IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 289 OF 2019

BETWEEN

NAIROBI WOMEN HOSPITAL..APPELLANT

AND

PURITY KEMUNTO MAKORI...RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.) delivered on 16th May 2018

in

Nai. High Court Civil Case No. 186 of 2009)

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JUDGMENT OF THE COURT

1. Nairobi Women Hospital, the appellant, has challenged the judgment of the High Court (***Mbogholi-Msagha, J.***) delivered on 16th May 2018 awarding the respondent, Purity Kemunto Makori, general and special damages of Kshs.54,712,078.00 as compensation for medical negligence.

2. The evidence on record shows that the respondent, then an expectant mother, was booked and admitted at Nairobi Women Hospital (the Hospital) on 27th May 2007 on self request for induction of labour at 40 weeks gestation. Prior to her admission, she had been attending ante-natal clinics at the Hospital since February 2007. Evidence was led that she was admitted to the Labour Ward of the Hospital and "*all findings were normal, she was well and the baby was not in distress*."

3. However, according to Professor Kiama Wangai, whose medical report was tendered in evidence before the trial court, the respondent and her baby were poorly monitored; the last observations were done on 29th May 2007 at 10.00 a.m.; the respondent laboured alone for three hours; that it was noted at 1.00 p.m. that her labour was not progressing and there were signs of obstructed labour; that no doctor reviewed her until 2.10 p.m. when foetal distress or severe obstruction of labour was diagnosed; that she was then taken to theatre at 3.00 p.m. and a caesarian section conducted, and that it was noted, among other things, that the fetus was in severe distress-severe asphyxia.

4. As a consequence, the respondent's newborn child, AJ, was born with spastic cerebral palsy condition and had to be transferred to Aga Khan University Hospital in critical condition where he was admitted in the High Dependency Unit and later into the Intensive Care Unit. AJ remained in hospital until on 22nd June 2007 when he was discharged and referred to an occupational therapist.

5. The lifelong effects of AJ's condition are that his upper and lower limbs are stiff with no voluntary movement; he has speech and communication difficulties; he has problems with mobility as he cannot stand, sit or crawl independently; and has poor neuro motor control. According to Professor Wangai, had labour been monitored, the caesarian section would have been done well before 1.00 p.m. and the baby would have been born healthy.

6. In their suit, the respondent and Geoffrey Somoni Birundu, the parents of AJ, claiming on behalf of the respondent and on behalf of the minor averred, among other things, that the Hospital was negligent in that it failed to exercise reasonable care, skill and diligence in the manner in which its staff handled the respondent's labour; that the appellant and its staff failed to properly attend to the respondent during labour leaving her alone in the delivery room without anyone to attend to her; failing to avail a doctor on time; and failing to observe, heed or adhere to established medical and gynecological practice.

7. In addition to the claim for general damages, medical expenses of Kshs.631,198.00, AJ's parents prayed, in their amended plaint for future medical expenses particularized as follows:

"*i) Speech, Occupation and Physiotherapy*

These are the mainstay of his rehabilitation and maintenance of his body and mind. He will require six (6) sessions per week at a cost of Kshs.1,500/- per session = Kshs.9,000/- weekly per year it will cost Kshs.468,000/-.

ii) Schooling

He will only learn in a special school. Circles Academy costs Kshs.60,000/- per semester.

For 3 semesters it will cost Kshs.180,000/- per year.

iii) Personal hygiene

He will require diapers and sanitary equipment @ Kshs.6,000/- per month = Kshs.72,000/-.

iv) Medical consultations

He will require 2 monthly visits to the doctor's @Kshs.3,500/- per visit = Kshs.84,000/- per year.

v) Medications

He is on daily medications. The 4 medicines he takes daily phenobarb, tegretol, 2 Edical etc costs Kshs.20,000/- per month = 240,000/- per year.

vi) Care giver

He requires someone to take care of his daily needs @ Kshs.15,000/- per month = Kshs.180,000/-.

His total financial outlay is Kshs.1,188,000/- per year (Kenya Shillings One million one hundred eighty eight thousand)"

8. In its statement of defence, the Hospital acknowledged that the respondent made ante-natal visits to the Hospital prior to the birth of AJ; that the respondent was admitted to the Hospital on 27th May 2007 at approximately 40 weeks into her pregnancy on self-request for induction of labour reason being that she was due to sit her examinations on 4th June 2007; that after examination, the respondent was given appropriate details with regard to her diagnosis, treatment and probable outcomes prior to her admission and commencement of the induction and that the time to induce labour depended on several factors including how her body responded to the treatment she received.

9. The Hospital denied that it, or its staff, was negligent and asserted that the respondent was afforded sufficient medical attention and her labour was properly monitored; that while being constantly monitored by hospital staff, steps were taken to minimize the risk of fetal distress through intravenous therapy and upon her review less than one hour after augmenting the labour contractions, there was no progress and upon diagnosing signs of fetal distress an emergency Caesarian section was carried out immediately. The Hospital admitted that soon thereafter the child was referred and transferred to Aga Khan University Hospital for specialized critical care.

10. During the trial, AJ appeared before the court which had occasion to observe him. AJ's caretaker, Everlyne Nyabate Onyiego (PW2) testified that she has looked after AJ since he was 5 years old; that AJ could not sit, eat or toilet on his own and has to be assisted to do everything; that from the time AJ wakes up, she has to assist him with diapers, bathing, brushing his teeth, clothing him and feeding him as well as administering his medicine, accompanying him to school where she supports him to sit, that while he is 100% dependent, she does everything to keep him comfortable. She stated that she earned a salary of Kshs.15,000.00 per month

11. Godwin Okunga (PW3), a driver, testified that he was engaged by the respondent as AJ's driver to ferry him back and forth from school and to assist the caregiver in looking after AJ. He stated that he earned a salary of Kshs.15,000.00 p.m..

12. The respondent, AJ's mother, testified as PW4 and narrated that at the time of trial, AJ was 7 years old and was attending Circles Academy, a special school, where in addition to being taught life skills, AJ also receives physio and occupational therapy; that on account of AJ's condition, his medical expenses and needs for which she has to financially cater include special schooling at Circles Academy, his speech, occupation and physiotherapy, his personal hygiene in the form of diapers and sanitary equipment, medication and medical consultations, provision of a wheel chair and other adaptive equipment, and provision for a caregiver and a driver all of which costed her Kshs.1,368,000.00 per year.

13. On 21st July 2015, prior to the respondent completing her testimony before the trial court, the parties recorded a consent order by which judgment was entered against the appellant on liability at 90%. The parties then agreed to have the matter mentioned on a future date "*to record consent on quantum or in the absence of such consent a hearing date to be taken for assessment of damages*."

14. On 21st October 2015 a further consent order was recorded before the Judge by which the Medical reports compiled by Professor Wangai, Dr. Washington Wokabi and Professor Erastus Amaya in respect of AJ's medical condition and prognosis were produced by

consent thereby dispensing with calling those doctors to attend court and thereafter the matter adjourned for further hearing.

15. By an application dated 11th April 2016 presented to court on 12th April 2016, the appellant applied for an order to set aside the consent judgment on liability that was recorded on 21st October 2015 on the ground that that consent was entered into without its knowledge. The respondent opposed the application. After considering the same and submissions made in respect therefore, the learned Judge dismissed it in a considered ruling delivered on 9th June 2016. Thereafter the hearing resumed, the respondent completed her testimony, was cross examined at length after which the respondent's (plaintiff's) case was closed.

16. The Hospital called two witnesses to testify. Dr. Mwihurih Githinji a doctor and chief of clinical services at the Hospital stated that; to the best of his understanding, there was no negligence in monitoring the respondent during the length of her labour; the Medical Practitioners Board did not find the Hospital negligent following a complaint by the respondent. Commenting on the medical report done by Professor Erastus Amayo, he stated that there was no indication regarding when the diagnosis of cerebral palsy was made and that it is impossible to make a retrospective opinion on cerebral palsy, almost 8 years after the child's birth; and that to the best of his knowledge, studies done state that there is no relationship between birth asphyxia and cerebral palsy.

17. Dr. Peter Igogo also testified for the appellant and maintained the respondent was accorded the best service in terms of clinical practice and the Hospital was not negligent in handling her; that her labour was properly monitored and that she was taken to theatre for caesarian section when labour did not progress well; that after delivery the child was diagnosed with cerebral palsy, a condition which can occur before or during or after delivery and that asphyxia and can arise as a result of the brain being deprived of oxygen. He maintained that in this case asphyxia was not as a result of the management of the patient by the Hospital.

18. After reviewing and evaluating the evidence, the learned Judge concluded that the Hospital was negligent. The Judge stated:

> ***"It bears repeating that when one surrenders himself or herself into the hands they believed to have the relevant facilities, expertise, knowledge and experience to undertake the expected services, their legitimate expectation should be met. Nothing short of this should be expected of any facility that opens its doors to offer such services at a fee. In the instant case the legitimate expectation of the plaintiffs was not met. Negligence was therefore established against both the 1st and 2nd defendants."***

19. The Judge went on to state, rightly in our view, that in light of the consent judgment on liability entered into by the parties, "*the defence advanced by defendants' witnesses is discounted*." The Judge proceeded to assess and award damages in the sum of Kshs.54, 712,078.00 made up as follows:

a) General damages for the 1st plaintiff Kshs.800,000/=

b) General damages for the minor Kshs.8,000,000/=

c) Cost of speech, occupation and Physiotherapy Kshs.18,720,000/=

d) Cost of schooling Kshs.6,000,000/-

e) Cost of personal hygiene Kshs.2,880,000/=

f) Cost of medical consultations Kshs.3,360,000/=

g) Cost of medications Kshs.9,600,000/=

h) Care giver Kshs.7,200,000/=

i) Adaptive equipment Kshs.3,600,000/=

j) Special Damages Kshs.631,198/=

Total Kshs.60,791,198/=

Less 10% Kshs.6,079,120/=

Total Kshs.54,712,078/=

20. In its memorandum of appeal before this Court, the appellant has complained that the Judge erred by awarding damages that are excessively high in the circumstances; that the judge ignored that the ordinary cost and duty to bring up a child lay with a parent; that the Judge wrongly allowed amendment of the respondent's pleadings after submissions had been filed hence the inflated award of damages; and

that the Judge erred by failing to hear and determine the appellant's application to join its insurer, ICEA Lion, in the suit and wrongly proceeded to deliver judgment when that application was pending.

21. During the virtual hearing of the appeal, ***Mr. Ngira*** learned counsel, appeared for the appellant. While abandoning the complaint in the memorandum of appeal that the award of damages was excessively high, counsel faulted the Judge for failing to take into account that AJ's parents have a duty, an ordinary parental duty, to cater for his school fees, food, clothing and medication under Article 53(1)(e) of the Constitution of Kenya, and Sections 6, 7(1) and 9 of the Children Act. Counsel submitted that the rationale behind a claim for damages is to put the injured party who has been injured or who has suffered, in the same position as he would have been had he not sustained the wrong. In that regard, the case of ***Akhs t/a Akuh vs. AAA [2019] eKLR*** was cited.

22. It was submitted that the Judge wrongly exercised his discretion in allowing an amendment to the pleadings after all submissions had been filed; that the respondent filed an application dated 23rd January 2017 to amend the plaint to specifically introduce the cost of future medical expenses after both parties had closed their respective cases and after the appellant had already filed its submissions and that the appellant was denied an opportunity to rebut the same. It was submitted on the strength of the case of ***Tracom Limited & another vs. Hassan Mohamed Adan [2009] eKLR*** that future medical expenses is a special claim though within general damages and the same needs to be specifically pleaded and proved before the court can award the same.

23. It was also submitted that the Judge erred in failing to hear and determine the appellant's pending application for joinder of its insurer in the suit; that the appellant filed an application dated 12th March 2018 before the court seeking leave to join its insurer, ICEA Lion Insurance Company Limited, as an interested party in the suit and for that company to be directed to shoulder any liability that may arise over and above the policy limit; that despite directions having been given with regard to that application, the Judge went ahead to deliver the impugned judgment on 16th May 2018 while the application was still pending. According to counsel, the issue of liability between the appellant and its insurer should have been determined in the same suit to save time and costs having due regard to the overriding objectives under Sections 1A and 1B the Civil Procedure Act.

24. In the appellant's written submissions before us, counsel brought it to the attention of the Court that "*the application is scheduled for mention to take a ruling date on 9th October 2019*."

25. Opposing the appeal, learned counsel for the respondent ***Mr. Kelvin Mogeni*** submitted that the medical reports compiled on behalf of the respondent by Dr. Washington Wokabi and Prof. Kiama Wangai were tendered into evidence in support of the claim for damages by consent; that in the medical report by Dr. Wokabi dated 3rd September 2014, the special medical needs of AJ that entailed speech, occupation and physiotherapy, special schooling, provision of diapers and sanitary equipment, medical consultations, medication, and a care giver were fully itemized and individually costed and that the total cost amounted to Kshs.1,118,000.00 per year; that Prof. Erastus Amayo who was called as a witness by the appellant supported the respondent's evidence regarding the condition of the minor; that the appellant did not, as the Judge correctly noted, controvert the workings and figures by Dr. Wokabi.

26. According to counsel, there is no merit in the contention by the appellant that the Judge failed to consider that AJ's parents had a duty, in any event, to raise and provide for him in spite of his condition. Counsel submitted that the apportionment of liability between the Hospital and the respondent in the ratio of 90:10 factored that consideration.

27. As regards the complaint that the Judge erred in allowing the respondent's application for amendment of the plaint, it was submitted that this complaint is baseless; that although the hearing date for the application for amendment was fixed by consent for the 4th May 2017, the appellant did not oppose; that no appeal was preferred by the appellant against the decision allowing the amendment and the present complaint in that regard is accordingly misplaced.

28. Regarding the complaint that the Judge erred in failing to consider the pending application for joinder of the appellant's insurer as an interested party, it was submitted that the appellant did not include its insurer as a party in this appeal and the issues relating to it cannot be canvassed without according it an opportunity to be heard; that in any event, that application has since been heard and determined; and that the contractual relationship between the appellant and its insurer cannot be tied with the claim between the respondent and the appellant arising from the appellant's negligence.

29. We have considered the appeal and submissions. On a first appeal such as this, we are required to review and evaluate the evidence and draw our own conclusions. See ***Selle vs. Association of Motorboat Co. of Kenya & others [1968] EA 123***: We would be hesitant to interfere the decision of the trial Judge on findings of facts and would only do so if, first, it appears that the Judge failed to take into account particular circumstances or probabilities material for the evaluation of the evidence, or secondly, that the Judge's impression based on the demeanour of a material witness was inconsistent with the evidence in the case generally; or thirdly, the finding is based on no evidence, or the Judge is shown demonstrably to have acted on wrong principle(s). Bearing that in mind, three issues arise for determination. The first is whether, in awarding the damages that he did, the Judge erred in failing to consider the ordinary parental responsibility to provide for the minor. Secondly, whether the Judge erred in allowing the amendment of the plaint. And third, whether the Judge erred in failing to hear and determine the appellant's application for the joinder of the appellant's insurer before delivery of the impugned judgment.

30. Consideration of those issues entail an examination as to whether the Judge exercised his discretion properly. In ***United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd (1985) EA 898*** Madan, JA had this to say:

> ***"The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

31. We also bear in mind, as already stated, that judgment on liability was entered by consent of the parties on 21st July 2015 whereby it was agreed that the appellant would shoulder 90% liability while the parents would shoulder 10%. As noted, a subsequent application by the appellant to set aside that consent judgment was dismissed by the High Court in a ruling delivered on 9th June 2016. Consequently, we cannot address the question whether the Hospital was negligent as urged by the appellant.

32. We start with the question whether the Judge failed to consider the ordinary parental responsibility to provide for the minor in assessing damages. We are in effect urged by the appellant to interfere with the award of damages even though the complaint that the Judge erred in *awarding damages that are excessively high in the circumstances*, was abandoned. In ***Karanja vs. Inter Continental Hotel & another [1987] eKLR*** F.K. Apaloo, JA stated that:

> ***"…it is necessary to bear in mind the normally accepted grounds on which Court of Appeal may interfere with the assessment of damages. The locus classicus is the statement of Green LJ in Flint v Lovell [1935] KB 354 CA. It is:-***
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> ***"The court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount on damages, it will generally be necessary that the court should be convinced that either the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small, as to make it in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

33. Did the learned Judge, in the instant case, proceed on wrong principle or misapprehend the evidence? AJ appeared before the trial court and the Judge was able to observe his condition. The respondent, AJ's mother, testified on the circumstances in which her child is living on account of his condition. She stated that AJ was confined to a wheelchair; is 100% dependent on others; cannot chew food; has no speech; has no head control; has to be assisted in every aspect of his life including feeding, clothing, toileting and movement. She stated that on account of his condition, AJ requires a full-time caregiver to cater for him..

34. The respondent testified further that on account of his condition, AJ cannot attend regular school and attends a special school, Circle Academy; that she had to employ a driver who drives AJ back and forth from school and who accompanies and assists the caregiver in looking after AJ. The respondent gave testimony on the costs involved in providing for AJ's special needs. In her witness statement dated 1st September 2014, the respondent provided an itemized breakdown of the costs involved ranging from speech, occupation and physiotherapy, special schooling, provision of diapers and sanitary equipment relating to AJ's personal hygiene, medical consultations and medication, care giver and driver costs as well as cost of adaptive equipment.

35. In cross examination, the respondent's testimony regarding the special care and cost relative to providing for the special needs of AJ was not challenged. The evidence of PW2 and PW3, the child's caregiver and driver respectively supported the evidence of AJ's mother with regard to the care they provide and the remuneration they receive from the respondent.

36. As already stated, medical reports by Dr. Washington Wokabi, Professor Wangai and Prof. Erastus Amaya were produced before the trial court by consent and attendance of the respective makers dispensed with. In the medical report of Dr. Wokabi in particular, the costs attendant to the special needs of AJ on account his condition was fully set out and itemized in detail. As the learned Judge observed, the contents of Dr. Wokabi's report were not controverted and the appellants did not "present alternative assessments." The Judge went on to state, correctly in our view that, "*these are expenses presented by an expert. I have no reason to discount them*."

37. We reiterate that the circumstances in which this Court can interfere with an award of damages is circumscribed. In ***Ken Odondi & 2 other vs. James Okoth Omburah t/a Okoth Omburah & Company Advocates [2013] eKLR*** the Court restated the above stated principle as also expressed in ***Butt vs. Khan [1981] KLR 349*** that in order to interfere with an award of damages, the Court must be persuaded that the trial Judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of damages to which the claimant is entitled. As per Law, JA in the latter case:

> ***"... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate.It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."***

38. In light of the evidence presented before the trial court, we are unable to conclude as urged by the appellant that the learned Judge either proceeded on wrong principle or misapprehended the evidence in making the award that he did. It was demonstrated in evidence that AJ's needs were special needs on account of his condition attributed to the appellant's negligence. Furthermore, and as already indicated, liability was apportioned by consent as between the Hospital and respondent and the Judge reduced the award he would otherwise have made by 10% representing the parents portion of liability. There is accordingly no merit in the complaint that the Judge erred in failing to consider the ordinary parental responsibility to provide for the minor, or in the assessment of damages.

39. We turn to the complaint that the Judge erred in allowing amendment to the plaint. Amendment of pleadings involve exercise of discretionary power by the court. Again, the circumstances in which we can interfere with exercise of judicial discretion by a judge are limited. See ***Mbogo vs. Shah [1968] E.A. 93*** for the holding that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice).

40. As a general rule, amendments are freely allowed. In the case of ***Elijah Kipn'geno Arap Bii vs. Kenya Commercial Bank Limited [2013] eKLR*** this Court cited the case of ***Joseph Ochieng & 2 Others vs First National Bank of Chicago, Civil Appeal No. 149 of 1991*** where the Court stated that:

> ***"… powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts."***

41. In the plaint as originally filed, the respondent prayed for general and special damages. In her witness statement, she set out, particularized and quantified the specific heads of claims in respect of AJ's special needs.

That witness statement was filed and served on the advocates for the appellant as early as September 2014, well before the commencement of the trial. As already noted, the medical report by Dr. Wokabi also set out in detail the special needs of AJ and also quantified the same. The subsequent amendment of the plaint did not entail more than a reproduction of the figures already contained in the respondent's witness statement and in Dr. Wokabi's report. We can see no prejudice to the appellant that would have been caused by the amendments.

42. Furthermore, and as pointed out by counsel for the respondent, the appellant did not oppose the application for amendment of the plaint. Even though the date for hearing of that application was taken by consent, the appellant's counsel did not attend court on 4th May 2017 when it was heard and granted by the Registrar. In the circumstances, we find no merit in the appellant's complaint that the court erred in allowing the amendment to the plaint.

43. The last issue is whether the Judge erred in failing to hear and determine the application for joinder of the appellant's insurer to the suit. The record shows that that application, dated 12th March 2018, was filed on the same date under certificate of urgency. That was well after counsel for both parties had appeared before the trial Judge on 25th January 2018 and confirmed that both parties had filed their respective written closing submissions on the substantive suit and judgment had been reserved for 25th April 2018. Subsequently counsel for the appellant indicated that the intended interested party had been served and had in turn filed and served a replying affidavit. Counsel for the appellant is captured in the record of the lower court as having indicated that "*this matter* [meaning the application for joinder of the insurer] *does not concern the plaintiff*", meaning it did not concern the respondent herein. Moreover, it was indicated during the hearing of this appeal that a ruling in respect of that application was subsequently delivered. That ruling is not before us and neither is it the subject of the present appeal. Accordingly, it would be in appropriate for this Court to address issues touching on that ruling.

44. All in all, we find no merit in this appeal. It is accordingly dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of November, 2020.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR