Liquid Telecommunication Kenya Limited v Communication Authority of Kenya (Civil Appeal E054 of 2021) [2023] KEHC 24691 (KLR) (Commercial and Tax) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E054 OF 2021

PN GICHOHI, J

OCTOBER 31, 2023

IN THE MATTER OF THE KENYA INFORMATION AND COMMUNICATION (LICENCING AND QUALITY SERVICE) REGULATIONS, 2010

AND

IN THE MATTER OF THE KENYA INFORMATION AND COMMUNICATION (COMPLIANCE, MONITORING INSPECTION & ENFORCEMENT) REGULATIONS, 2010

AND

IN THE MATTER OF THE KENYA INFORMATION AND COMMUNICATION (APPEALS) REGULATIONS

AND

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL DATED 4TH JUNE 2021

BETWEEN

LIQUID TELECOMMUNICATION KENYA LIMITED ..... APPELLANT

AND

COMMUNICATION AUTHORITY OF KENYA ..... RESPONDENT

(Being an Appeal from the Communication and Multimedia Appeals Tribunal of 4th June 2021 dismissing the Applicants Application dated 3rd December, 2020)

JUDGMENT

1. The background of this matter is that Liquid Telecommunications (herein referred to as the Appellant) entered into a Landing Party Agreement with Pakistan & East Africa Connecting Europe Company

(PEACE) Limited on 5th September 2019. The Purpose of the PEACE cable system was to provide alternative submarine cable system which would provide a direct access and link to Asia therefore reducing the latency period to the region and would result in better data/internet and voice experience and improve commercial prospects.

2. To fulfil its end of the agreement, the Appellant was required to obtain a Submarine Cable Landing Rights Licence (SCLR) from the Respondent within 135 days and by a letter dated 6th September 2019, the Appellant submitted its application for the Submarine Cable Rights to Communication Authority of Kenya (herein referred to as the Respondent) which was mandated by law to issue the Licence. This application was duly received by the Respondent on 13th September , 2019. However, the Respondent gave its response vide a letter dated 24th June 2020 declining the Appellant's Application and as the Appellant followed up on the reasons for the decline, time for filing appeal lapsed.

3. Through the firm of Kiptnness & Odhiambo Advocates LLP Advocates and under a certificate of urgency, the Appellant therefore moved the Communications and Multimedia Appeals Tribunal (herein referred as the Tribunal) vide an application dated 3rd December, 2020 against the Respondent seeking that:

    1. Spent

    2. Leave be granted to the Appellant to file and serve an appeal out of time.

    3. The Memorandum of Appeal and statement of facts of appeal filed simultaneously be admitted and service be allowed out of time.

    4. The Costs of the Application be provided for.

4. In support of that application was an affidavit sworn by Judy Njeru on 3rd December, 2020. She emphasised the contents of the application and how the Appellant was to get the licence within 135 days as per the agreement and that the Appellant had paid the requisite fees on 11th September, 2019.

5. She deponed that the Respondent declined to grant the said licence but did not give reasons for the decline even though by law, the Respondent was required to provide the reasons within 30 days from the date when it made the said decision to enable the Appellant to appeal in good time. She further averred that by the time the appeal was being lodged at the Tribunal, the Respondent had not supplied the Appellant with reasons for declining to issue the licence. She blamed the delay in filing the appeal on time on the Respondent.

6. Further, she deponed that unless the Application and the subsequent appeal were heard and determined expeditiously, the Appellant stood the risk of breaching the Agreement which would have subjected it to suffer loss. Lastly, she deponed that no prejudice would be occasioned to the Respondent.

7. On its part and through the firm of Igeria & Ngugi Advocates, the Respondent filed a Replying Affidavit sworn on 26th February 2021 by Edward Rinkanya in his capacity as its Ag. Director Legal services. Referring to the Supporting Affidavit , he contended that the Appellant's attempt to explain delay by blaming the Respondent on its alleged refusal to review its decision, Section 102F of the *Kenya Information and Communications Act* is clear that the remedy for an unsatisfied Applicant lies therein and not with the Respondent.

8. Further, he deponed that if indeed it was true as was alleged by the Appellant that there was risk of breaching its contractual obligation to PEACE with respect to timelines, then the Appellant should have hastily opted for the remedy provided under the *Act*. He thus contended that the reasons advanced

by the Appellant cannot be reasons for the inordinate delay in filing the Appeal and that further, the Appellant's indolence in following up the matter with the Respondent. That further, the Appellant's conduct went against the minimum reasonable /undue delay. He therefore sought dismissal of the application with costs.

9. Both parties presented their submissions and the Tribunal rendered its decision on 4th June 2021 dismissing the Appellant's application with an order that each party bears its own costs. Aggrieved by that decision , the Appellant filed this appeal on four (4) broad grounds that:-

    a. The Tribunal erred in law and in fact by failing to appreciate the Appellant's delay in filing the appeal before the tribunal was sufficiently explained hence inordinate.

    b. The Tribunal erred both in law and in fact by failing to appreciate that the intended appeal presented genuine issues of administrative law and fact with overwhelming chances of success.

    c. The Tribunal erred in law and in fact by failing to appreciate that the Appellant's appeal presented serious issues regarding application of the Kenya Information Communication and Technology Policy and the application of *Kenya Information and Communications Act* and the rules thereunder.

    d. The Tribunal erred in law and in fact by refusing to admit the Appeal thus driving the Appellant from the seat of Justice empty handed and without a fair hearing.

10. The Appellant therefore prayed for following orders :-

    1. The appeal be allowed.

    2. A finding that the Appellant's delay in filing the appeal against the Respondent's decision has been sufficiently explained hence not inordinate.

    3. An order be and hereby issued that the Appellant's appeal before the Tribunal is admitted for expeditious hearing and disposal on merits.

    4. Costs of the appeal.

11. By consent that this appeal be canvassed by way of written submissions, the Appellant and the Respondent filed their submissions dated 18th January, 2022 and 17th February, 2022 respectively.

Appellant's Submissions

12. On the issue as to whether the delay in filing the Application before the Tribunal was sufficiently explained and therefore excusable, counsel for the Appellant relied on the Supreme Court decision in *Nicholus Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2015]eKLR and the case of *Leo Sila Mutiso v Hellen Wangari Mwangi*[1999]2 EA 231 and maintained that in as much as Section 102 F of the *Kenya Information and Communication Act* provided for 60 days to lodge an Appeal at the Tribunal, it was not possible to do so because the Respondent refused to give the Appellant reasons for its decision not grant it the SCLR. Counsel further submitted that the proviso to Section 79 of the *Act* mandates the Respondent to provide reasons for refusal in writing within 30 days. He contended that this Section provided no discretion to the Respondent to refuse to grant the reasons.

13. He maintained that the filing of an Appeal at the Tribunal was dependant on the reasons provided by the Respondents and hence time ought not to have started running until the reasons were provided. To emphasise of the right of a party to be supplied reasons of a decision by the Administrator, counsel cited Section 4 (2) and (3) and Section 6 of the *Fair Administration Act* and further submitted that

the Appellant did all it could though belatedly to file the Appeal at the Tribunal and thus the Tribunal ought not to have dismissed the Application.

14. On the issue of whether the Appeal was arguable with overwhelming chances to succeed, counsel summited the intended appeal before the Tribunal must not necessarily succeed. However, he argued that the decision by the Respondent was prima facie unfair and unjustifiable thus there was need to call the Respondent to defend itself. Counsel further summitted that lawsuits challenging administrative actions should be allowed, to the best extent possible, to be heard and determined on merits.

15. Arguing that the Appellant had met all conditions of the application for the licence, counsel submitted that that the Applicant had a legitimate expectation that the application would be allowed except for a good reason yet to date, the Respondent has never supplied reasons for its decision . Further, and while highlighting the benefits the issuance of the Licence to the Appellant would have brought to the Kenyan public in particular and the importance of Information Technology services as part of Vision 2030, counsel submitted that the intended appeal before the Tribunal has a substantial public interest element.

16. On the issue of prejudice, counsel submitted the refusal to admit the appeal out of time will have the effect of allowing the Respondent's manifestly unconstitutional and unfair decision to go unchecked. That unlike the Appellant, the Respondent will suffer no prejudice as it will have its day before the Tribunal if this appeal is admitted.

17. Counsel therefore urged the Court to allow the appeal herein, set aside the decision of the Tribunal and direct it to proceed and grant the Appellant leave to lodge its appeal out of time.

Respondent's Submissions

18. The Respondent opposed the appeal and on the issue of delay in filing the intended appeal before the Tribunal. It submitted that the same was filed five (5) months after the Respondent's impugned decision made on 24th June 2020. While also relying on the Supreme Court decision in *Nicholus Kiptoo Arap Korir Salat* (*supra*), counsel submitted that a delay of five months is inordinate.

19. Highlighting that before the Tribunal the Appellant presented only one (1) main ground being failure by the Respondent to furnish it with reasons for its decision to decline the Application for the SCLR License as required by law despite the Appellant requesting for the same, counsel submitted that this is not a satisfactory explanation for the delay.

20. Counsel further submitted that according to the record, the Appellant first requested for reasons vide its letter dated 1st July, 2020 which letter was not responded to by the Respondent. The Appellant wrote another later dated 7th August, 2020 where it appeared to acquiesce to the decision noting that the Respondent had pronounced itself on the Application for the license. It proceeded to request apparently for an alternative measure wherein it requested for the authority of the Respondent to collaborate with other licensees.

21. He further submitted that the Appellant changed tact vide its letter 10th November, 2020 wherein it requested the reconsideration of the decision of 24th June, 2020 or reasons for the same. From the sequence of events, counsel submitted that the Tribunal was right to find that the decision to lodge an appeal and an application for extension of time was an afterthought and tthe delay thereof could not be attributed to getting reasons from the Respondent.

22. Further and on a without prejudice basis, counsel submitted that the Respondent was fully in agreement with the tribunal's finding that the Appellant did not require the Respondent to give it reasons for its decision for its disputed decision in order to lodge an appeal.

23. He further submitted considering that Section 5 (3) of the *Fair Administration Act* enjoins a public agency to furnish every person who is materially and adversely affected by any administrative action reasons for such actions within 30 days of request, the Respondent would have been required to give reasons by latest 1st August, 2020 which is within 30 days from the first request of 1st July, 2020.

24. That when the Respondent did not do so, the Appellant had recourse under a rebuttable presumption that the refusal to grant a license was taken without good reason and this recourse would have been available up to 24th August, 2020 when Sixty (60) days from the date the impugned decision was issued lapsed. Counsel therefore submitted that the Tribunal correctly found the Appellant's explanation for the delay given insufficient. On this line of argument , counsel placed reliance on the case of *George Kiptabut Lelei & another v Fanikiwa Ltd* [2019] eKLR.

25. Lastly, counsel relied on Supreme Court of Kenya decision in *Law Society of Kenya v Center for Human Rights and Democracy and 12 others* [2014] eKLR and submitted that a procedural technicality is a lapse in form and should not go to the root of the suit and therefore, the Tribunal correctly found that the provision of Article do not propose to outlaw procedure but requires procedure be used appropriately to advance the ends of justice. As a consequence, and while citing the case of *Kenya Pots Authority v Kenya Power & Lighting Co. Limited* [2012] eKLR, counsel submitted that the delay of five months is therefore inordinate and inexcusable and cannot be remedied by application of Article 159 (2) (d) of the *Constitution*.

Determination

26. I have considered the material placed before this Court and this being the first appeal, the duty of this Court is well settled. Indeed, the Court of Appeal in the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR had this to say:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA 212 wherein the Court of Appeal held inter alia that:-
>
> > " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

27. In the appeal before this Court, the issues raised by parties in their rival submissions can be discerned from the Tribunal's findings and conclusions on 4th June 2021 which held as follows:-

> " The cardinal question before this tribunal is therefore whether the Applicant has explained to the satisfaction of the tribunal the delay between 24th June 2020 when the Respondent gave its decision and 2020 December 2020 when it filed the instant application.
>
> The Applicant has presented one main ground to justify the delay, namely, the failure by the Respondent, despite request, to give reasons for its decision as required by law. Is this a satisfactory explanation for the delay? The Applicant requested for reasons by a letter

dated 1st July 2020. The Respondent did not oblige. This prompted the Applicant to write a letter dated 7th August 2020 in which it appeared to acquiesce to the decision noting that the Respondent [had] "pronounced itself" on the application for the licence. It then proceeded to request, apparently as an alternative measure, for the Respondent's authority to collaborate with other licensees. Then on 10th November 2020, the Applicant changed tack, this time requesting for a reconsideration of the decision of 24th June 2020 or reasons for said decision. From this sequence of events, we find that the decision to lodge an appeal and the application for extension of time was an afterthought, and that the delay thereof cannot be directly attributed to not getting reasons from the Respondent.

We also find that the Applicant did not need reasons for the impugned decision in order to lodge an appeal in this tribunal. It is true that section 79 of the *Kenya Information and Communications Act* (KICA) requires the Respondent to give reasons for refusal to issue a licence within 30 days of such refusal. It is also true that section 5(3) of the *Fair Administrative Action Act* enjoins a public agency to furnish every person who is materially or adversely affected by any administrative action with reasons for such action within thirty days of request. Under this subsection, the Respondent in the instant application would have been required to give reasons by 1st August 2020, which is thirty days from the request of 1st July 2020. When it did not do so, the Applicant had recourse under section 5(4) of the *Fair Administrative Action Act* to lodge an appeal in which it could have invoked a rebuttable presumption that the refusal to grant a licence was taken without good reason. This recourse would have been available up to 24th August 2020, when sixty days from the impugned decision lapsed.

Consequently, we find the explanation for delay given by the Applicant to be insufficient. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour, and there has to be valid and clear reasons upon which discretion can be favourably exercised (See George Kiptaput Lelei & Another v. Fanikiwa Limited (2019) eKLR.)

The Applicant urges us to extend time to lodge an appeal and not to pay undue regard to procedural technicalities. In Anchor Limited v. Sports Kenya (2017) eKLR, the High Court defined a procedural technicality to be a lapse in form that does not go to the root of the suit, such as citing a wrong provision of law. Article 159(2) of the *Constitution* does not propose to outlaw procedure, but requires that procedure be used appropriately to advance the ends of justice. In the instant application, we are not persuaded that section 102F (2) of KICA defining the period within which a party should lodge an appeal and which confers and limits substantive rights to parties is a procedural technicality, in the manner that the Applicant suggests.

Similarly, we do not find that the fact that the Applicant may suffer loss if it breaches its agreement with a third party to be a material consideration in determining this application."

28. The broad issue now that this Court would deal with is whether the Tribunal correctly applied its mind to the law and the evidence presented before it when it dismissed the Appellant's application for leave to file the intended appeal out of time .

29. The parties herein are in agreement that extension of time is perfectly within the discretion of the Court or the Tribunal as in this case. Such discretion is not one to be imagined. It has to be exercised

with certain parameters and principles. As aptly put by both parties, those principles were set out by Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat* (*supra*) thus:-

> " This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
>
> 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
> 6. Whether the application has been brought without undue delay; and
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

30. There is no dispute that the timelines for filing an appeal before the Tribunal are set out under Section 102F of the *Kenya Information and Communication Act* as follows:-

> " Any person who is aggrieved by an action or decision of the Media Council, the Authority or a person licensed under this Act, may within sixty days after the occurrence of the event or the making of the decision, against which he is dissatisfied, make a claim or appeal to the Tribunal."[Emphasis added]

31. The decision by the Respondent was rendered on 24th June 2020 declining the request for the SCLR Licence and the contents of that letter were as follows :-

> " We make reference to your application received by our offices on 11th September 2019 for the Sub-Marine Cable Landing Right (SCLR) Licence and various correspondences on the matter.
>
> Please be informed that that our licencing process includes inputs from other government institutions. Consequently, and after further consideration of the matter, we regret to advise you that you application was declined."[Emphasis added]

32. This Court's understanding of Section 102F of the *Kenya Information and Communication Act* is that these timelines are pegged on issuance of a decision not issuance of reasons for the decision. The sixty days within which the Appellant ought to have lodged the appeal to the Tribunal started to run from 24th June, 2020. The submissions by the Appellant's counsel that the timelines for appealing would as of necessity run from the date the said reasons are furnished is not sound in law.

33. From 24th June 2020, the Respondent's obligation to the Appellant was mandatory, time bound and in the following terms:-

> " The Commission may, upon expiry of the period of notice under section 78 grant a licence to the applicant if satisfied that the applicant should be licensed, subject to such conditions, including the payment of such licence fee as may be prescribed:
>
> Provided that where the commission does not grant a licence, it shall notify the applicant in writing of the reasons for refusal within thirty days of such refusal and the applicant may, if aggrieved, appeal to the tribunal." [Emphasis added]

34. This provision does not in any way place the obligation on any Applicant to seek reasons for its decision to decline the application. Once an Applicant presents his application to the Commission, the burden lies in law on the Commission to deal with it accordingly and as it deems fit . However, should it decline the application, then it has by law an unqualified obligation to give reasons within timelines set. To expect an Applicant to follow up on the reasons for the decline of his application would be tantamount to shifting the burden on the Applicant and that is not only untenable but also unpalatable.

35. It is true that Section 4 (2) of the *Fair Administrative Action Act* provides that every person has the right to be given written reasons for any administrative action that is taken against him. Further, every person has a right under Section 6 (1) of the Act to be supplied with such information as may be necessary to facilitate its application for an appeal or review. Under Section 6 (2), the *Act* provides that the information referred to under Section 6 (1) may include– (a) the reasons for which the action was taken; and (b) any relevant documents relating to the matter.

36. All these provisions favoured the Appellant in this case and indeed, Courts, including the case of *Republic v Procurement Administrative Review Board and 2 others Ex-parte Coast services board and another* [2016] eKLR , have often termed delay in furnishing proceedings and decisions to the parties amounts to unfair administrative.

37. In this case however, it was not lost for the Appellant in terms of taking action against the Respondent for failure by the Respondent to provide reasons for its decision. It had recourse under Section 6 (4) of the *Fair Administrative Action Act* which provides that :-

> " Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason."

38. This Court construes that the said proceedings would apply not only in proceedings for review but also in an appeal. This means that the Appellant would have moved the Tribunal within the stipulated time of sixty days even without reasons to enable the Tribunal make appropriate orders.

39. But what did the Appellant do? It engaged the Respondent in a myriad of correspondences soon after the decision of 24th June, 2020. By letter dated 1st July 2020, the Appellant wrote to the Respondent thus:-

> " We acknowledge receipt of your letter dated 24th June 2020 and refer to other communication exchanged between our offices under Ref: CA/LCS/1200/00014/Vol.1.
>
> Liquid Communications Kenya Limited is cognizant that applications submitted to the Authority are delt with on their merit and Submarine Cable Landing Rights does not

involve licensing access to, or assigning, a scarce or finite resource (unlike, for example, the assignment of spectrum, which involves a finite resource). Accordingly , we see no basis for this decision and hereby request that the authority furnishes us with a detailed assessment that has informed the rejection or otherwise decline of our application.

Liquid Telcom Group of Companies has made significant investments in Kenya and across the Continent remains committed to expanding the investments by amongst other others landing the PEACE submarine cable in Kenya."[Emphasis added]

40. The Appellant was not seeking just reasons but giving parameters of such reasons. Further, the Appellant was justifying why the decision by the Respondent was wrong but no indication of any urgency in regard to the timelines. Additionally, notwithstanding that the above letter was not responded to by the Respondent , and even though the sixty day period for filing appeal was still running, the Appellant wrote another letter on 7th August 2020 again referring to the Respondent's letter dated 24th June 2020 and listing the licenses and resources earlier issued by the Respondent and then immediately making a request to the Respondent as follows:-

> "In light of the foregoing, Liquid Telecommunication requests that the Authority confirms that Liquid Telecommunications Kenya Limited can collaborate with any existing Submarine Cable Landing Rights Licensee, duly licenced by the Authority, for the purpose of landing the PEACE Cable on the Kenyan coast. Further, we request that the authority details any other requirements necessary for this collaboration to satisfy the compliance threshold of the authority timeously."

41. This letter too was not responded to by the Respondent and still no reasons were given by the Respondent. For three (3) more months , the Appellant took no action. While again referring to the letter dated 1st July, 2020 and 7th August, 2020, the Appellant wrote to the Respondent on 10th November 2020:-

> "We are concerned that the Authority has abstained and or refused to provide us with a response to any of aforementioned letters and more particularly the reasons upon which a decision not to issue Liquid Telecommunications Kenya Limited a submarine cable landing rights licence was premised. As previously informed, Liquid Telecommunications Kenya Limited is committed to various project milestones whose delivery timelines have continued to draw close...Reasons would enable us to explore opportunities of appeal to the authority for a re-consideration of its decision. Further, and essence of time, we in letter dated 7 Augusts 2020 wrote to the authority exploring the possibility of partnering with any existing landing provider type agreement.
>
> Please advise if the Authority is amendable to reconsider its decision not to issue Liquid Telecommunications Kenya Limited a submarine cable landing rights licence. If so and as we submitted all the requisite information to the Authority , please provide us with the reasons to enable us to substantially address any other reservations . However, if not, please send us within seven (7) days from the date hereof, your revert on both letters for our assessment on the way forward , failure to which we will consider that the authority 's decision not to issue us with the submarine cable landing rights licence is final and we can act accordingly." [Emphasis added]

42. It is clear from this letter that the Appellant had not made up its mind on the action to take and if it was referring to Section 6 (4) of the *Fair Administrative Action Act*, the time for filing the appeal was

well past by the time the Appellant filed the application dated 3rd December, 2020. This was a delay of five months but what are the circumstances for the delay? In Nicholas Kiptoo Arap Korir Salat (supra), Supreme Court had this to say:-

> "...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant."

43. As per the legal provisions expounded herein, the refusal by the Respondent to furnish the reasons for its decision cannot be deemed as extenuating circumstances. It is not an excuse for delay by the Appellant to move the Tribunal as appropriate so as to comply with timelines. As demonstrated herein, the Appellant's conduct was one of indecision of what action to take. Its decision to appeal can therefore be described as an afterthought. In the circumstances, the delay in filing the appeal is therefore not only inordinate but also insufficiently explained, the issue of issue of no prejudice to the Respondent notwithstanding.

44. From the forgoing, this Court is satisfied that the Tribunal properly exercised its discretion and there is no reason to interfere with that discretion. This appeal is therefore dismissed. Due to the nature of this matter, each party will bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 31ST DAY OF OCTOBER 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Kabugu for Appellant

Mr. Mbaji for Respondent

Laureen Njiru Court Assistant