cases. Discussing any of them and making a determination thereof would be a violent breach of section 6 and/or 7 of the Civil Procedure Rules (sic!)." (Emphasis added.)

44. In view of the above unequivocal finding by the High Court as regards sub judice, we are satisfied that it was remiss for the appellants to file the originating summons raising the same sub judice issues.

45. As regards the second issue in the appeal on whether the learned judge erred by dismissing the originating summons without hearing the same on merits, the answer is plainly in the negative in view of the finding that the issues in the originating summons were sub judice and res judicata. If the originating summons was res judicata, as we have found it was, the High Court did not have discretion

to hear it on merits. In such circumstances section 7 of the *Civil Procedure Act* bars the court in absolute and mandatory terms from trying a matter that is res judicata. Indeed, in William Koross v. Hezekiah Kiptoo Komen & 4 Others (supra), this Court reiterated that:

> "…res judicata constitutes a mandatory bar that injuncts and precludes any fresh trial or reconsideration of a concluded issue."

46. Taking all the foregoing into account, we do not find any merit in this appeal and the same is hereby dismissed. Each party shall bear its own costs.

47. We wish to apologise sincerely to the parties for the delay in rendering this judgment. The delay was occasioned by indisposition and official regional duties involving one of the members of the bench.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER 2024.

K. M'INOTI

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.