



**Stephen v Kenya Wildlife Service & another (Cause E462 of 2021)  
[2024] KEELRC 88 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 88 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E462 OF 2021  
JK GAKERI, J  
JANUARY 31, 2024**

**BETWEEN**

**JOHN MUNENE STEPHEN ..... CLAIMANT**

**AND**

**KENYA WILDLIFE SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH  
SERVICES ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant commenced the instant suit vide a Memorandum of Claim dated 31<sup>st</sup> May, 2021 praying for;
  - i. Field allowances from June 2019 until the hearing and determination of this claim.
  - ii. Monthly salary from June 2020 till the determination of this suit.
  - iii. Special damages of Kshs.97,000/=.
  - iv. General damages for pain and suffering.
  - v. General damages for loss of amenities and earning capacity.
  - vi. Workmens compensation.
  - vii. Future medical expenses.
  - viii. Costs of the suit.
  - ix. Interest at court rates on (i) and (ii) above till payment in full.
  - x. Interest at court rates on (iii) above till payment in full.



- xi. Interest on (iv) and vii) above till payment in full.
- xii. Any other relief the court may deem fit.

**The Claimant's case is pleaded as follows;**

2. That he joined the Respondent as a Ranger on 27<sup>th</sup> October, 2015 and fell on 6<sup>th</sup> September, 2017 while in the course of his employment at Kifaru Court resulting in sharp back pains and was admitted at the Nairobi Womens Hospital for 10 days.
3. That tests showed that he had suffered a Broad based bulge, dehydration and left paracentral annular tear of the L4 – L5 disc and mild left paracentral bulge of the L5 – S1 disc.
4. That on 19<sup>th</sup> September, 2017, the Claimant was admitted at the Menelik Medical Centre for 3 days and was later referred to Doctors at the Kenyatta National Hospital but did not take up the referral as on 4<sup>th</sup> February, 2018 he proceeded for a Spinal surgery at the Nairobi West Hospital, was admitted for 3 days and off-duty for 21 days for physiotherapy.
5. That the Respondent did not facilitate him and had to incur own costs and the Respondent did not report the matter to the Director of Occupational Safety and Health Services (herein after DOSHS), the 2<sup>nd</sup> Respondent.
6. That he obtained a disability report from the National Spinal Injury Referral Hospital on 8<sup>th</sup> July, 2019 and was awarded 45% Workmen Compensation under the [Work Injury Benefits Act](#), 2007 and was subsequently registered by the National Council of Persons With Disabilities (NCPWD) as a person living with disability.
7. It is the Claimant's case that the Respondent refused to pay his field allowances.

**1<sup>st</sup> Respondent's case**

8. In its response, the 2<sup>nd</sup> Respondent avers that the Claimant has not been processed at the Directorate since the date of the accident as the Claimant had not lodged notice of the alleged accident as prescribed by [Work Injury Benefits Act](#), 2007 or any claim or disability report by Dr. Otworu.
9. The 2<sup>nd</sup> Respondent's defence is that it has not been engaged in the processing of the Claimant's claim.

**2<sup>nd</sup> Respondent's case**

10. In its amended response and Counter-claim dated 20<sup>th</sup> May, 2022, the 1<sup>st</sup> Respondent admits that the Claimant was its employee effective 21<sup>st</sup> October, 2015 and sustained injuries while stationed at the Nairobi National Park and the same was reported to the insurer.
11. That Dr. S.O. Otieno's Medical Report dated 21<sup>st</sup> November, 2018 advised the 1<sup>st</sup> Respondent that the Claimant could resume duty and be assigned light duties for 6 months, but resumed duty on 31<sup>st</sup> May, 2019 and did not report to work at the David Sheldrick Camp on 1<sup>st</sup> June, 2019 until 17<sup>th</sup> and 20<sup>th</sup> June, 2019 and was taken through a disciplinary hearing and was found guilty of absconding duty.
12. The Claimant resumed duty on 1<sup>st</sup> July, 2019 at the 1<sup>st</sup> Respondent's Headquarter but absconded duty and attempts to reach him fell through including vide contacts he had provided and was terminated from employment on 17<sup>th</sup> September, 2019 for having absconded duty since 1<sup>st</sup> June, 2019.



13. That under the *Wildlife Conservation and Management Act*, 2013, which creates the 1<sup>st</sup> Respondent, one is deemed to have deserted the service after 21 days of absconding duty unless the contrary is proved.
14. The 1<sup>st</sup> Respondent avers that the Claimant breached the terms and conditions of employment by absconding duty and denies having refused to pay allowances.
15. In its Counter-claim, the 1<sup>st</sup> Respondent avers that the Claimant absconded duty from 1<sup>st</sup> June, 2019 and from 1<sup>st</sup> July, 2019 for more than 21 days.
16. That the 1<sup>st</sup> Respondent paid the sum of Kshs.447,293.10 as ordered by the court on 5<sup>th</sup> July, 2021 being field allowances from June 2019 and salary from June 2020 to October 2021 and continued to pay the Claimant's salary and allowances from November 2021 to April 2022 when the court stopped the same.
17. It is the Respondent's case that the sum of Kshs.590,033.10 paid to the Claimant as salaries and allowances which he did not earn from 1<sup>st</sup> June, 2019 and April 2022 was unmerited.
18. The 1<sup>st</sup> Respondent prays for dismissal of the suit with costs and judgement in its favour for Kshs.590,033.10 with interest.

#### **Claimant's evidence**

19. In his evidence in chief, the Claimant denied having absconded duty and was not given light duties until he complained but provided no evidence of the complaint.
20. On cross-examination, the Claimant admitted that he had been proceeding on leave as it fell due by completing the relevant application form and the same was either approved or declined by the Company Commander.
21. That housing was provided for in the camp and did not complete any sick leave form and had none.
22. He testified that no field allowance had been paid from November 2022 to date and salary from April to August 2022.
23. He confirmed that while stationed at the Garisson Radio at the Kenya Wildlife Service Headquarters, he did not attend his work every day and worked for 2 to 3 hours per day.
24. That before his transfer to the Radio room, he was at the Garisson and was not reporting to work and had notified the boss.

#### **Respondent's evidence**

25. Mr. Vincent Samoo confirmed that the Claimant was absent from the work place from July 2019 to sometime in June 2020 and his salary was stopped.
26. The witness admitted that the letters dated 11<sup>th</sup> December, 2019 and another dated 30<sup>th</sup> July, 2019 and sick sheet dated 6<sup>th</sup> September, 2019 and letters dated 8<sup>th</sup> November, 2019 and 8<sup>th</sup> December, 2019 fell within the period the Claimant had absconded duty.
27. On re-examination, the witness testified that although the Claimant was eligible for treatment, he was not reporting to work.
28. That the Claimant did not avail the sick sheets to the 1<sup>st</sup> Respondent for records.



### **Claimant's submissions**

29. Counsel submitted on absconding of duty, withheld salary and allowances during treatment, termination of services and costs.
30. On desertion, counsel submitted that between June 2019 and June 2020, the Claimant was undergoing treatment while in the course of carrying out his duties at his duty station, Kifaru reception.
31. Counsel relied on the letter from the Ministry of Health dated 10<sup>th</sup> July, 2019 and the 1<sup>st</sup> Respondent's dated 8<sup>th</sup> December, 2019 and 22<sup>nd</sup> November, 2019 to Menelik Hospital written on behalf of the Claimant to accord him treatment.
32. Counsel submitted that the Claimant did not abscond duty.
33. On withheld salary and allowances, counsel submitted that the Claimant's field allowances and salary from December 2021 and September 2022 was not paid and relied on Article 41(1) of the Constitution of Kenya, 2010 to buttress the claim. That the 1<sup>st</sup> Respondent terminated the Claimant's employment because he could not be found.
34. The decision in *Mwachupa Haranga Ndurya V Krystalline Salt Ltd* (2019) eKLR was cited to buttress the submission as were the provisions of Section 15 of the Persons With Disabilities Act, No. 14 of 2003.
35. Reliance was also made on the sentiments of the Supreme Court in *Gichuru V Package Insurance Brokers Ltd* (2021) KESC 12 (KLR) 22 to urge the court to find that stoppage of the Claimant's salary was contrary to the law.
36. Counsel submitted that termination of the Claimant's services was wrongful and he should be allowed to continue working as per the court order.

### **1<sup>st</sup> Respondent's submissions**

37. Counsel submitted on four issues including costs.
38. As to whether the Claimant absconded duty between June and institution of the instant suit on 10<sup>th</sup> June, 2021, counsel submitted that the Claimant absconded duty from 1<sup>st</sup> June, 2019 after the 6 months of light duties as recommended by Dr. Otieno lapsed and he was unreachable by letter dated 20<sup>th</sup> April, 2020 and radio messages dated 16<sup>th</sup> July, 2019 and January 2020.
39. That it was only when his salary was stopped that he resurfaced.
40. Counsel submitted that the Claimant's argument that he was seeking treatment and had sick-offs which he never brought to the 1<sup>st</sup> Respondent's attention could not avail him hence the search for him.
41. The Claimant provided no sick leave application forms to accompany the sick offs or any evidence from the 1<sup>st</sup> Respondent of his being away.
42. That the sick-offs on record were never brought to the 1<sup>st</sup> Respondent's notice and have no acknowledgment yet the Claimant knew the Respondent's process of notification of absence.
43. Counsel submitted that the sick-offs were intended to hoodwink the court that the Respondent was aware of the Claimant's whereabouts and there was no sufficient evidence of notice to the 1<sup>st</sup> Respondent.



44. Pushing the case further, counsel submitted that the 1<sup>st</sup> Respondent had proved that it made efforts to trace the Claimant though unsuccessfully as evidenced by the letter and radio messages on record.
45. Reliance was made on the decisions in *Julius Kyalo Malonza V Ruth Osolo t/a Eraeva Catering Services (2021) eKLR*, *Simon Mbithi Mbane V Inter Security Services Ltd (2018) eKLR* and *New World Stainless Steel Ltd V Cosmas Mbalu Munyasya (2021) eKLR* to reinforce the submission on the burden of proof on the employer in cases of desertion.
46. On entitlement to field allowances from June 2019 and salary from June 2021 to April 2022, counsel submitted that the Claimant's application dated 31<sup>st</sup> May, 2021 sought salaries and allowances from June 2019, pending the hearing and determination of the suit and the order was granted and the 1<sup>st</sup> Respondent paid a sum of Kshs.590,033.10 and complied with the orders until they were set aside.
47. Counsel submitted that since the Claimant had absconded duty, he was not entitled to the sum of Kshs.590,033.10 and the same should be refunded to the 1<sup>st</sup> Respondent as he was absent from duty from June 2019 to May 2021 and did not earn the monies paid pursuant to the court order as he rendered no services as ordained by the provisions of Section 17 of the *Employment Act, 2007*, that an employer is only liable to pay the amount of wages or salary in respect of work done.
48. Counsel urged that Section 30 of the Act prescribed the remuneration of an employee in cases of illness and the amount sought by the Claimant is more than his entitlement if the court is convinced that he had a genuine reason to be away.
49. Counsel submitted that the Claimant was not entitled to the amount paid for services not rendered from June 2019 to April 2022 and was liable for termination under Schedule II of the *Wildlife Conservation and Management Act, 2013*.
50. As to whether the services of the Claimant ought to be terminated, counsel relied on the provisions of the *Wildlife Conservation and Management Act, 2013*, Schedule II to submit that the Claimant absconded duty for more than 21 days, was looked for unsuccessfully and disciplinary proceedings were commenced.
51. Counsel urged that as the Claimant was not interested in earning his keep from work, he was liable to termination under the 2<sup>nd</sup> Schedule of the Act.
52. On costs, counsel submitted that the 1<sup>st</sup> Respondent was entitled to the costs of the suit.

### **Findings and determination**

53. It is common ground that the Respondent engaged the Claimant as a Ranger effective 27<sup>th</sup> October, 2015 at a consolidated salary of Kshs.21,170/= which had risen to Kshs.26,840/= by May 2019 and Kshs.38,790/= by April 2022. The contract was explicit that the Claimant was subject to the Kenya Wildlife Service (Armed Wing) Disciplinary Code, 1990 and he agreed to work in any of the 1<sup>st</sup> Respondent's parks, reserves or stations in Kenya.
54. It is equally not in contest that the Claimant's employment was confirmed by letter dated 12<sup>th</sup> May, 2016 and he joined the Respondent's contributory pension scheme.
55. Equally not in dispute is the fact that the Claimant sustained an injury on 6<sup>th</sup> September, 2017 while deployed at the Nairobi National Park and was treated at the Nairobi West Hospital and other hospital and clinics thereafter.



56. It is important to highlight the history of the suit in an endeavour to contextualize the issues that commend themselves for determination.
57. The Claimant commenced this suit on 10<sup>th</sup> June, 2021 under Certificate of Urgency seeking field allowances from June 2019 until the claim is heard and determined and salary from June 2020 until determination of the suit and hearing was scheduled for 16<sup>th</sup> June, 2021 and later on 28<sup>th</sup> June, 2021 on which date the 1<sup>st</sup> Respondent was neither represented nor had it entered appearance and the Notice of Motion dated 31<sup>st</sup> May, 2021 was granted as prayed.
58. The 1<sup>st</sup> Respondent subsequently filed an application under Certificate of Urgency seeking the setting aside of injunctive orders dated 5<sup>th</sup> July, 2021, which the court granted as the application was unopposed.
59. Subsequently, the 1<sup>st</sup> Respondent paid the arrears claimed by the Claimant pursuant to a Penal Notice and later filed a Notice of Preliminary Objection challenging the court's jurisdiction to hear and determine the Claimant's case relating to compensation for the injuries sustained.
60. The court upheld the Preliminary Objection vide its ruling dated 28<sup>th</sup> September, 2022.
61. The matter proceeded to mediation but the parties could not agree.
62. The issues that commend themselves for determination are;
- i. Whether the Claimant absconded duty or absented himself from duty without authority or other lawful cause.
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Whether the Respondent's counter-claim is sustainable.
63. As regards desertion or absconding duty, the 1<sup>st</sup> Respondent maintains that the Claimant absconded duty from June 2019 to the date he filed the instant suit.
64. The Claimant on the other hand appears to be suggesting that he had a justification to be away.
65. According to the Black's Law Dictionary (10<sup>th</sup> Edition) desertion is;
- “The wilful and unjustified abandonment of a person's duties or obligations”.
66. In the words of Ndolo J. in *Ronald Nyambu Daudi V Tornado Carriers Ltd* (2019) eKLR,
- “Desertion of duty is a grave administrative offence which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show effort made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.”
67. (See *Evans Ochieng Oluoch V Njimia Pharmaceuticals Ltd* (2016) eKLR).



68. In the South African case of *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829, the court sought to distinguish desertion from unauthorised absence from duty as follows;
- “ . . . desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post subsequently formulates the intention not to return.”
69. In his evidence in chief, the Claimant denies having been out of the place of work and testified that he had not healed as the disability card and report dated July 2019 showed. That he was not given light duties.
70. The Claimant provided documents to explain his absence from the workplace as follows;
- i. National Council for Persons with Disability Card No. NCPWD 4XXXXX8 issued on 25<sup>th</sup> July, 2019.
  - ii. Ministry of Health Persons with Disability (PWDs) Medical Assessment Report dated 10<sup>th</sup> July, 2019.
  - iii. National Spinal Injury Referral Hospital Disability Report for the Claimant dated 8<sup>th</sup> July, 2019.
  - iv. Sick sheet dated 11<sup>th</sup> December, 2019 according the Claimant two (2) weeks off-duty.
  - v. Letter from the 1<sup>st</sup> Respondent to the CEO Menelik Medical Centre confirming that the Claimant was its employee dated 11<sup>th</sup> December, 2019 undertaking to pay upto a maximum of Kshs.7,000/=.
  - vi. Letter dated 6<sup>th</sup> December, 2019 by the Claimant to OC Garisson requesting for a vehicle to take him to hospital.
  - vii. Physiotherapy Request Form from Menelik Medical Centre dated 11<sup>th</sup> December, 2019.
  - viii. Sick sheet from Dr. Gakuu dated 3<sup>rd</sup> October, 2019 according the Claimant four (4) weeks “Duties/off-days”.
- The Sick sheet is unclear as to what the four (4) was about as neither the duties nor the off-duty is identified.
- ix. Prescription from Menelik Medical Centre dated 26<sup>th</sup> July, 2019.
  - x. Sick sheet from Dr. Gakuu dated 29<sup>th</sup> July, 2019 according the Claimant one week for “Duties/off-duty.”
  - xi. Letter from the 1<sup>st</sup> Respondent to “whom it may concern” dated 30<sup>th</sup> July, 2019 confirming that the Claimant was an employee of the 1<sup>st</sup> Respondent.
  - xii. Sick sheet from Dr. Gakuu dated 6<sup>th</sup> September, 2019 granting the Claimant four weeks of duties/off-duty.
71. Strangely, none of the sick sheets has any form of acknowledgement by the 1<sup>st</sup> Respondent and the Claimant adduced no evidence of having forwarded them to the 1<sup>st</sup> Respondent.
72. The same applies to the Claimant’s hand written letters requesting a motor vehicle to take him to the hospital or seeking a refund.



73. From the record, it is decipherable that the sick sheet dated 11<sup>th</sup> December, 2019 was completed and signed by a professional while the rest were not. The doctor's stamp used in the others is also different.
74. The sick sheets dated 3<sup>rd</sup> October, 2019, 6<sup>th</sup> September, 2019 and 29<sup>th</sup> July, 2019 were completed and signed by a different person.
75. While the foregoing documents reveal that the Claimant was still indisposed and other processes were on-going, there is no evidence to show that the 1<sup>st</sup> Respondent was aware of the Claimant's whereabouts or it was aware of his status.
76. Having been the 1<sup>st</sup> Respondent's employee since 2015, the Claimant was deemed aware of the 1<sup>st</sup> Respondent's process of registering his absence at the workplace as submitted by counsel for the 1<sup>st</sup> Respondent.
77. Finally, evidence on record show that the 1<sup>st</sup> Respondent made reasonable attempts to ascertain the Claimant's whereabouts.
78. The letter dated 20<sup>th</sup> April, 2020 from the Claimant's supervisor and the radio messages dated 16<sup>th</sup> July, 2019 and 22<sup>nd</sup> January, 2020 reveal the effort expended by the 1<sup>st</sup> Respondent.
79. From the letter, radio messages and the Claimant's sick sheets on record, it is discernible that the Claimant deliberately absented himself from the work place.
80. In addition, by letter dated 16<sup>th</sup> June, 2020, Mr. Samoo directed the Payroll Section of the 1<sup>st</sup> Respondent to stop the Claimant's salary effective on even date, more than one year after he disappeared from the work place.
81. From the evidence on record, it is clear that the Claimant absented himself from work with no authority and rendered no services to the 1<sup>st</sup> Respondent for about 2 years and was paid field allowances and salary as directed by the court.
82. In the court's view, the Claimant did not desert the workplace. He absented himself without authority.
83. Intriguingly, the Respondent failed, refused or neglected to take decisive action against the Claimant.
84. On payment of salary or wages, Section 17(1) of the *Employment Act, 2007* provides that;
  - a. cash
  - b. into a bank account or building society designated by the employee
  - c. by cheque, postal order or money order in favour of the employee; or
  - d. in the absence of an employee, to a person other than the employee if the person is duly authorised by the employee in writing to receive the wages on the employee's behalf.
85. This provision leaves no doubt that salary or wage is only payable for work done by the employee. In other words it must be earned.



86. It would appear to follow that while the employer is obligated to pay the employee the entire salary earned, the employee has no entitlement to salary he has not worked for and if paid erroneously is recoverable from the employee in accordance with the provisions of Section 19 of the [Employment Act](#), 2007.
87. Contrary to the Claimant counsel's submission that the Respondent was withholding any salary or allowances, the Claimant has no such claim.
88. Similarly, if the Claimant was not paid from December 2021 to September 2022, as submitted by counsel, it is because he did not render any services and he adduced no evidence to prove that he did. More significantly, the claim was not amended to reflect any withheld salary or the amount as special damages which must be pleaded and specifically proved.
89. However, in this case, the sum of Kshs.590,033.10 was paid pursuant to a court order dated 5<sup>th</sup> July, 2021. The 1<sup>st</sup> Respondent did not apply for review of the orders.
90. More significantly, the 1<sup>st</sup> Respondent left the court with no option as it neither entered appearance nor attended the hearing slated for 16<sup>th</sup> June, 2021 and later 28<sup>th</sup> June, 2021, more than 2 weeks after service of the Claimant's notice of motion.
91. In the circumstances, the court will not reverse its orders at this stage.
92. Finally, the Claimant has not demonstrated entitlement to any field allowances or salary allegedly withheld by the Respondent.
93. Closely related to the foregoing is the 1<sup>st</sup> Respondent's submission on the Claimant's performance which is a peripheral issue as the issue germane to the termination of the Claimant's employment is not before this court.
94. Having been its employee since 2015, the 1<sup>st</sup> Respondent is better placed to determine the merits of retaining the Claimant in employment or invoking available separation mechanisms.
95. Undoubtedly, the Respondent has accommodated the Claimant significantly but the Claimant appears to have taken the unfortunate injury at the workplace as an authorization to act with abandon in attending to his duties as by law required.
96. The record of his attendance after resumption of duty on 23<sup>rd</sup> August, 2022 leaves little doubt that the Claimant is either incapable of working, an account of the injury or is unwilling to do so. I will say no more.
97. Finally, contrary to the Claimant's counsel's submission that the Claimant's employment was terminated by the Respondent, the Claimant adduced no evidence of the alleged termination.
98. Neither the written statement nor the oral testimony led in court make reference to termination of employment and no reliefs germane to termination of employment were prayed for. The issue was not before the court. The issue is whether the Claimant's employment ought to be terminated, which again did not arise during the hearing.

#### Reliefs

- a. Field allowances from June 2019 and salary from June 2020 were awarded by the court by its order dated 5<sup>th</sup> July, 2021.
- b. Special damages of Kshs.97,000/=



99. The Claimant's written statement dated 31<sup>st</sup> May, 2021 makes no reference to the special damages claimed or how the amount was arrived at. Equally, the oral testimony adduced in court made no mention of the claim.
100. However, the Claimant attached copies of 26 receipts purportedly issued by Taxi & Cab Travel Services and County Taxi Services on diverse dates between 22<sup>nd</sup> September, 2017 and 7<sup>th</sup> November, 2021.
101. All the receipts were issued by the same person and none of them has the driver's signature.
102. It is trite law that special damages must be specifically pleaded and proved. (See Hahn V Singh Civ. Appeal No. 42 of 1983 (185) KLR P 16).
103. In addition, the Claimant attached copies of two (2) receipts from the Nairobi Orthopaedic and Spine Clinic.
104. Regrettably, the Claimant led no evidence to prove that he forwarded any of these receipts to the 1<sup>st</sup> Respondent and re-imburement was declined.
105. Strangely, the Claimant attached receipts issued before he stopped attending to his duties in June 2019.
106. It is unclear to the court why the Claimant kept these receipts without presenting them to the 1<sup>st</sup> Respondent.
107. For these reasons, the claim for special damages is declined.
- c. General damages for pain and suffering, loss of amenities and earning capacity, workmens compensation and future medical expenses
108. By its Ruling delivered on 28<sup>th</sup> September, 2022, the court downed its tools on the Claimant's claim for compensation for the injuries sustained as the same falls under WIBA, 2007.
- The foregoing prayers are unsustainable and are dismissed.
109. In a nutshell, the Claimant's case is unsustainable and it is accordingly dismissed.

### **1<sup>st</sup> Respondent's Counter-claim**

110. The 1<sup>st</sup> Respondent prays for the sum of Kshs.590,033.10 being the amount paid to the Claimant in compliance with the court order dated 5<sup>th</sup> July, 2021.
111. The 1<sup>st</sup> Respondent's case is that the Claimant was not entitled to the sum as he did not earn it.
112. However, as held elsewhere in this judgement, the sum was paid pursuant to an order of the court in light of the circumstances at the time and the court is not persuaded that it should reverse the order at this stage.
113. Consequently, the Counter-claim is dismissed.
114. Having found as above, it is only fair that parties bear own costs.
- It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024**

**DR. JACOB GAKERI**

**JUDGE**



## ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

