

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

CLARE AKOMBELWA MAC WANGI

1ST APPELLANT

KATONGO BWALYA

2ND APPELLANT

AND

THE ATTORNEY GENERAL

RESPONDENT

CORAM: Chashi, Mulongoti and Lengalenga, JJA

On 21st May, 2020 and 26th June, 2020

For the Appellant:

R. Msoni of Iven Mulenga & Company

For the Respondent:

Lt. F. Mandumbwa, State Advocate

JUDGMENT

Mulongoti, JA, delivered the Judgment of the Court

cases referred to:

1. ***R v Secretary of State for Wales Ex-parte Emery (1998) 4 ALL ER***
2. ***Sable Transport Limited v Commissioner of Lands and Zambia Airports Corporation- SCZ Appeal No. 132 of 2014***
3. ***Council of the Civil Service Union v Minister of State of Civil Service (1985) AC 374***
4. ***Nyampala Safaris (Z) Limited and four others v Zambia Wildlife Authority and six others (2004) ZR 49***
5. ***Frank Malichupa and others v Tanzania Zambia Railways Authority- SCZ Appeal No. 21 of 2008***
6. ***Lusaka City Council and National Airports Corporation v Grace Mwamba and four others- SCZ Appeal No. 21 of 1999***
7. ***Associated Provincial Picture Houses Limited v Wednesbury Corporation (194 7) 2 ALL ER 680***
8. ***R v Somerset County Council exparte Fewings (1995) 1 All ER 513.***
9. ***North Western Energy Co. Limited v Energy Regulation Board (2011) Vol.2, ZR 513***

Legislation and other works referred to

1. ***Cabinet Circular No. 12 of 1996***
2. ***Handbook on Civil Service Home Ownership***

1.0 Introduction

1.1 The appeal attacks the Judgment of her ladyship Nwa, J which dismissed the appellants' case for judicial review of the respondent's decision not to sale them the government flats they occupied as an incidence of their employment.

2.0 Background

2.1 The appellants (Clare Akombeiwa Macwangi and Katongo Bwalya) were employed by the Zambia Education Projects Implementation Unit (ZEPIU), a project under the Ministry of Education.

2.2 During the course of their employment, the appellants were accommodated at plot No. 2764/1-2 Twin Palm Road, Kabulonga. The appellants occupied flats No. 1 and 2 at the said plot, from ^{1st} May, 1991 and December, 1994 respectively.

2.3 Following the government decision, to sale government houses, the appellants applied to ZEPIU to purchase the flats which they were occupying in accordance with the guidelines on the sale and purchase of government pool houses.

2.4 Out of a group of 14 employees of ZEPIU that applied, 12 were given offer letters to purchase the flats except the two

appellants. They were told that ZEPIU did not have certificates of title to their flats. They were referred to the lands department for further dealing.

2.5 After several correspondences between appellants, ZEPIU, Ministry of Education and Ministry of Works and Supply, between ^{31st} May, 2016 and 23rd May, 2018, it was decided that the commissioner of lands should hive off the two flats for separate numbering so they could be offered to the appellants for purchase as sitting tenants.

2.6 However, they were later told to vacate the flats as they were not for sale. Additionally, that the two having retired were no longer employees of ZEPIU and thus not entitled to be accommodated in the flats.

2.7 Disgruntled with the threats of eviction and refusal to sale, the appellants sued the respondent in the High Court seeking judicial review of those decisions.

2.8 The reliefs sought were:

An order of certiorari to move the court to quash the respondent's decision to deny the sale of the flats to the applicants despite them being sitting tenants who are entitled to the sale in line with the Presidential Directive of 1996 that Council and Government pool houses should be sold to sitting tenants.

2. *A declaration that the respondent's refusal to sell the flats to the applicants in line with the Presidential Directive of 1996 was illegal and unlawful.*
3. *A declaration that the respondent's decision to evict the applicants from the flats was illegal and unlawful and therefore unenforceable at law.*
4. *An order of mandamus to move the court to compel the respondents to sell the flats to the applicants.*
- S. *An order that if leave for Judicial Review was granted, it is to operate as a stay of proceedings to evict the applicants from the flats.*
6. *Any other order the court deemed fit.*
7. *An order for costs*

2.9 The appellants alleged that the respondent's decision not to sell the flats was irrational and also breached their legitimate expectation.

2.10 For its part, the respondent filed an affidavit in opposition sworn by Joseph Nthele, the director of ZEPIU. The gist of the affidavit was that the flats/units occupied by the appellants were classified as institutional houses which

were not for sale in line with **Cabinet Circular No. 12 of 1996 and Handbook on Civil Service Home Ownership.**

2.11 The respondent averred that there was no breach of the appellants legitimate expectation by its refusal to sale.

2.12 In their affidavit in reply, the appellants averred that the flats were not institutional houses which were used for the convenience of ZEPIU and as such could be sold. They maintained that ZEPIU offices were located on Mungwi road far off from Twin Palm Road, Kabulonga where the flats were situated.

3.0 Decision of the Court Below

3.1 After analyzing the affidavit evidence, the **Handbook on Civil Service Home Ownership Scheme** and submissions by counsel, the trial Judge found that the decision not to sale was not irrational or unreasonable as the **Handbook**, which gave the respondent the power to make the decision as to which houses could be sold, was clear. Furthermore that, the decision not to sale the flats in question, was one which could have been made in the circumstances.

3.2 With regard to legitimate expectation, the lower court relied on several cases including the case of **R v Secretary of State for Wales, ex parte Emery**' which holds that:

"For legitimate expectation which has consequences; to which effect will be given in public law to arise, the decision maker must have made some express promise, undertaking or representation to the person or group of persons who wish to rely upon the legitimate expectation."

3.3 The learned Judge reasoned that in *casu*, the decision maker was not the Ministry of Works and Supply, Commissioner of Lands, or ZEPIU who had not objected to the sale. Rather, it was the ad hoc supervisory and monitoring committee, (ad hoc committee) which had not approved the sale. According to the learned Judge the decision maker; the ad hoc committee did not by its conduct induce any legitimate expectation to the appellants that they would be sold the units.

4.0 The Appeal

4.1 Aggrieved with the High Court decision the appellants appealed to this Court on two grounds as follows:

1. *The learned trial Judge erred both in law and fact when she held that the decision of the respondent to deny the sale of flats No. 1 and 2 located at Plot No. 2764 Twin Palm, Kabulonga was not irrational on reason that the flats are "Institutional houses which could not be sold", without considering that the said flats were built by ZEPIU after the said land was given to it by the Ministry of Education in 1989 and that the said flats have since been hived off from Kabulonga Boys Secondary School for purposes of sale to the appellants.*
2. *The learned trial Judge erred both in law and fact when she held that legitimate expectation did not arise as the decision to sale the flats was not induced by the ad hoc Supervisory and Monitoring Committee, without considering the composition of the Committee which includes the Permanent Secretary of Ministry of Works and Supply with actual and /or ostensible authority which had given a go ahead to sale the flats to the appellants and have the flats hived off from Kabulonga Boys Secondary School for purposes of sale to the appellants.*

5.0 The Arguments

5.1 In support of the appeal, the appellants filed appellants' heads of argument on ^{27th} June, 2019.

5.2 Learned counsel for the appellants argued on ground one that the flats were no longer institutional houses following the directive to survey and hive off the flats by Ministry of Education and Ministry of Works and Supply in 1996. The flats were then surveyed by the Ministry of Housing and

Infrastructure and they were changed to a common leasehold scheme under ZEPIU and not Kabulonga Boys/Girls Secondary School. This change was approved by Ministry of Works and Supply. The diagrams were even submitted for registration under common leasehold scheme. The flats are owned by ZEPIU explaining why it issued the notices to vacate.

5.3 It was counsels further submission that according to the Handbook,

"1.2 Institutional houses not to be sold are dwelling houses which are attached by use, construction and /or location, to a specialized institution, such as, hospitals, schools, colleges, police camps, research stations, military barracks, immigration and customs posts and are used or occupied by an officer of such institution for, the benefit and convenience of the institution."

(a)... the above will not be sold because this will deprive user institutions of the facility for attracting and retaining qualified staff at the stations where they are serving."

5.4 According to counsel the flats were built by ZEPIU not Kabulonga school. That ZEPIU is not a school or college or any of the institutions referred to in the Handbook. Not to mention, the flats are not ancillary to the operations of

ZEPIU as its offices are located in Mungwi Road whilst the flats are located in Kabulonga, along Twin Palm Road.

5.5 Additionally, that the flats were not within the premises of Kabulonga Secondary School. Thus, the flats fall into the category of institutional houses to be sold as stipulated in the Handbook.

5.6 Relying on the Supreme Court decision in *Sable Transport Limited v Commissioner of Lands and Zambia Airports Corporation*², which followed Lord Diplock's often quoted definition of irrationality in the case of *Council of the Civil Service Union v Minister for Civil Service*³, that:

"Administrative action is said to be irrational if the decision is outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. We adopted this reasoning in the case of Derrick Chitala (1995-1997) ZR 9, cited to us by counsel for the appellant, when we held that:-

"In law a decision can be so irrational and so unreasonable as to be unlawful on Wednesbury grounds -See Associated Provincial Picture House Limited v Wednesbury Corporation (1947) 2 All ER 680. The principle can be summarized as being that the decision of a person performing public duties or function will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review

proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision."

In other words, the decision being called into question must be so absurd that no reasonable person or body properly directing its mind could take such a view. The court must reach a conclusion that the decision maker must have taken leave of his senses when he made that decision.

Furthermore, before making a determination whether the decision is irrational or unreasonable, the court is required to examine the nature of the statutory power and the relevant consideration that a statutory authority should take into account.

These principles are echoed in the opinion of Lord Bridge of Harwick, in the case of Gillick v West Norfolk and Wisbech Area Health Authorities and another (1985) 3 ALL ER 402 where he stated that:

"Such a review must always begin by examining the nature of the statutory power which the administrative authority whose action is called in question has purported to exercise, and asking in light of that examination, what were not relevant considerations for the authority to take into account in deciding to exercise that power. It is only against such a specific statutory background that the question whether the authority acted unreasonable, in the Wednesbury sense can properly be asked and answered.

What constitutes a relevant consideration in any case will depend on the wording and context of the statutory provision"

5.7 It was the further submission of counsel that the learned trial Judge did not adjudicate on all issues in controversy

as raised by the appellants. In particular, the issue that the land where the flats were built was given to ZEPIU in 1989 by Ministry of Education. Secondly, that the flats do not fall in Kabulonga Secondary School land. Thirdly, the invalidity and irregularity of the offer letter at page 122 of the record of appeal.

5.8 According to the appellants, the trial Judge failed to adjudicate on these issues despite observing as follows:

"The applicants further contend that the flats in question were constructed by ZEPIU using government funds and are not ancillary to the operations of ZEPIU, as ZEPIU is located on Mungwi road, while the flats are located within the ordinary residential areas along Twin Palm road in Kabulonga, and not on school land for Kabulonga Boys as the land was given to ZEPIU in 1989, as shown on exhibits 'CAMKB8-9' to the affidavit. The applicants contend that the letter of offer dated 30th May, 2018 was issued after these proceedings had commenced, and contradicts the correspondence on record, and is irregular as it refers to bare land, yet the land is already developed. Further, that it refers to the lease being for a term of 99 years from 1st May, 2018 after the land was given to ZEPIU in 1989."

5.9 Counsel concluded that the trial Judge misdirected herself when she held that the two housing units are located on Kabulonga Secondary School land without evaluating the

documentary evidence on record which showed the contrary.

5.10 With regard to ground two, it was submitted that the appellants had a legitimate expectation as the ad hoc committee, comprised the Permanent Secretary of the Ministry of Works and Supply, who had actual and or ostensible authority and gave a go ahead to sale the flats and to hive them off from Kabulonga Secondary School. Equally, the Ministry of Education also approved the sale of the flats to the appellants.

5.11 It was argued that the trial Judge therefore misdirected herself when she held that there was no legitimate expectation because the ad hoc committee is not the body that did not object to the sale of the flats to the appellants.

5.12 In response, the respondent argued in relation to ground one that, the learned trial Judge did not err when she held that the decision of the respondent not to sale the flats was not irrational for the reason that the flats were institutional houses.

5. 13 The case of Nyampala Safaris **(Z) Limited and four others v**

Zambia Wildlife Authority and six others⁴ was cited as

authority on the parameters of judicial review as follows:

"(a) The remedy of judicial review is concerned not with the merits of the decision but with the decision-making process itself.

(b) That it is important to remember that in every case, the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of the purpose to substitute the opinion of the Judiciary or the individual judges for that authority constituted by law to decide the matter in question.

(c) A decision of an inferior court or public authority maybe quashed (by an Order of Certiorari) where that court or authority acted:-

(I) Without jurisdiction; or

(ii) Exceeded its jurisdiction; or

(iii) Failed to comply with the rules of natural justice where those rules are applicable; or

(iv) Where there is an error of law on the face of the record or

(v) The decision is unreasonable in the Wednesbury sense, namely that It was a decision which no person or body of persons properly directing itself on the relevant law and acting reasonably could have reached."

5.14 It was submitted that the ad hoc committee had power to exercise the authority vested in it to accept or reject the

application to buy a government house. In *casu*, both ZEPIU and Kabulonga Secondary School being government institutions, the ownership of the flats therefore vests in the government. It would therefore, not make any difference whether the institutions are identified by name.

5.15 It was submitted that the intention of building the housing units was for purposes of accommodating members of staff under the unit and that the need to do so was still alive.

5. 16. The learned state advocate went on to argue that the Permanent Secretary of Ministry of Works and Supply in his letter ^{of 31st} May, 2016, was merely confirming that on the same plot No. 2764 Kabulonga, there was a hiving off of Horizon School.

5.17 Furthermore, that it was not correct that the Cabinet Circular and the Handbook directed the survey and hiving off of the flats. The documents merely provided guidelines on how the exercise was to be carried out.

S. 18 It was amplified that the respondent is not willing to sale the two units for the reason that they are institutional houses. They cannot be compelled to sale as held in **Frank Malichupa and others v Tanzania Zambia Railways Authority**⁵.

5.19 In response to ground two, the respondent argued that the letter referred to by the appellants dated 24th July, 2017 was specifically addressed to the Provincial Education Officer under which schools fall. The first paragraph of the said letter states:

"Reference is made to the earlier minute sent to you dated ^{28th} November, 2016 in which you were requested to instruct schools to acquire title deeds."

It was due to increasing cases of encroachments on school land, that the Ministry of Education, issued a circular advising schools to acquire title deeds.

5.20 Therefore, the appellants cannot rely on this circular to argue that the letter of offer was issued after commencement of their case. The trial Judge was on firm ground when she held that the ground of legitimate expectation also failed.

The hearing

5.21 At the hearing of the appeal, Mr. Msoni, who appeared for the appellants relied on the heads of argument. To augment, on ground one, he submitted that to determine whether the decision not to sale was unreasonable, the lower court should have been guided by the Handbook.

5.22 Mr. Msoni amplified that as far back as 1989, ZEPIU was given bare land by Ministry of Education. Thus, the issue before the High Court was whether the flats were institutional houses not to be sold. He maintained that the two flats in question were not and should have been sold.

5.23 In relation to ground two, learned counsel submitted that, although the trial judge relied on **De Smith's Judicial Review** and gave four conditions for legitimate expectation to be satisfied, in the Judgment (page J28) she only picked one criteria that of the decision maker creating legitimate expectation.

5.24 The number three condition on actual or ostensible authority was not considered. He maintained that, the Permanent Secretary had ostensible authority. Furthermore, the correspondence from ZEPIU and Ministry of Works and Supply, all proved that a legitimate expectation had been created.

5.25 Lt. Mwandumbwa, who appeared for the respondent, equally relied on the respondent's heads of argument in opposition. He augmented that the flats in issue, are on Ministry of Education land. ZEPIU is a unit under the Ministry of Education and the plots where the flats are is where Kabulonga Secondary School and other properties are. All the properties are registered under Ministry of Education. There is no title deed to show that the flats were hived off.

5.26 To augment on ground two, he reiterated that none of the correspondence exhibited by the appellants was from the ad hoc committee, whose decision was being challenged. None of the letters were written to the appellants nor were they offered the flats to purchase.

5.27 He maintained that in **Lusaka City Council and National Airports Corporation v Grace Mwamba and four others**⁶, the letters of offer were even withdrawn and certificate of titles cancelled but the respondent was still not found wanting as the same were issued in error.

6.0 Issue Arising on Appeal

6.1 We have considered the submissions and Judgment appealed against. As we see it, the cardinal issue the appeal raises is, whether the respondent's decision not to offer for sale the flats to the appellants was irrational because the flats were not ancillary to the mandate of ZEPIU.

7.0 Consideration and Decision on Issue on Appeal

7.1 It is trite as argued by both counsel that the remedy of judicial review is not concerned with the merits of the case but the decision making process. The Supreme Court elucidated in **Nyampala Safaris (Z) Limited and four others v Zambia Wildlife Authority and six others**⁴, as stated by the trial Judge at J9-J 11 (pages 61-62) of the record of appeal

and as argued by the respondent at paragraph 5.13 of this Judgment.

7.2 In the *locus classicus* **Associated Provincial Picture Houses Limited v Wednesbury Corporation**⁷, which was followed in **Sable Transport Limited v Commissioner of Lands and Zambia Airports Corporation**², Lord Greene MR, set out the principles upon which the courts legitimately can interfere with administrative decisions. Thus, a failure by a public authority to have regard to matters which ought to have been considered, which is to be derived either expressly or by implication from the statute under which it purports to act will be an abuse of its discretion. Similarly, if certain matters are considered which from the subject matter and the general interpretation of the statute, are held by the court to be irrelevant, this will amount to a defect in the decision making process.

7.3 Lord Greene MR, then set out the head of challenge known as *Wednesbury unreasonableness* that is to say; a decision which is so unreasonable that no reasonable authority could have arrived at it. This has been followed in many

cases in our jurisdiction as cited by the parties. See also recent UK decision in **R v Somerset County Council ex parte Fewings**⁸.

7.4 In *casu*, the decision of the respondent was governed not by statute, but the Handbook on the sale of government houses.

7.5 The respondent refused to sale the flats to the appellants on the ground that they fall under the category of institutional houses not to be sold.

7.6 According to the Handbook institutional houses are:

"These are dwelling houses which are attached by use, construction and br location, to a specialized institution, such as, hospitals, schools, colleges, police, camps, research stations, military barracks, immigration and customs posts and used or occupied by an officer of such institution for, the benefit and convenience of the institution."

(a) Institutional Houses not to be sold

Institutional houses described above will not be sold because this would deprive user institutions of the facility for attracting and retaining qualified staff at the stations where they are serving.

(b) Institutional Houses to be sold

Institutional houses purchased or constructed by an institution using Government/Donor funds and are

located within ordinary residential areas but not ancillary to the operations of the institution concerned will be sold."

7.7 We are therefore of the firm view that, the respondent did not take into account irrelevant considerations when it refused to sale the flats in question on grounds that, they fall under institutional houses not to be sold. The rationale being that doing so would deprive the user institutions of the facility for attracting and retaining qualified staff at the stations where they are required to be per clause 1.3(a) of the Handbook.

7.8 This decision can not be said to be *Wednesbury unreasonable* as argued by the appellants. The appellants argument, based on clause 1.3(b) of the Handbook on institutional houses to be sold, that the flats are not ancillary to the operations of ZEPTU, is therefore meritless. If anything, this argument is self-defeating as they themselves occupied the flats as employees of ZEPIU, I a practice the respondent is keen to continue with hence refusal to sale in line with clause 1.3(a).

7.9 Our firm conclusion is that the lower court was on *terra firma* when it found that, in arriving at the decision not to sale the housing units in contention, the respondent was not irrational or unreasonable. The decision was one which could have been made in the circumstances and could be exercised under the power conferred by the Handbook.

7. 10 As earlier aforestated and as argued by counsel, judicial review is not concerned with the merits of the case but the decision making process. Whether the flats are not within Kabulonga Secondary School or not ancillary to ZEPJTJ operations, is immaterial in judicial review proceedings in *casu*. We see nothing wanting in the decision making process neither did the appellants demonstrate any.

7. 11 We are in accord with the trial court that the decision not to sale was not irrational nor unreasonable. In reaching this conclusion the trial court was guided by the provisions of the Handbook as is crisp clear from the Judgment in particular at page 32 of the record. Ground one must fail.

7.12 We now turn to ground two on legitimate expectation. The trial court found that there was no legitimate expectation raised to the appellants by the conduct of the decision maker, being the ad hoc committee on the sale of government pool houses.

7.13 The trial court relied on the learned authors of **Dc Smith's Judicial Review**, on legitimate expectation, as follows:

1. *The representation must be clear, unambiguous and devoid of relevant qualification.*
2. *The legitimate expectation must be induced by the conduct of the decision maker.*
3. *The representation must be made by a person with actual, or ostensible authority to make the representation.*
4. *A person who seeks to rely upon a representation must be one of the class to whom it might reasonably be expected to apply.*

7.14 Further reliance was placed on the Supreme Court decision in **North Western Energy Co. Limited v Energy Regulation Board**⁹ that:

"Legitimate expectation arises where a decision maker has led someone to believe that they will receive or retain a benefit, or advantage including that a hearing will be held before a decision is taken.

The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires regularity, predictability and certainty in government's dealings with the public.

The doctrine of legitimate expectation derives its justification from the principle of allowing the individual to rely on assurance given and to promote certainty, and consistent administration."

7.15 Upon analysis of the evidence before her, the trial Judge noted that, the letters by the director of prospects at ZEPIU and the Permanent Secretary Ministry of Education that, they had no objection to the sale of the units to the appellants were not written by the ad hoc committee which was empowered by the government to sale the government pool houses.

7.16 We cannot fault the trial court for the finding that the ad hoc committee did not by conduct induce a legitimate expectation in the appellants that the flats would be sold to them.

7.17 We must add that, that there was even no offer to purchase made to the appellants by the ad hoc committee or even Ministry of Education or ZEPTU, to induce such a legitimate expectation. If anything, it was the appellants who applied to purchase the flats but which were never offered to them.

7.18 The dictionary definition of ad hoc is simply '*created or done for a particular purpose as necessary*'. The ad hoc committee in question, herein, was created for the purpose of selling government pool houses to those who qualified and those houses which also qualified to be sold. The ad hoc committee identified and offered to would be purchasers the houses to be sold.

7.19 On the facts of this case, there was no evidence of the ad hoc committee making any offers to the appellants either expressly or by conduct. It is immaterial that the Permanent Secretary Ministry of Education, as a member of the ad hoc committee did not object. The decision had to be that of the committee as a whole.

7.20 Regarding the appellants' argument that condition three was not considered by the trial court is also without merit. (See Paragraph 7.13 of this Judgment on conditions of legitimate expectation.) The trial court's reasoning was simply that the ad hoc committee did not induce any

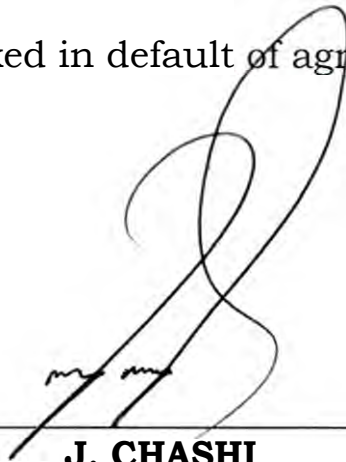
legitimate expectation in the appellants by conduct or otherwise.

All the four conditions were considered, together with the authorities cited like **North Western Energy Co. Limited v Energy Regulation Board**⁹, when the trial Court held that there was no correspondence exhibited to show that there was ever consideration of the appellants' applications in their favour by the ad hoc committee.

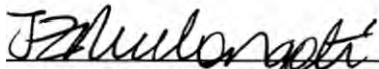
7.21 Furthermore, as we have pointed out the Permanent Secretary did not have actual or ostensible authority to offer the flats to the appellants. Such authority vests in the ad hoc committee, which did not by actual or ostensible authority make any representation to the appellants that the flats would be sold to them.

Ground two equally fails.

7.22 The appeal is thus devoid of merit and is dismissed with costs, to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



J.Z. MUL@ i GOTI
COURT OF APPEAL JUDGE



F.M. LENGALINGA
COURT OF APPEAL JUDGE