IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 88 OF 2020

THE REGISTERED TRUSTEES OF VIGNAN

EDUCATION FOUNDATION,
BANGALORE, INDIA .....1ST APPELLANT

INTERNATIONAL MEDICAL AND
TECHNOLOGICAL UNIVERSITY (IMTU).....2ND APPELLANT

VERSUS

NATIONAL DEVELOPMENT CORPORATION
THE HON. ATTORNEY GENERAL .....RESPONDENT

THE CHIEF SECRETARY PRESIDENT'S
OFFICE, STAE HOUSE .....3ND PARTY

THE PERMANENT SECRETARY, MINISTRY OF
EDUCATION, SCIENCE, TECHNOLOGY
AND VOCATIONAL TRAINING.....3RD PARTY

THE PETMANENT SECRETARY, MINISTRY
OF FINANCE AND ECONOMIC PLANNING.....3RD PARTY

THE PERMANENT SECRETARY, MINISTRY OF
LANDS, HOUSING AND HUMAN
SETTLEMENTS DEVELOPMENT.....3RD PARTY

THE PERMANENT SECRETARY MINISTRY OF
HEALTH, COMMUNITY DEVELOPMENT
GENDER ELEDERLY & CHILDREN .....3RD PARTY

THE PERMANENT SECRETARY MINISTRY OF
FOREIGN AFFAIRS EAST AFRICA, REGIONAL
AND INTERNATIONAL COOPERATION .....3RD PARTY

(Appeal from the Judgment and Decree of the High Court of Tanzania
(Land Division) at Dar es Salaam)

(Mzuna, J.)

dated the 27th day of February, 2018

in

Land Case No. 210 of 2012

.....

JUDGMENT OF THE COURT

11th May, 19th August, 2022

LILA, JA:-

The appellants were tenants in Plot No. 2348 block "H" Mbezi Beach, Dar es Salaam formerly owned by Tanzania Saruji Corporation (TSC) before its functions were placed under the Parastatal Sector Reform Commission (PSRC) who later handed the buildings to the respondent. The respondent's demand for payment of a monthly rental of USD 42,000 and a fourteen (14) days' notice of eviction from the building prompted the appellants to institute a suit before the High Court of Tanzania (Land Division) claiming that the respondent had breached the terms of the Memorandum of Understanding entered between the appellants and the Government of Tanzania on 6/12/1995. In the plaint, the appellants were seeking for the following orders:-

(a) A declaratory order that the defendant has breached the offshoot assurance/promises in relation to renewal of the Lease Agreement;

(b) An order to compel the defendant to perform the promises for extension of the lease for a further 25 years term;

(c) An order to restrain the Defendant from evicting the plaintiffs from the suit premises or interfering with or doing any acts whatsoever aimed at or calculated to interfere with the 2nd plaintiff's business in the suit premises, unless the Lease , upon extension, expires and the parties conduct a final settlement of accounts;

(d) A declaratory order that the eviction notice issued by the defendant against the plaintiffs is null and void and thus , inoperative; general damages as claimed under paragraph 18 of the plaint; costs of the suit, and

(e) Any other relief(s) the Hon. Court may deem fit and just to grant.

The claims were received by a written statement of defence vehemently denying all the claims and a counter-claim seeking for indulgence of the Court and an order that appellants should pay the claimed arrears of rent which had accumulated to a total of TZS 1,033,680,000.00, a monthly rent of TZS 73,000,000.00 until vacant possession, eviction order, payment of general damages in excess of TZS 100,000,000.00, interest and costs.

Having satisfied ourselves that the merits of this appeal turns out on only two grounds of appeal to be explained later, we consider this brief background sufficient in highlighting the bases of our decision. The record bears out that after the pleadings were completed and before the hearing of the suit commenced, the appellants (the plaintiffs in the High Court), through a chamber summons lodged on 18/4/2016 moved the High Court for leave to issue and serve a third party notice upon the Honourable Attorney General and Six Others in the case which was granted in a ruling made on 1/9/2016 found at page 510 to 515. Consequently, The Attorney General, the Chief Secretary, Ministry of Education, Science, Technology and Vocational Training, Permanent Secretary Ministry of Finance and Economic Planning, Permanent Secretary, Ministry of Lands, Housing and Human Settlement, Permanent Secretary, Ministry of Health, Community Development, Gender, Elderly and Children and; Permanent Secretary, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation were joined in the suit as third parties.

So as to guide the parties in leading evidence in the case, fivee issues were framed on 2/10/2014:-

1. Whether the defendant has breached the terms and conditions of the lease agreement.

2. Whether the lease was extended for a further period of 25 years.
3. Whether the Lease agreement for 25 years was varied to be for 5 years renewable.
4. Whether the defendant is entitled to rent arrears from September 2011 and for eviction orders against the plaintiff for failure to pay rent.
5. To what reliefs are the parties entitled to.

However, Mr. Omarprash Gupta who testified on 29/5/2017 as PW1 had his testimony adjourned till on 3/7/2017 on which date Mr. Ntalula, learned advocate who represented the first appellant together with Mr. Nditi, learned advocate, moved the trial court to add two more issues which prayer was not objected to by learned counsel Mr. Msemwa who acted for the 1st respondent, Mr. Ntuli and Greener, both learned State Attorneys who acted for 2nd respondent. Learned counsel Mr. Mbakileki, was also in court although it was not indicated whom was he representing. The two issues added are:-

6. Whether the Saruji Corporation the former land lord failed to offer the terms of sale of the suit premises.
7. Whether there was fair and equal treatment between NDC and IMTU (the second plaintiff by the Ministry of Lands, Housing and Human Settlement Development.

Two witnesses testified for the plaintiff and four witnesses for the defence side. At the conclusion of the trial, the High Court rendered its first judgment on 27/2/2018 dismissing the suit. It however allowed the counter – claim to the extent of TZS 200,000,000.00 being rental charges due plus costs of the suit and pegged the rental charge per month to be TZS 40,000,000.00 which the appellants were ordered to pay from September 2012 to the date of the decision (27/2/2018). Such judgment was however amended to accord with and include certain facts and findings which the appellant, through learned counsel Mr. Mbakileki, found missing in the former judgment and moved the court to correct it. Such judgment is termed "Judgment (Amended pursuant to the Court order of 29/6/2018)".

The decision aggrieved the appellants and it is being challenged upon seven grounds of appeal. The grounds represent two kinds of complaints; one; those based on legal flaws covering grounds 1, 3 and to some extent ground 5 of appeal and; two; those founded on factual analysis and evaluation which comprises of grounds 2, 4, 6 and 7.

Upon our serious examination of the complaints and the record of appeal, we are convinced that the first category of the complaints, in

particular grounds one (1) and three (3), is decisive of the appeal. The two grounds raise these complaints:-

1. That, the trial judge grossly misdirected himself by omission to review the framed issues after barring admission of the Lease agreement, leading to the impugned decision relying on the said document while it was not before the court.
3. That, the trial judge grossly misdirected himself by failure, during the hearing of the Main Case, to separate the Third Parties impleaded in relation to the respondent's Counter Claim only, thereby treating them as parties to the Main Case while they were not.

We shall start with the first ground. According to the appellants, both before us through the submissions of Mr. Mbakileki and the written submission lodged earlier on, the trial judge was bound to review the issues framed at the commencement of the trial in line with the evidence after he had declined to admit the lease agreement as exhibit. The learned judge is further faulted for making reference to it in the amended judgment while it was not evidence at all after its admission as exhibit was refused. The provisions of Order XII Rule 7 of the Civil Procedure Act, Cap. 33 of the

Revised Edition, 2019 (the CPC) and the Court's holding in the case of **Japan International Cooperation Agency (JICA) vs Khaki Complex Limited**, Civil Appeal No. 107 of 2004 were cited to the effect that application of that Rule cannot be relaxed by the trial court. In insisting that cases must be decided on evidence properly adduced in court, the appellants referred us to the case of **Ismail Rashid vs Mariam Msati**, Civil Appeal No. 75 of 2015 (unreported) in which the case of **Shemsa Khalfa and Two Others vs Suleman Hamed**, Civil Appeal No. 82 of 2021 (unreported) was cited.

Mr. Chang'a who addressed us for the respondents, was completely opposed to Mr. Mbakileki's view arguing that framing of issues is the prerogative of the trial court and the parties can only assist by requesting it to do so. While putting reliance on the provisions of order XIV Rule 5 of the CPC, he contended that issues cannot be reviewed simply because a certain piece of evidence or document is rejected or not admitted in court. He cited the case of the **Registered Trustees of Arusha Muslim Union vs The Registered Trustees of National Muslim Council of Tanzania @ BAKWATA**, Civil Appeal No. 300 of 2017 (unreported).

In resolving this ground of appeal, we shall begin by first expounding some fundamental principles governing formulation and amendment of issues. It is common knowledge that issues constitute material propositions affirmed by one party that is a plaintiff which, if decided in his favour, will give a right to relief and denied by the other party that is, a defendant which, if decided in favour of the defendant will be a defence. It is common knowledge too that issues are framed on the first day of hearing and are ascertained from the pleadings, that is to say, issues are extracted from the pleadings as from them areas of conflict or difference is identified and therefore they guide the parties in leading evidence. Issues are the lamp-post which enlightens the parties to the proceedings, the trial court as to what is the controversy, what is the evidence required and where lies the way to truth and justice (see C. K. Takwani, **CIVIL PROCEDURE**, Fifth Edition, page 200). Order XIV Rules 1, 2 and 3 of the CPC are very clear on this position. That position is embraced in Rule 1(5) of Order XIV which provides:

> *"(5) At the first hearing of the suit the court shall after reading the plaint and the written statement, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of*

fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."

In view of the clear provisions of this Rule, Mr Chang'a must be right that the duty to frame proper issues rests predominantly on the court and the Rule is clamorous that the judge must apply his mind and understand the facts of the case before framing issues. The pleaders and or their respective counsel as officers of the court on whom lie the duty to assist the court to arrive at a just decision have the duty to assist or move the court to formulate proper issues. Issues arise either from the pleadings or documents produced by parties and in the event a certain issue is omitted or wrongly framed at the first day of hearing, the court is still empowered to add, amend or drop it (see Rule 5 of Order XIV of the CPC). In all these cases, there is no suggestion that issues should be amended or in any way rectified or reviewed because a certain evidence or document is rejected during the trial. The rationale is that, the evidence whether oral or documentary is intended to prove or disprove an allegation in the issue raised. Rejection, denial or refusal to admit evidence whether oral, documentary or physical affects the outcome of the case and not the issues framed.

Mindful of the above legal foundation, we have read the cases cited by the appellant's counsel and we see none having a bearing on the issue before us on this point. They are distinguishable. Consequently, we agree with Mr. Chang'a that this complaint is without merit.

Subsequent reliance on the lease agreement whose admission as exhibit was refused forms the second limb of the appellants' complaint in the first ground of appeal. Our understanding here is that the learned judge's refusal to admit the lease agreement as exhibit is non-issue here and there is no appeal by the appellants against the refusal. We take it that the refusal was proper. The complaint is centred on its repeated reference in the judgment hence forming the basis of the trial court's decision. Luckily, parties, too, are not at issue that the lease agreement was not admitted in evidence. It was, however, an annexure to the plaint. It is trite law that an annexure not admitted as an exhibit is not part of the evidence which can be acted on to make a finding as was reaffirmed in **Godbless Jonathan Lema vs Mussa Hamis Mkanga and Two Others**, Civil Appeal No. 47 of 2012 (unreported). In that case, the respondents' Voters' Registration Cards were produced in court but were not tendered and admitted as exhibit and the Court, reinforced by its decision in **Sabry Hafidhi Khalfan vs**

Zanzibar Telecom Ltd (Zantel) Zanzibar Civil Appeal No. 47 of 2009 (unreported), held that annextures attached along with either the plaint or written statement of defence are not evidence hence the registration cards should not be treated as evidence.

Since it is undisputed that lease agreement which was annexed to the amended plaint and marked as "IMTU-5" was not admitted in court as exhibit, then it did not form part of the evidence hence could not be relied on in making any finding. It was no evidence at all. It is apparent from the plain reading of the judgment that there was repeated mention and reference to it and its terms and conditions by the learned judge as rightly complained by the appellants despite the learned judge's appreciation that it was not admitted due to some technicalities. Worse still, it even formed the basis of certain crucial findings. One such finding is the 1st respondent's right to be paid rent by the appellant as reflected at page 1675 of the record where the learned judge stated:-

> *"Based on the above evidence,* ***by entering into the lease agreement with Saruji Corporation, the Government of Tanzania foresaw that the plaintiff could claim that they were allocated the plot for good, something which is not the case****. NDC served*

them with a letter that they were lawful owners of Plots No. 2338 Block "H". That fact is clearly demonstrated by the Title Deed Exhibit D1 which shows that they own Plot No. 2348 block "H' at Mbezi. The differences for Title No. 2348 and 2338 was clearly elaborated by DW3 Kajesa Minga. In fact DW3 answered the allegation by the plaintiffs that the plot where they operate their business is unoccupied to be unfounded. ***So, even the contention that rent was demanded by NDC on 3rd February, 2015 while their title deed is of since April, 2015 is without merit. Even assuming such argument is anything to go by that NDC had no title deed at the time they signed the lease agreement with Saruji Corporation they had no such title deed.*** *It was learnt in due course of hearing that almost all government entities, Corporations inclusive, had by then no title deed.*

That being the case, NDC has the right to receive rent*. Now how much rent?"* (Emphasis added)

There is no doubt therefore that the learned trial judge considered the lease agreement and acted on it while it was not part of the record and hence no evidence at all. That was unjust and the trial court judgment cannot therefore be sustained. The complaint has merit.

We next consider ground three (3) of appeal in which the learned trial judge is being faulted for failure to separate the proceedings in the main case between the appellants and the 1st respondent and the one between the appellants (defendants in the counter-claim) and the third parties. According to the appellants, it was improper for the cases to be dealt with as one case and allowing third parties to participate in the trial between them and the 1st respondent (in the main case) because the case between the 1st respondent and the third parties was for the right to be indemnified as opposed to the case between them and the 1st respondent which was based on lease agreement. Their major contention is that the main case ought to have been heard first. Mr. Chang'a found no difficulty to concede that there was non-compliance by the judge on the third party procedure but was quick to comment that no injustice was occasioned to the appellants. He offered no reason for his assertion.

In the light of the contending views by the learned counsel, the central point for our determination is whether the basic concept on which third party procedure operates as set out under Order 1 Rules 14, 16 and 17 of the CPC was adhered to and it's obtaining consequences in the event of its

violation. We shall begin by expounding the law on third party procedure. We begin by quoting the relevant Rules as hereunder:-

> *"14.-(1) Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party")-*
>
> *(a) any contribution or indemnity; or*
> *(b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff,*
> *the defendant may apply to the court for leave to present to the court a third party notice.*

Furthermore, Order 1 Rules 16 and 17 provides:

> *16-(1) The court shall cause to be serve a copy of third party notice presented to it on the third party in accordance with rules relating to service of summons.*
> *(2) A copy of the third party notice shall also be served on each of the other parties to the suit in accordance with the provisions of rule 2 of Order VI as if such notice were a pleading other than a plaint.*
>
> *17. Where a third party notice has been served on the third party, the third party shall, if he wishes to dispute the plaintiff's claim in the suit against the defendant*

presenting the third party notice or his own liability to the defendant, within twenty-one days of the service of the third party notice upon him or such longer period as the court may have directed or as the court may, on the application of the third party, direct, present to the court a written statement of his defence."

As would be discerned from the provisions above, the essence of third-party procedure is to permit a defendant to bring into the case a person who is not a party to the case whom he believes that he has a right to indemnity in the event he is found liable in the suit preferred against him by the plaintiff. Such person is joined as a third party and not as a defendant [(see **Hasnain M. Murji vs Abdurahim Salum t/a Abdurahim Enterprises**, Civil appeal No. 6 of 2012 (unreported)]. To succeed on that, the defendant is enjoined to apply for leave of the court to join such person which is heard and determined ex-parte and once granted, a third party notice should be served on the third party who is, in terms of Rule 17, entitled to file a defence (written statement of defence) either against the defendant bringing him into the case over his right to indemnification or against the plaintiff's claims over the defendant's liability.

Explaining on this procedure, the learned author, **Mulla, Code of Civil Procedure,** Vol II, 15th Ed, p. 1303 has this to say:

> *"In invoking the third party procedure what is material is not the plaintiff but the right of the defendant to indemnity from the third party":*

And at page 1014 the author further says:

> *"The policy behind this rule is that the defendant who has got a claim against a third party need not be driven to a fresh suit against the third party to put the indemnity in his favour into operation or to establish his entitlement to contribution from the third party.* ***The claim and rights interse of the defendant and the third party have to be decided in the third party proceedings."*** (Emphasis added)

[See also **Hasnain M. Murji vs Abdurahim Salum t/a Abdurahim Enterprises** (supra)].

Rule 18 of the CPC, in imperative terms, gives the procedure or guideline to be followed by the trial court upon the third party lodging a written statement of defence. Given its significance in the determination of the issue before us, we take the liberty to cite it in extenso thus:-

> *"18(1)* ***where a third party has presented a written statement of defence the court shall*** *on the*

application of the defendant presenting the third party notice or on the application of the third party or, where the third party has disputed the plaintiff's claim against the defendant, on the application of the plaintiff, or on its own motion, ***fix a date for the giving of directions and may on such date, if satisfied that there is a proper question to be tried as to the liability of the third party in respect of the claim made against him by the defendant, order the question of such liability to be tried in such manner, at or after the trial of the suit, as the court may direct or, if the court is not so satisfied, pass such decree or make such order as the nature of the case may require.***

(2) The court shall cause a notice of the date of giving directions to be served on the defendant presenting the third party and on the third party and on such other parties to the suit as the court may direct, in accordance with the rules relating to service of summons." (Emphasis added)

The Rule provides two distinct procedures to be followed depending on the nature of defence advanced by the third party in the written statement of defence. One, is where the written statement of defence raises a defence against the defendant's claim of the right to indemnity and two, is where the defence is against the plaintiff's claim against the defendant.

Crucial in both situations is that where the third party disputes the claims by either the defendant against him or the plaintiff's claim against the defendant presenting a third party notice, the trial court is enjoined, either upon being moved by the parties or on its own motion, to set a date on which the relevant parties should be notified to attend for it (the court) to give directions on the way forward. In case of the court finding that there is need to adjudicate on any disputed claim by the third party, it shall decide either to hear and determine it in the course of hearing the original suit or dealing with it after conclusion of the trial of the main suit. Otherwise, if satisfied that there is nothing worth determination, the court is mandated to pass a decree or make any other order necessary in the circumstances of the case.

In the instant case, as demonstrated above, the record is clear that the respondent, in her amended written statement of defence raised a counter – claim against the appellants who, in turn applied and was granted leave to file and serve a third party notice. Accordingly, a third party notice was served to the six third parties (3rd parties) herein. As rightly submitted by Mr. Mbakileki before us and in the written submissions, the third party notice was in respect of the appellants' (defendant in the counter – claim)

right to indemnity from the third parties in respect of the counter – claim only. It was meant to bring the third parties into the case for indemnity in the event of the appellants being held liable in her case with the respondent herein. All the same, the third parties proceeded to lodge a joint written statement of defence in which both the appellants' right to indemnity from the third parties and the appellants' claims against the respondent in the main suit were vehemently disputed. By so doing, there arose a dispute between the appellants and the respondent founded on lease agreement (main or original suit) as well as a dispute between the appellants and the third parties based on the right to indemnity. Besides, there still existed a cross suit (Counter-Claim) between the respondent and the appellants.

In view of the above situation and in line with the exposition of the law, it was incumbent upon the learned trial judge to conduct the trial in conformity with the third party procedure as above expounded by either upon being moved by the parties or on its own motion to set a date for giving directions on how the three cases would be tried. Conversely and as rightly complained by the appellants, the record of appeal is silent on any attempt by the learned judge to comply with the third party procedure. It is, instead, clear that after the court was, on 22/05/2017 notified by Mr.

Mwakahesya, learned Senior State Attorney, who acted for the third parties, that the third parties had already lodged their joint written statement of defence, the case was straight away scheduled for hearing on 26/05/2017 on which date trial commenced by recording the testimony of Mr. Omaprash Gupta (PW1) who was cross-examined by Ms. G. Aden who together with Mr. Hosea Mtulo, both learned State Attorneys, represented the third parties. Such was also the case when Subrarao Katuri (PW2) testified who was cross – examined by Mr. Hosea. Even when David Basu (DW1) for the respondent's side and Prof. Silvia S. Temu (DW2) for the third Parties' case gave evidence, they were respectively cross-examined and examined in-chief by Ms. Aden and Mr. Mwakahesya. That is a clear indication that three cases were tried as one case between the appellants as plaintiffs on the one side and the respondent and third parties as defendants on the other side.

In the circumstances, we indeed agree with Mr. Mbakileki that the appellants' complaint in ground three (3) of appeal is clearly borne out by the record that the trial of the case was conducted as an ordinary case involving the third parties to the counter-claim as defendants to the original suit between the appellants and the respondent. In the circumstances it became difficult to separate which evidence was in respect of which claims,

between the appellants and the respondent (in the main case) or between the appellants and the third parties (on the issue of indemnity) or between the respondent and the appellant (in the counter-claim). Since cases are decided based on clear evidence, the manner the case was conducted occasioned injustice to the parties. That is evident from the manner the learned judge briefly and casually analyzed and evaluated the evidence in respect of the third parties' responsibility to indemnify the appellants and also on the appellants' liability in the counter-claim and hence the conclusion arrived at. For the latter case, for instance, the record loudly tells this at page 1676 (page 14 of the judgment):-

> *"The plaintiffs claims for indemnification by third part(ies). The evidence of PW1 shows there were various correspondence letters showing that the Government would offer them plots and maximum co-operation towards achieving that goal as agreed in the MOU (See exhibit s P2, P3 and P40. PW1 says was a bit shocked upon receiving a letter from the Chief Secretary that they should sort out their demands with the relevant Ministry (see exhibit P5). I see no fault. The plaintiff never heeded to that directive. S. actually two plots had been allocated to them. Further they ignored the offer for the plots at*

Bunju and Kigamboni. Payment of rent under the circumstance is inevitable."

On the face of the excerpt, no arguments of the parties are shown and even the liability of the third parties to the appellants was not conclusively determined. It escaped the minds of the learned judge that the third parties were brought into the case by the appellants (defendants in the counter-claim) and not by the appellants as defendants. Consequently, they participated in the case as defendants. To say the least, had the learned judge complied with the law on third party procedure and appreciated the existence of the counter-claim, such uncertainties in the judgment would not have arisen. With respect, by such violation, the High Court misdirected itself on the conduct of the whole matter resulting into miscarriage of justice vitiating the whole trial (see **Hasnain M. Murji vs Abdurahim Salum t/a Abdurahim Enterprises** (supra).

In view of the above, we need not delve into other grounds of appeal as these two grounds of appeal sufficiently dispose the appeal.

In the result we allow the appeal and hereby proceed to quash and set aside the proceedings from 29/05/2017 immediately after Mr. Ntalula had informed the trial court that he had filed and served the third parties with a

reply onwards, judgment and the decree by the High Court. We direct the record to be remitted to the High Court for it to hear and determine the case according to law but before another presiding judge. Given the nature of the infraction leading to this outcome, we make no order for costs.

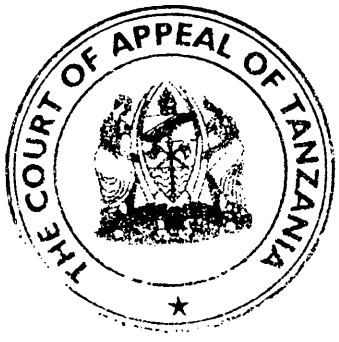
DATED at **DAR ES SALAAM** this 15th day of August, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2022 in the presence of Mr. Bernard Mbakileki, learned counsel for the appellant and Mr. Salehe Manoro, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL