REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA –IN CHAMBERS)

CIVIL APPEAL NO. 145 OF 2017

BETWEEN

ANN WANJUNU.....APPLICANT

VERSUS

MWIHAKI WARUIRU.....1ST RESPONDENT

LAND REGISTRAR KIAMBU.....2ND RESPONDENT

NYAKINYUA INVESTMENTS LTD.....3RD RESPONDENT

(*Appeal from the entire Judgment and Orders of the High Court of Kenya*

at Nairobi (J.L.A. Osiemo, J.) Dated 19th July, 2007

in

H.C.C.C. No. 5425 of 1992)

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RULING OF THE COURT

Before me is a Notice of Motion dated the 23rd day of June, 2017 and lodged in the Courts' Centrol Registry at Nairobi on the 27th day of June, 2017. It is premised on sections **3A** and **3B** of the Appellate Jurisdiction Act Cap. 9, Laws of Kenya, and Rule 4 of the Court of Appeal Rules 2010. Substantively the applicant seeks the following reliefs:

> ***(1) That this Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the whole Judgment and decree in High Court of Kenya, Nairobi (Osiemo, J.) delivered on 19th day of July, 2007 in Nairobi Civil Case No. 5425 of 1992.***
>
> ***(2) That the record of Appeal dated 26th May, 2017 and filed on 29th May, 2017 be deemed as filed and properly on record.***
>
> ***(3) That the costs of the application be provided for."***

The application is grounded on the grounds in its body, a supporting affidavit and oral submissions. It has been opposed by a replying affidavit deposed by **Mwihaki Waruiru,** the first respondent, on her own behalf, and filed on the 12th day of March, 2018, and oral submissions. There was no opposition from the 2nd and 3rd respondents who appear to have lost interest in the litigation.

Rising up to support the application, learned counsel **Mr. Waweru Sammy Kamuti** submitted that the intended impugned Judgment was delivered on 19th July, 2007; that the applicant was aggrieved and she timeously lodged a Notice of Appeal on the 24th day of July, 2007 alongside the letter bespeaking proceedings for purposes of preparation of the record of appeal; that the applicant successfully sought orders of status quo pending appeal, granted in her favour on the 15th day of April, 2009; that it was however not until the 4th day of February, 2010 that the Registrar of the Court certified that the proceedings were ready for collection; that it was not until the 22nd day of May, 2017 when the certificate of delay was issued. Upon receipt of the certificate of delay, she instructed her advocate now on record for her to file a record of appeal, which he did file on the 29th day of July, 2017. On the 27th day of June, 2017 her advocate on the record filed the application under review. The applicant therefore moved with speed as soon as she was capacitated.

It is also counsels' contention that the delay in filing the appeal was occasioned first by reasonof the Court delaying in the preparation of the proceedings which took over a period of three years; second, by reason of the firm of Advocates then on record for her splitting in the year 2015 without giving her any notice, and third, for the failure of the Judiciary to notify the parties when the file was transferred from the High Court Civil Registry in Nairobi to the ELC Court at Thika. It therefore took a considerable time before she finally located the file at the ELC Court at Thika.

It was also counsel's submissions that since the discretion donated under rule **4** of the Rules of the Court is unfettered, this Court would be making a grave mistake if it were to shut the applicant out of court and deny her the right of appeal considering that she has given a plausible explanation for the delay which delay is also excusable. Counsel also added that the subject matter of the appeal being a land matter, the Court ought to be cautious on the orders to be made which in counsels' view, should focus on the substance of the appeal as opposed to the procedural technicalities relied upon by the 1st respondent in opposition to the application.

Counsel further relied on the overriding objective principle enshrined in section **3A** and **3B** of the Appellate Jurisdiction Act Cap 9 laws of Kenya, in urging that no prejudice if any is likely to be occasioned to the respondents which is incapable of compensation by way of costs, considering that the appeal as intended is arguable. Counsel also urged me to invoke Article **159 (2) (d)** of the Kenya Constitution 2010 which envisages the delivery of justice without undue regard to technicalities.

Rising up to oppose the application, learned counsel **Mr. Dancan Okatch O.** for the 1st respondent conceded that the impugned Judgment was delivered on the 19th day of July, 2007 and also that the applicant obtained injunctive orders in her favour pending the determination of the intended appeal, and which orders the 1st respondent elected to respect in the anticipation that the applicant would move expeditiously to file and prosecute her then intended appeal. Instead, the applicant neither took steps to lodge the appeal nor even serve a Notice of Appeal and the letter bespeaking proceedings on the 1st respondent as was mandatorily required of her (the Applicant) by the Rules of the Court and which default in the 1st respondents view, has not been explained. Counsel also submitted that the 1st respondent is opposed to the applicant being granted the reliefs sought because the displayed dilatory conduct in the pursuit of her appellate process does not only amount to an abuse of both the injunctive orders and the due process of the court; but it is also perpetuating the pendence of the injunctive orders which in her view continue being abused by the applicant, and which also continue to deny her the enjoyment of her proprietary rights over the suit property, as crystallized in her favour by the intended impugned Judgment. It is also the 1st respondent's view, that it is the filing of her application to discharge the punitive injunctive orders that prompted the lodging of the record of appeal, without leave; that by reason of what has been submitted on above, the applicant's intended appeal is therefore defeated by the doctrine of laches as equity only aids the vigilant and not the indolent; that the same is not curable by the invocation of either the overriding objective principle or Article **159 (2) (d)** of the Kenya Constitution 2010, as it is now settled that these principles are not a cat blache for all manner of excuses. It is not a panacea or cure to be used at every instance where there is clear demonstration that the court process was being abused. Lastly, that the issue of arguability of the intended appeal is not a matter to be considered at this stage of the proceedings.

In reply to the 1st respondent's submissions, learned counsel **Mr. Waweru,** reiterated that the applicant has plausibly explained the reasons for the delay in lodging the intended appeal, and that the applicant moved diligently and with speed to lodge the record of appeal as soon as she was capacitated to do so. In counsel's view, this is borne out by the fact that the record of appeal was lodged in less than a month and four days upon receipt of the certificate of delay. Counsel also reiterated that the appeal is arguable; that the applicant is only asking for a single day to vindicate her appellate rights; that denying her a right to ventilate her appellate rights would leave a vacuum in the litigation as there are two titles over the same subject property but in different names and in respect of which the trial Judge made no order for the cancelation of whichever he found was not the genuine one. Ends of justice would in the circumstances demand that the issue of the existence of the two titles be sorted out on appeal.

My invitation to intervene has been invoked under the provisions of law cited above. Section 3A and 3B of the Appellate Jurisdiction Act enshrine the overriding objective principle, which principle confers on the Courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (***See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008)***. Second, the aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of ***Kariuki Network Limited & Another versus Daly*** & ***Figgis Advocates Civil Application No. Nai 293 of 2009).***Third, the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness. (See the case of ***Kariuki (Supra).*** Fourth, the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of ***Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR).*** See also **Edith Gichugu Koine versus Stephen Njagi Thoithi [2014] KLR** for the holding *inter alia* that there is also a duty imposed on the Court under section **3A** and **3B** of the Appellate jurisdiction Act to ensure that the facts considered are consonant with the overriding objective of civil litigation, that is to say the just expeditious, proportionate and affordable resolution of disputes before the court.

Besides the overriding objective principle highlighted above, the substantive rule for access to the relief sought and which needs interrogation is **rule 4** of the **Rules of the Court**. It provides:

> ***"4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."***

The principles guiding the exercise of this jurisdiction are now well settled. I will highlight a few by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi** (supra) Odek, J.A. held the view that:-

> ***"It is trite that the exercise of the mandate is discretionary which discretion is unfettered and does not require establishment of "sufficient reasons" save that it has to be guided by factors not limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance."***

Further that

> ***"There is also a duty imposed on the court under Section 3A and 3B of the Appellate Jurisdiction Act to ensure that the facts considered are consonant with the overriding objective of civil litigation that is to say the just expeditious proportionate and***

affordable resolution of disputes before the court" (see ***Fakir Mohamed versus Joseph Mugambi & 2 Others Civil Application Nai.332 of 2004 (UR)."***

In **Nyaigwa Farmers Co-operative Society Limited versus Ibrahim Nyambare & 3 Others** (supra) Musinga, J.A. reechoed the above principles thus:

> "***The principle that guide this Court in considering an application of this nature are well known. They are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed."*** (**Patel versus Waweru & 2 Others [2003**] KLR 361 approved).

In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998**] **eKLR G.S. Pall JA** (as he then was) added inter alia that:-

> ***"an appellant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the Rules of the Court and this order should liberally granted unless the applicant is guilty of unexplained and in ordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that his intended appeal is not an arguable appeal"***

The learned judge then went on to add the following:-

> ***".. the discretion granted under rule 4 of this Court to extend time for lodging an appeal is, as well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context, this Court has on several occasions granted extension of time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it."***

See also **Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board** (supra) in which K.M'Inoti J.A, made the following observations on the exercise of this jurisdiction:-

> ***"Rule 4 empowers this Court, on such terms as it thinks just, to extend the time prescribed by the Court of Appeal Rules for the doing of my act, subject only to the requirement that it must be exercised judicially. The discretion conferred by that rule is wide and unfettered."***

Quoting with approval the holding in **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai.332 of 2004** the learned judge added the following:-

> ***"The exercise of this Courts discretion under rule 4 has followed a well beaten path since the stricture of "sufficient reasons" was removed by the amendment in 1998. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the responses of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors."***

See also **Hellen Waruguru Waweru versus Kiarie Shoe Stores Limited** (supra) in which Odek, J.A approved the principle enunciated by the court in **Mutiso versus Mwangi [1997] KLR 630**, as approved in **Fakir Mohammed versus Joseph Mugambi & 2 Others** (supra). Lastly, there is **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which Odek, J.A. held that

> ***"failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other proceedings relied upon by such an applicant"***

Further while quoting with approval the holding in **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012** the learned judge added that:-

> "***The Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court."***

Further approved the holding in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013** that:

> ***"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

I have given due consideration to the totality of the record before me in the light of the rival submissions set out above and the principles of law that

guide the court in the exercise of its discretion both under sections 3A and 3B of the appellate jurisdiction Act (supra), Rule 4 of the rules of the Court and Article **159 (2) (d)** of the Kenya Constitution, 2010. It is not in dispute that in the light of the above principles, Rule **75(2)** of the rules of the Court obligated the applicant as the party who was aggrieved by the intended impugned Judgment of the High Court, to lodge a Notice of Appeal within fourteen **(14)** days of the date of the Judgment and also to timeously lodge with the Registrar of the Court a letter be speaking the proceeding and then serve these two processes on the respondents within seven days of their being lodged in terms of Rule **77(1)** of the Rules of the Court; and thereafter to lodge the record of appeal within sixty days of the lodging of the Notice of Appeal.

It is also evident from the record that although the Notice of Appeal and the letter be speaking proceedings were timeously lodged, neither of two processes were served on the 1st respondent, nor was the record of Appeal lodged within the stipulated time line, hence the invocation of the rule **4** of the Rules of the Court procedures, to cure that apparent default on the part of the applicant. Where there has been a delay, the defaulting party is not automatically shut out of the appellate process. There is provision for the Court to intervene and ameliorate any hardship occasioned on the defaulting party but subject to the defaulting party satisfying the prerequisite of the threshhold set in rule 4 of the Rules of the Court.

The applicant contends that she has met the prerequisites set under the rule 4 procedures and is therefore entitled to the exercise of the Court's discretion in her favour, while the 1st respondent asserts that she has not. Under the said rule, and as explicitly distilled by case law assessed above, matters of the length of the delay and the reasons for the delay are of paramount consideration in deciding either way.

The applicant concedes that she does not deny that there has been delay but says that it has been plausibly explained. The record is clear that the intended impugned Judgment was delivered on the 19th day of July, 2007, while the record of appeal was lodged on the 29th day of July, 2017 a period of ten (10) years and ten (10) days since the delivery of the intended impugned Judgment, and six (6) years, five (5) months and seventeen (17) days from the date the applicant was informed by the registrar of the Court about the readiness of the proceedings for appellate purposes; and three years after the splitting of the firm of advocates then on record for her; and one month and four days from the date the certificate of delay was issued to the filing of the record. The record is however silent as to when the record was transferred from the High Court Civil Registry in Nairobi to Thika and as to when she accessed it.

The record is also silent as to when the proceedings were collected from the Registrar. It is learned Counsel **Mr. Okatch** who submitted from the bar that these were collected on the 15th day of March, 2010. As for the certificate of delay, it is common ground that this was issued on the 22nd day of May, 2017 but in the wrong names of advocates. It was issued in the names of the current advocate on record for the applicant as opposed to it being issued in the names of the advocate who was on record for the applicant in the course of the proceedings in the High Court. It is this mix up on the advocates which **Mr. Okatch** has used to term the said certificate of delay invalid and could not be used to lodge the record of appeal sought to be validated.

Turning to the periods of delay that the applicant is obligated in law to explain, she contends she has furnished sufficient explanation in paragraphs 7, 8, 9 and 10 of the supporting affidavit, which are reproduced hereunder as follows:

> ***"7. That on 4th May, 2010, the proceedings were certified ready for collection by the Deputy Registrar of the High Court. This was almost 3 years from the date Judgment was rendered and proceedings requested by my advocates on the record then. (Herein attached and marked "A W6" is the letter dated 4th May, 2010 from the High Court registry attesting to the same.***
>
> ***8. That on May, 2017, I instructed my advocates to file a record of appeal seeking to have the Judgment of the High Court, (Osiemo, J.) set aside. The same forms part of the record of this Honourable court."***
>
> ***9. That I sought information from my advocates on record on the progress of my appeal but I received neither a reply nor any correspondence about the appeal.***
>
> ***10. That my former advocates on record, a firm of partners later in the year 2015 split and the whereabouts of my file were nowhere to be found and I sought to instruct a new advocate.***

The first respondent in her replying affidavit took issue with the content of the above paragraphs for the reason that there is nothing either in the said depositions or any annextures annexed thereto demonstrating that the applicant diligently made a follow up either with the court or her advocate then on record for her with regard to the expediting of both the acquisition of the proceedings for the intended appellate process, and the filing of the record of appeal, which assertions according to the 1st respondent remain mere allegations as the applicant filed no further affidavit in rebuttal to counter those assertions. It is correct as asserted by the 1st respondent that no affidavit in rebuttal was filed by the applicant. The 1st respondent assertions therefore remain unrebutted.

The 1st respondent also raised the issue of lack of service upon her of the Notice of appeal and the letter be speaking the proceedings in terms of Rule **77(1)** of the rules of the Court, which obligated the applicant to serve the Notice of Appeal on the 1st respondent within seven (7) days of such lodging as already pointed out above. This assertion too has not been rebutted by the applicant. No explanation was given for non compliance with Rule **77(1)** of the rules of the Court, save for the general blanket blame attributed to lack of diligence on the part of her former advocate then on record for her, but as already observed above, there is nothing on the record to show that she raised those issues with the said advocates with a view to expediting the appellate process she had timeously initiated. There is also no rebuttal of the 1st respondent's assertion that there has been no explanation as to why the record of appeal was not lodged or a certificate of delay obtained soon after collection of proceedings on 15th March, 2010.

It is now trite that Rules of procedure should be obeyed by parties seeking to avail themselves of procedures provided for under those rules in

the pursuit of their rights before Court. In fact the overriding objective principle highlighted above has explicitly stated that its application is not meant to oust the need to comply with Rules of procedure but to embolden the Court and give it greater latitude in the interpretation of those Rules. As for Article **159 (2) (d)** of the Constitution 2010, the principles that guide its invocation were set out in the case of **Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR** wherein the court held inter alia that:

> ***"rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action";***

In **Raila Odinga and 5 Others versus IEBC & 3 Others [2013] eKLR** the Supreme Court stated that the essence of **Article 159** of the Constitution is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case. In **Lemanken Arata versus Harum Meita Mei Lempaka & 2 Others eKLR** it was stated that the exercise of the jurisdiction under Article **159** of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice. Lastly in **Patricia Cherotich Sawe versus IEBC & 4 Others [2015] eKLR** it was stated that **Article 159(2) (d)** of the Constitution is not a panacea for all procedural short fall as not all procedural deficiencies can be remedied by it. In the light of the above principles, I agree with the submissions of the 1st respondent that that both principles enjoin parties to adhere to procedural rules. See **Jaidesa Tuke Debelo versus IEBC and another [2015] eKLR** wherein, the court held *inter alia* that:

> ***"Rules of procedure are hand maids of justice and where there is a clear procedure for redress of any grievance prescribed by an Act of parliament that procedures should strictly be followed."***

In the circumstances displayed above, it is my finding that the applicant's failure to furnish both plausible reasons and proof for the delay, leaves unrebutted the 1st respondent's assertion that the direct filing of the appeal record before seeking leave, was meant to circumvent and or short circuit the outcome of her application seeking the discharge of the interim injunctive orders.

Issue of the invalidity of the certificate of delay pursuant to which the records of appeal was lodged was also raised. None was annexed to the affidavits. I was referred to one in the record. Since I am not seized of the record, I cannot not make any observations thereon. It is sufficient for me to say that it was a vital document as it would have assisted in computing time for the amount of delay contributed to by the court. The failure to annex it is fatal to the applicant's application as there is nothing to show in capacity after collection of the proceedings on 15th March, 2010.

Issue of the intended appeal being arguable has been advanced by the applicant with a view to sustaining the application, even if I were to find that the explanation advanced by her for the delay is not plausible and has therefore not met the threshold under the rule 4 of the Rules of the court procedures. In **Joseph Wanjohi Njau versus Benjon Maina Kabau Civil Application No. 97 of 2012**, it was observed that, an arguable appeal is not one that must necessarily succeed but one which ought to be argued fully before court. In **Okiya Omtatah Okoiti and another versus Afrison Export Limited and 8 others Civil Application No. 225 of 2016 (UR) 177 OF 2016)** the following observation were made:

> ***"3 matters of the arguability of the intended appeal though a mere possibility cannot be ignored."***

When the above principle is considered in the light of the grounds of the intended appeal reproduced both in the grounds in the body of the application and at paragraph 12 of the supporting affidavit, it is my view that these do not reveal frivolous issues. The intended appeal is therefore arguable. The above finding notwithstanding, the issue of the intended appeal being arguable, cannot be treated in isolation with the need for the applicant to meet the threshhold set out in rule **4** of the Rules of the Court. It cannot therefore be sustained as a stand alone issue. It has to be weighed against the impact and consequences of non compliance with the rules already highlighted above.

Also critical to the lack of success of the application under review is the failure to serve the Notice of Appeal and the letter bespeaking proceedings on to the 1st respondent, which was fatal as it rendered the applicant's appellate process initially timeously initiated null and void *ab initio*, upon the lapse of the period allowed for the service of the Notice of Appeal on the respondents. It therefore follows that anything done in furtherance of the said intended appellate process was null and void. It could only be resuscitated in law if the applicant had sought leave of Court to restart that process a fresh in the first instance and then resort the process a fresh after obtaining the necessary leave. She elected to lodge the record first and then seek leave. In the circumstances displayed above, that record was incompetently lodged and could not even form anchor for the application under review. The application under review is therefore also tainted by the nullity that plagues the lodging of the record of appeal. It is also therefore incompetent.

Issue of the applicants' rights to be heard on appeal has also prominently featured in the applicants' submissions as another possible reason for salvaging her now tainted appellate process. Although this is not one of the prerequisites required to be met under the rule **4** procedures, there is no harm in interrogating it as both parties made submissions on it. The right to be heard has already been crystallized by the court in the case of **Richard Nchapi Lelyagu versus IEBC & 2 others civil Appeal No. 18 of 2013** that:

> ***"The right to a hearing has always been a well protected right in our constitution and is also the concomitance of the rule of law. This is why even if the Court have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

I agree that the applicant's right to be heard is guaranteed under the rules of the court. That is why there is provision for the filing of the Notice of Appeal and thereafter to take the procedural steps outlined above in order for her to realize her appellate right. The need for parties to respect Rules of procedure has been crystallized by case law. See **Jaldesa Tuke Dabelo versus IEBC** (supra). These exist to aid the Courts in conducting orderly business. It was therefore the duty of the applicant to comply with those rules. Since it is conceded that there was non compliance on her part, the rule 4 procedures came in hand to afford her a window of hope for her as a defaulting party. However, in order to benefit from that window of hope, she had to meet the thresh hold set under the Rule **4** Procedures, which unfortunately she failed to meet. My hands are therefore tied. I cannot shut my eyes to the reasons advanced above as reasons for the failure to meet that threshold.

In the result and for the reasons given in the above assessment, the application under review is nothing but a nullity *ab initio.* The application is therefore struck out with costs to the 1st respondent.

Dated and Delivered at Nairobi this 19th day of March, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR