



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME, ODEK, J.J.A.)

CIVIL APPEAL NO. 44 OF 2014

EDITH GICHUNGU KOINE.....APPELLANT

VS

STEPHEN NJAGI THOITHI.....1ST RESPONDENT

PETER MWANGI KIRAGU.....2ND RESPONDENT

(Appeal from the judgment in the High Court of Kenya at Nyeri

(Sergon, J.) dated 21st February, 2014 in H.C.C.A. No. 41 of 2008)

JUDGMENT OF THE COURT

This is a second appeal from the judgment of Sergon, J., in High Court Civil Appeal No. 41 of 2008. In that judgment, the appeal by the respondents was allowed, the judgment by the trial magistrate was set aside and was substituted with an order allowing the respondents' suit before the subordinate court. In effect, the appellants who were substituted for their deceased husband were ordered to transfer to the respondents' 2 acres each from **Land Parcel No. Mutira /Kaguyu/126**, (suit land).

There were two appellants before the High Court, that is Jane Wakiuru Koine and Edith Gichugu Koine, but the appellant in the instant appeal is Edith Gichugu Koine. The appellant is dissatisfied with that outcome and has filed this appeal which is predicated on the following grounds of appeal:

- 1. The learned Superior Court Judge erred in fact and in law in holding that the Magistrate in Kerugoya S.R.M.C.C. No. 232/96, erred and made generalized conclusions that the appellants' witnesses were unreliable and contradictory.***
- 2. The learned Superior Judge erred in fact and in law in holding that PW3 was a very important witness and that his evidence in the lower court was ignored contrary to the record.***
- 3. The learned Superior Judge erred in fact and in law in failing to note that the plaintiffs were from different mothers/houses and that their father and clan had made provision of land for each house and that the 1st appellant could not get the land of his stepmother's house as his land in his eldest brother named Kathaka Thoithi.***

4. *The learned Superior Court Judge erred in failing to appreciate that the 2nd appellant had not sought a declaration of trust for the house of Kiragu and was seeking land personally when he had a brother who did not make a claim of land.*
5. *The learned Superior Court Judge erred in failing to note that the interests of the appellants were in conflict as they were not from the same house.*
6. *The learned Superior Court Judge erred in failing to note that the appellants' husband, one, Koine Thoithi, was not the eldest brother of the 1st appellant, one, Stephen Njagi Thoithi, as his eldest brother was Kathaka Thoithi, who was the registered owner of Parcel No. Mutira/Kaguyu/125.*
7. *The learned Superior Court Judge erred in fact and in law in not appreciating that the shares the applicants were claiming were too large in view of the family size and the acreage of the land and the trust if any was determined unfairly.*
8. *The learned Superior Court Judge erred in allowing the appellants' case.*

The 1st respondent is the step-brother of the appellant's husband the late James Koine Thoithi, (deceased), who was originally sued before the subordinate court, while the 2nd respondent is the nephew being a son of the deceased's brother, the late Kiragu Thoithi. The deceased passed away in the course of proceedings and was substituted by his two widows as the legal representatives of his estate. The respondents' claim against the appellant's husband was that in 1958, the deceased was registered as proprietor of **Land Parcel No. Mutira/ Kaguyu /126**, measuring 7.5 acres for himself and his brothers because by then their father Thoithi Njogu was elderly and the 1st respondent was too young. Their father subsequently died in 1965 and he left the respondents in occupation of the suit land. The respondents, therefore, claimed that the appellants be ordered to transfer 2 acres each to the respondents.

The respondents' claim was resisted by the appellants, by their defence and counterclaim, it was contended that the 1st respondent was given a license to occupy the suit premises in 1965, on account of their father, upon the death of their father the license was terminated in 1971, whereby he was given notice to vacate and he complied. According to the defence, the said license was terminated when the 1st respondent started behaving in a manner that was incompatible with the license. The 1st respondent was given a village plot by the clan and he also purchased his own land where he resides. As regards the 2nd respondent, it is contended that he lives on the suit land but on a license which the appellant's husband applied by way of a counter claim to be terminated and sought for an order of his eviction.

The matter was heard by the subordinate court with the respondents giving their own evidence and calling 3 other witnesses in support of their case. The 1st respondent testified that their late father Thoithi Njogu told him that the late James Koine Thoithi was registered as proprietor of the suit land in trust of himself and his siblings. The 1st respondent contended that he was evicted from the land by his late brother in 1971. Out of the respect he had for the deceased as his elder brother, he did not resist the eviction but he kept his hopes that the deceased would settle the dispute; the 1st respondent was, however, shocked when he learned that the deceased wanted to sub-divide the land. The 1st respondent did not want to push his elder brother but in 1996, he filed suit claiming a portion of land the deceased held in trust.

The 2nd respondent claimed that the suit land was registered in favour of the deceased to hold it in trust of his father, the late Kiragu Thoithi, who was his brother; he stated that his older brother was in occupation of the suit premises not as a license but as a beneficial owner. Their evidence was supported by Musa Muriithi, (PW3), who was described as an old man of 80 years. PW3 told the trial court that he was a member of the land demarcation committee together with the father of the parties to the suit that is the late Thoithi Njogu.

They were also clan members of Agaciku Mbari Ya Ndambi and the suit land was allocated to the

deceased at the request of the late Thoithi Njogu to hold it in trust for the young siblings; the respondents were entitled to share a portion of the suit land. Stanley Karimi Miano, (PW4), also testified that he participated in the land demarcation as a young man and he personally heard the late Thoithi Njogu directing the members of the demarcation committee to register the suit land in the name of the deceased. Francis Kinyua Kiragu, (PW5), confirmed that the 2nd respondent was his brother, they were children of the Kiragu Thoithi who died and, therefore, the suit land should be divided among the three sons of Njogu Thoithi that is, the respondents and the appellants.

The two widows of the deceased Jane Wakiuru Koine, (DW1), and Edith Gichugu Koine, (DW2), were substituted in place of their deceased husband. They denied that their late husband was holding the suit land in trust of the respondents. They argued that the 1st respondent should claim land from his brother Kathaka who is the registered proprietor of **Mutira/Kaguyu 125**, which land was allocated for his mother's house. The deceased was registered as absolute proprietor of the suit land; the deceased chased away the 1st respondent from the suit property long time ago because the 1st respondent was not entitled to the suit land.

As for the 2nd respondent the appellants' position was that he should be evicted from the suit land as prayed in the counterclaim. Their evidence was supported by their son Joseph Wachira Koine. He further contended that their grandfather Thoithi Njogu had two wives; Wanjiru and Wachuka, his father was the son of Wanjiku while the 1st respondent's mother was Wachuka. The house of Wachuka was allocated **Parcel No. Mutira/Kaguyu/125**, which was registered in the name of Kathaka to hold it in trust of the 1st respondent; also he was given a village plot by the clan which he sold and bought another parcel of land where he lives. As regards the 2nd respondent, this witness told the trial court that he was allowed by the deceased to occupy the suit land on humanitarian grounds after he left Nyandarua due to tribal clashes.

The defence evidence was supported by Benson Mukiri, (DW4), he comes from the same clan as the parties to this suit. He told the trial court that he participated in the exercise of land demarcation; the deceased was given the suit land by the clan in his own right due to some contribution that he had made. The deceased brothers namely Kiragu and Ndinwa were given land in Mwea and a village plot respectively. Lastly, Harun Wagonda, (DW5), stated that he acted as a messenger for the village committee during the land demarcation. He testified that he was present when the deceased was given the suit land due to his contributions to the clan. He admitted that the deceased had two brothers that was Kiragu and Ndinwa. According to this witness, these were not given any land because the land was not available for everybody. However, Kathaka, who is the step brother of the deceased and a brother of the 1st respondent was given clan land. This witness also confirmed that the 2nd respondent resides on the suit land, but none of the respondents is entitled to the deceased parcel of land.

After considering the aforesaid evidence, the trial court was not impressed with the respondents' case, he concluded that PW4 was not a truthful witness, and their other witnesses contradicted themselves and therefore their case was not proved on a balance of probabilities. The respondents' case was dismissed, thereby giving rise to the appeal before the High Court.

The learned Judge of the High Court also fastidiously analyzed the evidence and considered the grounds of appeal against the evidence. He observed the trial magistrate fell into several errors, especially when he made generalized conclusions that the respondents' witnesses were unreliable and contradictory. The Judge was of the view that the so called contradictions were minor and did not affect the substance of the matter; that the magistrate completely ignored the evidence of Musa Murithi, (PW3), whose testimony was credible and was not controverted. On the conclusion by the trial magistrate that the respondents' claim was time barred, this is what the Judge stated in his own words:-

“I have re-examined the evidence and it is clear that the learned Principal Magistrate fell into error when he concluded that there was no explanation as to why it took the Plaintiffs more than 20 years to file the suit before trial court. There was a clear explanation given by PW1 to justify the delay in filing the suit at page 12 of the typed proceedings as follows:

“I was thrown out of the land by James Koine Thoithi in 1971. I filed the suit on 2nd December, 1996. This is a period of 25 years. I used to talk to him. I assumed we would settle out of court. This was so until 1986 when I knew he wanted to sub-divide the land. I failed to trust him again. I respected the defendant. I could not push him as he is older than me. In 1996, I decided to file the case in court. In 1986, he had gone to the land board. I filed the suit in 1996 then years later. We were negotiating about the land”.

It is clear from the above excerpt that the 1st Appellant gave a detailed explanation as to why it took him long to file to suit. Basically, he stated that there was no indication that the late James Koine Thoithi would short-change them, hence, there was no need to sue. It would appear the learned Principal Magistrate was of the view that time started to run from 1971 the date when the Appellant was evicted from the land. The 1st Appellant stated that this deceased brother had not taken any steps which adverse to his interests until 1986 when he visited the Land Control Board to obtain to consent to sub-divide and transfer the same. According to the 1st Appellant, a cause of action arose in 1986. In my view, the learned Principal Magistrate misapprehended the facts of this case. In any case, the provisions of Section 20(1) of the Limitation of Actions Act protects the rights of the Appellants. The aforesaid provision states as follows:

“None of the period of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action;

(a)

(b) To recover from the trustee property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to this use”.

The fiduciary position held by the Respondent is that of a continuing trust, hence, it is difficult for time to begin running. The learned Principal Magistrate, therefore, fell into error when he concluded that the Appellant’s claim was time-barred”.

Finally, the Judge found a further error in the conclusion that there was no trust noted in the title register. Citing the case of ***Muthuita vs Wanoe, [1982] KLR 166***, as follows:

“1. A registered proprietor is not relieved from obligations to which he is subject as a trustee, by Section 28 of the Registered Land Act (Cap 300).

2. The absence of a reference to a trust in an instrument of acquisition of land does not affect the enforceability of a trust existing in this land. The provisions requiring reference to a trust in Section 126 of the Registered Land Act are not mandatory but merely permissive”.

During the hearing of this appeal, Miss Thungu, learned counsel for the appellant, submitted that the leaned Judge misapprehended the evidence. For example, the 1st respondent was the son of Wachuka while the appellant was from the house of Wanjiru. In the house of Wachuka, the 1st respondent’s brother called Kathaka was given the adjusted land known as ***Mutira/Kayuru/125***. According to Kikuyu customary law, the 1st respondent should have pursued his claim for land from Kathaka. It was argued that the respondents did not prove the claim of trust because all the children of Thoithi Njogu were provided land by the clan. The 1st respondent was given a plot by the clan which he sold. The 2nd respondent is a son of a brother of the appellant and he was given a village plot. Other children were given money to buy land; there was, therefore, no way the land that was given to the appellants’ husband could have been the one that was trust land for sharing with everybody.

Counsel further submitted that the size of the suit land was not considered; in allowing the respondents' case, they were awarded a total of 4 acres without considering the appellants' have 6 children who too have beneficial interests over the suit property and they were left with only 3 acres between them; thus the distribution was unfair and oppressive considering other members of the family. The Judge was also faulted for interfering with the conclusions drawn by the magistrate that the respondents' evidence was contradictory as to who lives on the suit land. Issues of occupation are very material in a claim of trust and beneficial interests. Finally, counsel pointed out that the evidence of PW3 did not make sense when he testified that the suit land was registered in the name of the appellant because his father Thoithi Njogu was too old.

On the part of the respondents, this appeal was opposed; Mr. Magee Wa Magee, their learned counsel, supported the judgment of the High Court. He urged us to consider only two issues of law; which was whether the claim by the respondents was time barred and secondly, whether a trust must be registered in the title. According to counsel, the Judge set out the law correctly; the evidence was properly evaluated; where there were contradictions, they were found to be minor and they did not affect the veracity of the evidence, counsel urged us to dismiss the appeal.

This is a second appeal and that being so, we have to resist any temptation to dwell on matters of fact which must have been thrust almost to a pulp by the two courts below. See the case of *Kenya Breweries Limited vs Godfrey Odoyo, Civil Appeal No. 127 of 2007*, where it was stated:

“In a second appeal, however, such as this one before us, we to resist the temptation of delving into matters of facts. This Court on a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision....”

Bearing in mind the above principles and also the fact that there were no concurrent findings by the two courts below, there are two issues of law that are discernible in this appeal; first, was there evidence to support the conclusion that the deceased was holding the suit land in trust of the respondents, if so, what portions. Secondly, did the learned trial Judge re-evaluate the evidence as mandated by law? The claim by the respondents is captured by their own plaint which was filed on 2nd December, 1996, claiming as follows:

“4. That during demarcation of lands in 1958, the Defendant was registered as the proprietor of Land Parcel No. Mutira/Kaguyu/126 which measures 7.5 Acres for himself and his other brothers on undertaking that he will later share the same with them because their father, Thoithi Njogu, was very old and entrusted the Defendant on behalf of other brothers.

5. That at the time of the 1st Plaintiff's father's death, he left the Plaintiffs on the above stated land in 1965.

6. That subsequently in 1971, the Defendant chased the 1st Plaintiff from Land Parcel No. Mutira/Kaguyu/126, leaving him landless with nowhere to stay while the 2nd Defendant resides on the above land and have extensively developed the same”.

The appellant's deceased husband is the one who filed the statement of defence denying the claim by the respondents and also counterclaimed for an order of eviction against the 2nd respondent as follows:

“4. The Defendant admits terminating the 1st plaintiff's licence to live on the suit land when the latter started behaving in a manner incompatible with his licence and avers that the 1st Plaintiff was given a village plot by the clan and he also has his land on which he lives. The Defendant further states that the 2nd Plaintiff lives on the land as a licensee and he has allowed him to plant 2000 tea bushes to be able to feed himself and his family and eventually buy himself a piece of land like the 1st Plaintiff and vacate

the suit land”.

These were the pleadings that were before the learned trial magistrate. The respondents gave their own evidence as summarized above and the appellants similarly gave their own evidence including from people who stated they participated during the demarcation of the suit land which they contended was given to the appellants’ husband in his own right and his other brothers who were not given clan land were compensated in other ways.

The core of this appeal is whether the respondents proved on a balance of probabilities that the deceased held the suit land in trust for them. There is a long line of decided cases by the High Court and also this Court that a principle of customary trust is recognized as an overriding interest over a land that is registered. See ***GATIMU KINGURU V. MUYA GATHANGI***, [1976] KLR 253 at p.263 where Madan J., (as he then was) stated:-

“Under section 143 (1) a first registration may not be attacked even if it is obtained made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom, which may be described as a custom of primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya. It would require express legislation to enable the court to so hold”.

The above was cited with approval in ***KANYI V. MUTHIORA***, [1984] KLR 712 at p. 721 where Chesoni, Ag. J.A. (as he then was) said:-

“Section 143 of the Land Registered Act did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi’s rights under the Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was a trustee to Muthiora’s land: See proviso to section 28 of the Act and Gatimu Kinguru v. Muya Gathangi [1976] KLR. 253. There was overwhelming evidence of a trust in favour of Nyokabi”.

It is undisputed that the deceased is the registered proprietor of the suit land. It is also undisputed that part of the family of the 2nd respondent being sons of the deceased’s own brother, Kiragu Thoithi, who pre-deceased the registered proprietor are in occupation of part of the suit land. Another undisputed fact is that the 1st respondent was evicted from the suit land way back in 1971, and he has never been in possession of the suit land ever since.

The respondents’ case was that the suit land originally belonged to their clan Agachiku Mbari Ya Ndambi and their deceased brother was registered as proprietor to hold it in trust. The learned trial Judge while analyzing what constitutes a trust, was sport on especially when he cited the case of ***Muthuita vs Wanoe***, (supra). In many cases, what has come to be known as a customary trust, a member of a family is trusted to be registered as trustee for other brothers who could have been at the particular time incapacitated either by age or were absent during the land demarcation.

Was the deceased registered to hold the suit land in trust of the respondents? The two courts below were of divergent views; the trial court found there was no trust but the High Court Judge found there was a trust. In view of these divergent conclusions, it is imperative for us to revisit the evidence. Firstly, the undisputed evidence is that the suit land was originally clan land. It belonged to Agachiku Mbari Ya Ndambi. The person who ought to have been registered was Thoithi Njogu. The 1st respondent is a step-brother of the registered proprietor; it would appear the late Thoithi Njogu was polygamous; he had two wives (or there could have been more) i.e. Wanjiru who was the mother of the registered proprietor and Kiragu Thoithi the father of the 2nd respondent. The 1st respondent is the son of Wachuka together with his brother Kathaka. It is also undisputed that Kathaka was allocated clan land ***Mutira/Kaguyu/125***, while the deceased was allocated ***Mutira/Kaguyu/126***.

The trial court found the 1st respondent could claim land from his brother of the same house but the High Court while relying heavily on the evidence of Musa Muriithi, PW3, found that the deceased held the suit land in trust for the 1st respondent as well. The evidence by both sides, in our view, matched because in as much as the respondents' case was supported by Musa Mureithi, a member of the demarcation committee, the case for the appellants was also countered by the appellants' witnesses, Benson Mukiri, (DW4) and Harun Wang'ondu (DW 5), who said they were present during land demarcation, but denied the deceased was to hold the land in trust of the respondents.

Going by the evidence, what is clearly discernible to us is that not all the sons of Njogu Thoithi were given clan land. To us, the suit land was clan land; it falls squarely within the definition of customary trust as indicated in this court's judgment in the case of *Kanyi v Muthiora, 1984 KLR*, where it was held:

“3. Registered land as per Section 163 of the Act is subject to the common law of England as modified by equity which brings in the equitable doctrines of implied constructive and resulting trusts.

4. In this case a constructive trust arose when the land of the respondent's father was registered in the appellant's name in favour of the children of the deceased.

5. A proprietor by first registration or any subsequent registration is not relieved by anything in Section 28 from any duty or obligation to which he is subject as a trustee.

6. The respondent has rights against the appellant stemming from possession and occupation of part of the land, which amounted to overriding interest not required to be noted on the register and the appellants proprietorship was subject to it, Section 30(g).

7. The appellant's registration was a first registration the rectification of which is prohibited by Section 143 of the Act, however, in this case, the addition of the respondent's name does not amount to a rectification but an alteration by addition of the respondent's name to make the register conformable with the transfer for the land”.

As regards the 2nd respondent, he is from the same house as the registered proprietor of the suit land; he is the son of the late Kiragu Thoithi. He is claiming this land on behalf of his late father Kiragu Thoithi, he is also in occupation of a portion thereof and it was also confirmed in evidence that he was allowed by the registered proprietor to plant 2000 tea bushes. Indeed, the respondent sought in his counterclaim for an order of their eviction.

We agree with the learned Judge of the High Court that the case by the 2nd respondent in respect of a customary trust over the suit premises was proved for reasons that, the 2nd respondent or his brothers are in occupation of the suit premises in their own right as children of Kiragu Thoithi, the brother of the deceased from the same house of Wanjiru. It may seem logical that the suit land should be shared between the two brothers. On our part, we have decided not to interfere with the decision of the learned Judge that gave the 2nd respondent two acres for reasons that he did not cross-appeal. Secondly, under the customary law, the trustee is sometimes awarded a bigger portion in recognition of the trustship. (See Eugene Cotran's *Restatement of African Law: (Law of Succession)*, *Sweet & Maxwell, London*, 1969, Pg. 12):

“A slightly larger share may go to the eldest son, but otherwise, the sons share the land equally. The larger share is unspecified and will only be received if the eldest son proves in the eyes of the muhiriga elders to be a good muramati. In other words, the larger share is not a right but may be given at the discretion of the elders...”

We, however, part company with the learned trial Judge regarding the claim by the 1st respondent. This

is because of the undisputed evidence on record that the 1st respondent belonged to the house of Wachuka together with his brother Kathaka who was allocated clan land known as *Mutira/Kaguya/125*. The trial magistrate held that the 1st respondent should have pursued a claim for land from his brother Kathaka. The question we have to answer was whether the 1st respondent was entitled to claim land from the deceased or from his brother of the house of Wachuka. This matter was not fully analyzed by the High Court.

Firstly, the 1st respondent is not in occupation of the suit premises. He was evicted in 1971. From 1971, he has never been in occupation of the suit land. The trial magistrate found that he was not entitled to the suit premises but should have pursued his claim from his own brother, one, Kathaka. It took the 1st respondent about 25 years to file this case in 1996, seeking a claim for land. Possession and occupation of a suit land is a critical consideration when dealing with a claim under customary trust. See the case of *Mbui Mukangu v Gerald Mutwiri Mbui*, [2004] eKLR where a similar Bench of this Court stated;-

“But more significantly, we think a trust arose from possession and occupation of the land by Gerald which has the protection of Sections 28 and 30 (g) of the Act...”

What is in issue here is the entitlement of the land based on the doctrine of resulting trust. Going back to the evidence, what we discern is the suit land was clan land originally meant for Njogu Thoithi the patriarch of this family. This patriarch was a polygamist, he had children with Wanjiru and Wachuka. It seems to us from the evidence that the patriarch of this family arranged for the clan land that was due to him to be allocated to the sons of his two respective houses. The registered proprietor of the suit land being from the house of Wanjiru got the suit land, *Mutira/Kaguya/126*, while Kathaka from the house of Wachuka got *Mutira/Kaguya/125*. This is the evidence that must have led to the conclusion by the trial magistrate that the 1st respondent was not entitled to the deceased's land but he should have pursued his brother for a similar claim. To us this conclusion has a lot of merit.

Another matter that compounds the 1st respondent's claim over the suit premises is the fact that he is not in occupation. Between 1971 and 1996 when he filed this suit, he was 25 years. In other words, the 2nd respondent has not been in occupation of the suit land for a total of almost 45 years. Besides this being a claim under trust, it is also an equitable claim for land and as such occupation of the suit premises becomes an issue of paramount consideration because the land is already occupied by other people who have legitimate expectations. For example we were told the sons of the registered proprietor are in occupation of

the suit premises.

We think we have said enough to show this appeal partly succeeds as we deem it necessary to interfere with the orders of the High Court regarding a portion of 2 acres allocated to the 1st respondent. Had the trial Judge made the above considerations, most probably he would have held that the 1st respondent is not entitled to the 2 acres. We, therefore, set aside the judgment of the High Court to that extent and substitute it with an order that appellant do transfer 2 acres to the 2nd respondent in his capacity as the son of Kiragu Thoithi, while taking into account the portion with their developments within 6 months from the date of this judgment. The 2nd respondent will bear the costs of the partition. Failure by the appellants to comply with the orders, the Deputy Registrar of the High Court is ordered to sign all the requisite transfer documents. For avoidance of doubt, the appellants **shall not** transfer 2 acres to the **1st respondent**.

This being a family matter, each party to bear their own costs.

Dated and delivered at Nyeri this 17th day of March, 2015.

ALNASHIR VISRAM

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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