Herman v African Safari Club (In Liquidation through its Liquidator; Officer Receiver; First Assurance Company Limited (Interested Party) (Civil Appeal E036 of 2021) [2024] KECA 1288 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1288 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E036 OF 2021

M NGUGI, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

HEINZ-PETER HERMAN ..... APPELLANT

AND

AFRICAN SAFARI CLUB (IN LIQUIDATION THROUGH ITS LIQUIDATOR; OFFICER RECEIVER ..... RESPONDENT

AND

FIRST ASSURANCE COMPANY LIMITED ..... INTERESTED PARTY

(Being an appeal from the ruling of the High Court of Kenya at Mombasa (D. O. Chepkwony, J.) dated 11th October 2019 in Misc. Application No. 240 of 2017)

JUDGMENT

1. The appellant, Heinz-Peter Herman, asks this Court to reverse the decision of the High Court of Kenya at Mombasa (D. Chepkwony, J.) declining to grant him extension of time and leave to file his claim against the respondents. We note that First Assurance Company Limited, the interested party before the High Court, is also referred to in the Record of Appeal before us as the interested party. The proper appellation in an appeal should be respondents, and we shall therefore make reference in this judgment, where appropriate, to the respondent and interested party before the High Court as the 1st and 2nd respondents respectively.

2. As this is a first appeal, we are under a duty to re-appraise and re-assess the evidence on record and reach our own conclusion on the matters in controversy as was held in Selle v Associated Motor Boat Co Ltd.[1968] EA 123 and as is mandated by rule 31(1) (a) of this Court's Rules 2022. As the facts and issues in contention are fairly straightforward, a recap of the pleadings before the trial court at the outset will inform our re-appraisal and analysis of the matters at issue.

3. The appellant lodged Misc. Application No. 240 of 2017 by way of an Originating Notice of Motion dated 12th May 2017, amended on 2nd May 2018, before the High Court in Mombasa seeking, substantively, first, an order granting him leave to institute legal proceedings against the 1st respondent, the African Safari Club Limited, in liquidation, as set out in a proposed plaint annexed to the application. Secondly, the applicant sought an order that upon leave being granted as prayed, that he also be granted leave to file his suit out of time.

4. The application was supported by the appellant's affidavit sworn on 12th May 2017. He deposed that, on 18th December 2008, he was booked as a guest into Flamingo Beach Club, now under receivership; that he fell from the balcony of his room on the third floor as a result of the negligence of the 1st respondent, and fell into a coma. He was admitted into the ICU at Pandya Hospital in Mombasa and was later flown to Germany for specialized treatment. He further averred that he had left in his hotel room Euro 600 and Kshs. 430,000, which had been found and squandered by the 1st respondent's General Manager, and a motor cycle. He stated that his cumulative claim amounted to Kshs.12,344,411.

5. The appellant further averred that due to his being in a coma and the prolonged period of hospitalization in Germany, the matter took sometime before it was filed in court; that, in 2015, he instructed his then lawyer, O. Oguk & Co. Advocates, who filed Misc. Civil Application No.43 of 2015 which, unfortunately, was never heard and he wished to withdraw it.

   He averred that an extension of time to allow his claim to be ventilated would ensure that substantive justice was done to the parties as opposed to the bitter feeling that he would always harbour if he was denied a chance to fully ventilate his claim against the 1st respondent.

6. It was his averment further that the delay in filing his claim within the statutory period was not intentional or willful on his part as he was incapacitated through prolonged hospital admission abroad to restore his life, factors which were beyond his control; that he kept the claim alive by continued communication with the respondent and the interested party seeking an amicable settlement, but that such settlement was not realized; and that the last communication between them was on 5th January 2015 when he wrote a letter to the interested party's General Manager. He further deposed that he was a foreigner and was not familiar with Kenyan laws and procedures in that he spent more time collecting information and documents relating to the matter from the police and the respondent, but that in, the year 2011, the respondent was placed under receivership. He averred that at the time of the incident on 18th December 2008, the respondent was duly insured by the interested party.

7. It was his averment further that the law allows a court to temporarily lift a receivership of a company, particularly where the claim is payable both by the company that has been wound up and the insurance company; that the correspondence clearly demonstrated that the interested party had provided an insurance cover for the respondent against the type of injury that he sustained, but that the law of privity of contract did not allow him to claim directly from the insurance company. It was therefore just and reasonable to lift the winding up order against the respondent so that, if his claim against it succeeds, it could, in the fullness of time, be enforced against the interested party.

8. Both the respondent and interested party opposed the application. The respondent filed a replying affidavit sworn on 24th April 2018 by Ms. Hamida Chidagaya, a State Counsel in the office of the Official Receiver. Ms. Chidagaya averred that the application to temporarily lift the receivership of the respondent was not only grossly misconceived, but also highly irregular; that a winding up order was issued on 19th June 2014, and that the applicant was aware of the fact that there are other creditors claiming as against the company as the winding up order resulted from a creditor petition; that for

the applicant to file a suit against the respondent ten years after the alleged wrong against him and in contravention of the statute of limitation was highly irregular, especially when he had no justifiable cause for the delay and his claim of Kshs.12,344,411 had not been substantiated.

9. Ms. Chidagaya further averred that the applicant had not given any reasons why Misc. 43 of 2015 was never heard, and had not specified how long he was hospitalized. It was the respondent's averment that other creditors should not be punished because of the applicant's malfeasance since the winding up proceedings were underway, and to lift the winding up order would delay payment of claims against other creditors who had sufficiently proved their claim.

10. On its part, the interested party filed an affidavit sworn on 4th December 2017 by Mrs. Janerose Gitonga, its Legal Manager. Mrs. Gitonga averred that the application was misconceived, mischievous and an abuse of the court process and ought to be dismissed as no sufficient reason for delay was shown by the applicant, and the reasons advanced were insufficient to warrant issuance of the orders sought. She further averred that the interested party was not involved in the alleged accident giving rise to the application, was not a tortfeasor in the intended suit, and that the applicant's intended claim did not fall under the provisions of the Insurance (Motor Vehicles) Third Party Risks Act, Cap 405 of the Laws of Kenya, and the interested party was therefore not bound by any law to satisfy the applicant's claim; that the relationship between the applicant and the respondent was based on tort while that between the respondent and the interested party was based on contract, and the two issues could therefore not be tried together. Further, that there was no privity of contract or other relationship in law between the applicant and the interested party. The respondent and the interested party prayed that the application be dismissed with costs.

11. Upon considering the application, Chepkwony, J. dismissed it in the ruling dated 11th October 2019. In so doing, the court observed that upon perusal of the documents annexed to the applicant's application, it noted that at paragraph 14 of the affidavit in support of the application, the applicant had deposed that he found his motorbike which he had left at the hotel parking had been disposed of. That in his list of documents at page 37 (Annexture HPH 5) was a police abstract report dated 3rd February 2011. The court concluded that the report was personally made by the applicant at Bamburi Police Station in Mombasa on the date indicated in the police abstract report. It concluded that the applicant was in Kenya and was even capable of making a report at a police station; and that, by this time, he was still not statute barred from filing his claim.

12. Regarding the appellant's contention that he had kept the claim alive by continued communication with the respondent and the interested party seeking an amicable settlement, the court found that correspondence between parties does not stop time from running. It concluded that it was unable to find in favour of the applicant, and that it would be an academic exercise for it to determine the second issue relating to leave to file a suit against the respondent.

13. In his memorandum of appeal dated 24th May 2021, the appellant raises eleven grounds of appeal which, summarized, are that the trial court: erred in failing to exercise its discretion to extend time as prayed by the appellant and thereby ignored the wider interest of justice to have the case decided on its merits; contradicted itself with regard to the issue of jurisdiction in dealing with a matter filed outside the prescribed timeline; erred in conclusively holding that the appellant must have been in Kenya by 3rd February 2011 while there was no evidence to support such a finding; erred in holding that the fact that a matter was recorded in the Occurrence Book was evidence that it was recorded at the physical presence of the victim when it could be recorded, particularly in accident cases, in the absence of the victim; erred in failing to 'hold the scales of justice evenly' in assessing the physical reasons that contributed to the appellant being unable to file the suit in time, and in failing to weigh the appellant's evidence as a consequence of which the application failed; failed to properly balance the competing interests

in law to ensure that claims are filed within certain timelines and the need to ensure that all disputes are fully and properly resolved through the forums established under the law; failed to hold that on the basis of unrebutted evidence with regard to the correspondences between the appellant and the 2nd respondent, which were ongoing up to 5th January, 2015 and with regard to the representation made by the 2nd respondent, that the 2nd respondent was estopped from reneging on its said representations; and erred in failing to hold that the material facts relating to the cause of action were not within the appellant's knowledge until after the time limited for filing the suit had expired.

14. The appellant urged this Court to set aside the dismissal order given on 11th October 2019 and substitute it with an order allowing the appellant's application dated 12th May 2017. The appellant urged this Court, in the alternative, to allow his appeal and direct that the matter be remitted to any judge of the High Court other than Chepkwony, J. for a fresh hearing.

15. The applicant filed submissions dated 10th March 2023, which were highlighted by his learned counsel, Mr. Gikandi, at the hearing of the appeal. He submits that in the case of Mary Osundwa vs Nzoia Sugar Company Limited (2002) eKLR, the court laid down the circumstances under which the court can grant extension of time under section 27(1) of the *Limitation of Actions Act*. His submission was that what the provisions reveal is that an action for extension of time to file an action out of time can only be brought in strict instances of tort and, more specifically, in an action for negligence, nuisance or breach of duty and or on damages claimed in respect of personal injuries as a result of tort.

16. It is his case that the trial court misdirected itself in dismissing his application entirely on the issue of limitation and holding that the court had no jurisdiction to entertain his claim for being statute barred while it was empowered under the law to extend time. Further reference in support of this submission was made to the case of Willis Onditi Odhiambo vs Gateway Insurance Company Limited (2014) eKLR. The applicant submits that his action is founded on tort and thus was a proper case for grant of extension of time to avoid injustice. Further, that he had explained that the delay in filing the suit within the statutory period was not intentional as he was incapacitated through prolonged hospital admission in Kenya and Germany, factors that were beyond his control, and he could not come back in time to institute a suit against the respondents.

17. The appellant further submits that in computing the time within which he would have filed his claim and holding that he had until the end of 2011 to institute his claim in tort, the trial court erred as his claim is a hybrid of both tort and breach of contractual obligation by the hotel; that under tort, he had until 18th December 2011 while under contract, he had until 18th December 2014 to institute his suit. His submission is that since there is evidence that within that period negotiations with the 2nd respondent were ongoing and he had instructed the firm of Oguk & Co. Advocates who had, on 23rd March 2015 filed an application, the delay is not unreasonably long.

18. With respect to his contention that the trial court erred in concluding that he must have been in Kenya on 3rd February 2011, the appellant submits that it is trite law that a court of law cannot rely on presumptions and conjecture which is unsupported by any evidence. It is his submission that the trial court had no evidence to support its holding that he was in Kenya on that date; that none of the parties gave evidence or made any submissions with regard to his presence or otherwise in Kenya on 3rd February 2011, yet the trial court placed a lot of emphasis on the fact that since the OB report was issued and is dated 3rd February, 2011, the appellant was physically in Kenya at that time. His submission is that as there is no evidence of that particular fact, the trial court clearly fell into error in making such a positive finding, and in failing to realise that, time and again, police abstract reports are issued to agents of the complainants as there is no requirement in law that the affected person is to be physically in attendance in order to be issued with a police abstract.

19. The appellant submits that even had he been in Kenya on 3rd February 2011, it could reasonably be said that he was still under a disability up to the time when he collected information to know exactly what befell him on the fateful date to the period in which negotiations were ongoing. He relies on the case of David Stephen Gatune vs Headmaster, Nairobi Technical High School & Another (1986) eKLR in which the court extended time for the appellant to file suit against the Office of the Attorney General on the basis that "On the evidence, the appellant was under a disability up to the time he knew of the contents of the medical report. He could reasonably be said to have been under equal disability while he negotiated with the Attorney- General."

20. It is his submission further that the cause of action included facts which were outside his knowledge. He submits that the medical report on record confirms that he was found in a coma by the hotel guards and he thus spent some time in collecting information and evidence in order to institute a claim; that being a foreigner and unfamiliar with Kenyan law and procedures, he spent more time in collecting information and documents relating to this matter from the police, the respondent and witnesses which contributed to the delaying in filing the claim. Further, that the trial court erred in rejecting his application for extension of time primarily on the basis that he was in Kenya in 2011 without interrogating whether he had the mental capacity to make an objective decision affecting his well-being, considering the traumatizing incident he went through, which is supported by the medical report evidence on record stating that he suffered mentally in that he could not recall anything of what befell him.

21. The appellant submits further that the trial court erred in that it failed to hold that, on the basis of the unrebutted evidence on record with regard to the correspondence between him and the respondents, which was ongoing up to 5th January 2015, and on the basis of which the appellant believed that the 2nd respondent had agreed to settle his claim, the 2nd respondent was estopped from reneging on its representation or to raise the defence of limitation. He submits further that the evidence on record clearly shows that his claim was reported to the 2nd respondent as early as 19th December 2011 when the claim was not time barred.

22. The appellant refers to documents, including an investigation report dated 30th December 2013 to the 2nd respondent, a letter dated 24th January 2014 from the 2nd respondent promising to review the appellant's claim, and a letter dated 30th January 2014 with respect to the filing of a public liability claim form received by the 2nd respondent on 17th December 2014, all of which, in his view, pointed to the fact that negotiations were ongoing, and that the appellant had faith in the negotiations as a result of which he withheld court action. He submits that it was only after 5th January 2015, the date of the last communication between him and the 2nd respondent, that it became clear to him that the 2nd respondent would not resolve the claim. He asserts that as the respondents feigned that they would resolve his claim, they are estopped from pleading limitation. Reliance for this submission is placed on the case of David Stephen Gatune vs Headmaster, Nairobi Technical High School & Another (Supra) in which, according to the appellant, the court allowed extension of time on grounds that the parties were negotiating. The appellant further relies on the case of Belinda Murai & 9 Others vs Amos Wainaina (1979) eKLR.

23. The appellant submits that the action in this matter is founded on tort and was thus a proper case for grant of extension of time to avoid injustice as the law permits extension of time in the circumstances. Further, that he had explained that the delay in filing the suit was not intentional, and that the cause of action included facts which were outside his knowledge. In his view, the trial court would have considered the application objectively were it not unduly influenced by the date on the police abstract report.

24. The 2nd respondent, represented at the hearing by learned counsel, Mr. Mahogo, filed submissions dated 14th November, 2023 in opposition to the appeal. The 2nd respondent submits that the appellant relied on a physical disability as the reason for not filing his claim on time, yet his documents, in particular the medical report (HPH1) dated 2009 shows that, after 2009, he had the capacity to file the suit as he was not under any disability.

25. The 2nd respondent further submits that section 2 of the *Limitation of Actions Act* provides for the nature and extent of the disability before the court allows an application for a suit to be filed out of time. It submits that section 36 provides for extension for the periods of limitation in the case of disability; that section 3 is subject to Part III of the *Limitation of Actions Act*; and that the trial court did not misdirect itself in declining to allow the application for extension of time.

26. It is the 2nd respondent's further submission that the disability relied on by the appellant is a physical disability, and that such a disability does not fall within the context of a disability as is contemplated in section 27 of the *Limitation of Actions Act*. The 2nd respondent cites in support of this submission the case of Gathoni vs. Kenya Cooperative Creameries Ltd [1982] eKLR in which the Court stated:

> " The disability relied on by the applicant being a physical disability, the nature and extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section (2) (2) (b) of the *Limitation of Actions Act* does not include physical disability ..... Of course, If the applicant were under a relevant disability, she would not need the leave of the court to commence her action."

27. The 2nd respondent submits that the trial court rightly found that the appellant was in Kenya on 3rd February 2011 and made a report regarding his stolen motorbike, and that as at that date, the suit had not been statute barred. It is its submission that the trial court did not misdirect itself by finding that the incapacity relied on by the appellant was defeated by his presence in Kenya on 3rd February 2011.

28. The 2nd respondent notes that the appellant cited negotiations between him and the 2nd respondent as one of the main reasons why he did not file suit within time. It submits, however, that negotiations do not constitute material facts which were not within the knowledge of the appellant as envisaged under section 27(2) of the *Limitation of Actions Act*. Its submission is therefore that the trial court did not misdirect itself as it was not demonstrated that the requirements of section 27(2) of the Act had been met.

29. There was no appearance by the 1st respondent, nor were submissions filed on its behalf.

30. We have considered the ruling of the trial court, the record of appeal and the submissions of the parties. The crux of the appellant's case is that the trial court erred in declining to extend time to file his claim against the respondents, and in not allowing him to file suit against the 1st respondent, in receivership, and the 2nd respondent, which, according to the appellant, had provided insurance in respect of the kinds of injuries he had sustained. In considering these issues, we must determine whether the appellant sufficiently explained the delay in filing his claim to merit extension of time under section 27 of the *Limitation of Actions Act*.

31. We note, first, that the appellant seeks to file a claim in negligence against the respondents. Contrary to his written submissions in which he seeks to introduce the argument that he also had a claim under contract, the appellant was clear in his averments that his claim was in negligence, a tort. He averred as follows:

7. _ THAT on coming back to the room after dinner, I recall having rested on my bed for a while and then I walked towards the balcony thereafter I could not recall what happened to me as l was found lying down on the grass more than 12 meters down my hotel balcony in unconscious state bleeding from nose, mouth and ears.

8. THAT I must have fallen down from the balcony of my room in 3rd floor as was revealed by subsequent investigations as the result of the negligence of the Respondent.

9. THAT I was rushed to Pandya Hospital Mombasa where I was admitted into ICU since I was in coma and later flown back to my country Germany. for specialized treatment...

7. THAT after admission in a German Hospital for a period of nine months, I started slowly to regain my life...

8. THAT after being discharged from hospital, I was put on rehabilitation and therefore, I started a series of correspondence with the Respondent: and the Interested Party herein regarding what had happened to me at the African· Safari Club. Those correspondence continued upto the year 2013 when the Interested Party appointed an investigator to look into the said accident this was followed by other correspondence now put as a bundle and marked annexture "HPH-3"

1. Section 4(2) of the *Limitation of Actions Act* provides that:

> An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued...

33. The incident giving rise to the appellant's claim occurred on 18th December 2008 as a result, according to the appellant, of the negligence of the 1st respondent. His claim would have been in negligence, a tort, and he should have filed suit against the respondents by 17th December 2011. He did not, filing the application the subject of this appeal on 12th May 2017. His application was lodged pursuant to section 27 of the *Limitation of Actions Act*. Titled 'Extension of limitation period in case of ignorance of material facts in actions for negligence, etc', the section provides as follows:

1. Section 4(2) does not afford a defence to an action founded on tort where—

   a. the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

   b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

   c. the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

   d. the requirements of subsection (2) are fulfilled in relation to the cause of action.

2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

   a. either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

b. in either case, was a date not earlier than one year before the date on which the action was brought. (Emphasis added)

34. The appellant is aggrieved that the trial court relied on the police abstract report dated 3rd February 2011 to conclude that he was in Kenya on that date and had capacity to file suit. He submits that the court overlooked the fact that the report could have been made by someone else on his behalf. We have considered the submissions and the documents on record. We note that the police abstract report dated 3.2.2011, issued by Bamburi Police Station in Mombasa, indicates that 'The person named above reported to this office' the loss/theft of his motor cycle which occurred on '22nd March 2009'. The person named in the report is indicated as 'Heitz (sic) Peter Hermann'. With this evidence before it, could the trial court be faulted for finding that the appellant was in Mombasa in February 2011, before the time for

lodging his claim expired, and did nothing about it? We think not.

35. We note that the appellant now submits that the trial court overlooked the fact that the report could have been made on his behalf. This argument, however, was not presented to the trial court, and for the court to reach such a conclusion would have been speculative and contrary to the evidence before it, particularly the appellant's own averments. At paragraph 13 of his affidavit in support of his application, the appellant avers as follows:

13. THAT I also came back to Kenya to find out the whereabouts of my money amounting to 600 Euros and Kshs. 430,000/= which I had left in my room safe when the incident occurred and established that the same was taken by the General Manager of the hotel who squandered the same. I reported the matter to the Police and he was arrested and charged before court in Criminal Case No. 1079 of 2014... but he later absconded upon release on bond...." (Underlining ours.)

36. We find that, given the evidence on record, the trial court was correct in its finding that the appellant was in Kenya on 3rd February 2011. He could have filed his claim then, but did not, waiting until May 2017, almost nine years after his cause of action arose, to file this application. We find that his grounds of appeal predicated on the trial court's analysis and conclusions on the available evidence is without merit.

37. The appellant has also contended that the trial court disregarded the fact that he had a claim in contract, which cause of action was expiring on 18th December 2014. Such a claim, however, is not one for which extension of time is provided for under section 27 of the *Limitation of Actions Act*, as the decisions that the appellant has placed before us clearly state- see Mary Osundwa vs Nzoia Sugar Company Limited (supra).

38. The appellant has submitted that the 2nd respondent was estopped from raising the issue of limitation as he was engaged in negotiations with it in relation to his claim. We have considered the correspondence exhibited in the appellant's affidavit. We note that, gauging from the content and tenor of the correspondence, the 2nd respondent indicated its intention not to settle the appellant's claim from the outset.

39. In a letter dated 20th January 2012 (annexed to the appellant's application as annexure 'HPH3') from the 2nd respondent to AON Minet Insurance Brokers, the 2nd respondent indicated its 'inability to deal as the claim was time barred'. In yet another letter from the 2nd respondent to AON Minet Insurance Brokers dated 6th March 2014, the 2nd respondent again indicated its 'inability to offer any settlement for this claim as policy liability does not attach'. Our perusal of the correspondence does not show,

and none has been pointed out to us by the appellant, that there was any representation made to the appellant by the 2nd respondent that it would, as the 1st respondent's insurer, be settling his claim.

40. However, even had there been such negotiations, would they have stopped the running of time from 2008 to 2017? The law is that time does not stop running on the commencement of negotiations or attempts at reconciliation or other alternative dispute resolution mechanisms provided for under *the Constitution* or any other law. We have noted the appellant's reliance on the case of David Stephen Gatune v Headmaster, Nairobi Technical High School & another [1986] eKLR, the facts and circumstances of which are easily distinguishable from the facts before us. In that case, in reversing a decision of the High court declining to extend time for the appellant to file a suit in negligence against the state, the Court noted the special circumstances of the case, and the crucial role played by the Attorney General in the country's litigation.

41. Current jurisprudence on the issue of negotiations vis a vis extension of time is reflected in the decision of this Court in Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye and another [2016] eKLR in which this Court held as follows:

> "While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations.
>
> By craft and innovation, the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time."

See also G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR

42. It is our finding, therefore, that the appellant's appeal is devoid of merit, and it is hereby dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF SEPTEMBER, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.