IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: WAMBALI, J.A., MAIGE, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 276 OF 2020

NICHOLAUS MWAIPYANA .....APPELLANT

VERSUS

THE REGISTRED TRUSTEES OF LITTLE SISTERS OF JESUS TANZANIA .....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, Mwanza District Registry at Mwanza)

(Rumanyika, J.)

Dated the 11th day of March, 2019

in

Land Case No. 44 of 2016

JUDGMENT OF THE COURT

22nd & 30th August, 2023

MAIGE, J.A.:

The dispute at hand pertains to the ownership of a landed property on Plot No. 726 Block "A" at Mkolani area within the City of Mwanza with certificate of title No. 3538 LR (the suit property). The suit property was undeniably registered for the first time in the name of Deogratius William Kalekwa (DW1), in December, 2011. It is also common ground that, the suit property is currently in the name of the respondent having been transferred by DW1 to them way back

in 2013. The dispute, it would appear, is whether the appellant acquired interest on part of the suit property before its registration and subsequent transfer to the respondent.

At the High Court of Tanzania at Mwanza (the trial court), the respondent was the plaintiff and the appellant was the defendant in an action for vacant possession of the suit property and for general damages arising from loss of use of the same. The respondent asserted to have purchased the suit property from DW1 in 2013 and transferred the same in the names of "Little Sisters of Jesus Tanzania" without inserting the words "Registered Trustees." The error was subsequently rectified by the relevant land authority and the full name of the respondent was inserted in the certificate of title. When the respondent were purchasing the suit property, it was further alleged, the appellant was a tenant in a house at the suit property. After the transfer of the suit property in the name of the respondent had been made, it is asserted, the appellant started constructing a structure which extended to the suit property and thus, the institution of the suit.

In his written statement of defense, the appellant, while admitting that the respondent purchased a landed property from DW1, it was his assertion that the purchase agreement did not extend to a piece of land forming part of the suit

property which was purchased by the appellant from DW1 way back in 2008. At page 3 of the amended written statement, the appellant averred as follows:

> *"3. That apart from the above agreement, the defendant and Deogratius Kalekwa William agreed to process separate Certificate of Title in respect of the same Plot, which by then was not registered. To the contrary, the seller (Deogratius Kalekwa William) alone proceeded to process the Certificate of Title which was issued on his own name as plot no. 726 Block "A" Mwanza City without notifying the defendant. Therefore, the plaintiff's allegation that the defendant carved part of the suit plot from the plaintiff's plot are untannable. "*

The appellant vehemently denied construction of a structure extending unto the respondent plot maintaining that his structure was constructed before the respondent had purchased the suit property.

In view of the facts in the pleadings, the trial court framed two issues namely; whether the plaintiff is the lawful owner of the suit property and to what reliefs are the parties entitled. Subsequently, an issue as to whether the appellant had interest on part of the suit property was added.

Sister Monica Naasi (PW1) was at the material time, a member of the respondent. It was her evidence that, the respondent purchased the suit

Property from DW1 in 2013 at the purchase consideration of TZS 50,000,000.00. She testified that at the time of the purchase, the suit property was in occupation of the appellant as a tenant. She said, the appellant's lease agreement was terminated by DW1 after selling the suit property to the respondent as per exhibit P3. She further testified that, the suit property was at the beginning, mistakenly registered in the name of the society. The error was however, subsequently rectified by the Registrar of Titles and the correct name of the respondent inserted. She produced, which were admitted as exhibits P1 and P2 respectively, the corrected certificate of title and the declaration by the Registrar of Titles to that effect.

Shaban Mpuya (PW2), testified that, he was the chairperson of Mkolani area at the material time. He recalled to have unsuccessfully reconciled a dispute between the appellant and the respondent subsequent upon the purchase of the suit Property by the respondent from DW1. In the said dispute, the respondent was accusing the appellant for constructing a structure on the suit property. At the beginning, PW2 narrated, the appellant requested for extension of time to vacate the suit Property as per the letter in exhibit P4. His story was supported by Joseph Twahilwa (PW3), a resident of Mkolani area within the City of Mwanza.

For the appellant, DW1 testified that, in 2008, he sold the suit Property to the appellant at the purchase price of TZS 3,400,000.00 as per the sale agreement in exhibit D1. After the sale in question, it was further in his evidence, the suit Property was surveyed, and a certificate of title issued in his name in 2011. He said, having noted that the respective certificate of title incorporated the appellant's piece of land, he jointly with appellant, complained to the relevant land authority in writing. He conceded to have sold the suit property to the respondent in 2013 in the presence of the appellant, at the purchase price of TZS 50,000,000.00. He however offered the respondent TZS 5,000,000.00 as compensation in respect of the said portion of the suit property.

Sola Juma Chule, DW2 testified that he was, on the material time, the local leader of Mkolani area. He said, sometime in 2013, DW1 evicted the appellant from the house on the suit property after the same had been sold to the respondent. He said, before the purchase of the suit property by the respondent, the appellant had purchased a piece of land thereon from DW1. That, after his eviction as afore stated, the appellant became busy constructing a house on that piece of land which he purchased from DW1.

The appellant, testifying as DW3, told the trial court that, he purchased, in 2008, a piece of land measured 15 X 45 from DW1 which was adjacent to the

house sold to the respondent. He soon thereafter raised a column for construction of a storey house but eventually changed his mind to an ordinary house. He was express in his testimony of the information he received from DW1 in 2011 that, the piece of land he acquired from him had been wrongly included in the certificate of title under consideration. He added that, after being so informed, he together with DW1 lodged a written complaint to the land authority. He did not tender the alleged letter either. He testified further that, when the respondent was purchasing the suit property in 2013, he cautioned him about the error in the title as afore stated.

In his well-reasoned judgment, the trial judge started by pointing out some material facts in which the parties were not in dispute. Basing on those facts, he answered the first and third issues against the appellant and declared the respondent the lawful owner of the suit Property. In reaching to that conclusion, the trial judge took into consideration, upon assessment of evidence that, the appellant did not adduce sufficient evidence as to negate the *prima facie* evidence in the certificate of title (exhibit P1), that the suit Property belonged to the respondent. In addition, the trial judge was of the view that; much as there could be evidence suggesting that the appellant was a *bonafide* purchaser, in the absence of a counter claim against DW1, the same would not

affect the respondent's title on the suit property. Finally and in address of the second issue, the trial judge pronounced a judgment for vacant possession against the appellant and for payment of TZS 8,000,000.00 as general damages. Being aggrieved, the appellant has commenced the appeal under consideration doubting the correctness, validity and legality of the decision of the trial court on the following grounds:

1. *The learned Judge erred in law and facts by holding in effect that the acquisition of title over land by purchase is evidenced by the production of the Certificate of Title and not the Sale Agreement.*
2. *The learned Judge erred in law and facts by holding that in 2013, the respondent purchased the entire suit premises comprised in the Certificate of Title No. 35387.*
3. *The learned Judge erred in law and facts by holding that the respondent is the lawful owner of the suit premises since 2013 while her title was tainted with illegality.*
4. *The learned Judge erred in law by misconstruing the parole rule of evidence by holding that the Sale Agreement entered between the appellant (DW3) and Deogratius Kalekwa (DW1) which was admitted as exhibit D1 was altered or corrected by oral evidence of DW1 and DW3 while the sale of land under customary land tenure could even be done orally.*

5. *The learned Judge erred in law by his failure to answer at all issue number two that whether the appellant had an interest over a portion of suit premises before survey and subsequent allocation to Deogratius Kalekwa (DW1) and latter sale to the respondent.*

6. *The learned Judge erred in law and facts by holding in effect that the production of Certificate of Title defeats the interest of the appellant who was in possession of land under customary law prior to survey and subsequent allocation of the said land to Deogratius Kalekwa (DW1) and later sale to the respondent.*

7. *That the general damages granted by the trial court were excessive taking into account the circumstances of the case.*

In the conduct of the appeal, the appellant enjoyed the services of Dr. George Mwaisondola assisted by Mr. Gwakisa Gervas, both learned advocates whereas the respondent had the services of Mr. Innocent John Kisigiro, also learned advocate. We heard the counsel deeply submitting for and against the appeal. Admittedly, there submissions have been very instrumental in composition of this judgment.

We shall start our discussion with the last ground of appeal as to the correctness of the trial judge's award of general damages. On this, Dr. Mwaisondola submitted in effect that; although the award was within the discretion of the trial court, there was no factual materials on the basis of which

it would have been awarded. In any event, he submitted, the quantum of the general damages was quite excessive. Conversely, Mr. Kisigiro contended that the same was justified because the respondent have, as a result of the wrong at issue, to spend some money demolishing the appellant's structure on the suit Property.

As we said above, the trial court awarded general damages at the tune of TZS 8,000,000.00 as loss of use of the suit property. In the pleadings, it is apparent, the said damages were not pleaded. It was however sought in the relief clause. We are quite aware of the notorious position of law that, general damages need not be pleaded. Neither proved. We also subscribe to Mr. Kisigiro that, the award of general damages is within the discretion of the trial court. The discretion is, however, not absolute. As a matter of law, it has to be exercised reasonably, judiciously and on sound legal principles. In this case, the trial court awarded the respective relief without there being a finding on the assessment of the same. There was as well no factual finding of the casual connection between the wrong and the alleged damages. In the circumstances, therefore, it cannot be said that the discretion was exercised reasonably and judiciously as the law requires. On that account, therefore, we allow the seventh ground of appeal and set aside the trial court's award of general damages.

We now turn to the sixth ground of appeal which faults the trial court in holding that; mere production of certificate of title defeats customary interest of a third party acquired before registration of the same. Dr Mwaisondola submitted that the trial court was wrong in disregarding the appellant's evidence of prior customary interest on part of the suit property on a wrong presupposition that the respective interest was extinguished upon the suit property being registered in the name of DW1 and subsequently transferred in the name of the respondent. To substantiate his contention, the counsel made reference to the provision of section 33(1) (b) of the Land Registration Act, Cap. 34 of the Laws of Tanzania and the authorities in **Suzana Kakubukubu and Two Others v. Walwa Joseph Kasubi and Another,** Civil Appeal No. 14 of 1991 (unreported), **Mwalimu Omari and Another v. Omari A. Bilali** [1999] T.L.R. 433 and **Jane Kimaro v. Vicky Adili (As an Administratrix of the Estate of the Late ADILI DANIEL MANDE)** [2020] TZCA 1804 (6 October 2020, TANZLII) which support the position.

We have however carefully read the judgment of the trial court and established that nowhere has the trial judge held, as a point of fact that the appellant had a prior ownership interest on the suit property before registration of the same. More importantly is the fact that, there is nothing in the judgment

to the effect that, a grant of certificate of title extinguishes prior ownership interest on the registered land. What the trial judge said was that, a certificate of title constitutes a prima facie evidence of the title of the holder therein. We shall deal with this proposition when addressing the first ground of appeal in which we shall also consider the provisions of section 33(1) (b) of the Land Registration Act. Having said that, we dismiss the sixth ground of appeal for being misconceived.

We pass to the first ground of appeal where the trial court is faulted in holding in effect that, acquisition of title over a land by purchase is evidenced by the production of a certificate of title and not sale agreement. Before we proceed with the ground, we find it necessary to put the record correct that, the trial court did not rule out that a sale agreement cannot prove acquisition of title as suggested in the respective ground of appeal. Instead, the trial court held in effect that certificate of title constitutes a prima facie evidence that the holder therein is the owner of the property.

In his submission on this ground, Dr. Mwaisondola contended that, while the respondent traced his root of title on the suit property from a purchase agreement with DW1, instead of producing the alleged purchase agreement into evidence, he only produced the certificate of title in exhibit P1. With that

omission, he submitted, the case was not proved on balance of probability. The sale agreement was also very material in resolving the issue of whether the suit property was sold to the society or its registered trustees and whether the same covered the piece of land that was allegedly purchased by the appellant previously, Dr Mwaisondola further submitted. It would on top of that establish if the purchase price was TZS 50,000,000.00 as alleged by the respondent or TZS 45,000,000.00 as asserted in the defence evidence, he added. To substantiate his view, the counsel referred us to the case of **Paulina Samson Ndawanya v. Theresia Thomasi Madaha** [2018] TZCA 218, (11 October 2018, TANZLII)

In refutation, Mr. Kisigiro submitted that, once the transfer of a landed property is duly registered, the best evidence to prove title of the purchaser is the certificate of title itself. The issue of the amount of the purchase price, he submitted, is resolved by the certificate of title because in the endorsement signifying registration of the transfer, the figure of the purchase price is clearly stated. The authority cited is in his contention, irrelevant in the facts at issue.

We have closely followed the counsel's debate on this issue and we shall decide herein after which is the correct position having regard also to the effect of section 33(1) (b) of the Land Registration Act which shall be our starting point. It reads as follows:

"33-(1) The owner of any estate shall, except in case of fraud, hold the same free from all estates and interests whatsoever, other than-

(a) Any incumbrance registered or entered in the land register.

(b) the interest of any person in possession of the land whose interest is not registrable under the provisions of this Act."

What is clear from the above provision is that mere registration of title does not extinguish unregistered prior interest thereon. In the judgment, the trial court observed that, a certificate of title was a conclusive evidence of the ownership of the suit property. In our view, that is the correct position of law according to section 40 of the Land Registration Act. There are many decisions which support the position. See for instance, the case of **Amina Maulid & Two Others v. Ramadhani Juma** [2020] TZCA 19 (25 February 2020, TANZLII**)** where it was stated:

"In our considered view, when two persons have competing interests in a landed property, the person with a certificate of title is always to be taken the lawful owner unless it is proved that the certificate was not lawfully obtained."

Much as a certificate of title constitutes a presumption that the holder thereof has a better title, the presumption, we agree with Dr. Mwaisondola, can be rebutted upon adducing evidence of prior interest. We would add that, where, like in this case, the root of title is traceable from disposition of a land already registered, the provisions of section 33(1) (b) of the Land Registration Act should be read together with section 67 (a) (i) (ii) of the Land Act which provides as follows:

> *"(b) a person obtaining a right of occupancy or a lease by means of a disposition not prejudicially affected by notice of any instrument, fact or thing unless-*
>
> *(i) it is within that person's knowledge, or would have come to that person's knowledge if any inquiries and inspections had been made which ought reasonably to have been made by that person; or"*
>
> *(ii) it has in the disposition as to which a question of notice arises, comes to the knowledge of the person's advocate or agent as such if such inquiries had been made as ought reasonably to have been made by that advocates or agent as such, except that the covenant in this paragraph does not exempt the person referred to in this paragraph from any liability under or from any*

obligation to perform or observe any covenant, condition, or restriction contained in any instrument under which his title is derived, mediately or immediately, and that liability or obligation may be enforced in the same manner and to the same extent as if this covenant were not part of the disposition."

It is our further view that, for the presumption under discussion to be rebutted under section 33 (1) (b) of the same Act, the person seeking to rebut the same must produce not only evidence of prior ownership interest over the respective land but evidence of prior possession or use of the same as well. In this case, while the appellant produced a sale agreement in exhibit D1 which does not have a description of the purchased property, no concrete evidence was adduced to the effect that the appellant had been in possession or use of the alleged land before registration of the suit property in the name of DW1, the respondent's predecessor in title. To the contrary, there is irrefutable evidence that until in 2013 when the respondent purchased the suit property, the appellant was just a tenant.

The respondent as the facts speak, were not the original registered owner of the suit property. They just acquired the same by way of purchase in 2013.

Under the express provision of section 67 (1) (b) of the Land Act, therefore, they would not be prejudicially affected by a notice of any prior interest not within their knowledge or that which ought not to be in their knowledge upon inquiry or inspection. The appellant neither pleaded nor adduced any evidence to the effect that the respondent had prior actual or constructive knowledge of the alleged interest. That is so notwithstanding his evidence and that of DW1 that, he was aware since 2011 that his alleged interest had been incorporated into the certificate of title in question. In the absence of a caveat into the land registry, how could the respondent know if there any interest or incumbrance on the suit property?

It was submitted for the appellant that under section 64(1) of the Land Act, the respondent acquisition of title on the suit property in so far as it emanated from a purchase agreement, was only provable upon production of the respective purchase agreement. For clarity, we shall reproduce the relevant provision hereunder:

> *"64-(1) A contract for the disposition of a right of occupancy or any derivative right in it or mortgage is enforceable in a proceedings only if-*

(a) the contract is in writing or there is a written memorandum of its terms;

(b) *the contract is in writing or the written memorandum is signed by the party against whom the contract is ought to be enforced."*

The above provision, in its clear and unambiguous words, does not provide for the way of proving ownership of a landed property but rather, for the manner and conditions under which a contract for purchase of land can be enforced. It would have been relevant perhaps if the respondent had instituted a suit against DW1 for specific performance of the sale agreement or for mandatory injunction compelling DW1 to perform any terms of the contract. It cannot apply in the case at hand where the claim is for vacant possession against a person not privy in the purchase agreement.

Consequently, the authority in **Pauline Samson Ndawavya v. Theresia Thomasi Madaha** (supra), does not apply as the dispute therein was whether the vendor sold the suit property to the purchaser. At page 11 of the decision, the Court remarked that, in deciding whether the purchaser proved the case in the circumstances, he was obliged to establish existence of the contract, fulfillment of her part of bargaining and breach of the terms of the contract by the vendor. The Court was inspired by the commentary of the learned author Sir

P.C. Mogha in his "The Principles of Pleadings India (14th Edition) at page 269 thereof, in the following words:

> " *In a suit brought on a contract, the contract must first be alleged, and then its breach, and then the damages. The actual contract which was in force between the parties should alone be alleged."*

In our opinion, therefore, the first ground of appeal is devoid of any merit and it is hereby dismissed.

We turn to the second ground of appeal in which the trial Court is criticized in holding that the respondent purchased the entire suit Property. The submission for the appellant is based on the proposition that, acquisition of title by way of purchase cannot be proved by production of certificate of title. Since we have already held in relation to the first ground of appeal that, a certificate of title is a conclusive evidence of title on a registered land, it is obvious that unless rebutted, it is, in the same way, a conclusive evidence of the transactions conferring title on the holder of the certificate, including purchase agreement. Therefore, in the case of **Leopold Mutembei v. The Principal Assistant Registrar of Titles and Another** [2018] TZCA 213, (11th October 2018, TANZLII), it was observed that, aside from being a conclusive proof of

ownership over land, a certificate of title is "*evidence confirming the underlying transactions that conferred or terminated the respective titles to the persons named therein.*"

We have also considered the appellant's admission both in pleadings and evidence of the fact that; his alleged interest was included in the certificate of title in question which was the basis for the respondent's purchase of the suit property. Therefore, as the certificate of title was, at the time of the institution of the suit, in the name of the respondent, the appellant cannot be heard saying that the respondent did not purchase the entire suit Property. The second ground of appeal is, therefore, dismissed.

We proceed with the third ground of appeal as to whether the respondent's title on the suit property was tainted with illegality. In his submission, Dr. Mwaisondola linked the asserted illegality with the fact that, the respective certificate was initially in the name of the respondent's association and subsequently corrected to read in the name of its registered trustees. Without much ado, we find this ground misplaced. The reason being that, although errors in the initial certificate of title and the subsequent rectification were pleaded in details at paragraph 5 of the amended plaint, they were not specifically denied in paragraph 5 of the appellant's amended written statement

of defence. As such, the alleged illegality was not pleaded at all. Consequently, it was neither framed into issue nor testified upon. The issue is being raised for the first time by way of submissions. In our opinion, it being a pure factual issue, could not be proved by submissions, for submissions are mere legal arguments from the bar with no evidential value. For those reasons, the third ground of appeal is also dismissed.

This now takes us to the fourth ground of appeal wherein the application of the parole rule of evidence by the trial judge is doubted for the reason of his finding that, the sale agreement in exhibit D1 was altered or corrected by oral evidence of DW1 and DW2 while in fact a sale of land under customary could even be done orally.

We wish to state, before we proceed further that, no evidence was adduced during trial to the effect that the appellant's alleged title was based on customary land tenure. Besides, no authority has been cited to support the view that a landed property as the one in dispute could be purchased by way of an oral purchase agreement. In the absence of that, and since the issue did not arise during trial, we will refrain ourselves from making a decision thereon. We shall only discuss if the parole rule of evidence was correctly applied in the decision under consideration. For proper appreciation of the contention, we shall

here under reproduce the relevant part of the judgment at page 154 of the record of appeal where the rule was considered:

> *"Three, the DW3's plot allegedly sold to him by DW1 had its size, and, in terms of neighbors location in the sale agreement (Exhibit D1) not defined. DW1 only stated it in his oral evidence. Parole rule of evidence (Section 110 of the Evidence Cap. 6 R.E. 2002 requires that a written contract cannot be altered or corrected orally. It sounds to me that the defendant may have purchased a plot from DW1 but somewhere else."*

In relation to the above finding, the trial judge is faulted for applying the rule incorrectly. With all respects to the learned counsel, we cannot agree with him. The principle was correctly applied in deciding whether the purchase agreement in exhibit D1 was capable of rebutting the presumption in exhibit P1 that the respondent was the lawful owner of the suit Property. We shall account for our position henceforward.

It is the law, according to section 101 of the Evidence Act that if there be a contract which has been reduced to writing, verbal evidence will not be accepted so as to add to or subtract from or in any manner to vary or qualify the written contract. The rationale behind the rule is to uphold the value of written proof

and effectuate the finality intended by the parties. The applicability of the rule, according to the authority in **Jos Hansen and Soehne v. GK. Jetha Limited** [1959] E.A. 1563 is conditional upon there being established that the terms of the parties agreement are wholly contained in the written document. See also **Charles Richard Kombe t/a Building v. Evarani Mtungi and Others** [2017] TZCA 153, (8th March 2017, TANZLII) where it was observed:

> *" Once it is shown as in this case that the contract was reduced into writing then in terms of S. 101 of the Evidence Act, Cap 6 R.E. 2002 (TEA), a party to such a contract is not permitted to adduce oral evidence contradicting, varying, adding or subtracting from its terms."*

In this case, the appellant in his amended written statement of defence pleaded in effect that the written agreement in exhibit D1 constituted the entire agreement between him and DW1. Besides, the appellant did not plead existence of a collateral agreement connected to the purchase of the alleged interest on the suit Property. Neither did he lead any evidence on existence of the same. That aside, while exhibit D1 is absolutely silent on the size of the purchased property and the location thereof, in their testimony, DW1 and DW3 adduced oral evidence purporting to give description of the suit Property and the

location thereof. That being the case and indeed it is, we agree with the trial judge that, the oral evidence of DW1 and DW3 much as it sought to add some facts in the terms of the contract, is excluded under the parole rule of evidence. The fourth ground of appeal is thus dismissed.

We turn to the 5th ground of appeal wherein the trial judge is faulted for failure to determine the issue of whether the appellant had prior interest on the suit Property. In our reading, however, we entertain no doubt that, the issue was duly considered and answered against the appellant for two main reasons. The first reason which we pointed out above, is that, in the absence of the oral evidence of DW1 and DW3 which is excluded under the parole rule of evidence, exhibit D1 was incapable of proving that the land therein purchased is on the suit Property. Neither the size. It could not, for the same reason, the trial judge observed, correctly in our view, negate the respondent conclusive evidence of title as per exhibit P1. Another reason express in the judgment was that as the alleged agreement was between the appellant and the DW1, the issue could not be answered in favor of the appellant as against the respondent in the absence of a counterclaim against the respondent along with DW1. We entirely agree with the trial judge and dismiss the fifth ground of appeal.

In the final result and for the foregoing reasons, the appeal fails save only for the seventh ground of appeal which is allowed and the trial court's award of general damages set aside. To the extent of the other remaining grounds of appeal, the appeal is dismissed. The respondent is, in the circumstances, awarded only half of the costs of defending the appeal.

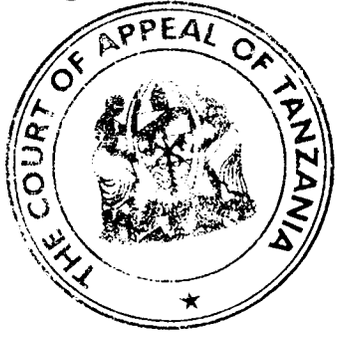
DATED at **MWANZA** this 29th day of August, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of August, 2023 in the presence of Ms. Marina Mashimba, learned counsel for the Appellant and Mr. Innocent Kisigiro, learned counsel for the respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL