IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: W. KARANJA, KOOME & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 18 OF 2017

BETWEEN

ABDUKRAZAK KHALIFA SALIMU.....APPELLANT

AND

HARUN RASHID KHATOR

(As administrator of the Estate of Rashid Khator Salim (Deceased)

IBRAHIM RASHID

MUSTAFA RASHID.....RESPONDENTS

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Muriithi, J.) dated 6th February 2015

in

Mombasa H.C.C. C. No. 188 of 2006)

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JUDGMENT OF THE COURT

1. Once again, the concept of "House without Land" is back before this Court. In coastal Kenya, a land tenure known as house without land is common. This is where a person can own a house without owning the land upon which the house stands. In **Famau Mwenye & 19 others vs. Mariam Binti Said, Malindi H.C.C.C. No. 34 of 2005** (Ouko, J.) (as he then was) described the concept of house without land as follows:

> ***"The dispute arises from land tenure unique … to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as 'house without land'. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, cujus est solum ejus est usque ad coelum [meaning, 'whose is the soil, his is also that which is above it']."***

2. In this appeal, the appellant is the owner of that "house without land" on Plot No. 3891 (Original 284/197) Sec. III MN. In his amended plaint filed before the trial court, the appellant concedes that he is the owner of "house without land" situated on Plot No. 3891. However, he contends that the respondents or persons acting under their authority unloaded building materials *to wit* sand and stones on the road leading to the appellant's house and further dug up a foundation and are putting up a building barely seven (7) feet from the front entrance of the appellant's house. That the stones and building have the effect of denying the appellant free and or unhindered access to his house; that the construction would have the effect of denying the appellant free flow of air and natural light; and that the windows and or ventilations on the front of the house would be rendered useless; that the said developments could well lead to an onset of upper respiratory tract diseases were the appellant and his household be denied ventilation; that the developments interfere with the appellant's right of easement; that the developments are being carried out in complete disregard to all notions of public rights over private property; that the respondents have been cutting down the appellant's trees growing on the portion let to him.

3. In the amended plaint, the appellant sought injunctive relief restraining the respondents' from blocking the appellant's access to his house and an order restraining the respondents from putting up developments at the frontage of his house. An order was also sought that the

developments and structures being put up by the respondents was a nuisance and a violation of the appellant's easement. The appellant sought an order to compel the respondents to forthwith pull down and remove the structure and or building now erected on Plot 3891(Original284/197) Sec. III MN and overlapping on the road reserve between the appellant's house and Kanamai/Beach Road. damages and costs of the suit were also prayed for.

4. Conversely, the respondents are the legal and registered owners of Plot No. 3891 (Original 284/197) Sec. MN. More specifically, the respondents aver that Plot No. 3891 once belonged to their deceased father one ***Rashid Khator*** Salim and the same is currently vested in the 1st respondent as the administrator of the deceased estate. In their amended defence and counterclaim filed before the trial court, the respondents assert that the appellant is a trespasser on Plot 3891 and he is liable for eviction. The respondents denied that their construction and development had barred the appellant from accessing his house or that the said developments had become a health hazard.

5. In the reply to the amended defence and defence to counterclaim, the appellant averred that the portion of Plot No. 3891 now occupied by him has at all material times been under the care of Masjid Rahma mosque to whom the appellant's predecessor in interest was paying rent. That the appellant has been paying rent to the mosque until the respondents unlawfully and without justification stopped rent payment.

6. Upon hearing the parties, the trial judge in a judgment dated 6th February 2015 dismissed the appellant's suit and allowed the counterclaim by the respondents. Among others, the trial court issued an order of eviction of the appellant; the appellant was given three (3) months to remove his house and or vacate the suit property. In the alternative, the parties were at liberty to enter into a House without Land agreement under which the appellant would pay the respondents such ground rent as may be negotiated between the parties from time to time; in alternative to removal of the house, it was ordered that the respondents may in agreement with the appellant pay such compensation for the value of the house as may be agreed between the parties.

7. Aggrieved by the judgment and orders of the trial court, the appellant has lodged the instant appeal citing the following grounds in his memorandum:

> "(i) That *the learned judge erred in law in delivering a judgement contrary to statute in that the respondent's counterclaim for recovery of possession was stale and time barred by virtue of* ***Section 4 (2)*** *of the* ***Limitation of Actions Act.***
>
> *(ii) The court erred in holding that the appellant was not entitled to notice of termination of tenancy under* ***Section 106*** *of the India* ***Transfer of Property Act 1882*** *(as applied and amended in Kenya).*
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> *(iii) That the Masjid Rahma mosque, having severally accepted rent on behalf of Mr. Rashid Khator (deceased), the tenancy of the appellant's house without land was continued and the judge erred in law by not holding that the receipt of rent by the mosque was sufficient validation of the appellant's tenancy.*
>
> *(iv) The court erred in holding that the appellant was a trespasser on the proportion of Plot 3891 on which his house without land stood.*
>
> *(v) The court erred in holding that the respondent was entitled to evict the appellant without considering the equity of expectation which had accrued to the appellant.*
>
> *(vi) The court erred in entertaining the counterclaim to terminate the tenancy of house without land yet the court did not require the presence of the original tenant thus contravening the natural justice principle of audialterempartem."*

8. At the hearing of this appeal, learned counsel ***Mr. Samuel Macharia*** **Kimani** appeared for the appellant while learned counsel ***Ms Lucy Momanyi*** appeared for the respondent. All parties filed written submissions and list of authorities in this matter.

9. In his submission, counsel for the appellant urged that the appellant purchased his house without land from a one ***Said A. Bawazir*** in June 2002. That the respondent's deceased father became the legal owner of Plot No. 3891 in 2002. Counsel submitted that the appellant could not become a trespasser simply as a result of registration of title for the smaller portion in the name of a new owner. It was further submitted that the respondents did not maintain an action for eviction or ejectment till September 2006; that by this time, **Section 4 (2)** of the **Limitation of Actions Act** had come into play and the counter claim was stale. The section provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. The appellant contends that the respondents' counterclaim for eviction is founded on the tort of trespass. That three years have elapsed from the date the respondents became owners of the suit property.

10. The appellant urged that it was the respondents' deceased father who permitted Mr. Said A. Bawazir to erect the residential house on the Plot; that it was necessary to explain how Mr. Said A. Bawazir came upon the land. According to the appellant, the entry by Mr. Said A. Bawazir on the Plot was with the authority of Masjid Nur and not that of Mr. Rashid Kator. That the trial court was faced with the issue as to who gave authority and permission to the said Mr. Said A. Bawazir to erect the house without land on the plot. It was urged that whoever gave authority to Mr. Said A. Bawazir to construct the house without land on Plot No. 284, regardless of the nature of the tenancy, could not terminate the tenancy without a notice of a termination. Counsel cited **Section 106** of **Transfer of Property Act (TPA)** which provides:

> **"In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing … and lease of immovable property for any other purpose shall be deemed to be lease from month to month terminable, on the part of either the lessor or lessee by fifteen days' notice expiring with the end of a month of tenancy."**

11. The appellant submitted that the trial judge having accepted the concept of house without land in the Coast region ought to have held that ***Sections 3, 8, 51*** and ***106*** of the **Transfer of Property Act (TPA)** applied to the tenancy of house without land. That in that context, no tenancy or lease or eviction order could issue without a statutory notice as stipulated under **Section 51** as read with ***Sections 105, 106*** and

108 (h) of the ***TPA***.

12. It was further submitted that the appellant acquired an equity of expectation upon construction of the house without land; that when the house without land was constructed, it enjoys all rights, privileged and obligations which existed when permission to construct was given. That under the concept of house without land, the respondents did not become owners of the house which had been constructed with permission of the proprietor of the suit pro*perty. Counsel cited the case of* **Inwards & Others vs. Baker (1965) QB 29** in support.

13. In opposing the appeal, the respondents stated that in 2003, they asked Masjid Rahma mosque not to receive any rent from the appellant; that to date, the appellant has not paid any ground rent to the respondents; that the respondents had given the appellant notice to vacate the plot or amicably settle the case by moving out of the suit property. It was submitted that the appellant neither led nor adduced any evidence that the registered owner Mr. Rashid Khator was in any way involved in the transfer of house without land to the appellant. Counsel further submitted that the appellant cannot maintain action against the registered owner by way of transmission or succession; that the appellant lacks *locus standi* to file and maintain the instant suit as he was not a bona fide owner of house without land; that the appellant had not paid rent since 2003 and has not counterclaimed for *mesne* profits or damages for trespass and thus, the trial court did not err in not awarding damages that were neither pleaded and prayed for.

14. On the issue of notice, the respondents submitted that the trial judge took into consideration the period the appellant had resided illegally on the respondents' land; that in the interest of justice, the trial court accorded the appellant an opportunity to renegotiate tenancy of the house without land with the respondents.

15. This is a first appeal and it has oftentimes been stated that our duty is to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle vs. Associated Motor Boat Co. [1968] EA 123,** it was expressed:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."**

16. We have considered the grounds of appeal, submissions by counsel and the authorities cited by all the parties. As already stated above, the contestations in this appeal revolve around the concept of house without land. In ***Christopher Baya and 2 Ors. vs. Philip Kiluko and Another*** **Mombasa HC Civil Appeal No. 64 of 2004**, Khaminwa, J. correctly understood the concept as follows:

> ***"This arrangement is known as "House Without Land" meaning the right to build on another's land under agreement which does not pass title to the land."***

17. One of the grounds urged by the appellant is that the trial court erred in law in delivering a judgement contrary to statute in that the respondent's counterclaim for recovery of possession was stale and time barred by virtue of **Section 4 (2)** of the **Limitation of Actions Act**. In this regard, the appellant faulted the trial court for not acting *suomoto* to raise, consider and determine whether or not the appellant was a trespasser in view of the allegation that by the time the respondents filed their counterclaim in 2006, three (3) years within which the respondents could have raised and prosecuted the counterclaim for eviction on account of trespass had lapsed in July 2004. That the trial court should have raised the issue *suomoto* as it was being invited to give a judgment contrary to statute. Counsel for the appellant conceded that the objection on the competence of the counterclaim was not explicit in the amended plaint as it should be. However, he submitted that this Court should not allow a judgment delivered in contravention of **Section 4 (2)** of the **Limitation of Actions Act** to stand.

18. We have considered the *suomoto* contention by the appellant. In the case of **Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd. - EALR (2000)2 EA 385**; it was stated that the issues for determination in a suit generally flow from the pleadings and a court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. Unless expressly permitted by an enabling statute, rule or principle of law, when a court acts *suomoto* (and without inviting the parties to make submissions on the issue) the right to be heard which is a principle of natural justice is violated.

19. Guided by the foregoing dictum in **Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd.- EALR (2000)2 EA 385**; we are of the considered view that the trial judge did not err in law or fact in failing to raise and consider *suomoto* the appellant's contestation relating to ***Section 4 (2)*** of the **Limitation of Actions Act**. Whether a limitation period has lapsed is a question founded and grounded on facts which must be specifically pleaded and proved. A trial court should not on its own motion raise, establish and determine un-pleaded facts for or against a limitation period. In this matter, if the appellant sought to invoke and rely on any limitation period, the duty to plead the facts in support thereof and the burden to lead evidence to prove expiry of the limitation period rested with the appellant. He failed to plead, lead or adduce such evidence and the trial court did not err in failing to address the issue of limitation *suomoto.* In any event, it is erroneous for a court to *suomoto* raise and determine limitation issues without inviting parties to make submissions thereon.

20. Further, the appellant relied on ***Section 4 (2)*** of the **Limitation of Actions Act** and ignored the provisions of ***Section 7*** of the **Act** which is relevant. ***Section 7*** provides as follows:

> **"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

21. On the issue whether the appellant as owner of house without land is entitled to Notice under ***Sections 3, 8, 51, 105, 106*** and ***108 (h)*** of the **Transfer of Property Act**, we are persuaded by dictum in ***Famau Mwenye & 19 Others vs. Mariam Binti Said, Malindi High Court***

Civil Case No. 34 of 2005, where the trial judge likened the concept of house without land to a lease stating, "*No matter what that arrangement is called, in my view it is a lease within the meaning of section 105 of the Transfer of Property Act*" . A lease can be determined by either effluxion of time or notice given by either party in accordance with the lease agreement or as stipulated by law in reference to the period in which rent is paid.

22. The appellant contends that as the owner of house without land, he was and is entitled to Notice of termination of the tenancy pursuant to the provisions of ***Section 106*** and **108 (h**) of the **TPA**. The section provides as follows:

> **"106.(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.**
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> **(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.**
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> **(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.**
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> **(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."**

Section 108 (h) provides that:

> **"108 (h) the lessee may, even after the determination of the lease, remove, at any time whilst he is in possession of the property leased but not afterwards all things which he has attached to the earth; provided he leaves the property in the state in which he received it."**

23. On the question whether an owner of house without land is entitled to a Notice to terminate the tenancy or permission to own the house without land, we are of the considered view that an owner of house without land is entitled to Notice. This is pursuant to the provisions of ***Section 106*** of the **TPA**.

24. The next issue for our consideration is whether in the instant case, such notice was given. The appellant contends that no notice was given. In contrast, the respondents contend that notice was given more specifically at the time the Masjid Rahma mosque was told not to accept any rent from the appellant. The trial court in its judgment gave the appellant three (3) months' notice to remove the house without land. It is not disputed that the appellant has never paid rent for the house without land since 2003. It is also not in dispute that whoever erected or constructed the house without land on the suit property did so with the consent and permission of the registered proprietor. In the instant appeal, the house without land having been erected by consent, the continued presence of the house on Plot No. 3891 can only be with the consent of the registered owner of Plot No. 3891. This being so, the respondents as registered owners of Plot No. 3891 have a right in law to withdraw and terminate the permission or consent granted to have the house without land on the suit property. We are of the considered view that when the respondents informed the Masjid Rahma mosque not to receive any rent from the appellant, they unequivocally expressed the intention to terminate the appellant's continued presence in and occupation of the suit property.

25. Comparatively, the Indian High Court sitting at Delhi in **Subhash Chander vs. Fathay Singh**, **RSA No. 290 of 2015** held that under ***Section 106*** of the **TPA**, a suit for possession of property cannot be dismissed on ground of invalidity of notice. The tenant is only entitled to reasonable time to vacate premises.

26. In the instant appeal, the appellant concedes that he entered the suit property and owns the house without land through consent and permission given by the registered proprietor of Plot 3891 and his successors in title thereto. Having conceded that the house without land was erected with permission, it follows that if such permission is withdrawn or cancelled then the house must be removed.

27. The respondents being registered proprietors of the suit property by way of counterclaim sought an order to evict the appellant from the suit property. Having entered the suit property by consent, the appellant's continued presence or occupation of the suit property can only be by consent or permission of the registered proprietor. When the respondents informed the Mosque not to accept or receive rent from the appellant, such intimation constituted an implied cancellation of permission to remain on the suit property. Upon such permission being cancelled, the appellant became a trespasser.

28. One of the novel submissions made by the appellant is on "equity of expectation." Counsel submitted that the appellant has an equity of expectation to continue being on the suit property. We have considered the submission and it has no merit. The house without land was erected on the suit property with permission of the registered proprietor of the property. The only expectation of the appellant was that his occupation of the property and the continued presence of the house without land on the suit property was subject to continued consent and permission of the registered proprietor. The expectation both in equity and in law is that if the consent or permission is withdrawn, the appellant becomes a trespasser. From the evidence on record, the consent or permission was withdrawn and there is no legal or equity doctrine of expectation that can make the appellant continue to occupy and have the house without land on the suit property.

29. Other allegations in the amended plaint is to the effect *inter alia* that the appellant's right of easement on the suit property was being infringed; that the developments carried out by the respondents are in complete disregard to all notions of public rights over the suit property;

that the said developments could well lead to an onset of upper respiratory tract diseases were the appellant and his household to be denied ventilation.

30. In considering these allegations, we have examined and analyzed the evidence on record. There is no iota of evidence to prove the nature of public right that exist over the suit property. On easement, there is no evidence on record to prove the nature, category or extent of the alleged easement that the appellant has over the suit property. On prospect that there could be onset of upper respiratory disease, there is neither scientific nor medical evidence pointing towards proof of such allegations. On the allegation of onset of respiratory disease, the appellant is inviting this Court to make a determination based on speculation and conjecture which we decline. This Court makes its determination based on facts, evidence and the law.

31. The appellant further assert that the respondents' development affects his right to light and ventilation. A landowner or owner of house without land has no property in air and light. What his land or house ownership gives him is a natural right to the use of air and light. The owner of a house without land cannot stop the registered proprietor from developing his property simply because the development will impede free flow of air or light or the view of the owner of house without land. The general position is that in law, there is no right to an unobstructed view. A land owner cannot protect the view that he has from that land; the rationale is that it would unduly limit the freedom to build on one's own land and thereby hinder beneficial development. Generally, home owners have no right to a view (or light or air), unless it has been granted in writing by a local ordinance or subdivision rule. The exception to this general rule is that someone may not deliberately and maliciously block another's view with a structure that has no reasonable use to the owner. **(**See **Tara Foster, "Securing a Right to View: Broadening the Scope of Negative Easement, Pace Environmental Law Review, September 1988 Vol. 6 Article 7)**.

32. A land owner (or owner of house without land) has no legal right to the light and air unobstructed from the adjoining land unless there is an easement. There can be no private right to an unobstructed view without an express easement or restrictive covenant. A property owner or owner of house without land, cannot complain about interference with a view resulting from the lawful erection of a building or other structure on the adjoining land. (See **In Pacifica Homeowners' Ass'n vs. Wesley Palms Ret. Cmty., 178 Cal. App. 3d 1147 (Cal. App. 4th Dist. 1986;** see also, **Carolina A. Koch, "The Right to a View, Common Law, Legislation and the Constitution" Stellenbosch University, Doctoral Dissertation, December 2012**).

33. In rehashing, we have examined the record of appeal and are satisfied that no formal or statutory notice was issued by the respondents to the appellant to terminate the house without land tenancy arrangement as required by ***Section 106*** of the **TPA**. On this ground, the appellant's submission has merit. However, in our considered view, the respondents counterclaim for ejectment and eviction of the appellant from the suit property cannot be defeated or dismissed simply on account of lack of notice. What the appellant is entitled to is reasonable time to vacate the suit property. The trial court gave the appellant a three (3) month notice to vacate. Is this period reasonable? Pursuant to ***Section 106*** of the **TPA**, the period of notice that the appellant is entitled to is a minimum of 15 days. We take note that from the year 2003 the appellant has not paid any rent for use and occupation of the suit property through his house without land.

34. Bearing all these in mind and guided by ***Section 106*** of **TPA** and taking into account the three months' notice given by the trial court, we are of the considered view that a notice of three (3) months from the date of this judgment is a reasonable notice for the appellant to vacate the suit property and remove the house without land.

35. The upshot and totality of our consideration and analysis of the evidence on record, grounds of appeal and the applicable law leads us to conclude that this appeal has no merit and must be dismissed. In making the final orders, we note that the appellant was aggrieved by the entire judgment and orders of the trial court. The appellant has failed to exercise the alternative options granted by the trial court and we hereby apply the maxim that equity does not aid the indolent. We are also alive to the principle that a tenant cannot question the title of the landlord. The case of ***Create Invest Develop Pty Ltd vs. Cooma Clothing Pty Ltd [2012] VCAT 1907***, reaffirms the principle that if two parties contract with each other as landlord and tenant, neither of them is entitled to deny the title of the other unless some other person by way of title paramount intervenes and disturbs the possession of landlord and tenant.

36. In the instant appeal, the appellant is attempting to question the title of the respondents by invoking ***Section 4 (2)*** of the **Limitation of Actions Act**. He is also challenging the respondents' title by asserting that the trial court ought to have inquired who put Mr. Said A. Bawazir into possession of the suit property. In this context, the appellant as the owner of house without land and being a tenant is questioning the title of the respondents *qua* landlord. This he cannot do. The appellant is estopped from challenging the respondents' title as landlord of the suit property. If a tenant denies or challenges the title of the landlord, the tenant must first surrender the possession of the property back to landlord. He cannot on one hand oppose the landlord's title and on the other have possession of the property. ***Section 121*** of the **Kenya Evidence Act, Cap 80** aptly covers this as it provides:

> **"121. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a right to such possession at the time when the license was given."**

37. In penultimate, in obedience to ***Section 108 (h)*** of the **TPA**, we set aside the alternative orders made by the trial court granting the parties at liberty to enter into a House without Land Agreement under which the appellant would pay the respondents such ground rent as may be negotiated between the parties from time to time. We also set aside the alternative order allowing the respondent to negotiate and enter agreement with the appellant whereby the respondent is to pay the appellant such compensation for the value of the house as may be agreed between the parties. In line with ***Section 108 (h)*** of **TPA**, the appellant as lessee on the suit property should remove his house without land and all things which he has attached to the earth; provided he leaves the suit property in the state in which he received it.

38. The final order of this Court is that this appeal has no merit and is hereby dismissed. The judgment of the trial court dated 6th February, 2016 is upheld and varied to the extent that the alternative orders be and are hereby set aside. The appellant is hereby given three (3) months' notice from the date of this judgment to vacate the suit property and remove his house without land. Upon expiry of the three months, the respondents shall be at liberty to evict the appellant from the suit property.

Each party is to bear its own costs in this appeal.

Dated and delivered at Mombasa this 8th day of November, 2018

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR