Kenya Forest Research Institute & another v Stephen Muriithi Ndung'u (Civil Appeal 2 of 2019) [2024] KECA 666 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KECA 666 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 2 OF 2019

DK MUSINGA, M NGUGI & JM MATIVO, JJA

JUNE 14, 2024

BETWEEN

KENYA FOREST RESEARCH INSTITUTE ..... 1ST APPELLANT

ATTORNEY GENERAL ..... 2ND APPELLANT

AND

STEPHEN MURIITHI NDUNG'U ..... RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court of Kenya, Nairobi (Makau, J.) dated on 28th September, 2018 in ELRC Cause No. 2188 of 2014)

JUDGMENT

1. This appeal turns on the correct interpretation of the 1st appellant's Career Progression Guidelines (Scheme of Service) For Kenya Forest Research Institute (herein after referred to as the Scheme of Service), whose effective date was 1st June 2011 (appearing at pages 22 to 33 of the record), and the applicability or otherwise of the Minutes of the 97th Full Board Meeting held at KEFRI Headquarters on 8th December 2014, (appearing at pages 65 to 67 of the record).

2. For a proper understanding, evaluation and determination of the diametrically opposed issues presented by the parties herein, it is important at the outset to appreciate the aims and objectives of the said Scheme of Service. Clause 1.1 of the Scheme of Service provides as follows:

    1.1 Aims and Objectives of the Scheme of Service.

        The aims and objectives of the Scheme of Service are:

        i. its mandate by providing clearly defined service personnel;

        ii. responsibilities at all levels in the career advancement and utilization of staff;

iii. and advancement within the career structure, and

iv. succession management.

3. As stated above, also relevant in this determination are the minutes of the 1st appellant's Board of Management 97th Full Board Meeting held at KEFRI Headquarters on 8th December 2014 adopting recommendations of a taskforce which introduced some amendments to the said Scheme of Service. The minutes were part of the 1st appellant's list of documents filed at the Employment and Labour Relations Court (ELRC). Later in this determination, we shall address the respondent's counsel's submissions questioning the merits of the said minutes.

4. In order to contextualize the respective parties' opposing arguments urged in this appeal, it is necessary to highlight, albeit briefly, the factual matrix which precipitated the litigation between the parties, which culminated in this appeal. Fortunately, to a greater degree, the facts are essentially common ground or uncontroverted.

5. By a memorandum of claim dated 8th December 2014 filed at the ELRC on 9th December 2014, the respondent sued his employer, the 1st appellant, claiming that the 1st appellant had refused to place him in the correct job group as provided in the aforesaid Scheme of Service. He also alleged that the 1st appellant had failed to pay him three years' salary.

6. The respondent averred that the Scheme of Service was to ensure that the 1st respondent's staff were promoted from one job group to another and their salaries increased with effect from 1st June 2011. Further, it meant that salaries would be backdated to the said date. He claimed that under the said scheme, he would automatically be promoted from job group RF 8 to RF 9 and his salary increased automatically.

7. He averred that he had worked for the appellant for 26 years from 1st July 1988, during which period he served in various departments, first, Technical Training for 8 years, and as a Technologist for 14 years. In 2008, he attained a Bachelor of Science Degree in Forestry, and in 2010 he was promoted to an Assistant Research Scientist, (Job Group RF 8). It was the respondent's case that in July 2011, the then parent Ministry of the 1st appellant, namely, the Ministry of Forestry and Wildlife, authorized the appellant to adopt and implement the said scheme of service. The respondent prayed for:

   a. A declaration that the appellant's actions were discriminatory and infringed his labour rights.

   b. An order compelling the appellant to pay him Kshs. 268,732/= being salary arrears for the period from 1st June 2011 to 31st October 2014.

   c. An order compelling the appellant to place him in the correct job group which is RF 9.

   d. An order directing the appellant to effect an immediate pay rise reflecting the respondent's correct job group.

   e. Any other relief the court may deem fit.

   f. Costs of the suit.

8. We note that the memorandum of claim filed before the ELRC only named the 1st respondent as the only respondent. The 1st respondent filed a memorandum of appearance dated 22nd May 2015 through the office of Attorney General, in which it appears as the only respondent. However, the reply to the respondent's claim dated 22nd May 2015, was filed on behalf of the 1st appellant and the Hon. Attorney General as the 2nd respondent. The record does not show any amendments introducing the Hon.

Attorney General, nor does the memorandum of claim seek any reliefs against the Attorney General. It is not clear why the Hon. Attorney General invited himself in these proceedings as a party. This issue was not raised at all before the ELRC.

9. In the reply to the claim dated 22nd May 2015, the appellants disputed the respondent's claim and maintained that the purpose of the scheme was to ensure that all serving officers adopt and convert appropriately to the new grading structure and designations and not to promote or upgrade any staff.

10. During the hearing before the ELRC, the respondent was recorded as adopting his witness statement. However, a scrutiny of the entire record shows that his witness statement is not among the documents in the record of appeal. This omission was not raised before us.

11. The gravamen of the respondent's evidence was that he was not placed in the correct grade as per the said Scheme of Service introduced on 1st June 2011. He testified that in 2011 he was an Assistant Research Officer grade RF 8 and the new scheme of service placed him at grade RF 9, Research Officer 11. He asserted that placement for serving officers under the said scheme was automatic, even without minimum academic qualifications. Answering to questions during cross-examination, the respondent stated that he obtained a Master's Degree in February 2018. He urged the Court to find on his favour and to issue the reliefs highlighted earlier.

12. Ms Janet Wambui, the 1st appellant's Human Resource Officer, testified on behalf of the appellants. She adopted her witness statement dated 7th May 2018. Her evidence was that the 1st appellant's Board of Management resolved to create the position of Assistant Research Officer which had been erroneously omitted in the 2011 Scheme of Service, but the respondent could not be promoted to the said post because he lacked a Master's degree. It was her evidence that the respondent never lost any benefits as claimed.

13. In the impugned judgement, the learned judge addressed three issues, namely;

    (a) whether the respondent's scheme of service forms part of the appellant's contract of service,

    (b) Whether failure to ''advance'' the claimant to the position of Research Scientist 11 RF 9 was discriminatory, unlawful and in violation of the respondent's labour rights, and,

    (c) whether the claimant is entitled to the reliefs sought.

    The learned judge answered the first two issues in the affirmative and proceeded to issue the following orders:

    a. The respondent is directed to place the claimant in the post of Research Scientist 11, Job Grade KEFFRI 9 effective 1.6.2011.

    b. The claimant is awarded his salary arrears for the position of Research Scientist 11 Job Group 9 retrospectively from 1.6.2011, less what he has erroneously and unlawfully been paid as assistant Scientist Job Grade KEFRI 8.

    c. The respondent is directed to pay Kshs. 1,175,704/= salary arrears plus any further arrears that will accrue the said date (*sic*) less statutory deductions.

    d. The claimant will have costs and interest at court rates from today.

14. Aggrieved by the above verdict, the appellants instituted this appeal citing 12 grounds. In summation, the grounds are:

    (a) the learned judge erred in misinterpreting clauses 1.4, 1.5 and 1.9 of the Scheme of Service and in disregarding the addendum to the Scheme of Service which restored the respondent's

position of Assistant Research Scientist RF 8 that had been omitted under the Scheme of Service adopted on 1st June 2011;

(b) despite admitting at paragraph 17 of the judgment that the respondent lacked a Master's Degree, the learned judge erred in placing the appellant in the position in question yet he lacked the required qualifications;

(c) the learned judge erred in distorting the intention of the scheme by importing into clauses 1.5 and 1.9 the word "advance";

(d) the learned judge improperly exercised his discretion by allowing the respondent to amend his pleadings during cross-examination;

(e) the learned judge erred in awarding salary arrears of Kshs.1,175,704/= premised on a computer- generated tabulation, which amount was not pleaded or proved;

(f) the learned judge erred in failing to appreciate that the finding on discrimination was unsupported by evidence;

(g) the learned judge exceeded his discretion by purporting to evaluate and promote the respondent;

(h) the learned judge failed to appreciate the appellant's submissions, disregarded points of law and that the judgment is unsupported by law;

(i) the learned judge erred in awarding costs.

15. The appellants pray that this appeal be allowed, the judgment and all the consequential orders be set aside and the respondent's claim before the ELRC be dismissed with costs to the appellants.

16. We note from the record that by a ruling dated 22nd June 2023, this Court (Musinga, Omondi and Laibuta, JJ.A.) dismissed the appellants' application seeking to adduce additional evidence.

17. During the virtual hearing of this appeal on 28th February 2024, counsel for the appellants Mr. Odukenya, and Mr. Wahome, the respondent's counsel, highlighted their respective written submissions.

18. The appellant submitted that the learned judge misinterpreted Clauses 1.4, 1.5, 1.7 and 1.9 of the Scheme of Service. It argued that Clause 1.4 provided the minimum number of years required to advance from one job group to the next is three years, subject to satisfactory performance and availability of a vacancy. It contended that the respondent did not satisfy this requirement. It also claimed that under Clause 1.5, serving officers were required to obtain the requisite qualifications to advance to higher grades and that the respondent did not have a Master's degree.

19. The appellant also submitted that Clause 1.7 provided for direct appointment of staff from outside the institute, therefore it was inapplicable to the respondent. Further, Clause 1.9 provided that the Scheme of Service will become operational with effect from 1st June 2011 and it shall supersede any other existing Schemes. It also provided that upon its implementation, all serving officers will automatically convert to the respective schemes of service. The appellant faulted the learned judge for disregarding the amendment to the Scheme of Service which restored the respondent's position that had inadvertently been omitted. It faulted the finding that under the new scheme, the position of Assistant Research Scientist RF 8 was scrapped and the lowest position was raised to Research Scientist 11 Grade RF9." It argued the said finding was contrary to the reviewed Scheme of Service because the Board of Management in a meeting held on 8th December 2014 introduced the position of Assistant

Research Scientist at RF 8 as the entry level for graduates which had been erroneously omitted in the 2011 scheme of Service. It maintained that under the reviewed Scheme of Service, the respondent was to retain his job group, which is commensurate with his current qualifications. Further, under Clause 1.5, serving officers were to adopt and convert to the new grading structure and designation provided in the scheme. More importantly, and to advance to a higher grade, the officer was required to possess the required qualifications which the respondent did not have.

20. The appellant maintained that the respondent misled the trial court that under the new scheme, his grade, RF 8, was scrapped and he automatically advanced to RF 9. He also misled the court that he obtained a Master's degree in February 2018, and therefore he was qualified for promotion to job group RF 10. To support the foregoing assertions, the appellants referred to the respondent's annexture SMN 4 at page 34 of the record of appeal entitled "job group conversion" and clarified that under the new scheme, the respondent's job group RF 8 was converted to RF 7, RF 9 was converted to 6 and RF 10 was converted to 5.

21. In addition, the appellants faulted the learned judge for importing the word 'advance" into the Scheme of Service while interpreting Clauses 1.2 and 1.9, and cited this Court's decision in *National Bank of Kenya Limited v Hamida Bana & 103 Others* [2017] eKLR in support of the proposition that the function of the court is to enforce and give effect to the intention of the parties as expressed in their agreement, and to interpret and enforce only those obligations which the parties have agreed to assume. Further, there is no legal obligation, express or implied, for the implication into the employment contract terms that the parties have not agreed to be binding conditions even if the court considers it reasonable to do so.

22. The appellant also submitted that under Clause 1.4, the minimum number of years required to advance from one job group to the next group is 3 years, subject to satisfactory performance and availability of a vacancy. They faulted the learned judge for failing to appreciate that the appellant was not qualified for promotion to the position of Research Scientist 11 RF 9 because the respondent-

    (i) had not served as Assistant Research Scientist for at least 3 years having been promoted to the said position in 2010;

    (ii) he lacked a Masters degree;

    (iii) no vacancy had been declared since Research Scientist is a managerial position and not a common cadre position; and,

    (iv) no appraisal was undertaken to determine satisfactory performance had been conducted.

    Further, the learned judge promoted the respondent to a non- existent job group, that is RF 9, yet the 2011 scheme converted the said grade to RF 6.

23. Regarding the finding by the trial court that the respondent was discriminated against, the appellant submitted that this finding was not based on evidence. Lastly, the appellant faulted the learned judge for granting the respondent leave to amend his pleadings after examination in chief, which was prejudicial to the appellant.

24. In his submissions, the respondent maintained that the trial court correctly interpreted the career progression guidelines. He reproduced Clauses 1.4, 1.5 and 1.9 and stressed that only the 2011 Scheme of Service was applicable and dismissed the Board of Management minutes which allegedly amended the said scheme. He questioned the merits of the said minutes, contending that-

    (a) except the minute on the adoption of the agenda, all other items discussed by the Board of Management on the material were not produced in court;

(b) the appellants never produced the resolution(s) passed in the said meeting,

(c) the minutes were not confirmed as a true record of the deliberations of the Board of Management.

The respondent argued that the 1st appellant's correspondence dated 12th January 2015 (pages 68-69 of the record) does not lend credence to the allegation that the Board of Management passed a resolution approving the amendments of the 2011 career progression guidelines, therefore, the said minutes are inconsequential. The respondent reiterated that the applicable career guidelines were those approved by both the parent ministry and the Board of Management which have never been amended to include or restore the position of Assistant Research Scientist, job group KEFRI 8.

25. The respondent maintained that Clause 1.4 of the 2011 guidelines outlines the general requirements for promotion within the organization, which is, the promotion is based on period served, performance and job availability. The respondent argued that the above clause does not apply to him because conversion of the position of Assistant Research Scientist to Research Scientist 11 under the Scheme of Service is not a promotion.

26. In addition, the respondent submitted that Clause 1.5 is two pronged. One, it allows serving officers to benefit from the new career progression system, even if they do not meet all the requirements for the grade. Two, it ensures that only qualified and experienced officers are promoted to higher grades. The respondent stressed that notwithstanding the fact that he did not have a Master's degree under Clause 1.5, he should have automatically converted to Research Scientist 11 with effect from 1st June 2011 as per Clause 1.9. In light of the foregoing, the respondent argued that the trial court correctly determined the applicable career progression guidelines were those adopted on 1st June 2011.

27. Responding to the appellant's argument faulting the learned judge for granting him leave to amend prayer 2 to cover arrears from 1st June to 2018, the respondent argued that the learned judge considered the appellants' objection to the amendment and despite being granted leave to reply to the amendment, the appellant did not do so. Further, the appellant never applied for review, nor did they appeal against the said order, and that the appellant's contestation that they were prejudiced by the amendment lacks merit. To fortify the foregoing argument, the respondent submitted that rule 14 (6) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, allows amendment of pleadings after the close of pleadings with the leave of the Court. He cited *Central Bank of Kenya Ltd. v Trust Bank Ltd* [2002] EA in support of the proposition that in considering applications for leave to amend, the court considers prejudice to the other party, whether the amendment would unduly delay resolution of the case, whether the amendments are necessary for the just determination of the suit, and delay is not a ground for declining leave to amend unless the delay is prejudicial to the other party. Lastly, the appellant submitted that the trial judge properly exercised his discretion in allowing the said amendment.

28. As alluded to earlier, this appeal will stand or fall on the correct interpretation of the Scheme of Service and whether the said scheme was amended as per the Minutes of the 97th Full Board Meeting held at KEFRI Headquarters on 8th December 2014 mentioned earlier. We shall also address the respondent's argument that the said minutes are devoid of merit and whether the learned judge erred by granting the respondent leave to amend his claim after he had concluded his evidence.

29. We are alive to the fact that determination of the above issues will entail evaluation of the evidence tendered before the trial court and determination of factual matters. An appellate court is mandated to re-evaluate the evidence tendered before the trial court and arrive at its own independent conclusions. The only caveat is that this Court must bear in mind that it did not have the advantage of hearing and seeing the witnesses testify. As for the factual issues, trial courts are finders of fact, therefore their

findings on matters of fact are given a high degree of deference by higher courts. On appeal, an appellate court will only overturn a conclusion of fact if the trial court's finding of facts was clearly erroneous. This is to be contrasted with a conclusion of law which will receive higher scrutiny.

30. Regarding the question whether the trial court mis-interpreted the provisions of the Scheme of Service, we must bear in mind the correct approach to the interpretation of contracts or agreements which is well established. We are obligated to give meaning to the words used in the document sought to be interpreted, applying the normal rules of grammar and syntax viewed with attendant factual context, in order to determine what the contracting parties intended. The starting point is to identify the intention of the contracting parties. This is an objective test; the court's concern is to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge available to the parties would have understood them to mean. (See Lord Hoffman in *Chartebrook Ltd. v Persimmon Homes Ltd* [2009] UKHL 38, para. 14). In seeking to harmonize different clauses of the document, we should not give effect to one clause to the exclusion of another, even though they seem conflicting or contradictory, or adopt an interpretation which neutralizes a provision if the various clauses can be reconciled.

31. At this juncture, it is important to underscore that the learned judge's understanding of the Scheme of Service was that with effect from its effective date, it formed part and parcel of the respective employee's contracts, therefore, the 1st appellant had no option but to implement it. The foregoing is captured at paragraphs 11, 12 and 13 of the impugned judgment reproduced below:

> "11. The Schemes of Service implemented by the respondent on 1.6.2011 constituted new terms of service for the respondent's employees. They were a culmination of consultation between the respondent and her employees which received the approval of the parent Ministry. The new terms were not just guidelines but formed part and parcel of the employees' respective contracts on the effective date. The respondent and the employees therefore were henceforth bound by the new schemes of service including new pay unless the employees opted out voluntarily."

32. At paragraph 12 of the judgment, the learned judge reproduced Clauses 1.2 and 1.9 of the Scheme of Service thus:

> "1.2. the scheme of service will be administered by the KEFRI Board of Management. In administering the scheme, the Board of Management will ensure that provisions of the scheme are strictly adhered to for fair and equitable treatment of staff.
>
> 1.9. The scheme of service will become operational with effect from 1st June 2011 and they supersede any other existing. On implementation, all serving officers will automatically convert to the respective scheme of service."

33. The learned judge's interpretation of the above clauses appears at paragraph 13 of the judgment where he stated:

> "13. From the foregoing clauses of the schemes of service, the employer had no choice but to implement the respective schemes of service on all the serving officers on the effective date. In this case therefore, the respondent was bound to effect the new scheme on the claimant as binding terms of service.

14. Under the foregoing clauses of the schemes of service, the employer had no choice but to implement the respective schemes of service on all the serving officers on the effective date. In this case therefore, the respondent was bound to effect the new scheme on the claimant as binding terms of service.

15. Under clause 21 of the scheme of service for Research Scientist under which the claimant fell, the lowest level was Research Scientist 11 Job Grade KEFRI 9 while the highest was Director/Chief Executive Officer, KEFRI 15. The clause set out the job description and the qualification including Bachelor of Science Degree in Forestry and related disciplines, Master's Degree in the said disciplines and computer literacy.[Please check whether the trial judge repeated number 14,also number 13 reads the same as number 14.]

16. Clause 1.5 of the Schemes of Service provided as follows in respect of serving officer:

> "Serving officers will adopt and convert as appropriate to the new grading structure and designations provided in the schemes even if one may not be in possession of the requisite minimum qualifications and/or experience specified for the present grade. However, for advancement to higher grades, the officers will be required to obtain requisite qualifications and experience." (Emphassis added)

17. Flowing from the foregoing clause read with clause 1.9 aforesaid, it is clear that the adoption and conversion of all the serving officer (sic) of the respondent was automatic whether or not the officer possessed the minimum qualifications and experience. The only obligation given to the unqualified officers was that they were bound to undergo the necessary training to acquire the requisite minimum qualifications.

18. In this case, the claimant admitted that he lacked the Master's Degree required for appointment to serve as Research Scientist 11 but he produced result slips to show that he registered for Masters course in Forestry in 2013 and attained the Master (*sic*) Degree in February 2018. After considering all the material presented to the court, I have formed the opinion that the claimant has proved on a balance of probability that he automatically adopted and converted to the new scheme of service for Research Scientist effective 1.6.2011 as provided under Clause 1.5 and 1.9 of the Schemes of Service implemented on the even date. His rightful post became Research Scientist 11 Job Grade KEFRI 9 effective 1.6.2011 and the respondent had no option. It was therefore unlawful and discriminatory for the respondent to, unilaterally and without consent of the claimant, suspend or fail to effect the new scheme of service applicable to the claimant's contract of service. The respondent's Board had a duty and not an option to implement the schemes of service to all the serving officers." (Emphasis added)

34. Even though the question whether the Scheme of Service was binding upon the parties was not an issue before the trial court, the trial court stated:

> " the employer had no choice but to implement the respective schemes of service on all the serving officers on the effective date. In this case therefore, the respondent was bound to effect the new scheme on the claimant as binding terms of service."

35. We agree with the learned judge that the Scheme of Service was binding upon the 1st appellant. However, that is how far it goes, because the correct position is that the 1st appellant was obligated to implement the Scheme of Service strictly in conformity with the terms and conditions contained therein. It could not have been the intention of the parties, that the Scheme of Service would contemplate its implementation in a manner that was inconsistent with its terms and conditions. In the same vein, it is not expected that a court of law would arrive at findings and issue orders which go against the letter and spirit of the Scheme of Service.

36. For example, the learned judge found that the adoption and conversion of all serving officers of the 1st appellant was automatic, whether or not the officer possessed the minimum qualifications and experience. This finding is manifestly wrong and flies in the face of the same instrument the learned judge was interpreting, because for serving officers to advance to a higher grade, it was a requirement under Clause 1.5 that the officer obtains the required qualifications and experience. Therefore, for the trial court to conclude that serving officers could automatically advance to higher grades was a grave mis-direction and a contradiction of the aims and objectives of the Scheme of Service reproduced earlier. It was also an affront to the qualifications for appointment as a Research Scientist 11, job group 9 stipulated in the Scheme of Service (see page 28 of the record). The qualifications are Bachelor of Science Degree and a Master's degree in any of the fields listed in the said paragraph and computer literacy.

37. As submitted by the appellant, for the respondent to ascend to the position of Research Scientist 11 RF 9, the requirements were-

(i) he should have served as an Assistant Research Scientist for at least 3 years. In his own admission at paragraph 7 of his claim, he was promoted to the said position in 2010. The Scheme of Service was adopted on 1st June 2011;

(ii) In his own admission, he lacked a Master's Degree;

(iii) no vacancy had been declared since Research Scientist is a managerial position and not a common cadre position; and,

(iv) no appraisal to determine satisfactory performance had been conducted.

In addition, the learned judge promoted the respondent to a non-existent job group, that is RF 9, yet the 2011 scheme converted the said grade to RF 6.

38. Equally important is the fact that the Scheme of Service was adopted on 1.6.2011. The respondent admits in his Memorandum of Claim filed at the ELRC on 9th December 2014, almost 4 years after its adoption, that he did not have a Master's Degree. During cross-examination on 7.5.2018, almost 8 years after the adoption of the Scheme of Service, the respondent said he obtained a Master's Degree in February 2018. Surprisingly, the learned judge at paragraph 17 reproduced above stated:

> " "...but he produced result slips to show that he registered for Masters course in Forestry in 2013 and attained the Master (*sic*) Degree in February 2018. After considering all the

material presented to the court, I have formed the opinion that the claimant has proved on a balance of probability that he automatically adopted and converted to the new scheme of service for Research Scientist effective 1.6.2011 as provided under Clause 1.5 and 1.9 of the Schemes of Service implemented on the even date. His rightful post became Research Scientist 11 Job Grade KEFRI 9 effective 1.6.2011 and the respondent had no option."

39. The above finding raises pertinent questions. First, the respondent did not have a Master's Degree as at 1st June 2011 when the Scheme of service was adopted. He even admitted it in his pleadings and evidence. He claims he obtained a Master's degree in 2013. However, by judicial fiat, the learned judge backdated his promotion to 1st June 2011, despite the appellant admitting that he had no Master's Degree as at the said date. This finding was a grave violation of Clause 1.5 which expressly required a serving officer to possess the requisite qualifications and experience.

40. Second, and closely related to the above finding, the learned judge directed the 1st appellant to place the respondent in the post of research Scientist 11, Job Grade KEFRRI 9 effective 1st June 2011, notwithstanding the fact that he lacked qualifications for the said post during the period prior to February 2018 when he claimed to have attained a Master's Degree. Ironically, a Master's Degree (or any other academic qualification) has no retrospective application or effect. It's therefore inconceivable that a court of law properly addressing its mind to the facts disclosed in this case could find that a Master's Degree obtained in February 2018 could entitle the respondent to an order promoting him with effect from 1st June 2011. In making the said order, the learned judge stated at paragraph 18 of the judgment:

> "Secondly, I direct the respondent to place the claimant in his correct Job Grade, that is Research Scientist 1 KEFRRI 9 retrospectively from 1st June 2011 in line with Clause 1.9 of the Scheme of Service implemented on 1.6.2011."

41. Third, even assuming the respondent acquired a Master's degree in February 2018 as he claimed, the pleadings were not amended to reflect the said achievement. The respondent's claim before the ELRC was filed on 9th December 2014. Therefore, the finding that he had a Master's degree was not founded on the pleadings.

42. Fourth, by directing the 1st appellant to place the respondent in the post of Research Scientist 11, grade 9, as at 1st June 2011, the learned judge effectively trashed the requirement for the 1st respondent to evaluate the respondent's suitability to serve in the said post and satisfy itself that as a serving officer, the respondent possessed the requisite qualifications as required by Clause 1.5.

43. Fifth, the learned judge's finding that the appellant proved on a balance of probabilities that he automatically adopted and converted to the new scheme was in total disregard of Clause 1.5 which provided that "however, for advancement to higher grades, the officers will be required to obtain requisite qualifications and experience." Our reading of the said clause is that progression to a higher grade was not automatic as the learned judge wrongfully suggested.

44. Sixth, much as the respondent claimed he obtained a Master's degree in 2018, the learned judge was obligated to interrogate the evidence before him and satisfy himself whether indeed the respondent had achieved this qualification. However, the learned judge stated that the respondent produced result slips to show that he registered for a Master's degree in 2013 and attained a Master's degree in 2018. No Master's Degree Certificate was produced to support the respondent's claim that he had a Master's degree, nor was the degree certificate among the documents relied upon by the respondent. In our

view, the learned judge lowered the standard of proof for the respondent on this particular issue and in the process, he fell into a grave error.

45. Having concluded herein above that the learned judge wrongfully interpreted and applied the provisions of the Scheme of Service, it follows that the award of Kshs. 1,175,704,704/= for salary arrears as at 4th June 2018 was a grave mis-direction. The other reason why the said award cannot stand is that a reading of the entire judgment, including the analysis, shows that there is absolutely nothing to show how the learned judge arrived at the said sum. In fact, the said sum appears for the first time in the judgment at paragraph 18 under reliefs. All that the learned judge said is:

> "Thirdly, I direct the respondent to pay the claimant Kshs.1,175,704/= being his salary arrears as at 4th April 2018 plus any further arrears which will accrue from that date."

46. There is absolutely no reference to any iota of evidence adduced in support of the said claim, or whether it was proved to the required standard and the basis upon which the learned judge computed the said sum. In our view, the said award was arrived at arbitrarily. For the said reasons, the said sum cannot be allowed to stand.

47. Next, we will address the respondent's argument casting doubts on the merits of the Minutes of the 97th full board meeting held on 8th December 2014. In the said meeting, the 1st respondent's Board of Management adopted recommendations of a Taskforce, which recommended some amendments. The import of this was that the Scheme of Service was amended in some areas, including re-introducing the position of Assistant Research Scientist, RF 8, which had been erroneously omitted in the Scheme of Service.

48. However, the respondent's opposition to the said minutes was raised for the first-time during submissions. The said document was part of the 1st appellant's documents filed before the trial court. No objection was raised against it during the trial. The respondent never adduced evidence during the trial to counter the said documents. Submissions are not evidence. We therefore find that nothing turns on this argument.

49. Lastly, we will address the appellants' grievance that the trial judge erred in grating the respondent leave to amend his claim after he had completed his evidence. In our view, nothing turns on this argument because leave to amend pleadings can be granted at any stage of the pleadings. In any event, despite being granted leave to amend their reply, they did not do so, nor have they demonstrated that they were prejudiced by the amendment.

50. In light of our analysis of the issues discussed above and the conclusions arrived at, the inevitable conclusion is that this appeal is merited. Accordingly, we hereby allow the appellants' appeal and issue the following orders:

    a. The judgment and decree delivered by Makau, J. on 28th September, 2018 in Nairobi ELRC Cause No. 2188 of 2014 together with all the consequential orders arising therefrom is hereby set aside in its entirety.

    b. The orders issued by Makau, J. on 28th September, 2018 in Nairobi ELRC Cause No. 2188 of 2014 are hereby substituted with an order dismissing the said suit with costs.

    c. The respondent shall pay the appellant the costs of this appeal and the proceedings before the ELRC.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR