IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CIVIL APPEAL NO. 28 OF 2015

BETWEEN

WILFRIDA ARNODAH ITOLONDO...APPELLANT

AND

BOARD OF TRUSTEES OF KENYATTA UNIVERSITY STAFF

RETIREMENT BENEFITS SCHEME..RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi, (Hon. Lady

***Justice Mumbi Ngugi, J.) dated 26th November, 2014* in**

Petition No. 410 of 2013)

****

JUDGMENT OF THE COURT

This is an appeal from the Judgment of the High Court (**Mumbi Ngugi, J.)** delivered on the 26th day of November, 2014 dismissing the appellant's petition, No. 410/2013 seeking various reliefs.

The background to the appeal is that, in August, 2013 the respondent was due to hold elections for positions of trustees of its staff pension scheme. The appellant expressed an interest to vie for the said position. She collected Nomination Forms, filled them and returned them to the respondent for clearance. In a meeting held on the 26th day of July, 2013, vide minute No. 4.0 thereof, the respondent invoked **Rules VI &VII** of its Nomination Rules to bar the appellant from vying for the said position for the reason that the appellant had a pending court case against the sponsor of the scheme; and second, that she was a union delegate, which in the respondent's view, rendered her ineligible for nomination.

The appellant was aggrieved and filed the petition challenging the respondent's action to bar her from participating in the said elections. In her supportive documents she contended *inter alia* that the respondent 's action of barring her from vying for the position of trustee to the respondent's Board of Trustees was in complete disregard and infringement of her fundamental rights and freedoms under **Articles 22, 27 (2)** and **41** of the Constitution; that the said action was unreasonable and therefore unconstitutional, null and void; that denying her the right to vie on account of her case against the sponsor was an infringement on her right of access to a court of law; neither did she see how vying for the said

position as a co-opted member of UASU would injure the interests of the scheme. Such a denial in her view, was tantamount to discriminating against her on account of her membership to a trade union and therefore an infringement on a fundamental right; and also that the respondents' right to self regulation was no licence for it to make rules that infringed on the constitution.

The respondent in its opposition to the petition contended that the Retirement Benefits Authority Act No. 3 of 1997 (The Act) to which both the appellant and the respondent were subject provides a procedure for redressing grievances of members of the respondent's scheme; that under the said Act every Retirement Benefits Scheme is mandated to have its own Rules and Regulations governing its day to day operations, including elections; that pursuant to the above requirement, the respondent promulgated its Nomination Rules, among them **Rules VI** & **VII;** that the respondent acted within the ambit of its Rules and Regulations' when it subjected all potential candidates to the schemes' Nomination Rules; that the appellant was found ineligible to vie for the said position in terms of Rules VI and VII which apply to all members of the scheme contrary to the appellant's assertion that she had been discriminated against on account of her being a member of the UASU; that both elected and co-opted members of UASU are ineligible to vie for the position of trustee; and, lastly that, there were no constitutional issues raised in the petition worth consideration by the High Court in the exercise of its constitutional interpretation mandate.

At the conclusion of the trial, the learned Judge assessed, evaluated and analyzed the record before her, and then framed three issues for determination. On jurisdiction, the learned Judge followed the case of **Owners of the Motor Vessel "Lillians" versus Caltex Oil Kenya Limited [1998] KLR 1;** considered **Articles 165, 22, 27 (2**) and **41(2) (c)** of the constitution and sections **46 (1) 47 (1) 48 (1)** and **49 (1)** of the Act, and then made findings thereon as follows-

> ***"40. As correctly argued by the respondent, the petitioner was aggrieved by its decision finding her ineligible to vie for the position of a trustee of the scheme. Given the above provisions of the Act, the petitioner's grievance was one which fell within the ambit of the Retirement Benefits Act. She should therefore, have placed her grievance before the Chief Executive Officer of the Retirement Benefits Authority and if dissatisfied with such decision as he would have arrived at appealed to the Tribunal."***

With regard to the appellant's contention that **Rules (VI)** and **(VII)** of the respondents' Nomination Rules violated her rights under **Article 27** of the constitution, the learned Judge made findings thereon as follows:-

> "***44. It is my view that the mechanism provided under the Retirement Benefits Act is not intended to deal with questions regarding the constitutionality or otherwise of regulations or rules, or to determine whether a right or fundamental freedom in the Bill of Rights has been infringed or threatened with infringement. Such jurisdiction, in my view, is vested in the High Court by Article 165 (3) set out above. I therefore find in favour of the petitioner with respect to the question of the jurisdiction and now turn to consider the other two issues raised in the petition."***

Turning to **Rule (VII)** of the Respondent's Nomination Rules, the learned Judge made findings as follows:-

> ***"48 A plain reading of rule Vii shows that the rule does not bar members of Trade Unions from being elected as trustees of the respondent rather, the limitation is of officials of Trade Unions, without a distinction being made between an elected official or, as the petitioner alleges she is, a co-opted official.***
>
> ***49 I observe, further that the rule also bars "Elected" council members of the sponsor. While the respondent was some what reticent on this issue on the basis for barring council members and trade Union officials from being trustees of the scheme, a reasonable supposition is that, such membership may result in a conflict of interests. At any rate, I can find no discrimination or other violation of the petitioners' constitutional rights by this rule."***

With regard to Rule **VI** the learned Judge considered it in the light of section **26(2) (d)** of the Act, and the principle in the case of **Onyango Oloo versus Attorney General [1986-1989] EA 456,** namely, that natural justice demands that those making decisions likely to impact negatively on others have a duty to act fairly; and second, that they can only be viewed to have acted fairly if they gave an opportunity to be heard to those likely to be affected by the outcome of their decisions, before such decisions are taken.

Applying the above principle to the rival arguments before her, the learned Judge made findings that, it is the Authority established under section 3 of the Act which is vested with the power to determine whether a particular person's membership of the Board of Trustees was likely to be detrimental to the scheme or not; that **Rule (VI)** as framed and applied seemed to be very wide and open to abuse as it did not provide the criteria on which the Authority or the respondent could determine what was likely to injure the interests of the scheme, what such interests were, and how such injury could be measured; that the respondent did not afford the appellant an opportunity to be heard before it reached the decision that her candidature was likely to injure the interests of the respondent; that in denying the appellant an opportunity of being heard the respondent breached the appellant's rights under Articles 47 and 50 of the Constitution which guaranteed her a fair administrative action and a fair hearing; and, also that while **rule VI** of the respondent's Nomination Rules may echo in some respects the provisions of section **26(2) (d)** of the Act, the respondent had arrogated to itself powers that it did not have under the Act, and that the application of **Rule (VI)** in the circumstances of the petition was in violation of the statute and therefore unreasonable.

On the totality of the above reasoning, the learned Judge concluded thus:-

> ***"Had this rule been the only basis for barring the petitioner from running for the office of trustee in the respondent; there would have been a basis for interfering with elections. However, having found that the petitioner was properly barred under rule V(ii) and that there is therefore no violation of her rights under Article 27 and 41, I am constrained to dismiss the petition"***

The appellant was aggrieved and is now, raising fifteen (15) grounds of appeal. These may be paraphrased as follows: That the learned Judge fell into error when:

> ***(1) She acknowledged that Rule VI as framed and applied by the respondent to bar the appellant from vying for the position of trustee of the respondent was wide and open to abuse but failed to give an appropriate positive remedy by declaring the limitation unconstitutional, unreasonable and therefore null and void.***
>
> ***(2) She found that Rule VI violated section 26(2) (d) of the Retirement Benefits Act but failed to declare the elections held on the 15th day of August, 2013 null and void.***
>
> ***(3) She held that the appellant's fundamental rights under Articles 47 & 50 had been violated but failed to issue any positive orders or declarations in her favour under Article 23(3) of the Constitution.***
>
> ***(4) She erred in law and misdirected herself that there would be a conflict of interest if the appellant were allowed to be elected as a Trustee of the respondent.***
>
> ***(5) She failed to exemplify judicial independence in the making of the Judgment and thereby rendered it defective.***

The appeal was canvassed by way of written submissions, and orally highlighted in Court by learned counsel for the respective parties and buttressed by case law cited by either side.

In support of grounds 1,2,4 &7, learned counsel **Mr. Onyony** for the appellant submitted that upon finding that **Rule VII** was couched in broad and vague terms and thereby open to abuse, the learned Judge should have ruled that the Rule violated the appellant's freedom of association guaranteed under **Article 33**, the right to equality and non discrimination guaranteed under **Article 27,** the right to fair

labour practices guaranteed under **Article 41**, which entitled the appellant to enjoy the right to form, join and participate in the activities and programmes of a Trade Union, and the right to fair administrative action guaranteed under **Article 47.** To buttress the above submissions, **Mr. Onyony** cited the High Court case of **Rose Wangui Mambo & 2 Others versus Limuru County Club & 17 others [2014] eKLR** for the proposition that private clubs are bound by the Constitution in the same way as any other legal person.

In support of grounds 3, 8, 9,10,11,12 and 13**, Mr. Onyony** submitted that the learned Judge should not have shied away from granting the appellant appropriate positive remedies under **Article 23(3)** of the Constitution after finding that the respondent had arrogated to itself powers not vested in it under the Act.

To buttress this submission, **Mr. Onyony** cited two High Court decisions of **Diana Kethi Kilonzo versus The Independent Electoral and Boundaries Commission and 10 Others [2013] eKLR**; and **The Coalition for Reforms and Democracy (CORD) & Another versus Republic of Kenya & another [2015] eKLR** for the holding *inter alia* that a court of law can award the remedies set out in **Article 23 (3)** of the Constitution where the claim has been properly laid under **Article 22** of the Constitution.

In support of grounds 4 and 5, **Mr. Onyony** submitted that the learned Judge's failure to find that Rules of Natural Justice and the appellant's right to a fair administrative action and hearing under **Articles 47** & **50** of the Constitution were violated when the respondent barred her from participating in an election on the grounds that she had filed a case against the sponsor of the scheme; and that the same was likely to injure the interests of the respondent without specifying what those interests were and how those interests would be injured by the appellant's membership to the respondent's Board as a trustee, was not only unreasonable but also unfair.

To buttress the above submission, **Mr. Onyony** cited the High Court case of **Jesus Care Centre Ministry International & another versus Registrar of Societies Joseph Onyango & 3 Others [2014] eKLR** for the exposition of principles of natural justice which enjoins a decision making Authority to act fairly; and **Diana Kethi Kilonzo & another versus Independent Boundaries Commission and 10 Others** (supra) for the proposition that, due process in public administration demands that there should be no bias in the execution of an adjudicating authoritys' mandate.

In support of grounds 6 and 14, **Mr. Onyony** submitted that **Articles 22** and **258** of the Constitution guaranteed to the appellant a right to institute the petition; that the legal entities against whom the said petition was directed were distinct from the respondent; and that the respondent's arrogation to itself of powers not vested in it by the Act, to bar the appellant from participating in the elections contravened section **26 (2) (d)** of the Act and was therefore unlawful and unreasonable.

When he rose to oppose the appeal, learned counsel **Mr. Chacha Odera** submitted that the applicable regime of law that the appellant ought to have invoked to redress her grievances was the Act and not the Constitutional regime on which she anchored her petition; that likewise the appropriate forum for redressing the appellant's grievances was the inbuilt dispute resolution mechanism provided for under sections **46** and **48** of the Act, which obligated her to lodge her complaint with the CEO duly appointed under the Act and if not satisfied with his decision, lodge an appeal to the Appeals Tribunal and thereafter appeal to the High Court.

To buttress the above submissions, learned counsel cited the case of **Speaker of the National Assembly versus Njenga Karume [1992] eKLR** and the High Court cases of **Francis Gitau versus National Alliance Party & 4 Others [2012] eKLR**; and **Benjamin Munywoki Musau versus Daniel Mutua & 2 Others [2013] eKLR** all for the principle that where there is a clear procedure for the redress of any particular grievance prescribed either by the Constitution or an Act of Parliament, such procedure should strictly be followed.

On discrimination, learned counsel **Mr. Odera** submitted that the appellant suffered no discrimination in the manner the respondent conducted the exercise of clearing candidates to vie for the position of trustee in its establishment as the said exercise was conducted in accordance with its Nomination Rules; that the respondent invoked and subjected all potential candidates for the said position to the prerequisites in the

said Nomination Rules and was therefore not guilty of any form of discrimination against the appellant as the Rules did not target her as an individual.

Turning to the implications of **Rules VI** and **VII** of the Respondents Nomination Rules, **Mr. Odera** submitted that **Rule VI** empowered the respondent to reject the nomination of a person who in its view was likely to injure the interests of the respondent, while **Rule VII** on the other hand barred all elected and co-opted council members and officials of a Trade Union from eligibility for nomination as a trustee of the scheme; that the appellant as a co-opted member of the UASU was rightly found ineligible for nomination; that **Rule VII** precludes officials of Trade Unions and not ordinary members of those Unions from vying for the position of trustee in the schemes' elections; that **Rule VI** is a reflection of **section 26(2) (d)** of the Act; that the best course of action the appellant ought to have taken to redress any grievances against the respondent if any, should have been to move the respondent for the amendment of **Rules VI** and **VII** if she found them offensive, instead of filing a constitutional petition.

To buttress the above submissions, learned counsel cited the case of **Narok County Council versus Transmara County Council [2001] IEA 157** for the holding *inter alia* that where a statute confers on a body the mandate to determine a dispute, the High Court cannot assume jurisdiction over that same issue; and a High Court case of **International Centre for Policy and Conflict and 5 Others versus Attorney General and 4 Others [2013] eKLR** for the proposition that the fact that constitutional provisions are cited as access provisions does not *perse* convert a matter into a constitutional matter warranting the exercise of the constitutional interpretation mandate of the High Court.

This being a first appeal, our duty, was appropriately put in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123,** thus:

> **"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 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 is 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."**

This Court further stated in **Jabane vs. Olenja [1986] KLR 664,** thus

> "**More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88)1KAR 870."**

We have given due consideration to the totality of the record in the light of the rival submissions and principles of law relied upon by either side, the reasoning and findings of the learned Judge as already highlighted above. In our view, the issues that fall for our determination are whether the learned Judge erred:

> *1. when she failed to issue positive orders declaring the limitation in Rule VI unconstitutional, unreasonable and therefore null and void;*
>
> *2. when she failed to declare null and void the elections held on the 15th day of August, 2013 upon holding that Rule VI of the respondents Nomination Rules violated section 26(2) (d) of the Act;*
>
> *3. when she failed to issue positive orders under Article 23(3) upon holding that the appellant's*

rights under Articles 47 and 50 of the Constitution were violated;

4. when she held that there would be a conflict of interest if the appellant were to be elected as a member of the respondents' Board of Trustees; and,

5. whether the learned Judge failed to exemplify Independence in the drafting of her Judgment and thereby rendered it in effective.

Issue numbers 1, 2 and 3 are interrelated and will be considered as such. Rule **VI** of the respondent's Nomination Rules, prohibits the nomination of, and allows the rejection of the Nomination of "**any person who in the view of the Board of Trustees is likely to injure the interests of the Scheme."** It is not disputed that the appellant was aggrieved by the respondent's failure to clear her to vie for the position of trustee in its Board of Trustees on account of this Rule. According to her, the remedy for her grievance lay under the constitutional law regime as she alleged breaches of her fundamental rights and freedoms, as stated in the said petition. As we have already highlighted above, the respondents' response to the said claim was that the remedy for the appellant's grievances, if any, lay in a purely administrative action under the Act.

In her decision, the learned Judge construed and rightly held that **Article 165** of the Constitution mandated the High Court to interrogate alleged breaches of the appellant's fundamental rights and freedoms and provide a remedy where appropriate. Also that the appellant had *locus standi* before the court in terms of the provisions of **Article 22(1)** which guarantees everyone the right to institute court proceedings claiming denial, violation, infringement or threats to a right or fundamental freedom; **Article 27(1)** which guarantees everyone equality, equal protection and equal benefits of the law; **Article 41(1)** which guarantees every person the right to fair labour practices; and, lastly **Article 258(1**) which guarantees every person a right to institute court proceedings claiming that the constitution has been contravened or threatened with contravention.

Turning to the Act, the learned Judge made findings that **Section 3** of the Act establishes the Authority whose objects *inter alia* is to regulate and supervise the establishment and management of retirement benefits schemes, to protect the interests of members and sponsors of retirement benefits schemes and to promote the development of the retirement benefits sector; that **Section 11** establishes the office of the CEO who among others is responsible for the day to day management of the affairs of the Authority; that **Section 22** entrenches the criteria, the Authority applies when determining the suitability of a person to serve as a trustee; that **Section 22(3**) entrenches the right to a hearing to any person negatively affected by a decision undertaken in the execution of a mandate under the act; that Section **26** makes provision for the disqualification of a person to be appointed as a trustee, while section **26(2) (d)** makes provision that a person is disqualified from holding the position of a trustee if he/she is disqualified pursuant to any written law; or is holding an office deemed by the Authority as being , in any way, detrimental to the scheme.

We have revisited and construed **Rule VI** on our own. We agree with the findings of the learned Judge that indeed **Rule (VI)** of the respondent's Nomination Rules was framed in a wide manner and was therefore open to abuse; that the respondent also arrogated to itself powers not vested in it by the Act, as the power to determine suitability to serve as a trustee on any retirement benefits scheme under the Act lay with the Authority in terms of the provisions of section **22A** of the Act. The section also entrenches the right to be heard before any adverse decision is taken against a person likely to be effected by administrative action. We also find that the appellant was not accorded her statutory right of being heard before the negative action barring her from vying for the position of trustee on the respondent's Board of trustees was taken against her.

The finding by the learned Judge and as affirmed above by us that the appellant's right to be heard before any negative action barring her from vying for the position of trustee on the respondent's Board of Trustees was taken against her was violated called for the determination of an appropriate remedy to redress the said breach, and also the determination of the particular regime of law under which such remedy lies.

As already pointed out, the learned Judge did interrogate, the competing redress systems (constitutional versus inbuilt statutory procedures under the Act) in order to determine which of the two procedures was appropriate. It was such a determination that would in turn have dictated the appropriate remedies attendant thereto. It is evident from the record that the learned Judge duly discharged that obligation and made findings that section **46** permits a person aggrieved by the decision of a manager, administrator, custodian or trustee of the scheme, to request in writing that such a decision be reviewed by the CEO with a view to ensuring that such a decision accorded with the provisions of the relevant scheme rules made pursuant to the provision of the Act under which the scheme was established; that section **47** establishes an Appeals Tribunal; while section **48(1)** permits a person aggrieved by a decision of the Authority or the CEO to appeal to the Appeals Tribunal whose mandate is set out under section **49** of the Act.

On the strength of the above analysis, the learned Judge ruled that the appellant's remedy lay under the dispute resolution mechanism procedures provided for under the Act, notwithstanding, the learned Judges' earlier finding that she was properly seized of the petition in the exercise of her constitutional mandate and that the appellant had *locus standi* before her.

The appellant took issue with the above findings because, the learned Judge had also made findings that her rights to fair administrative action under **Article 47** and fair hearing under **Article 50** of the constitution had been violated and therefore according to the appellant, the appropriate remedies that the learned Judge ought to have accorded to her were those available under the Constitution.

When the above complaint is considered in the light of case law, it is our finding that the learned Judges finding that she was properly seized of the constitutional mandate and that the appellant had *locus standi* before her did not *perse* imply that the matters raised in the Petition were purely constitutional in nature. All that these findings amounted to was that the appellant had sought the courts' intervention in the exercise of its constitutional mandate. It did not in any way, as rightly Put by **Mr. Odera,** clothe the appellant's petition with a constitutional veil. Neither did it preclude the learned Judge from determining the regime of law under which the appellant ought to have sought redress for her grievances, together with attendant remedies available for such redress.

The constitutional remedies permitted under **Article 23(3**) that could come close to the relief that the appellant sought is a declaration of the invalidity of any law that denies, infringes or threatens infringement of a right or fundamental freedom in the Bill of Rights which is not justified under **Article 24**. There is therefore no jurisdiction under **Article 23(3)** to fault a rule or regulation or any action executed pursuant to such a rule or regulation under the Act. That mandate fell squarely under the inbuilt dispute resolution mechanism within the Act which the learned Judge was not seized of. The Judge could not therefore be faulted for declining to accord the appellant a positive remedy under **Article 23(3)** of the constitution after finding that the respondent's action of barring her from contesting in the impending elections arose from the respondent's arrogation to itself of powers not vested in it under the Act.

Likewise, and in the light of our above reasoning, there was no way the learned Judge could have declared the elections held on 15/08/2013 null and void without impeachment of the offending rules through the mechanism provided for under the Act or alternatively through a civil action to declare them invalid as at the time the elections were held.

With regard to issue number 4, **Rule (VII)** prohibits the nomination of, and allows the respondent to reject the nomination of "Elected' council members and Trade Union officials of the Sponsor. The learned Judge upheld the respondent's invocation of this Rule to bar the appellant from participating in the elections because, according to her, there was nothing on the record to suggest that **Rule (VII**) as framed targeted the appellant as an individual. It applied generally to all council members and Trade Union officials whether elected or co-opted. We agree with the learned Judges' finding that the appellant suffered no discrimination by reason of the invocation of **Rule (vii)** to bar her from vying for the position of trustee as the said rule did not target her as an individual. It was applied generally across the board to all intending candidates as correctly contended by the respondent.

Turning to the manner the learned Judge drafted the Judgment, the position in law is set out in **Order 21**

rule 4. It provides:-

> ***"Judgment in defended suits shall contain a conclusive statement of the case, the points for determination, the decision thereon, and the reasons for such a decision."***

In **PIL Kenya Ltd versus Oppanga [2009] KLR 442,** the Court held that it is not necessary for every judgment to contain what each witness said but for purposes of impartiality, it is prudent to set out the conflicting evidence of both sides before analyzing and evaluating the same. In **The Code of Civil Procedure by Sir Dinshah Fardinji Mulla, 18th Edition, Reprint 2012, B.M. Prasad: Butter worths: Wadhwa Pg 2273,** paragraph 5 on contents of judgments, it states that the decision of a case should be based on grounds raised in the pleadings; that unbalanced language in a judgment is generally out of place in a Judicial adjudication; that a judgment should contain points for determination, discussion, the evidence, oral and documentary; that the judgment should contain the reasoning on which the conclusion has been reached; and, lastly that a Judge should not inject his own view into the judgment.

We have applied the above tests to the complaints raised against the manner the learned Judge drafted the Judgment. We find no demonstration of any transgression committed by the learned Judge as against any of the above cardinal principles on judgment writing .The learned Judge summarized the pleadings and the supportive facts relied upon by either side; framed three issues for determination, determined each of these issues in the light of the totality of the record before her and gave reasons as highlighted above. We find nothing in the said Judgment to suggest that the learned Judge either misapprehended the facts or misapplied the law to those facts, or that she was biased against any of the parties.

The upshot of all the above reasoning is that, we find no merit in this appeal. It is dismissed in its entirety. Due to the nature of the litigation giving rise to this appeal, we find it prudent to order each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2017.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR