



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & MURGOR, JJA)

CIVIL APPEAL NO. 21 OF 2015

BETWEEN

TIMBER MANUFACTURERS & DEALERS LIMITED.....APPELLANT

AND

FLORENCE WAIRIMU MBUGUA..... 1ST RESPONDENT

SYLVIA MURUGI MBUGUA.....2ND RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 180 OF 2015

CONSOLIDATED BANK OF KENYA LIMITED.....APPELLANT

AND

FLORENCE WAIRIMU MBUGUA & SYLVIA MURUGI MBUGUA (Suing as the

Administrators of the Estate of JOSEPH KIARIE MBUGUA)...1ST RESPONDENT

GRACE WANJIKU MBUGUA & PETER CHEGE KIARIE (Suing as the

Administrators of the Estate of JOSEPH KIARIE MBUGUA)...2ND RESPONDENT

(Being an appeal from Ruling of High Court at Nairobi (E.K.O. Ogola, J.) dated 19th May 2014 in HCCC No. 652 of 2006

JUDGMENT OF THE COURT

At the epicenter of this appeal is the question whether, at the time an advocate entered into a consent judgment in a suit between the disputing parties, the advocate had the requisite authority from the party it sought to represent to do so.

On 29th June 2011, a consent judgment was entered into between the administrators of the Estate of *Joseph Kiarie Mbugua (deceased)* on the one hand, and *Timber Manufacturers & Dealers Limited (Timber Manufacturers)* and *Consolidated Bank of Kenya Limited (Consolidated Bank)*, the appellants in the consolidated appeals, on the other.

The 1st respondent, Florence Wairimu Mbugua & Sylvia Murugi Mbugua (the House of Florence) and *the 2nd respondent, Grace Wanjiku Mbugua & Peter Chege Kiarie (the House of Grace)* are co administrators of the Estate of the deceased pursuant to a grant of letters of administration issued by the High Court on 6th August 2007 in *High Court Succession Cause No. 784 of 2007*. By a consent order dated 28th June 2010 in the succession cause, the beneficiaries of the Estate agreed to distribute the properties of the Estate between the two houses. Amongst the properties under distribution was the property known as LR No. 209/1605 Murang'a Road (*Muranga Road property*) which was charged as security for a loan with the Consolidated Bank by the deceased and later distributed to the House of Grace. Also

charged together with the Murang'a Road property as security was another property known as LR No. 4894/59 Garden Estate, (*Garden Estate property*), which was not mentioned in the Grant of Letters of Administration, it having been understood among the beneficiaries that it did not form part of the deceased's Estate, since the deceased was alleged to have sold it to Timber Manufactures prior to his demise.

The events leading up to the consent judgment were that in early February 2011, the House of Grace learnt that the Murang'a Road property, in which it had an interest, was to be sold by Consolidated Bank by private treaty. To restrain the bank from proceeding with the sale, the House of Grace instructed Judy Thongori & Co Advocates (*Judy Thongori Advocates*) to obtain an injunction against sale after reviving a suit the deceased had filed against the Consolidated Bank being *Civil Suit No 625 of 2006*, which had abated following his demise, and subsequently dismissed for want of prosecution on 14th October 2010.

On 20th May 2011, a consent in the aforementioned suit was entered in the following terms;

“1. That the suit be and is hereby revived.

2. That the administrators of the estate of Joseph Kiarie Mbugua (Deceased) be and are hereby substituted as the Plaintiffs herein.

3. That pending the hearing and determination of this suit the sum of Kshs. 13,625,675/= being the award available by the Commissioner of Lands for the compulsory acquisition of a portion of L.R. No. 209/1605 Nairobi be deposited in the joint bank account in the names of Ndungu Njoroge & Kwach advocates and Judy Thongori & Co. Advocates being Account Number 510836 Consolidated Bank of Kenya Ltd, Koinange Street.

