



REPUBLIC OF KENYA



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**Mukuha v Gashwe & 14 others (Civil Application E064 of 2023)  
[2023] KECA 1482 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1482 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E064 OF 2023  
K M'INOTI, F SICHALE & FA OCHIENG, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**NEWTON KAGIRA MUKUHA ..... APPLICANT**

**AND**

**CHARLES MUKUHA SIMON GASHWE ..... 1<sup>ST</sup> RESPONDENT**

**LINET WAIRIMU MUKUHA ..... 2<sup>ND</sup> RESPONDENT**

**GRACE WAMBUI MUKUHA ..... 3<sup>RD</sup> RESPONDENT**

**DAVID KIMANI MUKUHA ..... 4<sup>TH</sup> RESPONDENT**

**MERCY IRENE WAIHERA ..... 5<sup>TH</sup> RESPONDENT**

**PETER MUKUHA KAGO ..... 6<sup>TH</sup> RESPONDENT**

**FRANK ASTERE NDIYO BUTOYI ..... 7<sup>TH</sup> RESPONDENT**

**JEAN SEBASTIAN BERGASSE ..... 8<sup>TH</sup> RESPONDENT**

**JOSEPH MICHAEL PILOT ..... 9<sup>TH</sup> RESPONDENT**

**THIARA VANAN MAGALINGA PATTEN ..... 10<sup>TH</sup> RESPONDENT**

**NAIVAS LIMITED ..... 11<sup>TH</sup> RESPONDENT**

**NAIVAS INTERNATIONAL ..... 12<sup>TH</sup> RESPONDENT**

**GAKIWAWA FAMILY INVESTMENT ..... 13<sup>TH</sup> RESPONDENT**

**MAMBO RETAIL LIMITED ..... 14<sup>TH</sup> RESPONDENT**

**IBL GROUP ..... 15<sup>TH</sup> RESPONDENT**



*(Being an application for committal /punishment for contempt of Court of Appeal orders issued by Musinga, Okwengu & Asike-Makhandia, JJ. A. on 25th November, 2021 in Civil Application No. E050 of 2021)*

**RULING**

1. The application before us is dated August 1, 2023. It was brought under Section 3A & 3B of the Appellate Jurisdiction Act, Section 5 of the Judicature Act and Section 35 of the Court of Appeal (Organization and Administration) Act. The applicant prays for orders that:

- “ a) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> respondents and the principal officers or directors of the 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents be committed to civil jail for a period of six months, or such other period as this court may deem fit, for disobedience of the orders of this court issued on November 25, 2021.
- b. Fine(s) be imposed upon 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents for disobedience of court orders, as the court may deem fit.
- c. An order directing that all transactions from November 25, 2021 involving any direct or indirect sale or acquisition of a stake in Naivas Limited through Naivas International or otherwise is cancelled.
- d. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents be directed to disclose and file in court all relevant documents showing the sums paid and received from November 25, 2021 on account of any direct or indirect sale or acquisition of a stake in Naivas Limited through Naivas International or otherwise.
- e. In the alternative to prayer 4, an order directing that any monies paid to or received by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents jointly or singularly on account of any transaction from 25<sup>th</sup> November, 2021 involving any direct or indirect sale or acquisition of a stake in Naivas Limited through Naivas International or otherwise be deposited in court within 7 days or such other time as the court may direct.”

2. The application is premised on the following grounds:

- “ a) The applicant is a beneficiary of the estate of the late Peter Mukuha Kago, who died on 6<sup>th</sup> May, 2010.
- b. The deceased was survived by a widow and nine children.
- c. There are several suits pending before various courts with regard to the estate of the deceased.
- d. On 25<sup>th</sup> November, 2021 this court issued an order for status quo to be maintained with regard to the shares in dispute pending the hearing and determination of Civil Appeal No. 204 of 2016.



- e. The shares relate to Naivas Limited.
- f. The respondents have in sheer breach and violation of the court order, disposed of or interfered with the shareholding and ownership of Naivas Limited.
- g. Efforts to have the respondents cease and desist from engaging in contemptuous acts have been ignored.
- h. It is in the interest of justice that the orders sought be granted.”

3. The application was further supported by the applicant’s affidavit in which he stated as follows:

- “a) The deceased was one of the founder members and shareholder of Naivas Limited. A dispute arose when it came to distribution of the estate of the deceased.
- b. Simon Gashwe Mukuha was appointed the sole administrator of the estate of the deceased. However, he died on 26<sup>th</sup> August, 2019 and there is a succession cause pending substitution of the Simon.
- c. Following a resolution by Naivas Limited on 24<sup>th</sup> April, 2018 50,000 shares were transferred to Naivas International.
- d. The directors of Naivas Limited also incorporated Naivas Holdings Limited in Mauritius on 21<sup>st</sup> November, 2017. This company later changed its name to Gakiwawa Family Investment on 8<sup>th</sup> August, 2018.
- e. In February 2020, Gakiwawa Family Investment sold a 30% stake in Naivas International to International Finance Corporation, German Fund, MCB Equity and Amethis Retail.
- f. On 9<sup>th</sup> March, 2020 Naivas Limited passed a resolution to remove Simon as a director. However, the interim annual returns by Naivas Limited on 14<sup>th</sup> January, 2021 showed that Simon was still listed as a director.
- g. After the death of Simon, his son, Charles Mukuha Simon Gashwe was listed as one of the directors in Naivas Limited instead of Simon.
- h. This prompted the applicant to seek preservative orders. On 25<sup>th</sup> November, 2021 the court directed that the status quo with regard to the shares in dispute be maintained pending the hearing and determination of Civil Appeal No. 204 of 2014.
- i. In violation of the status quo order, Amethis Retail and Gakiwawa Family Investment signed a share purchase agreement relating to Naivas International with Mambo Retail Limited, a subsidiary of the IBL Group, Mauritius.
- j. In the agreement, Mambo Retail Limited acquired a 40% stake in Naivas International; 30% from Amethis Retail and 10% from Gakiwawa Family Investment.
- k. The actualization of the agreement was implemented on 10<sup>th</sup> August, 2022 when a resolution by Naivas Limited was passed to that effect.





7. In his written submissions, the applicant pointed out that there was no dispute that a status quo order was issued on 25<sup>th</sup> November, 2021. The respondents have not denied knowledge of the said orders, or their involvement in the manner set out in the application. The applicant's contention is that, there is violation of the shareholding in Naivas Limited through the actions undertaken by Naivas International. This is so, because behind what the respondents state is an undisturbed position, several actions have been undertaken contrary to the express order of the court.
8. The applicant pointed out that the order for status quo was not issued in vacuum, it was a well-reasoned order which meant something. The argument that there has been no interference with the shareholding of Naivas Limited is a shallow argument advanced in abuse of the corporate veil of these companies. The respondent relied on the case of *Njoroge Gikera & Another v Econite Mining Company Limited & 7 Others* [2018] eKLR in support of this submission.
9. Mr. Moindi submitted that the 3<sup>rd</sup> respondent was asked to sign the agreement which had already been signed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents, and she was not aware of the court order. He reiterated that the 3<sup>rd</sup> respondent was not in contempt; she had already resigned as a director of Naivas Limited by the time the order in issue was made.
10. Mr. Kuyo submitted that the standard of proof in an action for contempt is beyond the balance of probability. The consequences for committal are dire. Counsel questioned the scope of the status quo order, and whether it was precise or there was room for doubt. He was of the view that the order referred to the 10,000 shares in Naivas Limited previously held by the deceased. As at the time the order was issued, Naivas International was the sole shareholder of Naivas Limited. The same is still intact. The court did not make orders with regard to the directors, and the transactions complained of were with regard to shares in Naivas International and not Naivas Limited. Counsel urged that the prayer for contempt be rejected.
11. The 1<sup>st</sup> and 12<sup>th</sup> respondents submitted that the status quo order was ambiguous on its terms; and also, that the scope of application was ambiguous. They pointed out that the order was only with regard to the change in the shares in dispute with regard to Naivas Limited. Citing the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the 1<sup>st</sup> and 12<sup>th</sup> respondents were of the view that the purpose of a status quo order was that it is intended to maintain the prevailing situation as at the time of the order.
12. The 1<sup>st</sup> and 12<sup>th</sup> respondents pointed out that, for one to be cited for contempt, the terms of the order must have been clearly breached without doubt. The applicant has not demonstrated how the shareholding of Naivas Limited has changed. They maintained that the shares of Naivas Limited have remained intact and the transactions through other entities have not affected the same. They were of the view that the order of the court limited the scope and extent of the application, in that, the intention of the Court was not to prevent change in the shareholding of other legal entities, but that of Naivas Limited.
13. We have carefully perused the application, the affidavits by all the parties, submissions by counsel, the authorities cited and  
  
the relevant law. The issue for determination is whether the respondents were in contempt of the court order dated 25<sup>th</sup> November, 2021. Section 35 of the *Court of Appeal (Organization and Administration) Act* which the application is anchored on, was deleted by Act No. 46 of 2016, Section 40.



14. Section 5(1) of the [Judicature Act](#) gives this court jurisdiction in contempt matters, and provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.”

15. The prevailing law of contempt in England is found in the [Contempt of Court Act](#) of 1981 and Part 81 of the procedure in the Civil Procedure (Amendment No. 2) Rules, 2012 that replaced Order 52 of the [Supreme Court Rules](#) for contempt proceedings in the Supreme Court of England. In the case of [Justus Kariuki Mate & Another vs Hon. Martin Nyaga Wambora & Another](#), Civil Appeal No. 24 of 2014, the court addressed itself on the governing principles in contempt proceedings as follows:

“It is imperative in considering this issue to take into account the applicable law and the governing principles in contempt proceedings. As correctly pointed out by this Court in *Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 Others*, - Civil Application No. 233 of 2007 the statutory basis of contempt of court in so far as the Court of Appeal and the High Court are concerned is Section 5 of the [Judicature Act](#) and Section 63(c) of the [Civil Procedure Act](#). Of relevance to this case is Section 5 of the [Judicature Act](#)...

...Based on the foregoing provision, the applicable law in contempt proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the application for contempt was filed.”

16. The applicant’s position is that, there were 10,000 shares in Naivas Limited which were divided between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and then, transferred to the 12<sup>th</sup> respondent. The 12<sup>th</sup> respondent proceeded to transfer its shares to the 13<sup>th</sup> respondent. As a result of these actions, the 14<sup>th</sup> respondent was born, and is in control of the shares of Naivas Limited. The applicant is of the view that the continued transfer of the shares is in violation of the court order dated 25<sup>th</sup> November, 2021.

17. The 1<sup>st</sup> and 12<sup>th</sup> respondents on the other hand are of the view that the status quo order was ambiguous on its terms, and in its application. They pointed out that the order referred to the 10,000 shares in Naivas Limited previously held by the deceased, and that the order was only with regard to the change in the shares of Naivas Limited. This Court in the case of [Shimmers Plaza Limited v National Bank of Kenya Limited](#), (*supra*), held that:

“It is in the circumstances important to define what status quo means and what it meant for purposes of this appeal. We are apt to mention however, that when that order was made, none of the parties in Court sought any clarification from us as to what the status quo entailed. The presumption therefore must be that everybody knew the meaning and import of that order. “Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time that order was given. If there was any transaction of whatever nature that was going on in respect of the land in question, it had to freeze and await the discharging of the Court order.”



18. It is important to appreciate the nature or the terms of the order rendered by the Court and thereafter determine whether the terms thereof were disobeyed. The order of the Court dated 25<sup>th</sup> November, 2021 is as follows:

“This application is marked as withdrawn with no order as to costs in lieu of an expedited hearing of Civil Appeal No. 204 of 2016, which we direct that it be heard on priority basis.

In the meantime, the status quo in so far as the shares in dispute are concerned be maintained pending the hearing and determination of the said appeal.”

19. This was an order for status quo to be maintained. A status quo order is defined by the *Black’s Law Dictionary*, Butterworths 9<sup>th</sup> Edn, as “the situation as it exists”.

20. In the case of Msa Misc. Application (JR) No. 26 of 2010, *The Chairman Business Premises Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd* (UR), the court held thus:

“In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.

It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo.”

21. In essence therefore, a status quo order is meant to preserve the subject matter as it is or as it existed, as at the day of making the order. A status quo order is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention. By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed before the court renders its decision on the matters in issue.

22. It is apparent that the Court did not direct either party to do or abstain from doing anything. The Court merely stated that the status quo be maintained with regard to the shares in dispute, thus the disputed shares were to remain as they were at the time the order was issued. The applicant is of the view that the value of the disputed shares is being interfered with, through the actions of the respondents. It is common ground that the shares in dispute are the 10,000 shares which had been held by the deceased in Naivas Limited. It is also common ground that the status quo order was in relation to the shares in dispute.

23. The 1<sup>st</sup> and 12<sup>th</sup> respondents have submitted that they have not interfered with the disputed shares in any way, while the applicant maintains that the actions by Naivas International are expressly interfering with the disputed shares; particularly, the signing of a share purchase agreement between Naivas International and the IBL Group. The question that then begs to be answered is whether there is an explicit contravention of the court order dated 25<sup>th</sup> November, 2021 by the respondents.



24. The applicant clearly sought to preserve the 10,000 shares in Naivas Limited. The said shares belonged to his deceased father, and they are subject to various suits pending before different courts. It follows therefore, that these are the shares in dispute. This then leads us to the question as to whether the respondents were in contempt of court. It is trite that every person and institution is duty bound to obey the law, in order to enhance the rule of law, good order and due administration of justice. In *Hadkinson v Hadkinson* [1952] All ER 567, the court held that:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in *Chuck –vs- Cremer* (1) (1 Coop. temp.Cott 342):

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

25. Similarly, in the case of *Refrigeration and Kitchen Utensils Ltd v Gulabch and Popalal Shah & Another*, Civil Application No. 39 of 1990, the Court held thus:

“... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”

26. Cromwell J., in *Carey v Laiken*, 2015 SCC 17 enumerated three (3) elements to be satisfied in contempt proceedings as follows:

- “i) The order alleged to have been breached ‘must state clearly and unequivocally what should and should not be done’. This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
- ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
- iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.”

27. The High Court of South Africa in the case of *Kristen Carla Burchell v Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005 stated thus:

It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon



proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.”

28. In *Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 the court stated that:

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

29. In the case of *Consolidated Fish (Pty) Ltd v Zive*, 1968 (2) SA 517 (C) 524D, as applied in Noel Lancaster *Sands (Edms) Bpk v Theron*, 1974 (3) SA 688 (T) 691C, the court stated that:

“A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.”

30. It is trite that the refusal to obey should be both willful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt. The applicant must show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority.

31. In the present case, the applicant did not refute the respondents’ submission that the shares of Naivas Limited had not been

interfered with, and that the decisions made with regard to the directors and shareholdings were with regard to Naivas International. The applicant’s main concern is that the operations and undertakings in Naivas International are affecting the value of the shares in Naivas Limited.

32. The applicant in his affidavit in support of the application noted with clarity that the respondents had signed a share purchase agreement between Naivas International and Mambo Retail Limited, a subsidiary of the IBL Group, Mauritius. It is evident from the application that, it is only after Naivas Limited published the fact that the IBL Group would subscribe to an additional 11% share in Naivas International, allowing Mambo Retail Limited to take a controlling stake of 51% in Naivas International on 3<sup>rd</sup> July, 2023 that the applicant moved this court with the present application.

33. It imperative to note that, claims for contempt require proof and provision of evidence, which shall establish the commission of the acts complained of to the inter-mediate standard, that is the standard above beyond the balance of probabilities, but not beyond reasonable doubt.

34. We note that the applicant is apprehensive that the actions of Naivas International will muddle up and pre-empt the issues pending before Court. However, the applicant has not demonstrated to us that the status quo pertaining to the disputed 10,000 shares in Naivas Limited, has been violated by the respondents.



- 35. The applicant has submitted that the respondents have taken actions which were contrary to the express orders of the Court, but he has not shown us the specific order which has been contravened by the respondents.
- 36. We find that if there is need to read into an order more than that which is explicitly stated therein, the Court would not be expected to find a party to be in contempt of court as the interpretation given to the order in issue, would have gone beyond the explicit words of the order.
- 37. Often times, this Court has emphasized the need to make clear the actual factual position in relation to the subject matter whose status quo is to be maintained. The order should leave no room for more than one clear interpretation. The order herein was clear on the status quo be maintained. In our view, the applicant  
has not demonstrated in what manner the respondents have disobeyed the said court order.
- 38. We find that what the applicant is inviting this Court to do, is to lift the corporate veil, in order to attribute to the respondents, the actions which the applicant says have been undertaken by Naivas International, Gakiwawa Family Investment and Mambo Limited.
- 39. In our understanding, the applicant would be expected to first move the Court to lift the corporate veil; and if successful, that would expose the persons who might be in contempt. There is no proper application before us to lift the corporate veil.
- 40. We find that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the court to commit disobedient litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.
- 41. Applying the principles discussed herein above to the facts of this case, we are not persuaded that the applicant has demonstrated that the respondents willfully failed, refused and or neglected to obey the court order. Put differently, the applicant has failed to satisfy the tests for contempt which are a pre-requisite to granting the orders sought.
- 42. In the result, we find that the application dated August 1, 2023 is without merit and it is dismissed. This being a family dispute, each party shall bear their own costs.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

