Kithao v Ital Global Limited (Appeal E070 of 2023) [2024] KEELRC 1769 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1769 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E070 OF 2023

K OCHARO, J

JUNE 28, 2024

BETWEEN

PENINAH MUGURE KITHAO .... APPELLANT

AND

ITAL GLOBAL LIMITED .... RESPONDENT

((Being an Appeal from the Judgment of the Honourable N. Ruguru (Ms) (SPM) delivered on 5th May 2023 in the Chief Magistrate's Court at Nairobi in Employment and Labour Relations Cause No. E420 of 2021)

JUDGMENT

Introduction

1. Through a Memorandum of Appeal dated 17th May 2023, the Appellant assailed the Judgment of the Trial Court, setting forth the principle grounds that it in law and in fact: -
    a. In dismissing the Claimant's suit which finding was against the weight of the evidence on record as the Respondent never produced the alleged complaints by M.P. Shah Hospital.
    b. In holding that the Appellant did not prove her case on a balance of probabilities despite the fact that the findings on record were weighty against the Respondent.
    c. In finding that the Respondent had complied with and satisfied legal requirements under the *Employment Act* in Procedural Fairness.
    d. By relying on the Respondent's hearsay evidence that was not corroborated by documentation.
    e. By considering evidence tendered by the Respondent that the Appellant was supposed to work during public holidays which was not provided for in the contract.
    f. By failing to take into account the circumstances in which the termination took place.

2. On the above grounds, the Appellant prayed for orders that: -

   a. This Appeal be allowed with costs to the Appellant.

   b. The Judgment delivered on 5th May 2023 by the Honourable Ruguru N. (Ms) (SPM) be set aside in its entirety together with all consequential orders.

   c. This Honourable Court be pleased to determine the suit based on the facts of the case and evidence on record submitted by the Appellant.

   d. That costs and interest of this Appeal be borne by the Respondents.

3. When the matter came up for directions on the appeal on 2nd November 2023, this Court ordered that the appeal be canvassed by way of written submissions, and gave timelines for the parties to operate within in regard thereto.

4. The Appellant filed Submissions dated 20th November 2023 together with a List of Authorities dated the same day; while the Respondent filed Submissions dated 15th May 2024.

The case before the Trial Court

5. The suit before the Trial Court was commenced by a Memorandum of Claim dated 12th March 2021. The Appellant herein averred that she was employed by the Respondent on 13th November 2020 as a Customer Service Attendant earning a monthly wage of Kshs. 27,000/-. That on or about 12th January 2021, she was summarily dismissed from employment without notice, hearing or an opportunity to defend herself, thus without due procedure being followed. Further, the dismissal was without a valid and fair reason.

6. That prior to her summary dismissal, she had never been issued with a warning or had any disciplinary process undertaken against her. She maintained that her dismissal affronted the provisions of the *Employment Act* Cap 226 of the Laws of Kenya and the Regulation of Wages and Conditions of *Employment Act* Cap 229 of the Laws of Kenya.

7. It was assertion that as a result, she was entitled to various reliefs, thus; a declaration that the dismissal was illegal, unlawful, unfair and inhumane; compensatory damages; one month's salary in lieu of notice; compensation for loss of employment equivalent to her salary for the remainder of her contract; and house allowance for 3 months.

8. The Respondent opposed resisted the Appellant's claim through a Defence to the Memorandum of Claim dated 11th May 2021. Its case was that the Appellant came into its employment under a contract of service dated 13th November 2020. The contract provided that she serves under a probationary period of 3 months, before confirmation into employment. She was deployed at MP Shah Hospital, the Respondent's customer, as service attendant.

9. The Respondent alleged that it received complaints from the said hospital relating to the Appellant's conduct, work performance, and also her habit of absenting herself from her place of work without authority. In particular, the Appellant absented herself from her duties on 12th December 2020, 25th December 2020, 26th December 2020 and 1st January 2020 despite being allocated duties on the said dates via email. There were email correspondences between the Claimant and her Supervisor at the Respondent Company and at MP Shah Hospital regarding her absenteeism on these dates. As a result of the absenteeism, was forced from time to time to hire a replacement. This occasioned it an extra cost.

10. The Respondent further alleged that the Appellant's performance at work was not up to expectation. She was not able to communicate effectively with customers leading to several complaints. Despite its efforts to help her to improve by rotating her to different sections of the Hospital, her performance didn't improve. Flowing from her wanting performance, the Hospital even threatened to terminate the contract between it and the Respondent, if the Appellant was not transferred.

11. The Respondent was therefore left with no choice but to terminate the Appellant's contract of service by issuing her with a Termination of Employment Notice dated 12th January 2021. The notice stipulated that the Appellant's last day of work was 12th February 2021. The notice was issued pursuant to the contract of employment.

12. The Respondent charged that the Appellant was not entitled to the reliefs she had sought as the termination was justified considering her act of absenteeism, and poor performance. Further, procedural fairness was adhered to in the process leading to the termination.

13. After hearing both the Appellant's and the Respondent's witnesses on their respective cases, the Learned Trial Magistrate pronounced herself on the matter on 5th May 2023. She held that the Contract of Employment between the parties made no provision for three months' probation as claimed by the Respondent. She, however, held that the Respondent had proved that the Claimant absconded duty on 12th December 2020, 25th December 2020, 26th December 2020 and 1st January 2020 despite being informed through email that she was to be on duty on those specific days. The Appellant did not give sufficient reasons why she was absent from work on those days.

14. The Trial Court held further that the Respondent had demonstrated that it made efforts to locate/contact the Appellant without success as required by law, which was why they engaged a replacement at an extra cost to them. Persuaded by the Respondent's assertion that the Appellant's performance was poor, and that she was guilty of absenteeism, the Learned Magistrate concluded the summary dismissal was warranted under Section 44 of the *Employment Act* 2007, and dismissed the Appellant's claim for unfair termination.

The Appeal.

15. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal, on the grounds set out hereinabove.

Appellant's Submissions

16. The Appellant's Counsel submitted that from the termination letter that was presented in evidence before the Trial Court, the reason advanced by the Respondent for the dismissal was a report made by MP Shah Hospital complaining about the Appellant's failure to meet expectations and work performance requirements. However, the Respondent did not produce any memo or proof of communication between it and MP Shah hospital to support the allegations of non-performance. The Learned Magistrate therefore relied on hearsay evidence in concluding that she was dismissed upon a justified ground of poor performance.

17. The Learned Magistrate correctly found that the Appellant's contract of employment didn't provide that she could work on public holidays. However, this correct finding was negated, by her erroneous finding that the Appellant had received an email, from the Respondent which instructed her to work to work during the public holidays in December and January 2021.The Learned Magistrate didn't consider the Appellant's evidence that she received said email on 5th January 2021, way after the fact. The Learned Magistrate erroneously allowed the email to have a retrospective effect therefore.

18. Counsel conclude that the Respondent failed to discharge its legal burden under Section 43 of the *Employment Act* 2007. to proving the reason for termination. The trial Court fell in error therefore when it failed to find that the dismissal was unfair.

19. It was further submitted the Respondent as the employer in the controversy that were before the trial Court, was enjoined by the law to prove that the process leading to the dismissal of the Appellant from employment was procedurally fair. The provisions of Section 41 of the Act, sets out an elaborate mandatory procedure that the Respondent ought to have followed before dismissing the Appellant. The evidence by the Respondent before the Learned Trial Magistrate does not show at all that there was adherence to the procedure. That being so, it should be concluded that the dismissal was unfair by dint of the provisions of Section 45 of the Act. To support this submission, reliance was placed on the case of David Gichana Omuya vs Mombasa Maize Millers Limited [2014] eKLR.

20. By reason of the circumstances, the Learned Magistrate ought to have found that she was unfairly dismissed, and granted her the reliefs she had sought. She urges this Court to allow her appeal herein and grant her the reliefs that she had sought before the lower Court.

Respondent's Submissions

21. In their submissions dated 15 May 2024, the Respondent reminded the Court that as a first Appellate Court, it is obligated to re-evaluate the facts afresh and come to its own independent findings and conclusions as set out in the case of Abok James Odera T/A as A.J. Odera & Associates vs John Patrick Machira T/A Machira & Company Advocates [2013] eKLR.

22. The Respondent submits that the parties' contract of employment expressly stated that either party could terminate the same by issuing one month's notice to the other party. The Respondent did issue a proper termination notice dated 12th January 2021. They duly informed the Claimant of the reasons for her termination. The termination was therefore lawful.

23. The Respondent had a valid and fair reason to terminate the Appellant's employment, her absenteeism without authority and notice, and poor performance. Further, it adhered to the mandatory procedure under Section 41 of the *Employment Act* as it issued the mandatory termination notice under the Contract of Employment, which was the governing document between parties.

24. According to Counsel for the Respondent, whether a termination of employment is fair or unfair depends on the specific circumstances of each case. He cites the case of Kenfreight (E.A) Limited vs Benson K Nguti [2016] eKLR, to support this position.

25. It was contended that the Appellant's submission to the effect that the Learned Magistrate relied on hearsay evidence lacks merit. The Appellant was aware that she was required to work during the material public holidays. In her evidence under cross-examination admitted that she had previously worked in a hospital so she was fully aware of the working hours in a hospital. This included being aware that hospitals run full time and are open even on public holidays.

26. The Respondent states that its head of Human Resources, who was the Appellant's supervisor, had also discussed this issue with the Appellant and emailed her to confirm that she was required to work during public holidays falling on Monday to Saturday, but would be compensation with two PH days. This fact was imparted on the Appellant during her training as well as indicated by RW2 during her testimony. The refusal by the Claimant to work during the public holidays in December 2020 and January 2021 was therefore blatantly contrary to company policy.

27. On the remedies sought, the Respondent submits that the Appellant was paid all her dues when the notice period ended, a fact which she admitted during cross-examination. Granting the prayers sought would therefore amount to unjust enrichment which should not be facilitated by the Court. To buttress this submission the Respondent relies on the case of D.K. Marete vs Teachers Service Commission Cause No. 39 of 2009. Specifically, they postulate that she is not entitled to house allowance as she was paid a consolidated salary. They also state that she is not entitled to notice pay as she was issued with the requisite one month's notice prior to termination. Further, her claim for compensation for unfair termination also fails as her termination was lawful.

28. The Respondent was emphatic that the Appellant failed to discharge her burden of proving that there existed an unfair termination as mandated by Section 47 (5) of the *Employment Act* 2007.

29. The Respondent submitted further that where the terms of employment between parties have been reduced into a contract, the only test as to the fairness or otherwise of termination of employment is whether the termination was in accordance with the contract itself.

Analysis and Determination

30. This being a first Appeal, I am obliged to re-evaluate the evidence and come to my own independent findings and conclusions, as set out in the case of Selle -vs- Associated Motor Boat Co. [1968] EA 123); see also (Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270) where the Court held: -

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

31. This Court has reviewed the pleadings, oral and documentary evidence before the trial court as contained in the Record of Appeal dated 18th May 2023, the Judgment of the Trial Court delivered on 5th May 2023, the grounds of appeal, submissions filed by both parties and authorities in support thereof, and returns that the instant appeal can be justly disposed of by answering the following questions;

    a. Whether the termination of the Appellant's employment was unfair;

    b. If the answer to [a] above is in the affirmative, what reliefs are available to the Appellant?

Whether the termination of the Appellant's employment was unfair.

32. It is not in dispute that the Appellant herein was employed by the Respondent as a Customer Care Agent on 13th November 2020, for a term of 1 year, vide a Contract of Employment dated 13th November 2020. It is also not in dispute that she was terminated from employment on 12th January 2021. The Appellant is adamant that the termination of her employment was on valid and fair reasons, and in adherence to the cannons of procedural fairness contemplated under Section 41 of the *Employment Act* 2007. Therefore, it was substantively justified and procedurally fair.

33. The Appellant held a contrary view, charging that the termination was both procedurally and substantively unfair. It was not anchored on any valid and fair reason. There was total non-compliance with the provisions of Section 41 of the Act.

34. Before I delve further into the interrogating the identified issues, this needs a comment. I hear the Respondent's Counsel as suggesting that for as long as the employer issues the contractual termination notice and or pays notice in lieu of notice, the termination of an employee will be considered procedurally fair under Section 41 of the *Employment Act*. With great respect, this reasoning is; wholly erroneous; in ignorance of the scope of the mandatory procedural requirements under Section 41 of the *Employment Act*; and one that if accepted could lead to a grave diminishment of the rights and protections for employees, that the new employment and labour relations legal regime that came in post 2007, set in with.

35. Invited to interrogate the fairness or otherwise of termination of an employee's employment or dismissal of an employee from employment a court gets enjoined to consider two statutory aspects, procedural fairness and substantive justification. Of course, I have not lost sight of the fact that depending on the circumstances of a case sometimes only one of these aspects can be an issue for interrogation. In my view

36. Indeed, Section45 [2] of the Act contemplates these aspects and provides for when a termination of an employee's employment can be deemed unfair. It provides: -

> " (2) A termination of employment by an employer is unfair if the employer fails to prove—
>
> (a) that the reason for the termination is valid;
>
> (b) that the reason for the termination is a fair reason—
>
> (i) related to the employees conduct, capacity or compatibility; or
>
> (ii) based on the operational requirements of the employer; and
>
> (c) that the employment was terminated in accordance with fair procedure."

37. Shading light on the two aspects and their place in a dispute regarding termination of employment, the Court in Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR held that:

> " .... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

38. As will come out hereinafter shortly, the Learned Trial Magistrate insufficiently considered the two aspects and as they related to the matter that was before her, leading to an error in the determination of the matter.

39. Section 47 (5) of the Act provides for a reverse burden of proof. It places on the employee the initial burden. The employee is burdened to prove that an unfair termination occurred before the evidential burden shifts to the employer to prove that the termination was justified. For the evidential burden

to so shift, the employee is required to establish prima facie that the termination was unfair. I have carefully considered the Judgment by the lower court, the same is in a tone suggesting that in the manner it analyzed the evidence before it and made conclusions, the burden all through lay on the Appellant. This notwithstanding that she correctly pointed out the relevant provisions of the law.

40. I have carefully considered the Appellant's evidence on want of procedural fairness, and the Respondent's misconception on issuance of a termination notice and its relationship with the provisions of section 41 of the *Employment Act*, and the fact that the Respondent was all through emphatic that poor performance was the reason why the Appellant's employment was terminated, yet one cannot discern from the material that was placed before the lower Court that the Respondent did what the law required it to do, before terminating on account of poor performance, of course, duty lay upon it to demonstrate that requirement was met, and hold that contrary to the holding by the Learned Trial Magistrate, the Appellant did discharge her legal burden under Section 47[5] of the Act.

41. Section 41 of the *Employment Act* provides for a mandatory procedure that must be complied with by any employer contemplating terminating an employee's employment, of dismissing an employee from employment. The procedure is sequential. It embodies three components, the notification component-the employer must inform the affected employee of the intention and the grounds stirring it, the hearing component, the employee must be given adequate time to prepare and make a representation on the ground[s]. In this component too, is the right of accompaniment by a colleague of their choice or a trade union representative [where he/she is a member of a trade union], Lastly, the consideration component, the employer must consider the representations made by the employee and or the accompanying person, before taking a decision.

42. I have carefully considered the material that was placed before the trial court, I cannot be off the mark to conclude as I hereby do that the Respondent didn't comply with the mandatory procedure forestated. I think they were blurred by the misconception that issuance of a termination notice was all that the provision required and the failure to appreciate that the statutory procedural architecture, cannot be out contracted. The Learned Trial Court held in not finding that the termination was procedurally unfair. I hold.

43. As rightly stated by the Learned Trial Magistrate, Section 43 of the *Employment Act*, places the employer under the burden of proving the reason the termination of employment in a dispute regarding the termination of an employee's employment as is in the instant case. The termination letter dated 12th January 2021 set out the reasons for the termination as poor performance and failure to meet expectations, leading to dissatisfaction of the client to whom the Appellant had been seconded, and absenteeism.

44. It is trite law that discharging the burden under Section 43 of the Act, entails more than just stating that the employee's employment was terminated for this reason or that. There must be sufficient evidence to demonstrate that truly and genuinely, the reason existed. It is imperative to state that the law imposes a further burden on the employer under Section 45 [2] of the Act, to prove that the reason[s] was valid and fair. This speaks to substantive fairness.

45. In my view, it is now settled law that where the employer asserts that he or she terminated an employee's employment on account of for performance, such an assertion can only be successful if he demonstrates certain specific requirements that the law requires of an employer, in such situation. The requirements

were aptly captured Jane Samba Mukala V Ole Tukai Lodge Limited [infra] reiterated by the Court of Appeal in the case of National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR thus:

> " The reason advanced by the Bank for terminating the respondent's employment was poor performance. In Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;
>
> a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
>
> b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
>
> c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
>
> d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."

46. Considering the evidence by the Respondent, holistically, I have no doubt that they didn't strive to or sufficiently demonstrate that the requirements were met before the termination of the Appellant's employment. The Respondent alleged that their Customer, MP SHAH Hospital complained of the poor performance. Nothing was placed before the trial Court in form of a correspondence or evidence by a witness to show what was meant by the omnibus allegation "poor performance" and how the Claimant was guilty of it. Further, no detecting and weighting an employee's poor performance, and that upon noting por performance on the part of the employee, the Respondent put in place a mechanism to help her improve the performance. In absence of these, it is this Courts view, that the Respondent failed to discharge their legal burden under Sections 43 and 45 (2) of the Employment Ac 2007, proving that the reasons for termination, and that they were valid and fair.

47. I now turn to the second reason advanced, namely absconding duties. While I am cognizant of the fact that the Appellant did not deny that she failed to attend work on 25th December 2020, 26th December 2020 and 1st January 2020, the parties disagreed on whether the Appellant had prior notice of the fact that she was required to report to work on these dates. I note that the Appellant's contract of employment entered into on 13th November 2020 did not make provision for working during public holidays. This in my view was expressly appreciated by the Respondent themselves in the is dated 6th January 2021.

48. The email suggests that there had been a miscommunication in the month of December 2020 over the issue of working on public holidays. Went in detail to explain to the Appellant what it entailed

to work on Public holidays remuneration wise. Further, indicated that length discussions on the way forward as regards the Appellant working on public holidays were held. Optimism was exuded that the miscommunication couldn't occur again. The tone of the email was that which in no way laid blame on the Appellant. It didn't at all express that the Appellant had committed a misconduct.

49. Working on public holidays and compensation thereof should be one of those vital terms of a contract of employment. The law [section 9 and 10 of the *Employment Act*], directs employer to draw a written contract of employment, and what the terms thereof shall be largely. In my view, where the contract drawn is deficient in one way or the other, any misimpressions flowing therefrom should not be used to the prejudice of the employee.

50. Further, it is not difficult to conclude that the classification via the email mentioned above, come after the alleged dates of absenteeism.

51. Considering the totality of the foregoing premises, a conclusion that the Respondent didn't act in equity and justice as dictated by section 45[7] of the Act, and that the 2nd reason advanced, absenteeism, cannot be found to be a valid and fair reason. The Learned Trial Magistrate erred in finding that the reason was, established, fair and valid.

52. By reason of the foregoing premises, I hold that the termination of the Appellant's employment was procedurally and substantively unfair. I hereby set aside the Learned Magistrate's finding that it was fair.

Of the reliefs awardable.

53. Salary in lieu of notice is payable where an employer does not give an employee the requisite notice prior to termination. This is not the case here. The letter of termination dated 12th January 2021, which was produced by both parties before the Court expressly indicated that the Appellant's employment ended on 12th February 2021. She was therefore given one month's termination notice. Consequently, I decline to grant this prayer.

54. On the prayer for house allowance, I note that the Appellant admitted during cross-examination that her salary was consolidated. Further, her contract of employment under the headed "Salary" provided;

> " You will be paid a Gross Salary of Kshs. 27,000/- comprising of Basic Pay 23,500, House Allowance 3,500 effective 13th November 2020, payable in arrears on the last day of the month and subject to all statutory deductions in accordance with the relevant laws inter alia including PAYE, NSSF and NHIF."

The prayer for House Allowance therefore fails.

55. On the claim for salary for the remainder of the Appellant's contract, I rely on the case of Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya [2013] eKLR where the Court held: -

> " My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or 'permanent' contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently. Of course, parties in exercising their party autonomy

can make provision for payment of such agreed sums for wrongful dismissal or unfair termination where fixed term contracts have been agreed on and the Court would be able to enforce such contractual terms."

And decline to make any award under this head.

56. Nothing that the Claimant has in limb [b] of the reliefs section of her statement of claim had sought for compensatory damages, I now turn to consider whether this is a relief I can award. Section 49[1] [c] of the *Employment Act* bestows upon this Court power to grant a compensatory relief in favour of an employee who has successfully assailed his or her employer's decision terminating his or her employment, to a maximum extent of twelve months' gross salary. However, it should be noted that the power is exercised discretionarily, influenced by the circumstances peculiar to each case.

57. I have carefully considered the circumstances under which the Appellant's employment was terminated, circumstances of non-adherence to the requirements of the law[procedural and substantive justification]; the fact that the Appellant through her email correspondences demand to be explained to the reasons for her termination, but the Respondent didn't bother to; the fact that the Appellant had a legitimate expectation to work up to the appointed date for the lapse of her contract; and that she was not treated with equity, justice and fairness, and find that she is entitled to the compensatory relief and to the extent of Ten [10] months' gross salary.

58. In the upshot:

    a. This Appeal is hereby allowed.

    b. I hereby set aside the entire judgment delivered on 5th May 2023 in the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts in CMELRC No. E420 of 2021 and substitute the same with the following orders:

        i. A declaration that the Appellant's employment was terminated unfairly;

        ii. Compensation for unfair termination equivalent to ten months' gross salary (27,000/- x 10) Kshs. 270,000/-

        iii. Interest on (ii) above at Court rates from the date of this judgment until payment in full.

        iv. Costs of the suit to be borne by the Respondent

READ, DELIVERED AND SIGNED THIS 28th DAY OF JUNE, 2024.

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OCHARO KEBIRA.

JUDGE

In the presence of:

Ms. Kaberia for the Appellant.

No appearance for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They

have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE