IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 91 OF 2018

BETWEEN

CORDISON INTERNATIONAL (K) LIMITED.....APPELLANT

AND

CHAIRMAN NATIONAL LAND COMMISSION.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

DIRECTOR OF PHYSICAL PLANNING,

MINISTRY OF LAND & PHYSICAL PLANNING...3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

KENWIND (K) LIMITED.....5TH RESPONDENT

COUNTY GOVERNMENT OF LAMU.....6TH RESPONDENT

LINUS GACHOKI GITHI & 38 OTHERS.....RESPONDENTS

(An appeal from the Judgment of the Environment and Land Court

at Malindi (Olola, J.) delivered on 25th May, 2018

in

***ELC JR Misc. Application No. 11 of 2017.*)**

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JUDGMENT OF THE COURT

1. At the core of this appeal is a parcel of land situate in **Kiongwe** within Lamu County measuring approximately 11,100 acres or thereabout, hereinafter referred to as **"the suit land"**. The appellant's claim to the suit property is premised on the following facts: the suit property was allocated to **Kenwind (K) Limited,** the 5th respondent herein, by the **National Land Commission**, the 2nd respondent, vide a letter of allotment dated 7th February 2017.

2. It is the appellant's position that long before the 5th respondent expressed any interest, over the suit land the **County Government of Lamu**, the 6th respondent, being a trustee and lessor of the suit land had lawfully engaged with the appellant for the establishment of a wind power project thereon, which process began in the year 2009. On 16th November 2012 and 2nd September 2013 the County Council of Lamu and the County Government respectively, through a letter of Award for Land Lease approved the appellant's Expression of Interest to the Ministry of Energy.

3. On 31st January 2014, the County Government of Lamu wrote to the appellant to affirm its approval of implementation of the project and on 5th December 2014 the County Government wrote to the Chairman of the National Land Commission, the 1st respondent, stating that having received all the necessary approvals it wished to lease the suit land to the appellant. On diverse dates between 8th July 2015 and 23rd October 2015 the appellant and the County Government finalized on the lease agreement and the same was executed on 29th September 2015.

4. By a resolution dated 22nd July 2015, the appellant averred that it became aware that the office of the Clerk of the County Assembly of Lamu had approved an Electrowind project by a company called **Kenwind (K) Limited**. Subsequently a **Part Development Plan (PDP) LMU/1281/01/16** was completed and advertised on 22nd July 2016 and Gazette Notice No. 6554 issued to that effect. Incidentally, it turned out that on 12th August 2016 a similar PDP was advertised in the Kenya Gazette No.6554.

5. Also, the appellant averred that the 1st respondent had been sending conflicting and inconsistent correspondence to the County Government of Lamu, purporting to exercise powers and authorizing functions and actions over the suit land, while refusing to address objections or queries raised, which left the appellant with no option but to presume bias towards the 5th respondent.

6. The appellant contended that the said letter of allotment was prepared and delivered to the 5th respondent without any notice to it, yet it had already been granted all the relevant approvals by the County Government, the legal landlord of the subject land.

7. By a Judicial Review application dated 18th January, 2017, the appellant nmoved to court seeking, *inter alia*, the following orders:

> ***"i. Certiorari to remove into this Court and quash the decision contained in the Letter of Allotment issued by the 2nd Respondent to the 1st Interested Party dated 7th February 2017, of reference number CF 4154/34 and executed by one Kariuki J.K. for the 1st Respondent;***
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> ***ii. Certiorari to remove into this Court and quash the direction of the 3rd Respondent on 6th January 2017 through letter Reference Number PDD/206/XII/(26) to Ms. Amina R. Masoud, County Executive Committee member, Land and Physical Planning, County Government Lamu recommending that the 1st Respondent do issue a letter of allotment to the 1st Interested Party's power generation project;***
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> ***iii. Mandamus compelling the 2nd Respondent to forthwith issue land lease instruments to the Applicant as directed by the 2nd Interested Party in its letter Reference LCG/PA/Vol. 2/2014/77 dated 5thDecember 2014 for the area over the approximately 11,100 acres or thereabouts situate in Kiongwe within Lamu County and covered under the Coordinates as outlined in the Award of 2nd September 2013 by the 2nd Interested Party in the Letter of Award for Land Lease Reference No. LCG/ADM/3/3/77/203/18 and captured in the Valuation Report of 21st March 2014;***
>
> ***iv. Prohibition to be directed at the 1st Respondent whether by himself or through his agents and/or servants, from denying and/or compromising the validity of the Ex-Parte Applicant's approval with regard to the allocation and implementation of the Ex Parte Applicant's Project over the approximately 11,100 acres or thereabout situated in Kiongwe within Lamu County and covered under the coordinates as outlined in the Award of 2nd September 2013 by the County Government of Lamu; and***
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> ***v. That the costs of and incidental to this application be provided for."***

8. Opposing the application, the 1st and 2nd respondents averred that **Section 12** of the **Land Act** empowers the 2nd respondent to allocate public land on behalf of the National and County Governments whenever it becomes necessary. According to the 1st and 2nd respondents, they were aware that the appellant had submitted to the Ministry of Energy an Expression of Interest to develop a 350 MW of Wind Power energy at four sites being, Lambwe Valley, Offshore Lamu, Offshore Malindi and Marsabit vide a letter dated 4th November 2009.

9. On 5th November 2009 the Ministry of Energy wrote a letter to the appellant informing them that only two sites had been approved for development, being Offshore Lamu and Lambwe Valley and further that the other areas had already been allocated to other developers.

10. The 1st and 2nd respondents further stated that despite having not received explicit approvals from the Ministry, the appellant went ahead and sought allocation of land from the County Government in Kiongwe and engaged the community members over the same in a bid to secure public participation and legitimacy.

11. Thereafter the appellant and the County Government purported to draw a lease agreement on behalf of the 2nd respondent in respect of public land situate in Kiongwe and forwarded the same to the 2nd respondent for execution. After all the relevant proposals had received the requisite approvals as required by law and the Ministry of Energy, the 5th respondent on 24th August 2015, wrote to the 2nd respondents seeking the expedited allocation of the suit land to the it for implementation of a 90 MW wind energy project within Mpeketoni in Lamu County.

12. The 1st and 2nd respondents maintained that the area of land applied for by the 5th respondent is public land duly vested in the County Government of Lamu to hold in trust for the benefit of the residents of the County and that in line with **Article 62(2)** of the Constitution, it is therefore the role of the 2nd respondent to administer this land on behalf of the County Government.

13. After several correspondence and consultations, the County Assembly of Lamu, on 22nd July 2015 approved for allocation to the 5th respondent approximately 1,282.42 Ha of land for implementation of a Wind Energy Project within Bahari Ward, which decision was communicated to the 1st respondent, who thereafter placed the matter before the 2nd respondent's Committee on Land Administration for deliberation and the allocation was ultimately approved on 23rd September 2015. It appears that after the notices were published to elicit public participation, the appellant and the County Government of Lamu raised their objections to that effect.

14. On their part, the 3rd and 4th respondents asserted that the actions of the Director of Physical Planning were proper and within his powers and mandate by virtue of the fact that the 3rd respondent is empowered under **sections 4,5,16, 24 and 25** of the **Physical Planning Act** to carry out the actions that were undertaken.

15. The trial judge having considered the application, the affidavits on record and oral submissions by counsel declined to issue the orders sought. Dismissing the application, the learned judge stated, *inter alia*:

> ***"In this regard, Section 8 of the Land Act is prescriptive of the management role of the 2nd Respondent. This section falls under Part II of the Act entitled "Management of Public Land". It is instructive to note that the role prescribed under this Part include*** **identifying public land; keeping a data base of all public land; sharing of data; and land mapping among others.**
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> ***44. Under the National Land Commission Act, it is further clear that the 2nd Respondent was established to, inter alia, provide for the management and administration of public land. The role of the 2nd Respondent in its Constitution Act (sic), are in tandem with its roles in the Land Act. These include*** **allocation of land; disposing of public land; leasing and effecting change of user**.
>
> ***45. As it were, Section 12 of the Land Act equally gives the 2nd Respondent power to allocate public land on behalf of both the National and County Government. Section 14 of the Act provides the procedure to be followed by the 2nd Respondent prior to such allocation.***
>
> ***48. In contrast, it is apparent that the 1st Interested Party rightfully applied to the 2nd Respondent for land within Mpeketoni in Lamu County for development of what was termed as Mpeketoni Wind Energy Project. On 24thAugust 2015, the Ministry of Energy wrote to the 2nd Respondents seeking expedited allocation of the land for implementation of the project. The 1st Interested Party's application was placed before the County Assembly of Lamu for deliberation and was approved on 22nd July 2015."***

Aggrieved by the decision of the learned judge dismissing the application, the appellant lodged the instant appeal. The appellant in his memorandum of appeal raises several grounds which can be condensed as follows:

a) ***Whether the learned judge erred in his interpretation and application of Articles 61, 62 and 67 of the Constitution;***

b) ***Whether the learned judge erred in law in failing to adequately consider or at all the discrepancies raised in the approval process in favour of the 5th respondent;***

c) ***Whether the learned judge erred in law in failing to adequately consider or at all if the respondents were in breach of the rules of natural justice;***

d) ***Whether the learned judge erred in law in failing to adequately consider or at all whether the 1st respondent had caused a reasonable apprehension of bias in his decisions and directions.***

16. At the hearing of this appeal, learned counsel ***Mr. Wasuna*** appeared for the appellant. He pointed out that at the time of filing the suit there was another Judicial Review matter No. 2 of 2017 in which a preliminary objection was raised. It is claimed that before that matter was disposed of the 2nd respondent proceeded to issue a letter of allotment, allocating the land in dispute to the 5th respondent. Counsel contended that the learned judge failed to address all the grounds raised before him but found that the main issue for determination was who, between the 2nd and 6th respondents, had power to alienate public land.

17. Counsel faulted the learned judge for relying on the **Supreme Court Advisory Opinion No. 2 of 2014,** and opined that the National Land Commission should obtain consent and/or consult with the National or County Government before it does any land allotment. In his view, the learned judge erred in holding that the County Government had no say in allocation of the suit land. It was counsel's submission that the County Government did not give consent to the allotment of the suit land to the 5th respondent, thus making the allocation null and void. It was his further submission that the approval was not to exceed 20 years but the lease given was for 99 years. He urged us to allow the appeal with costs.

18. Opposing the appeal, **Mr. Wahome**, learned counsel for the 1st and 2nd respondents, submitted that **section 9** of the **Land Act** provides that any substantial alienation of land shall require approval of the National or County Government. Further, under **section 12,** the **National Land Commission Act** is mandated to alienate public land on behalf of the County Government, while **section 14** stipulates the requirements applicable for allotment of public land. He contended that there was an application by 5th respondent for allocation of the suit land and the 2nd respondent gave the conditions that were to be met. According to counsel, the 5th respondent complied with all the conditions and as a result a letter of allotment was lawfully issued to the 5th respondent.

19. Counsel opined that the law does not expressly state that consent of the County Government is required in the process of allocating

public land. In his view, **section 5(2**) of the **National Land Commission Act** provides that consent of the County Government is required before alienation of public land; that there is a difference between alienation and allocation; that alienation requires consent while allocation does not. It was contended that the County Assembly gave consent of the allotment to the 5th respondent. The National Land Commission gave notice of the intended allotment, hence the PDP was amended to cater for both applicants and both applicants were content with that arrangement. He asserted that the appellant did not prove bias or failure to adhere to the rules of natural justice. He prayed that the appeal be dismissed with costs.

20. **Mr. Mogaka,** learned counsel for the 5th respondent, also opposed the appeal. He submitted that the filing of the judicial review application was an abuse of the court process. It was not disputed that there were contested facts and hence the forum was not the appropriate one to determine the issues in dispute. It was stated that the planning of the land was for a specific purpose, energy generation, and so the Ministry of Energy had to be involved. Furthermore, vide a letter dated 18th January 2013, the Ministry of Energy required the appellant to submit a complete document of a detailed feasibility study together with all supporting documents but the appellant did not do so. Counsel maintained that the National Land Commission was right in allocating the land to the 5th respondent. He reiterated that there was an application by the County Government of Lamu to the County Assembly for approval of the 5th respondent's application, which was approved, and that the application was not challenged, and neither was the PDP objected to.

21. On the issue of public interest, counsel urged this Court to bear in mind that public interest prevails over private interest. The 5th respondent, having been granted all the necessary approvals, was ready to roll out the 300 MW wind power project which would greatly benefit the country. Further, the feasibility study of the appellant has not been approved while the 5th respondent was ready to roll out its operations. He urged that the appeal be dismissed with costs.

22. **Mr. Omwanda,** Counsel for the 6th respondent, opposed the appeal and associated itself with the other respondents' submissions. In its written submissions and relying on the provisions of **Article 62** of the Constitution, **sections 12, 13, 14** of the **Lands Act**, **section 5** of the **National Land Commission Act**, the 6th respondent maintains that the consent of the 6th respondent was not a prerequisite for any allocation of public land. It was asserted that the process that culminated in the issuance of the letter of allotment to the 5th respondent was with the active consultation, knowledge, participation and consent of all relevant statutory organs, including the 6th respondent and all the legal processes were dully followed.

23. As regards the issue of natural justice, it was submitted that every step taken to allocate land to the 5th respondent was within the knowledge of the appellant and in the PDP; and therefore the allegation of failure to be accorded a fair hearing under the rules of natural justice was an afterthought and unmerited. In addition, the allegations of manifest bias by the 1st respondent was not substantiated and lacks any basis or semblance of truth by virtue of the fact that the PDP was prepared to cater for both interests. The 6th respondent urged us to dismiss the appeal with costs.

24. **Mr. Kilonzo**, counsel for the 7th- 48th respondents, briefly submitted that the trial court did not have Jurisdiction to entertain the Judicial Review application in the manner it did. Only the High Court had jurisdiction and not the Environment & Land Court. He contended that apart from the pending suits, under **section 13** of the **Physical Planning Act**, the appellant ought to have appealed to the Liaison Committee if it was aggrieved by the PDP that had been prepared and gazetted. It was further contended that the PDP catered for the interests of all the parties. He opined that had the trial court considered the foregoing it would have found that the Judicial Review application had no basis. Counsel further maintained that there was no approval by the 6th respondent of the appellant's project. He urged the Court to dismiss the appeal with costs to the 6th respondent.

25. In a brief reply, learned counsel **Mr. Paul Amuga** on behalf of the appellant asserted that the matter was filed in the correct court because **section 13** of the Environment and Land Court Act grants that court jurisdiction to hear and determine all disputes relating to environment and use and occupation of land; and that failure to cite it was not fatal. In addition, the procedure prescribed under **section 13** of the **Physical Planning Act** was not followed and so the appellant could not pursue that line of objection. He went on further to cite **section 5 (2**) of the **National Land Commission Act** for the proposition that the National Land Commission can alienate public land only with the approval of the County Government and that what the 2nd respondent did was alienation and not allotment, hence it was contrary to the recommendations of the County Government. He concluded by stating that the land in question was not available to the 5th respondent because it had earlier been allotted to the appellant therefore the 5th and 6th respondent contravened the law in causing the land to be taken away from the appellant and allotted to the 5th respondent. He urged us to allow the appeal.

26. We have considered the rival submissions by counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See **SELLE -VS- ASSOCIATED MOTOR BOAT CO. [1968] EA: 123 EPHANTUS MWANGI v DUNCAN MWANGI WAMBUGU (1982-88) 1 KAR 278.**

27. The fundamental issue for determination in this appeal is: who, between the National Land Commission and the County Government, is lawfully mandated to allocate public land and what is the appropriate procedure thereof?

28. As earlier stated, the foundation of the appellant's appeal is that it was awarded a land lease by way of allotment by the County Government of Lamu to undertake a wind power project of Kiongwe. The appellant's case is that the procedure that was followed in allocating the suit property to the 5th respondent was irregular while the 5th respondent asserts that due process was followed; and to the contrary, it is the appellant's allotment of the suit land that was irregular.

29. It is important that we start by distinguishing between "**alienation**" and "**allocation**" of land. **Section 2** of the **Lands Act** defines "alienation of land" as **the sale or other disposal of the rights to land; while "allocation of land" means the legal process of granting rights to public land**.

30. **Article 67** of the **Constitution** that establishes the National Land Commission gives it power to, *inter alia*, manage public land on behalf of the national and county governments. The suit land is public land as defined under **Article 62(1) (a)** of the **Constitution** and therefore vests in and is held by the County Government of Lamu in trust for the people resident in the County. **Article 62 (2)** of the **Constitution** provides that the land shall be administered on behalf of the County residents by the National Land Commission. **Section 5 (1)(a)** of the **National Land Commission Act** is also explicit that one of the functions of the National Land Commission is to manage public land on behalf of the national and county governments. Under **section 5(2)** of the **Act** the Commission may,

> **"on behalf of, and with the consent of the national and county governments, alienate public land."**

31. **Section 12** of the **Land Act** grants the Commission authority to allocate public land on behalf of the national or county governments and **section 14** of the **Act** specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land.

32. At least thirty days prior to the allocation the Commission should send a notice to the governor in whose county the public land proposed for allocation is located and to the head of the governing body of any administrative subdivision having development control, among others. The notice should then be published in the Kenya Gazette and at least once a week for a period of three weeks and thereafter published in a newspaper of general circulation in the general vicinity of the land being proposed to be offered for allocation.

33. It is therefore clear beyond any peradventure that it is the role of the Commission, and not a county government, to allocate public land. The allocation must however comply with the laid down constitutional and statutory procedure as stated above.

34. In our view, the allocation of the suit land by the 1st respondent (the Commission) to the 5th respondent substantively adhered to the set down procedure. The approval of the County Assembly (the 6th respondent) was granted on 22nd July 2015, the approval of the Ministry of Energy was obtained; and the publication of notice for action in line with **section 14** of the **Land Act** was done on 28th January 2016. Lastly, the land approved for allocation was planned vide PDP reference No. NRB/1281/2016/01/16.

35. The 6th respondent's Director of Lands and Physical Planning, Erick Randu, stated in his replying affidavit that the said PDP was made pursuant to a request made by the 1st and 2nd respondents vide a letter dated 29th July, 2016; that the revision of the PDP was made in good faith as the 6th respondent wanted both the appellant and the 5th respondent to be accommodated with their respective proposed investments; that the revision of the said PDP was duly approved by the Cabinet Secretary, Ministry of Lands; that the decision to issue the letter of allotment to the 5th respondent was made on the recommendation of the 3rd respondent and with the full knowledge of the 6th respondent; and that the letter of allotment in question was issued to the 5th respondent with the full knowledge and consent of the 6th respondent.

36. In the circumstances, it is our considered view that the appellant did not establish any illegality, irrationality or procedural impropriety in the procedure followed by the 1st respondent in allocating the suit land to the 5th respondent.

37. It is trite law that in Judicial Review proceedings the court is concerned with the decision making process, not the merits of the decision. In **PENINAH NADAKO KILISHWA v INDEPENDENT ELECTORAL BOUNDARIES COMMISSION (IEBC) & 2 OTHERS [2015] eKLR**, the Supreme Court held:

> ***"The well-recognized principle in such cases, is that the court's target in JUDICIAL REVIEW, is always no more than the process which conveyed the ultimate decision arrived at. It is not the merits of the decision, but the compliance of the decision making process with certain established criteria of fairness. Hence an applicant making a case for Judicial Review has to show that the decision in question was illegal, irrational or procedurally defective."***

38. In our view, the appellant did not follow the appropriate procedure in its effort to be allocated the suit land. Briefly stated, the appellant first sought approval of the wind power project from the Ministry of Energy. That was on 25th November, 2009. The appellant then sought and obtained approval of the Commissioner of Lands, District Development Committee, Sub-District Development Committee, NEMA and the Kenya Civil Aviation Authority, amongst others.

39. Eventually, on 15th November 2012 the Town Planning, Works and Market Committee of the County Council of Lamu granted its approval. Thereafter, vide a letter dated 7th November, 2013 the County Government of Lamu confirmed the aforesaid Committee's approval and sent to the appellant a letter of award for lease of the suit land for a period of 40 years. On 31st January, 2014 the County Government gave approval of the appellant's implementation of the project and on 5th December, 2014 the County Government wrote to the Commission requesting for issuance of a lease over the suit land to the appellant.

40. In view of the foregoing, it is obvious to us that the appellant had not taken cognizance of the new land policy that had been ushered by the **Constitution of Kenya, 2010** and the **Land Act;** and as a result backed the wrong horse. The appellant ought to have engaged the National Land Commission as soon as it came into operation, given its constitutional and statutory role in allocation of public land.

41. The learned judge cannot therefore be faulted for holding that:

> ***"46. Arising from the foregoing, it is evident to me that the Ex-Parte Applicant and the 2nd Interested Party could allocate the public land in issue and thereafter direct the 2nd Respondent to prepare the relevant Part Development Plan (PDP) as happened herein. The 2nd Interested Party had no power to alienate and/or allocate public land in the manner it did and the PDP No.***

LMU/1281/10/16 as published in Gazette Notice No. 6128 of 5th August 2016 was therefore in my view unprocedural illegal and of no consequences in law.

47. While it is obvious to me that the Ex-Parte Applicant has indeed expended considerable amounts of time, research and money in its desire to establish the Wind Power Project in Offshore Lamu all the way from the year 2009, it is apparent that certain requirements, especially those that came with the advent of the Constitution of Kenya, 2010 were not adhered to.

48. In contrast, it is apparent that the 1st Interested Party rightfully applied to the 2nd Respondent for land within Mpeketoni in Lamu County for development of what was termed as Mpeketoni Wind Energy Project. On 24th August 2015, the Ministry of Energy wrote to the 2nd Respondents seeking expedited allocation of the land for implementation of the project. The 1st Interested Party's application was placed before the County Assembly of Lamu for deliberation and was approved on 22nd July 2015.

49. The contention by the Ex Parte Applicant that the subsequent allocation was irregular and unlawful for encroaching on land already issued and allocated to the Ex-Parte Applicant does not lie as in law, the 2nd Interested Party had no power to allocate the public land to the Ex-Parte Applicant in the manner it did or at all."

42. We do not agree with the appellant that the learned judge failed to consider whether the 1st and 2nd respondents were in breach of the rules of natural justice, for not having been given a fair hearing, audience, explanation or acknowledgment of its objections to the notice of action advertised on 28th January, 2016.

43. Vide a letter dated 17th June, 2016 the 2nd respondent dealt with all the appellant's concerns regarding the notice of action. A party need not be heard in its oral representations, the right and opportunity to be heard may be granted in written form. The 2nd respondent concluded its letter by proposing that a PDP for 3,200 acres in favour of the appellant and 8000 acres for the 5th respondent be prepared. If the appellant was not satisfied with that proposal, it ought to have appealed to the liaison committee in terms of **section 13** of the **Physical Planning Act.**

44. **Section 9(2)** of the **Fair Administrative Actions Act** bars a Court from reviewing any administrative action or decisions unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. As there existed a statutory procedure for questioning the said PDP, which procedure was not adhered to by the appellant, it would have been procedurally wrong for the trial court to review the said decision.

45. We have said enough, we believe, to demonstrate that this appeal is devoid of merit, even without addressing ourselves to each and every ground of appeal. Consequently, we hereby dismiss it in its entirety. The respondents are granted costs of the appeal.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR