IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 42 OF 2014

BETWEEN

JOHN FLORENCE MARITIME SERVICES LIMITED…….…..1ST APPELLANT

CONKEN CARGO FORWARDERS LIMITED…….....…….2NDAPPELLANT

AND

CABINET SECRETARY FOR

TRANSPORT AND INFRASTRUCTURE …….…….....1ST RESPONDENT

THE ATTORNEY GENERAL…….…..…..…….2ND RESPONDENT

KENYA MARITIME AUTHORITY…….……...…...3RD RESPONDENT

OFFICE DE GESTION DU

FREIT MARITIME (OGEFREM)…….……...……...…….4TH RESPONDENT

(Being an appeal against the Judgment and Order of the High Court of Kenya at Mombasa (Muriithi, J.) dated 31st July, 2014

in

H.C. Petition No. 64 of 2013)

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JUDGMENT OF THE COURT

The background to this appeal is that the appellants were the petitioners whereas the respondents were the respondents in a Constitutional Petition filed in the High Court in Mombasa. In the Petition, the appellants claimed to be Kenyan registered companies carrying on the business of clearing and forwarding of imported goods within the Mombasa port. They had however run into problems with the

4th respondent, an agent of the Democratic Republic of Congo ("**DRC"**) in respect of all imported cargo destined for DRC.

By virtue of a bilateral agreement on maritime freight management entered into on 30th May, 2000 between Kenya and DRC, which the appellants claimed had expired by the time they came to court; Kenya was tasked with collection of taxes and levies for DRC through the 1st to 3rd respondents and payment of the same through the 4th respondent. The agreement was to remain in force for a period of three years subject to a one -off renewal for a further three years. Upon such renewal, the agreement would have come to an end on or about 29th May, 2006. The agreement provided for the assessment, levying and collection of a commission to the tune of 1.8% of the gross freight charges on the imports. However, on 26th October, 2012, the 4th respondent issued circulars to shippers, forwarders and agents stating that effective 29th October, 2012 all payments for Fiche Eletronique de Renseigment Certificate *("***FERI"***)* as well as certificate of destination ***("COD")*** would be made to its account and that such payments were to be made in US Dollars after all the documents have been submitted and validated at its offices; and any cargo destined for DRC that left the Port after 1st October, 2012 should have a FERI before applying for a COD.

To the appellants these new requirements were onerous and in blatant breach of the bilateral agreement under which the only payment to be levied was 1.8% as aforesaid. Further the payments could only be collected by the 1st respondent on behalf of DRC and not by payment to a private individual's bank account in Italy that was now being demanded of the appellants. Despite the appellants' protestation, the respondents stuck to their guns. The appellant alleged that on or about 18th December 2006, the 4th respondent created and enforced procedures that ran contrary to the terms of the bilateral agreement by setting aside a yard for the separation of all DRC bound cargo which came to be known as Congolese cargo terminal, complete with the illegal enforcement of their above edicts by and with the connivance of the other respondents. Lastly and in their view, the bilateral agreement should have been subjected to Parliamentary approval so as to form part of the laws of Kenya to be observed and enforced in letter and spirit which was not the case here. Accordingly, those demands violated and were in total contravention of the various articles of the Constitution and the laws of Kenya to the detriment of the appellants. In the premises, the appellants prayed for conservatory orders restraining the 1st to 3rd respondents from levying the fees or charges not provided for under the bilateral agreement dated 30th May, 2000; a declaration that any provisions requiring the payment of anything above the sum of 1.8% of the gross freight charges were in contravention of the appellants' fundamental rights and freedoms and more particularly **Articles 2, 40** and **95** of the Constitution and were therefore null and void; general and punitive damages as well as costs.

Contemporaneously with the filing of the Petition, the appellants took out a motion on notice seeking conservatory orders in the same vein as prayed in the Petition pending the hearing and determination of the Petition. Both the grounds and the affidavit in support of the application merely elaborated and expounded on matters that we have already set out above.

First to respond was the 3rd respondent. It filed grounds of opposition to wit, that the Petition was *res judicata* as the issues raised therein had been determined by the same court in **Mombasa H.C. Misc Application No. 130 of 2011** ("**JR**") whose appeal was pending in this Court, that the application was therefore frivolous, fatally defective, misconceived, bad in law, an egregious abuse of the court process and did not demonstrate how the 3rd respondent had breached the law or how the appellants alleged rights had been violated. It also questioned the *locus standi* of the appellants in making the application considering that the impugned agreement had been validly entered into between the two sovereign governments. Subsequent thereto, the 3rd respondent filed a lengthy 35 paragraph, replying affidavit which again merely elaborated and expounded on the above grounds. Suffice to add that it placed on record the JR ruling.

Next in tow was the 2nd respondent. He also filed grounds of opposition, the main thrust being that the Petition was *res judicata* and consequently it was an abuse of the process of court. As a parting shot, he

pointed out that the court had no jurisdiction to entertain the Petition and that doing so would amount to the said court usurping the jurisdiction of this Court.

On 3rd December, 2013, the 4th respondent reacted to the application through a replying affidavit. In the main, it deposed, just like the other respondents, that the Petition was *res judicata*, that the court had no jurisdiction to entertain the Petition as what the issues before court could only be resolved by the courts in DRC, that in any event the Petition did not disclose any violation of constitutional rights and finally, that the appellants were estopped by the doctrine of privity of contract from challenging the content and validity of the agreement entered into between Kenya and DRC.

Having heard the parties interparties, Muriithi**, J**. in a reserved ruling delivered on 31st July, 2014 found in favour of the respondents, holding that the application and indeed the entire Petition was *res judicata*, and struck them out with costs. He reasoned that the respondents had all raised the question as to whether the Petition was *res judicata*. Holding that res *judicata* was a matter affecting the jurisdiction of the court, he found it prudent to determine it *in limine* before getting into the merits of the Petition if at all. He went on to find that the Petition raised the same issues about the validity, scope and legality of the bilateral agreement forming the basis for the requirement of the FERI and COD which were also the subject of the determination in the JR. He held that the issue of the constitutionality of the treaty and the infringement of property rights of the clearing and forwarding operators could have been made in the JR and having not been raised would in the subsequent Petition on the authority of **Mburu Kinyua v Gichini Tuti [1978] KLR 69** be barred by *res judicata*. The court opined further that the conservatory order sought in the Petition if granted would have had the same effect as the prohibition sought in the JR. The court observed that from the evidence before it, the petitioners were aware of the proceedings and the outcome of the JR and since the decision in the JR was on appeal in **Mombasa Court of Appeal No.254 of 2012**, they could have under the rules of this Court participated in the appeal as persons affected by the JR decision.

We have on our own called for the record in respect of the alleged appeal above and can confirm that it was actually not an appeal but rather a **5(2)(b)** application which was subsequently withdrawn on 15th November 2013, by the consent of the parties.

Aggrieved by the determination, the appellants have come to this court on appeal in a bid to overturn that decision on seven grounds to wit that the court erred:-

> *i) in considering and ruling on matters in respect of which no application was filed and prosecuted before it;*
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> *ii) in arriving at a decision regarding res judicata without any evidence having been tendered before it;*
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> *iii) in failing to avail the appellants the opportunity to respond and produce evidence in opposition to the allegations that the matter was res judicata;*
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> *iv) in failing to consider the application before him and matters that were relevant which he was seized of and instead considered matters that were irrelevant thereby arriving at a decision without any basis or evidence being laid;*
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> *v) in holding that the matters raised in the Petition were res judicata, whilst the appellants and the respondents were different with the exception of 3rd respondent;*
>
> *vi) in holding that the matters raised in the Petition were res judicata, whilst the reliefs sought in the JR and Petition were different; and*
>
> *vii) in holding that the Petition and the Notice of Motion filed by the Appellants was barred by section 7 of the Civil Procedure Act whilst the parties in the Petition were not same parties under*

whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit nor did they authorize any one to litigate on their behalf in JR nor were they making a claim on behalf of the other people.

By consent of the parties, the appeal was canvassed by way of written submissions. The submissions by the appellants in summary were that first, the principles of *res judicata* have limited or no application at all to constitutional petitions. Secondly, that the High Court should not have reverted to JR on the question of *res judicata* because the parties in the two suits were different, with the exception of the 3rd respondent who was common in both. That in the JR, the interested party was Office De Gestion Du Freit Multimodal while in the Petition, it was the Office De Gestion Du Freit Ogefrem; that while easily similar, the two were distinct entities; that the reliefs sought in the two suits were different; and that the two suits raised different issues for determination. That whereas the Petition concerned the contravention of constitutional rights of the appellants, the JR challenged the decision making process. The two cannot therefore be said to have dealt with substantially the same issues. That the issue of whether a matter is *res judicata* being one of both fact and law, the High Court should not have determined the same without a formal application being made in that regard. That the High Court had no jurisdiction to make that determination *suo moto*. In any event, the High Court had insufficient material to make that finding, since the proceedings of JR were not presented before it. And lastly, the High Court failed to determine the Petition on its merits but based its decision on technicalities despite the guarantees in **Articles 2, 3, 10, 20, 21, 22(3), 23, 27, 31, 35, 40, 47, 48, 94, 159(2)(d)** & **(e)**, **258** and **259** of the Constitution of Kenya.

The appellants cited the cases of **Wycliffe Gisebe Nyakina v AG & Another [2014] eKLR**, **Okiya Omtata Okoiti & Another v AG & Others [2014] eKLR** and **Issack Kamau Kabira & 3 Others v Commissioner of Lands & 7 Others [2014] eKLR** in support of their submissions on the question of *res judicata* in constitutional petitions. It is however instructive to note that they are all High Court decisions of one Judge, **Lenaola, J**. And contrary to the submissions by the appellant, they endorse the application of the doctrine though on a limited scale. We are however unable to tell whether those decisions elicited appeals and the results thereof. Accordingly, they may be of little assistance in determining this appeal.

The 1st and 2nd respondents aligned themselves wholly with the submissions of the 3rd respondent who submitted thus; that there was no principle of law that bars the application of the doctrine of *res judicata* in constitutional petitions. The doctrine of r*es judicata* is meant to meet the ends of justice. It was submitted further that the parties in the two suits were not different, but slightly altered by the addition or omission of certain parties. The appellants in the Petition were represented by the 23 *ex parte* applicants in JR. The appellants were at liberty to join in the JR, or lodge an appeal independently under **Rule 75 (1)** of this Court's Rules against it rather than instituting a constitutional petition on the same issue as the JR. Citing the cases of **Njangu v Wambugu & Another, Nairobi HCCC No. 2340 of 1991 (UR), E.T. vs A.G. & Another [2012] eKLR** and **R v City Council of Nairobi & 2 Others [2014] eKLR,** it was argued that the alteration of parties is not a bar to *res judicata*. These authorities, we may say, also suffer the same comments we have made in respect of the appellants' authorities with regard to our inability to gauge whether they were subject of appeals and resultant outcomes.

Counsel further argued that the Civil Procedure Act and rules in which the doctrine is enshrined are in line with the spirit of the Constitution to ensure fair administrative action. Further the variance of prayers sought was also not a bar to *res judicata*. The 3rd respondent further submitted that although the prayers in the two suits were worded differently, their effect was the same. In the JR, the applicants sought orders of prohibition against the respondents to prohibit them from demanding FERI or COD as required by the 4th respondent prior to the release of the goods and mandamus to compel the respondents to release all goods that had complied with all lawful customs procedures other than the requirement for the FERI and COD. In the Petition, what was sought was a conservatory order restraining the respondents from levying any other charges other than those provided for under the bilateral agreement and also the requirement that all such payments be made to and effected by the 3rd respondent. While not expressly mentioned in the Petition, the extra charge were meant to cater for the issuance of FERI and COD.

Counsel submitted that the FERI and COD were based on a bilateral agreement; that the two suits rested on the validity of the extension of that bilateral agreement and that the issues in the two suits were substantially the same going by the definition in **Section 7** of the Civil Procedure Act; that **Section 3A** of the Civil Procedure Act grants the court inherent powers to ensure the ends of justice are met and to prevent the abuse of court process. It was also pointed out that in the submissions before the High Court, all parties extensively argued on *res judicata*. The appellants' submissions were also faulted for failing to state with precision how their constitutional rights had been contravened, a mandatory requirement. The case of **Mumo Matemu v Trusted Society of Human Rights Alhanie & 5 others, [2013] eKLR** was cited for this proposition. The 3rd respondent further submitted that it was acting as an agent of the Government of Kenya to collect the charges on behalf of DRC under the bilateral agreement. For that reason, the matter concerned DRC as the main principal and the Kenyan Constitution would not apply in this case. Rather, the appellants should have addressed their grievances to DRC. Finally, on the rights and freedoms said to have been infringed, it was submitted that these were subject to limitations such as the right to lien over the appellants' property in default of payment as per the bilateral agreement.

The 4th respondent in its submissions concurred with the 3rd respondent but added that the High Court was entitled to look at its own record and proceedings in any matter and take notice of their contents even though they may not have been formally brought before it by the parties. For this proposition, counsel referred us to the case of **Craven v Smith [1869] LR 4 Exch. 146.**

As we see it, the issues for determination from the memorandum as well as the submissions of the parties are:-

i) Whether *res judicata* is applicable in Constitutional cases;

ii) Whether a plea of *res judicata* must be raised through a formal application;

iii) What must be proved in order to establish that a suit is *res Judicata*;

iv) Whether in this case the appellants were accorded a fair hearing and an opportunity to be heard or defend themselves against the claim of *res judicata*; and,

v) Whether the High Court was justified in holding that the matter was *res judicata*.

The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act. It is in these terms:-

> ***"7. Res judicata***
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> *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see ***Karia & Another v the Attorney General and Others [2005] 1 EA 83.***

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of **Henderson v Henderson [1843] 67 ER 313:-**

"…..where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time….."

See also **Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263**. Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under **Rule 3(8)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being *res judicata*. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality? If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

The respondents filed grounds of opposition and affidavits raising the defence of res judicata. The appellants had ample time and opportunity to advance evidence and submissions to refute this claim. Indeed from the record of the proceedings, there were extensive submissions on the issue by all the parties. We do not think that the appellants are therefore being candid when they claim that they were denied the right to be heard and or that the court ruled on the issue suo moto. This is a false accusation. The court in deciding to rule on the issue in limine is not the same thing as acting suo moto. It did so after hearing the parties on the issue. We are also not aware of any legal edict that an objection to a suit taken on the basis of res judicata must be so taken on a formal application. The appellants did not cite to us any such authority. In any event, the respondents had in their various pleadings raised the issue

and this was long before the hearing of the application and the appellants were therefore put on notice in good time. In any event, why did they not take up the issue in the High Court? They have not even alleged that they were ambushed by the plea.

The doctrine of Res inter alios acta alteri nocere non debet which holds that: "things done between strangers must not cause an injury to people who are not parties to such acts" is relevant in the circumstances of this case. Essentially, it means that a contract cannot adversely affect the rights of one who is not a party to it. This doctrine was applied in the case of ***Powel v Wittshire and Others [2004] 3 All ER 235*** *where the Court held that estoppel per rem judicatam could not bind a person who claimed under the person against whom a judgment had been obtained unless he had obtained his interest from that person after judgment had been given. In that case however, the court quoted with approval Lord Denning in the case* ***Nana Ofori Atta II v Nana Abu Bosra II (1957) 3 All ER 559*** *at* ***243*** *in which he stated that:-*

> *"…….....Those instances do not, however, cover this case which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fight out or at most giving evidence in support of one side or the other. In order to determine this question, the West African Court of Appeal quoted from a principle stated by* ***Lord Penzane*** *in* ***Wytcherley v Andrews [1871] LR 2 P& D 327*** *at 328). The full passage is in these words:-*
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> *'...there is a practice in this Court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the Judges of the Prerogative Court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case."*

The doctrine of *res judicata* has two main dimensions: cause of action *res judicata* and issue *res judicata*. *Res judicata* based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.

The cause of action in the JR as well as in the Petition was substantially the same, being the imposition of certification levies by the 4th respondent through the 3rd respondent. The genesis of these levies was traced to the bilateral agreement between Kenya and DRC. The issue in both suits is whether the levies were valid although the grounds of validity were anchored in the decision making process with regard to JR and violation of rights and fundamental freedoms of the Constitution of Kenya in the Petition. However, the main respondent against whom orders were sought and would have been executed is the 3rd respondent. Would it not be vexed twice over the same issue? The interested party in the JR was referred to as Office De Gestion Du Freit Multimodal. In the Petition, the 4th respondent is referred to as Office De Gestion Du Freit Maritime (OGEFREM). The appellants argue that the two are different parties altogether. Not much evidence was placed on record in this regard, although it is noteworthy that both institutions were represented in the respective suits by one, ***Bertha Morisho Mwamvua****. The two names appear to have been used inter-changeably in various documents on record, and they played the same function in both instances. Further, the applicants in the JR came to court as representing those who, just as the appellants, plied the business of clearing and forwarding. Therein lies the nexus of the two suits and the issue of res judicata. The appellants were aware of the JR proceedings but were content to just stand by and see the battle waged by their colleagues in the trade without intervention much as they were entitled to. They must suffer the consequences. They cannot be allowed to reopen the same case now on constitutional grounds. The appellants' claims of violations of their rights and freedoms would and could have been raised within JR and determined therein.*

The JR was tried before a competent court and judgment thereon delivered. ***Halsbury's Laws*** *(4th Edition, Volume 16 para 1527-1529) states that: in deciding what questions of law and fact were determined in the earlier judgment the court is entitled to look at the Judge's reasons for his decision, and his notes of the evidence and is not restricted to the record. As correctly submitted by counsels for the respondents, nothing would therefore prevent a court from accessing its own records in the previous proceedings. It should be noted that the Judge in the Petition had occasion to hear an interlocutory application for leave so as to operate as stay in JR, which he granted. Accordingly, the Judge cannot be said to have been a stranger to the facts and issues of both cases.*

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows:-

i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

iv) The appellants were accorded an opportunity to be heard against the claim of res judicata and finally,

v) We entertain no doubts at all that the High Court was justified in holding the subsequent suit to be res judicata.

This being our view of the appeal, it must fail and is accordingly dismissed with costs to the respondents.

Dated and delivered at Malindi this 31st day of July, 2015.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…..……..……

JUDGE OF APPEAL

K. M'INOTI

……..…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR