IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And MFALILA, J.A.)

CIVIL APPEAL NO. 3 OF 1988

B E T W E E N

PETER KARANTI & 48 OTHERS. . . . . APPELLANTS

A N D

1. THE ATTORNEY GENERAL
2. AKWILINI MISHIKO KICHDC
3. KIJIJI CHA URORI
4. NARUMU RURAL CO-OPERATIVE SOCIETY LIMITED

. . RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Chua, J.)

dated the 31st day of July, 1987

in

Civil Case No. 84 of 1977

JUDGMENT OF THE COURT

KISANGA, J.A.:

In 1966 one Dr. Phoneas borrowed money from the Land Bank of Tanganyika on the strength of the security of his farm held under the Right of Occupancy Registration No. L.O. 23342 C.T. N.P. 405 and E.P.661. Apparently he borrowed, on the same security, further monies from the Ottoman Bank which held a second mortgage on the farm. He later absconded and did not redeem the farm. Whereupon M/S Ottoman Bank advertised for the sale of the farm, and the Narumu Manushi Co-operative Society Ltd. secured the bid. On the evidence the agreement for the sale of the farm was concluded between the Narumu Manushi Co-operative Society Ltd. and the National Development and Credit Agency. The appellants claim that the Narumu Manushi Co-operative Society Ltd. was unable to pay the debt due to financial constraints, so that by a Members' Resolution at a meeting

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the Society authorized any of its able and willing members to liquidate the debt and take the farm. The appellants claimed that pursuant to that resolution they assumed the responsibility of paying the debt and at the same time the Tanzania Rural Development Bank, the successor of the National Development and Credit Agency and which hereinafter shall be referred to simply as the Bank, handed over possession of the farm to them. The appellants finished paying off the debt and demanded to have the title to the farm transferred to them but in vain. On the contrary the then Area Commissioner for Hai District in Kilimanjaro Region, representing the Government, gave the farm to Urori Village, the third respondent, of which the second respondent was the Chairman. It was further alleged that after the Area Commissioner had thus given out the farm, the second respondent and his follow villagers moved on to the farm, pushed out the appellants and committed trespass there by using the crops grown by the appellants and bringing onto the land sand and stones for building purposes.

Thus the appellants filed a suit against the Area Commissioner, the Urori Village and its Chairman asking for the following remedies:

(a) A declaration that they, the appellants, were in law and/or equity entitled to the farm in question;

(b) A declaration that the actions of the Area Commissioner, the Urori Village and its Chairman were illegal;

(c) An injunction against the Area Commissioner, the Urori Village and its Chairman or their Agents restraining them from interferring with the appellants' peaceful occupation of the said farm;

(d) Damages;

(e) Costs and

(f) Any other reliefs.

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In terms of section 6 of the Government Proceedings Act, 1967, as amended by Act No. 40 of 1974, the Government duly gave its consent to be sued; accordingly the Attorney General was made a party in substitution for the Area Commissioner and became the first defendant, while the Chairman for Urori Village was the second defendant and Urori Village itself was the 3rd defendant. The High Court dismissed the appellants' suit with costs. It then went on to declare the farm to be the property of Narumu Co-operative Society Limited, as presently constituted, for the benefit of the four original members of that Society, the said original members being Urori, Tella, Mulama and Useri Villages. It is from that decision that this appeal is preferred.

Before the hearing of the appeal started the fourth respondent, Narumu Rural Co-operative Society Limited, applied to be joined as a co-respondent on the ground that it had an interest in the matter and that it was likely to be affected by the outcome of the appeal. As there was no objection raised, and as the ground advanced seemed plausible, the application was accordingly granted. At the hearing of the appeal the appellants were represented by Professor G. M. Fimbo and Mr. J. C. D'Souza. Mr. Mono, Senior State Attorney, appeared for the first respondent, while Mr. E. S. Ng'maryo and Mr. Mrema appeared for the second, third and fourth respondents.

At the commencement of the trial before the High Court four issues had been framed for determination. Those were:

(1) Are the plaintiffs entitled to the ownership of the farm in dispute?

(2) Were the actions of the defendants in taking possession of the farm illegal?

(3) Are the plaintiffs entitled to an order of injunction and damages?

(4) To what other reliefs are the parties entitled?

The learned trial judge answered issues 1, 3 and 4 in the negative. He answered issue No. 2 in the affirmative by finding against the Area Commissioner for whom the first respondent had been substituted, and also against the 2nd and 3rd respondents. In this appeal counsel for the appellants have filed a total of twelve grounds of appeal. All of them are essentially centered on the first ground which alleges that:

> "(1) The trial court, having held that the actions of the defendants was (sic.) high-handed and unlawful, erred in law in not ordering repossession of the farm by the appellants and damages in their favour for trespass.".

The gravamen of the complaint as we see it is that the learned trial judge having found that the Area Commissioner, the Urori villagers and their chairman were to blame he erred in not making an award against them.

We have to state at once that the judgment of the lower court is open to criticism on a number of points. Counsel for both sides submitted, rightly in our view, that the agreement between the Bank and the Marumu Manushi Co-operative Society Limited for the sale of the farm in question was in law inoperative because it lacked the necessary approval by the Director of Land Development Services in terms of Regulation 3 of the 1948 Land Regulations made under Cap. 113 of the laws. Following such inoperative agreement, the property or the title in the farm did not pass to the intended buyer; it continued to be held by the Bank. The learned trial judge therefore clearly erred when he declared the farm to be the property of the Marumu Co-operative Society as presently constituted because nothing in law had happened in the first instance to divest ownership of or the property in that farm from Dr. Phoneas, its registered owner, or the Bank which held the title under the mortgage arrangement. In other words before the learned judge could validly say that the property in the farm was vested in someone other than Dr. Phoneas, the registered owner, or the Bank which held

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the title under the mortgage arrangement, it was necessary to show that the property in that farm was no longer vested in, or held by, either of these two. That, however, was not done and therefore the declaration that the farm was the property of the Narumu Co-operative Society was completely without any legal basis.

Counsel for both sides addressed us at great length on whether or not "Narumu Co-operative Society as presently constituted" which was purportedly declared to be the owner of the farm in question, was the successor of the Narumu Manushi Co-operative Society Limited which had entered into agreement with the Bank for the sale of the farm. However, not a shred of evidence was adduced that Narumu Co-operative Society as presently constituted was the successor of Narumu Manushi Co-operative Society Limited. Indeed there is evidence that in 1973 the Narumu Manushi Co-operative Society Limited split into two Societies, namely, Kibosho Manushi Co-operative Society and Narumu Machame Co-operative Society, but there is no evidence whatever of any distribution of assets and liabilities between the splinter societies. But the more important consideration is that once the agreement for the sale of the farm was inoperative, then the question of succession in-as-far-as it relates to the farm is irrelevant, because since Narumu Manushi Co-operative Society Limited had acquired no legal title or interest under the agreement then any successor of the Narumu Manushi Co-operative Society Limited cannot claim succession to the farm to which the Society had no legal claim. It seems plain to us that the fact that Narumu Manushi Co-operative Society Limited had acquired no legal interest under the agreement, effectively destroys or undercuts any arguments on the issue of succession to its assets and liabilities as far as the farm was concerned.

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Again, Marumu Co-operative Society as presently constituted was not made a party to the suit in the High Court at any stage of the proceedings, nor is it mentioned anywhere in the proceedings. Indeed it would appear that the learned judge misnamed it for the fourth respondent, Marumu Rural Co-operative Society Limited, which again was never a party to the proceedings at any stage, and was not mentioned anywhere in the proceedings. It was therefore wrong in principle for the learned trial judge to purport in his judgement to grant relief to someone who was never a party to the suit and who therefore had not sought any such relief.

The next point for consideration is: The learned judge having found that the Area Commissioner and the 2nd and 3rd respondents were blameworthy, then why did he not proceed to award against them and to grant the relief or reliefs prayed by the appellants? This question arises directly from the learned trial judge's answer to issue No. 2 which as noted before was framed as follows: "Were the actions of the defendants in taking possession of the farm illegal?" In dealing with that issue the learned judge criticized the Area Commissioner for taking a short cut, as it were, to a complex legal dispute by giving the farm to Urori Village in complete disregard for the legal rights of the other persons having interest in the matter. The crux of his criticism is contained in the following passage extracted from his judgment:

> "A suit in court would have been an appropriate method of resolving the conflict between the interested parties - i.e. the bank, the group of 50 and the former members of the co-operative society. After a court decision implementation would have been easy. Unfortunately the Area Commissioner ordered that the farm be handed over to Urori Village. Whatever superior orders he may have had the action of the Area Commissioner was high-handed and unlawful. It was not right to hand over the farm to Urori Village while originally four villagers through their co-operative society had agreed to buy it. The group of 50 persons too had to be told what rights if any they had and this could have been done by a competent court of law in the absence of an agreement between the parties. Issue No. 2 is therefore answered in the affirmative.".

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Mr. Mono did not cross-appeal against the trial judge's finding that the action of the Area Commissioner was high-handed and unlawful. However, at the hearing of the appeal he sought, with the leave of the Court, to attack that finding although in the end he conceded that he really had no valid ground for the attack.

Although the trial judge found the first, second and third respondents to be blameworthy, he declined to make any award against them and to grant relief to the appellants for two reasons: First there was no lawful resolution of the Narumu Manushi Co-operative Society Limited whereby the appellants claim to have taken over the agreement of sale of the farm; and secondly the appellants' claim was based on fraud and misrepresentation. Consequently, the learned judge found that the appellants had acquired possession of the farm illegally and hence they were not entitled to the reliefs sought. With due respect to the learned judge, however, this finding cannot be supported on the evidence. On the question of a resolution, P.W.1 Leon Athumani Manishi, the then Chairman of the Narumu Manushi Co-operative Society Limited, testified that a Members' Meeting of the Society was called which passed such a resolution. He himself attended the meeting. This was fully supported by the evidence of P.W.2, the then Secretary of the Society, who duly attended such meeting. It was further supported by P.W.4, the Bank official who said that when he was making a follow up on the repayment of the mortgage instalments of the farm in question, P.W.1 and P.W.2 informed him that the Society was having loan repayment problems with its members and that the Society had passed a resolution whereby any members who were able and willing to repay the mortgage debt could do so and take over the farm. P.W.1 and P.W.2 showed him the said resolution which was marked No. 25 in the record of the minutes.

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The trial judge took the view that there was no proof of such lawful resolution of the Society because P.W.1 and P.W.2 did not produce it in evidence. He further took the view that P.W.1 and P.W.2 both of whom controlled the Society and who were interested in having the farm, may have misled P.W.4 into believing that there was such a resolution of the Society. With due respect, however, the learned trial judge misdirected himself on the evidence. First, although admittedly P.W.1 and P.W.2 were in control of the Society in that they were Chairman and Secretary, respectively, there was no evidence that P.W.1 was interested in acquiring the farm. He was not one of the plaintiffs and was not shown to have had any interest at any stage in acquiring the farm. Therefore, the view that P.W.1, acting in concert with P.W.2 may have misdirected P.W.4 as to the existence of the Society's resolutions on the matter was not justified because on the evidence P.W.1 had no cause to do so.

Secondly, P.W.2 testified that sometime in 1976 the Police together with an officer from the District Co-operative Office seized from him all the documents which he had in connection with the farm. Those documents were never returned, and in 1978 he received a letter (Exhibit P.2) from the Regional Office saying that the documents got lost. That is why, he said, he could not produce at the trial any documents in connection with the farm. That evidence stood unchallenged. Yet the learned trial judge made no reference to it when he criticized P.W.1 and P.W.2 for not producing minute No. 25 as contained in the record of the minutes which may very well have been lost along with the other documents. Had he done so, and had he properly directed himself as to P.W.1's position in relation to the suit, he could not have rejected the appellants' claim as to the existence of the Society's resolution permitting any of its able and willing members to take over the farm upon repaying the outstanding mortgage instalments.

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Equally untenable is the trial judge's finding that the appellants' claim was based on fraud and misrepresentation. One of the grounds for such finding was that some of the plaintiffs were shown to be fictitious persons. But that arguement holds no water because out of the 49 plaintiffs only about five persons were shown to be of doubtful identity. So that even if those five were to be excluded, there was still to be answered the claim of the remaining plaintiffs, over forty of them, whose identity was not disputed. But what is even more important is that the respondents in their written statement of defence had clearly stated that paragraph one of the plaint which listed 49 persons as the plaintiffs, was not denied. So that if it was seriously intended to challenge the identity of any of the plaintiffs, this would have been done at the earliest opportunity when filing the written statement of defence and the other side might have taken steps to put the matters right. Since it is trite law that the parties to a suit are bound by their pleadings, it seems that the respondents could not validly be heard to dispute, at the hearing, the identity of some of the plaintiffs, a matter which they had clearly admitted in their written statement of defence.

It is true that out of the 49 plaintiffs only one of them (P.W.2) gave evidence, and at the hearing of this appeal counsel for the respondents took it up as a ground of complaint. However, we can find no merit in the complaint. As contended by counsel for the other side, this suit was not in the nature of a representative suit. It was a suit where all the complainants were plaintiffs suing in their own names. The main issue in the suit was that of possession where the plaintiffs/appellants claimed that they were in lawful possession of the farm and that the respondents wrongfully pushed them out of there. The appellants were further asserting that they were in common possession of the farm.

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So that the evidence of P.W.2 if accepted, as indeed it was and there was in fact other evidence to support it, then that was sufficient to establish such common possession and it was not really necessary to call his co-appellants on that issue.

The trial judge took the view that P.W.1 and P.W.2 had motive to commit acts of misrepresentations because both of them controlled the Society and were interested in acquiring the farm. But as stated earlier, P.W.1's position was quite neutral in that he was not a plaintiff nor was he shown to have any interest at any stage in acquiring the farm. He therefore had no cause to gang up with P.W.2 to commit acts of fraud and misrepresentations in order to induce the sale of the farm by the Bank to the plaintiffs.

The trial judge found fraud also in that the appellants did not refund the money amounting to shs. 27,260/= which the Society had paid to the Bank before the taking over of the mortgage debt by the appellants, and also because in his view the appellants in fact used not their own money but the Society's money, e.g. money realized from the sale of the Society's assets, to liquidate the balance of the mortgage debt. These arguments, however, have little or no bearing to the issue at hand. If the Society had made advance payment of shs. 27,260/= for the farm before negotiating with the appellants the take-over of the mortgage debt, then it was open to the Society to demand a refund of that sum. But there is no evidence that the appellants were ever asked to make a refund and they refused to do so. In any case that was clearly a matter between the Society and the appellants only and it had nothing whatsoever to do with the respondents. That answers equally the contention that the appellants used the Society's assets to liquidate the mortgage debt; that was a matter between the appellants and the owner of such assets, but the respondents were not shown to be the owners of those assets.

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At the hearing of the appeal counsel for the respondents contended that P.W.2 used his position as Secretary of the Society to work behind and against the interest of the Society by thereby defrauding the Society. Once again we can find no evidence to support this allegation. On the evidence all the transactions relating to the taking over of the mortgage debt by the appellants were done openly.

The approach in our courts has always been that fraud has to be established on something more than a mere balance of probabilities, although not beyond a reasonable doubt. See, for instance, the decision of the Court of Appeal for Eastern Africa in the case of R.G. Patel v. L. Mokanji (1957) E.A. 314. In finding fraud in the instant case, the learned trial judge did not direct himself as to the standard of proof required, nor is it apparent that he had that question in mind. To the extent of such omission he clearly erred. Had he directed himself on the issue we are certain that he would not have found fraud proved to the required standard. Indeed for our part there was no evidence of fraud even on a mere balance of probabilities.

By way of an alternative argument, counsel for the respondents submitted that the appellants as a group did not in fact exist, and that P.W.2 being a secretary of the Society was at all times acting for and on behalf of the Society. There can be no substance in this contention. There was ample evidence that a group of 50 people came into existence for the purpose of taking over the farm. Indeed the respondents' own witness (D.W.4) confirmed that he was one of the group and worked with the group for four years after which he quitted leaving the rest of the group to continue with the running of the farm. Admittedly, the appellants in undertaking to take over the mortgage debt did not do so under a new agreement; they undertook to repay the mortgage debt using the same name of the Society and under

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the same agreement concluded between the Society and the Bank. But it is clear on the evidence that the Society assigned its rights and obligations under the agreement to the appellants. The Society authorized the Bank to transfer the farm to the appellants upon the latter liquidating the mortgage debt.

It is true that the Government did give to the appellants assistance in the form of money and materials for the development of the farm, but the evidence is ~~loud~~ loud and clear that such assistance was specifically given to the group of 50 and not to the Society. This was clearly brought out in the evidence of the respondents' own witness (D.W.4) who testified that the dispute relating to the farm in question came up before the District Executive Committee of the Party of which he was a member and the Committee directed, inter alia, that:

> "(4) The group of 50 people to be refunded what they had paid the bank. But what they should be refunded should be minus government assistance which they had been given.
>
> I remember the group of 50 had been given 50,000/= for pig keeping and 10,000/= for furrow construction. Also the cost of materials sold by the group of 50 should be deducted.".

This would make it plain that P.W.2 and his co-appellants were managing and running the farm for and on their own behalf and not, as counsel claims, on behalf of the Society.

In the light of the foregoing, therefore, there is no basis for the trial judge's finding that the occupation of the farm by the appellants was illegal by reason of fraud and misrepresentation. But the question still remains: What precise interest did the appellants have in the farm, anyway? Counsel for the appellants rightly conceded that the agreement between the appellants and the Bank to transfer the farm to the appellants if the appellants liquidated the mortgage debt was equally inoperative in law by reason of non-compliance with regulation 3 of the 1948 Land

Regulations. Such inoperative agreement, therefore, did not transfer the title of the farm to the appellants, and so the legal title to that farm remained in the hands of the Bank which held it under the mortgage arrangement, while the appellants merely acquired possession of the farm. It is pertinent to stress here, though, that although the agreement was thus inoperative, it was not invalid for all purposes. It was valid to the extent of conferring lawful possession on the appellants. This is in line with our recent decision in the case of Mitin Coffee Estate Ltd. and 4 others v. United Engineering Works Ltd. and Another. Civil Appeal No. 15 of 1968 (Unreported). In that case the facts were similar to those of the present case. It was held that an agreement to sell land was inoperative and of no effect in terms of Regulation 3(1) of Land Regulations 1948. However, the respondents who had been put in possession of the land pursuant to such inoperative agreement, were awarded compensation for the improvements which they effect on the land during their occupation. Counsel for the respondents contended that under that transaction in the present case the appellants did not even acquire lawful possession of the farm because no steps had been taken to foreclose the existing mortgage. However, we are unable to agree to that. Once, as the evidence clearly shows, the Society had failed to repay the mortgage instalments and the Bank had given due notice of its intention to repossess the farm by reason of such default, then the Bank was perfectly entitled to resume possession of the farm and to reassign it to the appellants as it did in an attempt to secure repayment of the mortgage debt. It therefore follows that the appellants were in lawful possession of the farm. Although they had not the legal title to the farm, they nevertheless had lawful authority by the Bank which held the farm title under the mortgage arrangement, to be on the farm. They were, if you wish, licensees on the farm.

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AS stated before, the learned trial judge held that the actions of the respondents in taking possession of the farm were illegal but declined to grant relief only because he was of the view that the appellants' occupation of the farm was also illegal. In view of our finding that the appellants were lawfully on the farm, then the consequences have to follow, and the appeal is bound to succeed. In the memorandum of appeal the appellants have prayed for an order for possession of the farm, and an order for damages against the respondents jointly and severally. We find no difficulty in granting the first prayer. Accordingly it is ordered that possession of the farm be handed back to the appellants who were wrongfully pushed out of that farm.

As for damages, Mr. Mono, for the first respondent, submitted that no damages would lie against the Area Commissioner because he was acting in good faith for the benefit of the villagers. Alternatively, he submitted that if damages were awarded against him at all they should only be nominal and in any event less than those awarded against the rest of the respondents.

We have given due consideration to these submissions but we are unable to accede to them. The fact that the Area Commissioner was acting in good faith would not absolve him from liability to pay damages. He is required to act within the law. If he exceeds that he has to take the consequences and it is no defence that he was acting in good faith. He has to compensate the victims of his wrongful act. Nor can we find ground for awarding only nominal damages in a case like this where, following the trespass, the appellants clearly suffered damage by being kept out of the farm thereby being prevented from developing the farm and enjoying or selling the products thereof. The suggestion that damages ordered against the Area Commissioner should be less than those ordered against the villagers is objectionable on principle. For, it is the Area

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Commissioner who gave the villagers authority to commit the trespass. It would therefore be unjust to see the person who leads others into committing the wrong getting away more lightly than those whom he led into committing that wrong.

The appellants' side had attempted to show that before the trespass was committed, the appellants were growing or were trying to grow various crops including maize, bananas, coffee, cadamon, vegetables, pigs and fish. It was claimed also that they were growing timber trees. There was only the evidence of P.W.2 on this point which, however, was vigorously challenged and refuted by the other side except as regards the growing of maize which was conceded. So that except as regards the growing of maize, the claim was not proved because there was only an allegation by the appellants' side and a counter-allegation by the respondents' side. But as intimated before, the respondents conceded that the appellants were growing maize on the farm which is shown to be 116 acres. There was evidence that the average yield was 10 bags of maize per acre and that as at 1982 the official price was shs. 150/- per bag. That is to say in one year maize crop was bringing in an income of shs. 116 x 10 x 150.00 = 174,000.00. As the appellants have been kept out of the farm for a little over 13 years now, their counsel claimed the sum of shs. 174,000.00 x 13 = shs. 2,262,000.00, being compensation for loss of anticipated income from the maize crop during the period they were kept out of the farm. We have given due consideration to the grounds advanced by counsel in support of the claim. We think that the claim is reasonable and should be allowed. Accordingly it is ordered that the appellants are to recover shs. 2,262,000.00 in damages, and that the order is against all the respondents jointly and severally.

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On the issue of costs, counsel for the appellants asked for costs here and in the court below, with a certificate for fees for two counsel in this appeal, considering the difficulty involved in the appeal itself. We think that both applications have merit and they are accordingly granted.

The appeal is therefore allowed as explained hereinbefore, but we desire to make quite plain the scope and extent of this judgment. What we have decided is that while the appellants were lawfully on the farm, they were wrongfully pushed out of there, for which wrong we have awarded them damages. We have not, however, decided that the appellants are the owners of the farm, nor have we decided that the farm now belongs to the Bank. The facts as established show that the Bank merely held the title to the farm as security for the loan given to Dr. Phoneas, the registered owner thereof. The Bank did not at any time negotiate, or even express an intention, to purchase the farm. What the Bank was interested in was the repayment of the loan given to Dr. Phoneas. After the loan was fully repaid the position seems to be that the Bank continued to lawfully hold the legal title to the farm pending transfer to the person or persons legally entitled thereto. On the evidence it is apparent that the Bank was ready and willing to transfer the title to the appellants but that when the appellants tried to seek from the Commissioner for Lands approval for the transfer, no such approval was forthcoming. We think that if for one reason or another the Government did not, or does not wish to approve the transfer, then the right thing to do would be to compensate the appellants for the expenses legitimately incurred in attempting to acquire the farm and for developments which they had made while they were lawfully occupying the farm, before the Government itself could legitimately proceed to deal with the farm.

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DATED at ARUSHA this 2nd day of March, 1990.

R. H. KISANGA
JUSTICE OF APPEAL

A. RAMADHANI
JUSTICE OF APPEAL

L. M. KALILA
JUSTICE OF APPEAL.

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

(J. H. MSOFFE)
SENIOR DEPUTY REGISTRAR.