



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 63 OF 2012

BETWEEN

LALJI KARSAN RABADIA

CHANDRAKANT LALJI RABADIA

PRAVIN JADVA RABADIA .....APPELLANTS

AND

COMMERCIAL BANK OF AFRICA LIMITED .....RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Odunga, J.) dated 6<sup>th</sup> February, 2012*

In

H.C.C. NO. 109 OF 2011)

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## JUDGMENT OF THE COURT

### Introduction

1. The basic issue for our determination in this appeal is whether the trial court (Odunga J), erred in principle in the exercise of its discretion when it partly entered summary judgment in favor of the respondent. The three appellants are directors in a company known as *Kajulu Holdings Limited* (KHL), which is not a party to these proceedings. They are represented before us, as they were before the trial court, by learned counsel Mr. F. Wasuna assisted by Mr. P. Amunga, instructed by M/s Wasuna & Company Advocates. The respondent is the *Commercial Bank of Africa Ltd* (the bank) carrying on business in Nairobi, and it is represented before us, as it was before the trial court, by learned counsel Mr. K. Fraser assisted by Ms. Gathoni Kariuki, instructed by M/s Hamilton Harrison & Mathews, Advocates. Counsel on both sides agreed to file written

submissions upon which this appeal is considered and determined.

## **Background**

2. On diverse dates in the months of August 2007, October 2007, November 2008, January 2010, and June 2010 the appellants executed various guarantees in favor of the bank. The guarantees were additional security for financial accommodation extended by the bank to KHL which, as at December 2010, amounted to Kshs.698,124,630.90 and USD 644,173.02. For reasons which the bank says were legitimately part of the agreement between itself and KHL, but which the appellants dispute as non-existent, the bank sent letters to KHL on 25<sup>th</sup> October 2010, 10<sup>th</sup> November 2010 and 22<sup>nd</sup> November 2010, demanding full repayment of the outstanding principal sums together with interest at the agreed rates. The letters were copied to the appellants. When KHL made no payment in compliance with the demand, the bank appointed receivers under the debenture executed by KHL on 22<sup>nd</sup> November 2010. KHL, however, went to court and obtained restraining orders which removed the receivers. The bank then served each of the appellants with notices on 9<sup>th</sup> December 2010 demanding payment of the outstanding amounts within 10 days or face legal action. The appellants did not comply and so the bank filed suit on 25<sup>th</sup> March 2011 seeking payment of the debt standing, as at January 2011 at Kshs.721,489,273.78 and USD 654,119.01 together with interest.
3. The appellants entered appearance, but before they could file their defence, the bank, on 11<sup>th</sup> May 2011, took out a notice of motion under **Order 36** of the **Civil Procedure Rules**, seeking summary judgment for the debt. This was procedural under **Rule 36(1)**. It supported the application with all relevant documents relating to the banking facilities advanced to KHL, the guarantees signed by the appellants, as well as the account statements and demand notices. In compliance with **Rule 36(2)**, the appellants filed an affidavit in reply on 13<sup>th</sup> June 2011 to show that they should have unconditional leave to defend the suit. They admitted that loan facilities were advanced to KHL as stated by the bank and that the three of them executed guarantees to secure repayment of the loans. However, their case was that it is the bank itself through misconduct and breach of contract, which made it impossible for KHL to repay the facilities and, consequently, the guarantors were discharged from their obligation to the bank.
4. They referred to their joint defence which they filed after service of summons to enter appearance contending that there were serious triable issues raised therein, among them: that the immediate demand for repayment of the loan was unjustified, malicious, unreasonable and incapable of compliance; that the amounts demanded were not due; that the bank itself committed misconduct by making demands for long term facilities before expiry of the term, demanding repayment of the loan before any default by KHL, behaving unreasonably towards KHL and impounding all the stock in trade, machinery and equipment of KHL although it knew the delicate nature of its business, and agreeing to have some assets of KHL sold at Kshs.240 million. They also referred to another suit pending before the High court between the bank and KHL wherein KHL questioned its indebtedness to the bank.

## **Decision of the trial court.**

5. The trial court laid out the guiding principles in considering applications under **Rule 36** ( formally 35) of the **Civil Procedure Rules** as follows:-

**“The principles guiding summary judgment applications are now well known. In the case of Dhanjal Investments Ltd. vs. Shabana Investments Ltd, civil appeal no. 232 of 1997 the Court of Appeal stated that if the defendant can show that he has triable issues, he must be allowed to defend without conditions as conditions should not be imposed where there is a fair probability of a defence or where the practical result of applying it would unjustly deprive the defendant of his defence. In the case of Richard H. Page & Associates Ltd. vs. Ashok Kumar Kappor [1979] KLR 246;**

Chesoni, J (as he then was) stated *inter alia* that the basis of an application for summary judgment is that there is no defence to the Plaintiff's case and the purpose of Order 35 (now Order 36) is to enable a plaintiff with liquidated claim, to which there is clearly no defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant; indeed the purpose of summary judgment order is to enable a plaintiff quickly to realise what is his. However, in the case of Five Continents Limited vs. Mpata Investments Limited [2003] klr 443; it was stated that if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions and that in an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend. The court further stated that in an application for summary judgment, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial but not that it raises a defence which must succeed."

6. Citing other authorities, it added that "*triable issues ought to be allowed to go for trial, just as a sham defence ought to be rejected summarily*", and that a triable issue was "*an issue or issues that require investigation*." The onus was on the defendant to show, *prima facie*, that he should have leave to defend.
7. After examining the facts on record, the court found that there was no *prima facie bona fide* triable issue on the exact amount due to the bank; that the provision for repayment of the loan in the long term was subject to demand provisions set out in the contract instruments, and therefore the bank did not prematurely recall the loan or misconduct itself; that the dispute between the bank and KHL did not affect the appellants' liabilities under the guarantee instruments; that there was no non-disclosure of the seizure by the bank of the assets of KHL and even if there was, it was not a bar to the claim by the bank against the appellants; that the mere fact that a reply to defence was not filed did not mean that the suit must proceed to trial just as the mere filing of a reply to defence did not mean there was a joinder of issues; and that the mere fact that receivers were appointed and had a duty to render accounts to KHL did not discharge the appellants unless they could show, *prima facie*, that the debt was paid in full, which they did not. The court nevertheless found that, owing to the admitted fact by the bank that some assets of the KHL were to be sold for Ksh.240 million which would be credited to KHL thus reducing the liability of the appellants, such action would amount to deprivation of the said sum and therefore there would be leave to defend the suit on that sum only. The motion succeeded to that extent only.

#### **The appeal, the cross-appeal, and submissions of counsel.**

8. The appellants listed seven grounds of appeal but argued them in three tranches to underscore the triable issues which the trial court did not sufficiently consider. The first is that there was a joinder of issue on the pleading in the defence that the bank had committed misconduct and repudiatory breach of contract by recalling the credit facilities before their due date and before there was any default by KHL. They cited several treatises in support of that submission as follows:-

**"The Law of Guarantees"** by Geraldine Andrews & Richard Millet 2<sup>nd</sup> Edition, at page 156---

**"A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependant upon the default of the principal and which does not arise until that point. In Ex- parte Gardon (1808) 15 Vs 286, it was held that no claim could be brought by the creditor for the price of goods sold and delivered until the period for payment of the price for the goods allowed to the principal had expired". (emphasis ours)**

On discharge of surety by breach of contract by creditor at page 245: -

**“9.17 If the Creditor commits a repudiatory breach of his contract with the principal so that the principal is entitled to treat the contract as at end, the surety is also discharged from further liability .....”**

In Halsbury’s Laws of England, fifth Edition, Volume 49, the Learned auditors say the following at Page 561, Paragraph 1214: -

**“A guarantor will also be discharged if the creditor acts in bad faith towards him, or connives at the default by the principal debtor in respect of which the guarantee is given....”**

In **Keating on Construction of Contracts**, 9<sup>th</sup> Edition, the Learned Author says the following at page 394: -

**11-032 Conduct to prejudice of Surety.**

**“A surety is undoubtedly and not unjustly the object of some favour both at law and in equity and .... is not to be prejudiced by any dealings without his consent between the secured creditor and the Principal debtor. Conduct that prejudices the surety’s position may discharge the surety’s obligation.” (underlining ours)**

9. The second tranche of submissions raises the issue of clauses in the lending and guarantee instruments referring to **“normal bankers demand rights”** and **“payable on demand”**. These terms, the appellants submitted, are not defined in the contract documents and it was erroneous to give them the liberal construction the trial court did. The reasonable construction, in their view, would be that the bank could not recall the huge loans if there was no default or other breach by the principal debtor. It would be absurd and oppressive to demand about Kshs.1billion, to be paid within 10 days when the money was borrowed for repayment over a period in excess of 5 years, and there was no default. In support of that submission they cited the following authorities:-

In The Construction of Contracts by Gerald McMeel, 2<sup>nd</sup> Edition at Page 150, Paragraph 4.04, the learned Author says the following: -

**“In the construction of all instruments it is the duty of the court not to confine itself to the force of a particular expression but to collect the intention from the whole instrument taken together.....”**

The same author says the following on the modern approach to interpretation of instrument at Page 156 Paragraph 422: -

**“4.22 The modern principle is that the court will treat as repugnant a clause which is inconsistent with the main purpose of the contract, or with the intentions of the parties objectively ascertained from the whole of the contract in its relevant contextual setting”.**

And in Wallis -vs- Smith, citation Lindley L.J says at page 274 thereof as follows: -

**“You are to ascertain the intention of the parties not only by what they said but by what the court sees to be the consequence, and by what the Court may or may not consider to be absurd or oppressive,.....”**

10. The third tranche of arguments relates to the appointment of receivers before the suit was filed. This, according to the appellants, meant that their pleading in the defence that the loan amount as demanded in the suit was not due was not an idle one. The receivers, they contended, had not

rendered their accounts as by law required and therefore it was erroneous for the trial court to give partial leave to defend. The question as to whether KHL was indeed indebted to the bank and if so, to what extent, was a real triable issue and the application for summary judgment was thus premature.

11. In response to those submissions, the bank urged us to note that there were several admitted and also unchallenged facts, which must form the background for our consideration of this appeal, including :-

- i. The guarantees were executed by the appellants;
- ii. The quantum of the loans and overdraft facilities given to KHL were as stated by the bank;
- iii. The indebtedness of KHL to the bank as found by the trial court upon examination of the documents is not challenged in this appeal;
- iv. Demands made for payment were served on KHL;
- v. Demands for payment were also served on the appellants, and the appellants did not pay;
- vi. Demand before action was issued and served.

12. The bank supported the trial court on its exposition of the guiding principles and added further principles, thus:-

- i. ***Abdul Aziz Suleman v South British Insurance Company Ltd [1965] EA 66 per Chanan Singh J at 69 A to D [Respondent's Authority number 1] – “the complicated nature of a case is no excuse for refusing an application .... So long as it is clear that the defendant has no real defence to the action.***
- ii. ***Corporate Insurance Co. Ltd v Nyali Beach Hotel Ltd [1995 – 1998] 1 EA 7 at page 20 a-d – “the duty of the Court of Appeal in an appeal against the exercise of that discretion is not to interfere unless the Judge has exercised his discretion wrongly in principle or perversely on the facts of the case.***

***This basis of the jurisdiction of the Court of Appeal is accepted at page 14 on page 8 of the Appellant's Written submissions and in Held 1 of the Appellant's authority number 4 Giciem Construction Company v Amalgamated Traders & Services [1983] KLR 156.***

- iii. ***Gupta v Continental Builders Ltd [1976 – 80] 1 KLR 809 at page 814 line 19 to 815 line 20 “a minute and careful examination of documents and facts laid before the Court is carried out by the court as part of the daily task in the performance of its judicial duty.”***

13. As to the impugned clauses: “**normal banks demand rights**”, and “**on demand**”, the bank stressed that the clauses were spelt out in the contract documents signed between the parties and no court can rewrite that contract. It was clear to the appellants and KHL before they signed, that the bank was entitled to appoint a receiver “**on demand without any default**” or “**without a demand if there was a default**”. In the bank's view, the two were mutually exclusive and there was no limitation on the right of the bank to make demand for payment. In any event, failure to pay after demand was a default. Consequently, despite the agreement that the credit facilities would be paid over an extended period, this was subject to the demand provisions under the contract.

14. The bank further corrected the impression created that only one demand was made for payment within 10 days, submitting that there were three separate demands made between 25<sup>th</sup> October and

25 November, 2010, before the receivers were appointed, and before then there were “numerous discussions and communications” trying to rectify the deteriorating loan situation. Referring to the guarantee instrument, the bank submitted that it provided for “*the withdrawal of the facilities at any time at the absolute discretion of the bank*”. There was thus a complete answer to the submission that the bank could not simply demand repayment even if there was no default. In support of these submissions, the bank cited the same authority referred to by the appellants in **The Construction of Contracts** by Gerald McMeel (supra), stating:-

***“But a Court is not authorized to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every Court is bound by it, unless it is plainly contradicted by other parts of the instrument.”***

15. As relates to the timing for making the demand, and whether any debt was due, the bank submitted that this was a matter of judgment by the bank without regard to any loss which the borrower may suffer. On this submission, the bank cited the following authorities:-

- i. **“Madhupaper International Ltd v Kerr and Others [1958] KLR 840 held 4 and 5 and pages 848 – 9 and 850 – 1 relying on the case of In re Potters Oils Ltd [1986] 1 WLR 201 at page 201 – held; 205H to 206C:-**

***“The debenture holder is contractually entitled to appoint a receiver to protect its interests and owed no duty to refrain from exercising its rights merely because to exercise the rights might cause loss to the company or its unsecured creditors.”***

- ii. **J K Industries v Kenya Commercial Bank Ltd [1987] KLR 506 Held 2, 3, 4 and 5; at page 511 line 20 to page 512 line 23:-**

***“Where a debenture holder’s right to appoint a receiver to manage a company’s affairs accrues, it is a matter for the judgment of business when that right should be exercised and it is not the business of the courts.”***

In this case, it was submitted, the bank was fully justified to recall the loans after studying an **Independent Business Review Report** prepared by Deloitte Consulting Ltd and exchanging various letters with KHL. That was not misconduct but the exercise of rights given by the contract documents.

16. Furthermore, the bank submitted, even if, *arguendo*, the right to make a demand and to appoint receivers over KHL had not arisen, this would not provide a defence to the claim against the appellants as guarantors. For this proposition, the case of **Bowmaker (Commercial) Ltd v. Smith [1965] 1 WLR 855** was relied on. Reliance was also made on the quotation from **Halsbury’s Laws of England** (supra) stating thus:

***“However, there is no general principle that merely irregular conduct on the part of the creditor, even if it is prejudicial to the interest of the guarantor, discharges the guarantor.”***

And the quotation from **Keating on Construction of Contracts** (supra) stating thus:

***“But, mere omission on the part of the employer, mere passive acquiescence in the acts which are improper on the part of the employer, will not release the surety... ‘Merely irregular conduct on the part of the creditor, even if prejudicial to the interests of the surety, does not discharge the surety.’”***

17. In addition, the bank submitted that the appellants cannot set up an unliquidated claim by KHL as a defence under the guarantee; that the liability of the appellants arose from the terms of the guarantees which included indemnity, even if KHL for some reason was discharged; that all

payments by the appellants were to be free of any set-off or counterclaim; that it was not necessary to discuss the appointment of receivers or any accounting they allegedly needed to make before summary judgment could be entered; and that even if the receivers recovered any money, credit for it would be given at the time of judgment and it could not stop the entry of summary judgment. In sum, the bank submitted, the trial court made no error in principle in the exercise of its discretion, except for granting partial leave to defend, which is the subject-matter of the cross appeal.

18. On the cross appeal, the bank submitted that there was no *bona fide* claim for the sum of Kshs.240 million. That is because it was agreed by KHL and the appellants that the price of the attached assets was fair and reasonable and that they will not challenge the process, the price or the terms, and furthermore the appellants acknowledged that the sale did not amount to a discharge or variation of the guarantee signed by them. Despite the sale not being completed by the time the application for summary judgment was made, this did not amount to a *bona fide* defence.

19. In reply, the appellants emphasized that the parties were bound by their pleadings; that the cause of action pleaded by the bank was never that there was default as a result of which a demand was served; that the assertion that KHL had defaulted was outside the pleadings and should be ignored; that the appellants did not plead that there was no money owed to the bank; that their pleading in defence was that they were discharged from liability due to the bank's misconduct and appointment of receivers who had not accounted for the assets they took over; that the discussions held with the bank were not in relation to defaults but additional facilities; that the **Independent Business Review** was commissioned by the bank to assess the possibility of further facilities requested for and it was not negative; and that the trial judge erred in failing to consider that another judge of the High Court had found the bank's conduct was "*not only unreasonable, but also high handed and without justification*".

20. In relation to the cross appeal, the appellants submitted that a contract of guarantee is an accessory contract and the obligation of the guarantor can only arise upon the default of the principal debtor; that the appellants showed by documentary evidence that the bank had signed agreements, outside the matter before the court, under which it would receive Kshs.240 million and so the appellants were entitled to urge the defence against their alleged indebtedness to the bank.

### **Analysis and determination.**

21. We have considered the grounds of appeal, the record of appeal, the submissions of counsel and the authorities cited by learned counsel, for which we are grateful. As stated earlier, the appeal relates to the exercise of discretion by a trial court. This Court may only interfere with the exercise of such discretion on the basis of well settled principles which we take from the *locus classicus* case of **MBOGO & ANOTHER V. SHAH [1968] EA 93** at page 96, thus:

**“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been misjustice.”**

22. It is common ground that the trial court correctly stated the principles under which an application for summary judgment ought to be made. The only contention is that the principles were not correctly applied to the facts of this case. It is also not disputed that the bank extended financial accommodation to the principal debtor (KHL) as stated by the bank in the suit; that KHL provided security for that financial accommodation; that additional security was provided by the appellants in form of written guarantees; that the terms which bound the bank, the principal debtor and the

appellants were contained in the contract documents executed by them; that the bank served demand notices on KHL without citing any default; that demand notices were served on the appellants when no payment was made by KHL as demanded by the bank; and that the bank appointed receivers who took over the assets of KHL before they were removed by a court order.

**23. Did the trial court exercise its discretion wrongly in principle or perversely apply the facts of the case to the principles, despite summarizing them correctly?**

The gravamen of the argument by the appellants, as we see it, is that due to the misconduct of the bank, the appellants were no longer bound by the contracts of guarantee which they signed. The misconduct arose from the bank's decision to recall the long term loans of KHL before there was any default in payment of agreed installments. The gist of the bank's argument on the other hand is that it had the right under the contract documents, to recall the loans without waiting for default and therefore there was no misconduct. The answer therefore, in our view, must lie in the construction of the loan and guarantee documents.

24. We have examined the ruling of the trial court and found that it examined the contract documents keenly before coming to the conclusion that *“the payment of the two term loans over an extended periods was subject to provisions set out in the facility letters and debenture”* and that *“it was not the business of the court to read extraneous issues into a contract entered into with sound legal minds.”* In principle, we find no error in such approach since it is in the province of the trial court in an application for summary judgment to conduct *“a minute and careful examination of documents and facts laid before the court as part of the daily task in the performance of its judicial duty.”* See the **Gupta case** (supra). We also find no error in principle for the statement that the court has no power to rewrite a contract for the parties as it is based on many authorities including **Wallis v. Smith** (supra) where Jessel, Master of the Rolls, stated, thus:-

*“I have always thought, and still think, that it is of the utmost importance as regards contracts between adults – persons not under disability, and at arm's length – that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character.”*

25. See also the decision of this Court in the **National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd [2002]2 EA 503** where it was stated:-

**“A court of law cannot rewrite a contract, between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of *Fina Bank Ltd v Spares and Industries Ltd [2000] 1 EA 52*: “It is clear beyond peradventure that save those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain”.**

26. We have ourselves examined the facility letters dated 12<sup>th</sup> November 2008, and 17<sup>th</sup> December 2009 and confirmed that the facilities were subject to **“normal bankers demand rights”**. Apparently these were known to the parties as there was no insistence for a definition. But those “demands” are spelt out in the debenture document where the bank reserved a covenant for recalling the facilities **“on demand”**. The plain and natural meaning is just that; the debtor will pay the money when it is demanded. That would be an onerous provision considering the amount of money that was being borrowed. But then again, no questions were asked before pen was put to paper! There are also provisions for recalling the facilities in the event of default or in the happening of other events. The appellants are right that the bank did not plead these latter kinds of

default. Where then is the misconduct if the bank was guided by the contract documents? Like the trial judge, we find none. Consequently we must find as we now do, that it was not a triable issue. We would dismiss that ground of appeal.

**27. On the finding that there was no misconduct on the part of the bank in its dealing with the principal debtor, is there any other basis for the appellants claiming discharge from the guarantee obligations?**

On the authorities cited by the appellants, they would be discharged if the bank committed repudiatory breach of its contract with KHL, but we have found that the bank was not in breach of contract. Secondly, they will be discharged if the bank acted in bad faith against them or connived with KHL in respect of the loan facilities. On the record, there is no allegation or evidence of connivance with KHL and a finding of bad faith would be stretched where, as in this case, there were clauses in the contract which the bank invoked, however onerous they turned out to be. Thirdly, they would be discharged if the bank and KHL carried out dealings without the consent of the surety, which dealings are prejudicial to the surety. The dealing cited in support of this principle is the timing of the recall of the loans for no reason, but again, it is our finding that the dealing was sanctioned by the terms of the contract between the parties. On those findings the second broad argument in the appeal fails.

28. Lastly, as regards the cross appeal, we find no basis to interfere with the discretion exercised by the trial court. The agreement to sell the assets of KHL was entered into in October 2011, after the filing of the suit and the sale was not concluded by the time the ruling of the court was delivered. We do not accept the submission by the bank that the very fact that KHL accepted the price and terms of sale and that credit for the amount would be given to the appellants is a complete answer to the issue. It is plain that until that transaction is completed, there remain questions which are open for investigation before the appellants are called upon to discharge their full obligations under the guarantee as demanded of them by the bank. Leave to defend to that extent was properly given and for that reason we dismiss the cross appeal.

**Disposition.**

29. The upshot is that both the appeal and the cross appeal are dismissed. Each party shall bear its own costs.

*Dated and delivered at Nairobi this 20<sup>th</sup> day of February, 2015*

**P.N. WAKI**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**D.K. MARAGA**

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## **JUDGE OF APPEAL**

### **Explanatory note on delay:**

This judgment was due for delivery on 3<sup>rd</sup> October, 2014 but for several reasons, it was not possible to deliver it on that date. First was the pressure and priority given to Election Petition judgments which had Constitutional deadlines. At the conclusion of the hearing, the attention of the parties was drawn to this possibility for delay. Second, in the month of November, 2014, the presiding Judge, with the authority of the Hon. The Chief Justice proceeded on annual leave and engaged in official duties as President of the Residual Special Court for Sierra Leone, which took him outside the country throughout the month. Barely two days after his return to Kenya on 30<sup>th</sup> November, 2014, his father who had been hospitalised passed on, and he was allowed to concentrate on funeral arrangements until the end of term. The Judgment, among others, was prepared during the Christmas vacation and is delivered at the first opportunity in the new year.

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**