General Printers Limited v Savichem Africa Limited (Civil Appeal 295 of 2019) [2022] KECA 580 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 580 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 295 OF 2019

RN NAMBUYE, J MOHAMMED & HA OMONDI, JJA

APRIL 28, 2022

BETWEEN

GENERAL PRINTERS LIMITED ..... APPELLANT

AND

SAVICHEM AFRICA LIMITED ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya (M. Kasango, J.) dated 8th May, 2019 in HCCC Case No. 87 of 2017)

JUDGMENT

1. This is a first appeal arising from the judgment and decree of M. Kasango, J. in HCCC No. 87 of 2017 dated and delivered at Nairobi on the 8th May, 2019.

2. The brief background to the appeal is that the respondent moved to the High Court of Kenya at Nairobi (Milimani Commercial Court Division) and instituted Civil Case No. 87 of 2017 against the appellant in a plaint dated 2nd March, 2017 seeking special damages in the sum of KShs.3,149,072.39, USD 613,818.39, and Euro 313.53 and costs.

3. The respondent's complaint against the appellant was that on diverse dates, the respondent supplied the appellant with goods as and when ordered for by the appellant in respect of which the respondent raised several invoices directed at the appellant requesting for payment in terms of the agreement namely an order for supply of goods as duly executed between them which the appellant failed to honour within the stipulated ninety (90) days and in respect of which delay the appellant was liable to pay interest at the rate of 3% per month for each proforma invoices and invoice forming the subject delayed payment.

4. In rebuttal, the appellant filed a defence dated 4th April, 2017. In it, albeit in summary the appellant admitted existence of the commercial transactions between them but denied that there was an agreement in the above mentioned contract for the respondent to charge interest at the rate of 3% on

delayed payments beyond the ninety (90) days grace period stipulated in the aforementioned contract translating to 36% per annum which according to the appellant was not only excessive, unconscionable but also unlawful in any event.

5. Without prejudice to the foregoing averments, the appellant averred inter alia, that it fully paid off in full its indebtedness to the respondent using financial facility proceeds it had obtained from Credit Bank of KShs.112,000,000.00 secured against a residential property belonging to one of its Directors, attracting interest at 9.5% per annum for the Dollar denomination and 14% for the Kenya Shillings denomination which would translate to KShs.35,000,000.00 interest payable over the four (4) year period over which the financial facility was to be repaid. Sanctioning the respondent's claim as laid against it would in the circumstances have been tantamount to exposing it to double jeopardy of paying the interest claimed by the respondent on delayed payments as well as that arising from the financial facility taken from Credit Bank to pay off the respondent. On that account prayed for the respondent's suit against it to be dismissed with costs to it.

6. It is common ground that before the trial, parties were subjected to a mediation process resulting in a settlement, pursuant to which, the appellant paid in full the principal sum owed by it to the respondent. The issues agreed upon by the rival parties herein as issues remaining for determination by the trial Judge were as more particularly set out in the judgment.

7. The case was canvassed through oral testimony and written submissions. Ritu Bhattessa PW1, a director gave evidence on behalf of the respondent, while Nirav Nathwani DW1, describing himself as a financial consultant gave evidence on behalf of the appellant. The common position as at the time of trial was that the principal sum had been paid in full. The only contest between the parties was as to whether the 3% interest rate charged by the respondent on delayed payments was payable or not. PW1's evidence on the issue of interest in sum was that the appellant defaulted on its obligation to pay for the goods supplied to it by the respondent as per the invoices issued prompting the respondent to raise invoices not only for the delayed payments but also for the attendant 3% interest rate chargeable per month for the delayed payments. While that of DW1 also in sum was that they had indeed paid the principal sum in full. On the 3% interest claimed by the respondent, he was categorical that they never agreed to pay the 3% interest rate on delayed payments but conceded that the 3% interest rate had been provided for both in the proforma invoices and invoices duly executed by both parties herein.

8. At the conclusion of the trial, the trial Judge analyzed the record in light of the common issues for determination that the rival parties had invited the trial court to express itself thereon namely: was there an agreement to charge interest for delayed payments; if yes, at what rate; is the 3% interest rate charged by the respondent on the delayed payment excessive; and who should bear the costs of the suit and proceeded to make findings thereon.

9. The trial Judge took into consideration the following authorities: the case of *Fuelex Kenya Limited v Seed Group Limited* [2000] eKLR in which the court held that "a duly executed proforma invoice constituted a valid agreement for the supply of goods at an agreed price as indicated in the proforma invoice"; the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR for the now crystallized principle of law namely, that "parties are bound by the terms of their contract, unless coercion, fraud or undue influence in regard to the terms of the charge is proven," and, secondly, that "Save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."; and the case of *Bawazir Glassworks Limited & another v Asea Brown Boweri Limited* [2015] eKLR in which the court therein sustained a claim for interest at the rate of 3% per month which worked out to 36% per annum holding that the said interest was not unconscionable being the rate parties in the

cited case had not only agreed upon but also provided for in the proforma invoices and invoices duly executed by the rival parties therein.

10. Applying the reasoning in the above cited cases to the rival position before the court, the trial Judge found and held firstly, that the proforma invoices and invoices tendered in evidence contained all the essential terms of the contract governing the obligations and duties of the contracting parties therein which according to the trial Judge was enforceable as between the contracting parties inclusive of the 3% interest rate on delayed payments beyond the ninety (90) days grace period. Secondly, that there was sufficient demonstration on the record that parties intended to be bound by those terms. Thirdly, that the 3% interest rate per month charged by the respondent for late payments was not excessive nor unconscionable considering that it was a term of the parties' agreement and on the totality of the above reasoning allowed the respondents claim against the appellant as prayed with costs.

11. Aggrieved, the appellant is now before this Court on a first appeal raising seven (7) grounds of appeal in its memorandum of appeal dated 3rd July, 2019, subsequently condensed into three issues in the appellant's written submissions dated 25th June, 2020 namely:

    a) What is the scope of the appellate jurisdiction of this Court in the present matter?

    b) Whether the learned Judge erred in finding that there was in agreement to charge on interest rate of 3%?

    c) Whether the learned Judge erred in finding that the 3% interest per month charged by the respondent for late payments was not excessive.

12. When the appeal came for plenary hearing before us on the 2nd September, 2021, learned counsel Mr. Kivindyo appeared for the appellant while learned counsel Mr. Mogeni appeared for the respondent. The appeal was canvassed virtually through written submissions and legal authorities filed, fully adopted and orally highlighted by learned counsel for the respective parties herein in support of their opposing positions.

13. Supporting the appeal on issue (a), the appellant invites this Court to be guided by the principles on the exercise of a first appellate court's mandate enunciated in the seminal case of *Selle vs. Associated Boat Company Limited* [1968] E. A 123 and as approved and applied in the case of *Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.

14. In support of limb B1 of issue number (b), the appellant relies on the following authorities: *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [*supra*]; *Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited* [2014] eKLR for the holding/propositions firstly, that "it is now trite that it is not for the court to rewrite a contract with regard to interest as parties are bound by the terms of their contract". Secondly, that the above position notwithstanding "courts have never been shy to interfere or refuse to enforce contracts which are unconscionable, unfair or oppressive"; F*uelex Kenya Limited vs. Seed Group Limited* [*supra*] *Revelle Independent LLC v Anotech International (UK) Limited* [2016] EWCA CIV 443 for the holding/proposition, inter alia, that

> "a contract is founded in the acceptance of an offer" either formally or by conduct of the parties and lastly, the case of *Mcllkenny v Chief Constable of the West Midlands* [1980] 2 ALL ER 227 on various types of estoppel namely by: "conduct, acquiescence, election or waiver, negligence, premise or proprietary" and submits that indeed the rival parties herein had an agreement containing a component of 3% interest rate chargeable on delayed payments but which it asserts was subsequently superseded by another agreement providing

for the payment of the principal sum in full and final settlement of all the respondent's outstanding claims against the appellant.

