Mwangale v Trust Bank Ltd (In Liquidation) & 3 others (Civil Appeal 316 of 2018) [2023] KECA 713 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 713 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 316 OF 2018

DK MUSINGA, PO KIAGE & S OLE KANTAI, JJA

JUNE 9, 2023

BETWEEN

SALOME NALIAKA MWANGALE ..... APPELLANT

AND

TRUST BANK LTD (IN LIQUIDATION ..... 1ST RESPONDENT

KANCHAN RASIKLAL SHAH (BEING THE EXECUTRIX OF THE WILL OF THE ESTATE OF RASIKLAL DEVRAJ SHAH (DECEASED) . 2ND RESPONDENT

AMIT RASIKLAL SHAH ..... 3RD RESPONDENT

MEHUL RASIKLAL SHAH ..... 4TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (F. Tuiyott, J.) delivered on 6th April 2018 in H.C. Civil Case No. 132 of 2016)

JUDGMENT

1. By a plaint dated 2nd March 2006 and subsequently amended on 5th May, 20th November 2006 and 11th October 2010, the appellant stated that in 2004 she entered into an agreement with the 1st respondent for purchase of property known as L R No 209/7828/Kyuna Estate, Nairobi, (hereinafter referred to as the "suit property"). The suit property had earlier been charged to Trust Bank Limited, which was subsequently put under liquidation. The agreed purchase price was Kshs.8,250,000.00 and she paid to the 1st respondent a deposit of 10% thereof, amounting to Kshs.825,000.00, and subsequently made further payments, all amounting to Kshs.2,475,000.00, leaving a balance of Kshs.5,775,000.00.

2. The appellant applied for a facility from Commercial Bank of Africa Limited (CBA) to finance the balance of the purchase price and the application was approved. Thereafter, CBA wrote to the 1st respondent requesting for the necessary documents to enable its advocates to prepare a charge document. CBA also gave its undertaking to disburse the sum of Kshs.5,775,000.00 upon registration

of the intended charge. All the documents sought were not forwarded promptly, particularly receipts in acknowledgment of settlement of water bills. As a result, on 27th June 2005, the 1st respondent gave a fourteen (14) days' notice within which the water bills ought to have been paid and payment receipts forwarded, in default of which it would rescind the sale agreement and auction the suit property.

3. The appellant was unable to avail the water payment receipts as demanded. Consequently, the 1st respondent served upon the appellant, who was residing in the suit property, a notice of sale of the suit property addressed to M/s Enjinia Limited, who was the chargee against whom the 1st respondent was exercising its statutory power of sale in its attempt to sell the suit property to the appellant by private treaty.

4. On 22nd March 2006, the suit property was sold by public auction to the 2nd, 3rd and 4th respondents. The appellant stated that at the auction, she had circulated caveat emptor notices to all intending buyers, notifying them about the litigation in respect of the suit property, and her interest in the same, but despite that, one Rasiklal Shah proceeded to bid for the property on his behalf and on behalf of the 3rd and 4th respondents.

5. The appellant contended that the sale of the suit property by the 1st respondent to the said purchasers was fraudulent and set out in the plaint the particulars of fraud.

6. The appellant sought an injunction to restrain the respondents from effecting any transfer of the suit property, or interfering with her possession of the same, and an order for specific performance. In the alternative, the appellant sought refund of the money that she had paid to the 1st respondent in part payment of the purchase price. She also sought damages for loss of bargain on the suit property.

7. In its statement of defence, the 1st respondent stated that the sale agreement between itself and the appellant was entered into on 16th October 2003, but the appellant was unable to raise the purchase price, despite the 1st respondent having extended the completion date to 28th January 2004.

8. According to the 1st respondent, the suit property was lawfully sold by public auction to the 2nd, 3rd and 4th respondents, and denied any knowledge of the alleged circulation of caveat emptor notices before the auction. By then, the sale agreement between the appellant and the 1st respondent had been rescinded on account of the appellant's breach and failure to complete the sale transaction.

9. The 2nd, 3rd and 4th respondents stated that Rasiklal Devraj Shah (deceased), learnt of the sale of the suit property through a newspaper advertisement and proceeded to successfully bid for the same on 22nd March 2006. They denied receipt of any caveat emptor notice by the deceased prior to the said auction. Further, the 2nd, 3rd and 4th respondents denied all the particulars of fraud as alleged by the appellant.

10. By way of a counterclaim, the 2nd, 3rd and 4th respondents stated that upon registration of the transfer of the suit property in favour of Rasiklal Devraj Shah, the 3rd and 4th respondents as tenants in common on 11th August 2006, the said purchasers became entitled to vacant possession of the suit property from the appellant, but that notwithstanding, the appellant adamantly remained in unlawful occupation of the suit property.

11. Consequently, the 2nd, 3rd and 4th respondents sought an order of vacant possession of the suit property against the appellant as well as mesne profits at the rate of Kshs.120,000.00 per month from 11th August 2006 until full payment.

12. After a full hearing, the trial court F. Tuiyott, J., (as he then was), dismissed all the appellant's prayers, but ordered the respondents to refund to the appellant a sum of Kshs.2,475,000.00 together with interests at court rates from the date of filing suit until payment in full. This is the amount that the

appellant had paid as a deposit towards the purchase of the suit property. The trial court also allowed the counterclaim by the 2nd, 3rd and 4th respondents, but granted the appellant thirty (30) days to deliver vacant possession of the suit property, failing which she would be evicted from the same.

13. Being aggrieved by that decision, the appellant preferred this appeal, raising 16 grounds of appeal. Similarly, the 1st respondent also filed a cross-appeal that raised 15 grounds. The cross-appeal is against the part of the trial court's decision ordering the 1st respondent to refund the appellant a sum of Kshs.2,475,000.00 with interest at court rates from the date of filing the suit. The 1st respondent also sought costs of the High Court suit as well as costs of this appeal.

14. All the parties filed written submissions. In her submissions, the appellant identified the issues for determination arising from the appeal and the cross-appeal as follows:

    a) Whether the agreement between the appellant and the 1st respondent was duly rescinded;

    b. Whether the court should have considered the issue of waiver of the clause that time was of essence;

    c. Whether the 1st respondent was entitled to forfeiture of the deposits and sums paid by the appellant totaling to Kshs.2,475,000.00;

    d. Whether the 2nd to 4th respondents having bought the suit property in the public auction have duly acquired the suit property;

    e. Whether the doctrine of lis pendens is applicable;

    f. Whether the appellant is entitled to an order of specific performance;

    g. Whether the 2nd to 4th respondents are entitled to judgment on the counter claim; and

    h. Who should bear the costs of this appeal, the cross- appeal and the suit before the superior court."

        1. We think this is a proper summation of the main issues for determination, and we shall determine them in that order.

        2. We are conscious of our duty as the first appellate court, which is to revisit the evidence that was adduced before the trial court, analyse it, evaluate it and come to our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them, and observing their demeanour, for which due allowance should be given. See *SeaScapes Limited v Development Finance Company of Kenya Limited* [2009] KLR 384.

15. We have carefully perused the record of appeal, the written and oral submissions made by counsel for all the parties as well as the authorities cited by counsel. During the hearing of the appeal, Mr. Wandabwa appeared for the appellant; Mr. J. P. Machira for the 1st respondent; and Mr. Mwangi for the 2nd, 3rd and 4th respondents.

16. The first issue for our determination is whether the agreement between the appellant and the 1st respondent was duly rescinded. It is not in dispute that the sale agreement between the appellant and the 1st respondent entered into on 16th October 2003 stipulated that the completion date was on 28th November 2003, and time was of the essence. By the time the contractual completion period lapsed the appellant had not fully paid the balance of the purchase price.

17. The appellant had sought a facility of Kshs.5,775,000.00 from the Commercial Bank of Africa (CBA) to enable her to complete payment of the purchase price, and in that regard the Bank's advocates had given to the 1st respondent's advocates a professional undertaking dated 15th March 2004, committing themselves to pay that sum upon registration of a first legal charge over the suit property in favour of the Bank. The Bank's advocates called for the Transfer together with the original Certificate of Title, Clearance Certificate from Nairobi City Council, Rates Clearance Certificate, among other documents.

18. The appellant, who was then residing in the suit premises, had an outstanding water bill with the Nairobi City Council and was therefore unable to obtain the rates clearance certificate. On 6th June 2015, the appellant's advocates wrote to the CBA's Advocates stating: "We have had problems trying to sort out the water bill for the property. We hope to resolve the same within the next seven (7) days whereafter we shall obtain the relevant consent to charge."

19. Twenty-one days later, the appellant was still unable to clear the outstanding water bill. Consequently, on 27th June 2005 the 1st respondent's advocates sent a notice to the appellant's advocate stating that unless the water bill would have been cleared within 14 days, the sale agreement would be rescinded and the suit property advertised for sale by public auction.

20. The appellant's advocates wrote back and pleaded for more time, which was given, but by November 2005 the appellant had still not resolved the outstanding issue. Up to 22nd March 2006 when the suit property was sold by public auction, the appellant was yet to clear the outstanding water bill, despite all the accommodation that she had received from the 1st respondent.

21. The appellant now argues that the learned judge erred in law and fact and misdirected himself in failing to hold that the 1st respondent had, by its conduct, treated the subject agreement as if time was not of essence, by reason of which any rescission by it, upon default by the purchaser required the 1st respondent to first issue a reasonable completion notice.

22. In the impugned judgment, with regard to the issue of time being of essence and issuance of rescission notice, the learned judge delivered himself as follows:

> "78. From the evidence and the case as presented by the parties, time was of essence in the sale transaction and that time was extended from time to time beyond the initial period of 28th November 2003.
>
> 79. Time being of essence, there was no requirement for giving a Completion Notice before the Rescession Notice. The requirement of a Completion Notice set out in the *Law Society Condition of sale* (1989 Edition) was in respect of an Agreement which did not provide that time is of essence in respect to the Completion Date. Not so like here! On the other hand, the Agreement itself did not provide a period for a Rescession Notice. On 27th June 2005, the Bank gave a 14 days Rescession Notice but delayed it for another period of 7 days upon the request of the Plaintiff' Lawyer. Is this period unreasonable as submitted by the Plaintiff?
>
> 80. This Court is not prepared to agree with this submission given that the Plaintiff had been reminded of her outstanding obligation about 4 months earlier (letter of Bank's Lawyer of 8th February 2005) and when infact the Plaintiff's Lawyers had held themselves out as being in a position to resolve the Water bill within 7 days of 6th June 2005 (P Exhibit page 77). It cannot therefore be

unreasonable for the Bank to call up for the performance within 14 days of 27th June 2005. And the Bank was still more the generous by expanding that time by another 7 days!

81. In the Rescission Notice the Banks' lawyers make it clear that, save for the Water Bill, all the other completion documents were ready. The Plaintiff does not challenge that at the time her lawyer received the Notice or later during the hearing. (sic) This Court has to find that at the time of issuing the Notice the Bank was ready and willing to perform its side of the Contract. The Rescission was justified and valid."

23. The appellant submitted that even when time is expressly made of essence in a contract, and the time set in the said contract lapses, and subsequently there is unreasonable delay in completion, the party affected by the unreasonable delay ought to issue a Completion Notice before rescinding the agreement. He cited *Paradise Homes Properties Ltd v Steve Wambua Musyimi and Mercy Mbula Ndambuki*, [2014] eKLR.

24. In the above matter, the ELC cited this Court's decision in *Njamunyu v Nyaga* [1983] KLR 282 where the Court stated:

> " The principle to be acted upon in such a case is stated in Halsbury's Laws (4th edn) p 338, para 482, ie: Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties. Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. The return of the money by the defendant was notice to the plaintiff that the defendant had made time of the essence and rescinded the agreement. Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify."

25. In this matter, we are satisfied that the 1st respondent, who was the party affected by the appellant's unreasonable delay, gave the appellant 14 days to clear the water bill, failing which it would rescind the agreement. The grant of further extension, in our view, and in the circumstances of the matter, did not imply that the 1st respondent waived the condition that time was of the essence. The 1st respondent's long wait for a period of nearly one year eight months was sufficient evidence that it bent over backwards to accommodate the appellant with no success, and thus it was justified in rescinding the sale agreement it had entered into with the appellant. We find no merit in the first and second issue for our determination.

26. We now turn to consider whether the 2nd, 3rd and 4th respondents, having bought the suit property at the public auction duly acquired the suit property; and whether the doctrine of lis pendens was applicable. The appellant contended that at the said auction she caused caveat emptor notices to be circulated to all those who were in the auction hall, including the auctioneer; that on the morning of the date of the auction the appellant had filed the suit that gave rise to the impugned judgment; and that the suit property was registered under the Registration of Titles Act (now repealed), and therefore the substantive law applicable was the Indian Transfer of Property Act (ITPA), under which the doctrine of lis pendens was applicable, as held in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR.

27. The appellant further submitted that section 52 of the ITPA bars transfer of a property pendete lite; that whereas it is debatable whether there was a suit in existence, or whether the respondents were aware of it at the time of the auction, it was not in dispute that the date of the transfer was 11th August 2006. For those reasons, the appellant submitted, the sale and transfer of the suit property by the 1st respondent to the 2nd, 3rd and 4th respondents did not confer upon the purchasers an absolute indefeasible title.

28. In our view, the sale agreement having been lawfully rescinded, the 1st respondent was at liberty to sell the suit property. Peter Githirwa Waweru, the sole proprietor of Ideal Auctioneers, testified as to how he conducted the sale. He denied having been served with any caveat emptor notice as alleged by the appellant.

29. All we wish to say about this issue is that even if a caveat emptor notice was duly served upon the auctioneer and the bidders who attended the auction, it was of no legal effect. Only a valid court order would have sufficed. "Caveat emptor" simply means "let the buyer beware." It warns purchasers that they are buying at their own risk, it does not tell them that they cannot buy the property that is on sale.

30. As regards the doctrine of lis pendens, *Black's Law Dictionary* describes it as:

> " 1. A pending law suit.
>
> 2. The jurisdiction, power, or control acquired by a court over property while a legal action is pending.
>
> 3. A notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome."

31. It is trite law that the exercise of a chargee's statutory power of sale is not fettered by the mere filing or pendency of a suit seeking to challenge the sale, unless and until a court issues an order to restrain the chargee from exercising the power. In *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others* [1996] eKLR, this Court stated:

> " Here we must make it clear that Courts do not order exercise of statutory power of sale. It is statutory. Courts can only stop such exercise if the circumstances so warrant. If a court declines to grant an injunction, the stopping of such a statutory power of sale, the sale proceeds under the statute that gives such a power."

32. There was no court order that restrained the 1st respondent from exercising its statutory power of sale of the suit property, and so the 2nd, 3rd and 4th respondents lawfully purchased and acquired the suit property.

33. In view of our findings so far, it is clear that the appellant was not entitled to an order of specific performance, and the learned judge cannot be faulted for so holding.

34. Turning to the cross-appeal, the trial court is faulted for ordering the 1st respondent to refund a sum of Kshs.2,475,000.00 with interest at court rates from the date of filing suit until payment in full, being the sum that the appellant had paid to the 1st respondent towards the purchase price. The 1st respondent's learned counsel submitted that in making that order, the learned judge did not take into consideration that as of the date the sale agreement between the appellant and the 1st respondent was

drawn, the appellant was in possession of the suit property as a tenant, and did not pay any rent for a period of nearly two years.

35. Counsel further submitted that the trial court, having rightly held that the 1st respondent rescinded the sale agreement due to the appellant's default, the 1st respondent was entitled to retain the further deposit of Kshs.1,650,000.00 that the appellant had made towards the purchase price, over and above the initial 10% deposit of Kshs.825,000.00 that the appellant had paid upon signing of the sale agreement.

36. In response, the appellant submitted that:

> " A vendor has the right to retain the deposit if the reason for the failure to conclude the contract is based solely on the default on the part of the purchaser. However, this is not the case. The failure to conclude this contract was solely on the 1st Respondent who purported to auction the property during the pendency of the sale agreement with the Appellant. There is therefore no reason for the 1st Respondent to retain this deposit or part of the purchase price paid to them."

37. There is no dispute that from 16th October 2003 when the appellant and the 1st respondent entered into the sale agreement, the appellant, who was residing in the suit property as a tenant, did not pay any rent to the 1st respondent. However, there was no agreement between these two parties regarding payment of any rent whatsoever; and neither did the 1st respondent ever require the appellant to pay any rent.

38. A brief background regarding ownership and occupation of the suit property is appropriate to bring the issue of rent into perspective. As per the evidence on record, the suit property was registered in the name of Enjinia Investments Limited on 6th March 1987, who charged it to Trust Finance Limited, (then a subsidiary of the 1st respondent) on 7th March 1995 to secure a loan of Kshs.5 million and a subsequent loan of Kshs.2 million.

39. In her evidence during cross-examination by the 1st respondent's advocate, the appellant told the trial court that together with her husband, the late Elijah Mwangale, they moved into the suit property in 1999. She went on to state:

> " We moved in upon a gentleman's agreement between my husband and the Receiver. He was given the keys and we moved in. We did not pay rent. We were staying in the house free. My husband never told me he was paying. He was dealing with the 1st Defendant."

40. She further stated:

> " My husband was doing all the correspondence with Mr. Nduru who was the Trust Bank Receiver. After my husband's death, I dealt with Mr. Nduru."

41. On 7th July 2003, the 1st respondent's Liquidation Agent, Mr. C. K. Nduru, wrote to the appellant's late husband. The letter read as follows:

> " Hon. E. W. Mwangale
>
> Box 7027 Nairobi.
>
> Dear Sir,
>
> RE: Sale Of Lr No 209/7828

Trust Bank Limited (in Liquidation) v Enjinia Investments Ltd

We refer to the previous correspondence on the above matter and wish to confirm that we are willing to sell the above property to you through private treaty at Kshs.8,250,000.00 which is the current market price as per M/s Mwaka Musau Consultant's valuation report dated May 6 2003.

The offer is valid for 30 days from the date of this letter and is subject your making a down payment of Kshs.825,000.00 being 10% of the sale price upon signing of the Sale of Agreement and the balance to be paid within 90 days.

Kindly let us have your acceptance of this offer to enable us instruct our lawyers to draw the appropriate Sale Agreement.

Yours faithfully,

C. K. Nduru Liquidation Agent

CKN/slc"

42. On 1st August 2003 the appellant's husband accepted the 1st respondent's offer and requested that the sale agreement be drawn in his wife's name, the appellant. Subsequently, the sale agreement was drawn and the 10% deposit of the purchase price paid on 7th October 2003.

43. On the issue of rent, the 1st respondent's witness, Yasmin Roshen Kaka (Assistant Liquidation Agent), told the trial court that when the appellant was living in the suit property she was not paying any rent; that according to the Law Society Conditions of sale, deposit meant 10% of the purchase price; and that "any sum above the 10% should have been refunded" if the transaction fell through.

44. The *Law Society Conditions of sale* (1989 Edition) formed part of the appellant's bundle of documents. This document states, inter alia, "deposit" means "ten (10) per centum of the purchase money excluding the price of movables, livestock, chattels, fittings and other separate items."

45. Regarding possession before completion of sale, Condition 6 states as follows:

> " 1 Where the purchaser takes possession of the property before completion other than under a lease or tenancy entered into before the contract, the purchaser occupies the property as licensee of the vendor and not as tenant and the taking of possession is not an acceptance of the vendor's title or a waiver of the purchaser's right to make requisitions or objections to title;
>
> 2. From the date of taking possession until either completion or until the vendor retakes possession the purchaser shall:
>
> a. keep the property in as good a state of repair and condition as it was in when he took possession; and
>
> b. farm the property in a good and husband like manner; and
>
> c. pay all rates, rents, taxes, costs of insurance and repairs and other outgoings in respect of the property; and
>
> d. be entitled to the rents and profits as if the completion date had arrived; and
>
> e. pay interest on the purchase-money; and

f. not agree to lease, charge, mortgage or part with possession of the property or any part thereof without the prior consent of the vendor.

3. If the contract becomes void or is rescinded, the purchaser shall:

a. forthwith deliver up possession of the property to the vendor; and

b. apply any insurance money received by him in respect of the property in making good any loss or damage to the property or otherwise account for the same to the satisfaction of the vendor.

4. Where the purchaser is a lessee or tenant, the contract does not determine or affect the lease or tenancy."

46. The appellant herein was in possession of the suit property before completion of the sale under a tenancy arrangement whose terms were not fully disclosed to the trial court. However, it is evident that for whatever reason, no rent was being paid to the 1st respondent since 1999, and no demand was ever made by the 1st respondent for such payment, if at all.

47. The 1st respondent's statement of defence did not allude to any arrears of rent, and neither did it contain any counterclaim for such rent or at all. It is only the 3rd and 4th respondents who, in their counterclaim, sought from the appellant mense profits at the rate of Kshs.120,000.00 per month with effect from 11th August 2006 when they became the registered owners of the suit property until payment in full or eviction of the appellant, which the trial court granted.

48. At paragraph 4 of the 1st respondent's Statement of Defence, it is stated:

"In answer to paragraph 16 of the Plaint, the 1st Defendant avers that the said sum of Kshs.2,475,000/= paid by the Plaintiff to the 1st Defendant, was forfeited in accordance with the terms and conditions of the Sale Agreement, whereof time was of essence of contract."

49. In the impugned judgment, the learned judge sated as follows:

"86. Upon Rescinding the Contract, the Bank retained Kshs.2,475,000 paid to it by the Plaintiff and justifies this as forfeiture under the terms and conditions of the Sale Agreement. Neither the Sale Agreement nor the *Law Society Conditions of Sale* (1989 Edition) provided for forfeiture of either the deposit or part payment in the circumstances under which the Rescession (sic) happened. Retention of Ksh.2,475,000/= is not well grounded. This amount will have to be refunded as sought by the Plaintiff."

50. Condition No. 11 (3) of the *Law Society Conditions of Sale* states as follows:

"(3) On rescission the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor."

51. We have held that the sale of the suit property to the appellant was rescinded because of the appellant's default. Thereafter, the suit property was sold and transferred to the 2nd, 3rd and 4th respondents at a consideration of Kshs.14,500,000.00.

52. The sale agreement between the appellant and the 1st respondent incorporated the *Law Society Conditions of Sale* (1989 Edition) in respect of the completion of the same. The sale agreement did not contain a special condition to the effect that upon rescission due to the appellant's default the deposit and any other payment made towards the purchase price shall be forfeited by the appellant.

53. It follows, therefore, upon rescission of the sale agreement, the 1st respondent ought to have promptly repaid to the appellant the sum of Kshs.2,475,000.00 without interest. That was not done. The learned trial judge cannot therefore be faulted at all for ordering the 1st respondent to pay the appellant the said sum together with interest at court rates from the date of filing suit until payment in full.

54. The 1st respondent could not retain the sum of Kshs.2,475,000.00 pursuant to sub-condition 4(7) of the *Law Society Conditions of Sale*, which is not applicable if a special condition provides that time is of the essence in respect of the completion date.

55. In view of the foregoing, we find the cross-appeal unmeritorious and dismiss it with costs to the appellant. Equally, the appeal has no merit, and is hereby dismissed with costs, to the respondents, both in the High Court and this Court.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY JUNE, 2023.

C. K. MUSINGA, (P.)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR