



Judicial Service Commission & another v Katiba Institute & 4 others (Civil Appeal (Application) E337 of 2022) [2022] KECA 770 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KECA 770 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E337 OF 2022
W KARANJA, AK MURGOR & KI LAIBUTA, JJA
JUNE 16, 2022**

BETWEEN

JUDICIAL SERVICE COMMISSION 1ST APPLICANT

CHIEF JUSTICE OF THE REPUBLIC OF KENYA 2ND APPLICANT

AND

KATIBA INSTITUTE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

KENYA MAGISTRATES AND JUDGES ASSOCIATION 3RD RESPONDENT

LAW SOCIETY OF KENYA 4TH RESPONDENT

INTERNATIONAL COMMISSION OF JURISTS 5TH RESPONDENT

(An application for stay of execution of the Ruling and Order of the High Court of Kenya at Nairobi (A. C. Mrima, J.) given on 3rd June, 2022 in Constitutional Petition No. E128 of 2022)

RULING

1. The Judicial Service Commission (JSC), the 1st applicant, pursuant to Article 172(1) (a) of *the Constitution*, resolved to recruit Judges of the Court of Appeal and Judges of the High Court to fill up some vacancies arising in the two courts either by reason of natural attrition, suspension or other reasons.
2. Towards this end, the JSC placed an advertisement in the newspapers inviting interested and qualified persons to apply for 6 vacancies in the Court of Appeal and 20 positions of Judges of the High Court. An overwhelming number of applicants responded to the advert and eventually, the long list was sifted to a shortlist of 31 suitable and qualified applicants for the Court of Appeal positions and 104 applicants for consideration for the vacant High Court positions. Published with the list of shortlisted



candidates were the interview dates when the candidates were expected to appear for the interviews. It is safe to say that these candidates have been preparing themselves to appear before the JSC on the assigned dates.

3. As this was going on Katiba Institute (the 1st respondent), moved to the High Court vide Constitutional Petition No. E128 of 2022. In its Petition, the 1st respondent stated that it was challenging “the constitutional, legal and otherwise moral propriety and rationale of the 1st applicant’s invitation and call for applications” in the face of pending litigation touching on appointment of Judges, including Civil Appeal No. 369 of 2019 and Civil Appeal No. 268 of 2020 which appeals are pending determination before this Court. In the petition, the 1st respondent sought orders, inter alia, as follows:
 - (a) A declaration be and is hereby issued that the decision contained in Gazette Notice No. 2529 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 inviting interested and qualified persons to apply for appointment to Office of Judge of the Court of Appeal while cases challenging the appointment of Judges is/are pending is inconsistent with the rule of law, good governance, constitutionalism and otherwise undermines the independence of the 1st respondent, the Judiciary and the powers and functions of the Office of the Court of Appeal.
 - (b) A declaration be and is hereby issued that the decision contained in Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 inviting interested parties and qualified persons to apply for appointment Office of Judge of the High Court while cases challenging the appointment of Judge is/are pending is capricious, irrational, inconsistent with the rule of law, good governance, constitutionalism; and otherwise undermines the independence of the 1st and 2nd respondents, the Judiciary and the powers and functions of the Office of a Judge.
 - (c) A declaration be and is hereby issued that the decisions contained in Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 inviting interested and qualified persons to apply for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court while unresolved disputes/cases challenging the appointment of judges is/are pending creates, promotes, perpetuates and/or taints the process of appointing judges with uncertainty, lack of accountability, inconsistency; and is otherwise oppressive, capricious, unreasonable, irrational, ill-advised, undermines the Rule of Law and aids and/or abets the subversion of *the Constitution* of Kenya.
 - (d) A declaration be and is hereby issued that any consideration, evaluation, deliberation, process, reviews and/or interview conducted by the 1st respondent of interested and qualified persons seeking to be appointed to office of Judge of the Court of Appeal and Office of Judge of the High Court while unresolved disputes/cases challenging the appointment of judges is/are pending will not be fair or seen to be fair, legitimate, transparent and independent; and interferes with and/or undermines the integrity and independence of Judge.
 - (e) An order of certiorari be and is hereby issued quashing the decision contained in Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022 to the extent that it invites interested and qualified persons to apply for appointment to office of Judge of the Court of Appeal and Office of the Judge of the High Court by 4th April, 2022.



- (f) An order be and is hereby issued prohibiting any invitation, consideration, evaluation, deliberation, process, review and/or interview of interested and qualified persons to be appointed to office of Judge of the Court of Appeal and Office of Judge of the High Court by the 1st respondent until all disputes and/or cases challenging the appointment of judges are lawfully, finally and conclusively resolved and determined.
- (g) A conservatory order be and is hereby issued suspending the implementation and/or closure of the period for receiving applications pursuant to Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dared 11th March, 2022 to the extent that it invites interested and qualified person to apply for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court by 4th April, 2022.
- (h) A conservatory order be and is hereby issued suspending any further action by the 1st respondent including, invitation, consideration, evaluation, deliberation, processing, review, and/or interview of applicants and/or applications for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court pursuant to the decision contained in Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vol. CXXIV-No. 44 dated 11th March, 2022.
4. Contemporaneous with the filing of the petition, the 1st respondent filed a Notice of Motion under Articles 22 and 23 of *the Constitution* and Rules 23 and 24 of *the Constitution* of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 seeking orders as follows: -
- (1) ...
2. A conservatory order be and is hereby issued suspending the implementation and/or closure of the period for receiving applications pursuant to Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vo. CXXIV – No. 44 dated 11th March, 2022 to the extent that it invites interested and qualified persons to apply for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court by 4th April, 2022.
3. A conservatory order be and is hereby issued suspending any further action by the 1st respondent including, invitation, consideration, evaluation, deliberation, processing, review and/or interview of applications and/or applications for appointment to Office of Judge of the Court of Appeal and Office of Judge of the High Court pursuant to the decision contained in Gazette Notice No. 2529 and Gazette Notice No. 2530 dated 4th March, 2022 in the Kenya Gazette Vo. CXXIV – No. 44 dated 11th March, 2022.
- The application was premised on some 12 grounds on its face and supported the affidavit of Christine Nkoge, the 1st respondent’s executive director, sworn on 31st March, 2022.
5. The gist of the grounds forming the fundament of the application and the depositions in the supporting affidavit is that the President has failed to appoint/swear in some 6 Judges out of 41 Judges nominated and recommended for appointment by the applicant herein. The failure to appoint the 6 Judges, for whatever reason, is actually the gravamen of the matter before us, the other litigations referred to earlier, and also the Petition before the High Court.
6. In view of these pending matters, and the fact that the petition giving rise to this appeal and application is yet to be heard and determined, we approach this Ruling with utmost circumspection with a view to ensuring that we do not delve into issues raised in those matters that are yet to be determined, lest



we embarrass the courts seized of those matters. We shall, therefore, strictly confine ourselves to the impugned Ruling giving rise to the appeal herein.

7. In opposition to that application, vide an affidavit sworn by Ms Anne Amadi, the Secretary of the 1st applicant, the 1st applicant deposed that the 1st respondent's act is meant to compromise the applicant's constitutional mandate provided for under Article 172(1)(a) of *the Constitution* as read with Section 30 and paragraph 3 of the 1st Schedule to the *Judicial Service Act*. The applicants deposed further that the recruitment was aimed at realizing the citizens' constitutional right of access to justice, a fact which had been impeded by shortage of Judges. It was further averred that the number sought to be recruited would assist the Judiciary in tackling the expected avalanche of election petitions which are around the corner and, more importantly, that the 6 nominated Judges who are at the centre of all this litigation will not be prejudiced as their positions have not been advertised. They urged the court to dismiss the Notice of Motion. The application was opposed by the 2nd, 3rd and 4th respondents herein and supported by the 5th respondent herein.
8. Having heard the parties and after considering the rival pleadings and submissions, the learned Judge found merit in the application and granted orders, inter alia, as follows:-
 - b. A conservatory order be and is hereby issued suspending any further action by the 1st respondent including invitation, consideration, evaluation, deliberation, processing, review and/or interview of applicants and or applications for appointment to the Office of Judge of the Court of Appeal and Office of Judge of High Court pursuant to the decision contained in Gazette Notice No. 2529 and 2530 dated 4th March 2022 in the Kenya Gazette Vol. CXXV1-No. 44 dated 11th March 2022 pending the hearing and determination of the Petition.
 - c. The Petition to be heard by way of reliance on the pleadings, affidavit evidence and written submissions.
 - d. ...
9. Aggrieved by these orders, the applicants have filed an appeal before this Court and simultaneously filed the notice of motion before us under Rule 5(2) (b) of the Rules of this Court, among other provisions, seeking in the main an order of stay of execution of the ruling and order of the High Court delivered on 3rd June, 2022 in Constitutional Petition No. E122 of 2022, and effectively allow the 1st applicant to proceed with the recruitment pending the hearing and determination of the appeal. The application is supported by the grounds on its face and the affidavit of Anne Amadi, the 2nd applicant's secretary sworn on 6th June, 2022. It is also supported by the 2nd, 3rd and 4th respondents, but opposed by the 1st and the 5th respondents.
10. In opposition to the application, the 1st respondent has filed a replying affidavit sworn by Christine Nkonge, and dated 12th June, 2022. She deposes that the grant of conservatory orders by the High Court is an exercise of judicial discretion to preserve the matter that is before the High Court. She deposes that, in the impugned decision, the High Court made a finding that, unless it was accorded an opportunity to determine the grave issues raised in Constitutional Petition No. E128 of 2022, *the Constitution* and the law may be irreparably contravened in the event that the petition finally succeeds. She adds that the appellants/applicants have not challenged or disputed the High Court's finding and determination that Constitutional Petition No. E128 of 2022 has merit and that the constitutional issues therein should be heard and determined.
11. It is the 1st respondent's position that, since the appellants/applicants do not contend that the High Court did not exercise its discretion properly or correctly in granting the conservatory orders now



- challenged, then they cannot challenge the discretionary decision of the High Court merely because they desire a different decision; that they can only challenge the decision on the basis that the High Court did not exercise its discretion correctly or properly in making the decision, and that they have not done this.
12. In regard to the contention by the appellants/applicants that the JSC has expended human and financial resources which would go to waste if the recruitment process is not allowed to go on, the 1st respondent deposes that, firstly, the High Court has already made a determination that the petition raises grave constitutional issues worth determination; secondly, that the petition was brought to prevent the waste of public resources and finances through an exercise that is impugned; thirdly, that the petition was filed before the resources claimed to have been expended thus far were deployed; and that to allow the recruitment exercise to proceed only for the petition to succeed would lead to far greater waste of resources and finances; that good governance runs in tandem with the conscientious deployment of the scarce resources drawn from the public and lastly, that in clear demonstration of bad governance and disregard for the rule of law, the appellants/applicants, despite being aware of the pending constitutional challenge, defiantly continued to pursue a course of action that they knew could lead to waste of public resources.
 13. As regards the contention by the appellants/applicants that the shortlisted candidates ought to have been joined in the proceedings before the High Court, she deposes that this argument is patently disingenuous and only intended to obfuscate the issues, to blackmail and to intimidate the High Court hearing the matter; that it is misconceived and fallacious firstly because both the petition and the application for conservatory orders were filed on 31st March, 2022 before the applicants had taken any steps to shortlist any candidates; that despite being aware of the pending challenge to its decision and the application for conservatory orders, the applicants went ahead to shortlist candidates, which is clear demonstration of one of the issues in the petition; that the applicants' decision to defiantly proceed to shortlist candidates shows that they presumed they would have their way and their lack of deference to the rule of law and efficient administration of justice; that the shortlisted candidates have no identifiable stake or interest in the petition nor will their presence add any value or contribution whatsoever to the issues for determination in the petition.
 14. On the contention that public interest favours the grant of stay of execution, Christine deposes that the 1st applicant's constitutional mandate to recruit Judges is not contested or challenged, and neither do they contest the right of Kenyans to access efficient and effective justice; that there's need to ensure that the 1st applicant operates in accordance with and/or within the parameters of *the Constitution* in carrying out its mandate; that neither the appellants/applicants nor their decisions in the exercise of their constitutional mandates are immune from judicial scrutiny, nor do they enjoy special status; that the 1st respondent has also brought the petition before the High Court in the public interest and to uphold *the Constitution*; and that the appellants/applicants are not acting in the interests of the public. Lastly, she deposes that contrary to the allegations that the petition is against the public interest, this petition seeks to consolidate the gains made in the interest of the public to ensure that not only are Judges recruited timeously, but that the process of recruitment is also safeguarded.
 15. The 1st respondent winds up by deposing that, contrary to the appellants/applicants' contention that the High Court has indefinitely stayed the recruitment of Judges, it is evident from the ruling and/ order of the High Court that the conservatory orders are limited in time and are only valid until the petition before the High Court is heard and determined; that the court has already given expedited directions with regard to the progression of the matter, which will ensure that the petition is heard and determined expeditiously and on priority basis; and that it is not in the public interest to grant the orders sought by the appellants/applicants in the application as to allow the appellants/applicants



to proceed with the recruitment process while there is a pending petition in the High Court would offend any conscientious sense of proportion.

16. At the plenary hearing of the application, learned counsel, Mr. Charles Kanjama and Ms. Lyn Owano appeared for the applicants; Ms. Julie Soweto appeared for the 1st respondent, Mr. Bitta appeared for the 2nd respondent, Mr. Shadrack Wambui and Mr. Asuma for the 3rd respondent and Mr. Omwanza Ombati and Mr. Onderi appeared for the 4th respondent. The 5th respondent was represented by Mr. Ochieng Wesonga and Mr. Mwongela. Learned counsel Mr. Kanjama, Ms Soweto and Mr. Omwanza, whose submissions were on record as at the time the application was heard adumbrated their submissions and urged strongly in support of their rival positions. Mr. Bitta and Mr. Wambui supported the application and so did Mr. Omwanza. Submissions had not been received from the 3rd respondent and the 5th respondent as at the time the oral highlights were made. Nonetheless, all counsel present were accorded opportunity to make their oral highlights. For the applicant, it was submitted that the conservatory orders barring the 1st applicant from proceeding with the recruitment were inimical to the applicant's constitutional mandate bestowed on the applicant pursuant to Article 172(a) of *the Constitution*. It is also an affront to Article 48 of *the Constitution*, which guarantees citizens access to efficient and effectual justice. The applicants also contend that the shortlisted candidates, who are legitimately interested parties in the recruitment process, were not given an opportunity to be heard and their constitutional right to fair hearing had, therefore, been violated. These are issues that are arguable and which will be addressed in the appeal.
17. According to Mr. Kanjama, the appeal is arguable. He emphasised that the learned Judge, in exercise of his discretion, failed to consider relevant and important material placed before him, for instance, the urgency of the matter in that, whereas the interviews were supposed to commence on 20th June, 2022, the learned Judge had fixed the matter for mention on 7th July 2022; that this was therefore, injudicious exercise of discretion that would warrant this Court's interference with the exercise of the learned Judge's discretion.
18. On the nugatory aspect, Mr. Kanjama emphasised that, unless the conservatory orders are stayed, the substratum of the appeal will be lost and damage to the applicants will be irreversible and the orders given in the appeal will be reduced to an academic exercise. Mr. Kanjama also underscored the fact that this is a public interest matter, and that the principle enunciated by the Supreme Court in *Peter Gatirau Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR had been satisfied.

He referred this Court to several decisions and, in particular, this Court's decision in *Attorney General & Another v Tolphin Nafula & 5 others* [2021] eKLR, which dealt with similar issues as raised in this appeal/application.
19. On the issue of public interest, the applicants state that enormous resources in terms of public finances and time have been expended, and that all this will go to waste if the exercise is stopped. It is also in the public interest that Judges be recruited as there is dire need to boost the number, particularly in view of the expected election petitions which have strict timelines. He urged us to allow the application.
20. In support of the application, Mr. Bitta submitted that the learned Judge exercised his discretion improperly. He pointed out that in the entire proceedings before the High Court, the power and mandate of the 1st applicant to recruit Judges has not been challenged, nor has there been any contention that the applicant had flouted or violated the provisions set out in the JSC Act pertaining the process of recruitment of Judges. He submitted that the 1st respondent only challenges "the wisdom" of the 1st applicant to recruit Judges when there is still some 6 Judges who were nominated and who have yet to be appointed, he faults the learned Judge for stopping the recruitment process at a preliminary stage before hearing the parties.



21. Mr. Shadrack Wambui, submitting on behalf of the 3rd respondent, posited that restraining the 1st applicant from performing its constitutional mandate on the basis that the President neglected to exercise his mandate amounts to neglect of constitutional duty. Additionally, Mr. Wambui emphasised that members of the 3rd respondent have reduced drastically and that it is in the public interest that they be replaced in order to foster citizens' right of access to justice.
22. These sentiments were also supported by Mr. Omwanza, learned counsel for the 4th respondent, whose members are also affected by the impugned conservatory orders. According to counsel, the petition before the High Court was based on optics, an assumption that the Judges once nominated by the applicants may not be appointed by the President. He emphasised that the question of the President declining to swear in the 6 Judges is still the subject of litigation before this Court, and that the learned Judge ought not to have given the conservatory orders stopping recruitment on the basis of an issue that was pending determination before this Court. He also emphasised the public interest angle saying that the Law Society of Kenya is hamstrung by scarcity of Judges, and that the recruitment should, therefore, be allowed to proceed. He also relied on the Tolfin Nafula case (*supra*) and urged us to adopt the same stand.
23. On her part, Ms. Soweto, on behalf of the 1st respondent, adopted her very comprehensive submissions which we have rehashed earlier in extenso and highlighted a few salient points. She was emphatic that the appeal was not arguable and that being so, there was no need to consider the nugatory aspect. Her position was that it is actually in the Public interest not to allow the application, as that would result in greater waste of public resources if the recruitment exercise is allowed to proceed and the appeal eventually succeeds.
24. In rejoinder, Mr. Kanjama maintained that the petition was speculative and that the learned Judge, other than stating that the petition involved constitutional issues, did not identify which issues those were. He faulted the learned Judge for not considering the proportionate magnitude of the conservatory orders he gave, which was all to the detriment of the shortlisted persons who were not given a hearing, and who have expended their resources to prepare for the interviews. He capped his rejoinder by stating that the 1st and 5th respondents had failed to demonstrate the prejudice they were likely to suffer if the orders sought were granted.
25. We have considered the application, the rival affidavits and submissions by learned counsel. We commend all learned counsel herein for their industry and preparation of the detailed yet concise submissions and lists of authorities which they were able to put together within the short timelines given by the Court. We assure them that we have found the said submissions invaluable in the preparation of this ruling.
26. As stated earlier, our duty at this point is confined to considering the application and making a determination as to whether it meets the threshold set for applications premised on Rule 5(2) (b) of the Rules of this Court. The principles are clear. Is the appeal before us arguable? And if so, will it be rendered nugatory if the orders sought are not granted in the event the appeal eventually succeeds (See *Stanley Kangethe v Ketter and 4 others* [2013] eKLR. At this point in time, all we are required to do is determine whether the appeal, which has already been filed, demonstrates at least one arguable point. If so, then we shall move on to consider the question whether the appeal will be rendered nugatory if the stay orders sought are declined. Are there any discernible arguable points raised in the memorandum of appeal? In pondering thus issue, we

need to bear in mind the fact that an arguable point is not necessarily one that will succeed, but one that merits consideration by this Court. (See *Dennis Mogambi Mang'are v Attorney General & 3 others* [2012] eKLR.



27. On the first limb on arguability, we have no hesitation in finding that the appeal before us is not trifle or frivolous. The appellants/applicants have raised more than 10 grounds of appeal in their memorandum of appeal and all they need to do is demonstrate at least one arguable point. In our view, one of the arguable points that stands out is whether the court can stop the 1st applicant, an independent commission, from carrying out its constitutional mandate in the absence of any allegations or imputations of impropriety, procedural or otherwise, or any violations of any law on its part. We have not been told what part of its constitutional mandate the 1st applicant has violated, and how; and what Articles of *the Constitution* it has failed to uphold. Clearly, as posited by counsel who are in support of the application, the problem here is not that the applicant is recruiting Judges. The problem appears to be that the President has declined to swear in some of the Judges previously recommended for appointment by the 1st applicant. In counsel's view, that thorny issue is pending determination before this Court, and the same has no bearing whatsoever on the current recruitment exercise of Judges undertaken by the 1st applicant.
28. If indeed the High Court was influenced by that issue in reaching its decision to issue the impugned conservatory orders this would be a clear indication, in our view, that the learned Judge considered extraneous matters that ought not to have considered in arriving at his decision. In such circumstances, this Court is enjoined to interfere with the exercise of discretion by the learned Judge. The process of appointment of Judges is clearly set out in *the Constitution* and the *Judicial Service Act* and whether a court can stop the JSC from exercising this mandate based on extraneous factors, is an issue that commends itself to this Court for determination on appeal. The first limb has therefore been satisfied.
29. What about the nugatory aspect and the public interest involved in this matter? This Court has travelled this route before in a matter that was almost similar to this one in *Tolphin Nafula & 5 others (supra)* where this Court expressed itself as follows:
- “Having regard to the nugatory aspect and the public interest element, we find ourselves confronted by a not too neat picture of things. The High Court issued conservatory orders in the face of a strenuously argued challenge to the jurisdiction. It proceeded to grant conservatory orders of drastic dimensions, but before first disposing of the vital question of its authority ... thus while not at all treating as deminimis the concerns and complaints of the petitioners and while concerned by the fear expressed, but still unproven, that the interview and the interview process might fall capture to forces bent on manipulating the process and bending it towards a predetermined end, we cannot act on dark forebodings alone, less still ignore the jurisdictional bar apparent in the path of the High Court. The rule of law cannot be achieved by breach of law. We are satisfied that all things considered, the public interest and the cause of justice will be best served by grant of the applications. It bears repeating that JSC is a constitutional commission. It is also obvious that completion of the recruitment process per se does not immunize, provide blanket cover or otherwise whitewash any procedural or substantive wrongs and inequities, for the High Court may yet invalidate even a concluded appointment, if such be proved.” [Emphasis ours]
30. From the foregoing, we hold the view that the applicants have successfully demonstrated both arguability and the nugatory aspect, and bolstered this with a demonstration that it is in the public interest that the recruitment process of the much needed Judges proceed uninterrupted pending the hearing and determination of the petition before the High Court. If the appeal herein is unsuccessful or if ultimately the recruitment process is impugned by the final Court with requisite jurisdiction, then as held in the *Tolphin case (supra)*, the situation is reversible. We might also add that the 1st and 5th respondents have failed to demonstrate what prejudice they stand to suffer if the recruitment process



proceeds as intended. We find merit in this application and we allow it with no order as to costs in view of its public interest nature.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY JUNE, 2022.

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