15. The appellant laments that the learned Judge failed to appreciate that as at 8th September, 2016, the outstanding amount owed by the appellant to the respondent inclusive of both the principal and the interest owed was USD 1,041,072.79 and KShs.9,412,022. This is the amount that formed the appellant's proposal of offer to settle the amount owed by it to the respondent of KShs. 112,000,000.00 in full and final settlement of all the respondents claims against it in its letter of offer dated 21st November, 2016 whose terms of offer were allegedly impliedly agreed upon by the respondent by conduct.

16. On the second limb of issue b, the appellant relies on the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkei & another* [2005] 1 E A 334 on the threshold for proof of a civil litigation claim; the case of *Wood v Capita Insurance Services* [2017] VKSC 24 on interpretation of contracts howsoever crafted; and the case of Margret Njeri Muiruri [supra] and submits, firstly, that a proper construction of the intents and purposes of the appellant's proposal to the respondent for the settlement in full of the respondent's claims against it in its letter of 21st November, 2016 aforementioned would have left no doubt in the mind of the trial court that payment of the agreed sum of KShs.112,000,000.00 by the appellant to the respondent included any interest that may have been still outstanding and owing from the appellant to the respondent on any delayed payment especially when the respondent did not adduce any contrary evidence before the trial court. Secondly, that the trial court also failed to properly appreciate the role of a court of law when confronted with an invitation to interpret a contract namely, to give effect to the expressed intention of the parties which in the instant appeal was that the financial facility accorded to the respondent alluded to above was in full and final settlement of all claims owing from the appellant to the respondent as at the time the facility was afforded and thus took precedence over and or superseded the agreement entered into by the parties by way of the proforma invoices and invoices that the Judge relied upon at the trial to pin responsibility onto the appellant to pay the adjudged interest amount.

17. In support of issue number C, the appellant relies on the following authorities: the case of *Margaret Njeri Muiruri* case [*supra]*; the High Court decisions in the case of *Red Gems Investment Group Limited v Irene Chepkoech Chumo* [2019] eKLR; and *Comhard Limited v Nzoia Sugar Company Limited & another* [2019] eKLR and invites this Court to fault the trial Judge firstly, for arriving at an erroneous conclusion that the interest rate of 3% charged for late payment was not excessive. Secondly, for failing to appreciate properly and rule that the appellant's complaint specifically pleaded at paragraphs 10, 12, 13, 14, 15 and 16 of its defence that the said rate of interest was unconscionable was well-founded both on the facts and in law. Thirdly, that the respondent having acknowledged receipt of the amounts forming the financial facility in full and final settlement of its claim against the appellant is estopped by way of representation and deed to claim interest at the old rate. Fourthly, in the alternative and without prejudice to the totality of the foregoing, it is the appellant's submission that based on the factual context of the issues in controversy herein, the interest rate of 3% insisted upon by the respondent as payable constitutes an unfair bargain hence inapplicable in the circumstances of this appeal and invites this Court to hold that the same is unconscionable, especially when it is not disputed that the financial facility accorded to the respondent also attracts a bank interest at the rate of 9.5% on the dollar denomination and the rate of 14% on the Kenyan Shillings which would translate to KShs.35,000,000.00 by the time the facility would be fully paid up by the appellant.

18. In rebuttal of the appeal, the respondent likewise firstly reminds this Court of its mandate as a first appellate court as expounded in the often cited case of *Selle v Associated Motor Boat & Co Limited & another* [1968] E A 123, and submits that the record as laid before the trial court and now this Court on

appeal is explicit that before the suit was set down for hearing at the High Court, parties were referred to mediation and a partial settlement agreement was arrived at leaving issues set out in the body of the judgment as the only issues falling for determination by the trial court.

19. Secondly, the respondent tendered documentary exhibits in support of his claim as more particularly set out in the impugned judgment which went not only to prove the existence of the transactions between the appellant and the respondent that gave rise to the respondent's claim against the appellant at the trial, but also that documentation on the basis of which the claim was based were duly executed by both the appellant and the respondent. The trial Judge cannot therefore be faulted for arriving at the only logical conclusion on the matter that the above set of documents is what constituted the contract as between the appellant and the respondent as regards the basis for the respondent charging interest at 3% on delayed payments beyond the ninety (90) days grace period.

20. Thirdly, the respondent relies on the decision in the case of *Bawazir Glassworks Limited & another v Asea Brown Boweri Limited* [2015] eKLR and submits that the respondent's witness tabulated what according to him was the schedule of interest on delayed payments payable by the appellant which they assert was never rebutted by the appellant. The learned Judge cannot therefore be faulted for being guided by the decision of the Court of Appeal in the case of *Bawazir Glassworks Limited & another v Asea Brown Boweri Limited* [*supra*] and sustaining the respondent's claim on interest. According to the respondent, the rate sanctioned by the trial court had not only been agreed upon by the parties as borne out by the content of the proforma invoices and invoices, documents admittedly forming the contract of engagement as between the parties herein but also proved by the evidence tendered by the respondent. Lastly, the appellant's assertions that the old interest rate was superseded by a subsequent agreement entered into following mediation was never raised as one of the issues to be determined at the trial. It does not, therefore, fall for consideration by this Court on appeal.

21. This being a first appeal, the position in law is that we are entitled to re-evaluate and re-analyze the record and come to our own conclusion, bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanor of witnesses. See Selle & another vs. Associated Motor Board Co. Ltd (1968) EA 123. In undertaking that exercise, we are guided by the principle that a court of appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or that the Judge is shown demonstrably to have acted on a wrong principle in reaching the finding he did. See *Jabane v Olenja (*1968) KLR 661.

22. We have considered the record in light of the above mandate, the rival submissions and principles of law relied upon by both parties in support of their opposing positions. The issues that fall for our determination are whether:

    1. The respondent specifically pleaded and proved its claim for special damages.

    2. The superior court erred in holding that there was an agreement to charge 3% interest per month for delayed payments and whether the same was excessive and or unconscionable?

    3. As a result of the mediation/negotiations between the appellant and the respondent, there was a separate agreement that superseded the previous agreement between the parties and whether the credit facility borne out of the outcome of the said mediation/negotiations absolved the appellant from paying interests due on delayed payments.

23. Starting with issue number 1, it is not in dispute that the respondent, in its plaint dated 2nd March 2017, particularized its claim for special damages and gave in evidence during the trial, documentation which were in the form of proforma invoices, invoices and delivery notes and which

were all acknowledged by both parties as containing the terms of the contract executed between the rival parties herein.

24. As was held by this Court in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (*supra*) a court of law cannot re-write a contract between parties who are in law deemed to be bound by the terms of their contract. Herein, both parties have agreed that the initial agreement on the rate of interest payable on delayed payments was discernible from the proforma invoices and invoices exchanged between the parties and duly executed by the disputing parties herein on the basis of which the respondent specifically pleaded his special damages claim and which claim the trial Judge sustained a position the appellant has invited this Court to overturn and the respondent to affirm. Being a civil claim proof was on a balance of probabilities. We agree with the learned Judge that on the record as laid before the trial Judge and now this Court on appeal, the respondent proved on a balance of probability its claim for the interest charged on delayed payments as it was one of the terms stated in the contract/ agreement founded on the proforma invoices and invoices executed between the parties and tendered in court as documentary exhibits without any objection from the appellant.

25. With regard to the second issue, we affirm the position taken by the learned Judge that there was an agreement between the parties to charge 3% interest per month for delayed payments as explained above, a fact also admitted by the appellant in its submissions at paragraph 23. The appellant's position however is that the said rate was superceded by the agreement pursuant to which the amount forming the principal sum were paid off and which payment the appellants asserts was in full and final settlement of all the respondent's claims then outstanding and owing from the appellant to the respondent, a position we shall revisit when addressing issue number 3. The second objection was allegedly because the rate was unconscionable as pleaded by the appellant in its defence before the trial court and which pleading the appellant laments was never addressed by the learned Judge

26. It is our observation from the record that in reaching the impugned conclusion highlighted above, the Judge not only relied on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (2001) eKLR (*supra*) wherein this Court restated Shah J.A in the case of Fina Bank Limited vs. Spare & Industries Limited inter alia, that:

> " save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party escape from a bad bargain."
>
> but also fully adopted the decision in the case of *Bawazir Glassworks Limited & another vs. Asea Brown Boweri Limited* [*supra]* wherein this Court held inter alia, that: "the interest rate of 3% per month, which worked out to 36% per annum, could not be said to be unconscionable .....".

27. The position we take in resolving the above highlighted appellant's complaint is that taken by the court in the case of *National Bank of Kenya Limited case* [*supra*], namely, that it is only in exceptional circumstances that a court of law would invoke and apply tenets of equity to assist a party escape from a bad bargain. According to the appellant, the 3% interest rate is founded on a bad bargain and is therefore unconscionable and should be vitiated. As was stated in the case of *Fuelex Kenya Limited* [*supra*], it is not the business of the court to either rewrite or substitute what it thinks ought to have been the proper terms of a party's contract which in the instant appeal would translate to what the court would believe on its own as to what would be a proper interest rate payable on delayed payments in place of what was agreed upon as between the contracting parties herein as already alluded to above.

28. The position we take is that it is not correct as asserted by the appellant that courts are granted the leeway to maneuver where the scales of justice tend to tilt towards occasioning unfairness towards one party. Going by the case law assessed above, such tempering must not only be well founded both on the facts and the law but also have to bear in mind the guiding cardinal principle above namely, that courts of law have no mandate to rewrite a contract duly and validly executed by parties and therefore binding on them a threshold which in our view, has not been met by the appellant to entitle us tamper with the clear terms of the contract.

29. With regard to the third issue, it is not disputed that there was a mediation/negotiations before the suit was set down for hearing and as submitted by the respondent and also shown on the record at page 495 and 496, the issues that were left after the said mediation/negotiations for the trial court to determine were as already highlighted above. The issue of the contents of the draft proposal letter dated 21st November, 2016 given by the appellant to the respondent which resulted in the Credit Bank Limited issuing a financial facility to the total tune of Kshs. 112,000,000.00 in favour of the respondent against a security provided by one of the appellant's Directors as an agreement between the respective parties herein and which allegedly superseded their contract against which the respondent laid claim for the 3% rate interest chargeable on delayed payments was not one of the issues framed and agreed upon by the parties as one of the issues for determination by the trial court. The appellant asserts that a proper construction and or meaning of the said proposal was that the financial facility accorded by Credit Bank was to be in full and final settlement of all claims owed by it to the respondent inclusive of interest on late payments. The appellant has not however alluded to any other formal or separate agreement either by way of the respondent's response to that proposal or any such other document executed by the rival parties herein that specifically stipulates that thesaid proposal superseded the previous agreement signified in the contents of the proforma invoice and invoices wherein interest was charged on delayed payments at the rate of 3% per month.

30. We are also alive to the fact that the appellant has also asserted that acceptance of the proposal in their aforementioned letter of proposal by the respondent was by conduct because the respondent received payment of the amount forming the financial facility accorded by Credit Bank. The appellant's submissions are however silent as to why this was never made as one of the issues falling for consideration by the trial Judge since the payments forming the financial facility were made before issues for determination by the trial court were agreed upon and endorsed on the court record.

31. Secondly, the appellant's submissions are also silent as to why this fact was not pleaded in its defence which according to our take on it is that the same was filed after the respondent benefitting from the financial facility sourced by the appellant from Credit Bank. This is borne out by the reflection in the said defence of elements of the said financial facility. The inclusion of such an item in its pleading in the defence on the part of the appellant would have given the respondent an opportunity to respond thereto. The trial court and this Court on appeal would also have likewise been accorded an opportunity not only to interrogate but also to rule on the issue appropriately. Thirdly, it is also our observation that the appellant's own witness did not front this as one of the reasons why they were not willing to pay the interest rate of 3% per month on delayed payments. All he said was that there was no such an agreement between the parties authorizing the respondent to charge a 3% interest rate on delayed judgment.

32. The position in law with regard to pleadings is as enunciated in the case of *Captain Harry Gandy v Caspar Air Charters Limited* [1956] 23 EACA 139 wherein the predecessor of this Court was explicit that:

> " Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment."
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> while in *Odd Jobs v Mubia* [1970] E.A 476 the predecessor of the court added that:
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> " A court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue has been left to the court for decision."
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> See also the position taken by this Court in *Ole Nganai vs. Arap Bor* [1983] KLR 233 wherein the court was explicit that a court has no power to grant orders neither pleaded nor prayed for by the parties; and the case of *Galaxy Paints Co. Ltd v Falcon Guards Ltd* (2000) EA 885 wherein it was held, inter alia, that:
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> " The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings. *Gandy v Caspair* (1956) EACA 139 and *Fernandes v People Newspapers Ltd* (1972) EA 63."

33. In light of the observations made above with regard to the appellant's failure to include the issue of the proposal in its letter of 21st November, 2016 firstly, as an agreement superseding the earlier one and secondly, as having being deemed accepted by the respondent by conduct and deed as one of the issues falling for interrogation by the trial judge on the one hand; and, secondly, as one of the issues pleaded in its defence on the other hand cannot now turn around and state that the settlement agreed upon by the parties during mediation/negotiations resulting in the appellant making full and final payment of the principal amount to the respondent superseded the previous agreement between the parties herein in which interest was charged at 3% per month on delayed payments.

34. The above being the correct position on the record, it is in our considered view, that based on the totality of the record as already assessed above as well as our attendant reasoning thereon, we entertain no doubt in our minds that the appellant was fully aware of the conditions of the original agreement which included a component for a 3% interest rate charge per month for delayed payments and not having complied with its part of the contract, the appellant cannot in any way claim that having paid the principal amount owed to the respondent in full using the financial facility sourced from Credit Bank, it is absolved of its responsibility to pay the interest due on the same because of a separate unproven alleged superseding agreement.

35. Turning to the appellant's assertion that it will not only be unconscionable to require it to pay the amount claimed from it by the respondent because it is paying interest due on the credit facility sourced from Credit Bank to pay off the principal sum to the respondent amounts to exposing it to double jeopardy does not operate to assist it to wriggle out of its obligation to pay the amount claimed against it by the respondent firstly, because this is a separate transaction distinct from the first one and unless there is are specific terms in the letter agreement to that effect it cannot operate retrospectively to oust the earlier one. Secondly, we wish to reiterate the position taken above that this subsequent arrangement to pay off the principal sum did not in any way supersede the binding terms of the contract executed earlier as between the parties. In the result, we therefore, affirm the position taken by the trial

Judge that the appellant is obligated in law to pay the debt owed to the respondent as claimed and proved against it.

36. On the basis of the totality of the above assessment and reasoning, we find no basis for us to interfere with the learned Judge's decision. The upshot is therefore that this appeal has no merit and is therefore dismissed.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR