



IN THE COURT OF APPEAL
AT KISUMU

(CORAM: MARAGA, AZANGALALA, KANTAI JJ. A)

CIVIL APPEAL NO. 103 OF 2009

BETWEEN

AMALO COMPANY LIMITED.....APPELLANT

AND

SMITHKLINE & BEECHAM CONSUMER HEALTH CARE LTD.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu
(Hon. Justice Warsame, J) dated 23rd January, 2007.
in

H. C. C. C. 186 OF 2000

JUDGEMENT OF THE COURT

By the amended plaint filed at the High Court of Kenya, Kisumu, on 25th October, 2005 the appellant, Amalo Company Limited, sued the respondent Smithkline Beecham Consumer Health Care Limited for what it called a breach of contract. It was alleged in the plaint that the respondent had by a letter dated 10th August, 1995 appointed the appellant as its sole distribution agent for its products in stated areas in Western Kenya and that the respondent breached the said contract leading the appellant to suffer various losses for which it claimed various reliefs as follows: loss of profits; Kshs. 4,335,996/= being "**reliance loss suffered by the plaintiff due to expenditure on motor vehicles**"; Kshs. 4,079,101/50 being compensation for expired stocks held by the appellant; Kshs. 5,396,661/10 as refund for unexpired stock held by the appellant; an order compelling the respondent not to collect all expired and unexpired products held by the appellant and there was also a prayer for general and punitive damages to be awarded to the appellant.

The respondent delivered a statement of defence and counter-claim where it, in essence, denied the appellants' claim. It specifically denied appointing the appellant as its sole agent for its products in the said region stating that it sold its products to the appellant on a willing - buyer - willing seller basis and counter - claimed a sum of Kshs. 4, 892,482/ = for what it stated to be an agreed balance owing to it from the appellant for goods sold and delivered to the appellant.

The suit was heard by Warsame, J (as he then was) who in a judgment delivered on 23rd January, 2007 dismissed it and found for the respondent on the counter-claim. Those are the orders that provoked this appeal and because it is a first appeal it is our duty to re-evaluate the evidence adduced before the trial court and come to our own conclusions but always remembering that we do not have the benefit of having listened to the witnesses or observed their demeanour, an advantage which only the trial judge enjoys -

See Selle & Anor v Associated Motor Boat Co . Ltd & others [1968] EA 123 and Alfred Werimo v Mulaa Sumba Barasa (Kisumu) Civil Appeal No. 186 of 2011 (ur) Sixteen grounds of appeal are taken in the Memorandum of Appeal drawn by the appellants' lawyers. In the first ground the learned judge is said to have glossed over the appellant's claim that it was appointed a sole distributor of the respondent's products. In the second and third grounds the learned judge is said to have erred in holding that the appellant had not purchased motor vehicles to distribute the respondent's products. In the fourth ground the learned judge is said to have misdirected himself in not holding that unexpired products were not marketable while the next ground is an attack on the learned judge for not finding that the appellant was in possession of unexpired products. The next ground takes issue with the learned judge for finding that the letter of 10th August, 1995 could not be modified or altered by the subsequent letter of 8th August, 1996. In ground seven the learned judge is said to have put the cart before the horse by first dismissing the appellant's various claims and thereafter deciding on the issue of distributorship when, according to the appellant, distributorship should have been determined first and then claims to follow. Ground eight takes issue with the learned judge for finding in favour of the respondent on the counter-claim. In grounds nine and ten:

"9. (a) The learned trial Judge erred in not finding that, at the very least, the Appellant was entitled to 8% of the total purchase of the goods from the Respondent for period July 1995 to June 1997 i.e. Kshs. 14,500,083.23.

(b) The learned trial Judge misdirected himself in not, at the very least, the Appellant a global figure as profits proved in the peculiar circumstances of the case.

10. The learned trial Judge erred in holding that the Appellant had to specifically plead and prove loss of profits when in the circumstances of the breach of contract by the respondent, this was well-nigh impossible."

The appellant takes issue in the next ground because the learned judge; as seen by the appellant, laid much credence to evidence of DW1 and DW2 who according to the appellant were new employees of the respondent whose evidence is said to have been hearsay and secondary evidence. In the ground that follows the learned judge is said to have erred because he should have held that the respondent had a duty to visit the appellant's warehouse regularly to ascertain the viability of the goods in the warehouse. In ground thirteen the learned judge is said to have erred in demanding too high a standard of proof on the part of the appellant.

In ground fourteen:

"14. The learned trial judge failed to consider and find that the Respondent was in a much better bargaining position; such that its "request" re-the Appellant moving its account from Trust Bank Limited to Standard Chartered Bank Limited was, to all intents and purposes, an order by the Respondent to the Appellant if the Appellant hoped to get the distributorship".

In the penultimate ground the learned judge is said to have erred in giving judgement to the respondent on the counter-claim when it is said that there were outstanding issues to the tune of Kshs. 1,097,679/60 and in the final ground of appeal the learned judge is said to have shown extreme bias against the appellant during the hearing and thereby brought about a miscarriage of justice.

To our minds all those grounds of appeal can be collapsed into a determination of the following: (i) whether the respondent appointed the appellant as its sole distributorship agent for its products in named areas of Western Kenya, (ii) if the answer to (i) is "Yes", did the respondent breach that agreement and if so was the appellant entitled to compensation and what is the quantum thereof, (iii) was the respondent entitled to the sum claimed in the counter-claim.

In submissions before us when the appeal came for hearing on 4th March, 2015 Mr. M. E. Nyamweya, learned counsel for the appellant properly identified as the main issue: whether there was a sole

distributorship agreement between the appellant and the respondent.

Learned counsel referred us to a letter by the respondent to the appellant dated 10th August, 1995 headed "**Appointment as Distributor**" and another letter from the same source dated 8th August, 1996 and submitted that the totality of those correspondences was that the appellant was appointed to be the sole distributor of the respondent for its products in stated areas. This was because, stated counsel, contract had express terms but other implied terms had to be inferred from contract by what he called operation of law or usage. Furthermore, continued counsel, as more evidence of the said implied terms, a "Trade Financing Strategy" by the respondent with a bank showed that here existed a special arrangement between the appellant and the respondent in furtherance of the sole distributorship agreement. Learned counsel submitted that a sale of products by the respondent to a supplier in the appellants designated area of operation was a breach of contract for which the appellant was entitled to damages due to a loss of profits on expected sales in that region. According to counsel, "**loss of profits**" was a hybrid claim which a party had no duty to specifically plead as the court could work out such loss and award accordingly.

Mr. A. K. Muchigi, learned counsel for the respondent, was of the opposite view. On whether or not the appellant had been appointed a sole distributor of the respondents' products counsel referred to the amended plaint and submitted that because an express agreement was pleaded the appellant could not rely on what it called implied terms. While dismissing the notion that the appellant had been appointed a sole distributor learned counsel for the respondent submitted that the letter of 8th August, 1996 was merely informing the appellant that it was the sole distributor in the region for that particular period as no other distributor had been appointed. On whether there was a breach of contract it was counsels' view that such claim would have been in the nature of a special damages claim which required pleading and proof. Counsel submitted further that the learned judge was right to award the respondent what was pleaded in the counter-claim because it was based on an agreement reached by the parties.

In evidence taken before the learned judge Anilkumar Devshi Shah, a director of the appellant testified that his company had been appointed sole distributor of the respondent to sell its (the respondent) products in named areas. He produced as evidence various documents including the letters dated 2nd August, 1995, 10th August, 1995 and 8th August, 1996. He further testified that his company had changed its bankers at the request of the respondent because of a finance scheme arranged by the respondent with that bank. Also that his company bought three motor vehicles to facilitate distribution of the respondents products which vehicles they later sold after the distribution agreement ended. It was also his evidence that stocks had expired in their warehouses because the respondent had failed to collect them from there. In cross examination the witness testified that his company was in both retail and wholesale business and that it was a distributor for many companies as shown in the application letter to the respondent applying to be appointed a distributor of the respondents products.- Asked about the contents of the letters dated 2nd and 10th August, 1995 the witness stated that by those letters his company was not appointed as a sole distributor of the respondents products. Shown a letter dated 10th July 1997 the witness testified that:

"... The letter dated 10/7/97 is marked MFI-4, the letter is from the defendant and is addressed to the plaintiff. According to that letter dated 10/7/97, the company was seeking access to our share (sic) [probably "stores"] but we refused because they had already given goods to other competitor and they were not finalizing our accounts... According to the letter dated 10/7/97, we denied access to the defendant's agents to inspect the goods... The letter also warned us that denial of access would mean that the defendant would not be liable for the loss.."

On the issue of the appellant switching bankers the witness testified that movement was at the request of the respondent but was not obligatory and that such movement would be advantageous to the appellant as they would earn an extra incentive provided by the arrangement at that bank. The witness testified further that he had attended a meeting on 12th February, 1998 with the respondent and:

". ... I can remember holding a meeting with the defendants' company on 12/2/98. The minute of the meeting is marked as DMFI-6 - it was to resolve issues between the Company

and us.

At that time, the initial amount owing from the plaintiff to the defendant for (sic) Kshs. 8,683,277/42. We were then given credit for some amount. There was an amount of Kshs. 4,892,482/02 plus there were issues to be clarified like proof and of deliveries of Kshs. 1,097,979/60. We had to pay the defendant the sum of Kshs. 4,892,482/02. The amount of Kshs. 1,097,979/60 was part of the same (sic) of Kshs. 4,892,432/= but to amount proof of delivery of the invoices. I signed those minutes..."

and

"...I have not paid the sum of Kshs. 4,892,482/- is still outstanding"

Mr. Shah was the only witness called by the appellant and the case was then closed and the respondent took over and called two witnesses, Mr. William Charles Namwakina who was its Accounts Receivable Supervisor, and Mr. James Watenga Kamau, its Regional Sales Representative. Mr. Namwakina denied that the appellant had been appointed as a sole distributor of the respondents' products and produce letters and conditions of appointment of the appellant as a distributor of the respondents' products to back his claims. He testified further that the appellant was appointed as such distributor on satisfying the respondent that it had a fleet of motor vehicles, office staff and necessary infrastructure to enable it to carry out such a task. The witness produced minutes of a meeting already referred to in this judgement and prayed for the sum of Kshs. 4,892,481/20 claimed in the counter-claim as a sum outstanding from the appellant to the respondent. In further testimony the witness stated that his company had been denied access to the appellants premises and it could not therefore collect either expired or unexpired products. He therefore denied that the appellant was entitled to make claims on those items and further denied that the respondent had even terminated the distributorship agreement.

Mr. Kamau, the other witness, testified that after evaluating the appellants' performance in the relevant region he found such performance wanting and that is why he recommended to his employer that other distributors be appointed to do business in the area alongside the appellant. He denied that the appellant had any valid claim against the respondent.

The learned judge evaluated the evidence and the material placed before him and identified as one of the principal issues for his determination as being whether the appellant lost expected profits due to the conduct of the respondent and whether the appellant was entitled to an award for loss of profits. Counsel for the appellant in that court asked the learned judge to award a sum of Kshs. 50,752,906/= based on what counsel called cumulated purchases by the appellant from the respondent for the period July 1995 to June 1997 which counsel stated stood at Kshs. 181,260,379/40. The learned judge found no difficulty in dealing with this issue. He found that:

"... the plaintiff did not plead the net particulars of the loss of profits. I do not understand how the plaintiff's Advocate arrived at a sum of Kshs. 50,752,379/40. The plaintiff did not produce evidence whether documentary or otherwise to show the amount of profits he was making when the distributorship was in place and performing to the satisfaction of both parties. There is no evidence to show that the plaintiff made profits from the business relationship with the defendant..."

The learned judge therefore held that the claim for loss of profits was a special damage claim which required pleading and proof in the absence of which he dismissed that part of the claim.

On the claim for **"..reliance loss suffered due to expenditure on motor vehicles"** the learned judge found as a fact that the appellant had in its application to be appointed as a distributor of the respondent's products indicated that it had a fleet of motor vehicles and that it was a distributor for several other companies and therefore had the necessary infrastructure to distribute products for the respondent. That part of the claim was also disallowed.

On the issue of expired and unexpired goods and the related compensation claim by the appellant the learned judge relied on two letters from the respondent to the appellant dated 10th July, 1997 and 6th January, 2000 which stated inter alia that the respondent would take back unexpired products and pass an appropriate credit to the appellant but that there would not be any compensation for expired goods which were to be destroyed. These letters went on to state that the respondent had been denied access to the appellants' warehouse to inspect and collect goods stored therein. The learned judge therefore found that the respondent was blameless for the goods that expired within the appellant's warehouse to which the respondent was denied access.

On the issue whether the appellant had been appointed as a sole distributor of the respondent's products the learned judge found that there had been no such appointment. On the counter-claim the learned judge found that the same had been proved documentary evidence and even by the oral evidence of the appellant's director who had admitted in court that his company had not paid the respondent a sum of Kshs. 4,892,487/=.

The appellant's suit therefore failed on all aspects but the respondent's claim succeeded.

Starting with what the appellant saw as the principal issue - that it had been appointed as a sole distributor of the respondent's products in certain designated areas the learned judge found that there was no such appointment.

That issue appears rather straight forward. It starts with the letter dated 10th August, 1995 part of which the learned judge quoted in his judgment. That letter referred to various discussions held between the appellant and the respondent and declared that:

'... we are pleased to inform you that we would like to appoint you a distributor of the combined Sterling Health and Smithkline Beecham consumer health products in the Nyanza region, subject to your signing the attached offer which stipulates the requirements and conditions of appointments..'

"Conditions For Appointment of Distributors" were attached to that letter. The conditions were that distributors have manual capability and provide a guarantee for at least two months stock; that they stock at least a minimum of two months cover for **"OTC & Oral Care"** and three weeks cover for Nutritional Health Drinks including **"Tetras"**; provide adequate warehouse facility suitable for pharma/Healthcare products; be honest -people of integrity who would allow company representatives to check the stock product hygiene and expiry codings on the shelf, merchandise /rotate shows, check the stock in the store, record expiry date codings and count stock by **"SKU"**; to keep an up-to date record on economic, social events that influenced business trends; to avail space for Area Sales Managers and Sales Representatives to perform their functions; employ personnel dedicated to service to service the respondent's customers; to have operational van/vans and salesmen who would service the respondent's customers as per an agreed standard; to prominently display the respondent's brands in the appellants shop as agreed with the respondent's Area Sales Manager and finally agree to sign an Area Distribution Contract and adhere to the terms therein which would include a demarcated area of operation, a trading pricing policy, a policy on handling competition goods and an operational /administration matters.

These conditions were executed on behalf of the appellant and the respondent. Then there was a formal **"Letter of Appointment as Distributor"** dated 24th April, 1995. This letter defined the territory and products amongst other terms.

On **"Appointment as Distributor"** the same provided:

"We hereby appoint you as a Distributor for the Products in the Territory. You agree to use all reasonable endeavours to extend the sale and distribution of the Products in the Territory through the normal channels of trade".

It was argued before the learned judge of the High Court, and also before us, that the appellant had been

appointed as sole distributor as evidenced by a letter dated 8th August, 1996. This letter stated:

"This is to inform you that you are the sole distributor of Smithkline Beecham in those areas".

The learned judge found that the effect of this letter was not to appoint the appellant as a sole distributor. Mr. Muchigi, learned counsel for the appellant submitted that this letter merely informed that the appellant was the only distributor of the respondent's products in that region for that particular period but could not be construed as varying the earlier letter of 10th August, 1995.

In evidence in chief before the learned judge Mr. Shah, the appellants director and only witness stated on the said issue:

"...They never notified us that we are the sole distributor of their product..'

and

' . The letter of 2/8/95 and 10/8/95 do not state the plaintiff was appointed as the sole distributor..."

At a meeting held on 12th February, 1998 which was called to **"Resolve Pending Issues on Amalo Company Account"** and which meeting was attended by representatives of the appellant (represented by its Director Mr. Shah) and the respondent, various issues were discussed. One of these issues related to sales made by the respondent to another distributor within the area covered by the appellant. It was agreed that:

"This claim has no standing but having considered all the facts, Management has approved credit of 3% given in good faith- Shs. 472,423.56 on Credit Note No. 2504".

Various other issues were discussed and it was agreed that subject to the respondent producing proof of delivery of two identified invoices the appellant owed the respondent a sum of Kshs. 4,892,482/02 and the minutes of that meeting ended thus:

"Please confirm your agreement to the above analysis as a confirmation of the issues discussed and agreed upon during the meeting at the Regional Directors office.."

The minutes were signed by Mr. Anil Shah for the appellant, Mr. James Mathiu for the respondent and were approved by the Regional Director of the respondent.

Not only is it patently clear that the letter of 8th August 1996 was merely informing those who were claiming to be the respondents appointed distributors that they were not such distributors but the meeting of 12th February, 1998 resolved between the appellant and the respondent where the appellant agreed that it had no claim against the respondent for the sale by the respondent to a supplier in the appellants designated area. It was agreed at that meeting that the appellant had no valid claim against the respondent in that or any other regard and the compensation offered was done in good faith because of the existing business relationship between the appellant and the respondent. We find, as the learned judge found, that the appellant had not been appointed as the respondents sole distributor and the learned judge was right to reject the claim in that regard which we also do.

The other complaint by the appellant in the Memorandum of Appeal was that the learned judge erred by failing to award a sum of Kshs. 4,079,101/50 being **"reliance, loss suffered by the plaintiff due to expenditure on motor vehicles as stated in paragraph (6) above.."**

The learned judge found that this was a special damage claim which required specific pleadings and strict proof. He therefore rejected the claim.

It was alleged in the amended plaint that the appellant relied on the agreement between itself and the

respondent and purchased three stated motor vehicles at the said sum.

In a letter dated 24th June, 1995 the appellant wrote to the respondent giving a profile of itself for purposes of its application to be appointed a distributor of the respondent for its products. In that letter it stated inter alia that:

"..Distribution is organized by the Managing Director and facilitated by trained staff and fleet of three pick ups and two lorries."

That letter went on to give names of various other companies whose products the appellant distributed.

The conditions for appointment as distributor referred to earlier in this judgment gave one of the conditions for appointment:

"MUST have operational van/vans and salesmen who will service SB customers as per standards agreed".

So that by 10th August, 1995 when the appellant was appointed as a distributor by the respondent it had given as a condition precedent its ability and capacity to perform as distributor which condition included having a sufficient fleet of motor vehicles for the required task.

In evidence before the learned judge the appellants witness produced copies of log this evidence was obviously irrelevant as it was claimed in the plaint that motor vehicles were purchased to undertake the respondent's distribution when indeed, the appellant had contracted that it had a good fleet of motor vehicle that would perform the necessary task if the appellant was appointed as a distributor. That claim had no basis in law at all and was properly dismissed.

Then there was the claim for Kshs. 4,079,101/50 for compensation for expired stocks which had expired as a result of breach of contract by the respondent. This claim was rejected by the learned judge.

In a letter dated 10th July, 1997 the respondent addressed the appellant as follows:

**"SB
Smithkline Beecham**

International

10th July , 1997

Amalo Company Limited

P.o. Box 1824

KISUMU

Dear Sir

RE: A COUNT RECONCILIATION AND STOCKS HELD BY YOU

As earlier discussed, we are committed to ensuring that your account with us is reconciled as soon as possible. However, for us to be able to do this we require clarification on issues under sundry and others noted in our earlier communication dated 18th June, 1997 by our Edward Gitau. **(copy attached)**

After this reconciliation, we will then take back all goods that are in good and saleable condition and such will be used to compensate the account outstanding, if any, and the balance, if any, will be settled by cheque either way.

It is also important to note that regular inspection of goods in your warehouse by our sales personnel is crucial in order to avoid expires or damages. This has not been possible as you have not allowed them to do so. Please note that Smithkline Beecham will not be responsible for any expires for goods in your warehouse since the TSR and the ASM have been unable to establish the nature and quantities of the said good.

Looking forward to your continued co-operation.

Yours Sincerely

JAMES
NATIONAL SALES MANGER

MATHIU

cc: Evans Kidero
Linus Gitahi
Boniface Ngarachu".

Mr. Shah, in testimony before the learned judge stated that his company stopped dealing with the respondent and that the respondent sought to have access to the appellants' stores ostensibly to collect products therein but "**.. we refused because they had already given goods to other competitor and they were not finalizing our accounts..**"

and

".. we denied access to the defendants agents to inspect the goods. The letter also warned us that denial of access would mean that the defendant would not be liable for the loss.."

So the answer to the question on who was liable for expiry of products is provided by Mr. Shah himself- the appellant decided to deny the respondent access to its premises or the warehouse where the products were stored and persisted in that refusal and it is in this process that the products expired. We agree with the learned judge who in refusing that part of the claim stated that:

"It was the plaintiff which refused access to the employees of the defendant some eight years ago and now it is too late in the day for the defendant to participate in the programmes set by the plaintiff. The plaintiff failed to participate in the drama or play when the defendant was willing to play its leading role in the drama. The plaintiff refused to play according to the set rules. It can now play the comedy alone. The defendant gave several fantastic opportunities to the plaintiff but the plaintiff refused and left the theatre. The defendant had no supporting actor in the transaction and it did what was reasonable and possible under the circumstances. The plaintiff cannot collect awards when it refused to participate in the whole transaction. The court cannot give a supporting role by honouring the plaintiff for its own misdeeds. For the reasons stated prayers c, d, and e in the plaint fails. It also means that this court cannot give an order compelling the defendant to collect non-existent goods, whether expired or unexpired".

On the claim for Kshs. 5,396,661/-:-being a "**refund for unexpired stocks currently in possession of the plaintiff...**" we would be repeating ourselves if we went into a deep analysis of this claim. The same argument and the same findings go as in the finding on the claim for expired stocks.

In any event the said claims were in the nature of special damage claims which required specific pleadings and strict proof. In **John Richard Okuku Oloo v South Nyanza Company Limited (Kisumu) Civil Appeal No. 278 of 2010 (ur)** we quoted this courts decision in **Coast Bus Service v Murunga & Others** where it was stated that:

"In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & others Nairobi CA

No 192 of 1992 (ur) appears in the Jivanji case:.

It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1979] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and Another v Chebon Civil Appeal number 22 of 1991 (ur). In the latest case, Cockar JA who dealt with the issues of special damages said in his judgement: It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages Chesoni J quoted in support the following passage from Bowen LJ's judgement at 532-533 in Ratcliffe v Evans [1892]QB 524, an English leading case of pleading and proof of damage.

The character of the acts themselves which produce the damage, and the circumstances under which those acts are one, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved.

As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The compensation sought by the appellant was in the nature of special damage claims and was not a "hybrid" claim as was submitted by Mr. Nyamweya, learned counsel for the appellant. They required strict proof and pleading. The claim by the appellant against the respondent was based on alleged breach of contract general and punitive damages were not awardable as claimed because a breach of contract does not lead to an award of general damages - See Oharamshi v Karsam [1974] EA 41, Provincial Insurance Co. East Africa Limited v Nandwa [1995-1998] 2 EA 288 or our recent decision in Kenya Power & Lighting Co Limited v Abel Momanyi Birundu (Kisumu) Civil Appeal No. 30 of 2013 (ur).

What about the counter-claim sum of Kshs. 4, 892,482/ = which the learned judge awarded to the respondent?

We have already set out in this judgement the minutes of the meeting held on 12th February, 1998 which concluded that there was an outstanding balance of Kshs. 4,892,482/02 from the appellant to the respondent.

In evidence before the learned judge the appellants witness not only acknowledged that the said sum had been agreed as owing but he said:

".. I have not paid the sum of Kshs. 4,892,482/= is still outstanding."

So there was really no issue for determination here, the appellant freely agreeing that it owed that sum pleaded in the counter claim to the respondent. The award of that sum by the learned judge was properly made as it was pleaded and proved.

The upshot of our findings is that this appeal has no merit and we accordingly dismiss with costs to the respondent.

Dated and Delivered at Kisumu this 21st day of May, 2015

D.MARAGA

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR