IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 102 OF 2017

BETWEEN

J.P. MACHIRA T/A

MACHIRA & COMPANY ADVOCATES .....APPELLANT

AND

WACHIRA WARURU.....1ST RESPONDENT

THE STANDARD LIMITED.....2ND RESPONDENT

(Being an appeal from the Judgment/Decree of the High Court of Kenya at Nairobi (J.K. Sergon, J.) delivered on 16th August, 2016

in

H.C.C.C. No. 2002 of 2000)

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JUDGMENT OF THE COURT

1. The main issue in this appeal, in which the appellant, J.P. Machira t/a Machira & Co. Advocates, has challenged the decision of the High Court at Nairobi (***J.K. Sergon, J***.) delivered on 16th August 2016, is whether newspaper reports of judicial proceedings conducted in chambers are privileged under Section 6 of the Defamation Act. In that judgment, the trial court dismissed the appellant's libel suit for defamation against the respondents that had been instituted on 1st December 2000.

2. The appellant's suit arose from three separate but related newspaper articles or reports of judicial proceedings carried in the 2nd respondent's newspaper, "*East African Standard*", published on 26th July 2000, 27th July 2000 and 1st August 2000. The 1st respondent was sued as the editor of the publication while the 2nd respondent was sued as the publisher.

3. It is necessary to reproduce, in extenso, the three articles. The first article which the appellant complained of was published in the newspaper issue of 26th July 2000. It related to court proceedings that had taken place the previous day at the High Court before Lady Justice Joyce Aluoch. Those proceedings were in respect of HCCC No. 113 of 1999 in which the appellant was the plaintiff while one Patrick Kaniaru Muturi was the defendant. That article was titled ***"Mathari inmate's wife in bid to save property"*** and read as follows:

> ***"A mother of four whose husband is confined at Nairobi's Mathari Mental Hospital moved to court yesterday in a bid to save the family's Sh16 million prime property. Mrs. Julian Nyokabi Muturi asked the High Court to block attempts by a prominent city lawyer to buy the property for Sh. 3 million merely by taking advantage of her husband's mental disorder. Duty***

Judge, Lady Justice Joyce Alouch, certified Nyokabi's motion as urgent and directed that it be heard today inter partes. City lawyer Mr. Francis Mutua, representing Nyokabi, moved to Court under certificate of urgency urging the Judge to hear the matter on a priority basis. He said his client and her four children had been forcibly evicted from the property situated at the upmarket Karen area. He said the lawyer in question, Mr. John Patrick Machira, had started demolishing buildings on the property and was about to begin construction work. Mutua said he would be seeking for the reversal of an exparte, (one party) judgment entered in default of appearance on April 14, 1999, and all consequential orders made thereafter. The lawyer further told Justice Aluoch that he will also apply for orders that Nyokabi be declared legal guardian of her sick husband, Mr. Patrick Kaniaru Muturi. She should also be given powers of attorney to appear in court on his behalf and defend the lawsuit until further orders of the court. He said his application is based on grounds that Kaniaru is of unsound mind and never received court summons to enter appearance and defend the suit filed against him by Machira."

4. The second article was a follow up story, published in the same newspaper the following day on 27th July 2000 under the heading ***"Woman is fearing for her life, says lawyer"*** and proceeded thus:

"A MOTHER of four fighting to save a Sh 16 million prime property owned by her mentally sick husband is fearing for her life, the High Court was told yesterday. Mrs. Julian Nyokabi Muturi had to reportedly run for her dear life when agents allegedly acting for a prominent city lawyer chased her away when she went to inspect the family's property situated in Nairobi's upmarket Karen area. And her lawyer, Mr. Francis Mutua Mboya made an application before trial judge, Lady Justice Joyce Alouch, seeking to institute contempt of court proceedings against lawyer John Patrick Machira who has taken possession of the family property. Nyokabi is pleading with the court to save the family's only known property and to block Machira's attempts to acquire it for Sh 3 million merely by taking advantage of her husband's mental disorder. Mutua said Nyokabi had gone to inspect the property in compliance with the court's directive about the status of the property when she was chased away by about 11 guards placed at the premises by Machira. The lawyer said the guards allegedly warned Nyokabi of dire consequences if she dared to venture into the premises. The court heard the premises was bought by Nyokabi's husband Mr. Patrick Kaniaru Muturi, the longest mental inmate at the city's Mathari Mental Hospital."

5. The third article, also in respect of the same court proceedings, was carried in the same newspaper issue of 1st August 2000 and was titled, ***"Demolition of ill man's home stopped by court."*** The lengthy article was as follows:

"THE High Court yesterday stopped further demolition of a Sh 16 million prime property owner by a man confined at Nairobi's Mathari Mental Hospital. City lawyer James K' Owade undertook not to continue with the demolition of the property over which a woman and her four children are waging a legal battle to save it from being taken over by prominent Nairobi lawyer, John P Machira. Mrs. Julian Nyokabi Muturi last week took over the case telling Lady Justice Joyce Aluoch that because of her husband's mental illness, he was not in a position to defend the suit or enter into any agreement to dispose the property or make any sound decisions. Nyokabi, represented by lawyer Francis Mutua Mboya, is pleading with the court to save the family's only known property and to block attempts by Machira to acquire it for Sh 3 million merely by taking advantage of her husband's mental disorder. The property situated at the city's upmarket Karen area was bought in November 1984 by Mr. Patrick Kaniaru Muturi, then an accountant with Kenya Reinsurance Corporation. He has been in and out of Mathari Mental Hospital since 1987. Arguing the application yesterday, Mutua told trial Judge, Justice Richard Kuloba, that Machira knew he was dealing with a man of unsound mind when he purported to enter into a sale agreement with Muturi over the Karen property. He said the law was clear on the matter as it specified that where a man is of unsound mind a party has to apply to court for substitution. The lawyer submitted that the purported sale agreement which Machira exploited to deprive his client of the property was null and void as it involved a party whose mind

was not sound. Mutua accused Machira of professional misconduct by suing a client whose property he purported to act for in court. He described as hollow alleged affidavit of service on Muturi to enter appearance arguing that there was no acknowledgement from the defendant in respect of the service. The lawyer told Justice Kuloba that the proceedings that took place in the High Court in which Machira obtained judgment against Muturi were marred by serious irregularities, misrepresentations and grave concealment of material facts. *"Had the court been put into the full picture, this suit could not have been entertained by the Judge leave alone granting judgment and a decree that Machira obtained through concealment of material facts,"* ***he said. The lawyer argued that***

Machira lodged a suit against Muturi while the lawyer-client relationship was still in force and by April 14, 1999, when judgment was entered in his favour the only money that he (Machira) had paid was Sh 557,250. Mutua said even when Machira went to evict and demolish the premises of Muturi and his family, he had not completed the full purchase price. He said when Machira lodged the suit against his own client he did not inform the court about the conflict of interests which, he said, was a serious breach of legal professional ethics."

6. In his lengthy plaint, the appellant averred that he is a prominent advocate of the High Court of long standing and the articles were defamatory, false, malicious, ill motivated and calculated to injure, discredit and destroy him in his personal and professional image. He prayed for judgment against the respondents jointly and severally for: an order directing the respondents to publish a

full and unqualified apology and make amends; and for general, aggravated and exemplary damages for defamation.

7. In their statement of defence, the respondents denied that the publications were defamatory and raised a three-pronged defence. Firstly, that "*the said words were fair comment made in good faith and without malice upon a matter of public interest in so far as the same concerned the conduct of the* [appellant], *who is a senior advocate and who is a litigant more specifically the plaintiff in High Court Civil Case No. 113 of 1999-Nairobi*."

8. The second prong of the defence was that the words complained of "*were published on occasion of absolute privilege and were part of a fair and accurate report of court proceedings in High Court Civil Case No. 113 of 1999, J. P. Machira vs Peter Muturi Kaniaru*" heard on diverse days before the High Court and relied on Section 6 of the Defamation Act.

9. The third prong was that in as far as the said words consisted of allegations of fact, they were true in substance and in fact.

10. The suit was eventually tried before ***Sergon, J.*** who, in the impugned judgment, found that the publications reported what transpired in court on the material days. Of the first article, the Judge expressed:

> ***"In my humble understanding, I am unable to say that the above words are false and defamatory. I also do not understand how the aforesaid publication could be said to be defamatory to the Plaintiff. A critical examination of the proceedings reveal that the publication can be deduced from what transpired in court."***

11. Regarding the second article, the Judge also found that it was not false and that the respondents *"merely reported the proceedings as it were in the court file albeit by using different words"* and that the publication reported what had been submitted in court. In relation to the third article, the Judge stated that, "*the reporting in my view was accurate*."

12. Before the trial court, the appellant contended (and this is the critical issue on which this appeal rests) that since the proceedings were done in private and in chambers the respondents should not have published the same and do not enjoy privilege under the Defamation Act. In that regard, the appellant had cited an English case of ***Rex vs. Astor (1913) 30 TCR 10***.

13. In rejecting that contention, the Judge stated that a newspaper is not completely barred from reporting such proceedings; that it is allowed to publish in part but not in full; that it cannot be said that the respondents published in full the proceedings in the instant case; and that it is "*inconceivable for one to state that the* [respondents] *are not protected and privileged under the provisions of the Defamation Act*."

14. The trial Judge went on to say that the appellant "*failed to establish to the required standard of proof of actual or intrinsic malice, ill will or spite on the part of the* [respondents]" and dismissed the suit with costs to the respondents. The Judge expressed that had he found for the appellant on liability, he would have awarded him Kshs.5,000,000.00 as damages for defamation.

15.The appellant has challenged that judgment on 25 grounds set out in his memorandum of appeal. In his written submissions on which he relied during the hearing of the appeal, ***Mr. Kimondo Mubea***, learned counsel, compressed the grievances into the complaint that the Judge erred in dismissing the appellant's suit on the ground that the respondents were reporting judicial proceedings and that they were privileged when in fact what the respondents were reporting were private chamber matters which are not privileged or protected under the provisions of the Defamation Act.

16. Counsel submitted that the three publications do not qualify for absolute privilege or any other form of privilege; that the proceedings in respect of which the alleged reports related took place in chambers; and that only court proceedings that take place in open court enjoy the privilege under Section 6 of the Defamation Act. In support, counsel relied on passages from the book **Gatley on Libel and Slander**, 8th edition; a decision of the High Court in ***George Oraro vs. Wangethi Mwangi and Nation Newspaper, HCCC No. 1205 of 1992***; and the English case of ***Rex vs. Astor*** (above), among others.

17. Furthermore, counsel submitted, for the protection under Section 6 of the Defamation Act to be available, it must be shown that the report is fair and accurate; that in this case the three articles were neither fair nor accurate; that on the contrary, the articles were biased, malicious and loaded with the respondents' "*own evil creation, imaginations, ideas and innuendos*"; that a comparison of the record of proceedings in High Court Civil Case No. 113 of 1999 with what the respondents published indicate that the two do not correspond as there are differences and inaccuracies that are highly malicious and defamatory of the appellant.

18. It was submitted that it is clear that in publishing the three articles in succession, the respondents were motivated by malice, spite and grudge against the appellant. Citing the decision of this Court in ***J. P. Machira t/a Machira & Co. Advocates vs. Wangethi Mwangi & another, Civil Appeal No. 179 of 1997***, it was submitted that privilege can be destroyed by malice, whether express or implied; and that malice can be inferred from a deliberate, reckless or even negligent ignoring of facts; that the appellant's side of the story was never reported, including the fact that the appellant's opponent's application was dismissed by the court on 7th November 2002. Having failed to prove that the reports were fair and accurate, counsel urged, the appellant was entitled to succeed in his suit.

19. Counsel complained further that in reaching his decision, the learned trial Judge failed to adequately consider the evidence tendered; that the Judge "*did not give the appellant's evidence any serious consideration*"; that considering that the evidence was not faulted or doubted, *"it was unfair, unjust and bias"* for the Judge to have concluded that the appellant did not establish his case to the required standard; that the

Judge did not consider the appellant's reply to defence; and that the Judge did not consider that the reporting by the respondents was *"partisan and one sided against the appellant."*

20. Counsel also faulted the Judge for awarding costs of the suit to the respondent. It was submitted that the respondents were not entitled to costs as they did not adduce any evidence at the trial.

21. Regarding the suggested award of Kshs.5,000,000.00 had the Judge found in favour of the appellant on liability, counsel submitted that this did not take into account that there were three defamatory articles published. Counsel proposed that an award of Kshs.15,000,000.00 would be appropriate.

22. Opposing the appeal, ***Mr. John Ohaga***, learned counsel for the respondents also relied entirely on written submission. It was submitted that under Section 6 of the Defamation Act, a fair and accurate report of proceedings heard before any court exercising judicial authority in Kenya qualifies for absolute privilege; that the proceedings the subject of the three articles were not proceedings in camera and neither was the public barred from those proceedings.

23. Reference was made to **Gatley on Libel and Slander**, 9th edition at page 283 for the statement that an action for libel does not lie for words written or spoken before any court recognized by law irrespective of whether such proceedings take place in open court or in private, whether they are final or preliminary character or whether they are *ex parte* or *inter partes*.

24. It was urged that the publication of the articles in question arose out of court proceedings; that unlike the circumstances in the case of ***George Oraro vs. Wangethi Mwangi and Nation Newspaper*** (above) the publications in this case related to oral arguments by counsel in open court and do not refer to the contents of pleadings, affidavits or other papers filed in proceedings which had not been brought up in open court; and that the defence of absolute privilege under Section 6 of the Defamation Act was therefore available to the respondents; that it is not necessary that the report should be a verbatim one; a condensed or abridged report is equally privileged provided it gives a correct and just impression of what took place in court.

25. It was submitted that the respondents simply reported the court proceedings, a factual reproduction of those proceedings and the trial Judge was right in holding that the publications reflected what transpired in court.

26. Moreover, it was submitted, in discharge of the respondents duty of fair and balanced reporting, the respondents published a follow up article in the same newspaper on 6th October 2000; in that article the respondents reported that the appellant's advocate had disputed the claims that had been made by the advocate for Mrs. Muturi, the subject of the earlier reports.

27. It was further submitted that the claim that the publication was malicious is not supported by any evidence; that there is no basis for making an inference of malice either; that it was incumbent upon the appellant to prove malice; that contrary to claims by the appellant, the learned Judge considered all the evidence presented and correctly arrived at the conclusion that the appellant had not established his case for defamation to the required standard.

28. On costs, it was submitted for the respondents that the order made for the appellant to meet their costs is consistent with the principle that costs follow the event.

29. As regards damages in the event that the trial Judge would have found in favour of the appellant, it was submitted that the figure of Kshs.5,000,000.00 suggested by the trial Judge is excessive.

30. We have considered the appeal and the submissions. We are mindful of our duty on a first appeal such as this. We are not bound by the findings of the trial court. We are at liberty to draw our own conclusions should our evaluation of the evidence lead us to do so. As stated by the Court in the often-cited decision in ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123***:

> ***"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that***
>
> ***this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."***

31. As indicated earlier, the principal question in this appeal is whether newspaper reports of judicial proceedings conducted in chambers are privileged. Related to that is the question whether the publications complained of by the appellant were a fair and accurate report of court proceedings.

32. Under Section 6 of the Defamation Act, a fair and accurate report in a newspaper of proceedings heard before a court in Kenya is, subject to the proviso thereto, absolutely privileged. Section 6 of the Defamation Act, which is headed, *"Newspaper reports of judicial proceedings"* provides that:

> ***"A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged: Provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter"***

33. It was however contended for the appellant, on the authority of the High Court decision in ***George Oraro vs. Wangethi Mwangi and Nation Newspaper*** (above), that the privilege conferred under that provision does not extend to proceedings of a court in private and in chambers. The judgment of the High Court in that case related to an application to strike out a defence in a libel suit arising from an article that had been published in the defendants' newspaper on 17th March 1992. In its defence, the defendant in that suit, the newspaper, averred that the words that were complained of were contained in an affidavit or pleaded in a defence that had been filed in other suits. The plaintiff however deponed that the words complained of were not found in the affidavit or the defence as alleged by the defendants. It was in that context that ***M. Ole Keiwua, J***. stated:

> ***"The March 17, 1992 article went beyond reporting that Mr. Mbajah filed a defence. At any rate there is not right on a newspaper to report to the public the contents of pleadings filed in court but which have not become the subject matter of open court proceedings. There cannot be any privilege extended to such reports."***

34. In support, the Judge quoted a passage from **Gatley on Libel and Slander**, 8th edition at page 265, para 264 and the case of ***Rex vs. Astor*** (above).

35. With respect, we do not understand the High Court decision, or the passage referred to, to support the proposition advanced by the appellant that privilege does not extend to newspaper reports of judicial proceedings conducted in chambers. We are not persuaded that judicial proceedings in Kenya are necessarily private simply because they have been conducted in chambers. We do not understand the expression *"open court proceedings"* as used therein in a literal sense to mean the physical open court as distinct from a chamber. The rationale behind the common law rule that there is no right on a newspaper to report to the public the contents of pleadings filed in court which have not become the subject of open court proceedings is clearly stated in the same passage, that,

> ***"the reason underlying the common law rule as to qualified privilege make it entirely logical to draw a line between what took place in open court and that which is done out of court by one party alone."***

36. The editors of the 12th edition of **Gatley on Libel and Slander** clarify at para 13.48 that no privilege attaches to the publication in a newspaper of a summons which has been called in court, but upon which no other step of procedure has followed, for if it was otherwise, the editors state, quoting from Lord Deas in ***Richardson vs. Wilson (1879) 7 R. 237***

> ***"a pursuer who has nothing to lose, and cannot be criminally punished, made by raising a summons (which is a mere ex parte writ) and handing it, or causing it to be handed, to the newspapers, ruin irretrievably the character of anyone he chose."***

37. Furthermore, the rule is a common law rule. It cannot override an express statutory provision in our statute. Moreover, although privilege may not attach to a statement that proceedings have been commenced, the defence of justification may be still be available if that statement is accurate.

38. We are therefore unable to agree with counsel for the appellant that the defence of absolute privilege under Section 6 of the Defamation Act is not available where the judicial proceedings are conducted in chambers. We may add that in some of our court stations there is shortage of court rooms which compels judges and magistrates to conduct proceedings in chambers, which otherwise would have been done in open court.

39. That notwithstanding, it was incumbent upon the respondents to prove that reports were fair and accurate. Did the respondents discharge that burden? Although, as pointed out by the appellant, the respondents did not adduce any evidence or call any witness during the trial, the articles complained of as well as a transcript of the court proceedings in respect of which those articles related were produced in evidence by the appellant. As the editors of **Gatley on Libel and Slander**, 12th edition state at page 525 "*the onus of proving that the report is fair and accurate lies on the defendant, but it is sufficient if this clearly appears from the claimant's own evidence*." See ***Kimber vs. Press Association [1893] 1 Q. B. 65*** at 71.

40. We have reproduced the articles in question in this judgment. The article published on 26th July 2000 is a report of what transpired in court before the Duty Judge, Lady Justice Alouch, the previous day in High Court Civil Case No.113 of 1999. The substance of the article, in reference to the appellant, was that a Mrs. Muturi had moved the court to block attempts by *"a prominent city lawyer"*, the appellant, to buy the family's prime property from taking advantage of her husband's mental disorder; that the appellant had started demolition of the buildings on the property; and that Mrs. Muturi's lawyer, Francis Mutua, had indicated that summons to enter appearance in the suit in which the appellant had obtained judgment in default of appearance against Mrs. Muturi's husband had never been received.

41. The question is whether that was a fair and accurate report of what transpired in court the previous day. The transcript of the proceedings of 25th July 2000 before ***Aluoch, J.*** in High Court Civil Case No.113 of 1999 show that Mrs. Muturi's lawyer, Mr. Mutua, appeared before the court when an application by Mrs. Muturi was certified as urgent and scheduled for hearing the following day. In that regard, Mr. Mutua is captured in the transcript of the court proceedings of that day as follows:

> ***"The plaintiff is demolishing properties on the defendant's land. This started subsequently after 18th July 2000. The plaintiff was an advocate for the defendant, since 1994. He was acting for him in respect of the suit HCCC No. 1728 of 1988 and HCCC No. 809 of 1994. These cases are in respect of the same properties i.e. the defendant was having problems with his employer and Machira was representing him. Machira knew or ought to have known that the defendant was of unsound mind. When he purported to have purchased this property, he knew that the plaintiff was of unsound mind, he ought to have sought leave of the court to apply for somebody to represent the defendant. My client through the wife sees ever they have never been served with any document."***

42. Although the newspaper report published on 26th January 2000 was not a verbatim report of what had been said in court the previous day, a comparison of the transcript with the newspaper article leads us to the conclusion that the newspaper article was a faithful report or account of what had taken place in court the previous day. The editors of **Gatley on Libel and Slander**, 12th edition at para 13.38 at page 525 observe that it is not necessary that the report should be verbatim; an abridged or condensed report will be privileged, provided it gives a correct and just impression of what took place in court.

43. The article published on 27th July 2000 was a follow up of the same story and linked the court proceedings of 26th July 2000 to those of the previous day. It reported that the court was told that Mrs. Muturi feared for her life after she was chased from the property by agents allegedly acting for the appellant; that her lawyer had made an application to institute contempt proceedings against the appellant who had taken over the property; that Mrs. Muturi was pleading with the court to save her property and block the appellant from acquiring it by taking advantage of her husband's mental disorder.

44. The transcript of the proceedings before the court on 26th July 2000 record the lawyer for Mrs. Muturi as having represented to the court that,

> ***"As we sit here, one of the buildings has been completely demolished, this was a timber building of four rooms with concrete foundation. The second building is a permanent stone building serving as the matrimonial home. All the doors were removed plus all the windows. Secondly, the plaintiff has posted eleven security guards at the entrance and my client cannot go in."***

45. The last article complained of is the one published on 1st August 2000 and reported that the court had stopped further demolition of the property. It summarized the arguments that had been presented the previous day, 31st July 2000, before ***Kuloba, J.*** by Mr. Mutua, the lawyer for Mrs. Muturi. The transcript of the proceedings of that before ***Kuloba, J.*** were also produced and capture the extensive submissions by Mr. Mutua on behalf of his client Mrs. Muturi.

46. We have carefully compared the contents of the two articles with the transcripts of the court proceedings to which they relate and are satisfied that they are, substantially, an accurate account of the submissions or arguments made by Mr. Mutua on behalf of Mrs. Muturi. It is noteworthy that after Mr. Mutua concluded his arguments before Justice Kuloba on 31st July 2000, the matter was adjourned to a future date, 20th September 2000, in order for the lawyer for the appellant to reply and the court then directed that *"no more demolitions till that date."*

47. There was indeed a follow up report in the same newspaper published after the appellant's lawyer had presented the appellant's case and in which the appellant's counter arguments to the claims made by Mrs. Muturi were reported.

48. Based on the foregoing we are fully in agreement with the conclusion reached by the trial judge that what was reported is actually what was submitted in court and that the appellant had failed to establish his case to the required standard.

49. Consequently, on our evaluation of the evidence, we find that the articles published by the respondents on the three occasions were fair and accurate reports of the court proceedings to which they related and that the defence of privilege under Section 6 of the Defamation Act applied notwithstanding that the proceedings were conducted in chambers.

50. As regards the award of costs to the respondents, there is no doubt that the respondents defended the suit notwithstanding that they did no call any witnesses. The order on costs is consistent with the general principle that costs follow the event and it has not been demonstrated that the court wrongly exercised its discretion in awarding the costs to the respondents.

51. The result of the foregoing is that the appeal fails. It is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR