IN THE COURT OF APPEAL

AT NYERI

(CORAM; WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 10 OF 2015

BETWEEN

GEOFFREY MUTHINJA…….....1ST APPELLANT

ROBERT BANDA NGOMBE…….....2ND APPELLANT

AND

SAMUEL MUGUNA HENRY.....1ST RESPONDENT

JOHN JEMBE MUMBA….....2ND RESPONDENT

REV. JOHN MAROO…….....3RD RESPONDENT

JOHN COLUMBUS GIKUNDA M'MWANJAH .....4TH RESPONDENT

BERNARD NJIRU AROZON.....5TH RESPONDENT

SAMUEL CHIVATSI MUNGA.....6TH RESPONDENT

JAMES MARANGU M'MUKETHA & 1750 OTHERS.....7TH RESPONDENTS

(An appeal from the Judgment and Decree of the High Court of Kenya at Meru (Makau, J) dated 26th February, 2015)

IN

PETITION NO. 14 OF 2014)

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JUDGMENT OF THE COURT

The appellants GEOFFREY MUTHINJA and ROBERT BANDA NGOMBE are "***men of the cloth***". They were until the controversial Annual General Meeting of the East Africa Pentecostal Church ("***the***

Church") held on 19th August 2010 the National Secretary-General and Treasurer, respectively, of the Church. They, together with SAMUEL MUGUNA HENRY, JOHN JEMBE MUMBA and REV. JOHN MAROO, the persons said to have been elected to office on that date, were sued at the High Court in Meru by the Trustees of the Church and some 1,750 other persons.

That suit, commenced by way of **Constitutional Petition**, alleged that the said elections spawned misunderstandings which generated a plethora of law suits filed by various interested parties in various courts in Meru and its environs. The petitioners therein, who are the 4th to 7th respondents in this appeal, alleged that the said multiple suits, including a dozen the particulars whereof were given, had all been filed against the spirit and letter of **Article 21** of the **Church's Constitution** which barred recourse to law in the resolution of intra-church disputes in favor of a hierarchical dispute resolution mechanism set out therein. Further, it was alleged that the said suits, together with the various injunctive and the court orders given therein, infringed upon and violated the petitioners' freedom of worship as guaranteed under **Article 32** of the **Constitution of Kenya, 2010**.

The injury caused to and apprehended by the petitioners and the church's adherents, pleaded as numbering 1.5 million countrywide, was pleaded at paragraph 11 of the Petition thus;

> "(**a**) ***The Petitioners are not able to elect office bearers.***
>
> ***(b) The Petitioners are not able to employ new preachers and/or clergy.***
>
> ***(c) The Petitioners are not able to transfer their employees, or promote or demote their workers, preachers and their clergy.***
>
> ***(d) The Petitioners' developments have come to a stand still.***
>
> ***(e) The Petitioner's members' freedom of association has been interfered with.***
>
> ***(f) Court Orders barring members from holding meetings is tantamount to stopping the members from worship meetings which are cardinal to fundamental freedom of worship.***
>
> ***(g) Church ministers are unable to access marriage certificates from the Registrar's office because of Court injunctive orders.***
>
> ***(h) Physical fighting has been experienced in some of the petitioners' churches caused by such wrangles as explained above."***

The Petition was accompanied by an affidavit by one **John Columbus Gikandi** sworn on 30th May 2014 in which he swore that for four years members of the church had been denied services through court orders stopping meetings of any kind; the development of churches had stagnated and the celebration of marriages among the youth of the church had been curtailed, among other deleterious effects of the various suits filed. He also swore that a group led by the appellants had completely ignored the call by church elders to meet and find a solution to the wrangles over elections.

By way of reply to that Petition **Rev. Samuel Muguna** the first respondent to it as in this appeal, on his own and on behalf of the 2nd and 3rd respondents with their written authority, swore an affidavit on 2nd October 2014 in which he conceded and confirmed the factual basis of the Petition and supported the prayers sought.

On their part, the appellants swore a replying affidavit through **Robert Banda Ngome** dismissing the Petition as frivolous and devoid of merit. They referred to the elections of 19th August 2010 as botched for having been conducted in violation of a court order stopping the same and conceded that all the suits pending in the courts arose from these elections. They dismissed the petitioners as agents and mercenaries acting on behalf of the 1st, 2nd and 3rd respondents to perpetuate violation of court orders.

The Petition came before **Makau J**, for a pre-trial conference where it was agreed by the parties that it be disposed of by way of written and oral submissions. These were filed and made, whereupon the learned Judge made the following findings;

> **(i) That the Petition as filed did meet the threshold in Anarita's case and was therefore proper in form.**
>
> **(ii) That Article 21 of the East African Pentecostal Church (EAPC) Constitution do not (sic) oust the jurisdiction of the courts to entertain disputes between members of the church after the laid down procedure has been followed strictly and more in case of a dispute thereafter.**
>
> **(iii) That the plaintiffs' suits in various courts have some issues pending before such courts which are not justiciable but Article 21 of the petitioner's constitution must be applied first in dispute resolution mechanism before a party can invoke the jurisdiction of courts of law, on issues related to breach of rules of natural justice being violated.**
>
> **(iv) The plaintiff's suits in various courts are not justiciable as EAPC constitution has made sufficient provisions for dealing with plaintiff's complaints.**

Consequent upon those findings, the learned Judge ordered that all but two of the cases (the excepted ones being one filed at the High Court and the other a criminal case) were null and void; infringed the petitioners freedom of worship and struck them out. He also ordered that the affected plaintiffs or any members of the church aggrieved by the contested elections be at liberty within 30 days to refer their dispute to the appropriate body of the church for determination, failing which such party be at liberty to file suit for redress. The learned Judge disallowed the prayer seeking a blanket bar to any suit or dispute by any member(s) or leader(s) of the church against it. Each party was to bear its own costs.

The appellants were dissatisfied with that decision and preferred this appeal in which they stated in their memorandum of appeal that the learned Judge erred in law in;

- **Striking out various suits filed by the appellants despite finding that they raised legitimate and justiciable legal issues.**
- **Failing to give effect to the appellants' right to fair trial under Article 50 of the Constitution and limiting it by subjecting it to the Church's Constitution.**
- **Equating the Church's Constitution to a statute.**
- **Holding that the appellants and others refer disputes over the election to non-existent organs of the church despite finding that the courts were the only recourse.**
- **Rendering a self-conflicting judgment.**
- **Failing to give Article 24 of the Constitution a purposive interpretation and hold that the respondents' right under Article 32 was not absolute.**

When the appeal was argued before us, **Mr. Kariuki** learned counsel

appearing with **Mr. Ndubi** for the appellants isolated three issues on which he sought this Court's decision, namely;

> **(a) Whether the suits struck out raised justiciable issues and whether striking them out was available to the learned Judge.**
>
> **(b) Whether the appellants were bound to refer their disputes to the church organs before approaching the courts and whether the learned Judge's order to that effect amounted to a limitation of the appellants' right to a fair trial.**
>
> **(c) Whether the petition before the High Court met the constitutional threshold set out in ANARITA KARIMI NJERU –VS- ATTORNEY GENERAL (**NO. 1) 1979 I KLR 154.

On justiciability, **Mr. Kariuki** submitted that the learned Judge in the first

instance categorically found out paragraphs 62, 63 and 65 of his judgment that the

various suits did raise justiciable legal issues. Counsel pointed out that it was the appellants case that they were denied a fair chance to participate in the Church's elections due to the inadequacy and insufficiency of the notice given. He also contended that it was a justiciable issue whether the respondents could interfere with the appellants' discharge of their duties as pastors in light of injunctions issued barring them from interfering.

Mr. Kariuki argued that even in matters affecting a church, a court would have jurisdiction to provide a remedy where it is shown that civil rights have been, or are in threat of being, violated. He cited in aid the decision of the former English House of Lords in **FORBES –VS- EDEN** [1867] L.R 1.S.C. & DIV.AC 568 which was quoted with approval in **MBUGUA –VS- OLANG** [1979] e KLR. He also relied on this Court's decision of **ARTHUR GATUNGU GATHUNA –VS- AFRICAN ORTHODOX CHURCH OF KENYA** [1982] e KLR and specifically to this passage in the judgment of, **Kneller Ag. JA;**

> ***"There are, however, various churches in Kenya with their own Constitutions, regulations and tribunals for those who voluntarily submit to them. If the church or a member of it complains in correct form to a court of law of any injury to a right in any matter of a temporal character or mixed spiritual and temporal character, the Court may ascertain whether the judgment or sentence pronounced was regular and by a competent authority and then give redress if justice so demands. This may involve inquiry into the laws, rules, form and procedure of the tribunal or authority of that church (see para 338 pages 160 and 161 Halsbury's Laws of England 4th Edition [1975] Vol.14)."***

Counsel faulted the learned Judge for exercising the draconian power of striking out proceedings yet he should not have done so since there were triable issues disclosed in the cases that he struck out, a position he buttressed by this Court's oft-cited decision in **DT DOBIE & COMPANY (KENYA) LTD –VS- JOSEPH MBACIA MUCHINA & ANOR** [1980] e KLR;

> ***"No suit ought to be summarily dismissed unless it appears to be so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it."***

Turning to the question whether the appellants were bound to first have followed and exhausted the church's machinery before filing those challenged suits, counsel answered in the negative, because the first suit was challenging the legitimacy of the very national office purportedly elected in defiance of a court order. He contended that the provision in the church's constitution requiring exhaustion of internal mechanisms applied to such matters as the transfer and discipline of pastors but not those where legal rights were involved. What is more, counsel continued, the church's national committee (***Halmashauri***) comprised the very persons whose election was under challenge. There were therefore no effective organs to hear the dispute within the church set up.

Mr. Kariuki asserted that the effect of the learned Judge's decision was to deprive the appellants of the right to a fair trial before a fair and impartial body contrary to **Article 50(1)** of the **Constitution of Kenya**, which, by dint of **Article 24** could not be limited. Citing the Supreme Court decision in **JUDGES & MAGISTRATES VETTING BOARD & 2 OTHERS –VS- CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 11 OTHERS** [2014] e KLR ('The Vetting of Judges case') he maintained that the Judiciary is the custodian of the rule of law and the rights or freedoms of individuals and courts therefore retain jurisdiction in all cases where violation of rights is raised. The learned Judge was criticized for curtailing instead of upholding the right to fair trial.

Mr. Kariuki concluded his submissions by questioning the competency of the petition before the High Court for lacking particularity. He charged that beyond alleging violation of the religion, no particulars were provided as required under the ANARITA KARIMI (Supra) decision as restated by a five Judge bench of this Court in **MUMO MATEMU –VS- TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** [2013] e KLR. He added that even if the Judge found that there was violation of the petitioner's freedom of religion, he should have resolved the issue in light of **Article 24(1) (d)** to the effect that they could not enjoy their rights to the exclusion of others, since rights are not absolute.

In his view, the learned Judge should have given effect to the right to a fair trial in favour of the appellants. He urged us to allow the appeal and reinstate the suits that were struck out.

Rising to oppose the appeal, **Mr. Mwenda** learned counsel for the 1st to the 3rd respondents denied that the Judge made a finding that the impugned suits raised justiciable issues. Rather he found that all the disputes related to disputes that were domestic to the church with most involving the transfer of pastors and overseers while two challenged the controversial elections. The basis for the challenge to the elections was the shortness of the notice of the same and there was at the time a properly constituted ***Halmashauri*** and the organs that could very well have handled the dispute. In fact, pointed out **Mr. Mwenda,** the appellants were themselves members of the Church's National Governing Council at the material time.

Counsel was emphatic that the ten suits struck out did not raise any justiciable issues as the church was a voluntary organization which required all its disputes to be resolved internally as per its Constitution, which ironically, had the 1st appellant as one of its signatories. He then made the significant statement that whereas the court has general supervisory power over any body, it comes in only after all internal mechanisms have been exhausted and that the learned Judge was perfectly entitled to strike out the challenged suits and to direct that the plaintiffs therein go through the church's dispute resolution mechanisms. He concluded by contending that the enjoyment of the right to fair trial presupposes that a party is properly before the court, which the appellants were not, in the stricken suits.

On his part, **Mr. Riungu** learned counsel for the 4th to 7th respondents wholly associated himself with the submissions by **Mr. Murangoo.** He then contended that the learned Judge was right to call for all the cases that were before various Magistrates courts as he exercised the supervisory jurisdiction of the High Court granted by **Article 165** of the Constitution. He urged us to dismiss the appeal.

In his brief reply, **Mr. Kariuki** reiterated that the ***Halmashauri*** did not exist and added that even if it did, the issue of the legality of the disputed elections would not be a matter for its settlement.

As this is a first appeal, our mandate is a broad one and involves, by dint of **Rule 29 (1)** of the **Court of Appeal Rules,** a fresh and exhaustive examination, re-evaluation and re-analysis of the entire record with a view to drawing our own inferences and making our own independent conclusion, on all the material before us. We pay a measure of deference to the findings of the first instance Court but are free to depart from them in appropriate cases, where they are founded on no evidence, constitute a misapprehension of the law or are plainly wrong. The latitude to depart is wider where, as in this case, there was no trial involving the taking of *viva voce* evidence in which case the first instance Judge would have had the added advantage of hearing and seeing the witnesses and so would have been better placed to judge their credibility and make a more informed judgment on the veracity of the opposing cases.

Having carefully considered the entire record, the submissions of counsel

and the authorities cited before us, we surmise that this appeal hinges on three not wholly unrelated issues namely;

(i) Whether the Petition before the High Court was competent.

(ii) Whether the plaintiffs in the various suits raised justiciable issues.

(iii) Whether the courts' jurisdiction to handle disputes between the Church and its members was ousted by Article 21 of the Church's Constitution.

On the competency of the Petition, the issues to be determined is whether

there was a constitutional matter raised in the first instance and, next, whether it was pleaded with sufficient particularity.

In the Petition, it was pleaded that the petitioners' right to freedom of religion as enshrined in the Constitution had been, and continued to be infringed by the impugned suits filed in various courts and the many court orders emanating therefrom. The specific article of the Constitution implicated as having been violated is **Article 32** and the manner in which the same was being breached was set out in the Petition as we have quoted earlier in this judgment.

The jurisprudence of this jurisdiction in this regard has been settled for a long time that a petitioner should be specific as to the right violated and give particulars of it. It is a rule of good sense that aids in the crystallization of issues before the court and, moreover, gives opportunity to the other party to know the exact nature of the complaint leveled against him and therefore be in a position to give an appropriate answer. It provides structure, sense and symmetry to the litigation and prevents it from being an unruly free-for-all. The **ANARITA KARIMI NJERU** and **MATEMU** cases (Supra) are clear and authoritative expositors of that position. Indeed, the Constitution of Kenya (**Protection of Rights and Procedure Rules, 2013**) reflect that thinking in requiring under **Rule 10(2)** that constitution petitions must contain, *inter alia,*

(i) The facts relied upon,

(ii) The constitutional provision violated,

(iii) The nature of injury caused or likely to be caused,

(iv) The relief sought.

Having perused the petition, we find no difficulty in finding and holding, as did the learned Judge, that the petition did meet the threshold of formal competency as set out in the aforesaid Rules and the case law. We say so quite cognizant of the fact that so long as there is a sufficiency of information, as to the constitutional right violated with particulars supplied, then a court of competent jurisdiction ought, in the spirit of a rights-centric constitutional dispensation such as ours, to take the matter up, investigate and provide redress or relief if merited, careful not to defeat substance at the altar of procedure. We say this while aware that in matters of rights, constitutional courts in some jurisdictions, notably the Supreme Court of India, has been so proactive in the protection of fundamental rights and freedoms as to assume jurisdiction upon being moved by letter in what is fashionably referred to as 'epistolary jurisdiction' and especially in the context of public interest litigation. See, for instance, **FERTILIZER CORPORATION KAMGAR UNION –VS- UNION OF INDIA** [1981] SC 344 (AIR).

In the case before us formality beyond letters was observed and we uphold the learned Judge on competency. The Petition was competent in terms of specificity and particularity as well as in capacity in that, the strictures of *locus stan*di having been done away with under **Article 22** of the **Constitution**, the appellants' objections that the church was not a party before any of the suits that were impugned could not prevail. It is now open to an organization such as a church, to file a petition in the interest of one or more of its members, as may any person acting as a member of or in the interest of a group of persons or in the public interest. The Petition was competent.

On justiciability, the learned Judge's specific finding was as follows;

"77. In order for an issue to be justiciable it must constitute a cause of action in law and it must be an issue concerning a right to property, contract or any other right. It must not be

domestic matter that can be dealt with [under/within] the law and regulations concerning a particular body or organization.

78. The issue complained of in various suits instituted by the petitioner's members concern legitimacy of the election held on 19th August 2010 in accordance with the petitioner's church constitution. They challenge procedural irregularities as well as malpractices which divest the said election [of] the crucial elements of freeness and fairness. The issues raised in various suits excluding HCC 30 OF 2013 and a criminal case No. 1012 of 2014 pending before court are matters which do fall within the domestic matters that can be dealt with by regulations of the petitioner's organization. The EAPC constitution has made sufficient provisions for dealing with complaints such as the ones raised by plaintiffs.

79. In view of the foregoing, I find the issues in various suits before various courts to be not justiciable."

With respect to the learned Judge, he seems to have conflated justiciability, which he properly espoused at the beginning of paragraph 77, with jurisdiction, which he introduced in the latter part of that paragraph and the succeeding ones. Indeed, his finding at paragraph 80 (iv) was that;

"The plaintiffs' suits in various courts are not justiciable as EAPC has made sufficient provisions for dealings with plaintiffs' complaints."

If a matter or subject is not justiciable, it remains so quite irrespective of where it may have been previously handled or mishandled. Thus, it is somewhat confusing that the learned Judge having found that the matters raised in the various suits were not justiciable, nevertheless went on to order, at paragraph 81(v), that the same disputes in those cases be referred to the appropriate body of the church for determination per its constitution failing which "***the aggrieved party shall be at liberty to file appropriate suit at the High Court or appropriate court for redress."***

In this latter part the learned Judge seems to endorse the justiciability of the claims lodged by the various plaintiffs, a position he was more emphatic about in earlier paragraphs of his judgment, hence the appellants' criticism that the judgment was self-conflicting. Indeed the learned Judge had made specific findings as follows;

Par 62. ***"…I find that where matters affecting legal rights are in issue or matters are affecting [the] Bill of Rights as is the case herein, the Courts cannot shut their eyes on such matters and declare as there is one element of spiritual character the court has no jurisdiction….***

Par 63. ***… Barring of filing of disputes concerning the officers of the society in a court of law by a member or members of society but instead follow the church organizational system do (sic) not oust the jurisdiction of court in matters concerning breach whether a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed or threatened.***

Par 64. I am entirely in agreement with the submissions by Mr. M. Kariuki for the 4th and 5sth respondents that justice can only be seen to be done if the parties are left to ventilate their claims and a determination be made by courts on merits but subject to society's constitution.

Par 65. I hold the position that [the] matters raised in various courts by various parties are matters of mixed spiritual and temporal characters(sic) whereas in others there is no spiritual character… The only place the members could think of and hope to have a fair determination of the claims as at the court of law the petitioner failed to initiate the dispute resolution mechanism as per its Constitution."

In these paragraphs the learned Judge seems to emphatically find, and correctly so, in our view, that there are certain disputes even within a church setting which are justiciable or cognizable by the courts save that the courts would entertain them only after attempts to resolve them internally have been exhausted.

We are of the view that the learned judge should in the circumstances have answered the question of justiciability in the affirmative.

This is so because it really has never been the law in this country that courts cannot touch disputes involving churches. Churches are not some enclaves where illegalities and violations of rights can be allowed to thrive in the Name of God. They are not beyond the sway of the Constitution and the search light of the courts. The courts may be slow to intrude, for good policy reasons, but in appropriate cases and at appropriate moments they will. We agree with the concluding sentiments of **Law JA** in his lead judgment in the **ARTHUR GATUNGU GATHUNA** case, (Supra);

> ***"I would dismiss this appeal in so far as it challenges the jurisdiction of the High Court. As I understand previous decisions of the High Court in comparable cases, the judges have refused to interfere with decisions arrived at by properly constituted tribunals established under rules governing recognized churches in Kenya, but they have never held that they had no jurisdiction in such cases."***

See also **PETER MUIRURI KABIRU & 2 OTHERS –VS- PAUL WANDATI KABUE** HCCC NO. 319 of 2009 (MILIMANI).

This brings us to the final and related issue whether **Article 21**` of the Church's Constitution ousted the jurisdiction of the courts in disputes involving members of the church. The said provision states;

> ***"1. No dispute concerning the affairs of the Society (the church) shall be referred to or instituted in a court of law by a member or members of the society but shall be dealt with by the following church organs, namely the board of elders, the parish council, the District Executive Committee and the National Committee."***

The article goes on to provide that the disputes are to be originated at the lowest church organ competent to deal with it with a hierarchical appeal system in place. Further at **sub-article 4**;

> "***Every church organ to which a dispute is referred shall keep a proper record of the proceedings, and decisions and the person who had made the complaint and any person affected by the reference shall be entitled to a copy of such proceedings and decision."***

It is plain to see then, that the Church did have a place a rather elaborate system for dispute resolution which the plaintiffs in the various suits ought to have had recourse to, and exhausted, before litigating in court. We concur with the learned Judge's categorical finding at paragraph 75 of his judgment thus;

> *"**That though the court has jurisdiction to deal with the plaintiffs complaints it is premature as they did not strictly follow the Church Constitution, providing for dispute resolution mechanism."***

We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with **Article 159** of the **Constitution** which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church

mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.

The learned Judge correctly found, as we do, that **article 21** of the Church's Constitution did not oust the jurisdiction of the courts. Indeed it could not. All it did in practical and pragmatic terms is postpone, permissibly in our view, the entry point by the courts and thus allow the Church, a voluntary organization, to have the first expansive go at resolving disputes within its ranks. That did not in any way deny the appellants and the plaintiffs in the various suits the right to a fair trial.

Before we conclude this judgment we must observe and express our displeasure at what appears from the record as a disobedience of court orders on the part of the respondents in going ahead to conduct elections on 19th August 2010 when such orders barred the elections. If those allegations be true, then it is a matter of much regret seeing that the church ought to be more virtuous and should never be seen to sink to the miasmic morass of disobedience and lawlessness that the world may revel in. They must take the higher road and be an example in all things pure, just and true. They are the light of the world, sworn to the path of peace. They must not be incendiary.

The upshot of our consideration of this appeal is that its challenge to the decree judgment of the High Court fails and it is accordingly dismissed, but with no order as to costs.

Dated and delivered at Nyeri this 28th day of October, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR