



REPUBLIC OF KENYA



KENYA LAW
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**Kiriamiti v Mbui & another (Cause 1992 of 2017)
[2024] KEELRC 1847 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1847 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1992 OF 2017
NJ ABUODHA, J
JULY 12, 2024**

BETWEEN

PROF KIRIMI H. KIRIAMITI CLAIMANT

AND

DR CHARCLES KIRIMI MBUI 1ST RESPONDENT

KENYA METHODIST UNIVERSITY 2ND RESPONDENT

JUDGMENT

1. The Claimant through his Memorandum of Claim dated 18th February, 2021 pleaded inter alia: -
 - a. The Claimant was employed by the 2nd Respondent as Vice Chancellor on 25th May 2015 for a contractual period of five-year term and deployed within the Respondent's main campus at Meru.
 - b. The Claimant averred that he served his contract for two years up to 2017 when he was terminated with a reminder of three years in the said contract.
 - c. The Claimant averred that immediately he started running and managing the University as contracted and set about resolving issues that were bedeviling the Respondent.
 - d. That things were running smoothly until December 2016 when the University council decided to hire a consultant being Prof. Olive Mugenda.
 - e. The Claimant averred that he was of contrary opinion since the University was experiencing financial difficulties of outstanding huge debts and as such could not be able to spend more money that it did not have.
 - f. The Claimant averred that the said consultant was hired on terms that appeared to him to be a duplication of his role as the Vice Chancellor. That it was therefore clear that the Respondents



appointed the Consultant to rival, overshadow and frustrate the efforts of the Claimant. That the said Consultant reported as from 15th January,2017.

- g. The Claimant averred that in less than two months of the Consultant's appointment being the month of March 2017 all contracts of senior Management were terminated on the basis of some having expired or others being in acting capacities.
- h. The Claimant averred that in view of the terminations he was incapacitated in carrying out some of key duties since the said senior Management team were also crucial in the support and in performance of his duties.
- i. The Claimant further averred that immediately thereafter the chair to the council gave him twenty Key Performance Indicators(KPI) which covered various departments including Human Resource, Finance, Development and Planning.
- j. The Claimant averred that the KPI needed the Deputy Vice Chancellors, Registrars, Procurement officer as well as Human Resource Manager for their efficient and effective deliverability. That all these officers were not in office as they had fallen to the fate above.
- k. The Claimant averred that the above KPI had a duration between three months to six months.
- l. The Claimant averred that as from April to June 2017 he embarked on a massive and extensive recruitment of senior management staff who are crucial to the realization of the KPI.
- m. The Claimant averred that on 7th July,2017 he was summoned by the Chancellor, the presiding Bishop of Kenya Methodist Church who requested the Claimant to resign and that then he would organize for him to get a good send-off package.
- n. The Claimant averred that he refused and informed the Chancellor that that was only possible if his contract was terminated. Further that he had done no wrong to warrant resignation from office.
- o. The Claimant averred that on the same date of 7th July,2017 at around noon he received a letter from the Chairman of council asking him to within seven days explain why he had not accomplished 10 of the 20 KIP given to him. That he was astounded since there was no known evaluation that had taken place.
- p. The Claimant averred that he responded to the said letter vide his letter dated 13th July,2017 and came out that he had achieved about ninety percent of the said KPI despite working without senior management staff the entire period of three months.
- q. That on 17th July,2017 before a special council meeting he did table the response and none of the members raised any issue or comment as to the response.
- r. The Claimant averred that it was on 17th July,2017 when the council told him to take all his leave days immediately. That they would communicate to him later. That he wrote a letter on 20th July,2017 requesting to know why he was been send on leave which was never responded to.
- s. The Claimant averred that the KPI were just a trap laid against him as the council was aware that he did not have a single member of the senior management staff to enable him realize the same.
- t. The Claimant averred that he wrote to the council requesting to do orientation of the new management staff who were a week old but the council refused.



- u. The Claimant averred that the council ordered him to have the DV Academics act as the vice Chancellor during the period he would be on leave while the said acting VC was among the newly recruited staff.
- v. The Claimant averred that this was against the tradition or past experience and he could not give the instruments of authority to the acting VC. That he made himself available to sign and seal any relevant university documents as the substantive VC. That he even signed all the certificates of students who graduated in 2016 and who collected in 2017 as well as bank authorization in September,2017.
- w. The Claimant averred that the Respondent had two VCs one substantive and the other acting yet he was never suspended as per the law.
- x. That the relationship between him, the consultant, the council and the sponsor soured in March 2017 when he raised a red flag that the Consultant wanted the Respondent to enter in to some agreement for borrowing around Kenyan Shillings Five Billion Kshs 5,000,000,000.00 which could possibly bring the Respondent in to bankruptcy.
- y. The Claimant further averred that he refused to seal the Agreement between the Respondent and ONAP HOLDINGS LTD because he had reservations about the consents of the contract and unavailability of clear information on the internet concerning the ONAP HOLDINGS LTD. That Centre for Innovation, Leadership & governance had some vested interests on ONAP HOLDINGS LTD as there was no competitive bidding done by the consultant in consultation with the Respondent but rather it was just recommended.
- z. The Claimant averred that the sponsor was infuriated by his refusal to sign the agreement where the Respondent was to pay on behalf of the sponsor a bank loan of Kshs Fifty Million that the sponsor had taken yet they had only forwarded to the Respondent only thirty Million.
- aa. The Claimant averred that on 4th Septemeber,2017 he received a letter from the chairman alleging insubordination on his part. That the letter raised a myriad of allegations including refusal to hand over instruments of power in his possession among others. That he responded to these allegations vide a letters dated 5th September,2017 raising issues with the casual hand over of the instruments which would be illegal as he was still the office bearer. That the requested hand over was intended to maliciously remove him from the office.
- ab. That on 5thSeptember,2017 he did write again to the chair seeking clarifications of their letter but received no response. That on 19th September,2017 he received a letter alleging gross misconduct and they sought him to respond to the issues raised. That he was unable to respond because the issues raised were general and ambiguous. That he still wrote to the Respondent on 26th September,2017 seeking clarifications of their letter which they did not respond to.
- ac. The Claimant averred that instead of clarifying the Respondent wrote a letter to him dated 3rd October,2017 received by him on 4th October,2017 summoning him to a disciplinary proceeding on 6th October,2017, barely two days' notice.
- ad. The Claimant averred that the Respondent had made up their mind to dismiss him despise being the legally appointed office bearer who was never send on any suspension. That the Respondent's conduct amounted to breach of *Employment Act* and was unfair termination.
- ae. The Claimant averred that it was indeed an undeniable fact that the unfair and manifestly illegal attempts at terminating his services were stayed by this Honourable Court vide Orders dated



6th October, 2017. These Orders were issued by this Honourable Court before the unlawful termination of the Claimant by the Respondents.

af. That besides the fact that the Respondents proceeded to terminate his services without according him due process, it is also clear that the Respondents also acted in contempt, blatant breach and disregard for the Orders of this Honourable Court.

ag. The Claimant averred that part of the sums deposited with the Respondent's advocates include the following amounts which sums are still held in the Claimant's advocate's account pending the hearing and determination of this matter:

Date Amount

SUBPARA a.

22nd June, 2020: KES 910,491.03

SUBPARA b.

2nd July, 2020: KES 1,429,669.78

SUBPARA c.

6th November, 2020 KES 53,601.60

Total: KES 2,393,762.41

ah. It is the Claimant's position that as per the Consent Order dated 24th January, 2020, the total amount owing to the Claimant as at the date of this Amendment amounts to KES 6,477,393.75.

2. The Claimant in the upshot prayed for the following against the Respondents;

a. A declaration that the Respondent's action of compelling the claimant to take his annual leave and then proceed to appoint an Acting VC without any notice and or suspension and disciplinary proceedings as against the Claimant herein were unlawful, unfair, illegal and goes against the spirit of the Employment laws of Kenya, 2007 and *the Constitution* of Kenya, 2010.

b. In furtherance of 1 immediately above, a declaration that the Respondent's actions under this Suit amounted to a blatant breach of the Employment Contract dated 25th May 2015.

c. An order that the Claimant be paid his dues of KES 6,477,393.75/= being the outstanding sum as per the Consent Order dated 24th January, 2015 or as may be determined by the Court.

d. An Order that the Claimant be paid two month's salary in lieu of Notice.

e. An Order that the Claimant be paid a sum of KES 55, 747,505.88/= being the equivalent of the Contract Period not served under the said Contract due to the Respondent's [mis]actions.

f. An Order that the Claimant be paid a sum of KES 23,985, 741 =/ being the gratuity entitlement for the Contract Period under the Contract.

g. Damages equivalent to One (1) year's salary as compensation for wrongful termination.

h. Exemplary damages with interest until full repayment.

i. Interest on (3), (4), (5), (6), (7) and (8) above at courts rate until payment in full.



- j. An order that the Claimant be issued with a Certificate of service as required under Section 51 of the *Employment Act*.
 - k. Any other relief that this Honourable Court may deem fit and just to grant.
3. The Respondents filed their draft Memorandum of Response dated 29th September, 2022 which was admitted with the leave of the court as their response and averred inter alia;
- a. That the suit against the 1st Respondent was malicious as the said Respondent's role during the time relevant to this suit was limited to his capacity as the Chairman of the 2nd Respondent's Council and not in his personal capacity. The suit against the 1st Respondent should therefore be struck out as the suit does not disclose a reasonable or any cause against him.
 - b. That the 2nd Respondent would at the hearing of this suit, raise a preliminary objection that pursuant to a negotiated settlement, and a consent order recorded in Court on 22nd January 2020, the Claim against the 2nd Respondent was fully settled.
 - c. That pursuant to the aforesaid negotiated settlement; the Claimant was paid a gross sum of Kshs. 9,265,768.00 together with interest at court rate from the date of the suit. The said funds were paid to the Claimant's advocates in compliance with the Court Order issued 24th January 2020.
 - d. The Respondent averred that as per the Order issued by this Court, the 2nd Respondent fully settled the sum of Kshs. 9,265,768.00 as follows within the timelines stipulated by the Court:
 - a. Paid Kshs. 5,000,000.00 on 27th January 2020;
 - b. Paid Kshs. 910,492.00 on 24th June 2020; and
 - c) Paid Kshs. 53,601.86 on 9th November 2020
 - d) Liabilities recoverable from the Claimant- KShs. 544,878.00
 - e) PAYE-Kshs. 2,757,627.30
 - e. That since payment of terminal dues was subject to Statutory deductions and the Claimant's liabilities to the 2nd Respondent, the 2nd Respondent deducted a sum of Kshs 544,878.00 being the liabilities from the Claimant and Kshs. 2,757,627.30 being PAYE. That the PAYE computation was based on Kenya Revenue Employers Guide. That the 2nd Respondent has settled Kshs. 2,740,192.00 towards settling the PAYE and will settle the balance of Kshs. 17,480.30 to the Kenya Revenue Authority. That the Respondent was guided by the provisions of Sections 19(1)(f) and 49(2) of the *Employment Act* and Sections 37(1) of the *Income Tax Act*.
 - f. The Respondents averred that the tabulation of the Claimant's liabilities to the 2nd Respondent was duly accepted by the Claimant at the time of handover through Counsel. The said liabilities were occasioned by the Claimant's refusal to hand over items held by virtue of his employment to the 2nd Respondent even after the Consent Order. No Application has been filed to set aside the Consent Order.
 - g. That the receipt of payments to the Claimant's advocates was confirmed in Court before Lady Justice Wasilwa. Upon disagreement on the computation of PAYE, the Court directed the Counsel to sit with Court's accounts but the Claimant counsel and/or representative refused to be guided by the Court's accountant. That it was therefore misleading for the Claimant to



allege at paragraph 61 of the Statement of Claim that the 2nd Respondent only paid a sum of Kshs. 2,393,762.41.

- h. That the Claim at paragraph 62 of the Statement of Claim for a balance of Kshs. 6,477,393,75 is therefore intended to unjustly enrich the Claimant and portray the 2nd Respondent as unresponsive to Court processes and Orders.
- i. The Respondents averred that the Claimant agreed to have the funds due to him paid to his Counsel on record. That if the said funds have not been released to him, his remedy lies against his Advocate(s). Similarly, a claim of interest for the funds paid to the Claimant's Counsel cannot be against the Respondents but his Advocate(s).
- j. The Respondents averred that without prejudice to the foregoing, the 2nd Respondent admits that by a letter dated 25th May 2015, the Claimant was appointed as the 2nd Respondent's Vice-Chancellor for a contractual period of five (5) years and deployed to 2nd Respondent's main campus in Meru.
- k. The Respondents averred that they were not aware of the Claimant's objection to the Management's decision to appoint Ms. Mugenda as a consultant to the governing body and the management of the University. That the said appointment was approved in a special meeting of the University's Council held on 15th July 2016 with the Claimant acting as the Council's Secretary. The Claimant did not object to the appointment of the Consultant at the said meeting or afterward. That the Claimant as the Vice-Chancellor was also the Secretary to the 2nd Respondent's Council and was privy to the financial situation of the University. The Claimant was also present in the meetings held from 28th October 2016 onwards when the proposal to hire a consultant to help reorganize the University was made.
- l. The Respondents further averred that at no time did the 2nd Respondent lack senior management team. That in fact, the Claimant had an adequate support team as the 2nd Respondent would engage someone to hold office in an acting capacity in any post that became vacant and before the post could be filled. The recruitment process for the substantive posts would also be initiated even before the office became vacant.
- m. The Respondents averred that by a letter dated 1st March 2017, the 2nd Respondent issued the Claimant with time-specified performance indicators as it was agreed that like any other institution, the 2nd Respondent's operations needed to be guided for a turnaround after a long period of stagnation. These KPI had been agreed upon between the 2nd Respondent and the Claimant in a Council meeting held on 1st January 2017. The performance was tracked through phone calls and meetings with the council members.
- n. The Respondents further averred that over time, the council was concerned that the Claimant barely met the set targets and on 1st July 2017, the 1st Respondent on behalf of the 2nd Respondent, wrote to the Claimant on the non-attainment of KPI and the fact that such failure had put the 2nd Respondent in jeopardy in the attainment of its vision and mission as some items had a deadline of the end of March, April and May, 2017.
- o. That the Claimant elaborately responded to the 2nd Respondent's grievances. That on 17th July 2017, the Claimant made oral presentation and/or oral response to the grievances raised by the 2nd Respondent before the full council of the 2nd Respondent.
- p. The Respondents averred that upon hearing the Claimant at the said council meeting held on 17th July, 2017 it was resolved in the presence of the Claimant that since he had accumulated



leave days of about sixty (60) days, he ought to proceed for annual leave to allow him time to rest and also give the Council time to consider and deliberate on the issues raised. The 2nd Respondent issued the Claimant a letter on the same date requesting him to proceed on annual leave.

- q. The Respondents averred that whilst on leave, the Claimant engaged in a media campaign to stain the 2nd Respondent's reputation by disclosing matters discussed in the 2nd Respondent's Council meeting and caused the publication of the Council's decision in the Daily Nation dated 25th July 2017 and 3rd August 2017. The disclosure of the matters discussed in the 2nd Respondent's council meeting was in breach of a part of the 2nd Respondent's Human Resource Manual and the code of conduct.
- r. That in addition, the Claimant proceeded to issue instructions to a firm of Advocate, namely; Patrick Law Associates in respect of an employee of the 2nd Respondent without authority or first consulting the 2nd Respondent.
- s. The Respondents averred that by a letter dated 20th July 2017, the Claimant wrote to the 2nd Respondent protesting the request to take annual leave terming the same to be unprocedural and malicious. That this raised further concerns as annual leave is mandatory under the provisions of the Employment Act and the Council members were alarmed by the Claimant's protest.
- t. The Respondents averred that the Claimant also refused to hand over to the Deputy Vice-Chancellor as requested before he could proceed on leave to enable the 2nd Respondent to carry on with its responsibilities. That a further reminder was sent to the Claimant on 4th September 2017 and on 13th September, 2017.
- u. The Respondents averred that by a letter dated 6th September, 2017 the Claimant stated he had expected communication from the acting VC for assistance to seal documents if any and the said letter he declined to hand over the 2nd Respondent's property in his possession to enable normal operations of the University
- v. That by the letter dated 19th September 2017, the 2nd Respondent's Council issued the Claimant with a letter dated 19th September 2017, notifying him that the explanation provided was not satisfactory and requested him to provide further explanation. In addition, by the said letter of 19th September 2017, the 2nd Respondent raised grievances of insubordination, abuse of office, and breach of the code of conduct while on leave against the Claimant.
- w. That by a letter dated 25th September 2017, the Claimant responded to the allegations raised by the 2nd Respondent. The Claimant declined to provide a legitimate explanation for questionable performance, misconduct, abuse of office, and insubordination.
- x. The Respondents averred that on 3rd October 2017, the 2nd Respondent issued the Claimant with a Notice of disciplinary hearing scheduled to take place on 6th October, 2017 at 2.30 pm. That by the said letter the 2nd Respondent was clear and detailed the allegations as had been communicated to the Claimant and availed reasons as to why the explanations tendered were unacceptable.
- y. The Respondent averred that by a letter dated 4th October 2017, the Claimant informed the 2nd Respondent that the notice of disciplinary hearing was short and requested that the meeting be rescheduled to 20th October 2017 to enable him to get a witness and documentation for the



disciplinary proceedings. The Claimant did not disclose the name of the intended witness or indicate the documents needed.

- z. That in any event, the Claimant still had possession of all documents and equipment including a laptop and keys to his office which would enable him access to the required material. The 2nd Respondent was constrained to reject the Claimant's request and notified him of the said decision in a letter dated 5th October 2017.
- aa. The Respondents averred that it was on the basis of the Respondent's letter dated 5th October 2017 that the Claimant moved the Court to halt the disciplinary proceedings. However, the said Application and the orders issued by the court were only served upon the 2nd Respondent on 9th October, 2017 at Nairobi campus and on 10th October, 2017 at the main campus in Meru.
- ab. That on 6th October 2017, the Claimant did not attend the disciplinary hearing. The 2nd Respondent's Council proceeded to sit and deliberate the allegations made against the Claimant in his absence and reached a decision to summarily terminate the Claimant's employment. The 2nd Respondent's decision was communicated to the Claimant on the same day via email.
- ac. The Respondents averred that subsequent to the summary dismissal, the Claimant instituted contempt of Court proceedings against the 1st Respondent and the then-acting Vice-Chancellor, Prof. Maurice Okoth. The said application for contempt of Court was dismissed for lack of merit on 24th September 2018 and the Claimant instituted an Appeal in the Court of Appeal namely Civil Appeal No. 200 of 2019 Prof. Kirimi K. Kiriamiti vs. Dr. Charles Kirimi Mbui & Kenya Methodist University (KeMU). The Claimant has not taken steps to prosecute the said Appeal despite directions on the hearing of the same having been given by the Registrar of the Court of Appeal.
- ad. The Respondent further averred that the Claimant refused to withdraw the Civil Appeal even after the negotiated settlement was recorded in this Court on 22nd January 2020.
- ae. That the effect and the intention of these proceedings by the Claimant were therefore to paralyze the operations of the 2nd Respondent in retaliation following his disapproval of the 2nd Respondent's appointment of Ms Mugenda as a consultant for the 2nd Respondent's Management and the termination of his employment after his performance was exposed.
- af. That the Claimant's actions exposed the 2nd Respondent to penalties and threats of action by the Commission of University Education for its failure to appoint a substantive Vice-chancellor for a period of over three (3) years.
- ag. The Respondents averred that the Claimant had their support as he had been authorized to recruit support staff. That the Claimant's KPI had been discussed in Council meetings held in December 2016 and again in January 2017. The said KPI were also raised with the Claimant in March 2017 in a letter dated 1st March 2017. That the Claimant had interference with the operations of the 2nd Respondent while on leave. The 2nd Respondent did not at any time require the Claimant or any of its staff to sacrifice or forfeit their leave for the purpose of carrying out duties that could be undertaken by other staff in its employ with proper planning for execution of those duties.
- ah. The Respondents averred that the reasons for requesting the Claimant to take leave were explained to him verbally on 17th July 2017 and in a letter of the same day as he had over sixty (60) accrued leave days. That leave is a statutory requirement for every employee and it was



alarming that the Claimant did not intend to take leave at all even when requested to attend a disciplinary hearing on account of insubordination, abuse of office and breach of conduct among issues of performance that had been raised in July 2017.

