



REPUBLIC OF KENYA



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**Omiti & another v Ouma & another (Civil Appeal 71 of 2018)
[2023] KECA 650 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 650 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 71 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MAY 26, 2023**

BETWEEN

JOSHUA O OMITI 1ST APPELLANT

YONA BON OMITI 2ND APPELLANT

AND

CONSOLATA ADOYO OUMA 1ST RESPONDENT

JOSINTER ATIENO OUMA 2ND RESPONDENT

*(Being an appeal from the judgment and orders of the Environment
and Land Court at Kisii (J.M. Mutungi, J.) dated 20th April,
2018 in Environment and Land Court Case No. 122 of 2014)*

JUDGMENT

Judgment of Mumbi Ngugi, JA

1. The appellants are aggrieved by the decision of the Environment and Land Court (ELC) in which the court (Mutungi, J) declared the respondents the owners of land parcel number Kabondo/Kasewe/906 (the suit property) by way of adverse possession. The ELC further ordered the registration of the respondents as joint proprietors of the suit property, directed the Deputy Registrar to effect the transfer, and ordered the respondents to give vacant possession of land parcel number Kabondo/Kasewe/844 to the appellants.
2. In their memorandum of appeal dated June 4, 2018, the appellants raise four main grounds of appeal. They argue, first, that the evidence before the trial court does not support the finding that the respondents acquired the suit property by prescription or at all and the decision was wrong on the evidence; that the trial court misapprehended the evidence and misapplied the law and thereby arrived at a wrong decision, namely, that the appellants did not take any legal action to take possession of the



land from the respondents; that they have lost the right to recover the land; and that the appellants are the administrators of the estate of Jeremiah Omiti Odhok (deceased).

3. The respondents had, by their Originating Summons dated March 25, 2014 sought the following substantive orders:
 - a. Declaration that the defendants right to recover the whole of LR Nos Kabondo/Kasewe/844 and 906 respectively are barred under the Limitations of Actions Act Chapter 22 Laws of Kenya and his title thereto extinguished on the grounds that the plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 24 years.
 - b. That there be an order that the plaintiffs be registered as the proprietor(s) of the whole of LR Nos Kabondo/Kasewe/844 and 906 in place of the defendants and one Jeremiah Omiti Odhok (now deceased).
 - c. That the deputy registrar and/or the executive officer of the honourable high court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the said parcels of land, that is, LR Nos Kabondo/Kasewe/844 and 906 respectively in favour of the plaintiff, in the event of default on the part of the defendants.
 - d. That there be an order of permanent injunction restraining the defendants either by themselves, agents, servants and or employees from interfering with the plaintiff's peaceful possession and occupation of the said parcels of land LR Nos Kabondo/Kasewe/844 and 906 in any manner whatsoever and/or however.
4. The respondents' claim was based on the grounds that they were the widows of one Joseph Ouma Oundo, married to him in 1982 and 1990 respectively. He had established homes for them on the suit property, LR No Kabondo Kasewe/906, and their entry thereon was open, free and with the knowledge of one Jeremiah Omiti Odhok, deceased, whose estate the appellants had been appointed the administrators of. The appellants were the registered proprietors of LR No Kabondo Kasewe/906 which the respondents had freely and openly occupied for a period of over twenty-four (24) years.
5. In their defence and counterclaim dated January 14, 2015, the appellants pleaded that the respondents and their families have, unlawfully and without their consent and authority, been trespassing on land parcel numbers Kabondo/Kasewe/906 and 844. They averred that they had sought the assistance of elders and administrative officials to remove the respondents without success. They had been deprived of use, occupation and enjoyment of the two land parcels and been put to loss, inconvenience and suffering. They prayed for an order of eviction against the respondents and their agents or workers from the said land parcels.
6. In its decision dated April 20, 2018, the ELC found that the respondents have been in occupation and possession of the two land parcels since the 1990s. It further found that the respondents' husband had established a home for the 1st respondent on land parcel Kabondo/Kasewe906 where she resides to date, and he was also residing on the said parcel until his death in 2012. He was already in occupation of the said land parcel in 1998 when he was charged with the offence of forcible detainer before the Oyugis Magistrates Court, and his possession then, as thereafter, was adverse.



7. The ELC further found that although he was convicted of forcible detainer, the respondents' husband was not removed from the suit land, and the institution of the criminal case did not disrupt or discontinue the possession by the respondents. However, even if there had been any disruption, the respondents continued in adverse possession from 1998 until the institution of the present suit on March 25, 2014, a period that was in excess of the statutory period of 12 years. As the appellants had not taken any legal action to remove the respondents from the suit land, after the expiry of 12 years, they had lost the right to recover the land and the respondents had acquired title to the land by operation of the law. The ELC therefore found that the respondents had established the ingredients necessary for them to be declared as having acquired title to land parcel Kabondo/Kasewe/906.
8. The court further found that the respondents' occupation and possession of land parcel Kabondo/Kasewe/906 was adverse to the rights of the registered owner and consequently, after the expiry of 12 years from 1998, the title of the registered owner was extinguished. It was its finding further that the registration of the appellants as the owners of the property on February 7, 2012 following the death of their father, the initial registered owner, did not interrupt the adverse possession by the respondents, its decision being based on the authority of *Githu v Ndeete* [1984] KLR 776. Its finding was that following their registration as owners, the appellants held the land in trust for the respondents who had acquired title through prescription.
9. Regarding parcel number Kabondo/Kasewe/844, the ELC found that the evidence adduced did not show that the respondents had acquired the land through prescription. It found that the evidence showed that the parcel was still registered in the name of Jeremiah Omiti Odhok; that the evidence of occupation and possession by the respondents was not cogent as the respondents had merely stated that although their homes are on parcel Kabondo/Kasewe/906, they had cultivated on land parcel Kabondo/Kasewe/844 but have no buildings on it. The ELC was not satisfied that the respondents had exclusive use of land parcel Kabondo/Kasewe /844 or that their activities on the said parcel were hostile or inconsistent with the rights and interests of the true owner. The ELC accordingly issued an order for the respondents to yield vacant possession of land parcel number Kabondo/Kasewe/844 to the appellants in the event that they are in occupation or possession of the land parcel.
10. This is a first appeal. Rule 31 of the [Court of Appeal Rules 2022](#) provides that:
 - 31 On an appeal from a decision of a superior court acting in the exercise of its
(1) original jurisdiction, the Court shall have power—
 - (a) to re-appraise the evidence and to draw inferences of fact;See also *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
11. Before considering the evidence before the trial court, it is important to note that the present appeal revolves around land parcel number Kabondo/Kasewe/906. The ELC ordered the respondents to surrender land parcel number Kabondo/Kasewe/844, which is still registered in the name of the appellants' father, to the appellants. The respondents have not filed a cross-appeal with respect to this part of the court's judgment.
12. The respondents' case was presented through the testimony of the 1st respondent, Josinter Atieno Ouma (PW1). It was her evidence that she and the 2nd respondent were the wives, now widows, of Joseph Ouma Ounga (deceased). She married the deceased in 1982 while the 2nd respondent was married in 1990. The deceased had established a home for her on Kabondo/Kasewe/906. She and her co-wife were cultivating Kabondo/Kasewe/844. She had come to know the appellants in 2014 when



- they filed a complaint to the chief accusing her and her co-wife of trespassing onto their land. They wanted them to vacate the land parcels, so the respondents filed the suit against them.
13. It was her testimony that their deceased husband had established individual homesteads for them on Kabondo/Kasewe/906. She had occupied Kabondo/Kasewe/906 since she got married. When their husband died in 2012, they buried him in Kabondo/ Kasewe/906 without any objection from anyone. She had also buried her children and her mother-in-law in the said land parcel without any objection.
 14. PW1 further testified that she had grown blue gum trees, maize, sweet potatoes and avocados on the said land parcel, while the 2nd respondent had planted sugarcane, sweet potatoes and blue gum trees on Kaobndo/Kasewe/844. No-one had stopped them from developing the said land parcels. It was her case that she uses Kabondo/ Kasewe/906, which is about 8 acres, in its entirety while the 2nd respondent fully utilises Kabondo/Kasewe/844 which is about 3 acres. The appellants were not her neighbors as they reside in Kendu Bay. She denied that their father, Jeremiah Omiti, has a home on Kabondo/ Kasewe/906 and/or that one Lucas Ominda was buried in Kabondo/Kasewe/906 or 844.
 15. The 1st respondent further denied that their deceased husband had trespassed on the suit property or that there has been any effort at mediation. It was her testimony that their occupation of the suit property has been uninterrupted, open and peaceful. She conceded in cross-examination that her husband had been charged in a criminal case in 1998 and was sentenced to probation.
 16. The 2nd appellant, Yona Omiti (DW1) testified on behalf of the appellants. It was his testimony that parcel number Kabondo/Kasewe/906 was registered in his name and the name of the 1st appellant, while Kabondo/Kasewe/844 was still in the name of thie deceased father, Jeremiah Omiti Odhok. Parcel number Kabondo/Kasewe/906 was purchased by their deceased father in 1964 from Ounda Muma, the respondents' father in law. The appellants' father had also purchased land from Nicholas Adier Omolo, Johanna Muma and Ounda Muma pursuant to an agreement dated 27th November 1968. These parcels were consolidated and registered to form parcel number Kabondo/ Kasewe/906 while the portions bought from Ounda Muma and Yohana Muma were registered as Kabondo/ Kasewe/844. Kabondo/Kasewe/906 and 844 were in the same locality and were only separated by a road.
 17. It was his testimony that the respondents continued to occupy a portion of Kabondo/Kasewe/906 where they have built their home, and they also cultivated portions of Kabondo/Kasewe/844. He confirmed that the 1st respondent lives on Kabondo/ Kasewe/906 and both respondents cultivate portions of Kabondo/ Kasewe/906 and 844.
 18. According to DW1, as a family, they had made efforts to remove the respondents from the suit land. In 1990, their late father had reported the matter to the assistant chief as the respondents had built a house on Kabondo/Kasewe/ 844. The assistant chief and the elders had ruled that the respondents had occupied the land parcel unlawfully. The respondents had moved out of parcel number Kabondo/ Kasewe/ 844 and settled on Kabondo/Kasewe/906. Thereafter, their deceased father had reported the matter to Oyugis Police Station and the respondents' husband, Joseph Ouma Muma, was arrested and charged in April 1998 in Criminal Case No 260 of 1998. He was found guilty of illegally occupying the appellants' land and was placed on probation for two years on 9th November 1998.
 19. DW1 testified that the respondents and their spouse did not, despite the conviction, vacate the suit property. The appellants therefore reported to the chief in February 2014 that the respondents were preventing them from using their land. The chief summoned the respondents and their eldest son and the matter was heard but no resolution was arrived at. At a second meeting, it was decided that the appellants' family donates to the respondents a portion of one acre from Kabondo/Kasewe/844 on



- humanitarian grounds. According to the appellants, the respondents countered with an offer to give back parcel number Kabondo/Kasewe/844 while they retain Kabondo/Kasewe/906, a proposal that the appellants rejected.
20. DW1 confirmed that the appellants reside in Rachuonyo, where they relocated to after their late father moved from Kabondo/Kasewe/906 in the year 2000. He testified that they cultivate part of Kabondo/Kasewe/906 and 844 while the respondents use other portions.
 21. The second witness for the appellants was Moses Odhiambo Ongere (DW2), a senior chief of Kasewe in Rachuonyo. He confirmed that the appellants had, in 2014, reported a complaint against the 1st respondent relating to Kabondo/Kasewe/906, alleging that she was occupying the said parcel. He had invited the parties to appear before him and the elders, which they had done. The appellants had stated that they did not intend to evict the respondents but wanted to give the 1st respondent a parcel of land. He had scheduled a second meeting with the parties for the 8th of March 2014 but it did not take place as the respondents filed the suit before the ELC.
 22. DW2 testified that the 1st respondent initially stayed on parcel number Kabondo/Kasewe/844 but later moved, around 1994, to parcel Kabondo/Kasewe/906 where their husband was buried. He confirmed that upon a complaint by the appellants' father that the respondents had invaded his land, he reported the matter to the police at Oyugis and the respondents' husband was arrested, charged and convicted. It was his testimony that from 1998, the dispute was next handled in 2014.
 23. DW1 confirmed that on parcel number Kabondo/Kasewe/906, the respondents had planted trees and were carrying on farming activities. He confirmed in cross-examination that he knew the respondents' husband for more than thirty years before his death, and that at the time of his death, he was living on Kabondo/Kasewe/906. He confirmed further that the respondents' husband died in 2012 and was buried in Kabondo/Kasewe/906. It was his testimony that there were 3 houses with a compound, situated almost at the centre, on parcel number Kabondo/Kasewe/906, and that the 1st respondent and her son lived on the said land parcel.
 24. From the appellants' grounds of appeal, it is apparent that they challenge the decision of the trial court on three main grounds. The first relates to the evidence adduced before the trial court: in the appellants' view, it does not support the finding that the respondents acquired the suit property by operation of law. The appellants further take the view that the trial court misapprehended the evidence and misapplied the law. Finally, they argue that the trial court was wrong in reaching the conclusion that they had lost the right to recover the land.
 25. In their written submissions dated March 7, 2022, the appellants submit that the respondents' suit was filed as a result of the eviction threats from the appellants and the area chief. That this prompted the respondents to abandon the mediation talks and filed the present suit. It is therefore their submission that the process that they initiated against the respondents before the area chief interfered with the respondent's peaceful and continuous possession of the land, and it cannot therefore be said that their possession was peaceful and uninterrupted for a period of 12 years. The appellants rely on the decision in *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* (2017) eKLR.
 26. The appellants further submit that the trial court misapprehended the evidence and misapplied the law when he found that the appellants had not taken any legal action to take possession of the land from the respondents. It is submitted that during trial, it was established that the appellants had lodged a complaint before the area chief to mediate the dispute over the suit land. In their view, time stopped running when a complaint was lodged before the chief, and the effort made to mediate the dispute interrupted the peaceful and continuous possession by the respondents. It is their submission that they



- took legal action to assert their right to recover the land from the respondents before the suit was filed, and the claim for adverse possession had therefore not crystallised.
27. In highlighting the appellants' submissions, Mr Nyasimi submitted that a claim of adverse possession cannot succeed if possession is broken for any temporary purpose or by any endeavors to interrupt it. Further, that where the owner of the property brings legal proceeding for recovery of possession, the running of time will be interrupted.
 28. Learned counsel further submitted that clear evidence established that the appellant had made endeavors to interrupt possession of the suit land by the respondents. He observed that the appellants had initiated mediation meetings that were ongoing before the chief and elders to resolve the dispute over the land. Counsel noted that at the hearing, it was conceded by the respondents that the present matter was filed because the appellants were attempting to remove the respondents from the land. The respondents had been called to a meeting by the chief, which was an attempt by the appellants to interrupt the respondents' possession, and their claim of adverse possession could therefore not arise.
 29. The respondents filed submissions in opposition to the appeal dated March 14, 2022. They submit that parcel number Kabondo/Kasewe/906 was originally registered in the name of the appellants' father, Jeremiah Omiti Odhol, and that upon his demise, the appellants petitioned for grant of letters of administration and got the suit property registered in their names through transmission. The respondents observe that in the evidence before the trial court, PW1 had testified that in 1990, the appellants' father had tried to evict the respondents from the two parcels of land as a result of which the respondents vacated Kabondo/Kasewe/844 and moved to Kabondo/Kasewe/906. DW1 had testified that the respondents' husband was buried on Kabondo/Kasewe/906 with no objection being raised by the appellants who were residing in Kendu Bay. DW2 had confirmed that the respondents have been in possession and occupation of the suit land since 1994. In the respondents' view, the trial judge had properly appreciated the evidence adduced before him and had delivered a sound judgment.
 30. In highlighting the respondents' submissions, Ms. Ochwal noted that indeed there was an attempt at arbitration of the dispute before the area chief. It was her submission, however, that this did not amount to legal proceedings that would interfere with the occupation of the suit property. She conceded that the appellants' father had attempted to assert his rights and there were criminal proceedings against the respondents' husband. However, even after his conviction, the respondents continued to reside on the suit property until around 2014 when the present matter was lodged.
 31. The respondents contend that time stopped running when the appellants' father lodged a complaint to the police and the respondents' husband was charged and convicted. However, time started running again in 1998 and by 2014, the 12-period year period for the appellants to recover the suit property had been extinguished. The attempted arbitration meetings were a mechanism for sorting out the dispute and did not amount to legal proceedings that would interrupt the running of time. Support for this submission was sought in the case of *Githu vs Ndeete*. The respondents' submission was that the appellants did not lodge any legal proceedings for purposes of evicting the respondent from the land but instead slept on their rights until 2014 when they lodged a counterclaim, which could not stand.
 32. The respondents further observe that in its decision, the trial court had noted that although the respondents' husband was convicted of forcible detainer, he was not removed from the suit land. The institution of the criminal case in *Oyugis* did not disrupt and discontinue the respondents' possession.
 33. I have considered the judgment of the trial court as well as the evidence adduced before it. I have also considered the submissions filed by the parties and the oral highlights by their respective Counsel, Mr. Nyasimi and Ms. Ochwal, at the hearing of the appeal. I believe that the sole issue for determination is whether the trial court misapprehended the evidence or misapplied the law relating to adverse



possession in reaching the conclusion that the respondents were entitled to parcel number Kabondo/Kasewe/906 by way of adverse possession.

34. I consider first the law relating to the doctrine of adverse possession which, as the trial court observed, is fairly settled. First, under section 7 of the *Limitation of Actions Act*, a person may not bring an action-

“...to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person”.

35. When the period of 12 years expires, section 38 of the Act permits the persons who is in adverse possession of the land to apply for an order that he be registered as the proprietor of the land. It is incumbent on a party claiming to be entitled to the subject land under section 38 of the *Limitation of Actions Act* to demonstrate that his occupation of the land in contention is open, continuous and hostile to the rights of the registered owner. In its decision in *Titus Mutuku Kaswe v Mwaani Investments Limited & 4 Others* [2004] eKLR it was held that:

“...in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje v Saikwa (No 2)* [1984] KLR 284. A title by adverse possession can be acquired under *Limitation of Actions Act* for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession – (see *Githu v Ndeete* [1984] KLR 776).”

36. In this case, the respondents were required to prove that they have been in open and continuous occupation and possession of the suit land for a period of 12 years, but also that their occupation and possession was without the true owner’s permission; that the true owner was dispossessed of the land; and that they have done acts on the land that are inconsistent with the rights of the true owner.
37. The evidence presented before the court was that the respondents had entered into the suit land with their husband, who died in 2012. The 1st respondent entered upon the land in 1982 when she married the deceased while the 2nd respondent did so upon her marriage in 1990. The appellants do not dispute this.
38. It is also uncontested that the respondents have been in continuous occupation of the suit land since their entry in 1982 and 1990 respectively. The evidence shows that the 1st respondent and her son have built their houses on the suit land, and have planted trees and other crops on the said land.
39. In his evidence, the 1st appellant confirmed that the respondents were living in and using land parcel number Kabondo/Kasewe/906. He further confirmed that in 1990, his late father had complained to the Assistant Chief about the respondents’ occupation of Kabondo/Kasewe/844, following which they moved from the land parcel and settled on Kabondo/Kasewe/906. In 1998, their late father had again complained about the respondents’ occupation of Kabondo/Kasewe/906, this time to the police at Oyugis, resulting in the prosecution of the respondents’ husband with the offence of forcible detainer. He further confirmed that despite the respondents’ husband prosecution and conviction, the respondents were never removed from Kabondo/Kasewe/906.
40. The respondents conceded that their husband had, in 1998, been charged and convicted of the offence of forcible detainer in respect of the suit land. This notwithstanding, the respondents and their



spouse had remained on the suit land. Contrary to the appellants' contention, the conviction of the respondents' husband in 1998 did not interrupt their possession of the land. Even if it had, however, the respondents had continued in possession and occupation of the land openly and in a manner inconsistent with the rights of the owner for a period of sixteen years, from 1998 until the filing of the suit in 2014.

41. In *Kirutu v Kabura* - Civil Appeal No 20 of 1993 (unreported) cited with approval in *Kim Pavey & 2 others v Loise Wambui Njoroge & another* [2011] eKLR the court held:

“The passage from Cheshire Modern Law of Real Property which Potter JA made reference in *Githu v Ndeete* is important and deserves to be read in full. It is at page 894 section VI under the rubric the methods by which time may be prevented from running and the learned Author says:-

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him ... He must either make a peaceable and effective entry or sue for the recovery of the land. Again in the case of *Githu v Ndeete* [1984] KLR 776 at page 780 this Court held that time ceases to run when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor.”

42. In concluding that the prosecution of the respondents' husband did not interrupt their adverse possession of Kabondo/Kasewe/906, the trial Judge observed as follows:

“28. The totality of the evidence adduced by the parties in this matter establishes that indeed the plaintiffs have been in occupation and possession of land parcels 844 and 906 since the 1990's. The 1st plaintiff's husband established a home for the 1st plaintiff on land parcel 906 where she resides to date. The 1st plaintiff's deceased husband was also residing on land parcel 906 before he died in 2012. In 1998 when he was charged with the offence of forcible detainer at Oyugis Magistrates Court, he was already in occupation and possession of the suit properties. His possession then as thereafter was adverse. He had established a home on land parcel 906 and was using the land exclusively. Although he was convicted of forcible detainer he was not removed from the suit land and my view is that the institution of the criminal case at Oyugis Magistrates Court did not disrupt and or discontinue the possession by the plaintiffs and even if there was any disruption the plaintiffs continued in adverse possession from 1998 upto the time of the institution of the present suit on 25th March 2014 and this period was in excess of the statutory period of 12 years. The defendants did not take any legal action to remove the plaintiffs from the land and consequently after the expiry of 12 years the defendants had lost the right to recover the land and the plaintiffs had acquired title to the land by operation of the law.”

43. Having considered the facts of this case and the law relating to adverse possession, I find no basis to fault the reasoning of the trial court in reaching this conclusion. It is true that the appellants' father



asserted his right to the land in 1998. He reported the matter to police at Oyugis and the respondents' husband was charged with forcible detainer. He was convicted and sentenced to two years' probation. The appellants' father, however, did not follow up and reclaim the land by removing the respondents and their spouse. The respondents and their spouse did not vacate the suit land but continued in open and hostile occupation for another 16 years. By the time the appellants reported the occupation of the land to the chief in 2014, they had lost the right to claim the land, as the respondents had acquired title to the land by operation of law.

44. It is my finding, therefore, that the present appeal has no merit. I would accordingly dismiss it, but with an order that the parties bear their respective costs of the appeal.

Judgment of Kiage, JA

45. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, JA. I entirely agree with it and have nothing useful to add.
46. As Tuiyott, JA is in agreement, the appeal shall be disposed of as proposed by Mumbi Ngugi, JA.

Judgment of Tuiyott, JA

47. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

Dated and Delivered at Kisumu this 26th day of May, 2023

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

