Direct Assurance Company Limited v Nyasi (Civil Appeal E169 of 2023)
[2023] KEHC 27373 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27373 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E169 OF 2023

DKN MAGARE, J

DECEMBER 15, 2023

BETWEEN

DIRECT ASSURANCE COMPANY LIMITED ..... APPELLANT

AND

MBEYU NGEMA NYASI ..... RESPONDENT

JUDGMENT

1. The matter is an appeal from the decision of Hon. David Mburu SPM given on 22/6/2023 in Mombasa CMCC 1205 of 2022. the same is through a memorandum of appeal dated 21/7/2023 and filed on the same date. it sets out the following grounds: -

2. The Appeal was argued by way of written submissions.

Pleadings

3. The plain in Mombasa CMCC 1205 of 2022 sought to enforce a judgment in Kwale SRMCC E2 of 2020 wherein a sum of Kshs. 192,155 had been decreed.

4. The Defence filed Defence dated 30/8/22 denying liability stating that the suit motor vehicle did not have a valid cover at the time of accident and that notices were not issued 30 days prior to filing of the primary suit.

5. The Respondent did not waste time. After a lull of 2 months, she applied to strike out the defence. The court duly struck out the same and entered judgment as prayed.

Appellant's submissions

6. They submitted that they had a good defence, that they did not have a valid insurer cover at the time of accident occurred. They stated that this was a triable issue as the same was according to Black's Law dictionary subject to judicial examination.

7. They state that whether or not the suit motor vehicle was insured was a contested issue that shall have gone to trial. They said that the vehicle was covered under policy No. 04072348. They stated that with or without the abstract being filed the abstract is not a final proof that an insurer had a motor vehicle insured.

8. They relied on the case of Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR. In that matter the court, R.E.Aburili, stated as doth: -

> " However, the word "scandalous" for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997. But they may not be scandalous if the matter however scandalizing is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.
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> A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.
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> Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.
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> A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). Where it can really lead to no possible good. See Willis Vs. Earl Beauchamp (1886) 11 PD 59.
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> A Pleading tends to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).
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> A pleading which tends to embarrass or delay fair trial is described is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999."

9. The Appellant also relied on the case of Musau v Explico Insurance Company Limited (Civil Appeal 64 of 2020) [2022] KEHC 206 (KLR) (15 March 2022) (Judgment), where the court indicated as doth: -

> " It is not in dispute that judgement was entered in favour of the Appellant in Machakos CMCC No. 285 of 2016. In her judgement, the Trial Magistrate was of the view that there

was no proof to the averment that the Respondent had insured the subject motor vehicle apart from the information contained in the police abstract dated 26th June,2015 hence a triable to be adjudicated upon at the trial."

10. They are of the view that courts should be slow to strike out cases as held in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR, where the court of Appeal stated as doth: -

> " per Chitty J. in Republic of Peru v. Peruvian Guano Company, 36 Ch.Div. 489 at pp. 495 and 496.
>
> "It has been said more than once that the rule is only to be acted upon in plain and obvious cases, and, in my opinion, the jurisdiction should be exercised with extreme caution."
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> per Swinfen Eady, L.J. in Moore v. Lawson and Another,/31 ff.L.lf. 418 at p. 419... 31 T.L.R. 418 at p. 419.
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> "It is a very strong power indeed. Itis a power which, if it not be most carefully exercised, might conceivably lead a court to set aside an action in which there might really, after all, been right, and in which the conduct of the defendant might be very wrong, and that of the plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon.....
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> Therefore, unless the case be absolutely clear, I do not think the statement of claim ought to be set aside as not showing a reasonable cause of action."

11. They stated that an abstract only shows that a case was reported as held in Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR. However, that was not the holding in the referenced decision.

Respondent's submissions

12. The Respondent filed submission dated 22/9/2023. He gave a background of the case up to the delivery of the Ruling by hon DW Mburu on 22/6/2023. He addresses the mandate of the court as set of in the case of Samuel Kalomit Murkomen v Telkom Kenya Limited [2017] eKLR as doth: -

> " Our role as the first appellate court is to re-evaluate the evidence tendered before the trial court and reach our own conclusion. However, we are conscious of the fact that unlike the trial court, we did not have the benefit of observing the witnesses as they testified. Accordingly, we ought not to interfere lightly with findings of fact by the trial court. This much was appreciated by this Court in J. S. M. v E. N. B. [2015] eKLR -
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> "We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."

13. The respondent stated that the accident was confirmed by uncontroverted evidence in the police abstract tendered in evidence in the primary suit. It is the Respondent's case that the duty to settle the claim is set out in Section 10 (1) of the Insurance Motor Vehicle Third Party Risks) Act , Cap 405 . He stated that the notice under Section 10 of cap 405 was unconditionally acknowledged. Section 10(1)

of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya (the Act) provides as hereunder:

> "(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

14. There was no indication that there were issues from the insurance at the time the primary suit was filed. That under Section 10 (4) of the Act a declaration needs to be obtained either before or not more than 3 months following the filing of the primary suit.

15. They rely on Section 12 of the Insurance Motor Vehicle Third Party Risks) Act, Cap 405. The said section provides as follows: -

> "12. Duty of person against whom claim made to give information (1) Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act or would have been so insured if the insurer had not avoided or cancelled the policy and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance issued in respect thereof under section 7.
>
> (2) If, without reasonable excuse, any person fails to comply with the provisions of this section, or wilfully makes any false statement in reply to any such demand as aforesaid, he shall be guilty of an offence."

16. They thus stated that upon service it was incumbent upon the Appellant to take steps and state whether or not they were the insured. The respondent placed further reliance as placed on the case of Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR.

Analysis

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

18. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to

take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

19. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

20. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

21. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. The nature of the claim herein is governed entirely by a special legislation. In order to be triable, the defence must raise an issue capable of being adjudicated. It is not enough to have a general denial in a vain hope that the plaintiff will in any case have the burden of proof. The burden of proof is on whosoever alleges.

23. In Magunga General Stores vs. Pepco Distributors Ltd. [1987] KLR 150; [1988-92] 2 KAR 89 [1986-1989] EA 334 the same Court held:

> " Mere denial is not a sufficient defence in a claim for breach of contract for goods sold and delivered and cheques issued in settlement thereof. There must be a reason why the defendant does not owe the money. Either there was no contract or it was not carried out or failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given.

24. Consequently, the only issue is whether the defence raised a triable issue.

25. In case of The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999, the Court of Appeal stated as follows:

> " The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to

prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did."

26. Uchumi Supermarkets Limited & Another v Sidhi Investments Limited [2019] eKLR, the cCourt of Appeal stated as doth: -

> " An application to strike out pleadings involves the exercise of judicial discretion on the part of the court. In Crescent Construction Co. Ltd vs. Delphis Bank Ltd [2007] eKLR the Court stated that:-
>
> > "... one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.

27. If there is no triable issue, it is a waste of judicial time to have a matter in court simply to buy time to be heard, even when, there is nothing to hear.

28. Even one triable issue is enough. In raising a triable issue, the court must be alive to the natural order of things and consequences of actions. It is every species' duty to carry out self-preservation. No one acts against self-interest unless they have mental issues since doing so has consequences which sometimes are of cataclysmic proportions. It must be understood that people don't walk naked due to abundance of clothes but to cover the limitations that their bodies are exposed.

29. The Appellant was served with a notice under Section 10(1) of the Act and they acknowledged receipt. The first and most immediate they the insurers will do is to decline to receive notices that are not theirs. They also reply immediately and state they are not liable. The Respondent filed a suit. There was uncontroverted evidence that the respondents appointed their advocates to defend primary suit. The Appellant could not have been sufficiently philanthropic to defend a suit ex gratis, purely on the basis of love of litigation.

30. To make matters worse what was their possible defence?. That the police abstract used in this matter is different from the ones they used in the primary file, which they defended. An abstract is a summary of what is contained in the primary document. An abstract in research consists of main points in a thesis. A police abstract consists main points in the police record. It is extracting certain pertinent information for officious users.

31. There is no limit on how many times a plaintiff of even a stranger can receive information from the police. The first abstract was definitely used on the primary suit. The plaintiff can get another abstract

with the same information. Nothing was shown that the abstract was different in any material aspect. The defence that that there was no valid insurance is a sham that no court can take serious. The defence must go ahead and set out particulars of invalidity is the insurance. Was the insurance invalid because no premiums were paid? It is because it was never issued? Is it because it expired? If also when did it expire? Is it because it is for matatu and not private vehicle. What caused the invalidity. One thing stand out was that the Appellant did not deny issuing the policy, only that it was invalid. Order 2 Rule 4 requires that: -

> " Matters which must be specifically pleaded [Order 2, rule 4.]
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
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> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
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> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.
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> (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

32. This was succinctly addressed by the Court of Appeal when addressing evasive and academic defences. This was in the case or 23. In the Raghbir Singh Chatte vs. National Bank of Kenya Limited Civil Appeal No. 50 of 1996, the Court of Appeal held:

> " If a general traverse...were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89. The position of the law...is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to Constitute an admission of the issues raised in the Plaint."

33. What was there before the court to try? Having a pedestrian and standard denials does not amount to defence. I have always posited that in determining whether there is a defence, I should be able to explain to my grandmother Elizabeth Moraa, (May the lord rest in peace) why I should not pay. She preferred straight answers. In this case there is a police abstract, a policy no, a certificate number and accident and two suits relating to Motor vehicle Registration No. KBs 244J. The documents indicate that the insurance is valid as at the time of insurance.

34. The Appellant is indicated as the insurer. What else is the Respondent to prove Cases are not magic but proof on a balance of probabilities. The burden of proof is on a balance of probability.

35. In the presidential petition case, Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus

Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ, the supreme court stated as doth; -

> The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. Black's Law Dictionary[47] defines the concept as
>
> (a) party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production. With that definition, the next issue is: who has the burden of proof"
>
> The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the *Evidence Act*, cap 80 of the Laws of Kenya, legislates this principle in the words: Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

36. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

37. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

38. The insurer desired that we find that the insurance was invalid. However, they pleaded nothing of the invalidity in a manner that will amount to a defence. The reality is that the insurer has records which they knew the aspects of invalidity. It is within their special knowledge. The burden of such special information is on then. Failure to produce evidence which is within their special knowledge attracts adverse inference.

39. Section 112 of the *evidence Act* provides as doth:-

> " 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

40. The appellant knew when the aspect of invalidity arose and provided no evidence. There is nothing to go on trial. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, justice G V Odunga as then he was stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
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> > "Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."
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> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
>
> > "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
> >
> > > 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
> > >
> > > Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

41. In the circumstances I am satisfied the defence did not raise a triable issue. The same was academic evasive and was ripe for striking out. Regarding Article 50, the same is not applicable in the circumstances. The appellant was not on trial.

42. Even if they had a right to be heard they were heard. For you to be hard you must have something to say. Once you opt not to say anything in the civil context, inferences are made.

43. The list of documents is not relevant in terms of an application for striking out. There can be no non-existent abstract when the same can be seen on record.

44. I have read the trial court's appreciation of Section 10 (4) of the Insurance Motor vehicle third party risks) Act and I cannot find fault. The court was succinct and straight forward in his findings.

45. I have therefore come to the inevitable conclusion that the Appeal lacks merit in totality. The same is begging me to dismissed it, which I hereby do with costs of Kshs. 65,000/= to the Respondent.

Determination

46. In the circumstances I make the following orders: -

    a. The Appeal is dismissed with costs of Kshs. 65,000/= to the Respondent.

    b. Stay of executioner 30 days.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF DECEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Miss Azei for the Respondent

Ms Osewe for the Appellant

Court Assistant - Brian