IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 45 2014

BETWEEN

CIVICON LIMITED …..... APPELLANT

AND

KIVUWATT LIMITED …..1ST RESPONDENT

SMART CARGO LIMITED …..... 2ND RESPONDENT

THE COMMISSIONER, KENYA REVENUE AUTHORITY

CUSTOMS SERVICES DEPARTMENT. ….....3RD RESPONDENT

(Being an appeal against the Ruling of the High Court of Kenya at Mombasa (Kasango, J.) dated 18th December, 2013

in

H.C.C.C. No.117 of 2013)

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JUDGMENT OF THE COURT

Central to this appeal is the question of joinder of parties to a suit and in particular as a defendant. So how did this question end up in this Court?

The 1st respondent, is a company registered in the Republic of Rwanda. It claims to own a machine known as "**The Separator**" presently lying in a warehouse in Mombasa. The 2nd respondent is a clearing and forwarding company registered in Kenya. It was engaged by the 1st respondent to clear and transit the Separator to Rwanda. The Separator has been stored in a customs warehouse, which belongs to the appellant, but, operated by the 3rd respondent as a warehouse and transit shed. However, the appellant repulsed the 1st respondent's attempts at removing the Separator, on account of unpaid bills due to it by the 1st respondent.

The 1st respondent then filed suit in the High Court, Mombasa, to compel the 3rd respondent to release

the Separator and guarantee its exit from the Kenyan boarders. It was alleged that while the 3rd respondent had legal possession over the separator, the appellant had physical possession by virtue of being in the 3rd respondent's authorized transit shed. In due time the 1st and 3rd respondents recorded a consent order in the suit on 18th November 2013 for the release of the Separator. Despite issuing a release order for the Separator pursuant to the consent the 3rd respondent has been unable to facilitate the removal of the Separator from the appellant's warehouse, as a result of which the Separator remains in the custody of the appellant.

The appellant got information of the suit and by an application dated 15th November 2013 sought to be joined as a 2nd defendant claiming that that was necessary as it was the party actually in possession of the Separator, having asserted a lien over the same owing to substantial unpaid claims due to it by the 1st respondent. The claims arose from the performance of certain contracts between them amounting to approximately USD.20Million in which the 1st respondent had contracted the appellant to undertake some engineering works for methane gas extraction on site on Lake Kivu in Rwanda. It was alleged that the 1st respondent failed to pay the appellant on various invoices, and instead, terminated the contracts claiming breach thereof, and had the appellant ejected from the site with the aid of armed security personnel, without giving opportunity to the appellant to remove its on-site assets including specialized equipment and machinery. The 1st respondent, on account of the foregoing, referred the dispute to arbitration at the International Chamber of Commerce in Switzerland, demanding the release of any equipment or assets held by the appellant by virtue of the contract, with a threat to forcefully seize the appellant's other assets.

In the meantime, the appellant filed a claim against 1st respondent in **Mombasa High Court** being **Civil Suit No. 36 of 2013, Civicon Limited vs Kivuwatt Limited,** seeking an injunction to restrain the 1st respondent from accessing the performance guarantee funds from the appellant's bankers and from taking possession of any of the appellant's property pending the resolution of the dispute in the arbitral proceedings. On 25th July 2013, the High Court held that the dispute was subject to arbitration proceedings and therefore had no jurisdiction to entertain it. The suit was accordingly stayed pending arbitration.

The appellant's case before the High Court in support of the application for joinder was that it was in actual possession of the Separator, and relief, if any is granted in favour of 1st respondent cannot be realized without orders issuing to it as well. That the 3rd respondent's control over the Separator was only in terms of ensuring payment of taxes. It did not have physical control over it, and if anything, it could not access the premises without the appellant's consent or a valid court order. It contended that it was a necessary and proper party to be sued by the 1st respondent in so far as the release of the Separator was concerned.

The 1st respondent's attempt to obtain orders for the release of the Separator without involving the appellant was posited to be an attempt to mislead the court into granting an order purportedly against the 3rd respondent but which would allow the 1st respondent to forcefully access appellant's premises and remove the Separator thereafter. It was further pointed out that the court had already ruled that it did not have jurisdiction over the matter and could not therefore issue orders in respect of the Separator in favour of the respondents. The appellant contended further that it did not come into possession of the separator because they were a licensed transit shade but rather by virtue of contracts which are the subject matter of **Mombasa HCCC No. 36 of 2013** and the arbitral proceedings. The issue of possession and lien were submitted also, to be substantive issues which could not be determined at the interlocutory stage. The court was urged to find that the appellant had demonstrated on *prima facie* basis that it had a valid claim against the respondent and therefore ought to be joined to this suit.

The 1st respondent opposed the application. It admitted that it contracted the appellant, and among its obligations, it was required to transport the Separator to Rwanda. The Separator had been lying at its transport shade awaiting delivery at the time that the 1st respondent terminated the contract. According to

the 1st respondent, the Separator was lying in the shade being a customs warehouse and for which customs rent was payable to the 3rd respondent. The Commissioner for Customs under **Section 12** of the East African Community Customs Management Act "EACCMA" and Regulations made thereunder may define certain areas as Custom Areas. The appellant's transit shade was, under this legal provision, categorized as a Custom Area. As such, even though the shade was owned by the appellant, it had been determined for the purposes of the Separator to be a customs warehouse and not the appellant's. For this reason, the Separator was not in the appellant's possession but 3rd the respondent's legal and actual possession.

It was claimed that the appellant had been contracted as a transporter but did not incur liability for the Separator and that the Separator was placed in the shade by the 1st respondent's clearing agents at the time – Spedag Interfreight. The 1st respondent further claimed that as at 25th July 2013, the appellant was in possession of the Separator, but on 10th September 2013 when a Notice of Goods Deposited in Custom Warehouse was prepared, the position changed and the 3rd respondent now took possession. That the rent payment to the 3rd respondent was now evidence that the Separator was in the 3rd respondent's control. The Separator was left at the appellant's premises purely in furtherance of **Section 43(1)** of the EACCMA.

The High Court in its ruling delivered on 18th December 2013 held that:-

> *"7. Having considered the provisions of the Act and the evidence produced by the Plaintiffs I make a finding that Civicon does not have possession of the Separator and therefore it fails the test of asserting a lien over it. In addition by virtue of Section 16 (1)(h) of the Act the separator which is destined to be transported to Rwanda is under Customs Control and cannot therefore be the subject of a lien by a party in this country without an offence being committed.*
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> *8. The issue of KRA being in possession of the Separator is made more poignant by the fact that KRA has recorded a consent with the Plaintiff by their letter dated 18th November 2013.*
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> *9. It follows therefore as provided under Section 43(1) of the Act that although the land upon which the warehouse is situated belonged to Civicon as alleged it is however deemed under that Section as a Custom Warehouse.*
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> *10. Because Civicon claim for asserting a lien over the Separator is defeated by the lack of possession and because as rightly submitted by the Plaintiffs that Custom goods cannot be diverted to the local market, the application dated 15th November 2013 must and does fail."*

This holding spurred this appeal premised on eight grounds.

The grounds may be summarised;- that the judge;

- *Did not objectively examine and establish whether the appellant ought to have been enjoined into the suit as a necessary party or as a defendant.*
- *Effectively determined that the appellant had no interest to defend in the suit at an interlocutory stage.*
- *In reaching the verdict, did not consider that 'the Separator" was stored in the transit shade owned by the appellant and that the appellant had asserted a lien over the same on account of unpaid substantial contractual dues owed to it by the 1st respondent.*

- *Erred in finding that though the appellant was in physical possession of "the separator", it did not have legal possession and could not therefore assert a lien over it notwithstanding the fact that it was in its custody, it had come into its custody at the instance of the 1st respondent pursuant to the provisions of existing agreements between them, there were pending arbitral proceedings for breach of contract between them at the International Chamber of Commerce in Switzerland in which the 1st respondent was claiming, amongst other claims, for the release of "the Separator".*

- *Ignored previous and binding decisions in a related suit being Mombasa **HCCC No. 36 of 2013** in which the court had determined that the Kenya Courts did not have jurisdiction over the said equipment on account of the provisions of the agreements between the parties.*

- *Erred in holding that the appellant could not assert a lien over the equipment due to the fact that it was a transit good.*

- *Erred in holding that the equipment was in possession of the 3rd respondent by virtue of a consent letter dated 18th November, 2013 between the 1st and 3rd respondent and,*

    Erred when it determined substantive and contested legal and factual issues outside the suit rather than within the suit on the basis of substantive pleadings, oral and documentary evidence.

Mr. Nyachoti learned counsel for the appellant urged all the grounds globally. He submitted that the High Court erred in refusing to join the appellant in the proceedings yet it had shown that it had substantial interest in the subject matter of the case. That the injunction sought in **Mombasa HCCC No.36 of 2013** concerned the same contract and the Separator alongside a performance bond yet the application was dismissed on grounds of jurisdiction. How could the same court then assume jurisdiction and order for the removal of the Separator in the appellant's custody? He accused the 1st respondent of attempting to circumvent that ruling by filing **Mombasa HCCC No.117 of 2013**. This he claimed was a total abuse of the court process. He went on to submit that the appellant had a substantial interest in the separator as it is in its custody by virtue of a contract for transportation.The transit shed is private property belonging to it and not to the 3rd respondent. Reference was made to a letter dated 24th July 2014 from 3rd respondent to 1st respondent's counsel advising that, *"Physical release of the 'Separator' is a matter purely between your client (Kivuwatt) and Civicon Limited being the owners of the Transit Shed where the Separator is stored.....Your clients are therefore advised to engage directly with Civicon Limited on this issue."* On this basis, the court was urged to find that the appellant was a necessary party to the suit and ought to have been heard even before the consent was recorded.

Mr. Ongoya learned counsel for the 1st and 2nd respondents leading Mr. Biketi submitted in opposition to the appeal that the letter dated 24th July 2014 was the subject of a court order issued on 24th September 2014 in which the court directed the Officer-In-Charge of Makupa Police Station to accompany the 1st and 2nd respondents to the appellant's Transit shade to ensure that the Separator is released to them, and if need be break down any door which may impede such release. He also sought to focus the court's attention on the issue of whether the appellant had demonstrated an interest of a lien over the Separator. Whether or not the appellant owned the transit shade was immaterial, since it was deemed a Customs warehouse, and the Separator was deposited in it as custom goods. Furnished with the law and the relevant documentary evidence, it was contended, the High Court did not have any other choice but to disallow the application. We were thus urged to dismiss the appeal on that basis as well.

Mr. Mbaye learned counsel for the 3rd respondent declared that his client did not wish to take any position in the appeal, but confirmed that the Separator is subject to Customs and was in transit.

Having carefully considered the respective positions of the parties to this dispute, this is our view of the appeal. Under **Order 1** of the **Civil Procedure Rules**, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to

make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or;

a. *whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.*

b. *the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*

O'Hare & Hill's Civil Litigation, 7th Edition (1996) at page 101 opines that one cannot be added as a plaintiff unless one gives one's consent in writing. In contrast, anyone can be joined as a defendant even against his wishes. However no person can be a defendant unless the plaintiff claims some relief, even if only a declaration, against him. The general rule of practice is that the plaintiff is "*dominus litis*." This means that he is entitled to choose the defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue. The doctrine of "*dominus litis*" does not however extend to the joinder (or impleading) of parties. This is because the court has a duty and the power to add a person who is not a party to the action as originally constituted as a defendant even against the will of the plaintiff, whether on the application of the defendant or of the non-party in order for the real matter in dispute to be determined. The non-party (or intervener) must show that he has interest in the matters in dispute to be determined in the suit.

Mulla's Code of Civil Procedure, 16th Edition Vol.2 at page 1496 goes further on this proposition to state that:

> *"…It cannot be gainsaid that no decree in a suit can bind a person if he is not a party thereto or duly represented therein…*
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> *…all persons may be joined as defendants against whom any right to relief in respect of the same act or transaction is alleged to exist; where if separate suits were brought against such persons, any common question*
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> *of law or fact could arise, though the causes of action against the defendants would be different…*
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> *…where claims against different parties involve or may*
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> *involve a common question of fact bearing sufficient importance in*
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> *proportion to the rest of the action to render it desirable that the whole of the matter be disposed of at the same time, the court will allow joinder of defendants…*
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> *…it is not necessary that all the defendants should be interested in all the*
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> *reliefs or that their liability should be the same. On the other hand, it is*
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> *essential that there must* ***be some link or nexus so that the***
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> *condition as to the existence of the same act or transaction or some series of acts*

or transactions may be satisfied…"

In the case of **Gurtner vs Circuit (1968) I All ER 328 it was** held that , a party may be enjoined if he can demonstrate that any order in the action would directly affect him either legally or financially. (Denning, M.R.) stated thus:

> *"…The bureau clearly had a commercial interest in resisting the declaration; but that is not enough. John Stephenson J accepted the analysis of the rule and the many previous decisions under it contained in*
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> *the exhaustive judgment of Devlin, J., in A Amon vs Raphael Tuck & Sons, Ltd. (1956) 1 All ER 273 and took the view that the court had no jurisdiction to add a party against the will of the plaintiff unless the person seeking to be added was:*
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> *"…at least able to show that some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action will be affected by the result of the action…"*
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> *…The only reason which makes it necessary to make a person a party to an action is so that he may be bound by the result of the action, and the question to be settled therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party…"*
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> *Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained."*

From the forgoing the power of the court to add a party to a suit is wide and discretionary, the overriding consideration being whether he has interest in the suit. The question is whether the right of a person may be affected if he is not added as a party. Generally in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided.

Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made

but whose presence is necessary for a complete and final decision on the question involved in the proceedings. **Mulla's of Civil Procedure** 16th Edition Volume 2 goes on to state that,

> *"…What makes a person a necessary party is that he has relevant evidence to give on some of the questions involved; and this would make him a necessary witness. The only reason which makes it necessary to make a person a party to an action is so that they should be bound by the result of the action and the question to be settled therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has to be drawn on a wider construction of the rule between the direct legal interest and the commercial interest."*

Order 1 Rule 3 of the Kenyan Civil Procedure Rules provides for who may be

sued as defendants stating thus:

> *"3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative,*

where, if separate suits were brought against such persons any common question of law or fact would arise"

Order 1 Rule 10 (2) provides further that

> **(2)** *The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.* (emphasis provided)

Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined. In the same vein, a party seeking joinder who fails to establish any right over or interest in the subject matter cannot be enjoined. This Court in **Meme vs Republic (2004) KLR 637** considering an application for joinder held that joinder will be permissible:

> *(i) Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;*

ii. *Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and*

iii. *Where the joinder will prevent a likely course of proliferated litigation.*

The Court made reference to the Supreme Court of Uganda case of **Deported Asians Property Custodian Board vs Jaffer Brothers Limited (1999) I EA 55 (SCU)** in which it was held that,

> *"A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter… For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."* (emphasis provided).

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in **Order I rule 10 (2)** bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial. In the present case, it is our view that the circumstances of the case would require the participation of the appellant in the suit, owing to its

direct connection to the subject matter of the suit which is in its physical custody on alleged claim for lien for unsettled bills.

Again how the appellant came by the Separator is contested. According to the appellant it was on the basis of various contracts entered into between the 1st respondent and itself and it was required to transport the Separator to Rwanda. However, according to the respondents, the Separator was deposited with the appellant in accordance with ECMMA. The letter from the 3rd respondent regarding the release of the Separator seems to suggest that there was much more than meets the eye. The 1st respondent, it would appear could not merely secure the physical release of the Separator from the appellant. It had to engage the appellant directly regarding such release. Now if the Separator was a transit good as claimed by the 3rd respondent and that the transit shade was deemed to be owned by the 3rd respondent for purposes of ECMMA why should the 3rd respondent be asking the two parties to negotiate its release? Couldn't the 3rd respondent just have walked into the premises and carried away the Separator? These are some of the issues which perhaps could only be settled at the hearing upon the appellant being joined in the proceedings. As it is, the non– joinder of the appellant has produced results which can already be seen in the documents filed in the supplementary record of appeal. Though the 1st respondent obtained favourable orders, that is the release of the Separator, it has nonetheless been unable to enforce it, even with the assistance of the Police, thereby fortifying the appellant's case that it be joined in the suit. Further we note that on 25th July, 2013 the High Court in Mombasa HCCC No. 36 of 2013, in which the main issue of contention was a bank guarantee which the appellant sought to restrain the 1st respondent from accessing, and also attachment of machinery or assets which was in its possession by virtue of the contracts subject of the suit, the court found that it lacked jurisdiction to determine the dispute because it was the subject of arbitration proceedings. It observed that,

> *"...it is not in dispute that the plaintiff is holding onto equipment called Separator which belongs to the Defendant which was to be transported to Rwanda.There are allegations that the Defendant has neglected and or failed to honour conditions of the agreement in terms of payment for work done. I am of the considered view that these are issues that are subject to arbitration proceedings..."*

How then can the same court again, in a suit giving rise to this appeal, assume jurisdiction and order the forceful repatriation of the Separator to Rwanda and or determine the question of lien and even possession whether physical or legal? There is no doubt at all that the appellant had established claim over the Separator, which was in its possession pursuant to the contract with 1st respondent or even pursuant to customs requirements under EMCCA. The 1st respondent's decision to file suit and subsequently enter a consent with 3rd respondent when assessed in light of this background, may be said to have been an attempt to steal a match on the appellant. The ambivalent position taken by the 3rd respondent in this appeal of not supporting or opposing the appeal does not help the respondents' case at all. The 1st respondent caused the goods to be entered as transit and secured a transit bond on 23rd September 2013 after the goods had been deposited on 10th April 2013 pending a court case – presumably Mombasa **HCCC No.36 of 2013** which was filed sometime in April 2013. The transit bond brought the Separator into the legal custody of 3rd respondent, in an attempt, it would appear, to defeat appellant's claim. The Separator had previously been the subject of the suit filed by appellant, and an application in the arbitration proceedings, filed by 1st respondent. We are not informed of the outcome of any of the arbitration proceedings. In the circumstances the appellant's interest in the Separator had been sufficiently established and it was a necessary party to the suit. It was imperative at that stage that the appellant be heard since it had a stake in the Separator.

As it stands, the situation has not changed much. Though the 3rd respondent granted a customs release, the Separator still has not been moved. The 3rd respondent has however distanced itself from facilitating physical release in their letter dated 24th July 2014, referring the 1st respondent to engage directly with the appellant. The joinder of the appellant in the case need not result in the Separator being released into the local market as feared by the 3rd respondent. Hence the respondents' fear that such an act will breach

the provisions of ECMMA may well be unfounded.

In the result, we allow the appeal and set aside the ruling and order dismissing the appellant's application dated 15th November, 2013. In lieu thereof, we grant prayer 3 in the application which essentially makes the appellant the 2nd defendant in the suit. The appellant shall have the costs of this appeal as well as costs of the application in the High Court.

Dated and delivered at Malindi this 3rd 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