IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, JJ.A.)

CIVIL APPEAL NO. 73 OF 2013

BETWEEN

SCORPIO ELEGANCE LIMITED……..…...…..….APPELLANT

AND

KENYA POWER & LIGHTING LIMITED…..….RESPONDENT

(Appeal from the judgment and decree of the of the High Court of *Kenya at Nairobi (Rawal, J.) delivered on 4th October 2010 in H.C.C.C. No. 3372 of 1992)*

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JUDGEMENT OF THE COURT

In this appeal, ***the appellant, Scorpio Elegance Limited*** is aggrieved with the decision of the High Court that dismissed its claim for breach of agreement for the installation of a three phase power line, for general damages for negligence and special damages for replacing the damaged borehole pump.

The appellant which operates a horticultural farm, that utilizes large quantities of underground water for irrigation, entered into an agreement with ***the respondent, Kenya Power and Lighting Company Limited*** for the installation of an additional 14KVA three phase power line. The installation involved the;

i. conversion of a low voltage overhead line to a medium voltage underground cable in order to cross a high voltage line; and

ii. upgrading of an existing single phase service cable to three phase to terminate at the meter board of the appellant's pump house.

It was the appellant's case that whilst carrying out the installation works in August 1991, the respondent breached the agreement, when it failed to adhere to the supply drawings and the required professional standards. It was claimed that these omissions caused a fire to break out along the power line to the pump house, which resulted in loss and damage.

The particulars of negligence were stated to be;

"a) Failing to observe or have regard for the technical specifications contained in supply Drawing Number PDO 052 08.

b. Failing to ensure that the supply cables to the pump house were installed underground at the point where they crossed high tension cables near the said farm.

c. Installing the supply cables in close proximity to the said high tension cables.

d. Failing to ensure that the supply cables were installed at a reasonable distance from each other.

e. Failing to ensure that the supply lines would not sag after installation.

f. Causing fire to break out at the said pump house and/or causing an overload of current to occur at the said pump house."

Particulars of special damage were identified as;

"a) Cost of spares to replace parts damaged at the pump Sh.66,000/-

b) Cost of labour to refit the pump *Shs. 98,000/-*

c) Consultant's fee to prepare report on damage and loss *Shs 25,000/-*

T*OTAL* Shs. 189,000/-"

And as a consequence, the appellant claimed general and special damages. The respondent denied any breach, or having negligently undertaken the installation works. It also denied the claims for general and special damages.

In the judgment, the High Court (Rawal, J (as she then was)) found that no evidence was presented that showed that there was damage to the water pump or the electrical fittings, and considered it difficult to accept that the pump was damaged by a power upsurge caused by sparks and fire on the overhead electrical line. The learned judge concluded that negligence was not proved to the required standard.

In addition, the learned judge declined to award special damages, as she was not satisfied that the claim was specifically pleaded and proved. As regards the claim for general damages, the learned judge found that the appellant had not demonstrated any special circumstances to warrant the claim for general damages; that furthermore, general damages cannot be awarded in a claim for breach of contract.

Dissatisfied with the High Court's decision, the appellant filed this appeal on the grounds that the learned judge fell into error when she held that the appellant's claim was not supported by evidence; in finding that the appellant had not established negligence; in failing to assess and award the appellant special damages; in finding that the appellant had not demonstrated any special circumstances to warrant an award for special damages; in taking into account extraneous matters, and in so doing, reaching the wrong conclusion; in dismissing the appellant's suit in the face of overwhelming evidence, and in finding that the appellant had not proved its case on a balance of probabilities.

Learned counsel, ***Mr. M. Kihanya*** submitted that the trial court misconceived the evidence as to who was responsible for the damage to the pump, and wrongly concluded that there was no evidence that demonstrated that the appellant's witness inspected the pump. Counsel complained that the learned judge ignored Mr. Grayson's written report and overlooked Patrick's evidence which confirmed that there was damage caused by an electric fault and that no report was submitted to explain the cause of the fire. There was also no rebuttal of the facts as presented by the appellant's witnesses. Counsel asserted that there was no contestation by the respondent as to compliance with the design, and also no denial that a fire had resulted.

As concerns the claim for special damages, it was submitted that the documentary evidence produced was sufficient to support the claims for the cost of spares to replace the damaged parts of the pump, the cost of labour to refit the pump, and the consultant's fee for the report on damage and loss.

On damages, there was Mr. Gichuhi's report outlining the special circumstances that would assist the court arrive at compensation payable to the appellant or the damages caused. He did not state that this was the loss. The claim was one of tortious liability from which general damages would arise. ***Odd Jobs vs Mubia [1970] EA 476*** was cited to support the contention that a court may allow evidence to be called and determine an unpleaded issue if it appears from the evidence that it was a matter left for the court's determination.

Mr. Mwihuri, learned counsel for the respondent opposed the appeal. Counsel submitted that the appellant failed to prove that the fire was the cause of the damages claimed; that the expert witness did not inspect the pump and so the only conclusion the court could reach was that there was no damage to the borehole pump.

Counsel further asserted that no evidence was produced to prove that the electrical fittings were affected, as there were no signd of burning near the pump; that the power upsurge did not travel to the pump, but it travelled backwards to the transformer which was what blew; that the burden of proof was not discharged, and special damages was not specifically pleaded or proved.

We have considered the pleadings, the evidence and the submissions of the parties and are of the view that the matters for consideration are;

i. whether the appellant proved on a balance of probabilities that the respondent was in breach of the agreement, by negligently carrying out the installation works, and if so whether tortious liability was established on the respondent's part;

ii. whether the appellant was entitled to general damages; and

iii. whether the appellant was entitled to special damages.

We have considered counsel's submissions and examined the record of appeal. Our mandate on a first appeal is set out in ***rule 29 (1)*** of this Court's Rules namely to re-evaluate the evidence and to draw inferences of fact. Likewise, we remain guided by the principles enunciated in **Mwangi vs *Wambugu* *[1984] KLR 453*** that;

> **"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or a misapprehension of the evidence or the judge is shown demonstrably to have acted on a wrong principle in reaching the finding; and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally".**

So as to determine whether the appellant proved its case beyond a balance of probabilities, as is required of a first appellate court, we will reconsider and re-evaluate the evidence so as to ascertain with certainty whether or not the learned judge reached the right conclusion that the appellant did not prove its case to the required standard.

The appellant's case is that following an agreement to increase the supply of water to its operations entered into an agreement on 19th June 1991, to undertake installation works to supply additional power to the appellant's borehole. Whilst installing the new power line, sometime in August 1991, the respondent's servants, in negligent disregard of their professional standards required, failed to adhere to the agreed supply drawings; that the omission was to be the cause of a fire along the new power line on 21st September 1991, that led to loss and damage in the pump house.

The respondent denied responsibility for any loss and damage suffered.

Margaret Wanjiru (PW1) (Margaret), a director of the appellant, testified that, at the appellant's request, the respondent agreed to increase the power capacity to its borehole pump. Supply of power under the new power line commenced and following completion all seemed well until the morning of 21st September 1991 when a neighbor noticed sparks and flames along the newly installed line. The respondent sent its crew to rectify the problem on 3rd October 1991. The witness explained that the flames were caused by missing electricity poles, and the installation of a medium voltage power line near an existing high voltage power line, which installation was not in accordance with the agreed supply design.

The witness stated that the fire damaged the borehole pump necessitating its replacement, with a new one.

Peter Grayson (PW2), an Electrical Mechanical Engineer at Envirotech Limited opined as an expert witness that he had seen the damaged electrical equipment associated with the borehole, and concluded that electrical faults on the overhead lines were the cause of the damage. He stated that he was shown electrical designs that caused him to conclude that the installation design was not followed, as some of the electric poles for the new line were missing, and a section of the line which was to be laid underground, so as to pass under the overhead 66 KVA power line was not laid in accordance with the specifications.

He further stated that, *"After I saw these faults and examining the same, I* came to the conclusion that overhead lines had touched one another – referred technically as "line clash" that lead to damages and (sic) saw on the starter of the borehole".

In support of his conclusions, he produced 3 reports. The first report dated 26th May 1992 read in part;

> "…. The farm was visited on 19 May 1992 in the company of Dr Ragui and a full survey was carried out. We returned again on 25 May, 1992 after differences were noted between the starter wiring diagram and that seen on site.
>
> Preamble
>
> The feed to the borehole where the pump was damaged is an uprated medium voltage (415 volts, 3 phase & neutral) overhead line which in parts follows the line of an original low voltage (240-volt single phase & neutral) overhead line.
>
> The original line fed a borehole close to the farm but this was required to be extended downhill to a further borehole approximately 270metres away. Approximately 55 metres from the original borehole the new proposed borehole feed would pass at 90^0 under a KP & L 66,000 volt overhead line. It is normal practice when this occurs to either install an overhead protective "net" under 66KV lines or alternatively finish the new overhead line each side of the 66KV line and use an underground cable to join the two sections. In their design Messrs. KP & L decided to use the latter alternative.
>
> The above cautionary moves are meant as protection if even the 66KV line were to fall upon the medium voltage line not because of the risk of voltage induction."

In his view, the respondent was at fault, as the damage to the electrical equipment was as a result of over voltage in the electrical connection, due to clashing of two power lines. He testified that, the main switch at the borehole was not a protective switch. It was a plain isolated one, and that, *"It is possible that a power surge could have damaged the switch."*

The witness added;

> "There is no machinery to protect the power surge within the starter. There was protection. It burnt out and could not protect *on my (sic) wire it was due to over voltage. Power surge is also an over voltage."*

Next was ***Stevenson Gakuone Chege (PW3)***, a technical Agricultural officer who stated that he was an agronomist. He stated that he was aware that Mr. Gichuhi had prepared two reports in respect of the losses to the appellant arising from the water shortage on the farm

following the damage of the borehole pump. The witness produced Michael Wango'ndu Gichuhi, the agronomist's reports of 4th November 1991 and 30th March 1992 in support of the claim for compensation for the damage caused.

Charles Muhoro Ngure (DW1), a senior technician of the respondent who presented evidence for the defence testified that, he checked the start control that regulated the initial high voltage current before it started, the cut outs, the isolation component and the final circuit. He was satisfied that the meter that had been installed, was working well.

Next for the defence was ***Patrick Mwadafu Sahaksia (DW2)*** a technician II with the respondent who testified that, when he visited the farm, the pump had not been raised from the borehole; so on 25th September 1991 he returned to the farm and on arrival, he found that it had been raised. He was then directed by Mrs. Ragui to go to Davis & Shirtliff where he would find the pump identified as 'pump number 354 dated 15 horse power'. He then explained;

> "When I arrived at Davis & Shirtliff, I introduced myself and gave reasons of my visit. Someone led me to workshop and saw the pump as described…When I tried to rotate it, it failed to do so. On usual examination of the pump, I saw a hole on the starter which is the immobile part of the pump. The hole was caused according to me because of the short circuit. I could not know what could have caused the short circuit, since the fuses were intact, earth leakage circuit breaker was on position. I concluded that may be somebody might have restarted the pump after there was short in the pump. I could not verify my opinion."

He went on to state that if the line had clashed, the fault did not travel further, and in this case, the fault reversed to the transformers and blew the fuses; that this meant that, the line clash did not burn the motor because the fault did not reach the starter; that if the pump was damaged due to the line clash, the earth leakage system would have tripped, but that this was not the case here as it was still in the "on" position. He concluded that somebody must have restarted the earth leakage system after the fault which could have caused the starter to burn. But he did not agree that the pump burnt due to the line clash. On cross-examination, he declined to talk about the manner in which the installation works were undertaken.

We will begin by observing that our independent evaluation of the evidence points to the fault which occasioned damage resting at the respondent's doorstep. We say this because, it is not disputed that, the appellant entered into a contract with the respondent to upgrade the power supply to its borehole. This was to be undertaken by re-conducting a section of medium voltage overhead line, convert a low voltage overhead to a medium voltage underground cable in order to cross a high voltage line, and uprating the rest of the low voltage line to medium voltage and then uprating existing single phase underground service to cable to three phase that would terminate at the metre board of the appellant's pump house. A scheme was prepared in terms of drawing No. PD0 05208.

The evidence shows that the respondent indeed undertook the installation works, but failed to adhere to the specifications of the supply drawings. Despite the drawings specifying the number of the electric posts to be installed, three support posts were found to have been missing. Worse still, they failed to adhere to the safety precaution of laying an underground cable to enable the new line pass under the overhead 66 KVA medium power line. Instead, it passed under the 66 KVA high voltage power line as an overhead power line. The omissions led to a line clash on 21st September 1991 which sparked and ignited flames, causing an upsurge of power along the new power line to the pump house on one side, and the transformer on the other. This resulted in damage to the electric wiring, and the borehole pump's starter.

Margret who was an eye witness to the flames caused by the line clash testified that, "*… at around 7.30 am (*on the said day*) I was alerted by a neighbor* the area chief that he had noticed line on the … I visited town (sic) and noticed that the installed line had caught fire."

And as to the cause of the sparks and flames along the power line, Peter Grayson testified that there were electrical faults on the overhead lines, since some electric poles supporting the lines were missing, and the section of the new line which was designed to be laid underground, was not laid according to the specifications. He came to the conclusion that the power lines had touched one another causing what was referred to as a "line clash" that resulted in damage to the pump's starter.

In the judgment, the learned judge concluded that, Mr. Grayson did not at any time examine or see the damaged pump's starter. She was therefore not satisfied that damage to the starter was proved. She stated;

> "Neither in report or in his evidence Mr. Grayson has stated that he saw the damaged pump himself or inspected the place where it was fitted. On the contrary, he accepted that the incident was narrated to him by the staff member of the plaintiff it has to be noted that he first visited the site on 19th May, 1992 after about five months of the incident. His remarks in the report that during the incident the overload relay and phase failure relay was burnt out are not from his personal knowledge and definitely contrary to personal inspection made after the incident by PW2. I shall thus not accept the report of M. Grayson as totally reliable."

With respect, this cannot be the correct position. The report of 26th May 1992 clearly indicated that Mr. Grayson visited the farm on two occasions, on 19th May 1992 when a full survey was carried out, and on 25th May 1992 when they returned again. Granted, this was about five months after the incident, but this did not mean that he could not inspect the pump site to establish whether or not any damage occurred.

In fact, his inspection of the pump site led him to conclude that, "The borehole pump starter was burnt and ruined and the overload and phase failure relay *on the starter for the pump also burnt.***"** We are therefore satisfied that the inspections carried out, enabled Mr. Grayson assess

the resultant damage at the pump site.

In finding that there was no evidence that showed that the pump's starter was damaged, the learned judge had this to say;

> "None of the plaintiff's witnesses has given any evidence on the state of the pump or the electrical fittings at the place where the pump was stored. If no electrical fittings were affected near or in the place where the pump was installed, it shall be difficult to accept the evidence that the pump was damaged due to power upsurge which affected the overhead electrical line causing sparks and fire."

So was the borehole pump's starter damaged? As already seen above, support for damage to the electrical wiring and the pump's starter is to be found in Peter Grayson's report of 26th May 1997 which stated that, the borehole pump starter was burnt and ruined and the overload and phase failure relay on the starter for the pump were also burnt.

The testimony of defence witness Patrick Sahaksia lends further support to the fact of damage to the pump's starter when he stated that, he visited the farm on 23rd September 1991 he did not see the water pump as it was inside the bore hole. But a later examination of the pump, revealed a hole in the starter which he says was caused by a short circuit. He could not however explain the cause of the short circuit.

The evidence of Peter Grayson and Patrick Sahaksia is unequivocal that the starter of the borehole pump was indeed damaged. Patrick said that it had a hole in it. Mr. Grayson stated that it was burnt and the overload relay and phase failure relay were burnt out. This was sufficient evidence to show that there was some damage to the starter, yet the learned judge found that the starter was not damaged merely because Mr. Grayson did not inspect the pump, and proceeded to disregard Mr. Grayson's reports. We find that the learned judge misdirected herself in disregarding Mr. Grayson's reports on the basis of her findings that Mr. Grayson did not inspect the pump, and in so doing she misapprehended the evidence, and reached the wrong conclusion that the starter was not damaged and we so find.

This brings us to the issue of the causal link between the fire along the power line and the damaged starter, where the learned judge was not satisfied that a causal link was established.

When we consider the evidence, it is at this juncture that the divergence between the appellant's and the respondent's witnesses arises.

According to Margaret, it was after the line clash occurred that the pump's starter ceased to work, causing water shortages for irrigation of the flowers and vegetables. Peter Grayson's explanation on the issue is to be found in the report of 2nd April 2007 where it was explained that the line clash "…caused problems in your borehole and borehole pump control panel. The overhead line was seen to clash, sparks ran down it and the cable was later noted to be damaged".

The same report further stated;

> "The problems of the slope of the site, the longer spans due to the omission of the three poles, not changing the conductor spacing to a safer gap and the possibility of a strong crosswind all left the original overhead line, in our opinion, not up to standard and at risk of having a "line clash" (when swinging, live, cables touch each other)".

Mr. Grayson explained that the line clash probably caused the power surge that damaged the starter. He stated that;

> "There is no machinery to protect the power surge within the starter…It burnt out and could not protect on my wire (sic) it was due to over voltage. Power surge is also an over voltage. The witnesses reported line clash."

In explaining the damage to the pump's starter, Patrick surmised tha the damage was due to a short circuit caused by someone restarting the damaged pump starter, but he also stated that he, *"… could not know what could have caused the short circuit..."* From this evidence, it is evident that the starter was damaged either by a power surge or a short circuit. As to their cause, the only intervening event attributable would have been the line clash that caused the flames and sparks along the power line that were witnessed by Margaret. We are therefore satisfied that, there was a causal connection between the line clash and the damage to the pump's starter and find that the learned judge was wrong in finding that no causal connection was established.

Turning to where the fault lay, the same report is categorical, it observed;

> "Our reasons for considering that KPLC were at fault lie basically in the fact that they did NOT follow their own design as shown on their drawing 05208.

Their design engineer must have visited your premises, seen the slope of the land, seen the 66 KV line crossing the proposed new overhead cable route and noted that your premise was in a windy valley.

The engineers' design took these into consideration when preparing the drawing and his design shows this – he utilized a correct number of support poles and went underground when crossing the 66 KV line position. This is also correct and reasonable.

However, when KPLC installation team arrived they DID NOT follow the KPLC design. They missed out 3 support poles (out of the proposed 7) and did not go underground when passing under the 66 KV line.

They did not change the conductor (cable) spacing from the original 9" centres to a more sensible and safer 14" centres normally used on a three phase line.

Technically, the installation of the line was a fault.

We consider the damage that occurred was due to the following points;-

a. KPLC did NOT install the correct number of overhead line support poles.

b. KPLC did NOT re-adjust the spacing of the conductors from the original 9" to the safer 14" centers when the line changed from a 240 volt line to a 415 volt line.

The problems of the slope of the site, the longer spans due to the omission of the three poles, not changing the conductor spacing to a safer gap and the possibility of a strong crosswind all left the original overhead line, in our opinion, not up to standard and at risk of having a "line clash" (when swinging, live, cables touch each other)…"

It not disputed that a line clash occurred on 21st September 1999. It is not also in dispute that this caused sparks and flames to ignite along the power line. Immediately thereafter, the borehole pump ceased to work, and the appellant was unable to pump water to irrigate its horticultural produce.

From Mr. Grayson's reports, it is not in doubt that the line clash resulted from failure by the respondent to adhere to the design specifications set out in the agreement between the parties, in that it failed to install the specified number of supporting poles, it failed to lay the underground cable in accordance with the drawings, and it failed to adjust the spacing of the conductors from the original 9" to the safer 14" centers when the line changed. These omissions caused the line clash that occurred on the material day.

On the basis of this evidence we disagree with the learned judge that negligence was not proved to the required standard, or that no evidence was adduced to show that the pump's starter and the electrical fittings were damaged by the line clash, and that no causal connection between the sparks and flames seen along the power line and the damage to the pump starter was established. To the contrary, it is evident that, the line clash on the material morning which caused flames to ignite along the power line resulting in a power upsurge that damaged the pump's starter. Visible damage to the starter, and the overload and phase failure relay on the starter were observed by both the appellant's and respondent's witnesses. Also caught up in the incident were the respondent's fuses at their transformer which also blew.

Further credence is lent to support the fact of fault being laid at the respondent's doorstep in Mr. Grayson's report of 2nd April 2007 which stated;

"KPLC returned to your premises soon after the incident, added a further pole, went underground below the 66 KV line and changed the cable spacing to the larger 14" gap. This now corresponds more, but not completely, to their original design.

We feel that by doing this KPLC have virtually admitted they made an error in not following their original design."

From the aforegoing, we are satisfied that the appellant has discharged the burden of proving on a balance of probabilities that the respondent's failure to install the new power line according to the specifications resulted in damage to the appellant's borehole pump, and we so find.

We next now turn to consider the claims for damages.

In the case of ***Stroms Bruks Aktie Bolag vs Hutchison*** ***[1905] AC 515*** Lord MacNaughten sought to distinguish between the nature of special and general damages and explained that***;***19

"'General damages'… are such as the law will presume to be the direct natural and probable consequence of the action complained of. 'Special damages' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore must be claimed specifically and proved strictly."

The appellant has claimed special damages for cost of spares to replace parts damaged at the pump of Kshs.66,000, cost of labour to refit the pump Kshs.98,000 and Consultant's fee to prepare report on damage and loss Kshs.25,000 all totaling Kshs. 189,000.

The learned judge declined to award special damages for reasons that the sums claimed were not specifically pleaded or proved. The judge observed that the receipt of Kshs. 125,000 produced by Mr. Grayson could not be relied upon as it was not pleaded, and that what was claimed was an amount of Kshs.25, 000 for which no receipt was produced. The learned judge also found that no receipts were produced to support the claims for the cost of spares and repair, and labour costs or to support the agronomist's claims.

Again, the agronomist has claimed net profit for a period of 6 ½ months from October 1991 to January 1992 at Kshs. 1,057,355.42 and for

the period February 1992 to 5th April 1992 at Kshs. 981,499.24, at the rate of Kshs. 264,339.10 per month, and totaling Kshs.2,038,855.60. Despite this being a claim in the nature of special damages, it was neither pleaded nor proved.

We have considered the evidence and do not agree that the claim for special damages for cost of spares to replace parts damaged of the pump of Kshs.66,000, and cost of labour to refit the pump Kshs.98,000 were not proved. Documentation was produced to support both these claims, and in her evidence Margaret Wanjiru testified that she paid Mburu Borehole Services Kshs. 98,000, and Davis & Shirtliff Limited Kshs. 66,000. Accordingly, we find that these amounts have been proved to our satisfaction.

Regarding the consultant's fees, like the learned judge we would decline to award this amount, as the fee note dated 17th May 2010 for Kshs 125,000 was not pleaded at the time the plaint was filed.

This then leaves the claim for general damages. In this regard the learned was disinclined to award general damages for reasons that general damages cannot be awarded for breach of contract which the learned judge found to be the basis of the appellant's claim. See ***Dharmashi vs Karsan [1979] EA 41.***

That said, it is our position, like the learned trial judge, is that no damages can be awarded for breach of contract. As stated earlier, breach of contract has certain elements, which can only be granted if specifically pleaded and proved with certainty. As such, it is not within the purview of this court to speculate or assume the exact loss or injury suffered by the appellant.

In sum the appeal is allowed in part, and the respondent shall pay the appellant special damages as set out hereunder.

1. Special damages comprising; -

    a. Cost of spares to replace the damaged parts of the pump Sh.66,000/-

    b. Cost of labour to refit the pump Shs. 98,000/-

2. Interest on special damages at court rates from the date the suit was filed;

3. The appellant shall have the costs in the High Court, but each party shall bear their own costs of the appeal

It is so ordered.

Dated and Delivered at Nairobi this 24*th* *day of May, 2019.*

P.N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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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

DEPUTY REGISTRAR