



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 20 OF 2017

BETWEEN

STAFF PENSION FUND & KENYA COMMERCIAL BANK

STAFF RETIREMENT (DC) SCHEME 2006.....1<sup>ST</sup> APPELLANT

RETIREMENT BENEFITS AUTHORITY.....2<sup>ND</sup> APPELLANT

AND

ANN WANGUI NGUGI & 524 OTHERS.....RESPONDENTS

*(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nairobi (J. N. Abuodha, J.) dated 26<sup>th</sup> June, 2015*

in

ELRC Cause No. 10 of 2014)

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JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling of the Employment and Labour Relations Court (ELRC) (**Abuodha, J**) dismissing a preliminary objection to Civil Appeal No. 10 of 2014. The preliminary objection was based on two grounds; firstly, that the court lacked jurisdiction to hear and determine any dispute relating to a retirement benefits or pension scheme and any appeal from the determination of the Retirement Benefits Tribunal, and secondly, no right of appeal lies to ELRC.

[2] The respondents are former employees of the Kenya **Commercial Bank Limited (bank)**. The bank established the **Kenya Commercial Bank Staff Pension Fund (Fund)** by a Trust Deed dated 10<sup>th</sup> March, 1982, later amended by Deed of Amendment dated 23<sup>rd</sup> June 2008. This was a defined benefits scheme where the bank solely made contributions to the staff retirement benefits scheme. By a Trust Deed dated 6<sup>th</sup> October, 2006, the bank established the **Kenya Commercial Bank Staff Retirement (Defined Contribution) Scheme 2006** inclusive of both the bank and the employees' contribution to the staff retirement benefit scheme.

The respondents were members of the 1982 scheme. The respondents left service under different circumstances, including normal retirement; special voluntary retirement, early retirement, dismissal or ill health.

[3] The Trust Deed contains terms and the rules of the pension fund. The main object of the Fund is to provide pension to members on retirement from the service of the bank. The Deed provides, *inter alia*, the mode of computation of pension. The Fund is administered by a Board of Trustees who hold the assets of the Fund upon trust to apply the fund towards providing pension and other benefits payable under the Fund.

[4] The retirement benefits schemes are regulated and supervised by the **Retirement Benefits Authority (RBA)** established under the **Retirement Benefits Act – No. 3 of 1997 (Act)**. One of the functions of RBA is to protect the interests of members and sponsors of the retirement benefits sector. Under the Act, every retirement benefits scheme other than a scheme established by written law should be established under an irrevocable trust (s.26). The scheme manager, custodian or administrator, are required to be limited liability companies

and should also be registered under the RBA (Sections 25, 25A, 25B and 27).

By S. 32 every retirement benefits scheme (other than a scheme funded out of the Consolidated Fund) is required to have a scheme fund into which all contributions, investments, earnings, income and other monies payable under the scheme should be paid.

[5] Section 46 of the Act provides for appeals to the Chief Executive Officer (CEO) of RBA and states that any member of a scheme who is dissatisfied with the decision of the manager, administrator, custodian or trustees of the scheme, may request in writing that such decision be reviewed by the CEO with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established. Section 47 of the Act requires the Minister responsible for Finance to establish an Appeals Tribunal, and provides that the Chairman of the Tribunal shall be an advocate of the High Court of Kenya. By section 48 (1) of the Act, any person aggrieved by the decision of the RBA or CEO has a right of appeal to the Tribunal – **The Retirement Benefits Tribunal (Tribunal)**. By section 48(2), any dispute between any person and RBA as to exercise of powers under the Act is also appealable by either party to the Tribunal. Section 49(1) provides:

***“On hearing of an appeal, the tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.”***

Any interested person may be represented by an advocate or any other person before the Tribunal. The Tribunal has power to award costs and issue a certificate of costs which should be filed in the High Court, which upon filing is deemed as a decree of the High Court and may be executed as such (s.51). In addition, Section 52 of the Act provides:

***“The Chief Justice may make rules governing the making of appeals and providing for fees to be paid, the scale of costs of any such appeal, the procedure to be followed therein, and the manner of notifying the parties thereof; and until such rules are made and subject thereto, the provisions of the Civil Procedure Act (Cap. 21) shall apply as if the matter appealed against were a decree of subordinate court exercising original jurisdiction.”***

The Retirement Benefits (Tribunal) Rules 2010 have been made to regulate appeals under section 48(1) and 48(2) of the Tribunal.

The extent to which the Civil Procedure Rules are applicable to the appeals is circumscribed by Rule 12 thus:

***“In matters of procedure not governed by these Rules or the Act, the Tribunal may adopt the Civil Procedure Rules made under the Civil Procedure Act (Cap 21) where applicable.”***

[6] Sometime in 2009, the CEO of RBA received a complaint from the Bank’s former employees (members) to the effect that their retirement benefits had been erroneously calculated. The members were in essence complaining of under payment. On or about December, 2009, the CEO informed the Board of Trustees of the Fund of the complaint and required the Trustees to furnish details regarding how the benefits had been determined. Several letters were exchanged and the Trustees responded that they had forwarded the documents to their Actuaries, M/s Alexander Forbes Financial Services for verification whether the benefits were correctly computed. Later, the computations by the actuary were forwarded to the CEO of RBA. Ultimately, by a letter dated 16<sup>th</sup> June, 2010 addressed to the members’ advocates, the CEO communicated his decision, in essence, that he was satisfied that the benefits calculation adopted by the Trustees was consistent with the Trust Deed and Rules of the Scheme save for a few cases where he directed the Trustees to recalculate the benefits.

[7] The respondents appealed to the Tribunal against the decision of the CEO. They sought an order that the decision of the CEO be set aside and replaced by prayers in the statements of claim and that the calculation prepared by their actuary be upheld. At the hearing of the appeal, the Tribunal ordered RBA to appoint an independent actuary to file a report on calculation of benefits due to the respondents. An actuarial report by Robert Oketch of NBC Holdings (Pty) Ltd was filed in compliance with the Tribunal’s order. Apparently, the independent actuary concluded that the respondents’ benefits were properly calculated. The Tribunal considered the report prepared by **Robert Oketch** of NBC Holdings (Pty) Ltd. the respondent’s actuary and rejected it as an incorrect calculation of benefits and gave reasons for rejection. The Tribunal also considered the report of Alexander Forbes Financial Services relied on by the Trustees and the independent report. It adopted the report prepared by Robert Oketch and dismissed the appeal on 19<sup>th</sup> September 2014.

[8] The respondents filed an appeal against the decision of the Tribunal before ELRC. The 1<sup>st</sup> appellant herein – the Trustees filed a preliminary objection based on two grounds namely;

***“(a) The Court lacks jurisdiction to hear and determine any dispute to retirement benefits or pension scheme and any appeal arising from the determination of the Tribunal in connection with or relevant to such scheme, such as is the nature of the appeal herein.***

***(b) No right of appeal lies to the court as no such right has been specifically conferred either by the Constitution or enabling statutes, namely Employment and Labour Relations Act and the Retirement Benefit Act”***

The 2<sup>nd</sup> appellant supported the preliminary objection. On the issue of jurisdiction the Court concluded:

***“13. ....The appellants are former employees of Kenya Commercial Bank. Their retirement benefits therefore find their rooting on the relationship with the bank as its employees. This court has as one area of jurisdiction, resolution of disputes arising out of employer-employee relationship. A purposive interpretation of this jurisdiction includes prospective and former employees such as the appellants before me. It is therefore erroneous to submit as senior counsel Mr. Fred Ojiambo did, that***

*the court lacks jurisdiction in the matter”.*

Regarding the right of appeal, the Court reasoned partly as follows:

**“22. ....The absence of any inhibitive legislative provision cannot be construed to oust a fundamental right such as the right to access the courts for redress. Further whether there was an ouster clause or not such ouster cannot effectively deny the court its supervisory jurisdiction over inferior tribunals exercisable by way of judicial review. However with regard to appeals, it would be advisable before such an appeal is filed for the leave of the court to be sought and obtained for reasons proffered earlier in this ruling.**

**“23. Considering the uniqueness of the circumstances of this appeal and the apparent lack of clarity in the law, the court will admit the appeal for hearing on merit but would recommend that future appeals arising from the decisions of the Tribunal be not filed unless the leave of court first had and obtained.”**

[9] The appeal is based on two broad grounds namely, firstly, the jurisdiction to entertain the appeal and secondly, the right of appeal to ELRC from the decision of the Tribunal. The ground of the right of appeal was argued first, followed by the ground of jurisdiction. The appeal will be considered in that sequence.

[10] As regards the right of appeal, the learned Judge is faulted for failing to properly address the question of whether an appeal lies from the Tribunal to the ELRC and also in conferring jurisdiction upon ELRC to hear and determine the appeal despite the fact that no such appeal exists in law.

**Mr. Ojiambo**, Senior Counsel for the 1<sup>st</sup> appellant submitted that, right of appeal and the jurisdiction of a court to entertain an appeal must be expressly provided for in law; that section 12(3) of the Labour Relations Court Act, Rule 2 and 8(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provide that a right of appeal must be conferred by law and that Rules on their own without written substantive law cannot confer appellate jurisdiction. Counsel cited authorities to support the submissions. Although 2<sup>nd</sup> appellant’s counsel did not attend the hearing of the appeal, he nevertheless filed written submissions citing the same provisions of the law as the counsel for the 1<sup>st</sup> appellant. Counsel for 2<sup>nd</sup> appellant contends in support of this ground of appeal that the right of appeal must be expressed and cannot be granted by implication and that decisions of the Tribunal can only be challenged in ELRC by way of judicial review.

**Mr. Gikandi Ngibuini** who represents nine of the respondents named in his notice of appointment of advocates, supported the decision of the learned Judge and submitted that the appeals Tribunal is in the same class as a Magistrate’s court and an automatic right of appeal either to the High Court or ELRC exists by virtue of the provisions of section 77A to 79G of the Civil Procedure Act; that the Retirements Benefits Act should be interpreted in the context of the Constitution which gives the High Court supervisory jurisdiction over tribunals and a right of fair hearing and access to court; that right of fair hearing includes a right to appeal and that right of access to court is fundamental to stability of an orderly society.

In the written submissions of **Koceyo & Co. Advocates** for the rest of the respondents, which were highlighted by **Savini Dorcas**, counsel submitted that since by s.49(1) of the Retirement Benefits Act the Tribunal has all the powers of a subordinate court and as section 52 of the same Act provides that where there are no rules governing the appeals the provisions of the Civil Procedure Act applies, the respondents have a right of appeal under the Civil Procedure Act.

[11] It is apparent from the authorities cited by the respective counsel that the decisions of the Retirement Benefits Tribunal have either been challenged by way of appeal, either in the High Court or in the ELRC but the jurisprudence is not consistent. The courts’ decision falls into three categories. In the first category are decisions of the High Court which emphatically hold that there is absolutely no right of appeal. In this category are two decisions - **Board of Trustees of New Kenya Creameries Ltd (Junior) Staff Pension Scheme v Retirement Benefits Authority [2012] eKLR** and **The Trustees, Teleposta Pension Scheme v. Mackenzie M. Mogere & Another [2013] eKLR**. The second category, are decisions which equate the Tribunal to a subordinate court and apply the provisions of the Civil Procedure Act to find that a right of appeal exists. An example of this category is **Nasim Devji & 3 Others v. Retirement Benefits Authority [2014] eKLR**. In the third category are decisions which invoke the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution and hold that the decision of the Tribunal can be reviewed by the ELRC. The case of **Trustees of Telposta Pension Scheme v Attorney General & 5 Others [2014]** and **Amon O. Chuchu & 9 Others v Retirement Benefits Authority & 2 Others [2015] eKLR** fall under this category.

In the first case (**Trustees of Telposta Pension Scheme**) Nduma, J. said at para. 37 of the judgment:

**“The court has already found that notwithstanding that the Retirement Benefits Authority RBA Act is silent on the issue of review or appeal of the decision of the Tribunal the High Court and by extension this court has jurisdiction to entertain judicial review applications by fact of its supervisory jurisdiction under Article 165(6) as read with Article 162(2) and 165(5) of the Constitution.”**

[12] In **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** at para. 50, the Supreme Court of Kenya while distinguishing features of “appeal” and “review” said;

**“An appeal is granted in specific terms by the Constitution or Statute. The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A court of law cannot assume appellate jurisdiction where none has specifically been granted by the Constitution or Statute.”**

The Court of Appeal has on many occasions similarly held that a right of appeal must expressly be conferred by Statute and that such right cannot be implied or inferred; for instance in **Harman Singh Bhogal t/a Harman Singh & Co. v Jadya** [1953] 20 EACA 17; **Anarita Karimi Njeru v Republic** (No. 2) [1976-1980] KLR 1283; **Kakuta Maimai Hamisi & 2 Others v Peris Pesi Tobiko & 2 Others** [2013] eKLR and **Nyutu Agrovet Limited v Airtel Networks Limited** [2015] eLKR.

In **Kakuta Hamisi** case, this court said at page 9 of the judgment:

***“It is enough to say that the right of appeal must be statute or other law based and so viewed, there is nothing doctrinally wrong or violative of the Constitution for such right to be circumscribed in ways that render certain decisions of courts below non-appealable”***

In **Nyutu Agrovet Limited**, the High Court while setting aside an arbitral award under section 35 of the Arbitration Act had given leave to appeal to the appellant to appeal to the Court of Appeal but **Mwera, JA** said in part;

***“However, be it appreciated that such leave does not constitute the right to appeal. The right must precede leave.”***

The same view was expressed by **M’Inoti JA** in the same case thus:

***“I think the short answer to the argument that the appellant’s right of appeal to this Court flows from the leave granted by Kimondo, J. in that where allowed, a party may appeal to this court either as of right or with leave of the High Court or this Court.”***

This Court in **Nyutu Agrovet Limited** considered whether Rule 11 of the Arbitration Rules confers a right of appeal to the Court of Appeal. That rule provides:

***“So far as is appropriate the Civil Procedure Rules shall apply to all proceedings under these Rules.”***

The contention that the rule confers a right of appeal was rejected. **Mwera, JA** said in part;

***“The subject is only as far as it is appropriate Civil Procedure Rules shall apply to Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10.”***

On his part **M’Inoti, JA** said:

***“...I am not convinced that, in view of the express terms of the Arbitration Act, that it is possible to found a right of appeal to this Court in the Civil Procedure Act. The Arbitration Act is in a specific code on matters of arbitration while the Civil Procedure Act and the rules made thereunder provide the general procedure to be followed in civil disputes. I do not see the basis upon which the general would prevail over or supplant the specific.***

***Additionally, application of the Civil Procedure Rules in arbitration proceedings is rather qualified by the words “in so far it is appropriate”, which in my view does not constitute a wholesale importation of the Civil Procedure Rules into arbitration proceedings”***

[13] The Constitution in Article 162(2) enjoins Parliament to establish courts with status of a High Court to hear disputes, *inter alia*, relating to employment and labour relations and Article 162(3) give Parliament power to determine the jurisdictions and functions of such courts. Pursuant to Article 162(2), Parliament enacted the Employment & Labour Relations Court Act, 2011 which provides in section 12(1):

***“(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any written law which extend jurisdiction to the court relating to employment and labour relations including –***

***(a) Disputes relating to or arising out of employment between any employer and an employee.”***

As regards appeals, Section 12(5) of the ELRC Act provides;

***“The court shall have jurisdiction to hear and determine appeals arising from –***

***(a) Decisions of the Registrar of Trade Unions.***

***(b) Decisions of any other local tribunal or commission as may be prescribed under any written law.”***

Rule 2 of the Employment and Labour Relations Court (Procedure) Rules 2016 (Employment Procedure Rules) defines an appeal as:

***“An appeal to court by a party against an order, decision or proceedings under any written law and includes appeals from the Cabinet Secretary, Director of Work Injury Benefits Authority, Registrar of Trade Unions, Subordinates Courts and Tribunals.”***

Further, Rule 8(1) of the Employment Procedure Rules provides:

***“Where any written law provides for an appeal to the court an appellant shall file a memorandum of appeal with the court within the time specified for that appeal under the written law.”***

[14] We have extensively quoted the decision of **Nyutu Agrovet Limited** because it adequately deals with the issues raised by the respondents in this appeal. The RBA is the statutory law which provides for the establishment of retirement benefits schemes, regulates their operations and, in addition, provides for dispute resolution mechanisms arising from the operation of such schemes. The Act entrusts the Trustees with the responsibility of determining the retirement benefits payable to a member. Section 46(1) of the Act gives a right of appeal or review to a member who is dissatisfied with the decision of the Trustees to the CEO. Section 48 (1) of the Act provides for a second appeal to the Tribunal. Being the basic law it is to the Act that the court should solely resort to establish whether a third appeal is provided for or whether the Parliament intended that there should be a further third appeal. It is a common ground, and, the learned Judge appreciated, that the Act does not expressly provide for an appeal from the decision of the Tribunal either to ELRC or to the High Court.

Section 12(5) of the ELRC Act and Rules 2 and 8(1) of the Employment Procedure Rules give jurisdiction to ELRC to hear appeals and to regulate the procedure in appeals respectively where an appeal is provided for or prescribed under any written law. It follows that neither s.12 (5) nor rules 2 and 8(1) confers a right of appeal to ELRC.

[15] The Civil Procedure Act defines a “court” as meaning the High Court or subordinate court acting in exercise of civil jurisdiction. Section 3 of the Civil Procedure Act provides:

***“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form or procedure prescribed, by or under any other law, for the time being in force.”***

It is submitted, relying on Section s.49(1) and 52 of RBA that, the Tribunal is a subordinate court and that where there is no provision in the RBA relating to appeals, the provisions of Civil Procedure Act applies. That contention is patently erroneous. The Tribunal is a statutory body established by the Minister under the authority of RBA. The powers of the Tribunal referred to in s. 49(1) are limited to summoning witness, taking evidence and to the production of documents.

Furthermore, section 52 of RBA does not apply as the Chief Justice has made the Retirement Benefits (Tribunal) Rules 2000 which regulate appeals to the Tribunal. According to Rule 12 of those rules, the Civil Procedure Rules are only applicable, if at all, where the rules have no provision to govern the procedure of appeals.

A similar contention was rejected by this Court in **Nyutu Agrovet Limited**. We respectively adopt the reasoning of Mwera and M’Inoti, JJ.A in **Nyutu Agrovet Limited** in this appeal.

By section 3 of the Civil Procedure Act, the operation of the RBA, the appeal rules made thereunder and the provisions of the Employment & Labour Relations Court Act and the rules made thereunder governing appeals are not limited or affected by the Civil Procedure Act. It follows that the Civil Procedure Act does not give a right of appeal from the decision of a Tribunal.

[16] The supervisory powers of the High Court conferred by Article 165(6) of the Constitution was invoked by the learned Judge as giving power to ELRC to supervise decisions of tribunals. In **Trustees of Telposta Pensions Scheme** (supra) the ELRC said that it has by extension, supervisory powers over tribunals. The jurisdiction of the High Court and ELRC are distinct. The High Court has unlimited jurisdiction. The ELRC is a court of limited jurisdiction. The question whether ELRC has supervisory powers over tribunals has not been canvassed and we leave that question open.

It is sufficient to say that the supervisory jurisdiction is in essence a review jurisdiction exercisable in accordance with the prescribed procedure or rules and that the respondents herein invoked the appellate jurisdiction of ELRC and not the review jurisdiction and that the general supervisory jurisdiction is not applicable to appeals.

[17] Lastly, as the Court in **Nyutu Agrovet Limited** correctly held, the grant of leave to appeal by a court is not decisive. For a right of appeal to exist, the statute itself must provide for an appeal with the leave of the court. The duty of the court is to interpret the law, as enacted by Parliament. It is not its duty to legislate for what Parliament has failed to provide.

[18] The Tribunal is a specialized quasi-judicial body. The learned Judge appreciated that it deals with a specialized area when he said:

***“This is a specialized area familiar mostly to experts in actuarial science. Like any specialized field or profession a court of law is least equipped to supervise and question the technical and scientific rationale of the decisions of such specialized bodies”.***

As already stated, the appeal to the Tribunal was a second appeal. The appeal to ELRC is a third appeal. For reasons of policy, that is finality of disputes, granting of right to a third appeal is rare in our jurisdiction. By Article 163(4) of the Court, appeals lie to the Supreme Court from decisions of the Court of Appeal with leave of either the Supreme Court or the Court of Appeal in the special circumstances specified therein. Therefore, as a general principle, if the Court of Appeal determines a second appeal, the Supreme Court may entertain a third appeal with leave if the conditions therein are satisfied. That is one rare case where a third appeal is allowed.

[19] From the above analysis, we hold that the law does not provide for an appeal from the decision of the Retirements Benefits Tribunal and such right of appeal can neither be implied nor inferred to confer jurisdiction to ELRC or the High Court Jurisdiction to entertain such an appeal. It follows that the appeal filed by the respondents is incompetent.

[20] The finding in para 19 above disposes of the appeal. However, the decision of the lower court is also assailed on the ground that it erred in finding that it has jurisdiction to determine a dispute relating to a retirement benefits or pension scheme. Extensive submissions have been made by the respective counsel on the jurisdiction of the Court.

Nevertheless, it is not necessary to determine this ground of appeal. Having found that the appeal does not lie and that the ELRC has no jurisdiction for that reason, to determine the appeal, it follows that the court is debarred from hearing and determining the appeal thus rendering the remaining ground of appeal hypothetical and therefore moot.

As a general principle, courts only decide live issues and do not decide hypothetical or abstract issues unless there are good reasons to do so, such as the illumination of unsettled points of law for the benefit of the public.

[21] Moreover, the case of **Trustees of Telposta pension Scheme** (Supra) shows that the decision of the Retirements Benefits Tribunal was appealed against in the High Court and the High Court held that there was no right of appeal from the decision of the Retirement Benefits Tribunal. Thereafter, a constitutional petition was filed in the High Court impugning the same decision which was later transferred to the Industrial Court (as it was then named). The Industrial Court entertained the petition and ultimately reviewed the decision of the Retirement Benefits Tribunal on constitutional grounds. The question whether ELRC has jurisdiction to entertain a constitutional petition impugning the decision of the Retirement Benefits Tribunal has not been raised in this appeal and thus does not fall for determination.

[22] In our view, to determine the statutory jurisdiction of the ELRC to entertain disputes relating to retirement benefits or retirement benefits schemes without determining the court's constitutional jurisdiction to entertain such disputes, would not finally settle the law on jurisdiction. It would only cause confusion. For those reasons, we decline to determine the question of the statutory jurisdiction of ELRC until the right occasion arises.

[23] Following our finding in para. 19 above, the appeal is allowed, the Ruling of ELRC dismissing the preliminary objection is set aside insofar as it relates to the right of appeal. The preliminary objection on the right of appeal is allowed and the appeal is struck out. As regards the costs of the appeal, this decision has clarified the law on the right of appeal, not only for the benefit of the numerous respondents but also for the benefit of Trustees of pension schemes and all members of pension schemes. It is just that no order for costs should be made against the respondents. We order that each party bears its/his own costs of this appeal and the court below.

***Dated and delivered at Nairobi this 16<sup>th</sup> day of March, 2018.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***H. M. OKWENGU***

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***JUDGE OF APPEAL***

***J. MOHAMMED***

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***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**