



REPUBLIC OF KENYA



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**Jelimo v Kemboi & another (Civil Appeal 61 of 2019)
[2023] KECA 577 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 577 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 61 OF 2019
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MAY 12, 2023**

BETWEEN

LILIAN JELIMO APPELLANT

AND

ENOCK KIPKOECH KEMBOI 1ST RESPONDENT

JOYCE CHEPCHIRCHIR 2ND RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Kitale (Mwangi Njoroge J.) dated 29th January 2019 in Environment & Land Case No. 78 of 2008)

JUDGMENT

JUDGMENT OF MUMBI NGUGI JA

1. In her plaint dated 15th October 2008 and amended on 3rd February, 2014, the appellant sought a declaration that she is the owner of title number Kitale Municipality Block 1/Lessos /1224 and title number Kitale Municipality Block 1/Lessos 412 measuring 10.290 hectares and 7.20 hectares respectively (hereafter the suit property). She also sought a permanent injunction to restrain the respondents, their servants, agents or employees or anyone claiming on their behalf from interfering with or laying claim over the suit property.
2. The respondents denied the appellant's claim in their amended defence and counterclaim dated 3rd April 2014 and further amended defence and counterclaim dated 3rd October 2017. It was their case that the appellant had obtained registration as the proprietor of the suit property fraudulently as the suit property had been acquired by their father, one Tangut Bariwot, in 1969. He had however, passed away in 1982 before the property was transferred into his name. Thereafter, the suit property had been registered in the name of the appellant's husband, one Wilson Kipkorir Tangut, as he was the deceased's only son. The respondents further asserted that they had been residing on the suit property since they were born and it was the only home they knew. Further, that they only discovered that the land had



been transferred into the appellant's name after the death of Wilson Tangut when she filed the suit before the trial court.

3. The respondents' case further was that the appellant had secretly transferred parcel number 1224 without having obtained letters of administration to her husband's estate. They denied that they had begun laying claim to the property after the demise of the appellant's husband. They averred that they were in occupation of the suit property, and it was the appellant who began the dispute by threatening to evict them from the suit property. They therefore sought orders that the new titles to the suit property, numbers 1224 and 412, be cancelled and revert to the original numbers 994 and 39 respectively. They also sought rectification of the register and the costs of the suit.
4. Upon hearing the suit, the Environment and Land Court (Mwangi Njoroge J) found in favour of the respondents, dismissed the appellant's case and allowed the counterclaim with costs to the respondents.
5. Dissatisfied with the judgment of the trial court, the appellant has filed the present appeal in which she raises some thirteen (13) grounds in her memorandum of appeal dated 15th April, 2019. These can be summarised as being that the learned Judge erred in law and fact in:
 - i. holding that the transfer of the suit land to her was fraudulent;
 - ii. holding that the resultant divisions emanating from parcels number Kitale Municipality Block 1/Lessos/994 and Kitale Municipality 1/Lessos/39 be cancelled and the Land Register be rectified to reflect the reinstatement of the said parcels respectively;
 - iii. holding that the appellant holds the suit land in trust for the respondents;
 - iv. allowing the respondent's counter-claim despite the fact that it was not proved on a balance of probability;
 - v. finding that her claim was not proved on a balance of probabilities which finding is against the weight of evidence;
 - vi. misapprehending the evidence on record, failing to properly and exhaustively evaluate such evidence and in failing to appreciate the significance of the documentary evidence tendered in support of the appellants case in consequence of which he reached a wrong decision.
6. This is a first appeal and we are, accordingly, under a duty to re-evaluate the evidence and reach our own conclusion-see *Selle & Another v Associated Motor Boat Co. Ltd & others* [1968] EA 123.
7. The appellant testified as PW1. It was her evidence that she owned land parcel number Kitale/Lessos/412 which had belonged to her husband, Wilson Kipkorir Tangut who died on 29th November 2007. He had transferred the land to her on 16th May 2003 and they had gone to the Land Control Board which gave its consent on 22nd May 2002. She had transferred the land parcel to her name on 16th May 2003.
8. It was her testimony further that her husband also owned parcel number Kitale Municipality Lessos/826 which was transferred to her on 12th February 2003, the Land Control Board having given its consent to the transfer on 22nd May 2002. She stated that she had since subdivided the said land parcel into several sub-plots namely land parcel numbers Kitale Municipality Block 1/Lessos/867- 869. Further, that she had subdivided parcel number 867 into plot nos. 994 and 995. Additionally, she had sub-divided plot no. 994 into plot numbers 1062, 1063, 1102, 1111 and 1112. According to the appellant, plot number 1062 was further subdivided into plot numbers 1130-1134 while plot number 1130 was subdivided into plot nos. 1172 and 1173. It was her testimony further that plot number 1172 was further subdivided into plot no. 1215 and 1216, while plot no. 1215 has been subdivided



into plot numbers 1224 and 1225. She testified that she resides on plot number 1224 and is utilizing parcel number 412 for farming.

9. The appellant testified that the land parcels were subdivided and sold in order to cater for her late husband's medical bills and to raise fees for her children. While confirming that Nancy Chelimo Tangut (the initial 1st defendant who passed away on 7th May 2016 and was substituted with her son, the 1st respondent) and Joyce Chepchirchir Tangut (Joyce), the 2nd respondent, were her sisters in law, she denied that they were residing on the suit property. She asserted that they had never claimed the property while her husband was alive, doing so only after his demise. She denied that the suit property was transferred into her name after her husband's death, or that he had not signed the transfers to her name, though she testified that she did not keep copies of the transfers to her.
10. In his testimony, Nelson Otieno Odhiambo, the Trans Nzoia Land Registrar (PW2), who had reported to the Trans Nzoia District Land Registry on 31st August 2018, produced copies of the minutes of the Land Control Board, which he had certified, showing transfer of plot no. 826 from the appellant's husband to the appellant. When questioned about the unsigned entries on the green card of land parcel number Kitale Municipality Block 1 Lessos 826 (PEXh2 and DMFI8) and cancellations in the Minutes of the Land Control Board produced by the appellant as evidence that the Board had given consent for the transfer of the suit property from her husband to her, he dismissed them as "not serious" and "anomalies capable of being corrected".
11. Joyce Chepchirchir Tangut DW1, the 2nd respondent, testified that she was one of six children of Bariwot Tangut. Her mother passed away in 1979 before her father's demise in 1982 when she was about 4 years old. The appellant's husband had passed away in 2007. It was her testimony that the suit property, comprising 154 acres, belonged to her father, being his share of land that he and 17 others, members of Lessos Farm called Chuma & Partners, had bought through joint efforts from the Agricultural Development Corporation. She testified that by the time of his death in 1982, the land had not been registered in his name. She further testified that 75 acres of the land were registered in the name of Wilson Kipkorir Tangut, her brother and the appellant's husband, while 75 acres went to her stepmother. It was her testimony that 4 acres were given to her sister, Mary Chebet Bariwot. Joyce produced receipts as evidence of purchase of the land by Chuma & Partners (D Exh 2(a) – (e).)
12. According to Joyce, the appellant was married by her brother in 1989 while the family was still resident on the land. Her brother was registered to hold the land in trust for the family as he was the only son. As his motor vehicle had been involved in an accident and he did not have insurance, he had transferred the suit land to the appellant in 2003 to avoid execution in respect of claims arising from the motor vehicle accident. Her brother had died in 2007 and upon his death, the appellant claimed the land and wanted her sisters in law to leave.
13. It was Joyce's testimony further that she believed that the appellant obtained registration of plot numbers 1062 and 1224 after her husband's death without having first obtained letters of administration to Wilson's estate. She testified that she was still a student at the time and that is why she did not get any land. Her sister, Nancy Chelimo Tangut, was promised land by Wilson but was not given any.
14. The 1st respondent, DW2, Enock Kipkoech Kemboi (Enock) adopted the statement of his mother, the original 1st defendant, Nancy Chelimo Tangut, dated 4th September 2015. It was his testimony that the suit land belonged to his grandfather and that his mother and the 2nd respondent were the administrators of his estate. He further testified that he used to stay at the home of his uncle, Wilson Tangut, the appellant's husband, during school holidays.



15. The evidence of DW3, Rael Chepkas Mwaswai (Rael) was that she and Tangut Bariwot, the father of the respondents, were part of a group that purchased shares in Lessos Farm. Bariwot had bought 154 acres but by the time of his death, he had not obtained title to the land. She confirmed that she knew the appellant as the wife of Wilson. Wilson had been registered as the owner of the land as he was Bariwot's only son.
16. According to Rael, the appellant found Bariwot's children on the land when she got married to Wilson. Further, that Wilson used to stay in the same house with the respondents and other sisters, and that Mary Chebet, one of Bariwot's daughters, was given a parcel of land by Bariwot.
17. Mary Chebet Bariwot (DW4) testified that the appellant was married to Wilson in 1987 while Wilson was still residing at his mother's house. She further testified that the suit property had been purchased by their father, Bariwot Tangut, and by the time of Bariwot's death, he had not completed payments for the land, and she therefore paid the remaining amount. It was her testimony that she was given 4 acres during Bariwot's lifetime as her father considered that she had "guarded his property." While she was older than Wilson, the elders resolved, after her father's death, that the land should be registered in Wilson's name as he was the only son.
18. Mary's testimony further was that she and her sisters, Ruth and Rebecca, all got 4 acres. Joyce was still in school then while Nancy was still in Mombasa. Wilson had stated that he would give them land later on. Wilson lived in his mother's house on the suit property and when he married the appellant, she stayed in the same house. According to Rael, Wilson did not purchase the land. He was born in 1966 and was 16 years old in 1982 and could therefore not have afforded to buy the land.
19. Helen Mutai, DW5, the Land Registrar, West Pokot, had worked as the Land Registrar, Trans Nzoia, between 2007 and 2018. She confirmed that the Green Card for Kitale Municipality Block 1/ Lessos/ 412 registered in the name of the appellant did not have the signature of the Registrar. She however testified that the absence of a signature on the Green Card did not mean that the transfer had not been signed, and the absence of a signature could have been an oversight which could be rectified if the Land Registrar was satisfied that it was proper to do so.
20. The evidence of DW6, Shem Kiptoo Sawe Amai, was that he was a senior chief, now retired, of Kibomet Location Trans Nzoia County. His father and Bariwot lived in the same village. He was aware that Bariwot had purchased land measuring about 150 acres which was subdivided between his two wives. The land had not been registered in Bariwot's name by the time he died, and the committee handling the land found it fit to have the land registered in the name of Wilson to hold in trust for the family. According to Sawe, Bariwot died while Wilson was about 10 years old.
21. With regard to the registration of the land in the appellant's name, Sawe testified that Wilson had a public service vehicle which was involved in a fatal accident along Kiungani Road. Wilson was afraid that he would lose the family land as his vehicle was not insured. He had therefore transferred the land to his wife and was later declared bankrupt.
22. It was Sawe's testimony that the appellant had found the respondents and their other sisters living on the suit property. Their eviction, in his view, would be an abuse of trust as it is family land. Wilson had transferred the land to the appellant as he had been seeking a way of securing family property. It was Sawe's testimony further that in Kalenjin customs, land was held by sons and not daughters.
23. In support of her appeal, the appellant filed written submissions dated 10th June, 2022 which were highlighted by her counsel, Mr. Kamau. Her submissions were that the trial judge erred in finding that her husband held the land in trust for the family and that she now holds the land in trust for them.



According to the appellant, no evidence was produced by the respondents' witnesses to prove that the land had been transferred to her to hold in trust.

24. To the question whether the land had been registered in her name fraudulently, the appellant submitted that Wilson Tangut was the first registered owner of the suit property, number 826, having been so registered on 12th February 2003. He was also the first registered owner of plot no. 412, registered as such on 3rd February 1997.
25. The appellant further submitted that the evidence of Mary (DW3) was unreliable as she could not remember when Bariwot died and when her own title was issued. She was also not aware whether Bariwot had directed that the land be registered in Wilson's name. As for the absence of a signature on the Green Card, her submission is that the Land Registrars, PW2 and DW2, explained it clearly as a mere oversight which does not affect the validity of the registration. In the appellant's view, the respondents had failed to prove that she had obtained the titles fraudulently. The appellant relied on the case of *John Mbugua Gitau v Simon Parkoyiet Mokare & 4 others* (2017) eKLR in which the Court reiterated the findings in *Emfil Ltd v Registrar of Titles* and held that

“Allegations of fraud are allegations of a serious nature normally required to be strictly proved on a higher standard than the ordinary standard of balance of probabilities”.
26. Mr. Kamau submitted at the hearing of the appeal that the respondents had not been able to establish a trust; that the respondents' father had made a gift *inter vivos* to the appellant's husband and upon his demise, the issue that would arise was whether the suit property formed part of his estate and whether it was available for distribution. He submitted that it is only the succession court that is vested with the jurisdiction under the *Law of Succession Act* to determine whether there was a gift *inter vivos* and not the ELC. Further, that while the ELC found that there was a trust, the issue of trust with respect to inheritance rights can only be resolved by the High Court in exercise of jurisdiction under the *Law of Succession Act*. As the ELC had failed to establish whether there existed a customary or constructive trust, then a trust was not proved in accordance with the law.
27. The respondents were represented by Ms. Munialo who highlighted their written submissions dated 14th June 2022. In their submissions, the respondents sum up the evidence that was before the ELC and contend that the court was correct in its finding that the appellant was registered as proprietor but that she held the suit property in trust for the respondents. The property had been registered in the name of the appellant's husband as he was the only son of the deceased, in accordance with Kalenjin custom.
28. Regarding the submissions by Mr. Kamau that the ELC did not have the jurisdiction to issue the orders that it did, Ms. Munialo submitted that the issue could not be raised on appeal as it had not been raised during the trial.
29. I have considered the judgment of the ELC and the proceedings before it. I have also considered the respective submissions of the parties highlighted above. I note that the appellant has raised the question of the ELC's jurisdiction to issue the orders that it did, as well as the submissions of Ms. Munialo that the issue of jurisdiction had not been raised during the trial.
30. While the question of jurisdiction can be raised at any time, and having considered the proceedings before the ELC, I agree with Ms. Munialo's submission that it was not raised in the trial before the ELC, nor has it been raised in the memorandum of appeal filed before this court. Accordingly, it does not fall for determination before us.
31. In my view, two issues arise for determination. The first is whether the trial court erred in holding that the appellant was registered as the proprietor of the suit property in trust for the respondents. The



second is whether the trial court erred in finding that the appellant was registered as proprietor of the suit property fraudulently.

32. In determining these issues, I consider, first, the undisputed facts that emerge from the evidence before the trial court. First, it is uncontested that the appellant was the widow of Wilson Kipkorir Bariwot, the son of Bariwot Tangut. She was the sister in law of the mother of the 1st respondent, who is deceased, and the 2nd respondent. It is also undisputed that the appellant and her sister in law lived, during the lifetime of the appellant's husband, on the suit property. From the evidence, they lived in accord, and from the testimony of the respondents, they stayed together in the same house, which had belonged to the 2nd respondent's mother before her demise in 1979.
33. The evidence of DW3 and DW4, Rael and Sawe, indicates that the suit property was purchased by Bariwot Tangut, a member of Chumo Partners. The evidence of Rael indicates that 'Bariwot A. Tangut' was member number 8 in the list of members produced in evidence, in the form of a letter from Lessos Farm to ADC Lands Limited. The testimony of Rael and the receipts produced by Joyce in evidence show that the land was bought by Wilson's and the 2nd respondent's father prior to his death in 1982. It is uncontested that the appellant's husband, who died on 29th November 2007 at the age of 41, was 16 years old at the time the land was purchased. While the appellant asserts in her witness statement that the land belonged to her deceased husband and not to Bariwot Tangut, she has not claimed nor adduced evidence that he bought the suit land.
34. The evidence of Rael and Sawe further shows that the only reason that the land was registered in the name of the appellant's husband in 1997 was because he was the only son of the purchaser, Bariwot Tangut. The appellant did not controvert this evidence.
35. The gist of the appellant's claim is that the land was given to her as a 'gift' by her husband, and she transferred it to herself in 2003. There is no evidence to back her claim that her deceased husband was given the property inter vivos by her deceased father in law. She does not shake the very cogent evidence of Rael and Sawe that the only reason that the members of Lessos Farm and Chumo & Partners, the group which had bought the suit property, in which Bariwot Tangut was member number 8, decided that the land should be registered in the name of the appellant's husband rather than in his older sisters' names was because he was the only son of Bariwot Tangut. Their reasoning, it would appear, was that in accordance with Kalenjin custom, the land could not be registered in his sisters' names.
36. In analyzing the evidence before it and reaching the conclusion that the appellant held the suit property in trust for the respondents, the trial Judge stated:

“Evidence points to the fact that both Tangut Bariwot and his wife having died, the land committee that dealt the winding up issue in respect of Lessos Farm was at a loss as to whose name the land purchased by Bariwot should be registered in. They took initiative and chose to have the land registered in Wilson's name. Such an arbitrary transfer by a non-owner can only be presumed to mandate the transferee to hold the property on behalf of the family of a deceased, for any other interpretation may lead to unjust enrichment of a transferee at the expense of all the other beneficiaries of the deceased's estate. I use the term “non-owner” to refer to Lessos Farm for the reason that though they could transfer the land, it was legally Bariwot's.

32. Wilson, apparently recognizing his trusteeship, even transferred two parcels each of 4 acres to each of his two sisters, Ruth and Rebecca. From his conduct,



it can be safely concluded that Wilson knew that he was only holding the land as a trustee for the family.”

37. Mr. Kamau submitted before us that the trial court did not specify the kind of trust that he found in favour of the respondents, whether it was a customary or constructive trust. He asked us, for that reason, to find that no trust was proved in accordance with the law, and accordingly, to allow the appeal.
38. It is correct that the trial court did not specify the nature of the trust that it found in favour of the respondents. However, from its analysis of the evidence, it is evident that the court found that a customary trust had been established in favour of the respondents. The appellant’s husband, Bariwot Tangut’s only son, had been registered as the proprietor because he was the male in the family, a not unexpected occurrence in our patriarchal society. In the view of the members of Chumo & Partners, Kalenjini customs dictated that land could not be registered in the names of females. He was registered as proprietor, therefore, not because he was solely entitled to the land, but to hold in trust for his siblings.
39. In its decision in *Isack M’inanga Kiebia v Isaaya Theuri M’litari & another* [2018] eKLR, the Supreme Court held that in determining whether a customary trust has been established, a court must be satisfied that certain elements exist. It enumerated these elements as being the following:
1. The land in question was, before registration, family, clan or group land;
 2. The claimant belongs to such family, clan, or group;
 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
40. In light of the foregoing, it is my finding that the trial court properly found that Wilson held the suit property in trust for his siblings. It also properly found that his widow, the appellant, to whom Wilson transferred the land, held the said property in trust for his siblings.
41. The second issue to consider is whether the trial court erred in finding that the suit property was fraudulently transferred to the appellant. The trial court found, and as the analysis above indicates, I agree with this finding, that Wilson was registered as proprietor of the suit property for himself and to hold in trust for his siblings. The evidence shows that when he was concerned about possible execution against the suit property in respect of claims arising from an accident involving his public service vehicle, he was advised to transfer the land either to his sisters or his wife. It appears that he elected to transfer the property to his wife.
42. He did not, however, stop there. He also transferred several other parcels of the suit property to other parties. The trial court found that the suit property was transferred to the appellant by Wilson during his lifetime. It observed, however, that Wilson did not have the right to transfer the property to the appellant, or to others as he held the property in trust for his siblings. The trial court observed as follows:
- “ 30. There is credible evidence that the land was transferred to the plaintiff by Wilson. That notwithstanding, can the transfer be faulted as being fraudulent?”



There is evidence that the registration of the Wilson (*sic*) was not prompted by himself and he had not purchased the land.

31. Evidence points to the fact that both Tangut Bariwot and his wife having died, the land committee that dealt the winding up issue in respect of Lessos Farm was at a loss as to whose name the land purchased by Bariwot should be registered in. They took initiative and chose to have the land registered in Wilson's name. Such an arbitrary transfer by a non-owner can only be presumed to mandate the transferee

to hold the property on behalf of the family of a deceased, for any other interpretation may lead to unjust enrichment of a transferee at the expense of all the other beneficiaries of the deceased's estate. I use the term "non-owner" to refer to Lessos Farm for the reason that though they could transfer the land, it was legally Bariwot's.

32. Wilson, apparently recognizing his trusteeship, even transferred two parcels each of 4 acres to each of his two sisters, Ruth and Rebecca. From his conduct, it can be safely concluded that Wilson knew that he was only holding the land as a trustee for the family.

33. However later on, he appeared to set out on an expedition to fritter the very resources that his father had gathered for his family. The minutes of the Land Control Board meeting of 22/5/2002 are dominated by transactions in which he was transferring numerous parcels carved out of the suit land to numerous third parties. It is this conduct that renders his transfer of plots to his wife, the plaintiff, suspect."

43. I agree with this conclusion by the trial court. Like Wilson's conduct, the subsequent conduct by the appellant in subdividing the suit property into several plots after her spouse's death, transferring them to herself and then seeking to remove the respondents from the property by filing the suit the subject of this appeal had one intent: to deprive the respondents of their interest in the property belonging to their deceased father.

44. Fraud is defined as a deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. The actions of the appellant and her spouse were analogous to what is defined as a fraudulent conveyance- transferring an interest in land in order to hinder a creditor- see *Black's Law Dictionary*, 10th Edition 777. From the evidence, while the respondents were living on the suit property in 2002-2003 with the appellant and her husband, their brother, they had no inkling that the suit property was being transferred to the appellant-as a gift, and other parts of the land that belonged to their father to third parties. They only came to know what transpired after their brother died in 2007 and the appellant chased the 2nd respondent away from the suit property before filing suit seeking to be declared the registered proprietor of the suit property. In transferring the suit property to his wife, the appellant's husband, Wilson, was attempting to defeat the customary trust in which he held the suit property in favour of his siblings.

45. It is also instructive that the appellant, like her spouse, embarked on a spree of disposing of the suit property, ostensibly to cater for her spouses' medical bills and school fees for her children. As the trial court found, however:

- " 34. No evidence has been tabled by the plaintiff to support the allegation that her own sale of portions of the land transferred to her were prompted by any acute



need. No evidence was presented that the portions disposed of to third parties during Wilson’s lifetime were sold to raise money for any medical expenses. No history of illness formed part of the plaintiff’s evidence.

35. Further, the speed with which the plaintiff has ensured multiple subdivisions of the land transferred to her is quite suspect. Her story that she required money for school fees for her children was not supported by any concrete evidence. She is deemed to have known the status of the land in question.”

46. I find therefore, that the present appeal has no merit. The appellant’s husband was registered as proprietor of the suit property to hold in trust for himself and his siblings. He had no right to transfer it to the appellant, or any other party, to the detriment of the respondents. The appellant, to whom the suit property had been transferred, also held the land in trust, and had no authority to dispose of it in the manner that she did. Such claim as she had over the suit property could only be limited to what her deceased spouse was entitled to as one of the children of Bariwot Tangut.

47. I would accordingly uphold the decision of the trial court and dismiss the appeal with costs to the respondents.

JUDGMENT OF KIAGE, JA

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, J.A. I entirely agree with it and have nothing useful to add.
2. As Tuiyott, J.A is in agreement, the appeal shall be disposed of as proposed by Mumbi Ngugi, J.A.

JUDGMENT OF TUIYOTT, JA

1. 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 12th day of May, 2023.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

