Kipchirchir v Cabinet Secretary for Lands & 6 others (Civil Appeal E001 of 2022) [2024] KECA 1484 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1484 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E001 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

PHILLIP KIPCHIRCHIR ..... APPELLANT

AND

THE CABINET SECRETARY FOR LANDS ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, MOMBASA ..... 3RD RESPONDENT

THE DIRECTOR OF SURVEYS ..... 4TH RESPONDENT

THE DIRECTOR OF PHYSICAL PLANNING ..... 5TH RESPONDENT

THE ATTORNEY GENERAL ..... 6TH RESPONDENT

THE NATIONAL LAND COMMISSION ..... 7TH RESPONDENT

(Appeal from the Judgment of the Environment and Land Court at Mombasa (N. A. Matheka, J.) dated 22nd February 2022 in Environment and Land Court Petition Number 128 of 2016)

JUDGMENT

1. The appellant, Phillip Kipchirchir, filed a Petition against the respondents seeking:

    a. A declaration do issue that he is the lawful registered owner of the parcel of land known as LR NO. MN/1/6748 (C.R 2165) and that his title to the same is valid.

    b. A declaration that his property known as LRNO. MN/I/6748 (C.R 2165) was not un-alienated Government land and could not therefore be allocated or allotted by the Respondents to any other persons after the parcel of land had been leased to and registered in his favour.

c. An order be issued that the creation of a new registration area called Ziwa La Ng'ombe Settlement Scheme over his parcel of land known as LR NO. MN/I/6748 (C.R 2165), the issuance of letters of allotment to plots thereon and title deeds to plots of land sub divided from his said parcel of land or derived there from and the registration of dealings involving the plots so created is contrary to law and in breach of his rights enshrined under Article 40 of *the Constitution* and amounts to compulsory acquisition of his land without compensation.

d. A declaration that the plot numbers set out hereinabove, that is to say 962, 940, 946, 945/1398, 987, 989, 990, 955, 994,996, 997, 998,993, 992, 991,999/1016,1015/1000,1013/1001,1012/1002,1011/1001,1029/1010,1030/ 1017,103/10[illegible]056,1035,1020,1034,1024/1033,935/1036,1053/913,1052/921,1051,1062,1063,1056,1156, 1197,922/1067,92[illegible]949134,989, 982, 7982, 975, 913, 943, 949, 916/1, 197, 1077, 9115 935 ,948, 987,984,988,986,774,947/1400 together with all sub- divisions thereto or howsoever registered as amounting to trespass.

e. An order compelling the respondents to compensate him the full value of the land being a sum of Kenya Shillings One Hundred and Thirty-Six Million Four Hundred Thousand (Kshs. 136,400,000.00) in line with the valuation report dated 21st October 2020 by Salem Valuers Limited.

2. In his amended Petition, he stated that his claim is based on Article 2(1), Article 3(1]), Article 10, Article 19, Articles 20, 22, 23, 27 and 28, Articles 40, 47, 50 , 159, 160 (1), 165 and Article 256 of *the Constitution*.

3. The appellant's case was that he is the registered owner of the parcel of land known as LR NO. MN/I/6748 (C.R 21651) (the subject property) registered as Leasehold for 99 years from 1st August 1988 from the Government of Kenya. He claimed that the respondents, in order to facilitate the unlawful sub division and reallocation of the subject property, issued letters of allocation and title deeds for plots over the subject property and unlawfully created a settlement scheme covering the subject property; that the respondents have no power in law to demand the surrender of the subject property or to subdivide it, or to issue letters of allotment over it or to issue title deeds to any person, or to extend registration boundaries into privately owned property, or to change the registration regime of any parcel of land already registered under the Registration of Titles Act without following due process as provided under *the Constitution* and the *Land Act*, 2012.

4. The appellant claimed that he acquired proprietary rights to the subject property in 1988 through a proper and lawful grant from the Government of Kenya but that, as a result of the respondents and their officers' acts and omissions, numerous plots have been created haphazardly over the subject property and numerous persons have occupied portions of the land and have put up structures, cut trees, dug holes, fenced off portions and cleared the ground.

5. He claimed that, by virtue of the use of non-existent powers to revoke the title to his property, together with the illegal and unconstitutional adjudication, allocations, issuance of illegal titles and subdivisions and invasion of the subject property with the participation of state agents, the appellant was apprehensive that the Register, Folders, Kalamazoos, parcel files and all other documents relating to the Titles described and the subdivisions as well as his properties will be destroyed, altered, concealed, or otherwise criminally and fraudulently dealt with before the determination of this Petition.

6. He further claimed that the subject property continues to be subdivided and re-surveyed to create new titles and various dealings involving the named plots and their subdivisions continue being registered at the Mombasa District Lands office to allow new occupants and owners to take possession. He asserted that the acts and omission of the respondents and their officers acting in collusion have aided and abetted the unlawful acquisition of portions of the subject property in contravention of his constitutional rights as protected under Article 40 of *the Constitution*, and that he has suffered loss; that despite the respondents having knowledged that no adjudication was lawfully created over the subject property and that there was no approved planning permission to sub- divide the subject property into small plots and allocate them to third parties, (allegedly squatters) they went ahead to collude with officers at Mombasa to alter the fictitious Survey Map with the full knowledge that he has never applied for or been party to such a scheme over his own private parcel of land.

7. He averred that the acts and omissions of the respondents are in blatant disregard of the rule of law and that , unless curtailed by the court, his rights to property and fair administrative action as guaranteed under Article 40 and 47 of *the Constitution* will be violated and continues to be violated; and that the government is mandated in law to provide an effective mechanism to redress the appellant against the effects of the unlawful takeover and dispossession of the subject property but that, instead, its agents, the respondents have been engaged in endorsement and continued perpetuation of the illegalities.

8. He contended that he has never acquiesced to the wrongful alienation of the subject property, but that he had been vigilant to recover it by filing suits against various person who have unlawfully occupied the subject property or entered thereupon but has lacked the necessary support, co-operation and assistance from the respondents who have and hold all records pertaining to the subject property; that the acts of the respondents in creating a settlement scheme and settling squatters over his property and beyond essentially means that if he was to seek and enforce orders evicting the trespassers and thereafter take possession of his property, he would be surrounded by a slum area and squatters who could be hostile to his occupation of the land.

9. It was his contention that eviction orders were therefore untenable and therefore sought compensation from the respondents as their acts amounted to compulsory acquisition of his property without following the law with respect to land acquisition, and are therefore illegal under Article 40 of *the Constitution*.

10. On their part, the 1st to 6th respondents denied the claims and filed grounds of opposition and a replying affidavit. They claimed that they did not issue any title documents to the appellant; that the settlement was done procedurally; and that, if the appellant had any complaint, he ought to have raised it earlier. They further claimed that over 2,000 people have been living there for decades before they were settled; and that, until the issuance of the land titles by the President in 2013, the appellant who alleges to own the property since 1991 ought to have known that there were people invading the subject property and that they were thereafter settled under the Settlement Scheme. They averred that the 1st to 6th respondents do not allocate land, which is the mandate of the 7th respondent, and if at all the appellant was allocated the subject property, it is the 7th respondent that would hold such records; and that, therefore, any compensation claim should not be directed at the 1st to 6th respondents. They also claimed that the appellant did not obtain the subject property lawfully, and that he failed to carry out ground truthing; that he was evasive in particularising the history of the subject property, and had no letters of allotment; that the Land Commissioner had no powers to allot him un-alienated government land under the Government Lands Act.

11. Ramadhan Ali Yongo, a representative of all the residents living in the subject property, deponed that they have been living there for decades until they were settled and later on issued with the land titles

by the President on 8th August, 2013. Prior to that, no one including the appellant ever came to evict them, and neither have they ever received any communication that it belonged to him.

12. Upon considering the dispute, the trial Judge held that the appellant did not meet the requirements of a constitutional petition; that although he pleaded the provisions of *the Constitution*, he did not demonstrate to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondent. And with that, the court dismissed the Petition.

13. Aggrieved, the appellant has filed an appeal to this Court on grounds that: the learned Judge misapplied and misinterpreted the law by declaring that the appellants Petition did not meet the threshold of a constitutional petition as per the holding in the case of Anarita Karimi Njeru vs. The Republic [1979] eKLR in relying on the evidence of an unknown third party named Ramadhan Ali Yongo who filed an unknown replying affidavit on 25th October 2021, and yet he was never a party to the proceedings nor enjoined as an interested party; in relying on the evidence of the 7th respondent, whose response and submissions were never served on the appellant; and in relying on the respondents' replying affidavits filed on 25th October 2021 and 26th October 2021 and the 7th respondent's submissions, which documents the appellant was unaware of until the contents were reproduced in the judgment dated 23rd February 2022; in assigning more weight to the respondent's affidavits and evidence while disregarding the appellant's evidence, including the title to the property and accompanying search proving his ownership of the suit property; in relying on pleadings and evidence not served upon the appellant thereby causing a miscarriage of justice as the appellant was not afforded an opportunity to rebut the evidence of the respondents; in failing to issue proper directions and orders to the respondents to serve their responses upon the appellant contrary to rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 where it is mandatory to serve documents on the other party; in determining that the dispute was civil whereas the petition concerned the unlawful deprivation and the compulsory acquisition of the appellant's land and as such an infringement of his right under the bill of rights as expressly protected under Article 40 of the Constitution; in failing to reach a finding on the issues raised and prayers sought by the appellant; and in failing to pronounce itself on the ownership of the suit property therefore leaving the appellant's proprietary rights and title undetermined.

14. The parties filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel for the appellant, Mr. F Mutua, submitted that the trial court did not properly apply the principles in the Anarita Karimi Njeru case (supra) that required that constitutional petitions be pleaded with reasonable precision; that this was a clear case requiring protection of property rights under Article 40 of the Constitution and the right to fair administrative action under Article 47 and the particulars of the violations were precisely pleaded in the petition; that the petition particularized and detailed the issues that the respondents curtailed the appellant's rights to property and fair administrative action as guaranteed by Articles 40 and 47 and that the misapplication of the principles of the Anarita Karimi case occasioned a miscarriage of justice as the appellant was not afforded an opportunity to be heard on merit.

15. Counsel submitted that the judgment rendered by the trial court relied on the evidence of one Ramadhan Ali Yongo, who was not a party to this suit and neither was his replying affidavit served on the appellant to allow him to object to the affidavit and supporting documents, or to have the evidence expunged from the record; that the acquisition of the allotment letter and titles if at all by the Ramadhan Ali Yongo and other trespassers through the respondents was illegal as the subject property was private land and therefore not available for alienation and, hence, the appellant's suit seeking compensation.

16. Counsel contended that the respondents' submissions ought not to have been considered by the trial Judge as the 7th respondent's submissions were filed out of time and the 1st to 6th respondents' submissions though filed were not served upon the appellant; that the court ought to have decided whether the appellant was entitled to the remedies sought and that, by invoking the principles in the Anarita Karimi case (supra), the court effectively determined that the petition was incompetent and fatally defective.

17. On their part, learned counsel Mr. Mwandeje holding brief for Ms. Waswa for the 1st to 6th respondents submitted orally and prayed that the trial court's decision be upheld; that the petition was not competent as the appellant was required to demonstrate a nexus between himself, the particular constitutional provisions alleged to have been infringed and the manifestation of such infringements which the appellant failed to do; that, although he pleaded various provisions of *the Constitution*, he failed to adduce evidence to demonstrate the manner of infringement claimed and that, as a consequence, the learned Judge was right in holding that the appellant had not satisfied the threshold requirements established in the Anarita Karimi case (supra).

18. Counsel submitted that the prayers sought in his petition are civil in nature and that the learned Judge was right in finding that the appellant's suit ought to have been filed as a civil suit concerning ownership of land.

19. There was no appearance or filing of submissions by the 7th respondent though served with the hearing Notice.

20. This being a first appeal, this Court should proceed by a way of re-hearing based on the evidence on record. In the circumstances, the Court is required to undertake a reappraisal of the evidence on record and arrive at an independent decision.

21. This is the import of rule 31(1) (a) of the Court of Appeal Rules, 2022 and has been the tradition of this Court as established in various decisions, including Attorney General & 2 others vs. Independent Policing Oversight Authority & another [2015] eKLR where it was stated that:

> "On our part, as a first appellate court, it is not lost on us that we have the duty, and responsibility to reevaluate the evidence adduced before the High Court and arrive at our own independent decision. This re- evaluation is not merely a rehashing of the evidence or findings of the trial court. It entails reconsidering the evidence afresh with a clear mind devoid of any influence from the findings of the trial court."

22. See also Mohammed Mahmoud Jabane vs Highstone Butty Tongoi Olenja [1986] KLR 661; [1986-1989] EA 183, Hancox, JA, (as he then was) where it was held that:

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

23. Bearing the above in mind, the issues that fall for consideration are i) whether the subject property was legally and procedurally acquired by the appellant; ii) whether the appellant's rights to the subject property were violated; and iii) whether the trial Judge ought to have considered the respondents' responses and submissions.

24. In asserting violation of his rights under Article 40 of *the Constitution*, the appellant claimed to be the registered proprietor of the subject property as allocated to him in 1986. He produced a copy of a title deed and a search evidencing the allocation and registration of the subject property in his name by the Commissioner of Lands.

25. Article 40(3) of *the Constitution* provides that:

> " The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
>
> a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
>
> b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
>
> i. requires prompt payment in full, of just compensation to the person; and
>
> ii. allows any person who has an interest in, or right over, that property a right of access to a court of law".

26. In the oft cited case of Anarita Karimi Njeru vs Republic [1979] eKLR, it was held regarding pleadings in Constitutional petitions that:

> " We would however, again stress that if a person in seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

27. The position was reiterated by this Court in the case of Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.

28. We begin from the premise that the appellant was required to state his case with precision, and to succinctly set out the parameters of his allegations. Regarding his ownership of the suit property, it is observed from the outset that this was strenuously challenged by the respondents in specific terms. The 1st to 6th respondents averred that they did not allocate the appellant's title to him, and that settlement on the subject property was undertaken lawfully and procedurally.

29. Addressing the question of ownership, the trial Judge observed that:

> " The Petitioner states that he is the registered owner of the parcel of land known as LRNO. MN/I/6748 (C.R 21651) the same having been registered as Leasehold for 99 years from 1st August 1988 from the Government of Kenya. On a date and time unknown to the Petitioner and in order to facilitate the unlawful sub division and reallocation of the Suit Property and the issuance of letters of allocation and title deeds for plots over the Suit Property, the Respondents and their officers unlawfully created a settlement scheme which covers the Suit Property. This ought to have been filed as a civil suit concerning ownership of land the same."

30. It is evident from the Judgment that the learned judge declined to determine the question of ownership, and was of the view that the matter would be more efficaciously determined as a civil suit. Given the extant challenges to the appellant's ownership of the subject property, the question for us is whether the learned judge rightly declined to address this issue.

31. The Supreme Court when determining similar circumstances in the case of Musembi & 13 others vs Moi Educational Centre Co. Ltd & 3 others (Petition 2 of 2018) [2021] KESC 50 (KLR) had this to say:

> " In ensuring that the right to property ownership is not violated, it is provided at Article 40(2)(a) that; "Parliament shall not enact a law that permits the State or any person – b. to arbitrarily deprive a person of property of any description, or of any interest in, or right over, any property of any description; or c. to limit, or in anyway restrict the enjoyment of any right under this Article, on the basis of any of the grounds specified or contemplated under Article 27(4)".
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> 48. These constitutional rights as guaranteed under the cited provisions are only in relation to property that has been legally acquired, and does not extend to property that has been unlawfully acquired. In that regard, Article 40(6) of *the Constitution* is instructive and provides that: "The rights under this Article do not extend to any property that has been found to have been unlawfully acquired". [Emphasis added].
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> 49. The Petitioners' claim in the above context was that the 1st Respondent had entered into and forcefully evicted them from the suit property which they had resided in since the 1960s, thereby depriving them of their right to own property under Article 40(1), as well as a violation of their social and economic rights under Article 43. They decried that after they were evicted from the suit property, the 1st Respondent was then issued with a letter of allotment to the property by the 3rd Respondent.
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> 50. Whether the 1st Respondent was issued with a letter of allotment is one issue; what was more important from the outset however was the determination of the question whether the letter of allotment was issued lawfully or legally. That question was not an issue that was conclusively determined at the High Court or the Court of Appeal. We note in that regard that the Petitioners had sought a declaration that the acquisition of the suit property was illegal and unlawful. The learned Judge of the High Court in her rendition on the issue held, inter alia:
>
> I am, however, not in a position to issue orders in relation to the legality or otherwise of the1st respondent's title. The determination of that issue is, I believe, best left to the National Land Commission or a court of law seized of that particular matter which can call for the relevant evidence and examine all such documents pertaining to the allocation of the land to the 1st respondent as it deems necessary for it to establish the validity or otherwise of the title." [Emphasis added, Para. 86]
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> 51. The learned Judge had thus, on her part, correctly held that the issue would be better determined by the National Land Commission as provided under Section 152C of the *Land Act*...

> On our part, we note that the learned Judge also correctly held that the relevant Court seized of jurisdiction over land matters – the Environment and the Land Court – should have determined that question."

32. In the instant case, what was before the trial court was affidavit evidence filed by the parties where the respondents had challenged the validity or legality of the appellant's title to the subject property. Just like the trial court, we also take the view that the question of determining ownership from the affidavit evidence adduced is not efficacious, as to do so would require poignant evidence to be placed before the court distinctively pointing to the appellant's acquisition of the land and how it came to be registered in his name. Viva voce evidence would enable the court to test the veracity of the title and other documents through witness testimony and the cross-examination of the witnesses. It is also not lost on us that, the 1st to 6th respondents have also filed a significant number of documents that also require interrogation and verification. Given the nature of the Petition filed and of the proceedings, the constitutional court was not the proper forum to undertake this process. It is on the basis of factors such as we have outlined here that we agree with the trial judge that a Civil court would have been a more appropriate forum. On this account, we uphold the trial court's decision and, just as did the trial judge, we likewise decline to determine the question of ownership of the subject property.

33. Next, we turn to the issue as to whether the appellant established the alleged violation of his rights.

34. In this regard, the learned judge held:

> I concur with the grounds of opposition by the Respondents that looking at the Petitioner's pleadings, the evidence of the parties as well as the submissions, it is my opinion that the petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded provisions of *the Constitution*, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the Respondents. He has not adduced any evidence to demonstrate the alleged violations".

35. In the case of Macharia & 6 others (suing as next friends of and on behalf of CWM & 6 Others) vs The Standard Group & 4 others [2022] KECA 610 (KLR), this court held that:

> the law is clear that the duty to prove any alleged violations of constitutional rights and consequential damage rests on the person alleging breach, (see sections 107, 108 and 109 of the *Evidence Act*). It was therefore manifestly incumbent upon the appellants to discharge and surmount the burden as set out under sections 107, 108, and 109 of the *Evidence Act*. A claimant must lay on the table evidence of all facts contended against the defendant and the trial court has a duty to examine the evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof which is on a balance of probabilities, the claim must be dismissed" (emphasis ours)

36. And in the case of Kenya Forest Service vs Rutongo't Farm Limited [2015] KECA 160 (KLR) this Court similarly held that:

> "With regard to the contention that the appellant evicted the respondent from the suit land, and destroyed its members' houses, from the respondent's petition, and the supporting affidavit, we can find no evidence to support the averments that the respondent's members took possession of the suit land or that any evictions took place at the time the contract was entered into with Olsen. There are no facts or particulars identifying the members who took

possession of the suit land, or evidencing the destruction of their property, when and how the destruction occurred, or even the extent and value of the destruction.

Without specification of such factual particulars, we are not satisfied that the evidential threshold to support the rights violations alleged was met." (evidence our)

37. In as much the appellant claimed that his rights over the subject property were violated, the 1st to 6th respondents' case was that the process of establishing the scheme started in 1998, a report showed that several meetings by the stakeholders and settlers were held, and there were radio announcements regarding the settlement and the final settlement which took place in 2013; that throughout the entire process, which took about 10 years, the appellant was nowhere to be seen, as he did not raise any objections against the much publicized settlement. And neither did he lay claim over the subject property, or seek to have his portion in the scheme, reserved. In point of fact, the appellant did not demonstrate that he ever occupied or utilized or developed the subject property. In the face of these allegations, it is difficult to appreciate how the appellant's rights could have been violated. Clearly, the appellant's claims lacked specificity on the manner in which his rights of proprietorship were violated, with the result that the evidential threshold to support the rights violations alleged was not satisfied. We find that therefore the appellant has failed to establish his claim to the required standards and that the trial Judge rightly dismissed the Petition.

38. Finally, regarding the complaint that the trial Judge considered affidavits, and responses and submissions that were not served on the appellant, we have been through the Judgment, and it is evident that the trial Judge relied on the Petition and affidavit in support, the Grounds of opposition of 5th December 2016 and a replying affidavit of 23rd July 2020 sworn by the County Land Adjudication and Settlement Officer, Mombasa together with annextures, and the submissions of the all the parties, including the 7th respondent's submissions. Once the submissions were filed on 26th January 2022, the Judge reserved 22nd February 2022 as the date for delivery of the Judgment. At no time did the appellant's counsel notify the court that he had not been served, or required time to lodge an additional response. Without any such objection to the filing of submissions on the record by the appellant, we consider that the learned judge was at liberty to take them into account in arriving at her decision. In any case submissions do not constitute evidence in the case and as was held by this Court in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> Submissions cannot take the place of evidence...Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

39. Failure to consider evidence or reliance on submissions which were not served cannot, without more, be aground for setting aside an otherwise proper judgement. This ground is unmerited and we dismiss it.

40. Accordingly, the appeal lacks merit and fails, and is hereby dismissed with costs to the respondents.

It is so ordered.

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

A. K. MURGOR

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JUDGE OF APPEAL

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

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR