



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & MURGOR, J.J.A)

CIVIL APPEAL NO. 278 OF 2016

BETWEEN

AMATSI WATER SERVICES COMPANY LIMITED ..... APPELLANT

AND

FRANCIS SHIRE CHACHI ..... RESPONDENT

*(An appeal from the Judgment/Order of the Employment and Labour Relations Court of Kenya at Nairobi (James Rika, J.) dated 26<sup>th</sup> September, 2012*

*in*

*(ELR Cause No. 1548 of 2010)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The parties on both sides of the argument in this appeal have identified two issues which we shall consider and determine shortly. Firstly, whether the employment of the respondent was terminated unfairly and unlawfully; and secondly, if so, what remedies he was entitled to.

The background to those issues may be briefly stated.

The respondent was appointed as the Managing Director of the appellant on a three year contract on 2<sup>nd</sup> July, 2007. Ordinarily the contract would have terminated on 1<sup>st</sup> July, 2010, unless it was earlier terminated by the appellant or renewed at the respondent's instance. About six months before expiry of the contract, however, the relationship between the two went south. Audit queries arose from a report by the Kenya National Audit Office dated 14<sup>th</sup> October, 2009, on the accounts and management of the appellant. Some funds (Urban Project Concept) (**UPC fund**) put at the disposal of the appellant by the Water Services Trust Fund (**WSTF**) also appeared to have been mismanaged or misappropriated, necessitating an internal audit in March 2010. According to the appellant, some aspects of those audit reports directly pointed at the respondent. Recommendations were made to investigate him further and in April 2010, the respondent was suspended from his duties by the Board of Management (**BOM**). He would henceforth be paid allowances but not his basic salary during the suspension.

On 15<sup>th</sup> June 2010, the appellant served the respondent with a letter listing a raft of accusations against him and asked him to show cause why disciplinary action should not be taken against him. No response appears to have come from the respondent as at the time of expiry of the contract. The next communication was from the appellant on 2<sup>nd</sup> August, 2010 conveying the decision of the BOM which met on 30<sup>th</sup> and 31<sup>st</sup> July, 2010 and affirmed the end of the contract since there was no intimation of renewal from the respondent. The appellant offered to pay him two months' salary in lieu of notice and invited him to apply for the post whenever it would be advertised. On 26<sup>th</sup> August, 2010, the appellant wrote again surcharging the respondent a sum of Sh.66,312 found by the Auditors to have been traceable to him for various items of improper expenditure. Another letter was written on 17<sup>th</sup> September, 2010 confirming the BOM's resolution to pay him the salary withheld since January 2010, less the surcharge. However, no funds were released to the respondent.

On 6<sup>th</sup> December, 2010, the respondent went to the Industrial Court and filed his claim seeking a declaration that the termination of his first contract was unfair, wrongful and unlawful. He also sought a declaration that by the time the contract was terminated, the respondent had begun serving another term of three years of the renewed contract whose termination was also unfair and wrongful. He sought specific compensatory figures for both terminations as follows:

**"Period running upto 1<sup>st</sup> July, 2010**

**1. Gratuity January 2009 - June 2010**

18 months x Kshs. 17,587.50 = Kshs. 316,575.00

Unremitted personal contribution to CFC Life pension

Cheque No. 329 October, 2009

1 month x Kshs. 25,000 = Kshs. 25,000.00

Unremitted personal contribution to CFC Life pension

Cheque No.330 November, 2009

1 month x Kshs. 25,000 = Kshs. 25,000.00

Unremitted personal contribution to CFC Life Pension

Cheque No.375 December, 2009

1 month x Kshs. 25,000 = Kshs. 25,000.00

**Kshs. 391,575.00**

**2. Unremitted NSSF contribution**

(Part of cheque No. 348)\* 2 for December, 2009

1 month x Kshs. 10,200.00 = Kshs. 10,200.00

**3. Salary arrears January, 2010 - June, 2010**

(6 months x Kshs. 118,350.00) Kshs. 710,100.00

**4. Leave allowance - 2009/2010**

(1 month x Kshs. 25,000) = Kshs. 2 5,000.00

Leave unutilized - (57 days x Kshs. 2,705.77) = Kshs. 154,228.85

**Kshs. 179,228.85**

**5. Reimbursements**

PD: Nairobi following up RTA, electricity, WASPA and KENAO 15<sup>th</sup> - 19<sup>th</sup> March, 2010

6 x Kshs.5, 000.00) Kshs. 30,000.00

Transport expense for the above

(1 x Kshs.1,400.00) Kshs. 1,400.00

Airtime allowance - January-April, 2010

(4 x Kshs.6,000) Kshs. 24,000.00

**Kshs. 55,400.00**

**Subtotal Kshs. 1,346,503.85**

**Period after 1<sup>st</sup> July, 2010.**

6. Dues owing following wrongful termination

of contract of employment (36 months x 118,350.00) = **Kshs. 4,260,600.00**

**GRAND TOTAL KSHS.5,607,103.85**

Plus costs."

In response, the appellant denied all the claims as particularized, pleading that there was only one contract of employment which terminated on expiry. It contended that the respondent "oversaw an era of gross mismanagement of the appellant's affairs, open and shameless fraud and defiant breach of his terms of employment resulting in loss and embarrassment" to the appellant. It counterclaimed a sum of Sh.340,312, particulars of which it gave. Nevertheless, the following concessions and assertions, which we summarize, were made in the pleading:

- "1. That the claimant was employed as Managing Director on a three year contract effective from the 2<sup>nd</sup> day of July 2007.**
- 2. That the claimant took over the appointment from the said date until the 20<sup>th</sup> April 2010 when he was suspended.**
- 3. That the respondent, Amatsi Water Services Company Limited, is a company established under the Companies Act Cap 486 Laws of Kenya and governed by its Memorandum and Articles of Association.**
- 4. That the parties' terms and conditions of service are those contained in the employment contract.**
- 5. That the expiry date for the said contract of employment was the 2<sup>nd</sup> day of July 2010.**
- 6. That despite the suspension, the claimant remained an employee of the respondent until the 2<sup>nd</sup> day of July 2010.**
- 7. That the claimant would be entitled to his pay for the period he remained on suspension.**
- 8. That the claimant was by a letter dated 2nd August 2010 informed of the expiry of his employment contract on the 2nd day of July 2010 and the Respondent's decision not to renew the contract.**
- 9. That the respondent had not paid the claimant what he was entitled to by the date of filing the claim on the 10th of December 2010.**
- 24. That the claimant was entitled to or never paid leave allowance for the year 2009/2010.**
- 25. That the claimant is entitled to any reimbursement while on duty in the year 2010 as alleged or at all.**
- 26. That the claimant was denied letter of service on expiry of contract."**

Upon hearing the parties and their witnesses, and considering written submissions of counsel, the trial court (**James Rika, J.**) found, correctly in our view, that there was only one contract of employment and that there was no employment relationship created between the parties after the lapse of the first contract. Any claims by the respondent could only be made with respect to the expired three year term. There is no cross appeal on that finding.

After analysing the evidence on record, the court made the following findings:

- "i. The respondent initiated a disciplinary process against the claimant, but there was no formal outcome on this process, communicated to the claimant;**
- ii. The plethora of accusations made against the claimant were not genuine concerns; they were raised by the respondent to justify its premature termination of the claimant's contract of employment. This early termination of the contract in April 2010 was clothed in the guise of suspension and investigations;**
- iii. The decision of the respondent came in close proximity to the date of termination the first contract; the impression of the Court was that the decision was meant to discourage the claimant from seeking renewal of the contract;**
- iv. Ultimately, the fixed term contract did not terminate by lapse, but was terminated prematurely, in a way that the respondent would be called upon to justify by valid reason or reasons, and demonstrate it paid heed to the requirements of procedural fairness.**

v. *In this respect the termination did not observe the statutory minimum procedures under section 41 of the Employment Act 2007; did not offer any valid reason or reasons under section 43 and 45 of the same law; and failed the test on justice and equity under section 45 (4) (b) of the Act.*

vi. *The respondent misjudged the nature of the fixed term contract and rushed to take pre-emptive actions to ensure the claimant did not continue to be its Managing Director; it was not bound to give him reasons for non-renewal. Clause C (1)*

*(f) of the claim did not compel the respondent to re-employ the claimant. The rush to suspend, refuse to pay salaries, and adopt and inconclusive disciplinary mechanism, changed the nature of termination.*

vii. *The claimant is entitled to compensation for an unfair termination."*

The court also considered the specific claims made and ended up with the following final awards on the claim and counterclaim:

*"(a)*

*The termination of the claimant's contract of employment was unfair in both procedure and substance;*

*(b) Compensation of 10 months' gross salary at Ksh.1,183,500;*

*(c) Gratuity at Ksh.211,050;*

*(d) Leave allowance at Ksh.25,000;*

*(e) 57 un-utilized leave days' pay at Ksh.154,228;*

*(f) Arrears of salary 710,100;*

*(g) The counter-claim is allowed at Kshs.64,000;*

*(i) offsetting the mutual liabilities, the respondent shall pay to the claimant the total amount of KSH.2,219,878; within 30 days of the delivery of this Award;*

*(j) Certificate of service to issue*

*(k) No order on the costs and interest."*

Those are the findings that aggrieved the appellant who put forth 11 grounds of appeal to challenge them. There was no cross appeal on any of the orders. As stated earlier, the appellant condensed the appeal into two issues in its written submissions, the first one based on Grounds 1, 2, 8 & 9 stating:

***"1. THAT the Learned Trial Judge erred in fact and law by finding that an employee whose fixed term contract expires while on investigation over suspected misappropriation of funds, theft, gross misconduct and incompetence can be said to have been unfairly terminated in his employment and therefore proceeding to award compensation to the Respondent for unfair termination.***

***2. THAT the Learned Trial Judge erred in fact and law by finding that the Respondent was entitled to compensation for unfair termination outside his entitlement in terms of the salary under the contract of service.***

***8. THAT the Learned Trial Judge erred in fact and in law in holding that the Respondent's suspension was not justified in law and under his terms of employment.***

***9. THAT the Learned Trial Judge erred in fact and in law in failing to consider that the disciplinary action against the Respondent was rendered nugatory and superfluous by lapse of his contract of service."***

The second one is based on grounds 3, 4, 5, 6, & 7, stating thus:

***"3. THAT the Learned Trial Judge erred in fact and in law and proceeded on extraneous and mere speculation in holding that the Respondent's monthly salary had been reviewed during the said Respondent's tenure from Kshs 70,350/= to Kshs 118,350/= without any proper foundation in evidence.***

***4. THAT the Learned Judge misdirected himself in proceeding to calculate the allowances and benefits due to the Applicant on the basis of the basic pay of Kshs 70,350 against his finding that the Respondent's salary had certainly been***

*reviewed upwards and accordingly, this amounted to material contradiction in his judgment as to affect its validity.*

**5. THAT the Learned Trial Judge erred in fact and in law in considering extrinsic terms to the Respondents terms of service contained in the Respondent's contract of employment, in particular, terms as to the Respondent's salary entitlement, thereby conferring undue benefit to the Respondent in the Honourable Court's award.**

**6. THAT the Learned Trial Judge misdirected himself in holding on one part that the Respondent being the Managing Director had a relative degree of control over remittance of salary and allowances to him while holding on the other that the excessive allowances paid to the Respondent outside his contractual entitlement were effected properly as the Respondent could not have had control over his salary remittance.**

**7. THAT the Learned Trial Judge erred in fact and in law in finding that the Respondent was entitled to gratuity in terms of Clause 4.1 for inter alia having successfully completed his contract of Employment while failing to consider the terms of the said Clause 4.1 in its entirety inter alia failing to consider that the Respondent's term ended while the Respondent was serving suspension on charges of gross mismanagement of the Appellants affairs."**

Was the respondent's employment contract terminated unfairly, wrongfully and unlawfully? That is the first issue.

Learned counsel for the appellant, **Mr. Daniel Sifuma**, instructed by M/s Nyachae & Ashitiva Advocates, in both written and oral submissions, contended that the appellant followed the terms of the contract between the parties. According to him, there was a proper basis for suspension of the respondent two and a half years into the contract. This was because of the revelation made in two independent audit reports which confirmed mismanagement and misappropriation of funds and recommended investigation of the respondent, hence his suspension. Counsel further observed that the respondent was served with a 'show cause' letter on 15<sup>th</sup> June, 2010, to respond to the audit queries failing which disciplinary action would be taken. In his view, this was procedurally fair, but the respondent offered no defence, and indeed made no response at all. Before any other step could be taken, the contract expired and the appellant could not proceed further since there was no longer an employer/employee relationship.

On the finding that the appellant suspended the respondent shortly before the end of the contract in order to pre-empt renewal of the contract, counsel observed the contradictory finding by the trial court that nothing prevented the respondent from seeking renewal despite the suspension. As for the finding of non compliance with statutory minimum procedures under **sections 41, 43 and 45** of the Employment Act, 2007, counsel submitted that there was compliance since the appellant genuinely believed the matters unearthed by the auditors to exist and put them in writing to the respondent for his response. According to him, a fair disciplinary process was not necessarily an oral hearing as was held by this Court in the case of ***Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR***. The trial court was in error, therefore, he concluded, in finding that the contract was terminated unfairly when in truth it expired while the respondent was being investigated over gross misconduct and incompetence.

Responding to the 1<sup>st</sup> issue, learned counsel for the respondent, **Ms. Faith Kamau**, instructed by M/s Lumumba & Lumumba Advocates, submitted that the contract was terminated unfairly because the suspension of the respondent was for the purpose of further investigations which were never finalized. In counsel's view, it was necessary to go through an oral disciplinary hearing for the allegations leveled against the respondent to be answered but that opportunity was not given to him. She agreed with the trial court that the contract was not terminated by lapse, but premature and unfair termination in breach of statutory provisions.

Counsel further observed that one audit report showed a surplus in revenue and a positive balance sheet for the year 2008/2009, thus demonstrating sound financial management by the respondent. The onus was on the appellant to prove the raft of allegations made against the respondent and that burden did not shift simply because the respondent did not respond. **Section 107** of the **Evidence Act** and the High Court case of ***Alfred Kioko Muteti vs Timothy Miheso & Another [2015] eKLR*** were relied on for that submission. In conclusion on this issue, counsel contended that the unjustified and premature termination prevented the respondent from enjoying the terms of the contract fully and denied him an opportunity to apply for renewal.

We have considered those submissions and the entire record of appeal, as we must on a first appeal, in order to arrive at our own conclusions on matters of law as well as facts. See **Rule 29 (1) (a)** of the Court's Rules. As we do so, we must generally defer to the findings made by the trial court, especially on credibility of witnesses as it had the added advantage of hearing and seeing the witnesses. Nevertheless, we are at liberty to interfere with the findings if they are based on no evidence or on a misapprehension of the evidence or the court is shown demonstrably to have acted on wrong principles in reaching its findings. See ***Mwangi vs Wambugu [1984] KLR page 453***.

It is common ground, and the trial court affirmed it, that the contract of employment was for a fixed term of three years ending on 1<sup>st</sup> July, 2010. The respondent never sought to renew it although he was at liberty to do so, as correctly found by the trial court. The main bone of contention, in our view, is whether the contract was prematurely terminated or it ended by effluxion of time.

In the case of ***National Water Conservation & Pipeline Corporation vs Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014 (UR)***, this Court stated as follows:

***"The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise. The principle has been considered by several Judges of the Industrial Court (now the Employment and Labour Relations Court) and they are generally in agreement. Indeed this Court was in agreement in the *Oshwal Academy (Nairobi)* case (supra) when it decided as follows:-***

***"Termination of fixed term contracts has received judicial consideration by the Industrial Court. In *Bernard Wanjohi Muriuki vs****

*“In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”*

The Court also stated thus:

***"A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and an end date. The contract would logically end automatically without more otherwise it would no longer be a fixed term contract. See the case of SA Rugby (Pty) Ltd vs CCMA & Others (2006) 27 ILJ 1041 (LC) at 1044 par 6).***

Further to being fixed, the contract between the parties in this matter contained a termination clause. In part, the contract would terminate ***"..in the event of any of the following:- expiry of the contract without renewal, retirement, summary dismissal, protracted illness, permanent disability or death"***. It could also be terminated by either

party giving to the other two months notice or paying two months' salary in lieu.

As a general guiding principle, we must recall that in matters employment, there has been a drastic change in policy and approach post the **Employment Act, 2007** and the **Constitution, 2010**. The latter decrees fair labour practices in **Article 41** while the former has elaborate provisions on fairness in termination of employment in **sections 41, 43, 44, and 45**. It is no longer fashionable, therefore, for employers to fire their employees willy nilly -- for any reason, no reason, or in any manner. The principle runs across all contracts of employment.

In this case, there was evidence that audit queries had been raised by the Kenya National Audit Office in respect of the accounts for the year 2008/2009. Other audit queries arose through WSTF on the use of the UPC fund. These queries called for further investigations, hence the suspension of the respondent in April 2010 to facilitate the investigations. The trial court was of the view that the suspension, coming so close to the end of the contract, was ill motivated, but we find no support for that finding. The respondent was a member of the BOM that recommended suspension and he himself accepted the suspension and handed over as confirmed in his letter dated 14<sup>th</sup> June, 2010. His only concern was that the allowances payable to him were not forth coming and that there was no communication on the result of the investigations.

The communication was delivered to him the following day in the letter dated 15<sup>th</sup> June, 2010. We may reproduce the letter for full effect:

***"Mr. Francis Chachi***

***P/NO. 7021***

***Managing Director***

***Amatsi Water Services Company Limited***

***P. O. Box 740***

**MARAGOLI**

**RE: INDISCIPLINE**

***Further to your suspension letter Ref: AWASCO/STAFF/1/263 dated 20<sup>th</sup> April 200 concerning the above subject and followed by investigation carried out, it has been established on diverse dates between 1<sup>st</sup> January***

***2010 to date you failed to do the following:***

***~To respond to audit queries raised by Kenya National Audit Office.***

***~ To submit accounts for the year 2008/2009.***

***~To follow Government procedures by taking a government vehicle GK A167 L to a private garage for repair (SAHAJANAND). The vehicle is still incurring storage and the garage is demanding over Kshs 300,000.00.***

***~Supplying raw water to consumers in contravention of Article 4.2b and Article 29 of the SPA.***

***~To implement the new WASREB guidelines vide Ref LVNWSB/HQS/WSP/2.VOL IV/77.***

- To meet revenue collection targets of 85% as recommended by WASREB.
- To ensure supply of water to consumers for more than three months in contravention Section 28. 1 of the SPA.
- Driving vehicle registration KBG 907C without authority and disregard to rules and regulations governing the use of government motor vehicles.
- Mismanagement and misuse of UPC project and failure to respond to queries raised by WSTF auditors. Ref: WSTF / 7/ADT/VOL 11 (430).
- Non remittance of statutory deductions such as NHIF, NSSF, PAYEE etc, this is against the law and is a criminal offence.
- Remittance of gratuity deductions CFC before expiry of your contract. As per the employment contract, gratuity of 25% is only payable upon successful completion of the contract. If this was in good faith, then the gratuity for the TM and CM could have been handled in the same manner.
- Among others.

All these actions have not only led to lose (sic) of revenue but also brought

disrepute to the company. As a result the Company has not been able to pay staff and other creditors.

Given the nature of the malpractice, you are hereby required to show cause why disciplinary action should not be taken against you. You shall within seven (7) days from the date of this letter state your defence in writing, failure to which it will be assumed that you have no defend and Board will institute disciplinary action against you without further reference.

Yours faithfully

(Signed)

Mrs. Alice Kirambi

Chairlady Amatsi Water Company Limited."

There was no response made by the respondent to that letter. The view taken by the trial court was that the respondent should have been called for an oral disciplinary hearing to respond to the queries raised by the appellant. That may well have been the next logical step. However, oral hearing is not necessarily the best evidence of fairness. As correctly submitted by the appellant citing this Court's decision in Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR:

*"The fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing. In the case of Local Government Board vs Arlidge [1915] A.C. 120, 132-133, Selvarajan vs Race Relations Board [1975] I WLR 1686, 1694, and in R vs Immigration Appeal Tribunal Ex-parte Jones [1988] I WLR 477, 481 it was held:-*

*"the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.".....*

*Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ..."*

At all events, the letter came barely 15 days before the expiry of the contract and it was fair and reasonable to give the respondent time to respond. That the contract ended during the investigation process cannot be placed solely on the appellant's doorstep. It is our finding, in all the circumstances, that the contract was not terminated before its expiry. It ended by effluxion of time before any communication on the disciplinary process envisaged in the letter of 15<sup>th</sup> June, 2010 could take effect. Nevertheless, the respondent continued to be an employee of the appellant throughout his suspension, as admitted in the pleadings filed by the appellant. There was no case of wrongful or unfair termination and we so find.

Having so found on the 1<sup>st</sup> issue, it follows that the order for compensation of 10 months' gross salary must be set aside. That leaves the other entitlements of the respondent which we now consider under the 2<sup>nd</sup> issue.

The only items challenged by the appellant are the **remuneration** of the respondent as at the time of expiry of the contract, and the **gratuity** payable to him. Learned counsel submitted that the gross salary under the contract was Sh.90,000, made up of basic salary - Sh.67,000, house allowance - Sh.20,000 and medical allowance - Sh.3,000. According to him, that is the basis on which the arrears of salary and gratuity should be calculated.

On the other hand, the respondent contended, and the trial court agreed with him, that the remuneration was subject to review every year and it was reviewed by the BOM. Salary payment slips for the months of November and December 2009 were produced in evidence to show that the gross monthly salary paid was Sh.118,350.

We need not dwell on the issue of salary because it is covered in the contract and was subject to yearly review. There is evidence that the respondent was paid the gross salary at Sh.118,135 as at the time he was suspended and there was admission of that figure by the appellant's witness, **Frederick Adongo Atwa**. We agree with the trial court that that is the figure on which the arrears of salary and gratuity should be based.

Gratuity was provided for in the contract at 25% of the annual basic salary. The appellant contends that it was only payable upon successful completion of the contract and was not payable if his separation with the appellant was a consequence of gross misconduct as provided for under the **Employment Act, 2007**. The appellant further argues that failure by the respondent to respond to the 'show cause' letter was an admission of gross misconduct and he was therefore not entitled to gratuity. With respect, we cannot accept that argument. As already held above, the process of investigation and disciplinary process were inchoate. There was no conclusive action taken before expiry of the contract. The appellant cannot take refuge in such state of affairs. We accordingly uphold the order on payment of gratuity. The other orders are not challenged and therefore we need not say anything thereon.

The final orders boil down to this:

- (a) The appeal is partly successful but is otherwise dismissed.**
- (b) The finding that the termination of the respondent's contract of employment was unfair in procedure and substance is set aside.**
- (c) The order of compensation of 10 months' gross salary at Sh.1,183,500, is hereby set aside.**
- (d) The order for payment of gratuity at Sh.211,050 is upheld.**
- (e) The order for payment of leave allowance at Sh.25,000 is not disturbed.**
- (f) The order for payment of 57 un-utilized leave days at Sh.154,228 is not disturbed.**
- (g) The order for payment of salary arrears at Sh.710,100 is not disturbed.**
- (h) The order allowing the counterclaim at Sh.64,000 is not disturbed.**
- (i) The order for issuance of certificate of service is not disturbed.**

As the appellant has substantially succeeded in the appeal, each party shall bear its own costs of the appeal.

Orders accordingly.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of October, 2018.**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**