



**IQuekenda Holdings Limited & another v Nimrod & another (Civil Appeal
61 of 2019) [2024] KECA 1533 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1533 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 61 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
OCTOBER 25, 2024**

BETWEEN

QUEKENDA HOLDINGS LIMITED 1ST APPELLANT

NESSY KITHII JUSTUS 2ND APPELLANT

AND

MARCLUS KIRANGA NIMROD 1ST RESPONDENT

}NIMROD KINUKU KIRANGA 2ND RESPONDENT

(Being an appeal from the judgement of the Environment and Land Court of Kenya at Kerugoya (E. C. Cherono J.) dated 22nd March 2019 in ELC Case No.737 of 2013)

JUDGMENT

Background

1. Quekenda Holdings Ltd and Nesy Kiranga Justus, (the 1st and 2nd appellants) were sued by the respondents before the Environment and Land Court (ELC) at Kerugoya. The 2nd appellant herein, was described as the estranged wife of Marclus Kiranga Nimrod (the 1st respondent) and a mother of Nimrod Kinuku Kiranga (the 2nd respondent). The 1st and 2nd respondents are father and son respectively.
2. The respondents, through a Plaint dated 30th September 2023, moved the ELC claiming that the 2nd appellant fraudulently and in breach of fiduciary duty as constructive trustee of the 1st and 2nd respondents disposed of land known as LR. NO. Kiine/Rukanga/2336 (the suit property). The particulars of fraud were that the 2nd respondent registered an ex-parte ELC Case No. 4 of 2011 at Kerugoya with an intention of changing ownership of the respondents' family lineage and ancestral land to her names and obtained ex-parte orders unknown to the respondents and thereafter illegally disposed the suit property for Kshs.600,000. The respondents sought for: a declaration that the



purported sale of the suit property from the 2nd appellant to the 1st appellant was null and void; an order to cancel the name of the 1st appellant from the register in respect of the suit property and replace it with that of the 2nd respondent; and general damages for loss and damage suffered by the respondents.

3. It was contended by the 1st respondent that the suit property was family land from the 1st respondent's grandfather, Nimrod Gitemenge Mwiru and was not intended to be sold but for cultivation and was to be passed from one generation to another. The 1st respondent claimed to have bought the suit property from his sister, Tabitha Wathoni Gitemenge and registered it in the name of his son, the 2nd respondent, who was a minor at that time. The 1st respondent further contended that out of spite, greed and without his knowledge, the 2nd appellant applied to court via Miscellaneous Application No. 4 of 2011 at Kerugoya to cancel the name of the 2nd respondent, who was at the time a minor, from the register in respect of the suit property and replaced it with her name on the ground that she required to raise funds to educate the 2nd respondent which reason was claimed to be false. The 1st respondent further contended that thereafter, upon registering the suit property into her name, she sold it to the 1st appellant for a sum of Kshs.600,000. The 1st respondent maintained that he was willing to refund the purchase price to the 1st appellant since he did not give consent for the sale of the suit property.
4. The 1st respondent further claimed that as a result of the 2nd appellant's action of selling the suit property, a curse has befallen the family evidenced by deaths, alcoholism and refusal by the 2nd appellant's son to attend school.
5. In denying the respondents' allegations, the 1st appellant filed its defence and raised a counterclaim dated 3rd February, 2014 seeking for dismissal of the respondents' suit and damages for trespass. The 1st appellant's defence was that no interest was registered prior to the lawful purchase of the suit property to warrant the averments that the 2nd appellant held the suit property as a constructive trustee of the respondents. Further, that the 1st appellant bought the suit property for valuable consideration of Kshs.3,000,000 and not Kshs.600,000 as alleged by the respondents. The 1st appellant declined the 1st respondent's offer to refund the purchase price.
6. The 1st appellant through a counterclaim maintained that it bought the suit property from the then registered owner, the 2nd appellant, for a valuable consideration. The 1st appellant therefore claimed to be the registered owner of the suit property and its rights are indefeasible under Section 26 of the [Land Registration Act](#), 2012. The appellants sought general damages for trespass and costs of the suit.
7. The record does not have the defence filed by the 2nd appellant. What is on record are the 2nd appellant's witness statement, list of documents, statement of issues and reply to the 2nd appellant's defence filed by the respondents. The reply to defence is a clear indication that the defence was filed although omitted from the record. Going by the 2nd appellant's witness statement dated 3rd February 2014, she stated that she and the 1st respondent agreed to sell the suit property for reasons that they were strained financially in raising their son, the 2nd respondent, who had been admitted to Kiranga High School. The 2nd appellant further claimed that her husband, the 1st respondent, suggested that they sell the suit property to raise money for school fees. The 2nd appellant further claimed that the suit property was registered in the name of the 2nd respondent, who was at the time a minor and she and the 1st respondent agreed to apply and obtain

court orders to have the suit property registered in the 2nd appellant's name. Further, that with the knowledge of the 1st appellant, the Miscellaneous Application No. 4 of 2011 at Kerugoya was filed to facilitate the registration of the suit property in the 2nd appellant's name.



8. The 2nd appellant stated further that the court order seeking to register the suit property in her name in place of the minor, the 2nd respondent herein, was issued on 3rd February 2011. Further, that consequently, the 2nd appellant advertised the suit property for sale and sold the suit property to the 1st appellant upon consultation and with the knowledge of the 1st respondent. The 2nd appellant contended that on that basis, the 2nd appellant sought orders for the suit to be struck out for failing to disclose any reasonable cause of action and being an abuse of the court process as the respondents were at all times aware of the sale.
9. Upon conclusion of the case and after analysis of the evidence, the ELC (E.C. Cheron J.) found as follows:

“The evidence in this case puts no doubt in the mind of this Court that the title to the 2nd defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1)(b) have been met and the title of the 2nd defendant is liable to be cancelled. In the final analysis, I find that the plaintiffs have proved their claim in the required standard and should be granted the prayers sought in the plaint.

In the result, the plaintiff’s suit is allowed with costs to the defendants jointly and severally. The 2nd defendant’s counter-claim is hereby dismissed with costs to the plaintiffs.”

10. It is this finding that provoked the appeal herein filed by the 1st appellant. The 1st appellant filed a memorandum of appeal against the impugned judgment seeking inter alia that the appeal be allowed; that the impugned judgment be set aside; and an order allowing the 1st appellant’s counterclaim.
11. The 1st appellant’s grounds of appeal are that the ELC erred in law and in fact in: making contradictory findings; making a finding that is per incuriam as regards the law regarding an innocent purchaser of land for value without notice; making a finding in favour of a party who had withdrawn from the proceedings; overlooking the contradictions by the 1st respondent and making findings in his favour to the detriment of the 1st appellant; overlooking the uncontroverted evidence of the 1st appellant; and ignoring the judicial precedents relied upon by the 1st appellant.

Submissions by Counsel

12. The appeal was heard and parties exchanged written submissions. All parties filed their written submissions to the appeal.
13. The firm of Waruhiu, K’owade & Ng’ang’a Advocates, represented the 1st appellant. At the hearing of the appeal, learned counsel Mr. Gathambo Kamau and learned counsel Mr. Philip Wambugu appeared for the 1st appellant. Mr Gathambo submitted that the 2nd respondent filed a notice of withdrawal of the suit and the same was endorsed as an order of the court on the 28th March, 2017. This is seen in the proceedings attached to the record. The 1st appellant relied on the case of Bahati Shee Mwafundi vs Elijah Wambua [2015] eKLR where the High Court (Kasango J.) quoted author Stuart Sime in the book “A practical approach to Civil Procedure” 9th Edition that:-

“... Notice to discontinue takes effect and brings the proceedings to an end as against each defendant ...”



14. Counsel further submitted that the suit property was sold and registered in favour of the 1st appellant when the 2nd appellant and the 1st respondent were still married. The 2nd appellant confirmed the sale via the sale agreement and receipt of the purchase price and the 2nd appellant's testimony that she changed the title into her name and sold the same to the 1st appellant with the consent and knowledge of the 1st respondent, who was still her husband at that time. According to the 1st appellant, the 1st respondent did not adduce any nexus between him and the suit property while the 2nd respondent withdrew his suit. Counsel asserted that the court order endorsing the withdrawal was not set aside and the 2nd respondent failed to testify in court. It is the appellant's case that the rectification of the register cancelling the name of the 2nd respondent, who was then a minor, and replacing it with that of the 2nd appellant was not challenged.
15. Counsel assailed the impugned judgment on the ground that it relied on allegation of fraud yet fraud ought to be strictly proved and not inferred from facts of the case. The 1st appellant relied on Section 26(1) of the Land Registration Act to demonstrate that it was an innocent purchaser for value with an indefeasible title. Counsel relied on the decision of Lawrence Mukiri Mungai vs Attorney General & 4 others [2013] eKLR on the elements of a bona fide purchaser for value and submitted that the 1st appellant falls within that bracket.
16. The 2nd appellant was represented by the firm of Muchemi & Co Advocates. Counsel made similar submissions with those of the 1st appellant on the issue of fraud and relied on the decision of Vijay Morjaria v Nansingh Nadhusingh Darbara & Ano. [2000] eKLR that:-

“... Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not enough to leave fraud to be inferred from the facts.”
17. Counsel further submitted that it was erroneous for the ELC to find in favour of the respondents without sufficient evidence indicating the 1st respondent's ownership of the suit property and on non-existence of evidence indicating the creation of trust. Counsel asserted that the 1st respondent did not prove that he purchased the suit property from his sister, Tabitha Wathomi Gitemenge (PW1) as claimed in the plaint. Further, that a copy of the green card produced indicated that the suit property was registered in the name of 2nd respondent as a gift. Counsel asserted that this position, coupled with the withdrawal of suit by the 2nd respondent and the failure by the 2nd respondent to testify in court defeated the 1st respondent's allegations of fraud. Counsel further submitted that the 2nd appellant supported the 1st appellant in the contention that the 1st appellant was a bona fide purchaser of the suit property for value.
18. Counsel asserted that the 2nd appellant supports the 1st appellant's title to the suit property. Further, that due diligence was carried out on the 2nd appellant's part to ensure the smooth transition of the suit property to the 1st appellant by obtaining a court order via Miscellaneous Application No. 4 of 2011 at Kerugoya transferring the suit property into her name and subsequently sell the same. Counsel reiterated the 1st appellant's submission regarding the effect of withdrawal of the suit by the 2nd respondent and the contradictory evidence of the 1st respondent's witnesses.

Counsel urged that the appeal to be allowed.
19. The 1st respondent was represented by the firm of G. W. Makimi & Co. Advocates. Learned counsel, Ms. Makini filed submissions opposing the appeal that the 2nd appellant obtained the suit property by fraudulently filing Miscellaneous Application No. 4 of 2011 at Kerugoya. Counsel termed the proceedings fraudulent for reasons that they were filed ex-parte without the 1st respondent being



served with the pleadings. Further, that the proceedings were unusually expedited indicating the 2nd appellant's intention to dispose the suit property. Counsel further asserted that the grounds in support of the Application indicating that the 2nd appellant had no means and there was therefore need to dispose of the suit property to meet the 2nd respondent financial needs, were false.

20. Relying on Section 26 of the Land Registration Act counsel further submitted that the 2nd appellant obtained the title to the suit property through a process that was characterized by falsehood, tainted with illegality rendering the entire action fraudulent. Counsel submitted that the 1st appellant may not have been party to the fraud by the 2nd appellant but it benefitted from the fraudulent actions of the 2nd appellant. That it is therefore immaterial whether the 1st appellant was privy to the fraud. The 1st respondent relied on the persuasive decision of Joyce Kemunto Osoro vs Attorney General & 9 others [2020] eKLR where S. Munyao J. held that:-

“The title in the hands of innocent 3rd party can be impugned under section 26(1)(b) of the Land Registration Act 2012 if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.

21. The 1st respondent also relied on this Court's decision in Munyu Maina vs Hiram Gathiha Maina, [2013] eKLR which held that:-

“...when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from encumbrances including any and all interests which would not be noted in the register.” On that reasoning, counsel submitted that the 1st appellant is not an innocent purchaser for failure to appraise itself regarding how the 2nd appellant obtained the title to the suit property.

22. Regarding the withdrawal of the suit, the 1st respondent submitted that the 2nd respondent did not withdraw the suit against the appellants for reasons that the 2nd respondent's affidavit filed on 12th March, 2015 stating that he had no case against the appellants was superseded by another affidavit filed on 31st March, 2015 stating that he did not authorize the withdrawal of the suit. That, even if the withdrawal of the suit by 2nd respondent was effected, the suit by the 1st respondent against the appellants would still be live. Counsel relied on the decision of Allahabad High Court in Smt Raisa Sultana Segam & others vs Abdul Qadir & Others AIR (1966 ALL 318) as quoted in Kofinaf Company Limited & Another vs Nahashon Ngige Nyagah & 20 others (2017) eKLR on the effect of withdrawal of suit that:

“Either it is done or not done. ... the consequence of an act of withdrawal is that the plaintiff ceases to be a plaintiff before the Court. ... if he is only one of the several Plaintiff, he ceases to be a party and the suit of only the other Plaintiffs continues The further consequence of withdrawal of a suit is that the Plaintiff cannot institute any fresh suit in respect of the subject matter. He becomes subject to this bar as soon as he withdraws the suit, it follows as corollary that he cannot revoke or withdraw the act of withdrawal There is no provision allowing revocation of the withdrawal.”

23. The 2nd respondent, represented by the firm of Mose & Co. Advocates, filed his submissions to the appeal dated 4th August 2023. The 2nd respondent concurred with the appellants' submissions entirely.



Determination

24. This is a first appeal. The court reminds itself of its mandate as the 1st appellate court to re-evaluate the evidence, assess it and reach a conclusion bearing in mind that it neither saw nor heard the witnesses and make due allowance for that. See Rule 31(1) of the Court of Appeal Rules, 2022 and this Court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
25. To begin with, as regards the issue of withdrawal of the suit by the 2nd respondent, we have noted that the notice for withdrawal was endorsed by the court on 28th March 2017. We are persuaded by the High Court decision of *J. Mativo J. (as he then was) in Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR that:-
- “.. Withdrawal of a suit is itself its end. ... There is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal ... Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal ...”
26. We note that the ELC took note of the 2nd respondent's affidavit filed on 12th March 2015 averring that he had no case against the appellants and a notice of withdrawal of the suit filed on 19th March 2015. Subsequently, the 2nd respondent filed another affidavit on 31st March 2015 indicating that he did not authorize withdrawal of the suit. However, the learned Judge did not make any finding on this action but went ahead to find in favour of the respondents as prayed for in the plaint. The appellants raised this as a ground of appeal contending that the trial court found in favour of a party who withdrew his case. Both parties have submitted on this issue.
27. Guided by the above decision, the withdrawal of the suit by the 2nd respondent is not contested. We find that there is an order of the court endorsing the withdrawal of the suit made on 28th March, 2017. In the circumstances, the 2nd respondent's suit against the appellants was withdrawn. Consequently, prayer 2 in the plaint seeking for an order to cancel the name of the 1st appellant from the register in respect of the suit property and replace it with that of the 2nd respondent has no merit. In the circumstances, with respect, we find that the ELC erred in making orders in favour of the 2nd respondent.
28. The ELC found that the title in favour of the 1st appellant was obtained illegally, unprocedurally and through a corrupt scheme and that the documents that conveyed title were forged. The ELC therefore ordered that the 1st appellant's title was liable for cancellation.
29. Section 26 of the *Land Registration Act*, 2012 provides as follows:-
1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



30. There is no dispute as to the origin of the title. The dispute begun from the cancellation of the 2nd respondent's name and entry of the 2nd appellant's name on the title in respect of the suit property. All the parties are in agreement that the 2nd respondent was a minor when his name was entered in the register in respect of the suit property. The 2nd respondent's name was entered in the register on 12th October, 2010 as shown in the copy of the Green Card. As per the copy of his certificate of birth, the 2nd respondent was born on 22nd March, 1995. Accordingly, on the date of entering his name in the register in respect of the suit property, the 2nd respondent was barely 15 years old and the Registrar indicated in the register in respect of the suit property that he was a minor. Accordingly, the 2nd respondent had no legal capacity to hold land at that time. It is common ground that minors can hold land through a duly registered trust. In this case, there is no evidence that a trust was registered in the 2nd respondent's favour.
31. Section 47 of the [Land Registration Act](#) provides for how the name of minors may be entered in the register of land:-
- 47(1) "The name of a person under the age of eighteen years may be entered in the register to enable the minor's interest to be held in trust and shall be registered under the name of the guardian either on first registration or as a transferee or on transmission."
- 47(3) "If a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, that disposition may not be set aside only on the grounds of minority."
32. Section 27 of the [Land Act](#), 2012 provides for obligations of children holding land:- 27. "A child shall be capable of holding title to land through a trustee and such child shall be in the same position as an adult with regard to the child's liability and obligations to the land."
33. The issue then is whether forged documents were presented in conveying the title to the suit property. To challenge a certificate of title on ground of fraud under Section 26(1)(a) of the [Land Registration Act](#), one must demonstrate that the holder of the title was a party to the fraud. The 1st respondent submitted that the 1st appellant may have been a party to the alleged fraud for reasons that it benefitted from the acts of fraud allegedly committed by the 2nd appellant.
34. From the record, as narrated by the 1st respondent, the Miscellaneous Application No. 4 of 2011 at Kerugoya sought rectification of the register to remove the name of the minor, the 2nd respondent, and replace it with that of his mother, the 2nd appellant. A court order was issued to that effect. There is no document that is alleged to have been forged in the process of obtaining the order and there is no step taken by the 1st respondent to set aside the order that allowed the 2nd appellant's name to be entered in the register in respect of the suit property in place of the 2nd respondent who was then a minor. The said court order had the force of law. The 1st respondent submitted that the information presented to court to obtain the said order was false. We find that this information ought to have been presented to the court that made the order for purposes of setting it aside and or varying it. That was not done. In the circumstances, it is our finding that there was no evidence of fraud in the change of name from the 2nd respondent to the 2nd appellant. With respect, we therefore find that the ELC erred in finding that forged documents were presented in conveying the title in respect of the suit property.
35. Regarding the claim that the 1st appellant's title was obtained illegally, unprocedurally and through a corrupt scheme, counsel for the 1st appellant submitted that due diligence as demonstrated by copy of title deed, official search, sale agreement, valuation report, proof of payment of the purchase price was carried out. This was supported by the 2nd appellant's submission that she legally changed the name in the title in respect of the suit property through a Court Order and ensured that there was smooth



transfer of the title to the 1st appellant without any hitches. The submission by the 1st respondent is that no due diligence was carried out, that the 1st appellant ought to appraise itself regarding how the 2nd appellant obtained that title.

36. We are in agreement with the 1st respondent's submission and the trial court's analysis that a certificate of title can be challenged upon demonstration of vitiating factors of illegality or involvement of corrupt scheme in acquisition of the title and it is immaterial that the title holder was not a party to that. (See Joyce Kemunto Osoro (suing as the legal representative of Stephen Obonyo –deceased vs Attorney General & 9 others [2020] eKLR; Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others [2015] eKLR.
37. The trial court noted that the 1st respondent was neither a party to the sale agreement between the appellants nor the Miscellaneous Application No. 4 of 2011 at Kerugoya. With that the ELC held that the title to the 1st appellant was obtained illegally, unprocedurally or through a corrupt scheme. The ELC relied on the decision of this Court in Arthi Highway Development Ltd vs West End Limited & 6 Others [2015] eKLR that:-

“ ... There is no dispute that he never dealt with the plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraudulent person who had no claim whatsoever to the land. The consequence is that the 1st defendant was a purchaser who did not deal with the registered proprietor of the land ”

We wish to distinguish that decision with the instant appeal. In the instant appeal, the 2nd appellant was the registered owner of the suit property having legally been entered in the register through rectification of name from that of her minor son, the 2nd respondent herein. In the circumstances, there is no evidence that the 2nd appellant was not the registered owner of the suit property to invoke the above authority.

38. Further, the presence of a valid Court Order made in Miscellaneous Application No. 4 of 2011 at Kerugoya cancelling the name of the minor, the 2nd respondent, and in place of it allowing the name of the minor's biological mother, the 2nd appellant herein, to be entered after demonstration before a court of law regarding why the changes ought to be made in the register in respect of the suit property is sufficient to satisfy the process of acquisition of a title by the 2nd appellant and by extension the 1st appellant.
39. The High Court (J.B. Ojwang J.- as he then was) had this to say on Court orders in the case of B vs Attorney General (2004)1 KLR 431 that:-
- “ The court does not and ought not to be seen to, make Orders in vain; otherwise, the Courts would be exposed to ridicule ...
40. Further, in Wildlife Lodges Ltd vs County of Narok and Another (2005) 2 EA 344 (HCK) this Court expressed itself on Court Orders in the following terms:-
- “ It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it until that order was discharged... A party who knows of an order whether null or void, regular or irregular cannot be permitted to disobey it ...”



- 41. In the circumstances, this Court finds no illegality and/or procedure that was flouted in acquiring the title in the name of the 2nd appellant. The same was done pursuant to a valid court order which was in force. Thereafter the suit property was sold to the 1st appellant as indicated in the sale agreement and payment of the purchase price. The 1st respondent did not demonstrate any corrupt scheme used in procuring title to the suit property in favour of the 1st appellant.
- 42. It is notable that the 1st respondent claimed that the best interests of the minor were not catered for in the sale and transfer of the suit property to the 1st appellant by the 2nd appellant. We note that the 2nd respondent is now an adult and is not challenging that he withdrew his suit before the trial court. From the record and the written submissions filed on his behalf, he has submitted that he fully concurs with the written submissions filed by counsel for the appellants.
- 43. In the circumstances, the outcome of our re-evaluation of the entire evidence is that the appeal is merited and is hereby allowed. The judgment of the ELC dated 22nd March, 2019 is hereby set aside and substituted with orders of this Court dismissing the 1st respondent's suit noting that the 2nd respondent's suit was withdrawn.
- 44. The dismissal of the counterclaim was not a ground of appeal and no submissions have been made in respect of the said order dismissing the counterclaim. As such the trial court's order dismissing the counterclaim still stands.
- 45. On costs, the order that commends itself to us is that each party will bear its own costs in the ELC and of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