4. That the matter be mentioned on 23rd May 2011

5. That interim orders be and are hereby extended until 23rd May 2011.”

On 25th May 2011, Judy Thongori Advocates wrote to the firm of Machira & Company Advocates (*Machira Advocates*) informing them of the impending sale, and advising that the suit had been revived, and an injunction subsequently obtained to forestall the sale of the Murang'a Road property. Machira Advocates were also advised that negotiations had commenced with Consolidated Bank to settle the loan amount at Kshs. 47,500,000.

On 6th June 2011, Machira Advocates wrote back expressing dissatisfaction with the ongoing negotiations, for reasons that the Estate had not been made a party to the discussions. It also informed Judy Thongori Advocates that the House of Florence would not enter into the consent unless the terms were mutually agreed between both houses.

In a reply on 13th June 2011, Judy Thongori Advocates informed Machira Advocates, that their clients were at liberty to contact Consolidated Bank and negotiate further, as the settlement amount reached had been negotiated to the extent possible. They were further reminded that the property at issue was distributed to the House of Grace, which had a major interest in resolving the dispute out of court, and that the matter was to be finally mentioned in court on the 22nd June 2011; that if no response was received by Monday 20th June 2011, Judy Thongori Advocates on behalf of the House of Grace would settle the matter, and thereafter pursue the Estate for a refund of any outstanding amounts and legal fees expended.

On 21st June 2011, Machira Advocates wrote further to their previous letter to Judy Thongori Advocates, which letter read in relevant part;

“...we regret to inform you that Mrs. Florence Wairimu Mbugua is not and shall not be a Party to any Consent that you may enter into, as you suggest.

Our view is that the Parties should have an urgent meeting to try and resolve the matter. Remember our Firm is acting for the Estate of the deceased, whereas you are acting for the house of Mrs. Grace Wanjuku Mbugua and Messrs P.M. Ndungu & Co. Advocates are acting for the house of Mrs. Florence Wairimu Mbugua.”

True to their word, on 29th June 2011, the parties, that is Judy Thongori Advocates, Consolidated Bank and Timber Manufacturers entered into a consent judgment in the following terms;

“1. The plaintiffs do pay to the 1st Defendant a sum of Kenya Shillings Forty Seven Million, Five Hundred Thousand (Kshs.47,500,000/=) only in full and final settlement of the Plaintiff's loan account with the 1st Defendant. That the said amount be paid as follows:-

a. The sum of Kshs.13,652,675/= due from the Ministry of Lands and which amount the parties have agreed to be deposited in a Joint Account in the names of their Advocates be transferred to the 1st Defendant upon signing this consent and if the said sum has not been received into this account as at 29.06.2011, the same be transferred to the 1st Defendant as soon as it is put into the account.

b. The balance being the sum of Kshs.33,847,325/= be paid on or before 31st January, 2012.

2. Upon payment of the amount set out in clause 1 above, the two properties used as security for loans that is to say LR No. 209/1605 Muranga Road, Nairobi and LR No. 4894/59 Garden Estate Nairobi be unconditionally discharged.
3. The Discharge of Charge and original Title document over LR No. 209/1605 Muranga Road Nairobi be released to the Plaintiffs upon payment of the amount above.
4. The discharge of Charge in respect of LR No. 4894/59 Garden Estate Nairobi be released to the purchaser that is Timber Manufacturers and Dealers Limited who have in their possession the original Title document.
5. That in default of payment of the sums set out above, the 1st Defendant do sell LR No. 209/1605 Muranga Road, Nairobi.
6. The intended Appeal by Timber Manufacturers and Dealers Limited in HCCC No. 1048 of 1994 be marked as settled in terms of this Consent.
7. That each party do bear its costs.”

It is this consent judgment that provoked the House of Florence into bringing a Notice of Motion dated 26th April 2012 seeking orders for the Consent, as well as the decree and other consequential orders to be set aside, cancelled or varied or reviewed in such a manner as the court should direct. The application was supported by the affidavit of Florence Wairimu Mbugua of the same date which set out to a large extent the chronology of events outlined above save to emphasise that, the consent was entered into without their knowledge or consent by Judy Thongori Advocates, who did not have their instructions; that the release of the Garden Estate property to Timber Manufacturers was unjust, unfair and unacceptable to the beneficiaries of the House of Florence as no consideration was paid for that decision and meant that the Estate had lost a property worth Kshs. 100,000,000 to Timber Manufacturers whose claim in *Civil Suit No. 1048 of 1994* was unsuccessful, and their appeal was pending before this Court.

Grace Wanjiku Mbugua on behalf of the House of Grace, in an affidavit in reply opposed the application.

Also opposing the application were the appellants who both argued that the consent judgment and decree was not capable of being set aside, varied or reviewed and, further that any actions by Judy Thongori Advocates’ did not affect them, as they at all times understood that she acted for and on behalf of the Estate; that in any event, as a consequence of the consent, they had taken steps to execute its terms which could not now be reversed.

Upon considering the motion and the parties’ submissions, the learned judge (E.K.O. Ogola,J) concluded that;

“The fact that a consent is entered into without full instructions of one or more of the parties does not of itself invalidate the consent. Other parties affected by the said consent are the 1st Defendant and the Third Party. The consent was recorded on 29th June 2011 and the House of Grace, the 1st Defendant and the Third Party have acted upon it...Under the consent the 1st Defendant has been paid its loan balance of Kshs. 47,500,000/= pursuant to the above payment the two properties that is, the Murang’a Road Nairobi Property, and the Garden Estate Nairobi Property, have since been discharged, and the Discharge of Charge for the Murang’a Road, Nairobi, property issued to the House of Grace, and the Discharge of Charge for the Garden Estate Nairobi, property issued to the third party who has also paid Kshs. 1,000,000/= to the estate of the deceased”.

The court found that the consent had already been performed to a great extent, and in so finding, concluded that it should not be interfered with.

The court nevertheless went on to observe that a disagreement over the discharge of the Garden Estate property to Timber Manufacturers existed between the two houses for reasons that Timber Manufacturers’ appeal was pending before this Court, and the House of Grace, should not have given the property over to Timber Manufacturers without their consent.

On this basis, the court decided to sever the consent into two, in that, it declined to interfere with the consent as it related to the House of Grace, but with respect to the Garden Estate property it ordered that; (i) the Discharge of Charge for the Garden Estate property be released to the deceased’s Estate pending determination of the appeal; (ii) that Kshs. 1,000,000 paid by Timber Manufacturers to the Estate be refunded to it; and (iii) the intended appeal against the decision in *HCCC No. 1048 of 1994* to proceed as intended.

The appellants, Timber Manufacturers and Consolidated Bank were aggrieved with the High Court’s decision and filed separate appeals to this court which were consolidated on 26th March 2019.

Timber Manufacturers appealed on grounds that the learned judge was wrong to vary the consent judgment and decree of 29th June 2011, yet the consent was lawfully entered into, and acted upon by the parties; that the learned judge misdirected himself by setting aside the consent judgment on extraneous grounds, and considering issues that were neither pleaded nor proved thereby exposing Timber Manufacturers to hardship and immense loss and damage, particularly since it held the title and transfer of the property, and was in possession of the property. Finally, it was contended that the learned judge wrongly severed the consent judgment which was incapable of being severed.

On its part Consolidated Bank complained that the learned judge wrongly concluded that the dispute centered on whether Judy Thongori

Advocates had instructions and authority to act for the Estate in the suit and to execute the consent judgment without appreciating that the consent judgment was not severable having regard to the applicable law on setting aside of consent judgments, and in view of the parties

having implemented most of the terms of the consent; in concluding that there were differences between the administrators of the deceased's Estate, yet the evidence showed that the distribution of the estate was settled; in finding that there was a dispute over the property yet it was not listed as among the assets available for distribution; in finding that Judy Thongori Advocates did not have instructions to act for the Estate to record the consent judgment; in severing and varying the consent judgment after Consolidated Bank had discharged the properties after receiving payment in settlement of the outstanding loan and in ordering the parties to proceed to prosecute their appeal, despite the parties having agreed to settle it in terms of the consent judgment.

The 1st respondent also filed cross appeals in both appeals, but which were withdrawn by consent of the parties on 26th March 2019 when both appeals came up before us.

All the parties filed written submissions, and in highlighting them, **Mr. Nengo**, learned counsel for Timber Manufacturers submitted that their appeal was with respect to the Garden Estate property; that at the time of purchasing it, the deceased did not disclose that it was charged to Consolidated Bank as security for a loan. As a consequence they had filed *Civil Suit No. 1048 of 1994* to enforce the sale contract, but Azangalala, J (as he then was) declined to make an order for specific performance, but instead ordered that the purchase price be refunded. Thereafter a stay of execution of that decision was ordered by this Court, which appeal is now pending before this Court. Counsel asserted that after the deceased passed on, the Estate obtained letters of Administration, and the Garden Estate property was not listed as an asset for distribution, for reasons that it had already been sold, a fact conceded by the House of Grace; that after the suit was compromised, a substantial part of the terms had since been implemented by the parties.

Counsel faulted the learned judge for taking into account extraneous matters such as disagreements within the family unit in setting aside the sale of the Garden Estate property, yet the issue was commercial in nature. Counsel concluded by submitting that the conditions for partially setting aside the consent were not met.

Learned counsel for Consolidated Bank, **Mr. J.K. Thuku** supported the appeal and submitted that one of the terms of the consent judgment was that Consolidated Bank was to discharge the properties upon payment of the outstanding loan sums, while another term settled the intended appeal in *Civil Suit 1045 of 1994*; that pursuant to the consent, Consolidated Bank released the Murang'a Road property to the House of Grace, and the Garden Estate property to Timber Manufacturers. It was further submitted that setting aside the consent would mean that Consolidated Bank would be compelled to reverse transactions which was impractical. Counsel asserted that the learned judge misdirected himself when he set aside the sale of the Garden Estate property as it was not one of the orders sought in the application, and further that it was legally impossible for the court to have found one part of the consent to be legal and the other fraudulent. It was counsel's case that, the court ought to have retained the consent in its entirety or set it aside in its entirety; that since fraud was not established, no reason existed for the court to have severed a part of the consent.

On the issue of lack of instructions, counsel argued, that the Consolidated Bank had dealt with Judy Thongori as an advocate acting on behalf of the Estate, particularly as the notice of change of Advocates showed that the firm was acting on behalf of the Estate. It was contended that Consolidated Bank was entitled to rely on the representation of Judy Thongori Advocates on behalf of the Estate, as there was nothing to show that this was contested at the time.

Mr. Ongoya learned counsel holding brief for Judy Thongori Advocates for the House of Grace submitted that it was not in dispute that the deceased received consideration for the Garden Estate property from Timber Manufacturers. It is also not disputed that the deceased obtained a loan from Consolidated Bank and charged both the Murang'a Road and the Garden Estate properties as security for the outstanding loan. Counsel further submitted that it is also not disputed that the succession cause was settled between the parties, where the Murang'a Road property was distributed to the House of Grace, and that the Garden Estate property, which was not included in the Letters of Administration, was sold to Timber Manufacturers; that the understanding was always that once the loan was repaid the properties would be discharged to the respective parties.

As to whether Judy Thongori Advocates had the necessary authority, counsel argued that she did, since the Garden Estate property was tied to the Murang'a Road property under the loan facility with Consolidated Bank, it remained the responsibility of the House of Grace to resolve the outstanding loan with the Consolidated Bank, who in turn were entitled to rely on the representations made by Judy Thongori Advocates acting on behalf of the House of Grace. It was counsel's view that the interests of justice would be better served by upholding the entire consent.

On his part, learned counsel for the House of Florence, **Mr. Mbaabu** opposed the appeal. Counsel submitted that the dispute was not with respect to the Murang'a Road property, as it was agreed that it belonged to the House of Grace. The problem concerned the Garden Estate property, which counsel argued was the Estate's responsibility, particularly as Timber Manufacturers' appeal against dismissal of *Civil Suit No 1048 of 1994* was still pending before this Court.

As to whether Judy Thongori Advocates had the requisite authority to enter into the consent, counsel asserted that the court found that the firm did not have the requisite authority from the two administrators to enter into the consent, particularly as the House of Florence had prohibited the firm from entering into the consent. As a consequence, the consent was a nullity, and the Garden Estate property should not have discharged to Timber Manufacturers.

In reply, Mr. Njengo countered that, since the learned judge found that Judy Thongori Advocates had authority to enter into consent, then the consent was legally binding and the court had no authority to subsequently sever it.

Mr. Thuku submitted in support that, since Consolidated Bank was not a party to the communication between the administrators of the Estate, it ought not to be penalized for having entered into the consent, irrespective of whether or not Judy Thongori Advocates had authority.

We have considered the appeal, the submissions and the ruling and in determining the issues we appreciate that we are only entitled to interfere with the findings of the court below if they are based on no evidence or on a misapprehension of the evidence or where the judge is

shown demonstrably to have acted on wrong principles in reaching the findings. See *Mwangi vs Wambugu [1984] KLR page 453* where it was also stated;

"An appellate court is not bound to accept a 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."

Bearing the above in mind, we consider the issues for consideration are; whether Judy Thongori Advocates had the requisite authority to enter into consent on behalf of the Estate; whether the consent judgment could be set aside or varied; whether the learned judge rightly ordered severance of the consent judgment and whether the consent judgment was substantially performed.

As to whether Judy Thongori Advocates had the requisite authority to enter into the consent, the learned judge found that she did not because the firm was informed by Machira Advocates that the House of Florence would not be party to the consent. But upon appreciating that Judy Thongori Advocates had acted bonafide in the interest of the House of Grace, the court concluded that a valid and binding consent had come into existence, and declined to interfere with it.

Whether or not the Advocates had the requisite authority, requires that we evaluate the facts as were presented to the lower court and arrive at our own conclusion on the issue. – See *Selle vs Associated Motor Boat Co. [1968] EA 123*.

In ascertaining whether a binding consent had come into existence, we will analyse the evidence from the two divergent viewpoints, that being from the House of Grace's standpoint on the one hand, and that of the Consolidated Bank and Timber Manufacturers on the other.

Beginning with the House of Grace's standpoint, the properties involved were the Murang'a Road property and the Garden Estate property. Both properties were charged to Consolidated Bank as security for loan proceeds that were advanced to the deceased. Consolidated Bank threatened to sell the Murang'a Road property to recover the outstanding loan amounts. Being the beneficiaries of the Estate that directly stood to suffer from the loss of this property, the House of Grace instructed Judy Thongori Advocates to act on its behalf to secure the assets. Correspondence shows that the firm wrote to the Estate which was represented by Machira Advocates to inform them of the steps taken to safeguard the assets, including the orders obtained to stop Consolidated Bank from selling the properties.

When informed that negotiations had commenced to settle the outstanding debt, Machira Advocates on behalf of the Estate declined to participate in the negotiations or to enter into the consent to avert the sale of the Murang'a Road property. So what was the House of Grace to do? Sit back and await consent from each and every beneficiary of the House of Florence to save the properties, (of which they had no apparent vested interest), and that were on the verge of being sold? We think that this was not the most reasonable or efficacious stance to take given that initially the House of Florence did not register any objection when Judy Thongori Advocates entered appearance in the suit as representative of the Estate, and revived the suit and obtained an injunction to restrain the Consolidated Bank from selling the properties. In addition, the inertia displayed by Machira Advocates to safeguard the Estate's assets left the House of Grace with no choice but to take the necessary steps to forestall sale of the properties.

By entering into the consent on behalf of the House of Grace in the manner that she did, we are satisfied that Judy Thongori Advocates acted appropriately under authority from the House of Grace, to execute the consent on behalf of the Estate to save the properties.

On the other side of the divide, was the belief by the Consolidated Bank and Timber Manufacturers that Judy Thongori Advocates was duly authorised to enter into the consent. Based on this belief, they negotiated, executed and went on to substantially perform the terms of the consent. From the appellants' standpoint, we are of the view that they were entitled to harbor this belief as nothing showed that they were aware that Judy Thongori Advocates was not authorized to represent and to execute the consent on behalf of the deceased's Estate. Though it is appreciated that Machira Advocates informed Judy Thongori Advocates that the House of Florence would not participate in the negotiations aimed at recording a consent, Machira Advocates did not similarly notify the appellants of the House of Florence's position. As such, since a distinction between the position the representatives of the House of Grace and the House of Florence both of which comprised the Estate was not drawn or brought to their attention, the appellants could not be faulted for relying on the representations made by Judy Thongori Advocates, and which culminated in the consent.

Having found that Judy Thongori Advocates was duly authorized to represent the Estate, and appreciating that the appellants were entitled to rely on the representations that culminated in the consent, we find that the consent was valid and binding. And despite misdirecting himself that she was not so appropriately authorized, the learned judge rightly reached the conclusion that *"...the Consent should not be interfered with."* But the matter does not end there. The learned Judge then proceeded to sever the consent and order that the Garden Estate property be released to the Estate and for the dispute over the Murang'a road property to proceed on appeal.

This leads us to the next issue of whether, having found the consent judgment to be valid and binding, it could be set aside or varied or severed as ordered by the judge.

In order to vary or set aside, or sever a consent, (as was the case here), it must be proved that the consent was procured through fraud, or collusion or misrepresentation or non-disclosure of material facts or that the consent was contrary to public policy. In the oft-cited case of *Brook Bond Liebig (T) Limited vs Mallya [1975] EA 266* which expounded this principle, this Court considered the case of *Hirani vs Kassam (1952) 19 EACA 131* where an extract from *Seton on Judgments and Orders, 7th Edn., Vol, p.124* was cited with approval to the effect that;

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to policy of the court... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a court to set it aside."

And in the case of *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd [2017] eKLR*, the Court in addressing the issue of contracts between parties expressed itself thus;

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

None of the factors enumerated above were found to exist in the instant case. Neither fraud nor collusion nor misrepresentation of the facts was established. The parties had set out the terms of their agreement in the consent, which terms encompassed both properties. If the impeding factors were not established in the case of the Murang’a Road property, the same were also applicable to the Garden Estate property. The House of Florence was therefore estopped from alleging that one part of the consent was fraudulent, and that another part was not.

In the case of *Harambee Cooperative Savings & Credit Society vs Mukinye Enterprises Limited [1982] eKLR*, this Court explained;

“The authorities we follow are at one, that where a contract is wholly in writing, its interpretation is exclusively within the jurisdiction of the judge; and that courts insist that “the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement.”

More fundamentally, it cannot be overlooked or disregarded that the consent has been performed to a large extent, and any reversal at this stage would be detrimental to the parties.

Citing the case of *F and G Sykes (Wessex) Limited vs Fine fare Limited (1967) Lloyds Rep 53* in the case of *Diamond Trust Bank Limited vs Ply and Panels Limited [2004] 1 EA 31* this Court observed;

“In a commercial agreement the further the parties have gone on with their contract the more ready the courts are to imply any reasonable terms so as to give effect to the intention. When much has been done the Courts will do the best not to destroy the bargain. When nothing has been done, it is easier to say there is not agreement between the parties because the essential terms have not been agreed.”

Both the House of Grace and Consolidated Bank have deposed that Consolidated Bank had performed its side of the bargain and discharged the properties to the House of Grace and to Timber Manufacturers. With a substantial part of the consent having already been implemented, to reverse such performance at this stage would not only be to go against the parties’ bargain, but would also reopen the parties’ dispute in its entirety, which for the most part, had been effectively settled.

Once a valid and binding consent between the parties had come into existence, and having found that there was nothing to support or justify setting it aside or severing it, the learned judge ought to have upheld the parties’ consent instead of severing it for reasons that some of its terms were legitimate and others were not. The court was bound to interpret and construe the consent in the terms set out within the four corners of the agreement, and in failing to do so, the learned judge misdirected himself and we find that for the reasons aforesaid we must interfere with that decision.

In sum, the consolidated appeals are merited. We set aside the decision of the High Court dated 19th May 2014 with costs to the appellants.

It is so ordered.

Dated and delivered at Nairobi this 27th day of September, 2019.

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

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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