Gachuhi & another ((Suing as the Managers of the Estate of Margaret Wanjiru Gachuhi)) v Wanjohi & 5 others (Civil Appeal 335 of 2017) [2022] KECA 473 (KLR) (18 March 2022) (Judgment)

Neutral citation: [2022] KECA 473 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 335 OF 2017

RN NAMBUYE, HM OKWENGU & DK MUSINGA, JJA

MARCH 18, 2022

BETWEEN

JOHNSON HOME GICHUHI AND GEORGE MURIUKI GICHUHI ..... APPELLANT

(SUING AS THE MANAGERS OF THE ESTATE OF MARGARET WANJIRU GACHUI)

AND

ISAAC GATHUNGU WANJOHI ..... 1ST RESPONDENT

ISABELLA NYANGUTHII WANJOHI ..... 2ND RESPONDENT

WAHFAM LIMITED ..... 3RD RESPONDENT

ZACKY HINGA MUNYUA ..... 4TH RESPONDENT

KOOME MBOGO T/A KOOME MBOGO & CO. ADVOCATES .... 5TH RESPONDENT

NAIROBI CITY COUNCIL (SUCCESSOR IN TITLE TO THE CITY COUNCIL OF NAIROBI) ..... 6TH RESPONDENT

(Being an appeal from the Ruling and Orders of the Environment and Land Court at Nairobi (K. Bor, J) delivered on 14th July, 2017 in ELC Case No. 1006 of 2016)

JUDGMENT

1. This appeal originates from the ruling and order of the Environment and Land Court (ELC) at Nairobi (Bor, J) delivered on 14th July, 2017. In the ruling, the learned Judge dismissed an application dated 3rd April 2017, that had been lodged by the appellants, Johnson Home Gichuhi and George Muriuki

Gichuhi seeking to revive an abated suit that had been filed by the appellants in their capacity as managers of the Estate of Margaret Wanjiru Gichuhi.

2. The appellants instituted the suit before the ELC on 2nd February, 2007. In the suit, the appellants sought cancellation of the conveyance of LR 2009/1461 (suit property) to Isaac Gathungu Wanjohi (Isaac) and Isabella Nyanguthii Wanjohi (1st and 2nd respondents respectively), on the ground that it was obtained through fraud or mistake. During the pendency of the suit, temporary interlocutory orders of injunction were issued in favour of the appellants.

3. Margaret Wanjiru Gichuhi (deceased) died on 12th January, 2009 and since no application for substitution was made within one year of her death, the suit that had been filed on her behalf abated in accordance with the Civil Procedure Rules. On 19th August, 2013 one of the appellants, Johnson Home Gichuhi (Johnson), obtained letters of administration ad litem for the purpose of prosecuting suits on behalf of the estate of the deceased. Subsequently the appellants filed the application dated 3rd April 2017.

4. In the application, the appellants sought orders to have the ELC suit revived, and the name of the deceased substituted with that of Johnson, as the administrator of the estate of the deceased. Johnson filed an affidavit in support of the motion in which he explained that the court file had been missing and that an application for reconstruction of the file was only made when their current advocates came on record. He blamed his former advocates for failing to pursue the missing file, and not filing an application for substitution of the deceased, and urged that on his part, the failure to make the application for substitution was not intentional or out of negligence. He further averred that he was desirous of prosecuting the suit and would be prejudiced if the orders sought were not granted, while the respondents would not be prejudiced if the orders were allowed.

5. The respondents opposed the motion through a replying affidavit sworn by Isaac, who claimed to have been granted authority to swear the affidavit by the 2nd respondent who is his wife, and the 3rd respondent, Wahfam Limited. The 3rd respondent is a limited liability company in which the 2nd respondent and Isaac are Directors and sole shareholders. Isaac averred that the suit property was transferred to him and his wife by the deceased upon payment of a consideration of Kshs.6 million, and a sum of Ksh1,220,540.35 for land rates, water and rates clearance certificate. Despite the conveyance, the respondents were not able to realize any returns from that investment, as the appellants frustrated and prevented them from taking possession of the suit property. The appellants have erected semi-permanent structures on the suit property which they have leased, together with an old permanent building standing on the suit property, and from which they earn rental income of Ksh450,000 every month. Isaac stated that Johnson obtained the grant more than 4 years after the demise of Margaret, and that his intention is to perpetuate the injustice being visited upon the respondents.

6. In dismissing the application, the learned Judge noted that there was a delay of 7 years in filing the application for revival of the abated suit from the time Margaret died, and a delay of 4 years from the time letters of administration were issued. The learned Judge dismissed the reasons given for the delay (said to be loss of court file and change of advocates), as unpersuasive, irrational and not plausible.

7. Aggrieved by that decision, the appellants filed the present appeal seeking to have the ruling of the learned Judge set aside and the application dated 3rd April 2017 allowed. In the memorandum of appeal, the appellants raised 5 grounds on which they fault the judgment of the learned Judge. These were: dismissing the application seeking to revive the suit; finding that there was no basis or sufficient cause for reviving the abated suit; failing to exercise her discretion properly to revive the suit for hearing and determination on its merits; failing to promote the constitutional principle of administering

substantial justice; and finding that the reasons given for the delay were not persuasive, plausible or logical.

8. The appellants, who were represented by Muchoki Kang'ata Njenga & Co. Advocates, filed written submissions in support of the appeal. During the hearing of the appeal, learned counsel Mr. Njenga orally highlighted the written submissions. In their submissions, the appellants identified three main issues for determination in the appeal. These are: whether the learned judge erred in finding that the appellants did not show sufficient cause to revive the suit and substitute Margaret with Johnson; whether the learned judge exercised her discretion properly; and whether the appellants deserved the orders that were issued by the trial Judge.

9. On "sufficient cause", the appellants maintained that in the affidavit that was sworn in support of the application, they had shown "sufficient cause" why the abated suit should be revived. They reiterated that the ELC file had gone missing and they were only able to have the file reconstructed after they changed advocates. Relying on *Noah Misiko & 26 others vs. Registered Trustees of Christ the King Catholic Church Kibera & 2 Others*, [2015] eKLR, the appellants urged that the mistake of an advocate should not be visited on an innocent litigant, and that the fact that Johnson had obtained a limited grant ad litem for purposes of prosecuting the suit at the High Court, demonstrated that the appellants were keen on prosecuting the suit.

10. The appellants relied on *Stephen Gathu Kimani vs Nancy Wanjira Waruinge t/a Providence Auctioneers* [2016] eKLR, where Mativo, J. followed a decision of the Court of Appeal of Tanzania in the *Registered Trustees of the Archdiocese of Dar es salaam vs. The Chairman Bunju Village Government & Others* that explained that the words "sufficient cause":

> "....should receive a liberal construction in order to advance substantial justice when no negligence, or inaction or want of bona fide is imputed to the appellant."

11. They also cited *Kishor Kumar Dhanji Varsani vs Amolak Singh & 4 Others* [2016] eKLR, where the Court expressing the view that it would be unconscionable to lock out a party who has exhibited serious keenness in proceeding with a case, allowed a party who claimed that she was not aware of Order 23, to have her suit revived so that the legal issues raised in the suit could be properly determined. The appellants urged the Court to find that they had shown sufficient cause for the delay in making their application for revival of the abated suit.

12 On the second issue, the appellants argued that the learned judge erred in failing to properly exercise her discretion as the application should have been allowed so that the contending claims of the parties could be determined on merit; that in light of the sufficient cause for the delay arising from the missing file, the learned judge ought to have exercised her discretion in favour of the appellants. The appellants cited *Patriotic Guard Limited vs Joseph Kipchirchir Sambu* [2018] eKLR, for the proposition that a court of law must exercise its discretion judiciously based on legal principles, the circumstances of each case, and the need for substantial justice.

13. The appellants urged the Court to find that in failing to allow the application to revive the abated suit, the learned Judge failed to properly exercise her discretion. Relying on *Peter Ngugi Kabiri vs Esther Wangari Githinji & Anor* [2015] eKLR, for the proposition that a right to a hearing is a fundamental right which the Court should protect, the appellants prayed that their appeal should be allowed so that the issues in dispute in the superior court could be resolved.

14. The 1st to 3rd respondents who were represented by Dr. Kamau Kuria SC, filed written submissions that were orally highlighted by Senior Counsel during the hearing. The respondents identified the question for determination in the appeal as the exercise of judicial discretion. That is, whether the

application for substitution of the deceased plaintiff and revival of the abated suit should have been granted or not. The respondents cited *Mrao Limited vs. First American Bank of Kenya & 2 Others* [2003] eKLR; and *Shah vs Mbogo* [1968] EA 93 on the jurisdiction of an appellate court to interfere with the exercise of judicial discretion by a superior court, and submitted that in the circumstances before the learned Judge, justice tilted in favour of the respondents as it was outrageous that 15 years after they had bought the suit property, they were still kept out of it.

15 Further, the respondents argued that the appellants had failed to demonstrate that the ELC exercised its discretion wrongly or unlawfully. They cited *Nabro Properties Limited vs Sky Scrapers Limited & 2 others* [2002] eKLR for the proposition that a person cannot base his claim on his own wrong, and urged that the appellants should not be allowed to take advantage of their own wrong doing in failing to file the application for extension of time, and the application for substitution within one year, to gain a favourable interpretation of the law.

16 On the issue whether the learned Judge erred in dismissing the appellants' application that was seeking to revive the abated suit, the respondents argued that the application was defective as the appellants failed to apply for extension of time within which to apply for the revival of the abated suit. Relying on *Rebecca Mijide Mungole & Anor vs Kenya Power & Lighting Company Limited & 2 Others* [2017] eKLR, the respondents contended that since the appellants failed to seek enlargement of time, its application before the superior court was incompetent.

17. On the issue whether there was sufficient cause for the learned Judge to exercise her discretion in the appellants' favour, the respondents pointed out that there was a delay of 10 years in prosecuting the ELC matter as the deceased plaintiff died on 12th January 2009, and the application for revival of the abated suit and substitution of the deceased was made on 4th April 2017, four (4) years after Johnson had obtained the Limited Grant, and about 8 years after the death of the deceased, and this was inordinate delay which had not been sufficiently explained. The respondents argued that they would suffer serious prejudice if the abated suit is revived, as the prolonged litigation has prejudiced their right to a fair hearing, and the appellants continue being in possession of the suit property to the respondents' detriment.

18. In regard to the appellants' attempt to rely on Article 159 of *the Constitution*, the respondents relied on *Charles Wanjohi Wathuku vs Githinji Ngure & Anor* [2016] eKLR, arguing that the appellants' failure to provide sufficient cause for the delay in order to enable the court to apply substantive justice as provided under Article 159(2)(d) of *the Constitution* and sections 3A & 3B of the *Appellate Jurisdiction Act*, made their attempt to rely on Article 159(2)(d) futile. That the appellants slept on their rights and have tendered no evidence of any attempt they made to follow up with the court in regard to the missing file, or any evidence from the advocates affirming that they were to blame for failing to take the necessary action. The respondents therefore urged the Court to dismiss the appeal.

19. By a notice of motion dated 13th October 2017, the respondents moved this Court to have the record of appeal dated 21st September 2017, and the supplementary record of appeal dated 29th September 2017, filed by the 1st respondent in this appeal struck out with costs. The motion was premised upon grounds stated on the face of the motion and the supporting affidavit sworn by Isaac. The grounds include, inter alia, the Court lacking jurisdiction to hear the purported appeal as the 1st appellant had not satisfied a condition precedent; that no right of appeal lies within the meaning of Rule 84 of this Court's Rules; and that the appellants had not obtained leave of the Court to appeal.

20. Directions were given by this Court for the motion dated 13th October 2017 to be heard together with the substantive appeal. Both the appellants and the respondents have filed written submissions in regard to the motion. For the respondents who are the applicants in the motion, it is submitted that the

Honourable Court lacks jurisdiction to hear the appellants' appeal as the appellants have no automatic right of appeal and failed to file an application for leave to appeal within 14 days of the ruling of the superior court, as required under Order 43 Rule 2 of the *Civil Procedure Rules* and Rule 39(b) of this Court's Rules. Relying on this Court's decision in *Rhoda Wairimu Karanja & Anor vs Mary Wangui Karanja & Anor* [2014] eKLR, the respondents submitted that leave of the ELC court was required, and the same not having been sought, the appellants lost their right of appeal.

21. The respondents argued that Order 43 Rule 1(1) sets out the Orders from which appeals lie as of right and Order 23 Rule 7 which provides for revival of abated suits is one such provision. On the other hand, Order 43 Rule 1(2) of the Civil Procedure Rules, provides for orders from which appeals lie only with leave of the court and Order 23 Rule 3 which provides for substitution of a deceased plaintiff is one that requires leave. Therefore, although the appellants had an automatic right to appeal against the Order made by the Court for revival of the suit, the right to appeal against the prayer for substitution lies only with the leave of the court.

22. The respondent pointed out that in the application before the Court, the decision sought to be appealed against by the appellants was delivered by the ELC on 14th July 2017, and more than a year after it was delivered, no application for leave had been made as required by Rule 39(b) of the Court of Appeal Rules and Order 43 Rule1 (2) of the Civil Procedure Rules, and consequently, the appellants have forfeited their right of appeal. The respondents urged that the Court has jurisdiction to hear the motion because it was brought within 30 days of service of the record of appeal upon them.

23. In regard to the motion, the appellants submitted that the challenge to the competence of the appeal under Order 43 of the Civil Procedure Rules, has no legal basis; that Order 43 Rule 1(1) provides for appeals as of right, and sub-rule 1(m) includes Order 24 Rules 5, 6 and 7; and that as the application before the ELC court was brought under Order 24 Rules 3 and 7(2) of the Civil Procedure Rules, the appellants did not require leave to appeal against the ruling of the ELC. The appellants pointed out that Order 24 rule 7(2) sets out the requirements for revival of a suit, which is, that the applicants desire to continue with the suit and was prevented by sufficient cause. The appellants contended that it could not apply to enlarge time without first reviving the suit. The appellants added that there was no time limit for revival of the suit as the one-year rule only applies under Order 24 Rule 3 of the Civil Procedure Rules, and the revival provided under Order 24 Rule 7 was not covered by the time limit. They urged the Court to disallow the application for striking out the appeal, and allow the appeal and give them an opportunity to have the abated suit dealt with substantively.

24. This being a first appeal, this Court has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. This duty is well settled in our jurisdiction. (See *& Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123)

25. In line with our aforestated duty, we have perused and considered the record of appeal, the contending parties' rival written and oral submissions, and the law. We discern the following issues for determination. First, whether the appeal before the Court is incompetent. Secondly, whether the learned judge exercised her discretion judiciously, and thirdly, whether the appellant satisfied the principles required to grant the orders for revival of an abated suit.

26. It is not in contest that Margaret died on 12th January, 2009 and that no application for her substitution was made within 12 months, leading to abatement of the suit that had been filed by the appellants on her behalf. It is also not in contest that (Johnson), obtained letters of administration on 19th August, 2013 and filed the application for revival of the abated suit and substitution of Margaret on 4th April, 2017 under Order 24 Rules 3 and 7 of the Civil Procedure Rules. Further, it is not in

dispute that the appellant has not obtained leave to appeal against the ruling of the ELC dismissing the application for revival of the abated suit and substitution.

27. The question that we must first address is the competence of the appeal. That is, whether leave to appeal was necessary, and if so, whether the failure to obtain leave to appeal has rendered the appeal incompetent. In the motion before the ELC which was brought under Order 24 Rule 3 and 7(2) of the Civil Procedure Rules, the applicant sought two main prayers. First to revive the abated suit, and secondly to have the name of Margaret substituted with that of Johnson. Order 43 of the Civil Procedure Rules which identifies Orders from which leave to appeal is provided as of right, and those from which leave must be obtained, has categorized Orders made under Order 24 Rule 3 as requiring leave to appeal, while Orders made under Order 24 Rule 7 as not requiring leave. This means that to the extent that the ruling made by the ELC in regard to the prayer to revive the abated suit under Order 24 Rule 3, required leave to appeal, and leave not having been obtained, the appeal was incompetent.

28. As regards the prayer under Order 24 Rule 7(2) for substitution of Margaret, leave was not required and in regard to that prayer, the Court is competent to hear the appeal. Thus, the Court would have jurisdiction to consider whether the learned Judge erred in rejecting the application to have Margaret substituted. But the question is, of what use would this be if the suit in which Margaret is sought to be substituted is already abated given the order declining to revive the suit?

29. Be that as it may, in *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, which was cited by the respondents, this Court considering Order 24 Rules 3 and 7 of the Civil Procedure Rules stated that:

> " There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.
>
> Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.
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> Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff."

30. The reasons given by the appellants for the delay in applying for substitution of Margaret, was the missing court file and failure by their former advocate to pursue the matter. In dealing with the application for substitution of Margaret, the learned judge was exercising judicial discretion.

31. It has been stated many times that the appellate jurisdiction of this Court to interfere with the exercise of judicial discretion is circumscribed and can only arise in specific situations. In *Mbogo vs Shah* (1968) EA page 93 in which Sir Charles Newbold P. stated that:

> " A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter

and as a result has arrived at wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result, there has been misjustice."

32. Similarly, in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR, this Court reiterated that:

> " The Court of Appeal may only interfere with the exercise of a court's judicial discretion if satisfied:
>
> a. The judge misdirected himself on law; or
>
> b. That he misapprehended the facts; or
>
> c. That he took account of considerations of which he should not have taken account; or
>
> d. That he failed to take account of consideration of which he should have taken account; or
>
> e. That his decision, albeit a discretionary one, was plainly wrong."

33. Thus, for this Court to interfere with the ruling of the learned Judge declining to extend time for Margaret to be substituted, the appellants had to meet the threshold set in *Mbogo vs Shah (supra)* and *Mrao Limited vs First American Bank of Kenya Ltd (supra)*, by demonstrating that the learned Judge misdirected himself in some material particular, or failed to take into consideration relevant matters or took into consideration irrelevant matters.

34. Was the reason given by the appellants in failing to substitute Margaret within one year sufficient? Johnson claimed that after receiving letters of administration, he realized that the court file was missing and that his former advocates did little to trace the file or apply for its reconstruction. It is noteworthy that the letters of administration were obtained 4 years after the death of Margaret. There is no explanation why Johnson took so long to obtain the letters of administration.

35. In the impugned ruling, the learned judge observed that an application for reconstruction was filed on 28th June, 2016 and was allowed on 4th July, 2016. This was about two years and ten months from the time the appellant obtained letters of administration, and about 7 years from the time Margaret died. This period of inaction has been blamed on the previous advocates. However, the appellants have not demonstrated any action they took in following up the matter. It seems that the appellants just sat back during this period without taking any initiative in pursuing the matter in court or with their advocates. This was an inexcusable lapse on their part, given the prejudice suffered by the respondents who have the title to the suit property subject of the litigation, and have not been able to enjoy possession due to the pending suit.

36. As observed by this Court in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR:

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

37. While we appreciate that a party should not be blamed for mistake of counsel, a party must satisfy the court that he has on his part exercised due diligence and has done everything possible to pursue the

matter. Although the appellants have explained the remainder of the timeline as having been spent on reconstruction of the file and subsequent filing of the application, no sufficient explanation has been tendered for the two years 10 months' delay in taking action to pursue the substitution of Margaret.

38. Moreover, in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR this Court emphasized that;

> "...it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again, it is only after the legal representative has been joined as a party that he can apply for the revival of the action."

39. The learned judge pointed out the appellant's failure to apply for enlargement of time for seeking revival of the abated suit. This issue has not been addressed by the appellants before us despite the respondents having pointed out this lapse in their replying affidavit. What this means is that the appellants having failed to apply for enlargement of time, their application for revival of the abated suit and substitution of Margaret was incompetent and the application was rightly dismissed.

40. The appellants sought refuge under Article 159 (2) (d) of *the Constitution*, maintaining that the learned judge erred in paying attention to technicalities as opposed to substantial justice. Although we appreciate the need for substantial justice as stated under this Article, we note that the same is often relied upon by litigants to cover up failure on their part to act in accordance with the laid down statutory procedures.

41. In *Raila Odinga vs IEBC & Others* [2013] eKLR (Petition No 5 of 2013). the Supreme Court provided guidance on Article 159(2)(d) of *the Constitution* as follows:

> "Our attention has repeatedly been drawn to the provisions of Article 159(2) (d) of *the Constitution* which obliges a court of law to administer justice without undue regard to procedural technicalities. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law."

42. In a nutshell, Article 159 (2) (d) of *the Constitution* cannot save this appeal. The appellants had the obligation to comply with the rules to facilitate substantive justice. The learned Judge cannot be faulted for rejecting the reasons given by the appellants as the reasons given only reflect indolence on their part. We are in agreement with the decision in *Registered Trustees of the Archdiocese of Dar es salaam vs. The Chairman Bunju Village Government & Others* from the Tanzania Court of Appeal followed by Mativo, J. in *Stephen Gathu Kimani vs Nancy Wanjira Waruinge T/A Providence Auctioneers (supra),* that a party can only talk of substantial justice where "no negligence, or inaction or want of bona fide" can be imputed upon him. The appellants herein have been indolent and have not exhibited any

urgency in bringing this litigation to conclusion. Instead the appellants continue to benefit from the suit property to the prejudice of the respondents.

43. Consequently, we are satisfied that the learned Judge properly exercised her discretion in dismissing the appellants' motion and we have no reason to interfere with the ruling. We find no merit in this appeal and accordingly dismiss it with costs to the respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR