IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 300 OF 2016

BETWEEN

AFRICA CENTRE FOR OPEN GOVERNANCE.....1ST APPELLANT

PETER GASTROW.....2ND APPELLANT

AND

JOHN HARUN MWAU.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi

(Mumbi Njugi, J.) dated 31st July 2014

in

Const. Pet. No. 233 of 2011)

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JUDGMENT OF THE COURT

This is a rather unusual appeal, the type that does not normally get to this Court. On 26th June 2014, the High Court at Nairobi ***(Mumbi Ngugi, J.)***, ren-dered a judgment in which it dismissed a petition by the ***1st respondent, John Harun Mwau, (Mr. Mwau),*** against four respondents, namely, ***Mr. Peter Gas-trow (Mr. Gastrow), the African Centre for Open Governance (Africog), the Attorney General (AG)*** and ***the Director of Public Prosecutions (DPP)***. One week after the judgment, Mr. Mwau took out a motion on notice under certificate of agency seeking a declaration that the judgment delivered on 26th June 2014 was null and void on account of bias on the part of the learned judge, which bias he claimed to have learned of only after the delivery of the judgment.

The motion was placed before the learned judge for mention on 31st July 2014. In a short ruling, the learned judge stated that the allegations by Mr. Mwau were erroneous, unfortunate and untrue. However she vacated all the proceed-ings in the petition, including the judgment, as she stated, for the interest of justice. The learned judge directed the petition to be placed before the Presiding Judge to appoint another judge to hear the petition *de novo*.

Now it was the turn of Africog and Mr. Gastrow to be aggrieved. After lodg-ing a notice of appeal on 5th August 2014, they filed the present appeal chal-lenging the order vacating the judgment and for *de novo* hearing of the petition on two main grounds, namely, that when she vacated the judgment, the learned judge was *functus officio* and no longer had jurisdiction in the matter and that their right to natural justice, in particular the right to be heard before the judge-ment was vacated, was violated. While the DPP supports the appeal, Mr. Mwau and the AG oppose the same.

It is important to set out briefly the background to the appeal for complete-ness and proper context. At all material times, Mr. Gastrow was a Senior Fellow and the Director of Programs at the ***International Peace Institute***, an inde-pendent international not-for-profit think tank that specializes in global security issues and trends. In 2011, Mr. Gastrow authored a report entitled ***"Termites at Work: A Report on Transnational Organized Crime and State Erosion in Kenya"*** containing research findings on transnational organized crime in Kenya. The

report was launched in Nairobi on 4th October 2011 at an event facilitated and co-hosted by the International Peace Institute and Africog.

On 3rd November 2011, Mr. Mwau, then the Member of Parliament for ***Kilome Constituency***, filed a petition in the High Court in which he averred that the report had defamed him and disparaged and violated his constitutionally guaranteed right to dignity and integrity by untruthfully claiming that he was involved in drug trafficking, money laundering, gun running, smuggling, racketeering, and tax evasion. He therefore prayed for a host of remedies including a permanent injunction to restrain Africog, Mr Gastrow, the AG and the DPP from further publishing material injurious to his integrity and dignity or invading his privacy, a declaration that he was entitled to have the misleading information about him corrected, an order compelling the author of the report to delete all references to him, and a declaration that he was not involved in any of the criminal activities cited in the report.

Opposing the petition, Mr. Gastrow contended that the petition did not disclose any violation of Mr. Mwau's constitutional rights and freedoms and that the report was a legitimate exercise of freedom of expression. He denied that the report was defamatory of Mr. Mwau and added that it was not intended to single him out or any other specific individual but was an academic, professional and policy research which was factually correct and based on information that was readily available in the public domain.

On its part Africog also opposed the petition, maintaining that it was not involved in the preparation of the report, and that its involvement was limited only to facilitating the launch. It also contended that the report was intended to realize the constitutionally underpinned right of access to information. Lastly Africog contended that as a Member of Parliament and a State Officer, Mr. Mwau could not rely on the right to privacy to shield himself from public scrutiny.

The Attorney General took two diametrically opposed positions on the pe-tition. By grounds of objection dated 13th December 2011, he urged dismissal of the petition, contending that it did not disclose violation of Mr. Mwau's rights and fundamental freedoms and that the publication of the report was constitu-tionally protected freedom of expression. But in a subsequent replying affidavit on 4th March 2014, the Attorney General supported the petition, claiming that Mr. Gastrow's report had no merit because police investigations had debunked allegations of drug trafficking and organized transnational crimes in Kenya.

The learned judge heard the petition and held that Mr. Mwau had not es-tablished violation of his constitutional right to human dignity, privacy, fair ad-ministrative action and as an old member of society. The learned judge found further that the bulk of Mr. Mwau's claim sounded in damages for libel rather than as a claim for violation of constitutional rights. Accordingly she dismissed the petition, but made no orders on costs.

In his subsequent motion to vacate the judgment, Mr. Mwau claimed that three days after the judgment, he had obtained information that the learned judge ran a blog called *"Kenyan Jurist"* in which she had expressed opinions on the issues raised in the petition. He according prayed for remedies worded as follows:

> *i. a declaration that the Hon. lady Justice Mumbi Ngugi at the time she accepted to hear Petition No. 233A of 2011 and during the proceedings already had prior knowledge of the subject matter of the petition, she had previously taken personal interest of the matter and had written about it widely, negatively against the petitioner over the internet and her opinion on the matter was so deeply rooted to the extent that she would not have been able to arrive at any other judgment other than the preconceived opinion about the petitioner;*
>
> *ii. a declaration…that the judgment made by this honorable court on 26th day of June 2014 in Petition No. 233A is null and void and or invalid;*
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> *iii. the said invalid judgment…be recalled and canceled and vacated forthwith;*
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> *iv. alternatively the said judgment in Petition No. 233A be rescinded."*

In the affidavit in support of the application, Mr. Mwau deposed that the learned judge operated a blog called *"Kenyan Jurists…the musings of a Kenyan advocate practicing in the courts of Kenya" o*n which articles were written and his photos posted, vilifying and condemning him as early as 2nd June 2011, long before he had filed his petition. Those articles, he claimed were hyperlinked to, among others, the US White House, the US Department of Justice and to the US Secretary of State so as to cause him maximum harm. To the affidavit were an-nexed copies of pages from the blog, among them one headed *"Harun Mwau, drugs, kingpins and the US war (on) drugs."* He deposed further that the learned judge was the blogger known as *Kenyan Jurist* because upon her appointment as a judge of the High Court, she carried on the blog an item on her appointment and wished her followers *"adieu"*, stating that she would not be able to continue the blog in her new office. On that account Mr. Mwau averred that the learned judge was biased against him, was a judge in her own cause, and should have recused herself from his petition. In his view, the judgment by the learned judge was therefore vitiated, null and void and should be set aside.

In a supplementary filed on 21st July 2014, Mr. Mwau claimed that after he filed his motion, the *"Kenyan Jurist"* blog was pulled down from the internet.

From the record, it appears that none of the respondents to this appeal had responded to the application to vacate the judgment before the learned judge made the decision the subject of this appeal. The record shows that on 30th July 2014 the application was placed before the learned judge when she directed the same to be served for ***mention*** on 31st July 2014. On 31st July 2014, all counsel for the parties appeared before the learned judge. Mr. Mwau's counsel informed the learned judge that his client felt that it was necessary for the matter to come before the court. Mr. Gastrow's and Africog's counsel stated that they would leave it to the court to give directions but should a substantive hearing of the applica-tion be required, they would need time to obtain instructions from their clients.

The AG stated that the matter required investigations as to the author of the blog and that he was ready to take directions. As for the DPP, his position was that he had not yet been served with the application and was ready to file a response once directions were given.

On the basis of the above proceedings, the learned judge delivered a short order, which we produce *verbatim*:

> *"Having read the application by the petitioner dated 3rd July 2014 and the affidavits in support, I take the following view of the matter. The peti-tioner has made allegations against the court that are based on error, are unfortunate and untrue. The court has no interest in this matter, and has never at any point made any comments, adverse or otherwise regarding the petitioner. The application before it now require(s) that it descend into the arena and engage in a fray that it has no interest in. It dealt with this matter conscientiously as a judicial officer. However, in the interests of justice, it is the court's view that it should no longer be involved in the matter to avoid placing the court and the administration of justice in disre-pute. Consequently, all the proceedings before this court, including the judgment of the court dated 26th June 2014 are hereby vacated. Let the matter be placed before the Presiding Judge, Constitutional and Human Rights division, with a view to the appointment of another judge de novo, on 6/8/2014."*

That is what aggrieved Africog and Mr. Gastrow, leading to this appeal.

Prosecuting the appeal, their learned counsel, ***Mr. Nderitu*** submitted that on the date that the learned judge vacated the judgment and directed *de novo* hearing of the petition, she was *functus officio*, her jurisdiction having been spent and exhausted upon pronouncement of the judgment. He relied on, among others, the ruling of the High Court in ***Muiri Coffee Estate Ltd v. Kenya Commercial Bank & 3 Others [2014] eKLR,*** the judgment of this Court in ***Telkom Kenya Ltd v. John Ochanda [2014]eKLR,*** and the decision of the Supreme Court of Canada in ***Chandler v. Alberta Association fo Architects [1989] 2 SCR 848*** and submitted that the doctrine of *functus officio* is founded on the principle of finality in litigation and prevents a judge who has rendered a decision from re-voking or varying it, save for correction of clerical or arithmetic errors. He added that the remedy available to a party aggrieved by a final judgment is to appeal to a higher court.

On the violation of the rules of natural justice, counsel contended that the learned judge had denied Africog and Mr. Gastrow the opportunity to file a re-sponse to Mr. Mwau's application and to be heard before the judgment was va-cated. He urged us to find that his clients' right to a fair hearing guaranteed by ***Article 50*** of the Constitution was violated. Counsel concluded by submitting that the learned judge erred by taking away his clients' judgment without affording them an opportunity to be heard and that the *de novo* hearing that the learned judge ordered was in violation of the *res judicata* rule, exposed his clients to double jeopardy, and was therefore prejudicial and injurious to them.

Turning to the respondents, we heard ***Mr. Obiri,*** learned counsel for the DPP, first because he was in support of the appeal. While conceding that the learned judge had jurisdiction to review the judgment under ***Section 80*** of the Civil Procedure Act, counsel submitted that she exceeded her jurisdiction by nullifying the judgment because review does not entitle the court to set aside the judgment in total. In his view, the review jurisdiction of the High Court is limited to correction of errors or to enable expression of the intention of the court and not to enable the court to nullify a judgment which has been pronounced. He relied on the decision of the Supreme Court in ***Menginya Salim Murgian v. Kenya Revenue Authority [2014] eKLR*** and submitted that after passing judg-ment, a court becomes *functus officio* and cannot revisit the merits of the judg-ment. In his view, the option that was open to Mwau was to appeal the learned judge's judgment in this Court. It was also counsel's further contention that the inherent powers of the court under section 2A of the Civil Procedure Code could not be invoked to nullify a judgment.

On the right to be heard, counsel submitted that the learned judge nulli-fied the judgment without affording the parties a proper opportunity to be heard on merit. He emphasized that on 31st July 2014 when the learned judge rendered the impugned decision, Mr. Mwau's application was listed only for directions. He accordingly urged us to allow the appeal for the above reasons.

Mr. Ouma, learned counsel for Mr. Mwau opposed the appeal and urged us to dismiss the same. He submitted that the decision by the learned judge to recuse herself and vacate the proceedings and judgment was made in exercise of discretion her judicial discretion, which we cannot interfere with. Counsel fur-ther contended on the authority of ***Angela Mwai & 3 Others v. Commissioner of Co-operative Development [2015] eKLR*** that all Africog and Mr. Gastrow were entitled to was *an opportunity* to be heard and that the learned judge af-forded them the opportunity to comment on the application, but they elected to leave the matter to the court after which the learned judge reached the conclu-sion that it was in the interest of justice to vacate the proceedings and judgment so that the petition could be heard *de novo*. In the circumstances, he contended, Africog and Mr. Gastrow were estopped from claiming that they were denied an opportunity to be heard.

Counsel further submitted that his client was entitled to be heard by a fair and unbiased court and that it was within the jurisdiction of the learned judge to recuse herself once she felt that there were reasonable grounds on which her impartiality could be questioned. He added that the contents of the blog were adverse to Mr. Mwau and created a strong perception that the learned judge could not be impartial or unbiased in deciding his petition. He cited the decision of the High Court in ***Home Park Caterers v. Attorney General & Another [2006] eKLR*** and those of this Court in ***Standard Chartered Financial Ser-vices & Another v. Manchester Outfitters (Suiting Division) Ltd & 2 Others [2016] eKLR*** and ***Kipkoech Kangogo & 62 Others v. Board of Sacho High School & 5 Others [2015] eKLR*** in support of the submission.

On the application of the doctrine of *functus officio*, counsel submitted that ***section 80*** of the ***Civil Procedure Act*** and ***Order 45*** of the ***Civil Procedure Rules*** allow review of a judgment and rehearing, as an exception to the doctrine. He added that even without regard to those provisions, the High Court has in-herent power under ***section 3A*** of the Civil Procedure Act to review its decisions.

It was counsel's further contention that the application for review of the judgment was properly made because it was based on discovery of new infor-mation which was not in Mr. Mwau's possession and could not have been ob-tained by exercise of due diligence at the time the learned judge heard and de-livered the judgment. In support of that submission counsel relied on the ruling of the High Court in ***Trust Bank Ltd v. Midco International (K) Ltd & 4 Others [2004] eKLR.*** He added that an application for review of a judgment is heard by the same judge who made the judgment.

Lastly counsel submitted that a *de novo* hearing of the petition would not be prejudicial to Africog and Mr. Gastrow because they would still have an op-portunity to be heard by a judge whose partiality was not called in question. For that reason, he urged us to find that the doctrine of *res judicata* did not apply in this case because the learned judge, having set aside the judgment, there was no longer in existence a valid judgment by a court of competent jurisdiction which could bar a rehearing of the petition.

Mr. Maimbo, learned counsel for the AG, who also filed grounds of affir-mation of the decision of the High Court, joined Mr Mwau in opposing the appeal. He submitted that ***section 3A*** of the Civil Procedure Act vests in the court in-herent jurisdiction to set aside its judgment and that ***section 80*** and ***Order 45*** of the Civil Procedure Rules confer on the court jurisdiction to review its deci-sions, re-open, re-hear, and re-determine the case, and to make such orders as it may deem fit. He relied on the decision of this Court in ***Nguruman v. Shompole Group Ranch & Another [2014] eKLR*** in support of that contention.

The AG further submitted that the learned judge was not *functus officio* when she reviewed and vacated her judgment because the review jurisdiction is an exception to the doctrine of *functus officio*. He relied, in support of the sub-mission, on ***Order 21 rule 3(3)*** of the Civil Procedure Rules, which prohibits alteration of a judgment, save for clerical or arithmetic mistakes or on review. On *res judicata*, it was submitted that the doctrine had no application in this appeal because there was no other suit between the parties where the issue be-fore the learned judge had been litigated. As regards double, jeopardy, the AG dismissed it as equally inapplicable because it was a criminal law doctrine.

Lastly on the violation of the right to be heard, the AG submitted that all the parties were afforded an opportunity to make comments when Mwau's ap-plication came up for mention on 31st July 2014 and that Africog and Mr. Gas-trow elected to leave the matter to the court. For that reason, it was contended on the authority of the decision of the High Court in ***Nairobi County Government v. Kenya Power & Lighting Co Ltd [2018] eKLR,*** that they were estopped from reneging on what they had represented to the learned judge. The AG further argued that since Mr Mwau's application was directed at the learned judge, the other parties in the application did not have to respond to the same.

We have anxiously considered this appeal. In our estimation, there are only two issues in contention, namely whether the learned judge had jurisdiction to review and set aside her judgment, and if so, whether in the circumstances of this appeal, she was entitled to set aside the judgment.

We do not think there is any basis for the contention that the learned judge was *functus officio* when she entertained the application for review of her judg-ment. Both ***section 80*** of the ***Civil Procedure Act*** and ***Order 45*** of the ***Civil Procedure Rules*** confer on the High Court the power to review its judgments and rulings in certain specified circumstances. Section 80 of the Act provides as follows:

> *"Any person who considers himself aggrieved—*
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> *(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
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> *(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."* (Emphasis added).

Order 45, on the other hand provides that such review applications are to be made without unreasonable delay and only upon discovery of new and important matter or evidence which, after exercise of due diligence, was not within the knowledge of the applicant or could not be produced at the time of the decree or order, or on account of some mistake or error apparent on the face of the record, *or for any other sufficient reason*. By dint of ***Order 45 rule 3***, where it appears to the court that there is no sufficient ground for a review, it is obliged to dismiss the application but where it is of the opinion that the application is merited, it should grant the same. Lastly under ***rule 5*** of the same Order, where the court allows the application for review, it is required to, at once, re-hear the case or make such order in regard to the re-hearing as it thinks fit.

The jurisdiction of the court to review its judgments and rulings under the circumstances set out in Order 45 therefore cannot be defeated on the argument that the court is *functus officio*. What the court is concerned with in an applica-tion for review is not a consideration of the merits of its decision, which is really the province of an appellate court. Far from it, the court is merely asked, on account of relevant evidence which was not available at the time of the judgment or ruling, or because of a stark error on the face of the record or for other sufficient reason, to reconsider its decision. (See ***Christopher Musyoka Musau v. N.P.G. Warren & 8 Others [2017] eKLR)***. The Civil Procedure Act and the rules made thereunder are clear enough that once the court is satisfied that it should review its decision, it can make such orders as it deems necessary, including setting aside its decision and re-hearing of the case.

There are also several decisions of our courts that caution against artificial or mechanical extension of the principle of *functus officio*. Thus for example, in ***Bellevue Development Co. Ltd v Vinayak Builders Ltd & Another [2014] eKLR,*** the High Court ***(Gikonyo, J.)*** observed as follows:

> *"Properly understood, whereas the court becomes functus officio when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceed-ings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supple-mental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court."*

Similarly, in ***Telkom Kenya Ltd v. John Ochanda [2014] eKLR***, this Court reiterated that the principle of *functus officio* does indeed admit a number of exceptions. The Court stated thus:

> *"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional reengagement with the case once fi-nal judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions…"*

We respectfully agree with those views.

We are equally persuaded that there is no merit in the contention that a re-hearing following a successful application for review is in violation of the principle of *double jeopardy* or is *res judicata.* Neither of the two principles has any relevance in this appeal. Double jeopardy is a principle of criminal trials that prohibits prosecution of a person on the same acts or omissions after a previous acquittal or conviction. (***See Article 50(2) (n), Constitution of Kenya***). On the other hand, *res judicata* has no application because, upon a successful application for review that results in vacation of a decree or order, there is no longer in existence a judgment or ruling of a court of competent jurisdiction between the same parties and on the same issues that would act as a bar to subsequent litigation on the issue. (See ***Housing Finance Company of Kenya v. Captain. J. N. Waffubwa [2014] eKLR)***.

Even outside the provisions we have quoted above, we believe that the court has inherent jurisdiction to review its decision in the interest of justice where it is alleged, on reasonable grounds to be established to the required standard, that the decision is tainted by violation of the rules of natural justice and in this case the ***nemo iudex in causa sua*** rule. In ***in Re Penochet (No.2) [1999] All ER 577,*** the House of Lords, even as the apex court in the United Kingdom, agreed that it had inherent and unfettered jurisdiction to rescind or vary its judgment to correct an injustice where it was alleged that the decision was tainted by the undisclosed links between one of the judges and a party in the proceedings.

What has however caused us considerable concern in this appeal is the manner in which the learned judge dealt with Africog's and Gastrow's application for review. We have carefully reviewed the record and with respect, we are satis-fied that there is no basis for the contention that the learned judge afforded them a fair opportunity to be heard on the application for review before she delivered her ruling and allowed it.

To begin with, on 31st July 2014, the date the learned judge wrote and delivered the ruling in question, the matter was listed before her for ***mention*** for directions, rather than for hearing. As we noted earlier, as of that date, none of the respondents to the application had had an opportunity to respond to it. In-deed, counsel for the DPP informed the learned judge that he had not yet been served with the application and that after directions he was going to respond to the application. On his part, counsel for Africog and Gastrow informed the learned judge that after directions, he was ready to take instructions from his clients on the application.

In our view, the understanding of the respondents to the application was clearly that on 31st July 2014, the learned judge was to give directions on the hearing and determination of the application, upon which they would have an opportunity to respond to it. Instead however, the learned judge wrote and read a ruling that effectively determined the application in Mr. Mwau's favour.

This Court has consistently held that unless the parties otherwise consent, a court should not delve into and determine substantive issues on a date when the case is listed for mention. The rationale is too plain to belabour; a mention is intended to be a short appearance in court for either directions, feed back by the parties on any issue, fixing of convenient dates for further hearing, submissions, judgment, or such other minor and routine purposes. On such occasions the parties are not primed for the substantive duel. It is therefore not surprising that in ***Mrs. Rahab Wanjiru Evans v. Esso Kenya Ltd, CA No.13 of 1995***, this Court emphatically asserted as follows:

> *"We have no doubt that where a matter is fixed for mention, as it was in this case, the learned Judge had no business determining on that date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice."*

That position has been reiterated and followed consistently in among others, ***Floriculture International Ltd v Central Kenya Ltd & 3 Others [1995] eKLR***, ***Barclays Bank of Kenya Ltd & Another v. Gladys Muthoni & 20 Others [2018] eKLR*** and ***Rift Valley Water Services Board v Oriental Construction Co. Ltd [2018] eKLR.***

The ultimate effect is that the parties were denied a fair opportunity to be heard when the learned judge wrote and delivered a ruling which determined the application for review on a date when it was scheduled only for mention. The parties were not given a hearing on the merits or demerits of the application even though from the record it is clear that some of them craved the opportunity to be heard. In particular, Africog and Gastrow had a judgment in their favour which the court was not entitled to take away without first affording them a fair opportunity to be heard. It is trite that a decision made in violation of the rules of natural justice is null and void. (See ***Onyango Oloo v. Attorney General [1986-1989] EA 456*** and ***Pashito Holdings Ltd. & Another v. Paul Nderitu Ndun'gu & Others [1997] 1 KLR (E&L)).***

In the circumstances we find considerable merit in this appeal and hereby allow it. The learned judge recused herself from the matter and so it will serve no purpose to remit the application for review back to her. The order that there-fore commends itself to us is to remit the matter back to the High Court for the hearing on merit of the application dated 3rd July 2014, by a judge other than ***Mumbi Ngugi, J.*** Africog, Gastrow and the DPP will have costs of this appeal. It is so ordered.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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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