Eaton Towers Kenya Limited v Kasing'a & 5 others (Civil Appeal 49 of 2016) [2022] KECA 861 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 861 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 49 OF 2016

RN NAMBUYE, W KARANJA & PO KIAGE, JJA

APRIL 28, 2022

BETWEEN

EATON TOWERS KENYA LIMITED ..... APPELLANT

AND

KEN KASING'A ..... 1ST RESPONDENT

DANIEL KIPLAGAT KIRUI ..... 2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 3RD RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA ..... 4TH RESPONDENT

NAKURU COUNTY GOVERNMENT ..... 5TH RESPONDENT

PEMAN CONSULTANTS LTD ..... 6TH RESPONDENT

((An appeal from the Judgment of the High Court of Kenya at Nakuru (S. Munyao, J.) dated 4th November, 2015 in PETITION NO. 50 OF 2013))

JUDGMENT

1. The appellant, Eaton Towers Kenya Limited is a company that specializes in the construction of telecommunication masts (masts) which are leased to network operators at a fee. In August of 2013, the appellant through its acquisition agent M/s Eackelberg & Company Limited (agent) earmarked LR No. Nakuru Municipality Block 11/96 (site property) as best suited for the construction of a mast. The agents engaged Daniel Kiplagat Kirui, the 2nd respondent, who is the proprietor, with a view to lease part of the site property for the said construction. This culminated in the signing of a letter of offer dated 6th September, 2013 between the appellant and the 2nd respondent.

2. To this end, the agent engaged Peman Consultants Limited, the 6th respondent, who applied for a development permission from the Nakuru County Government, the 5th respondent, and the extension of user. The 5th respondent approved the application and issued a notification of approval for the development permission dated 9th October, 2013 which was subject to the appellant's compliance with the relevant regulations of the National Environmental Management Authority, the 3rd respondent.

3. The 6th respondent being also an impact assessment expert duly authorised by the 3rd respondent, was additionally contracted by the agent to prepare an Environmental Impact Assessment Project Report (project report) for the construction of the mast. On or about 25th September, 2013, the 6th respondent tendered the duly completed project report to the 3rd respondent who, by a letter dated 6th November, 2013, enumerated several environmental sustainable conditions to be complied with before the commencement of the construction, including obtaining a clearance from the Kenya Civil Aviation Authority (KCAA). Once the appellant complied with the conditions, the 3rd respondent issued it with an Environmental Impact Assessment License (EIA license) dated 28th November, 2013 under registration No. 0020320 and it commenced construction.

4. Peeved by the ongoing construction, Ken Kasinga, the 1st respondent and owner of the property adjacent to the site property, filed a constitutional petition at the High Court in Nakuru. He complained that the 2nd respondent had caused him injury by allowing his compound to be used as an offloading site and a metal cutting workshop by the 3rd respondent; tons of construction steel was being offloaded day and night; very noisy machines were used to cut metal; and this exposed him to intrusive noise. He accused the 2nd respondent of leasing out part of the site property without establishing whether the appellant had followed the laid out procedures required prior to the construction of the mast.

5. The 1st respondent alleged that the 3rd respondent issued the appellant with an EIA license without adhering to the environmental impact assessment guidelines and regulations thus sanctioning the illegal construction of the mast. In support of his assertion, he produced copies of complaint letters dated 27th and 28th November, 2018 which he wrote to the 3rd respondent's Nakuru County Director that led to stoppage of the construction. However, orders from 'above', which he believes were due to the influence of the appellant, overturned that directive.

6. The 1st respondent averred that the 4th respondent illegally issued a telecommunication licence to the appellant without conducting due diligence on procedural issues surrounding the legality of the construction of a mast. He berated the 5th respondent who he alleged illegally approved the appellant's development application without an application for change of user and based on a deceptive project report without exercising due diligence in order to confirm the accuracy of the same.

7. On the issue of deception, the 1st respondent contended that the public participation forms annexed to the project report were fictitious and untruthful and were not reflective of the personal views of the immediate community around the site property since the people appearing on them were not legitimate members. That the fictitious report prepared by the 6th respondent was then used to obtain the illegal approvals from the 3rd, 4th and 5th respondents.

8. The 1st respondent affirmed that the appellant was in violation of the *Environmental Management and Co-ordination Act*, 1999 (EMCA) and the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 as; the contractors on the property site were cutting metal 24 hours a day; the use of a high powered stand-by generator which was very noisy and thus intrusive to the immediate community; and the erection of the mast which blocked the view of Lake Nakuru and the National Park hence denying his family the use and quiet enjoyment of their

property. Furthermore, the presence of the towering 45 meters high mast affected the value of the 1st respondent's property and in the unfortunate event of a structural failure; it would collapse on his property.

9. The 1st respondent asserted that the appellant and the rest of the respondents violated his rights by failing to accord him reasonable opportunity to submit oral or written comments on the project report before approving it and subsequently issuing the appellant with the EIA License, a telecommunication licence and the development permission. Consequently, his right to a safe, clean and healthy environment had been violated. He therefore prayed for;

   a) A declaration that the respondents have violated his right to a safe, clean and healthy environment.

   b) An order prohibiting, stopping and restraining the 2nd respondent from permitting the erection of the mast on the site property.

   c) An order directing the 2nd respondent to stop using the site property as a metal cutting, working and off-loading point for tons of construction steel bars or any other construction equipment materials.

   d) An order compelling the 3rd respondent to take measures to prevent and discontinue the actions of the appellant continuing erection of the mast on the site property.

   e An order for the payment of general damages by the appellant and the rest of the respondents for the violation of his right to a safe, clean and healthy environment.

   f) An order for costs of the petition.

10 In response, the appellant filed a replying affidavit deposed by its Project Manager Christopher Taracha. He outlined the steps the appellant took prior to the construction of the mast as earlier mentioned. On the noise and pollution, he deposed that the same had been adequately addressed in the project report and the mitigation measures undertaken included; maintaining the machinery at the best operating conditions; construction was undertaken during the day; and the use of muffling equipment for the operation of the site generator. Moreover, the construction was complete hence the issue of intrusive noise as alleged was no longer as issue.

11. Christopher opined that the 1st respondent ought to have directed its complaints to the National Environmental Tribunal (tribunal) as required by law. The EMCA, which established the tribunal, provides that appeals concerning the approval of EIA license are to be directed thereto. The 1st respondent did not lodge anything at the tribunal hence the High Court did not have jurisdiction to entertain the petition.

12. The 4th respondent's Assistant Director in charge of telecommunication licensing, Linston Kirui, swore its replying affidavit. He affirmed that the commission had not issued the appellant with a licence. He deposed that the appellant applied for a Network Facilities Provider Tier 2 (NFP-T2) licence to enable it to construct a telecommunication tower in Kenya on March 22nd 2013. However, since it failed to pay the requisite fees as directed by the 4th respondent, none was issued.

13. The 5th respondent's replying affidavit was deposed by Joseph M. Malinda, the interim clerk of the County Assembly. He confirmed that the appellant made an application for development permission dated 11th September, 2013 and also for an extension of user for the site property. After exercising due diligence, the 5th respondent was satisfied that the application was proper and there being no objections from members of the public, the application was approved and the development permission granted.

14. Christopher Muchiri, the 6th respondent's Managing Director deposed that it is a duly registered environment impact assessment entity under NEMA Registration. No. 2798. He pointed out that upon being engaged by the agent, the 6th respondent carried out a study, partly through literature review and partly through a detailed and structured field study. The process included; collection of baseline data to describe the status of the project site before the commencement of the project; data analysis and evaluation, public participation to identify the concerns of persons likely to be affected by the project; and preparation of the project report encompassing the details specified in the EMCA Regulations.

15. On the issue of public participation, the 6th respondent assigned the responsibility to Julius Macharia, one of its Field Officers who consulted with the neighbours to find out their general feeling towards the proposed project. The sheets in evidence of the same were attached to the project report. During the field visit, Julius discovered that most of the houses operated as guesthouses with serviced rooms and therefore decided to take the views of the caretakers as they were the ones involved in the day to day running of the houses. However, the 1st respondent, on being requested for his opinion, was hostile to Julius and indicated that he would stop the proposed project. It was clear that his opinion towards the intended project was biased ab initio.

16. When the project report was completed, it was submitted to the 3rd respondent and after the 21 days meant for circulation and comments, the report was reviewed and a conditional approval was given. Subsequently, the appellant was issued with an EIA license. Contrary to the 1st respondent's assertion concerning the complaint, Christopher stated that the directive to halt the construction was lifted once they furnished the 3rd respondent's County Director with all the documents in evidence of all the approvals they obtained. The said Director then offered the 1st respondent a written explanation on the same. Nevertheless, he was not satisfied but, instead of going to the tribunal as is required, the 1st respondent filed the petition which contradicts proper procedure.

17. The 3rd respondent filed grounds of opposition dated 3rd April, 2014 challenging the jurisdiction of the High Court on matters of Environment and Land and asserting that the proper court, which was the Environmental and Land Court (ELC), had jurisdiction to only hear appeals from the decisions of the tribunal. Emukule, J delivered a ruling on 18th June, 2014 where he concurred with the 3rd respondent that the High Court did not have jurisdiction to hear and determine the matter and in the interest of justice, he directed that the petition be transferred to the ELC for determination.

18. At the conclusion of the hearing at the ELC, M. Sila, J considered the submissions and evidence presented before the court and held in favour of the 1st respondent. He ordered that;

    a) The EIA license issued by the 3rd respondent and the development licence issued by the 5th respondent be cancelled.

    b) The mast be pulled down and the environment be restored to the manner that it was before it was put up.

    c) An environmental restoration order was issued ordering the appellant and the rest of the respondents jointly to ensure that the site property is restored back to the manner that it was before the mast was constructed within 30 days.

    d) The appellant and the rest of the respondents jointly pay the 1st respondent Kshs. 10,000 in recognition that his rights were duly infringed.

    e) The appellant and the rest of the respondents to jointly pay the costs of the petition.

19. Aggrieved by the judgment, the appellant filed the instant appeal containing 9 grounds which, abridged, are that, the learned judge erred by;

    a) Making an assumption that failure to follow due procedure before the commencement of the project led to the violation of the right to a clean and healthy environment.

    b) Holding that the precautionary principle was applicable in this matter.

    c) Holding, without proof, that there was no public participation and that masts have a negative visual impact on the environment.

    d) Finding that a full Environmental Impact Assessment Study ought to have been required in respect to the construction of the mast.

    e) Considering and determining matters that were not pleaded.

    f) Rendering orders whose nature, effect and purport went beyond the prayers as sought in the petition.

20. During the virtual hearing of the appeal, learned Counsel; Mr. Kuyo appeared for the appellant, Mr. Konosi appeared for the 1st respondent, Mr. Kahiga appeared for the 2nd and 5th respondent while Mr. Inyangu appeared for the 4th respondent. There was no representation for the 3rd and 6th respondents. The Court being satisfied that the 3rd and 6th respondents had due notice of the hearing date having been served electronically with a hearing notice by the Deputy Registrar of this Court on Thursday, September 30, 2021 at 9.57a.m., allowed learned counsel present to prosecute the appeal.

21. Mr. Kuyo submitted that the Petition did not raise any constitutional questions to the required standards as was held in *ANARITA KARIMI NJERU -VS- THE REPUBLIC* (1976-1980) KLR 1272. He argued that the learned judge erred by finding that the alleged failure to adhere to due procedure constituted a violation of the 1st respondent's right to a clean and healthy environment. According to him, the petition was essentially a challenge against the issuance of the EIA license and as such it ought to have originated at the tribunal as provided for under the EMCA. Similarly, any complaint about the development permission granted to the appellant should have been lodged with the Liaison Committee (committee) as provided for under the Physical and Land Use Act.

22. Counsel postulated that the learned judge failed to adhere to the principle of exhaustion and rather arrogated the court jurisdiction due to the multifaceted nature of the petition. He insisted that this was not a legally recognised mode of conferring jurisdiction. In support of his assertion, he cited this Court's finding in *KIBOS DISTILLERS LIMITED & 4 OTHERS -VS- BENSON AMBUTI ADEGA & 3 OTHERS* [2020] eKLR. He further argued that the learned Judge erred by disregarding the principle of avoidance where constitutional redress should be turned to only when the available means are neither efficacious nor adequate.

23. Counsel posited that the precautionary principle did not apply in this instance as section 2 of *EMCA* recognises that its applicability is limited to where there is scientific uncertainty. He pointed out that the obligation to prove that the project was environmentally sound was discharged by the appellant through the preparation of the project report; evidence of which was uncontroverted at the trial. He urged us to find that the standard on public participation as imposed by the learned judge was not envisioned by statute and finally, the restorative orders as issued were not pleaded or otherwise sought by the 1st respondent.

24. Mr. Kahiga supported the appeal and contended that the learned Judge erred by; conferring jurisdiction to the court for the convenience of the 1st respondent while the petition did not meet

the threshold for invoking constitutional redress; the court did not well address the precautionary principle; the view that failure to adhere to due procedure creates a presumption that there was violation of *the constitution* was a negative test that could not be rebutted and as such put the respondent at a disadvantage; and there was no cause of action against the 2nd and the 5th respondents hence they ought to have been exonerated. Finally, Counsel prayed that the appeal be allowed with costs.

25. Mr. Inyangu, who did not file submissions, indicated that he supported the appeal and therefore associated himself with the submissions of the two Counsel.

26. Mr. Konosi in rebuttal asserted that the violation of the 1st respondent's constitutional right to a clean and healthy environment was the predominant claim in the petition. He supported the learned Judge's decision to entertain the petition despite there being other avenues available to the 1st respondent. In any case, the existence of those avenues did not divest the court of its jurisdiction in the petition. On the precautionary principle, Counsel adopted the reasoning in the publication by Godber W. Tumushabe, The Precautionary Principle, Biotechnology and Environmental Litigation: Complexities in Litigating New and Emerging Environmental Problems, No. 3, ACODE Policy Research Series (2001) and urged the Court to find that the learned Judge did not err in his finding on the same.

27. On whether the learned Judge gave orders not pleaded, Counsel relied on the finding in *ODD JOBS -VS- MUBEA* (1970) EA 476 and affirmed that the issues were indeed raised in the 1st respondent's submissions and in the course of proceedings. He prayed that the appeal be dismissed with costs to the 1st respondent. When questioned concerning the import of the holding of this Court in KIBOS DISTILLERS LIMITED & 4 OTHERS -VS- BENSON AMBUTI ADEGA & 3 OTHERS (supra), Counsel concurred with the assertions of Mr. Kuyo that litigants ought to exhaust all avenues of redress before moving to Court and that indeed his client, the 1st respondent ought to have initially lodged his complaints on the project report and the change of user to the tribunal and the Committee, respectively.

28. Having carefully read and considered the rival submissions in light of the entire record, we have distilled the following as the issues for determination; whether the court had jurisdiction to hear the petition; whether the petition raised any constitutional questions; whether the learned judge properly applied the precautionary principle, the principle of avoidance and the principle of exhaustion; and whether all the orders issued by court were pleaded by the 1st respondent.

29. We are cognizant of our duty as a first appellate court as was capsulated in *ROBIN ANGUS PAUL & 2 OTHERS -VS- MIRIAM HEMED KALE* [2019] eKLR;

> "As stated earlier, on first appeal this Court is enjoined to re-evaluate, re-assess and re-analyze the entire evidence adduced before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way."

30. Since jurisdiction is everything and without it a court has no power to move one more step and must lay down its tools in respect of the matte as memorably put by Nyarangi, JA. in *OWNERS OF THE MOTOR VESSEL "LILLIAN S" -VS- CALTEX OIL (KENYA) LTD* [1989] eKLR, we shall deal with this issue in limine.

31. It was contended that the court lacked jurisdiction to entertain the petition as a constitutional one as it did not raise any constitutional questions. Further, the petition was primarily challenging the issuance of the EIA licence and the development permission and as such ought to have been challenged through the proper channels, being the tribunal and the committee respectively. Therefore, the learned Judge

ought to have applied the principle of avoidance and dismissed the petition since the 1st respondent failed to have his issues addressed at the appropriate avenues available to him.

32. It is trite that by virtue of Article 23 as read together with Article 165 (3) (a) of *the Constitution*, the court has been accorded jurisdiction to hear and determine applications for redress for a denial, violation, infringement of or threat to a right or fundamental freedom in the bill of rights. However, it is worth mentioning, that not every petition professing a violation of rights raises a constitutional question.

33. The 1st respondent filed a petition at the High Court challenging the alleged illegal issuance of an EIA license, a telecommunication licence and development permission to the appellant by the 3rd, 4th and 5th respondent, respectively. He claimed that as a consequence his right to a safe, clean and healthy environment was infringed. In addition, the failure of the 6th respondent to consult him as it conducted public participation violated his right by failing to accord him a reasonable opportunity to make oral or written comments on the project report that was prepared.

34. From our reading of the petition, we concur with the appellant that the heart of it was a challenge on procedural issues. A look at the prayers sought in the said petition which included; the suspension of all the licences and approvals issued to the appellant is tell-tale sign as to what the petition was primarily about. We find that the 1st respondent creatively couched his complaints as a constitutional petition, when he could easily have lodged them with the tribunal on the issuance of the EIA licence and to the committee concerning the development approval. This Court has made numerous pronouncements on this issue. It stated in *GABRIEL MUTAVA & 2 OTHERS -VS- MANAGING DIRECTOR KENYA PORTS AUTHORITY & ANOTHER* [2016] eKLR;

> " In saying all these, we are not oblivious to the fact that a party is entitled to sue under *the Constitution* even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes." (Emphasis added)

35. This is not to say that the 1st respondent may not have a had a legitimate constitutional right that was infringed, However, it is impermissible that any and all complaints be constitutionalized. He ought to have exhausted all other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the court by way of constitutional petition. See *BETHWELL ALLAN OMONDI OKAL -VS- TELKOM (K) LTD (FOUNDER) & 9 OTHERS* [2017] eKLR.

36. For a claim to fit a constitutional petition, even when other avenues are available, a party ought to demonstrate that the respondents, who caused the injury, were barring him from pursuing the other avenues available for redress. As was held in *ROYAL MEDIA SERVICES LIMITED -VS- ATTORNEY GENERAL* [2018] eKLR;

> " [I]n our view, failure or refusal to make good a debt cannot be equated to a deprivation of property or appropriation thereof. In other words, non-payment of a debt due does not amount to deprivation of property as argued by the appellant. Nor can it be equated to compulsory acquisition of property as again submitted by the appellant. Such deprivation would only be justified, if, for instance, the respondent arbitrarily barred the appellant from claiming or pursuing the claim. As it were, at the time of filing the petition the debt was

still alive and the appellant was entitled to invoke the relevant legally tenable procedure to secure a determination on account of the law provided for that purpose. The respondent had not failed to provide a forum or remedy for such determination or that it had impaired or placed roadblocks to the appellant's right to seek redress under the ordinary and usual legal process." (Emphasis added)

37. That was not the case herein. The 1st respondent was free to pursue all the available avenues but instead he chose to skip them for convenience, we presume, and therefore his petition ought not to have been entertained by the court. Despite all this, the learned judge, misdirected himself and held that the court had jurisdiction to entertain the petition as follows;

> " In my view, as long as a dispute can be categorized as being a dispute to our environment, or over land, the ELC has unlimited jurisdiction. The jurisdiction is both original and appellate. One cannot therefore be faulted if he originates his suit in the ELC and not in the NET, for ELC has original jurisdiction."
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> He further observed;
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> "I do not think that this is mandatory position that where there are alternative remedies available under statute, or other procedure under statute, a court can never entertain a constitutional petition. The court has to weigh the matter, an in its discretion, make a decision whether or not to proceed with it, or refer the litigant to other existing remedies."

38. The learned Judge erred by seeming to believe that adherence to the principle of avoidance was discretionary hence applicable only as a Judge deems fit. It is not so. The principle is an old adage principle that has been adhered to by courts not just in Kenya, but around the globe. This was articulated in *JOHN HARUN MWAU -VS-PETER GASTROW & 3 OTHERS* [2014] eKLR, where the Court stated that;

> " It is an established practice that where a matter can be disposed of without recourse to *the Constitution*, *the Constitution* should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so." (See also ASHWANDER V. TENNESSEE VALLEY AUTHORITY, 297 U.S. 288, 347 (1936) and S V. MHLUNGU, 1995 (3) SA 867 (CC).
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> On the multifaceted nature of the petition, the learned Judge pronounced;
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> > " I do not think given the multifarious nature of his complaint, the issues raised could be addressed comprehensively in any single forum unless that forum is this court ... Given the wide ranging complaint that encompasses several state players and individuals I cannot fault the petitioner for coming to court."

39. We state categorically and without equivocation that the multifaceted nature of any petition, or suit for that matter, is not a basis to find a court to arrogate jurisdiction to itself. This Court already made a finding on this issue and castigated such reasoning

40. in *KIBOS DISTILLERS LIMITED & 4 OTHERS -VS- BENSON AMBUTI ADEGA & 3 OTHERS* [2020] eKLR;

> In the instant matter, the learned judge citing the case of Ken Kasinga -vs- Daniel Kiplagat Kirui & 5 others, [2015] eKLR, and other decisions from courts of coordinate jurisdiction held that where a claim in a petition or suit is multifaceted, a court can have jurisdiction

> despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting of pleadings - that all that a litigant need to do is to draft pleadings such that claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping."

41. Despite acknowledging that the petition might as well have been filed as an ordinary suit, as Counsel for the 1st respondent acknowledged, the learned Judge held;

> "I]f I am to fail to address the issues in this petition, the recourse of the petitioner will be to file a new suit, which I would still have to hear...I am guided by Article 159 of *the Constitution* to do justice without undue regard to procedural technicalities."

42. This cannot be good law and it remains unacceptable for a court to consider that convenience is enough ground to confer jurisdiction. In as much as the learned Judge, in his position at the ELC could hear both ordinary suits and constitutional petitions touching on land, he ought to have taken judicial notice of the fact that both avenues, though leading to his judicial 'seat', nonetheless confer separate jurisdictions with separate procedures that must strictly be adhered to. The notion that non-exhaustion of all prior forums does not strip the constitutional court of jurisdiction is erroneous and should not gain traction.

43. It is patently clear that procedures that properly bring matters within the jurisdiction of a court go to the heart of a court's ability to hear and determine those matters. They serve salutary practical and pragmatic purposes and cannot be reduced to mere technicalities curable by article 159. With due respect to the learned Judge, he misapplied the letter and spirit of that provision of *the Constitution*.

44. In the end, and on the critical foundational question of jurisdiction alone, without going into the other issues, we allow this appeal and set aside the judgement of the court in its entirety but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR