**STALLION INSURANCE COMPANY LIMITED …..…….…. APPELLANT**

**AND**

**IGNAZZIO MESSINA & C S.p.A ……..…… RESPONDENT**

***(An appeal from the ruling of the High Court of Kenya At Nairobi Milimani Commercial Courts (Ransley, J.) dated 16th May, 2000* in H.C.C.C NO. 216 of 2000)**

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**JUDGMENT OF THE COURT**

On the 16th May, 2000, the superior court (Ransley, Commissioner of Assize, as he then was) refused to exercise his discretion in favour of setting aside a judgment obtained in the main suit in default of appearance or defence being filed by the defendant. The appeal before us is against the dismissal of that application.

The parties …….

The plaintiff in the main suit, and the respondent here, is Ignazzio Messina & C. S.p.A (hereinafter "Ignazzio" or the "respondent"). It is an Italian limited liability company registered in Genoa which carries on international business in shipping. For its operations in Kenya, it had signed an Agency Agreement with **M/S. Marship Ltd** ("Marship") a Kenyan company, on 1st August, 1990 wherein, Marship would *inter alia*, collect all freight, accessories, detention fees, demurrage charges and any other amounts due to Ignazzio and remit it to Genoa on stated terms. As a precondition for the performance of their part of the Agency Agreement, Marship was required to obtain and provide to Ignazzio, a "*performance Bond"* from a Bank or Insurance Company approved by Ignazzio. They settled on **M/S. Stallion Insurance Company Ltd** ("Stallion" or "the appellant") who were the defendants in the main suit. On 31st October 1991, Stallion confirmed to Ignazzio that they would "*irrevocably, absolutely and unconditionally guarantee"* the punctual payments due to Ignazzio from Marship up to a sum of USD 750,000 which at the existing exchange rates was Kshs.46,500,000. At the time, Stallion was a viable Insurance Company and continued to be so until the suit was concluded in the superior court and this appeal was filed in January, 2001. Shortly thereafter however, the Commissioner of Insurance placed it under Statutory Management under ***section 67(c)*** of the ***Insurance Act***, ***Cap (Cap 487)***. Within the same year, on 15th November, 2001, a winding up order was issued by the superior court at the instance of the Commissioner, on the ground that the Insurance company was insolvent, incapable of paying its debts and/or was unable to meet the reasonable expectations of policy holders. Henceforth it fell under a liquidator but leave was granted under ***section 228*** of the Companies Act to proceed with the suit.

**The dispute…….**

On 21st July, 1999, Ignazzio demanded Shs.45,561,095.20 or the equivalent thereof in US Dollars, being the amount due from Marship under the Agency agreement as at 30th April, 1999 with interest thereon at 2 % per month until payment, but no payment was forthcoming from Marship. Pursuant to the performance guarantee issued by Stallion, Ignazzio sought the payment from Stallion up to

Shs.46,500,000, but Stallion refused or neglected to pay. On 29th July, 1999, Ignazzio filed suit in the superior court for recovery of the said amount and on 13th September, 1999, summons to enter appearance was served on Stallion. As no appearance was filed within the prescribed period, Ignazzio requested for, and the deputy registrar recorded, entry of judgment in default on 29th September, 1999. The deputy registrar further certified costs on the suit in the sum of Shs.775,265 on 7th October, 1999, and on the same day a notice of entry of judgment was served on Stallion. Eight (8) days later on 15th October, 1999, Stallion filed an application to set aside the default judgment, under ***Order IXA rule 10*** of the Civil Procedure Rules.

The affidavit in support of the application was sworn on 15th October by ***Mrs. Nancy Shikuku***, Stallion's Legal Officer who had been personally served with the plaint and summons to enter appearance one month or so earlier on 13th September, 1999. She deponed as follows: -

"*2.THAT on 14th October, 1999, our clerk in charge of court matters one Mr. Kiragu who had been on leave since mid September brought to me summons in this case. He informed me that I had given him the summons to file and bring the file to me for perusal but he put them in the file and forgot to give it to me before proceeding on leave.*

*3. THAT on perusing the summons, I saw my signature on the back but I have no recollection about it as I did not have opportunity to peruse the plaint before it was filed by the clerk. In the course of my work, I receive numerous claims every day and the relevant file has to be removed before I can act on the documents.*

*4. THAT on being notified of this matter, I promptly instructed our advocates on record to check the position in court and they notified me that ex parte judgment has already been entered, the decree has been drawn and warrants of attachment may be issued any time.*

*5. THAT failure to enter appearance within the prescribed time was not on account of deliberate intention to delay the matter but a genuine inadvertence on our part as explained hereinabove.*

*6. That I verily belief (sic) that the defendant has a good defence to this claim as shown in the affidavit of the defendant's General Manager and the annexed draft defence."*

There was no affidavit filed by the clerk mentioned in paragraph 2. The draft defence introduced by the Stallion's General Manager, as stated in paragraph 6, basically admitted the guarantee but only up to USD 500,000 and not USD 750,000; averred that there was an implied term in the guarantee that payment would be subject to verification of Ignazzio's claim and would not be paid unless it was proved; averred that the claim had been disputed by Marship; denied that the claim was due and payable; and finally asserted that the agency agreement between Ignazzio and Marship had expired and with it, the guarantee.

Ignazzio on their part were able to show in their affidavit in reply sworn by ***Captain Giordano Gelasini*** that notice of entry of judgment was served on Mrs. Shikuku by the same process server who had served her with the summons to enter appearance; that Stallion had by letter dated 22nd October, 1998 confirmed the validity of the guarantee up to USD 750,000 or Kshs.46,500,000; that the Agency Agreement between it and Marship was express and there were no implied terms; that the claim made in the suit was based on Marship's own calculations and acknowledgment of debt; that the Agency Agreement had not expired when demand for payment was made; and that the guarantee was valid when the suit was filed.

Upon consideration of the affidavit evidence and the law applicable, the superior court rejected the explanation given for failure to enter appearance or file defence within time and made a further finding that the draft defence was not tenable. In the Commissioner of Assize's own words:

"**The terms of the Guarantee are that the Defendant undertook to pay Ignazzio Messina & C.S.P.A irrevocably and immediately the whole or part of the amount of U.S$750,000.00 after receipt of the**

**first written request specifying that Marship Limited had not fulfilled their payment within the terms of the Agency contract without requesting them to take any or any further procedure or step against Marship Limited.**

**From this it is clear that the Defendant was absolutely bound to pay what was demanded upto the stated amount on notification of non-fulfilment by Marship Limited of their obligations under the agency agreement.**

**This as we have seen was done. I can see nothing in the Draft Statement of Defence that would amount to a good defence to the claim.**

**The implied term referred to in Para. 4 of the Defence is contrary to the clear words of the guarantee and would not be admissible in evidence……..**

**In the event I dismiss the Defendant's application with costs as I am neither satisfied with the reason for the non-filing of the appearance and can see no valid Defence to the claim."**

Aggrieved by those findings, Stallion now comes before us seeking reversal thereof and unconditional leave to defend the suit.

**The appeal …….**

Some seven grounds were put forward in the memorandum of appeal drawn by learned counsel for Stallion Mr. Mbigi Njuguna on 29th January, 2001. These were as follows.

"*The learned trial judge erred in fact and law by: -*

*1. failing to find misplacement of the summons in the appellants busy office a reasonable excuse for delay in filing appearance and defence within time prescribed by law.*

*2. failing to weigh all the circumstances of the case before and after service of summons and look favourably at the appellants immediate action on discovery of the inadvertent misplacement of the summons by a junior officer of the appellant company.*

*3. failing to find that the plaintiffs claim as revealed by the affidavits filed by the parties was inexplicit in the notice given and was disputed by the principal debtor hence needed to be proved in a trial.*

*4. finding the appellants defence lacking in merit while it disputed the very existence of the plaintiffs claim hence the need to ventilate the claim in a trial.*

*5. concluding that the guarantee subject matter of the case was absolute without considering that the beneficiary of the claim was to bring it within the stipulation of and provisions of the guarantee which had not been done with any certainty hence the need for a trial.*

*6. regarding the guarantee in issue as absolute while it was clear on the face of it that it was subject to an earlier agreement between the guarantee (sic) and the principal debtor.*

*7. treating the guarantee subject matter of the suit as absolute while it appears to be offensive to the provisions of stamp duty and revenue laws hence incapable of being enforced in court."*

In urging those grounds Mr. Mbigi condensed them into three by arguing grounds 1 & 2 together, grounds 3, 4, 5 and 6 together, and ground 7 separately. At the tail-end of his submissions however, Mr. Mbigi sought to introduce an entirely new ground which was neither pleaded in the application made before the superior court nor submissions made on it before that court. Serious objections were however raised by learned counsel for Ignazzio, Mr. Kamau Karori and we allowed both counsel to make

submissions on the propriety of raising the ground at this late stage.

Mr. Mbigi pleaded that the issue had not registered in his mind before he had concluded his arguments on the grounds stated in the memorandum of appeal but submitted that it was an issue of law that would dispose of the entire appeal and should therefore be allowed to be argued. It had to do with the form of the summons to enter appearance which had provided that appearance be entered within 10 days and thereby reduced the period provided for entry of appearance in ***Order IV rule 3(4)*** of the Civil Procedure Rules. He further cited two decisions where this Court stated in *obiter dicta* that such summons was in breach of the rule and of no effect. The cases were **Ceneast Airlines Ltd vs. Kenya Shell Ltd [2000] 2 EA. 362**, and **Atulkumar Shah v Investment & Morgages Bank Ltd & 2 others [2001] 1 EA 274**.

Mr. Karori for his part vehemently opposed the introduction of such issue in March 2007 when in October, 1999, which is eight years earlier, the appellant was at liberty to choose the case they would submit to the superior court. In making the application they did before that court, the appellants acknowledged that there was a regular judgment entered in default of appearance and all they prayed for was the exercise of the court's discretion to have it set aside for the reasons given in supporting affidavits. No irregularities were pleaded and no opportunity was given to the superior court to pronounce itself on the irregularity sought to be introduced. The appellants cannot therefore be allowed to change their case so dramatically at the appellate level. In Mr. Karori's view, the raising of such ground would be prejudicial to the respondents considering that they have a substantial judgment in their favour but the appellant has in the last eight years of litigation been declared insolvent. He cited several authorities for support of his submissions among them: **Alwi A. Saggaf v. Abed Algeredi [1961] EA 767**; **The United Marketing Company v Hasham Kara [1963] EA 276**; **Ex parte Reddish In re Walton [1877] 5 Ch. C. 882**; **United Dominion Trust Ltd v Bycroft [1954] All ER 455**; **Nash v Rochford Rural District Council [1917] KB 384**.

We have anxiously considered the issue raised, the rival submissions of counsel and the authorities cited and we think, with respect, that we ought not to allow the raising of the issue at this late stage. It is, of course, within the discretion of the court to allow arguments on unpleaded issues, but there must be a judicial exercise of that discretion. The starting point is ***Rule 101*** of the rules of this Court which prohibits arguments on such issues and states in relevant part: -

"**101. At the hearing of an appeal –**

**(a) no party shall, without the leave of the court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal ……..**"

It is common ground in this appeal that the issue intended to be raised did not form any ground stated in the memorandum of appeal and did not arise before the superior court. Indeed for a period of eight years it did not form part of the appellant's case. There are good reasons for the existence of the rule and some of them appear in the authorities cited before us by Mr. Karori. Apart from considerations of fairness, delay and prejudice that may be occasioned, the predecessor of this Court in the **Alwi A. Saggaf Case** (Supra) agreed with Lord Birkenhead L.C. in **North Staffordshire Railways Co. v. Edge [1920] A.C. 254** at p. 263, on the guiding principle, when he stated:

"**The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the arguments it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.**"

The Privy Council also, in an appeal emanating from the supreme court of Kenya, **The United Marketing Company Case** (Supra), held: -

"**(ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the courts below, accordingly;**

**(iii) their Lordships would not, even if the question were a bare question of law, entertain the submission that the respondent's claim was to be defeated by reason of his breach of a condition in his contract of insurance.** ***North Staffordshire Railway Company v. Edge, [1920] A.C. 254,*** **applied."**

We are of the further view that the appellant's case as put and argued before the superior court was specific. The intention to alter it at this appellate stage would be grossly prejudicial to the respondent and it ought not to be allowed. The persuasive speech of Sir Raymond Evershed M.R. in **United Dominion Trust Case (Supra)** may illustrate the point: -

"**I rest my conclusion perhaps most strongly on this consideration, that the judgment, extracts from which I have read, seems to me to be in no way whatever related to it. Indeed, it seems to me to have proceeded on a basis which was absolutely inconsistent with the way in which counsel for the plaintiff now puts his case. As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below. After all, the county court is intended to serve litigants of relatively small means. It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below, but in this court."**

The same approach appears to obtain in India where, in a case where the new issue of law was raised for the first time on appeal eighteen months after the lower court's decision, the court stated: -

"**Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation."**

We have said enough, we think, to underscore our reluctance to accede to the arguments sought to be put forth by the appellant in this matter and we reject that attempt.

**Findings on main grounds …….**

We must now revert to the main appeal and, firstly, dispose of ground No. 7. Mr. Mbigi submitted that the guarantee document relied on by the respondents to enforce their claim was inadmissible in evidence as it was not stamped contrary to the **Stamp Duty Act**. It is a submission which has been raised in other cases before but this Court has approved the procedure that ought to be followed in such matters. A case in point is **Diamond Trust Bank Kenya Ltd vs. Jaswinder Singh Enterprises** CA No. 285/98 (ur) where Owuor JA, with whom Gicheru JA (as he then was) and Tunoi JA, agreed, stated: -

"**The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of Suderji Nanji Ltd. -vs- Bhaloo (1958) EA 762 at page 763 where**

**Law J., (as he then was) quoted with approval the holding in <u>Bagahat Ram -vs-</u> <u>Raven Chond (2) 1930) A.I.R Lah 854</u> that:**

"***before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ……***

***The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in his support of his claim against the 2nd defendant/respondent and he must be given the opportunity".***

**Although it was the respondent that was relying on the unstamped agreements, there was the offer by the appellant's counsel to be given a chance to have the agreements stamped. This in my view was the correct step in terms of section 19 (3) of the Stamp duty Act."**

We take the view in this case that it was Stallion who drew up and issued the performance guarantee and they cannot therefore benefit from the failure to stamp it, if that was the case. At all events the issue did not arise before the superior court and even if it had, it would have been sufficiently answered on authority. That ground of appeal is rejected.

The remaining grounds of appeal may be dealt with collectively since there is no dispute about the guiding principles that must apply in considering applications made under ***Order IXA r 10*** of the Civil Procedure rules. These have been summarized in numerous authorities and the common authority relied on by both counsel was **<u>Patel v E.A</u> <u>Cargo Handling Services Ltd</u> [1974] EA 75** which has been followed faithfully in other decisions including **<u>Chemwolo v Kubende</u> [1982 – 88] 1 KAR 1036** where Platt J.A stated:

"**In Patel v EA Cargo Handling Services Limited [1974] EA 75 (supra) the Court of Appeal following its previous decision in Mbogo v shah [1968] EA 93 adopted the opinion of Harris J in Kimani v McConnel [1966] EA 547 where he said:**

"***In the light of all the facts and circumstances both prior to subsequently and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed"***

**But the court went on to explain (on p 76), that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the Rules."**

In the ***Patel case*** (Supra) the court cited with approval the judgment of **Lord Russel of Killowen** in **Evans v Bartlam** [1937] AC 437, thus:

"**It was argued by counsel for the respondent that, before the court or a judge could exercise the power conferred by this rule, the applicant was bound to prove (a) that he had some serious defence to the action and (b) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that, until those two matters had been proved, the door was closed to the judicial discretion, in other words, that the proof of those two matters was a condition precedent to the existence, or, (what amounts to the same thing) to the exercise, of the judicial discretion. For myself, I can find no justification for this view in any of the authorities which were cited in argument; nor, if such authority existed, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose. The contention no doubt contains this element of truth, that from the nature of the case, no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action and (b) how it came about that the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a**

**different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance ."**

Clearly therefore the discretion exercisable is in terms unconditional and the matters which the court ought to have regard to are part of the judicial exercise of that discretion, since it cannot be whimsical or capricious. The superior court appreciated these principles in considering the application before it and it is only the manner of application that is challenged before us.

There is also no dispute about the principles that apply in considering this appeal. We take it from Sir Clement De Lestang V-P in **Mbogoh & Anor v Shah [1968] EA 93**:

"**I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

For his part Sir Charles Newbold P in the same case stated:

"**For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."**

As stated earlier, the superior court considered the two relevant factors relating to the explanation by the appellant for failure to enter appearance, and whether there were triable issues that would raise a *prima facie* defence even if the application was granted. Mr. Mbigi argued in grounds 1 & 2 of the appeal that the delay was fully explained and should not have been rejected. A misunderstanding in the company's offices, in his view, was sufficient explanation and this was rectified promptly when the appellant discovered the omission on its own since there was no service of notice of entry of judgment. To this, Mr. Karori pointed out that there was an affidavit of service, which was not denied, confirming service of the notice of default judgment. There was a period of 16 days before the judgment was recorded, but action was only taken after service of that notice. The reason given for the delay, he submitted, was attributed to a clerk who did not even swear an affidavit in the matter. The other was forgetfulness of the legal officer who was served. In his view, all these flaws on the part of the appellant were taken into consideration.

We have carefully examined the affidavit in support of the application made in the superior court and we think there was proper factual basis for rejection of the explanation given for the delay. We have no reason therefore to interfere with the exercise of that discretion otherwise we would be simply substituting our discretion for that of the superior court.

As regards grounds 3, 4, 5 and 6, Mr. Mbigi submitted that the superior court did not consider that there were triable issues since the claim was enormous and there were no particulars pleaded; that the amount was only payable if it was "*due & owing"* but the claim put forward was speculative at best; and that there was no agreement of the amount owing from Marship who had disputed it. He also submitted that there were erroneous findings made by the superior court that the performance bond or guarantee issued in favour of the respondent was absolute; that the contract of guarantee could be enforced in isolation of the Agency contract; and that there were no implied terms in the Agency contract which would affect the guarantee. Mr. Karori on the other hand submitted that the amount due on the guarantee was not disputable; that there was no "policy" between the parties as pleaded which contained any implied terms; that oral evidence was not admissible to alter or contradict the terms of the guarantee as that would be contrary to ***sections 97*** and ***98*** of the ***Evidence Act (Cap 80)****;* that the performance guarantee did not involve Marship and was enforceable on its own; and that no dispute was raised by Marship against Ignazzio either before or after institution of the suit.

We have examined the draft defence with care and also the various issues touted as triable but we think they are but fanciful. The thrust of the draft defence is that the guarantee which was admittedly issued by the appellant was not for USD 750,000 but for USD 500,000 and that in any event the amount was not payable without proof because it was disputed. The denial about the amount of the guarantee flies in the face of documentary proof produced by the respondents in their replying affidavit and no challenge was made to that document. There can be no issue there. The performance guarantee is expressly admitted and was made in favour of Ignazzio by Stallion. It is therefore enforceable directly by Ignazzio. Stallion's obligation under the guarantee was spelt out in the Agency agreement and was expressly acknowledged by Stallion itself. It was this:

"**BY ISSUING THE ABOVE MENTIONED PERFORMANCE BOND THE GUARANTOR OR COMPANY SHALL UNDERTAKE TO PAY TO OWNERS** *(IGNAZZIO)* **UPON SIMPLE REQUEST UPTO THE MAXIMUM OF THE ABOVE MENTIONED AMOUNT, THE SUM RESULTING FROM THE STATEMENT OF ACCOUNT ATTACHED BY OWNERS** *(IGNAZZIO)* **TO SUCH REQUEST TOGETHER WITH THE NOTIFICATION TO AGENTS** *(MARSHIP)* **OF DELAYED PAYMENT DATING BACK AT LEAST 15 DAYS BEFORE THE DATE OF THE STASTEMENT OF ACCOUNT TO BE USED TO CLAIM PAYMENT OF THE PERFORMANCE BOND."**

The preliminaries before demand for payment was made were evidently complied with and no issue is raised by Stallion on that. The attempt by Marship therefore to urge Stallion not to pay was of no consequence on the performance guarantee or bond. The Agency Agreement itself had clear provisions on resolution of any dispute between Ignazzio and Marship, but Marship did not make any claim under the Agency Agreement, and none was pleaded. In our view, the performance guarantee had no ambiguities and was plainly enforceable against Stallion. The amount stated therein had become due and was payable by them. We see no good reason to fault the superior court for the manner in which it resolved the second factor in the exercise of its discretion. We shall not interfere with the decision in the circumstances.

In the result, the appeal is for dismissal in its entirety and we so order. Costs of the appeal shall be paid to the respondent.

***Dated and delivered at Nairobi this 25th day of May, 2007.***

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

…….…….

**JUDGE OF APPEAL**

**W.S. DEVERELL**

…….…….

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**