



**Cheruiyot & another v Bomet University College (Cause 35 of 2021 & Employment and Labour Relations Cause 030 of 2021 (Consolidated))
[2024] KEELRC 1562 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1562 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 35 OF 2021 & EMPLOYMENT AND LABOUR
RELATIONS CAUSE 030 OF 2021 (CONSOLIDATED)**

MA ONYANGO, J

JUNE 21, 2024

BETWEEN

PROF. THOMAS CHERUIYOT 1ST CLAIMANT

PROF. JOSHUA KWONYIKE 2ND CLAIMANT

AND

BOMET UNIVERSITY COLLEGE RESPONDENT

JUDGMENT

Introduction

1. This judgment relates to two suits. Eldoret ELRC NO. 35 of 2021 filed by the 1st Claimant and Eldoret ELRC NO. 030 of 2021. On 22nd September 2022, the court directed that the two files be consolidated and the lead file to be E035 of 2021. For purposes of this judgment, the Claimant in E035 of 2021 is the 1st Claimant, while the Claimant in E030 of 2021 is the 2nd Claimant.
2. The Respondent is a statutory body established under Legal Notice No. 145 of 2017 and had engaged the 1st Claimant and the 2nd Claimant herein between 7th December 2017 and 30th September 2019 as Acting Principal and Acting Deputy Principal- Academic and Student Affairs respectively pending recruitment of substantive office holders of the two positions.

The 1st Claimant's case

3. In his Amended Memorandum of Claim dated 20th February 2023, the 1st Claimant avers that on 2nd May 2019, he received communication from the office of the Cabinet Secretary –Ministry of Education extending his interim appointment as Acting Principal for a period of one (1) year or until such time when a substantive principal of the Respondent was appointed.



4. He avers that his terms and conditions of service in the capacity of Acting Principal was implied and subject to the letter of appointment dated 7th December 2017, the letter of extension of appointment dated 2nd May 2019, the Constitution, the Human Resource Policies and Procedures Manual for the Public Service and the Public Service Commission Discipline Manual.
5. He states that he was disengaged from service by the Respondent on 30th September 2019, that he was not guilty of any misconduct, negligence, carelessness, absenteeism or absconding duties or any misconduct in the performance of his duties at the time of his disengagement as Acting Principal of the Respondent.
6. According to the 1st Claimant, on the day of his disengagement, the Respondent owed him the following terminal benefits:
 - a. Unpaid leave days amounting to Kshs 841,190 for the 75 leave days balances as at 30th September 2019 acknowledged in the Respondent's internal memo dated 25th September 2019 and its terminal and settlement allowance for top management schedule prepared by Head of Finance on 25th September 2019;
 - b. Car allowance/transport facility for the duration of his employment with the Respondent as provided in the appointment letter dated 7th December 2017: Kshs 156,000x 22 months=Kshs 3,432,000;
 - c. Kshs. 810,476 payment of one (1) month salary in lieu of notice as approved by the Respondent on the 20th September 2019 and as per its terminal and settlement allowance for top management schedule prepared by Head of Finance on 25th September 2019;
 - d. Gratuity as provided under the notice of appointment dated 2nd May 2019 and as per the Respondent's terminal and settlement allowance for top management schedule prepared by Head of finance on 25th September 2019 payable annually at the rate of 16% of the basic salary amounting to Kshs 404,134;
 - e. Kshs 60,000 payment of passage and baggage as acknowledged by the Respondent's terminal settlement allowance for top management schedule prepared by Head of Finance on 25th September 2019;
 - f. Disengagement allowance as per the Respondent's terminal and settlement allowance for top management schedule prepared by Head of Finance on 25th September 2019, Kshs 378,000;
 - g. 2017-2019 CBA arrears amounting to Kshs. 534,323.
7. The 1st Claimant states that the Respondent is statutorily obligated to pay him a total amount of Kshs 6,460,123 as at 30th September 2019.
8. The 1st Claimant therefore seeks for the following orders:
 - a. A declaration that failure to pay the Claimant his terminal benefits by the Respondent was unlawful, irregular and unprocedural
 - b. An order directing the Respondent to pay the Claimant all dues, salary, benefits and allowances due to him arising out of the contract of employment at Kshs. 2,477,671
 - c. Kshs 1,200,000 being compensation for loss and damages with interest at commercial rates from 20th September 2019 until payment in full



- d. Costs of this suit together with interest thereon at such rates and for such period as this Honorable court may deem fit to order
- e. Any such and further relief as this Honorable court may deem appropriate for the ends of justice.

The 2nd Claimant's case

9. The 2nd Claimant in his Amended Memorandum of Claim dated 21st September 2022, contends that on 2nd May 2019, he received communication from the Council of the Respondent extending his interim appointment as Acting Deputy Principal- Academic & Student Affairs for a period of one (1) year or until such a time when a substantive Deputy Principal –Academic & Student Affairs of the Respondent was appointed.
10. He states that his terms and conditions of service in the capacity of Acting Deputy Principal- Academic & Student Affairs was implied subject to the letter of appointment dated 7th December 2017, letter of extension of appointment dated 29th October 2018, letter of extension of appointment dated 26th April 2018, the letter of extension of appointment dated 2nd May 2019.
11. It is the 2nd Claimant's case that his services were disengaged by the Respondent on 30th September 2019 without him being guilty of any misconduct, negligence, carelessness, absenteeism, absconding duties or any misconduct in the performance of his duties at the time of his disengagement as Acting Principal of the Respondent.
12. According to him, on the day of his disengagement, the Respondent owed him the following terminal benefits:
 - a. Unpaid leave days amounting to 64 leave days balances as at 30th September 2019 acknowledged in the Respondent's internal memo dated 25th September 2019 and its terminal and settlement allowance for top management schedule prepared by Head of Finance on 25th September 2019 amounting to Kshs 682, 695;
 - b. Kshs 712,879 payment of one (1) month salary in lieu of notice as approved by the Respondent on the 20th September 2019 and as per its terminal and settlement allowance for top management schedule prepared by Head of Finance on 25th September 2019;
 - c. Gratuity as provided under the notice of appointment dated 2nd May 2019 and as per the Respondent's terminal and settlement allowance for top management schedule prepared by Head of finance on 25th September 2019 payable annually at the rate of 16% of the basic salary amounting to Kshs 340,213;
 - d. Kshs 50,000 payment of passage and baggage as acknowledged by the Respondent's terminal settlement allowance for top management schedule prepared by Head of Finance on 25th September 2019;
 - e. Kshs 378,000 payment of disengagement allowance as per the Respondent's terminal and settlement allowance for top management schedule prepared by Head of Finance of 25th September 2019;
 - f. 2017-2019 CBA arrears amounting to Kshs. 313,884.
13. The Claimant avers that the Respondent is statutorily obligated to pay him a total of Kshs. 2,447,651 as at 30th September 2019.



14. The Claimant in his Memorandum of Claim therefore seeks for orders that:
- i. A declaration that failure to pay the Claimant his terminal benefits by the Respondent was unlawful, irregular and unprocedural;
 - ii. An order directing the Respondent to pay the Claimant all dues, salary, benefits and allowances due to him arising out of the contract of employment at Kshs. 2,477,671;
 - iii. Kshs 750,000 being compensation for loss and damages with interest at commercial rates from 20th September 2019 until payment in full;
 - iv. Costs of this suit together with interest thereon at such rates and for such period as this Honorable court may deem fit to order;
 - v. Any such and further relief as this Honorable court may deem appropriate for the ends of justice.

The Respondent's Case

15. The Respondent filed Amended Statements of Response and Counterclaim dated 23rd February 2023 in response to the two suits.
16. With regard the 1st Claimant, the Respondent averred that he was employed in an Acting Capacity and on secondment from Moi University pending the recruitment and hiring of a substantive Principal. That his appointment was subject to the various advisories from relevant government bodies on the said appointment and its entitlements. The Respondent denied the contents of paragraph 5 in relation to the payments owed to the Claimant and maintained that the said payments tabulated on a monthly basis are the entitlement of a substantive Principal and not one in acting capacity as in the case of the 1st Claimant herein. According to the Respondent, the said entitlements were contrary to the Advisory of the State Corporation Advisory Committee to the Respondent dated 13th December 2018. The Respondent avers that the office of the Auditor General in its audit of the Respondent in the Financial Year 2019/2020 observed that there was an overpayment to the Claimant.
17. The Respondent further states that the term of office of the 1st Claimant was conditional upon the substantive office bearer being appointed as specified in his extension of appointment letter as Interim Principal dated 29th April 2019. That according to the Human Resource Policies and Procedure Manual for Public Service, 2016, at section C.14, acting position should not go beyond 6 months.
18. On the relief of unpaid leave days sought by the 1st Claimant, the Respondent states that its Terms and Conditions of Service for Senior Management Staff as well as The Human Resource Policies and Procedures Manual for Public Service 2016 require that annual leave days be utilized within the period in which it accrues failing which the leave is forfeited. That annual leave cannot be carried forward to the following year and is not cumulable. It is averred that had the 1st Claimant required an extension of the said leave days to be extended, he ought to have sought for approval in writing from the Institution before the lapse of the same.
19. Regarding the claim for Car allowance, the Respondent states that the 1st Claimant utilized the Institution's Motor Vehicle at all times during his employment by the Respondent as the Work Ticket retained at the Institution clearly proves this averment. Further, the Respondent avers that the said allowance, if at all, was supposed to be claimed by the 1st Claimant upon his arrival at the Institution and not on exit which he did not.



20. The Respondent has also denied the 1st Claimant's claim for payment of one (1) month salary in lieu of notice on the basis that he was notified of the substantive appointments to fill the vacancies and he even did an exit interview. Further, that the 1st Claimant's extension of contract letter notified him that the extension was to come to an end upon the substantive filling of the position.
21. On the Claimants claim for gratuity, the Respondent avers that the same was already paid to them. The Respondent further denied owing the Claimants CBA arrears. Regarding the other reliefs such as passage, baggage and disengagement allowance, the Respondent contends that the claims have no legal basis and are therefore not owed to the Claimants.
22. In its counter-claim, the Respondent sought to recover overpayment of Kshs 1,755,700 paid to the 1st Claimant during the period between October 2017 and June 2019.
23. For the 2nd Claimant, the Respondent in its Amended Statement of Response and Counter-claim dated 23rd February 2023, avers that the 2nd Claimant was employed in an acting capacity on secondment from Moi University pending recruitment and hiring of a substantive Deputy Principal.
24. The Respondent states that the 2nd Claimant was not entitled to the listed monthly basic salary as the same was intended for the substantive positions and was paid contrary to the advisory of the State Corporation Advisory Committee. That despite the resolution of the Audit and Compliance Committee of the University College to recover the overpayments amounting to Kshs 1,629,119 from the 2nd Claimant, the same has not been recovered and is due. That the office of the Auditor General in its Report for the year ended 30th June 2019 flagged the irregular payment of the said basic salary and found the management of the University College, which the 2nd Claimant was part of, to be in breach of the law. That as such the 2nd Claimant is guilty of double standards. It is further the Respondent's averment that the 2nd Claimant was not entitled to Transport Allowance since the university college provided him with official transport during all his official duties.
25. with regard to the other reliefs sought by the 2nd Claimant, the Respondent denied owing the Claimant unpaid leave days and averred that there was no approval nor resolution from the Council to commute the Claimant's leave days. On the prayer for payment of one month *in lieu* of notice, it is the Respondent's case that it did not terminate the 2nd Claimant's. that on the contrary the term of his contract as acting Deputy Principal (Academic and Student Affairs) came to an end with the recruitment of a substantive Deputy Principal. The Respondent further denied owing the 2nd Claimant gratuity, passage and baggage disengagement allowance and CBA arrears as particularized by the 2nd Claimant in his Memorandum of Claim.
26. In the counter-claim, the Respondent seeks for refund of over-payment of Kshs. 1,629,119 in salary during the period between October 2017 and June 2019 plus interest at commercial rates from the date of payment to full settlement. It also prayed for dismissal of the Claimant's claim against the Respondent.
27. The suit was set down for hearing on 7th June 2023 when the Claimants testified as CW1 and CW3 respectively. They called Mr. Richard Rotich, a former driver of the Respondent who testified as CW2.
28. On its part, the Respondent called Daniel Kiplagat Kimaiyo who testified as RW1. At the close of the Respondent's case, the court directed parties to file written submissions.



The 1st Claimant's submissions

29. In his submissions filed in court on 3rd July 2023, the 1st Claimant framed the issues for determination to be:
- a. Whether the Claimant is entitled to terminal benefits
 - b. Whether the Claimant owes the Respondent any money as a result of the overpayment
 - c. Whether the Claimant is entitled to the remedies claimed for.

Whether the 1st Claimant is entitled to terminal benefits

30. The 1st Claimant submitted that paragraph 3 of his appointment letter dated 7th December 2017 provided that he would be eligible to all benefits as stipulated in the Terms and Conditions of Service of Senior Management Staff (Principal and Deputy principals) approved by the Bomet University Council.
31. He submitted that he is therefore entitled to unpaid leave days, transport facility, one month pay in lieu of notice, gratuity, passage and baggage allowance, disengagement allowance as well 2017-2019 CBA arrears as per the Terms and Conditions of Service for Senior Management Staff dated 24th December 2017.

Whether the Claimant owes the respondent any money as a result of overpayment

32. The 1st Claimant avers that the annual report and financial statement for 2019/2020 which was produced by the Respondent does not raise the issue of overpayment. The Claimant submitted that the Respondent's witness testified that the discrepancy on the audit report for 2019/2020 and 2020/2021 was a result of the delays in issuance of the certificate by the Office of the Auditor General, that the auditors were not aware that the issue of overpayment had been resolved. The 1st Claimant further submitted that it was the testimony of RW1 that the 1st Claimant does not owe the university any money and also that he was not paid the terminal dues as per the approval made via the internal memo dated 25th September 2019.
33. On whether the 1st Claimant is entitled to the remedies he is claiming, the 1st Claimant submits that he had proved his claim and should be awarded the reliefs he is seeking. The 1st Claimant also urged the court to award him costs.

2nd Claimant's submissions

34. The 2nd Claimant filed his submissions on 4th July 2023. His submissions are by and large a reproduction of the 1st Claimant's submissions.
35. In sum, the 2nd Claimant sought to be paid his terminal benefits as per the Terms and Conditions of Service for Senior Management Staff dated 24th December 2017. In response to the Respondent's counterclaim, the 2nd Claimant submitted that RW1 in his testimony stated that the 2nd Claimant does not owe the University any money in terms of overpayment. The 2nd Claimant sought to be paid his terminal dues as prayed as well as costs.

The Respondent's submissions

36. The Respondent filed its written submissions in respect of the 1st Claimant on 17th October 2023. It identified the issues for determination to be:



- i. Whether the Claimant's appointment terms in the Respondent were to be similar to an officer appointed in a substantive capacity.
 - ii. Whether the Claimant was overpaid in his appointment as an Acting Principal.
 - iii. Whether the Claimant's termination was undertaken lawfully and procedurally.
 - iv. Whether the Claimant is entitled to the claim for:
 - a. Arrears claimed as car allowance.
 - b. Passage and Baggage, Disengagement Allowance and Gratuity.
 - c. Salary arrears as per the 2017/2021 CBA.
 - d. Loss and damages quantified to Kshs. 1,200,000/=
 - e. The issue of costs.
37. On the first issue, the Respondent submits that the 1st Claimant has not disputed that his appointment was in an Acting Capacity. The Respondent submits that from the Claimant's letter of appointment, the terms of service were to be set by Council having been seconded and subsequently appointed as Acting Principal. According to the Respondent, Clause 11 of the Bomet University College Terms and Conditions of Service for Senior Management Staff (Principal and Deputy Principals) provides that:
- Acting allowance shall only apply when the Principal and deputy principal will be acting for periods longer than 30 days continuously.
38. The Respondent submits that the amount payable for a principal in Acting Capacity is fixed at Kshs. 30,000/= per month.
39. It is the Respondent's case that the appointing authority did not envision a substantive appointment with terms of substantive office holder. According to the Respondent, at no point can an acting officer be subjected to substantive terms of service and vice versa. It is submitted that the terms of appointment for the 1st Claimant were to be in Acting Capacity.
40. On the second issue, the Respondent submits that the 1st Claimant was overpaid as he drew salary of an office holder in a substantive capacity despite being appointed in an Acting Capacity.
41. In this regard, it is contended that the audit reports, (Respondent's exhibit 12) directed the Respondent to take action to recover the overpayment made to the 1st Claimant. The Respondent avers that the Claimant was issued with a demand letter for refund of the overpayment but has not settled the overpayments due to date.
42. On the third issue whether the 1st Claimant's termination was undertaken lawfully and procedurally, it is the Respondent's submission that the Letter of Extension dated 24th April, 2019 clearly stated that the Claimant's term shall be for a period of 1 year or until a substantive office holder was appointed. The Respondent submits that the substantive appointment of the principal was undertaken in September, 2019 and the Chairperson of Council vide a letter dated 17th September 2019, notified the 1st Claimant of the substantive appointment which action the 1st Claimant obliged and even attended an exit interview.
43. Accordingly, the Respondent submits that the Terms and Conditions of Service instrument which is applicable to the present case clearly provides at Clause 21 that the termination of appointment shall



be as per Bomet University College Legal Notice which procedure the Respondent followed in its disengagement with the 1st Claimant.

44. On the Fourthly issue whether the Claimant is entitled to arrears claimed as car allowance, the Respondent submits that car allowance is only applicable to substantive office holders. It is further submitted that even if the 1st Claimant was to be entitled to this allowance, Clause 19 of the Terms and Conditions of Service instrument provides two options for claiming this type of allowance: that the institution will provide a car and driver to the Principal or the Principal can opt to use his personal car and he will be entitled to a car allowance of Kshs. 156,000/= per month in lieu of an official car. The Respondent submits that procedurally in its institution, the Principal is always required to make a declaration in writing of which option they choose in enjoying this allowance which action was not undertaken by the 1st Claimant.
45. The Respondent further submits that the Work Tickets produced as Respondent's Exhibit 3 point clearly to the fact that he at all times utilized the official institution's car and had a driver hence he was not entitled to the car allowance claimed. The Respondent submits that no evidence has been tendered by the Claimant to indicate that he wrote a memo on arrival at the Respondent, opting to take car allowance.
46. On the claim of passage and baggage and Disengagement allowance, the Respondent submits that the Terms and Conditions of Service were applicable to officers in a substantive capacity and since the Claimant was in an acting capacity, he should not be granted these reliefs.
47. Regarding the claim for loss and damages quantified to Kshs. 1,200,000/= the Respondent submits that the same can only arise after the cause and on determination by the Court as to who bears the liability in this case as per the legal principle in place.
48. On the issue of costs, the Respondent urged the court to be guided by the provisions of Section 27 of the Civil Procedure Act and dismiss the claim with costs.
49. The Respondent also filed submissions in respect of the 2nd Claimant on 17th October 2023 which submissions are similar to the submissions filed in relation to the 1st Claimant.

Analysis and Determination

50. From the pleadings, evidence and the submissions of the parties herein, the plea of the Claimants before this court is for payment of their terminal dues that they allege they are owed by the Respondent.
51. The Claimants do not dispute that they were employed in acting capacity. From their evidence the basis of their Claim is the internal memo dated 29th September 2019 by which they aver the Respondent acknowledged that it owed them terminal benefits.
52. The memo dated 29th September 2019 is reproduced herein below:

Bomet Univeristy College

(A Constituent College of Moi University)

Internal Memo

From: Deputy Principal (A&F) Date:25th September, 2019

REF:BUC/DPAF/GC/33/18

Prof. Thomas Kimeli Cheruiyot



Prof. Joshua Kwonyike

Subject: Leave Days

Please find below your Leave balances as of 30th September 2019:

Name	10th Nov 2017 30th June 2018	1st July 2018 To 30th June 2019	1st July 2019 To 30th August 2019	Leave Taken	Balance
Prof. Thomas Cheruiyot	29 Days	45 Days	11 Days	10 Days	75 Days
Prof. Loice Maru	29Days	45Days	11 Days	29Days	56Days
Prof. Joshua Kwonyike	29 Days	45 Days	11 Days	21 Days.	64 Days

Thank you,

Signed

Prof. Loice C. Maru

Professor of Entrepreneurship and Sustainability Management

Deputy Principal-A&f



University Collee						
Final And Settlnent Allowances For Top Management						
Date	Period	Months	Total	Gratuity	Paye	Net PAY
Loice Maru	10May 2019 to 30 September 2019	4 months & 20 days	1,518.184	242,909	72,873	170.037
Joshus Kwonyike	10 May 2019 to 30 September 2019	4 months & 20 days	1.518.184	242.909	72,873	170.037
Thomas K. Cheruiyot	17 April 2019 to 30 September 2019	5 months & 13.days	1,490,589	238,494	71.548	166.946
TOTAL			4,520,957	724,313	217294	507,019

Passage And Baggage Allow						
Name	Passage:	Baggagl	Total		Paye	Net Pay
Joshua Kwonyike	25.000	25,000	50,000			50.000
Thomas K.Cheruiyot	30,000	30.000	60,000			60,000
TOTAL			110,000			110,000



Disengagement Allowance	Period Days	Rate Per Day	Total		Paye	Net Pay
Joshua Kwonyake	30	12,600	378.000			378.000
Thomas K. Cheruiyot	30	12.600	378.000			378.000
TOTAL			756,000			756,000

Leave Days						
Name	Period-Days	Rate Per Day	Total		Paye	Net PAY
Loice Maru	56	10,836	606,840		182.052	424,788
Joshua Kwonyike	64	10.836	693.532		208,060	485.472
Thomas K. Cheruiyot	75	11,216	841.190		252,357	588.833
Total			2,141,562		642,469	1,499,093

One Month Pay In Lieu	Period-days	Gross Pay	Total		Paye	Netpay
Joshua Kwonyike	30	712.879	712,879		213.864	499.015
Thomas K. Cheruiyot	30	810,476	810,476		243,143	567,333
Total			1,523,355		457,007	1,066,349
Grand Total			5,255,230		1,316,769	3,938.46

54. The Claimants in their Memorandum of claim have sought for the following reliefs which I will address in separate head:

- a. Unpaid leave dues.



The 1st Claimant seeks for payment of 75 leave days balance amounting to Kshs 841,190 while the 2nd Claimant seeks for 64 leave days amounting to Kshs 682, 695.

The Respondent in opposition to this averment has stated that the Claimants are not owed the leave dues they are seeking. The Respondent contends that the Claimants utilized all their leave days and that if at all they did not use the leave days, the said days are considered as forfeited and cannot be carried forward into the following years as they are not cumulable.

The Terms and Conditions of Service for Senior Management Staff (Principal and Deputy Principal) for Bomet University College (A constituent of Moi University) provides at at Clause 13 provides as follows:

13. Annual Leave

The Senior Management Staff shall be entitled to an annual leave of 45 working days and shall be taken within the year. Leave accumulated beyond 135 working days may be commuted at the approval of the Bomet University College Council.

From the foregoing it is clear that the Claimants, being Senior Staff of the Respondent, were entitled to carry over leave days beyond one year. The averment by the Respondent that leave days could not be accumulated beyond one year has no basis. The fact that the Respondent tabulated the leave in the memo dated 25th September, 2019 is testament to the fact that the Respondent was aware that it owed the Claimants their outstanding leave days earned but not taken. The Claimants are accordingly awarded leave days as claimed, the Respondent not having contested the number of days claimed.

b. Car allowance

Clause 19 of the Terms and Conditions of Service for Senior Management Staff provides that the Principal and the Deputy Principal would be provided with a university car and driver to be used on official duties or in the alternative, the university would pay Kshs. 156,000 and Kshs 135,000 respectively to the 1st and 2nd Claimants in lieu of the official vehicle. CW2 in his evidence stated that the Respondent had only one car that was used by the Council and other staff of the Respondent. However, the 2nd Claimant did not seek payment of the travel allowance. No evidence has been proffered by the Respondent to explain how both the Claimants were utilizing one vehicle in the performance of their duties together with the Council members and all other staff. The 1st Claimant further explained that he signed the work ticket as the accounting officer.

The averment by the Respondent that the Claimants were supposed to elect in writing whether they wished to be paid or to be issued with a vehicle is not supported by any evidence. Neither is the averment that transport was provided by the Respondent. the Respondent did not deny that it had only one vehicle and that it did not provide transport for exclusive use by each of the Claimants. I find that the 1st Claimant has proved that he was entitled to a vehicle or payment of transport allowance none of which was provided to him. He is therefore entitled to the car allowance. I award the car allowance as prayed by the 1st Claimant.

c. One (1) month salary in lieu of notice.

The Claimants prayed for one-months' salary in lieu of notice following their disengagement by the Respondent. The Respondent on the other hand has submitted that the Claimants are



not entitled to this relief as they held their position in acting capacities as they awaited the appointment of substantive office holders.

The Claimants contracts of the Claimants provided for termination by one months' notice or pay in lieu. The averments by the Respondent that the contracts were to come to an end upon substantive filling of the positions of the Claimants does not mean that they were not entitled to notice as the date of substantive filling of the positions were not ascertainable and it is factual that the letters notifying them of the filling of their positions did not give them notice. Having not been given the notice the Claimants are entitled to pay in lieu thereof which I accordingly award them.

- d. Gratuity as provided under the notice of appointment payable annually at the rate of 16% of the basic salary. From the payment vouchers for gratuity produced by the Respondent for the period November 2017 April 2018 and May 2018 to May 2019, the Claimants were duly paid their gratuity. They are entitled to gratuity for any period not already paid for to be confirmed by the Respondent.

- e. Payment of passage & baggage allowance and the disengagement allowance.

The Respondent's Terms and Conditions of Service for Senior Management Staff provided for these allowances under clause 17 and 10(e) respectively. The Respondent has denied that the Claimants are entitled to these allowances on the basis that they are only payable to employees in substantive positions and not those engaged in acting capacity. The Advisory of the State Corporation Advisory Committee dated 13th December 2018 annexed to the Respondent's bundle of documents, at paragraph 6 reads:

"Please note that the State Corporations Advisory Committee (SCAC) has in such previous circumstances determined that officers deployed in such a caretaker status be paid as follows:

- a) Salary and allowances enjoyed in the substantive appointment of the officer by the deploying institution."

From the above, it is clear that the Claimants are entitled to these allowances which I accordingly award them.

- f. 2017-2019 CBA arrears

Although the Claimants in their pleadings sought to be paid the CBA arrears for the period 2017-2019. No evidence was tendered in court to support the allegation that they were entitled to salary review which was never implemented. The Terms and Conditions of Service for Senior Management Staff does not make any reference to the CBA.

This prayer was therefore not proved and is declined.

The Respondent's counterclaim

55. The Respondent in its counterclaim prayed for refund of Kshs 1,755,700 and Kshs 1,629,119 on account of overpayment to the 1st and 2nd Claimants respectively. According to the Respondent, the Report of the Auditor General for the period ended 30th June 2021 revealed that during the period between October 2017 and June 2019, the Claimants were paid basic salaries for the upper substantive positions contrary to the advisory of the State Corporations Advisory Committee.
56. I have also looked at the Report of the Auditor General for the year ended 30th June 2022 forming part of the Respondent's bundle of documents. At page 44 of the report, on the progress on follow up of Auditor's recommendations, the issue of overpayment of salaries to former members of staff



was indicated as resolved. This therefore means that the issue of over payment was resolved and the Respondent cannot therefore claim the same. Further, the terms of service of the Claimants were approved by the Council in accordance with their contracts.

57. In the end, judgment is entered in favour of the Claimants in the following terms:

1st Claimant Prof. Thomas Cheruiyot

- a. Unpaid leave dues Kshs. 841,190
- b. Car allowance Kshs. 3,432,000
- c. Passage and baggage allowance Kshs. 60,000
- d. Salary in lieu of notice Kshs. 810,476
- e. Gratuity for unpaid period Kshs. 238,494
- f. Disengagement allowance Kshs. 378,000
- g. 2017-2019 CBA arrears Declined

2nd Claimant Prof. Joshua Kwonyike

- a. Unpaid leave dues Kshs. 693,532
- b. Passage and baggage allowance Kshs. 50,000
- c. Salary *in lieu* of notice Kshs. 712,879
- d. Gratuity for unpaid period Kshs. 242,909
- e. Disengagement allowance Kshs. 378,000
- f. 2017-2019 CBA arrears Declined

58. Payments awarded herein to the Claimants are to be net of any payment already received by the Claimants from the Respondent under the specific heads.

59. The Claimants are also awarded costs and interest at court's rates on both the Claim and Counter-claim.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF JUNE, 2024

MAUREEN ONYANGO

JUDGE