- ai. The Respondents denied any existence of a tradition or experience while handing over instruments of power by the Claimant. That the 2nd Respondent's Council was still in place to guide the acting Vice-Chancellor. The Respondents averred that the Claimant's refusal to hand over as requested was open defiance to authority and insubordination.
- aj. The Respondents averred that like any other office, the post of the Vice-Chancellor could be held by any other qualified person or become vacant for any reason at any time. The Claimant did not tender reasons for refusal to proceed for leave or hand over to enable smooth operations of the 2nd Respondent in his absence.
- ak. The Respondents averred that at the time of filing this Cause, the Claimant was on leave and had been requested to attend a disciplinary hearing on account of insubordination, abuse of office, and breach of code of conduct among issues of performance that had been raised in July 2017. It is true that there were other senior management staff and the University was capable of running the 2nd Respondent in the absence of the Claimant.
- al. The Respondents averred that at no particular time was the Claimant directed to sign any agreement with Onap Holdings Limited ("Onap"); That the 2nd Respondent was considering the proposal offered by Onap to enable the University to borrow an amount that would have helped the University resolve its cash flow and debt issues. This was within the rights of the governing organs of the University and not an illegality as imputed by the Claimant; Claimant did not raise any concern as alleged. Even if he had, the borrowing would not have caused any conflict in the governing organs and his concerns would have been looked into and addressed.
- am. The Respondents averred that this court did not have jurisdiction on the issue of Respondents' loan affairs as this was an employment dispute.
- an. The Respondents also averred that the allegations of insubordination had nothing to do with Onap loan issues but the same was clear and detailed as it related to handover before proceeding for leave as well as the conduct while away on leave. The claim that the intended handover was casual and malicious was unfounded. The concerns raised by the Commission of University Education were addressed in the appropriate forum and had no bearing on the claim before this Court.
- ao. The 2nd Respondent averred that when it became apparent that the Claimant was obstinate in controlling the operations of the 2nd Respondent even when on leave instead of taking time to rest to allow other senior management to run the University.
- ap. The Respondents averred that given the express order of the court of 22nd January, 2020 for recruitment of substantive vice Chancellor and payment of the terminal dues, the Claimant cannot seek to be the 2nd Respondent's Vice-Chancellor. That the Claimant was never cooperative as he had to be compelled by the court to hand over. That the said handover was carried out through the Advocates for the parties herein as a condition for payment of the settlement recorded in Court on 22nd January 2020.
- aq. The Respondents averred that the Claimant declined to attend the disciplinary hearing scheduled to take place on 6th October 2017 and choose to seek the intervention of the court and by the time the Respondents received the court's order directing them to lift the



suspension of the Claimant and disciplinary' proceedings initiated by the 2nd Respondent on 9th and 10th October,2017 they had already terminated the Claimant employment on 6th October,2017. The Respondents further averred that Clause 13 of the Claimant's letter of appointment dated 25th May 2015, employment with the 2nd Respondent could be terminated by either party upon issuance of two (2) months' notice; there was therefore no guarantee that Claimant would remain in the 2nd Respondent's employment for the entire five (5) year term.

- ar. That upon termination of his employment, the Claimant was paid salary for the days worked, accrued leave days, and gratuity for the days worked as well as pay in lieu of notice.
- as. The Respondents averred that they acted in accordance with the law given the circumstances and especially the conduct of the Claimant.
- at. The Respondents averred that the Claimant was notified of his termination on 6th October 2017. In addition, the Claimant was engaged as full-time professor of Moi University in the Department of Chemical and Process Engineering since February, 2018. It follows that the Claimant was in gainful employment at the time of his termination.

Evidence

- 4. The Claimant's case was heard on 3rd October,2022, 13th October,2022 and 27th February,2023 where the Claimant herein testified and stated that he was working as a fulltime Professor at Moi University with a diversity of work experience in other universities. He relied on his statement, amended claim and documents filed with the claim as his evidence in chief.
- 5. CW 1 stated that he was appointed by the Council and the Board of Trustees which was legally in office and that in 2016 graduation the Chancellor hinted that he would have a consultant and in December one was appointed. At a meeting held on 21st December, 2016 to discuss how the consultant would be appointed, the council disagreed as the tasks to be performed were of the Vice Chancellor. The Council therefore appointed four members. He further stated that in the normal operations of the university a consultant would be appointed by the Chief Executive Officer/Vice Chancellor who used to appoint service providers before but in this case the Council appointed the consultant contrary to the Act or the practice of the Universities. The consultant had roles similar to his.
- 6. CW1 further stated that the consultant position was neither advertised nor competitively selected. Further that the terms of the consultant's employment were among others that she was to earn Kshs.10,200,000/= quarterly. This was more than what the Respondent paid any staff. It was his testimony that when the consultant came in January 2018 she suggested to fundraise abroad and terminated all senior managers, all DVC, HR managers, Registrars. That he was left alone and this was strange. That the Respondent rated all staff at KPI 20. He stated that he was not consulted or informed on the evaluation but the Chair sent him the evaluations to sign and he did under duress.
- 7. CW1 testified that in April 2018 the consultant was to come up with a matrix but the report was not approved by council and that on 7th July, 2017 the Chancellor and the Bishop called him to resign on evaluation of 10 KPI yet he assessed himself at 90% since one could not be done due to the Consultants interference and since he had no Human Resource and support staff who were sacked by the Respondent. It was his evidenced that there was no proof of evaluation and he had six months to do the KPI but after four months the Respondent demanded his evidence. CW1 contended that there was stakeholders' meeting on 13th October, 2017 and the Higher Education Council informed the meeting that it was sent to Cabinet Secretary to do an evaluation.



8. The claimant informed the Court that on 13th September, 2017 there was a report on the issue of the University having two VC's and that the tradition while going on leave was for the Vice Chancellor to appoint an acting VC and not the Council.
9. On KPI targets, the claimant stated that on 17th July, 2017 he was called by Council to present his document which he did but the Respondent did not respond but instead told him to go on a forced annual leave. He objected to the forced leave because the new management was only two weeks old and needed orientation and on 18th July, 2017 asked Council to stay on for the same but Respondent refused so he proceeded on leave.
10. It was further the claimant's evidence that on 19th September, 2017 the Council sent him a show cause letter on gross misconduct letter to which he responded. He stated that the issues on KPI were new and done after he had left the Respondent. The same also applied to the external audit report tabled before council while he was on leave. He hand only concerned himself with the question by Council of University Education why there were two VC's yet CUE advise was to have only one. CW1 further testified that on 3rd October 2017, the Respondent sent him a Disciplinary Committee enquiry which was to take place in two days from the date he received the letter. That he was then in Eldoret and he needed documents in Meru to respond to the accusations against him. That he asked for 14 days to access the same as well the Respondent to give more documents to be able to attend on the Disciplinary Committee but the respondent said this was not necessary and that he should attend the meeting as scheduled. The meeting therefore proceeded and at the conclusion thereof the respondent gave him a summary dismissal.
11. It was his evidence that upon looking at the minutes of the meeting of 6th October, 2017, they were not signed by the Secretary or Vice Chancellor. Only the Chair signed them on 7th October, 2017 after the meeting of 6th October, 2017 and that there were no minutes to show the same were confirmed by the members.
12. The claimant stated that the email communicating his dismissal was served outside working hours on 13th October, 2017 and that it found when he was busy in Court trying to extract the order seeking to stop the disciplinary hearing and this took some time and further that the 9th October, 2017 being a Saturday, he did not see the respondent's email.
13. CW1 further testified that there was a consent order where the Respondent was to pay him Kshs. 9 million to allow for the recruitment of a new Vice Chancellor. That the Respondent did not adhere to the consent and Kshs.6,477,323.75/= remained unpaid at the time of the hearing of the suit and further that he cleared with the respondent but was not issued with a certificate of service
14. CW1 further testified that the Respondent surcharged him Kshs.544,878/= as liabilities and on account of laptop, phone, tablet, use of motor vehicle and fuel despite having an order stopping the same. According to him he was using the Respondent's motor vehicle and properties as per his terms as the Respondent' VC. The Respondent further complained that the respondent broke the safe and surcharged him while he had not refused to surrender the key.
15. Regarding carrying out duties while on compulsory leave, CW1 testified that as the Vice Chancellor he was the accounting officer and despite being out of office, he was able to serve the Respondent and paid salaries for August, September and October and signed the documents. According to him, there was no one else to carry out these That no one else could do such duties.
16. In cross examination CW1 he stated that he was improperly surcharged for what he did not have and that he handed over as per the consent. That the handover was indirect through the respondent's



- advocate since the Respondent had stopped his access to its premises. It was his evidence that the consent was for Kshs 9,988,000/= plus interest at court rates and that it was consolidated and not broken down and that its purpose was not stated
17. Regarding his terms of service, it was his evidence that the letter of appointment provided that either party could terminate the contract upon giving two months' notice or pay in lieu. The contract was for five years and gratuity was provided for at 31% per annum. He further informed the Court that the respondent had paid him Kshs. 8 million leaving a balance of Kshs. 6 million unpaid. CW1 further confirmed that the Letter of appointment allowed for the deduction of statutory dues.
 18. Concerning the consent, he denied it constituted a separate deal between him and Respondent so as to allow for the recruitment of a new Vice Chancellor. It was further his evidence that the consent was not part of his contract and that the Respondent decided to terminate his contract before he served the full term.
 19. Regarding the stakeholders meeting, CW1 confirmed that the meeting between Meru Stakeholders Council chaired by Chancellor Professor Kobia and MPs and Bishop Samuel Kobia and the Council of University Education took place and was purely on how to assist the Respondent. CW1 further stated that he was not in the meeting that approved Prof. Mugenda's appointment and that it resulted in a disagreement.
 20. Regarding his performance, it was his evidence that the Council did not address his performance on KPI where he was the only one said did not perform. He responded to all issues raised by the respondent but was not given any feedback. It was his evidence that on 17th July, 2017 his response of 13th July, 2017 was discussed in his absence as he was asked to step out.
 21. CW1 further stated that not taking his annual leave was due to duty and when asked to take his leave he objected because the acting VC was new as well as other staff and that during leave he did not disclose to the media any information about the Respondent and further that the publication of his leave in the media was by the Chair of the Council and was meant to embarrass and shame him.
 22. CW1 stated that the notice of disciplinary was too short to enable him get his documents and that on 6th October, 2017 he filed a suit when he realised, he could not stop the Respondent in this disciplinary cause hearing. The allegations related to his KPI and response.
 23. In reexam the CW1 clarified that the Respondent in settlement was to pay Kshs.9,265,768/= and part of it was not for gratuity. That he had been the in university administration for over 40 years and that the Respondent said he had summary dismissal and no gratuity was to be paid.
 24. CW1 clarified that he was not involved in appointment of the consultant who advised the termination of all senior management and that he was then given KIP without the said senior management's involvement. He further stated that he had nobody to support him in the meeting. He was not consulted on the KPI and that there was no policy to determine his performance. He therefore did not know how the Respondent assessed the KPI and how the criteria was set. No council meeting was held to set the policy on KPI assessment and that he was not invited for assessment on the KIP and further that he was not the sole implementor of the KPI. According to him it was the consultant who did the re-engineering report for two years and he was given two months.
 25. The Respondent's case on the other hand was heard on 5th July, 2023 where the 1st Respondent who was also the chair of the 2nd Respondent testified and adopted the Respondent's documents, the affidavits and his statement filed in court as his evidence in chief. It was his evidence that there were no personal contract with the Claimant and did not know why he was dragged in to the proceedings. The Claimant



- had a contract with the 2nd Respondent hence his name ought to be struck off the proceedings with costs.
26. RW1 further stated that as the chair of the University Council he was aware of the dispute and confirmed that the council was legally constituted. It was his evidence that the 2nd respondent had fully paid the amounts as per the consent and that the minutes relied on by the Claimant of 28th May, 2018 were not the University meeting nor were they party to the same and further that the University was not notified of the same.
 27. According to him the Claimant was paid and the payment validated the termination. In cross examination RW1 confirmed that the Claimant was involved in the KPI. That he also signed them and further that the timelines of the KPI were such that some were immediate and others long term. RW1 confirmed that the letter telling the Claimant that he had not met the target was after four months of signing the KPI and that the Claimant responded to their letter.
 28. Regarding the consultant it was his evidence that the consultant was appointed to advise the council and restructure university and further that the council did not rationalize staff on the recommendations of the consultant.
 29. Concerning KPI, it was his evidence that the claimant as the VC was supported by a team and that he assessed himself at 70 % with respect to KPI. The 2nd respondent had a matrix for measuring performance. At the council meeting of 17th July, 2017 the Claimant submitted on nonattainment of goals and he was sent on leave because he had not taken leave for two years and that leave was not a termination.
 30. RW1 stated that the Claimant ought to hand over instruments of power while proceeding on leave and it was unprocedural for him to authorize payments when he was on leave. The University could still run when the Claimant was on leave since there was someone acting and that the council never requested him to deal.
 31. Regarding disciplinary hearing, RW1 confirmed that they sent the Claimant a notice of disciplinary hearing dated 3rd October, 2017 and he was to appear on 6th October, 2017 and that on 4th October, 2017 they received the claimant's complaining that the notice was too short and asked for rescheduling. He further stated that the letter of invitation did not have documents since the Claimant had earlier received them. He confirmed that the request for rescheduling was not granted and the Claimant did not attend the disciplinary hearing on the 6th October, 2017 and the meeting proceeded.
 32. RW1 confirmed that at the conclusion of the meeting they reached a decision to terminate the Claimant's service and that an email confirming the same was sent to him on the same day at 6.19 pm. That he was not aware that the Claimant had already filed a case by the time he was terminated and that the respondent was not aware of the injunction against the hearing issued by the Court.
 33. RW1 confirmed that the consent was entered in to as per terms of employment and that the Claimant was not the VC as at the time of the consent. It was his evidence that the Claimant was paid Kshs 9,207,439/= as per the consent.
 34. RW1 further stated that he was not aware of previous warnings to the Claimant and that there was no written warning. RW1 further stated that after investigation following an article in media it was found that the Claimant was disclosing confidential information of the University.
 36. In re-examination RW1 clarified that he signed both the appointment letter and termination letter as the chair of the council. That the Claimant served under directions of the council and that he was the secretary to the council.



37. RW1 clarified that there was no directive to implement recommendations by the council of University Education and that KPI gave specific periods for performance targets which were agreed upon and signed. RW1 clarified that when the Claimant proceeded on leave he did not hand over all instruments of power. That he continued to render some services while on leave and further that there was no request by the Claimant to have documents before hearing and that the Claimant had the documents. He further clarified that the claimant had already provided elaborate answers to the questions by the council and that he went to court the same day he was to appear before the council.

Claimants' Submissions

38. The Claimant filed written submissions dated 30th December, 2023. On the issue of Whether the Respondents have proven that the grounds for termination, the Claimant submitted that termination was unfair if there was no valid and fair reason and if procedure followed was not fair. According to Counsel for the Claimant Mr. Mbogua, the Claimant's termination on account of poor performance was unfair since there was no valid and fair reasons for termination on such grounds.
39. It was his submissions that the Consultant initiated the creation of 20 KPI on March 1, 2017, which the Claimant received on March 3, 2017. The Claimant was not involved in developing the KPI, which goes against the HR Manual that requires staff participation in the appraisal processes.
40. It was the Claimant's submission that the Respondent's witness testified that the KPI were not developed in consultation with employees, as required by the company's HR manual and relied on the case of *Kenya Union of Commercial Food and Allied Workers v. Tusker Mattresses Limited* [2015] eKLR.
41. The Claimant submitted that the Respondents did not follow proper disciplinary procedures outlined in their HR manual in Clause 12 when addressing alleged poor performance related to KPI. That Clause 12.8 outlined the key principles of the disciplinary procedures, which included a full investigation, opportunity to be heard and right of appeal against any disciplinary action.
42. The Claimant submitted that there was no evidence of a full investigation conducted and that he was not given an opportunity to defend himself. Further, the KPIs were not clearly communicated as per the evaluation matrix or achievable by the Claimant alone and out of the 20 KPI, the Respondents arbitrarily chose to action only ten. In this regard, the Claimant relied on among others the case of *Periosteum Bheekboo v. Linksoft Group* [2015] eKLR: Cause No.1232 of 2014 at Nairobi and submitted that in cases of alleged poor performance leading to termination, the employer must prove that the employee was aware of performance standards, efforts were made to support improvement, and that time was given to the employee to make necessary improvements. Merely citing poor performance is not enough; the employer must show that they took steps to help the employee meet expectations.
43. The Claimant submitted that none of these prescribed steps were followed by the Respondents before any institution of any disciplinary action was taken against him for poor performance and the Respondents conduct was in outright disregard for the Respondent's own HR Manual.
44. The Claimant submitted that for any termination to be deemed fair, there must be both substantive justification, and procedural fairness while relying on among others the case of *Walter Ogal Anure versus Teachers Service Commission*.
45. The Claimant submitted that the Council of the Respondent only considered 100% performance as successful without taking into account the continuum of performance. That the selection of specific KPI to evaluate the Claimant's performance indicated bias and a preconceived intention to terminate him.



46. The Claimant submitted that the Respondent showed a lack of procedural fairness and disregard for the Claimant's rights. The process of termination on grounds of poor performance could therefore not be said to have been procedurally fair where the tribunal before whom the Claimant was to appear was clearly biased ab initio.
47. The Claimant further submitted that some KPI lacked a timeframe for implementation, such as reducing the workforce and setting up a committee for a strategic plan as the Vice Chancellor's office relied on the support of the University Council, Board of Trustees, and Senior Management staff for success.
48. The Claimant further submitted that the Council hired a Consultant who recommended terminating contracts of senior management staff, causing challenges in implementing KPI at the University. That the allegations of Non-performance and under performance were non-merited, and unreasonable.
49. On the issue of whether there was procedural unfairness contrary to the *employment act*, 2007 the Claimant submitted that on 7th July 2017, the Claimant was summoned by the Chancellor, the Presiding Bishop of Kenya Methodist Church, who requested the Claimant to resign and that then he would organize the Claimant gets a good send-off package.
50. The Claimant submitted that the council responded that the summon of the Vice Chancellor by the Chancellor was an indication that the entire university governance was frustrated by his poor performance in attainment of the basics which response was an admission of previous attempts by the 2nd Respondent to remove the Claimant from office.
51. The Claimant submitted that according to his testimony, this attempt to have him step aside was informed by his strong stance against recommendation by the Consultant for the University to borrow around KES 5 Billion and other attempts at corruption and unlawful activities as pleaded between paragraphs 34 to 38 of the Amended Claim.
52. The Claimant submitted that the Claimant responded to the 2nd Respondent's Council letter regarding the alleged non-performance of KPI, and was subsequently placed on mandatory leave and was sent a show cause letter for gross misconduct.
53. On the breakdown of the termination process the Claimant submitted that he received letters accusing him of insubordination and gross misconduct while on leave, but did not receive clarification on the allegations. That the Respondent then summoned the Claimant to a disciplinary proceeding with short notice, while he was still on leave and away from his office.
54. The Claimant submitted that the actions of the 1st Respondent in terminating their employment were unfair, inhumane, and a violation of the *Employment Act*. That he was not given a fair hearing, not allowed to serve his full contract term, and was not provided with proper notice or compensation as required by the law.
55. It was the Claimant's submission that the Respondent also unlawfully denied him access to his personal property and broke into his office safe. Despite court orders staying the termination, the Respondent proceeded to terminate the Claimant's services without following proper procedures.
56. With regard to Procedural Unfairness, the Claimant submitted that the Claimant was served with a termination letter outside official business hours, and as an elderly man without internet access, only saw the email a week later. That the court had already granted orders dated 6th October, 2017 to stop disciplinary proceedings against the Claimant before he was aware of the termination letter, so he was legally protected.



57. In addition, the Claimant submitted that the Respondents acknowledged and accepted the Orders dated 6th October, 2017 in this case, and entered into a consent agreement on 24th January, 2020. They admitted that the Claimant remained the rightful Vice Chancellor and could not appoint another one until the Consent was signed. The Respondents confirmed that the Orders were in effect until the Consent date, and any benefits due to the Claimant were to be determined up to that date.
58. The Claimant submitted that he requested a rescheduling of the hearing, but the respondent claimed his reasons were not valid. That the Respondents also falsely stated that the claimant had all the required documents, when in fact he had requested more information previously which was not provided.
59. The Claimant further submitted that Section 41 of the [Employment Act](#) placed the burden of availing any documents which form the basis of any accusation of under-performance, and all disciplinary proceedings, solely on the employer and not the employee and relied on the case of [Lilian Muchungi v.Green Belt Movement ELRC Cause No. 1418 of 2017](#) among others.
60. The Claimant submitted that the notice for disciplinary hearing must as a matter of law be reasonable and/or adequate so as to be in compliant with the [Employment Act](#), 2007, the Fair Administrative Act, 2015, and [the Constitution](#) of Kenya, 2010 and relied on the decision of this Honourable Court in [Munir Sheikh Ahmed v. National Bank of Kenya \[2020\] eKLR](#).
61. The Claimant submitted while relying on [Kenfreight \(E.A.\) Limited v Benson K.Nguti \[2016\]](#) that Claimant's right to be heard was clearly violated by the Respondents and as such any such alleged hearing was a further violation of his rights under the statute law and [the Constitution](#) of Kenya, 2010.
62. The Claimant submitted that his right to natural justice was violated when the 2nd Respondent had already decided to terminate the Claimant's employment before the disciplinary hearing and this bias and malice tainted the proceedings, contravening the principles of natural justice which require a fair and unbiased decision-making process while relying on [Msagha v Chief Justice & 7 Others](#).
63. The Claimant submitted that the Respondents had through their previous actions disclosed their latent and patent bias with regards to the employment of the Claimant which was further supported and reiterated by the Council of the 2nd Respondent during the alleged disciplinary hearing of 6th October, 2017.
64. The Claimant submitted that the 2nd Respondent's Council, led by the 1st Respondent, did not have the lawful capacity to act, including the authority to terminate. According to the [Universities Act](#) and the 2nd Respondent's Charter, the Board of Trustees was appointed for a five-year term. The last registered Board of Trustees was in 2013, and their term would have expired in 2018. The Charter stated that the Board of Trustees had the power to appoint the Council. Any amendments or appointments of new trustees must be registered. The Claimant was hired by the Council in 2015, but the Council may not have had the proper authority to make such decisions.
65. On the issue of whether the Claimant is entitled to the reliefs sought, the Claimant submitted that the prayers in the Amended Claim be granted, including accrued interest. That the Claimant was entitled to the benefits of the VC position until the Consent Order was entered.
66. The Claimant submitted that the Consent Order of January 24th, 2020 was made after a previous court order, and the Claimant believed he remained the rightful Vice Chancellor and any other appointment was not valid.



67. The Claimant submitted that he was entitled to a refund of unlawfully deducted amounts totaling Kshs 544,878/=, which were taken without proper justification or legal basis. The deductions were made without permission in the Consent agreement, and the Respondents did not have a valid reason for surcharging the Claimant.
68. The Claimant relied on the case of Periosteum Bheekhoo v. Linksoft Group [2015] eKLR while submitting that deductions should be included in a counterclaim, not made arbitrarily without proper pleading.

Respondents' Written Submissions

69. On the other hand, the Respondent filed its submissions dated 12th February 2024 and submitted that parties had recorded a Consent on 22nd January 2020 and the Claimant paid a gross sum of Kshs. 9,265,768.00. That on entering the consent the case against the Respondent was fully settled and relied on the case of Star Paper Mill Limited & another vs Bashiru Adetunji & others.
70. Counsel for the respondents Ngode, submitted that a Consent Order was binding and could not be set aside unless proved that it was obtained by fraud or an agreement contrary to the to the policy of the court and further relied on the case of Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd [1982].
71. It was the Respondent's submission that the Claimants had never filed an application to set aside, vary or discharge the said Court Orders and the only appropriate issue for determination was whether the parties discharged their obligation under the Court Order which they submitted under four limbs.
72. On the issue of whether the summary dismissal was substantively fair, the Respondent submitted that Section 44 of the *Employment Act*, 2007 stipulates when summary dismissal can occur and particularly 44(4) lists actions that may amount to gross misconduct including insubordination and poor performance.
73. The Respondents relied on the case of Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another and submitted that the list in Section 44(4) is not exhaustive and an employer can summarily dismiss an employee on an account outside those listed.
74. The Respondents submitted that the test in McKinley v BC Tel, [2001] 2 SCR 161, 2001 was that the two examination methods used to determine the impugned misconduct of an employee were; the context of the alleged insubordination and the nature and degree of the misconduct.
75. The Respondents submitted that given the prevailing circumstances during which the Claimant engaged in gross misconduct, abuse of office and insubordination, the only proper course of action was summary dismissal.
76. The Respondents submitted that the Claimant's actions fractured his relationship with the university and its council making the Respondents lose faith in him.
77. The Respondents submitted that the Claimant open defiance to the council and the insubordination irretrievably broke the employment relationship between the Claimant and the Respondents and relied on the case of Anthony Thuo Kanai vs Cannon Assurance Limited.
78. The Respondents further relied on the case of Poly Oak Packaging (PTY) Limited vs. Siquibo NO 7 Others (unreported) while submitting that insubordination constitutes a misconduct which warrants summary dismissal.



79. On the issue of whether the summary dismissal was procedurally fair the Respondents relied on the case of Pius Machafu Isindu vs. Lavington Security Guards Limited in submitting that the procedure to be followed in summary dismissal was set out under Section 41 of the Employment Act and submitted that they faithfully applied the procedure applicable to summary dismissal.
80. The Respondents further submitted that the vide a letter dated 7th July 2017, the 1st Respondent wrote to the Claimant seeking an explanation for the non-attainment of the KPI to which the Claimant Responded with reasons. That the Claimant was allowed to make a presentation during a University Council meeting held on 17th July 2017 but his explanations were unsatisfactory. That the Claimant gave no explanation to his non-attainment of the KPI, abuse of power and insubordination and was issued a notice of disciplinary inquiry and disciplinary hearing scheduled for 6th October, 2017 which the Claimant sought to postpone.
81. The Respondents submitted that they discharged their obligation under Section 41(2) and the Claimant on the other hand refused to submit to the disciplinary process hence could not claim to have been denied an opportunity to be heard and relied on the Court of Appeal case of Sirma v Kenya Pipeline Company Limited & another.
82. The Respondents relied on the case of Okun -vs- Kenyatta University while submitting that an employee subject to a disciplinary procedure cannot scuttle the disciplinary hearing and turn around to claim lack of due process. The Respondents submitted that the Claimants efforts to obstruct the disciplinary process could only be interpreted to mean that he had no defense.
83. The Respondents further submitted that the Claimant's extraordinary actions taken to stop the disciplinary process including moving the court to hold the 1st Respondent's officials in contempt for his own failure in service of the Court Order, was gross misconduct which itself was sufficient reason to terminate the Claimant's employment.
84. On the issue of whether the decision to terminate the Claimant by the University Council was unlawful the Respondent submitted that the Claimant's allegation that the Respondent's decision to terminate his employment was unlawful because the decision was by a Council which was appointed by unregistered Board of Trustees was incorrect. The 2nd Respondent's Board of Trustees was created under Sections 35(2) and (3) of the Universities Act 2012 which only provide for establishment of Boards of Trustees and appointment of University Councils in Private Universities. That the Claimant accepted the appointment as Vice Chancellor of the University from the University Council which now he claimed was appointed by an allegedly illegal Board of Trustees.
85. It was the Respondents submission that the Claimant then must be estopped from claiming an employment relationship and benefits arising from his appointment while at the same time alleging that the actions and decisions of the Council are illegal as this amounted to approbating and reprobating at the same time. The Respondents relied on the case of Republic v Institute of Certified Public Secretaries of Kenya ex parte Mundia Njeru Geteria.
86. On the issue whether terminal dues were subject to statutory deduction, the Respondents submitted that Section 49(2) states that all terminal dues by the employer must factor in PAYE and adopted in the case of Kioko Joseph (Suing as legal representative of the Estate of Joseph Kilinda)-vs- Bamburi Cement Limited .
87. The Respondents submitted that the amounts paid to the Claimant were discussed and agreed upon between the Claimant and the representatives of the University and the Claimant cannot allege lack of knowledge of the components.



88. On the issue as to whether there was a basis for suing the 1st Respondent, it was their submission that 1st Respondent was the Chairman of the University's Council and that no Claim or orders were sought against him in person and his joinder to the suit was malicious. That there was no explanation why other members of the council were not joined.
89. In conclusion, the Respondents submitted that its summary dismissal of the Claimant was both substantively and procedurally fair and that the Claimant's case against the Respondents was settled through the Consent Order made on 22nd January 2020 and urged the court to dismiss the Claimant's claim with costs to the Respondents.

Determination

90. I have reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. I have also considered authorities relied on by Counsels.
91. Having summarized the pleadings, evidence and submission by Counsel for the parties as above, this Court considers as preliminary, whether the consent entered into on the 24th January, 2020 fully resolved the dispute between the parties. A finding in the positive of the above question would release the Court from considering any other matter raised in the suit herein.
92. From the record, on 9th October, 2017, this Court issued an order pursuant to an application dated 5th October, 2017 to the effect that "the suspension of Prof. H. Kirimi be lifted and the entire process and any subsequent action including employment, termination planned to be undertaken against him by the respondent be halted pending hearing and determination of the application herein. This order prompted the respondent file an application dated 16th October, 2017 in which they sought that these orders be vacated.
93. On 22nd January, 2020, the parties herein appeared before Hon. Lady Justice Wasilwa and recorded a consent in terms inter alia that:
- a. The pending applications dated 5th October, 2017 and 16th October, 2017 are compromised in the following terms"
 - i. The interim orders made on 6th October, 2017 are vacated
 - ii. The respondent to pay the claimant a sum of Kshs. 9,265,768/- plus interest at Court rates from the date of filing the suit
 - iii. The payment to be made through the claimant's advocates in the following manner:
 1. Sum of Kshs. 5,000,000/- to be paid on or before 31st January, 2020 upon the claimant's advocates undertaking that the claimant will undergo clearance process before 29th May, 2020
 2. The balance of the agreed sum be paid on or before 29th May, 2020 upon clearance
 - iv. The claimant is at liberty to amend his statement of claim
 - v. The respondent is at liberty to recruit a substantive Vice Chancellor
94. Pursuant to this consent, the claimant by an amended memorandum of claim dated 18th February, 2021 amended his claim as per the consent. In that amended claim, the claimant sought to be paid the sum of Kshs. 6,477,393.75 being the amount outstanding and owing to him as per the consent referred to



above. The claimant further sought to be paid Kshs. 55,747,505.88 being the equivalent of his contract period not served, Kshs. 23,985,741/- being gratuity for the period of the contract and 12 months' salary as compensation for unfair termination of service. According to the respondent however, the respondent paid the claimant all his dues as per the contract and therefore the claimant held no valid claim against the respondent.

95. A consent is binding on parties to it and can only be set aside on similar grounds for setting aside a contract. The claimant herein has not sought the setting aside of the consent. His argument is that the consent did not amount to waiver of his claim for unfair termination of his contract against the respondent. According to him the consent was to pave way for the respondent to recruit a new Vice Chancellor.
96. Whereas the Court may not be happy with the way the consent was crafted, it does not buy into this contention. The consent talks of the payment to the claimant being subject to him clearing with the respondent and further him letting the respondent recruit a new Vice Chancellor to replace him. By conduct, the claimant showed his willingness to let go his employment in return for payment of the sums agreed in the consent. The Court does not believe that any person in their right mind would pay out such a colossal sum of money just for no serious consideration. The claimant is therefore estopped from sustaining a claim for unfair termination after agreeing to what he initially considered as an unfair termination of service and sought the court's intervention. To accede and entertain the claimant's claim under the circumstances would be tantamount to the court aiding and abetting the claimant to unjustly enrich himself. This court cannot allow that the claim for unfair termination is therefore found without merit and is disallowed.
97. The claimant further sought to be paid for salary equivalent to the balance of the contract as well as gratuity for the same period. The Court for reasons given while rejecting the claim for unfair termination will disallow these claims. Further, the claimant's contract had a termination clause and could have come to an end prematurely for any other reason including death or resignation by the claimant. This claim too is untenable and is hereby disallowed.
98. If there are any funds outstanding pursuant to the consent entered into by the parties herein, that would be a matter for execution and not for this court to deal with in the light of the consent
99. In conclusion the claim in its entirety is found without merit and is hereby dismissed with costs.
100. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JULY, 2024 DELIVERED VIRTUALLY THIS 12TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE

