



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MAKHANDIA & KIAGE, J.J.A.)

CIVIL APPEAL NO. 163 OF 2013

BETWEEN

JAMES JORAM NYAGA.....1ST APPELLANT

ABIJA JAMES NYAGA.....2ND APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTER, PUBLIC WORKS, ROADS & HOUSING.....2ND RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi,

(Nyamu & Wendo, JJ) dated 28th February, 2007

in

H.C. MISC. CIVIL APPLICATION NO 1732 OF 2004)

JUDGMENT OF THE COURT

At the centre of this appeal is the property known as **L.R No. 7741/350** the suit property situate in the suburb of Kitisuru within Nairobi City County. The suit property was excised out of a larger parcel of land known as LR No. 7741/34. Vide a Gazette Notice dated 21st March 1975, the Government of Kenya, signalled its intention of acquiring or repossessing the said property compulsorily amongst others for intended purpose of constructing a road linking Waiyaki Way to Red Hill Road in the Lower Kabete Area. The Government duly complied with the relevant provisions of section 75 of the repealed Constitution of Kenya and the Land Acquisition Act, and the property in effect reverted to the Government by way of compulsory acquisition. The property was later sub-divided into several parcels of land with the suit property being amongst them.

On 28th November 1994, the Nairobi City Council Engineer wrote to the Director of Physical Planning, Ministry of Lands and Housing, ‘*the 2nd respondent*’, informing the latter that for named reasons, the construction of the proposed link road had been rendered impractical and some of the other land parcels had in fact been acquired for other purposes. Conceding that it was impossible to construct the road as originally planned, the City Engineer stated that the affected area or parcels of land could be reviewed and re-planned for other purposes.

The City Engineer’s position was echoed in a letter dated 8th December 1994 from the 2nd respondent through its Permanent Secretary addressed to the mentioned Director of Physical Planning stating that Residential Plot No. 3-Kitisuru was no longer feasible for construction of a road and could be re-planned for other purposes. Subsequently, through an allotment letter dated 18th December 1997, the Commissioner of Lands offered the appellants the suit property upon their formal written acceptance of the conditions contained therein and upon payment of Kshs. 90,950 as relevant charges. The appellants formally accepted the offer by their letter dated 15th August 2000 addressed to the Commissioner of Lands and upon payment of the charges. Subsequently on 20th December 2001, a grant of the suit property under the Registration of Titles Act, being Nairobi Land Titles Registry No. 88103/1 was issued to the appellants. The appellants pursuant to the grant, took possession of the suit property and commenced developments thereon. However, on 20th December 2013, bulldozers guarded by armed policemen moved into the suit property and demolished the developments thereon with intention to evict the appellants. The appellants

alleged that there had been no prior notice whatsoever to them of the planned demolition and eviction. After the demolition, the appellants caused valuation of the suit property and the developments thereon as at 14th February 2004 to be undertaken and it was valued at Kshs. 6,200,000/=.

It is upon this background that the appellants approached the High Court through an Originating motion seeking declarations to the effect that they were the lawful owners of the suit property; that the demolition of the suit property was an affront to their constitutional rights under section 75 of the former Constitution; that the acts by the respondents were contrary to the law, high-handed, arbitrary, malicious and oppressive such they were justifiable in a democratic society. They complained before court that they had not been informed of any challenge to their title in the suit property or accorded a right to be heard before the demolition and eviction. They denied any fraud in the manner in which they acquired the suit property. They denied further that they were given a formal explanation as to the reasons behind the demolition save for media reports that the demolished properties were on a road reserve.

In their response, the respondents asserted that the suit property had been repossessed or acquired in full compliance with the law. That upon the compulsory acquisition of the suit property it became public land held in trust by the Government of Kenya. The respondents denied that it had declared the construction of the link road, for which the compulsory acquisition had been meant for, unfeasible or impossible. They denied that they had surrendered or even degazetted the suit property. The respondents were of the view that neither the Director of Physical Planning nor the City Engineer had powers to alienate land acquired by the Government for purposes of road development. The respondent stated that the Government had issued a Gazette Notice No. 3632 on 6th June 2003 requiring illegal structures erected on road reserves to be demolished within 30 days. That notice was to be followed by a subsequent one issued on 6th August 2003 through a local newspaper. The respondents therefore insisted that the demolitions carried out on the suit property were pursuant to the said notices after the appellants failed to abide by them.

Pertinently, the respondents refuted claims that the appellants were the lawful owners of the suit property with contentions that the suit property was curved out of LR No. 7741/34 which had been acquired compulsorily by the Government. They denied any breach of the appellant's constitutional rights as claimed and accused the appellants of being trespassers in the suit property.

Upon consideration of this set of facts, the law and the parties' submissions, the High Court in a judgment dated 28th February, 2002, and delivered by **Nyamu & Wendo, JJ.** found and held that the appellants had no title to the suit property.

In the court's view, the Commissioner of Lands could not purport to pass valid title under the Governments Lands Act, (*repealed*) or the even the Registration of Titles Act, (*repealed*) for that matter when acting contrary to constitutional provisions. Further, the High Court held that the suit property having been acquired for public purposes of constructing a public road, it could not otherwise be allocated to the appellants who are private individuals for their private use. The court found further that the appellants were not entitled to the declaratory prayers sought and that they had failed to justify the sum of Kshs. 6, 200,000 sought as compensation. The court proceeded therefore to dismiss the suit. In penultimate 2nd last paragraph the judges concluded thus:

"... In conclusion we find and hold that the land in dispute is public land held by the Government on behalf of the public and the commissioner of lands could not purport to pass any title to the applicant under the Registration of Titles Act. The applicants were not therefore entitled to any declaratory prayers sought. If they have any claim, it will lie in the ordinary civil courts. We accordingly dismiss the originating summons. We make no order as to costs..."

The appellants filed their notice of appeal in respect of the judgment and decree signalling their intention to appeal to this Court. Subsequently they filed a memorandum of appeal containing nine grounds of appeal which in their written submissions they condensed into three. The appellants accused the learned Judges for failing to consider that the Director of Physical Planning and the Nairobi City Council had conceded that it was not feasible to construct the proposed road as it was originally planned and therefore the affected parcels of land could be re-planned for other purposes. Further, they complain that the Judges erred in finding that the land compulsorily acquired can only be used for public purposes for which it was acquired; that by dint of section **144 (3)** and **(5)** of the repealed Local Government Act, a local authority could let, grant or license a person to occupy land which it may possess.

The appeal was canvassed by way of written submissions and limited oral highlights. The appellants concede in their written submissions that the suit property had been legally acquired by the Government pursuant to the then Land Acquisition Act. They contend that although the law stipulated the acquisition process, it was silent in the event that the repossessed land was no longer needed for the purpose for which it had been intended. According to the appellants, 19 years after the suit property had been compulsorily acquired by the Government, the then Nairobi City Council wrote to the 2nd respondent informing it that the construction of a link road on the suit property was no longer feasible. They contended that the Government was left with public land with no purpose. That as public land, under section **144 (3)** of the Local Government Act, such land not required for the purpose for which it was acquired may with the approval of the Minister be appropriated for any other purpose which such a local authority is authorised to undertake. The appellants contend that the Commissioner of Lands allotted the suit property to them on behalf of the Nairobi City Council.

According to the appellants, the allotment of the suit property was legally above board. They sought to distinguish the authorities relied on by the learned Judges with contentions that the said cases only discussed the effect of not disclosing the purpose of the compulsory acquisition or the intended beneficiary of the acquired property. They denied that such a situation obtained herein since the purpose and the beneficiaries were clear from the onset but it was discovered after 19 years that the purpose for which the suit property had been acquired was no longer tenable. That upon the realization that the suit property could not be used for the purpose for which it had been acquired, the appellants urged that the Commissioner of Lands was entitled to allocate the land on behalf of the Nairobi County Council.

The appellants further challenged the findings of the learned Judges that the Commissioner of Lands alienated the suit property yet at the same time acknowledged in their judgment that it was the President of Kenya who on 20th December 2001 granted the appellants a leasehold interest in the suit property.

The appellants faulted the learned Judges for holding that the Commissioner of Lands acted illegally and ultra vires his powers in alienating the suit property yet they acknowledged in their decision that it was the President of Kenya who on 20th December 2001 granted the appellants a leasehold interest. It is the appellants' submission that the Commissioner of Lands only issued a letter of allotment on behalf of the Nairobi City Council but submitted that this did not vest any interest in the suit property to them. The appellants however urged that the true powers lay and were exercised by the President pursuant to section 3 (a) of the Governments Lands Act. The said provision grants the President powers to make grants or dispositions of any estates, interests or rights over or in un-alienated government land. The appellants contend that the President exercised the powers provided when he granted the suit property to them as the land fell within the definition of un-alienated government land. Simply put, the appellants refute the claim that it was the Commissioner of Lands who alienated the suit property. The commissioner merely informed the appellants of the Government's intention to grant them the suit property. The actual grant, according to them, was by the President pursuant to his powers under the Government Lands Act.

The appellants maintain that they acquired the suit property in compliance with the law without any fraud and misrepresentation on their part. They base their argument on section 23 of the repealed Registration of Titles Act which espoused the sanctity of title. The provision provided that a proprietor's right is absolute and indefeasible and is not subject to any challenge except on the ground of fraud or misrepresentation, which they denied could be imputed in this case. The appellants opine that though section 75 of the repealed Constitution laid down the compulsory acquisition process, the Constitution was silent on how public land could be converted to private property.

The appellant also faulted the learned Judges for failing to address the issues of damages and compensation for loss of user of the suit property and failing to take into consideration the value of the developments undertaken by the appellants on the suit property. They claimed Kshs. 6,200,000 as damages for demolition of their developments on the suit property despite the allotment and a grant issued by the President and on which they had legitimate expectation that they were entitled to rely on.

In their joint submissions, the respondents point out that the original owners of the suit property were compensated after compulsory acquisition and the suit property was thereafter reserved for public utility. They reiterated that at no time did the 2nd respondent declare that construction of the link road was no longer feasible. They reiterated further that both the Commissioner of Lands and the Nairobi City Council lacked authority to alienate the suit property. According to the respondents, the suit property had never been de-gazetted from being a public utility parcel of land to give room for transfer to any other party including the appellants. They also maintained that there had not been a change of user of the suit property from public to private land. According to the respondents, the suit property was not available for reallocation after compulsory acquisition and was therefore illegally acquired by the appellants which action necessitated eviction and demolition of structures thereon. Once the suit property was reserved as public utility land, the respondents were of the view that the Commissioner of Lands held it in trust for the public. They argued that the Commissioner of Lands could not therefore commit/allocate the suit property for any other use other than a public one. That any allocation of the suit property by the Commissioner of Lands to private individuals or entity was irregular and a nullity.

Pointing to the gazette notice and another notice in a local newspaper, the respondents insisted that the appellants were notified of the impending eviction and demolition contrary to their assertions that they were never notified. In light of the notices, the respondents took the view that sufficient notice was given to affected parties to take necessary remedial measures. They alleged that due process was followed and there was no denial to the appellants of the protection of the law. On the question of whether the respondents violated the appellants' rights to property so as to warrant compensation, the respondents submitted that public interest in this matter outweighed the appellants' rights since the disputed suit property was public land which ought to be safe-guarded at all costs unless a contrary decision is reached within the framework of relevant laws.

During the oral hearing of the appeal, learned counsel **Mr. Gabriel Mwangi** appeared for the appellants and contended that the issue in dispute was the validity of the appellants' title. Counsel was of the opinion that the suit property had been acquired for specific purpose and since the purpose proved untenable then according to counsel, the property ought to have reverted back to the original owners. However, since the original owners had been compensated, it would have amounted to double compensation. Counsel was of the view that it was inimical to public interest for Government to acquire property and fail to utilize the same. In counsel's view, such land was available for alienation.

Mr Odhiambo, learned counsel for the respondents on his part submitted that the suit property was not available for re-allocation. The custodian of the suit property was the 2nd respondent which had not surrendered it back to Government for re-allocation. Counsel reiterated that the Commissioner of Lands had no powers to alienate land reserved for a link road; that the appellants were dealt with fairly and had been notified of impending eviction and demolition and therefore had opportunity to remedy the situation. To counsel, the respondents' actions were justified and did not violate the appellants' constitutional rights.

This is a first appeal. In the case of **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212**, this Court observed:

“on a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence...”

In our view the issues for determination in this appeal are; whether the grant of the suit property to the appellants was legal; whether the demolition and or eviction of the appellants by the respondents was justified; and finally, whether the appellants were entitled to compensation.

The facts that inform the dispute between the parties herein are worth revisiting. Sometime in the 1970s, the Government of Kenya acquired, under the Land Acquisition Act, land parcel No. 7741/34 which measured 5.0 acres for purposes of constructing a link road between Waiyaki Way and the lower Kabete Area. The record is silent on what transpired to the property between when it reverted to Government and the year 1994 but it would appear that during the period the land parcel was sub-divided resulting in various parcels among them the suit property.

The year 1994 is mentioned because in support of their claim, the appellants exhibited a letter dated 28th November 1994, from the Nairobi City Council City Engineer addressed to the Director of Physical Planning of the 2nd respondent informing the latter that the construction of the proposed link road was no longer feasible. The reason given was that some parts along the proposed length of the road had been surveyed and acquired for other purposes. In the said letter, the City Engineer informed the 2nd respondent that in light of the developments, the area previously acquired for the construction of the link road could be reviewed and re-planned for other purposes. The appellants annexed a Letter of Allotment dated 18th December 1997 in which the appellants were offered the suit property measuring 0.227 hectares upon their written acceptance of the conditions and payment of specified charges. The record reflects that the appellants formally accepted the offer on 15th August 2000 upon payment of the charges. Subsequently on 20th December 2001, a grant of the suit property under the Registration of Titles Act, being Nairobi Land Titles Registry No. 88103/1 was granted to the appellants. Pursuant to the grant, the appellants took possession of the suit property and commenced development. On 20th December 2013 however, bulldozers with armed guards and police officers rolled into the suit property and demolished the developments thereon, thereby triggering this litigation.

The respondents did not impeach or challenge the documents relied on by the appellants in support of their claim as either forgeries or fraudulent. They, however, opposed the appellant's claim that the Government declared construction of the link road as impractical or impossible. The other arguments were that the suit property had never been de-gazetted from being a public utility parcel of land to give room for transfer to any other party including the appellants. They also contended that there was no change of user of the suit property from public to private land. According to the respondents, the suit land was not available for reallocation once it was compulsorily acquired and was therefore illegally allotted to the appellants by the Commissioner of Lands, which action necessitated their eviction. Once the suit property was reserved as public utility land, the Commissioner of Lands held it in trust for the public. The Commissioner could not therefore avail/commit the suit property for any other use other than a public one. Any allotment and transfer of the suit property by the Commissioner of Lands to the appellants was therefore irregular, *ultra vires* his power and therefore a nullity. In a nutshell, the Commissioner of Lands had no authority to alienate the suit property for private use. All these assertions were never sufficiently rebutted by the appellant and represent the position in law.

Following the demolition and eviction, the appellants, as already stated instituted the suit seeking mainly declaratory orders that they were the legal owners of the suit property. To support their case, they exhibited a certificate of title issued to them by the Commissioner of Lands. The said grant had been issued to the appellants under the repealed Registration of Titles Act, Cap. 281. Now pursuant to section 23 of the said Act, a certificate of title was held as conclusive evidence of proprietorship impeachable only on grounds of fraud or misrepresentation. The said provision embodies the principle of sanctity of title which is a cornerstone to the land registration system and which is based on the Australian Torrens system of registration. The system has been previously discussed and this Court in **Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 Others (1997) eKLR**, had this to say:-

“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party; such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya, would be placed in jeopardy.”

Based on the system, the Government, as the record keeper of all land and its respective owners, guarantees the indefeasibility of all rights and interests shown in the land register against the entire world. Where a party suffers loss from relying on an error in the land registration system, the Government is liable to compensate the party since the sanctity of the system is guaranteed by the Government. Without the sanctity of the Torrens system, the whole land registration system would prove unreliable and unworkable resulting in adverse and far reaching consequences to the economy.

As seen the only way envisaged for impeaching a certificate of title is on grounds of fraud or misrepresentation. The respondents though did not allege or prove fraud on the appellants' part. Indeed, such allegations, previously described as of being of a serious nature, would require to be distinctly pleaded and proved, and it is not allowable to leave fraud to be inferred from the facts. See **Kuria Kiarie & 2 Others v Sammy Magera (2018) eKLR**; **Vijay Morjaria v Nansingh Madhusingh Darbar & Another (2000) eKLR**.

Can it be that the respondents succeeded in impeaching the certificate of title on grounds of misrepresentation? If the answer is in the affirmative, what is the misrepresentation or is the same to be inferred from the facts?

The respondents did not allege or adduce any evidence to prove misrepresentation. The respondents' case was based on denials. Denial that the Commissioner of Lands lacked powers to alienate the land; denial that there had been any change of user from public to private property; denial that the suit property had ever been de-gazetted from being a public utility parcel of land to give room for transfer to any other party including the appellants; denial of any surrender or conveyance by the custodian of the suit property's title and that the Commissioner acted without jurisdiction in allocating the suit property to the appellants.

The Learned Judges however found and held, and correctly so in our view, that only the President of Kenya and not the Commissioner of Lands had power to alienate un-alienated Government land by dint of section 3 of Government Land Act and by a reading of section 7 of the same Act. To the extent that it was the Commissioner of Lands who masterminded the process of the allocation and processing of the title of the suit property to the appellants, he acted without jurisdiction and whatever resulted was a nullity. The question of whether the Commissioner of Lands could legally alienate un-alienated public land has been considered in the past by the Supreme Court in an advisory opinion - **In the Matter of the National Land Commission (2015) eKLR** in which the Court remarked as follows,

“Section 3 of the Government Lands Act (GLA) conferred powers on the President to make grants of freehold or leasehold of un-alienated Government land. Section 7 prohibited the Commissioner of Lands from exercising the powers of the President under Section 3, subject to certain exceptions; though the President could (and did) delegate his powers to the Commissioner. Procedures were laid out, to guide the allocation of Government land; but those were not duly followed,

subsequently. The Government treated public land as its “private property”, and the public-interest element in administration and allocation of public land was negated. **The Commissioner of Lands was making allocations of land by direct grant, routinely exceeding his authority.** (Such excesses of power are well documented in the Ndungu Report).

It follows that the onus was on the appellants to satisfy court that the Commissioner of Lands had requisite powers to grant the suit property to them. The appellants were indeed required to do more in proving that the legal and right procedure was followed in alienating the suit property to them. Bare denials of fraud on their part in acquiring the suit property or assertions that they acquired the suit property legally above board would not suffice. In *Munyu Maina v Hiram Gathiha Maina*, Civil Appeal No. 239 of 2009, this Court held as follows:-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis added)

As it is, other than the certificate of title and the letter of allotment, the appellants did not produce any other evidence to show that the procedure required for alienation of the suit property was followed. There was no evidence tendered of documents from the Department of Survey to show planning or surveying before a land reference number was issued in respect of the suit property. Other than the certificate of title and the allotment letter, the appellants failed to produce any other document in support of their case. It is our view that they failed to prove they were legally entitled to the suit property especially in the face of counter allegations that the suit property had never been de-gazetted as public land, was not available for alienation by the Commissioner of Lands and the respondents’ insistence that the appellants acquired the suit property illegally thus necessitating their eviction. As correctly observed by the trial court, the Commissioner of Lands had no authority to alienate the suit property to the appellants as he purported to do. That was the preserve of the President. It follows, therefore, that the Commissioner of Lands could not have made any grant under the Government Lands Act, nor could he pass any registerable title under the Registration of Titles Act. To counter this, the appellants have claimed that the Commissioner of Lands initiated the process on behalf of the President and the City Council of Nairobi. However, our short answer to that assertion is that, that was not their case in the High Court. We are also of the persuasion that the doctrine of public trust envisaged under section 75 of the old Constitution so that land compulsorily acquired could only be used for public purposes for which it was acquired and the Government hold such land in trust for its citizens was applicable in the circumstances. Accordingly, the suit property having been acquired for public purposes, that is, construction of a road, it was held in trust for the public and could not have been allocated to the appellants who were private individuals for their own private use. As was stated in *Niaz Mohamed V Commissioner of Land & others*, HCC No. 423 of 1998 and reiterated in *Re Kisima Farm Ltd [1978] KLR 36*, land had to be used for the purpose for which it was acquired and use of land for any other purpose was illegal. If the land was not utilized then the Local Authority should have held it in trust under the Local Government Act.

In light of the finding that the appellants failed to prove that they acquired the suit property legally, the Court ought to consider whether the demolition of their house was justified. As already noted, the Government had issued a Gazette Notice No. 3632 on 6th June 2003 requiring illegal structures erected on road reserves be demolished within 30 days and had asserted that the demolition of the suit property was pursuant to the said notice. Another notice was subsequently issued on 6th August 2003 in a local newspaper. In those circumstances, it is our view that the suit property was not demolished whimsically or arbitrarily as claimed by the appellants.

On whether the appellants are entitled to compensation, having found that the suit property was justifiably demolished, then the question of compensation is rendered moot. In any event, the compensation sought was in the nature of special damages requiring to be specifically pleaded and proved suitably through an ordinary civil claim and not through an Originating motion. We agree with the reasoning of the learned Judges when they rightly observed as follows,

“The Applicants paid a sum of Kshs 90,950/- upon being allocated the house and plot as per the letter of 15th August 2000. The Applicants claim to have completed developments on the said plot in November, 2003 only for bulldozers to move in on 20th December, 2003. Even if the Applicants were entitled to any compensation, may be it would only be Kshs 90,950/- paid after the illegal allotment and they would need to pursue that claim in an ordinary civil court as that claim is not a constitutional issue. They have not justified the sum of Kshs 6.2 million. The disputed plot is public land and includes the residential house and the developments that stood thereon prior to the allotment and the Respondent had the right to demolish what was theirs. If the Applicants had put up any structures, they had the notice period from June till December, 2003 to pull them down and mitigate their losses and if they did not, they have only themselves to blame.”

In our view, there is no justifiable reason advanced to warrant this Court’s interference with those findings. As a parting shot, it is our opinion that the issues canvassed herein through an originating summons were better suited for determination through an ordinary suit. An originating summons is only suitable specifically for matters or issues that are not complex factually and legally. An ordinary suit allows better canvassing of competing claims. In *Kibutiri v Kibutiri (1983) eKLR*, the Court stated as follows,

“The procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way. The procedure is, however, not meant to determine matters which involve serious complex questions of law and fact (Re Giles (2) [1890] 43 Ch D 391 and Kulumbhai v Abdulhussein [1957] EA 699). 2. In cases where complex issues and contentious questions of fact and law are raised, the judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit because the scope of inquiry which is made and dealt with on an originating summons”.

The upshot is that this Appeal lacks merit and is for dismissal with no order as to costs. It is so ordered.

Dated and delivered at Nairobi this 21st day of June, 2019.

E.M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR