



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 70 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLE 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 35, 41, 47, 48, 50, 165, 258, 259 AND 260 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF 2015**

**AND**

**IN THE MATTER OF SECTIONS 42 AND 45 OF THE EMPLOYMENT ACT, 2007**

**BETWEEN**

**KENNEDY NYAKUNDI.....PETITIONER**

**VERSUS**

**POWERHIVE EAST AFRICA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Petitioner, Kennedy Nyakundi, vide a Petition dated 4<sup>th</sup> May 2020 seeks for the following Orders:-

- a. *A Declaration be and is hereby made that the act of the Respondent in relieving the Petitioner of his duties vide a letter dated the 31<sup>st</sup> March 2020 is a breach of the latter's constitutional rights under articles 27 (1), (2) and (3), 28, 41(1), 48 and 50 of the Constitution and that the same is null and void ab initio for all intent and purposes.*
- b. *An order of judicial review of Certiorari to quash the decision of the Respondent purporting to extend the probation period by one month vide the letter dated 2<sup>nd</sup> March 2020.*
- c. *An order directing the Respondent to pay to the Petitioner an amount of Kshs.150,000 being his one month salary in lieu of the notice period of one month.*
- d. *An order directing the Respondent to compensate the Petitioner a sum total of Kshs.16,200,000 the total salary entitled to the Petitioner till his retirement' for the unexpired period of his contract of employment of nine years.*
- e. *Interest on prayer (c) and (d) above.*
- f. *Cost of this Petition and interest thereon; and*
- g. *Any other relief or order that this Honourable court may deem fit to grant.*

**Background**

2. The Petitioner avers that prior to his removal from service, he worked for the Respondent as its Sales and Marketing Manager and earned a gross salary of Kshs 150,000. That his contract of employment commenced on 24<sup>th</sup> day of April 2019 and provided that he would be on probation for Six (6) months. That the Respondent could at its discretion extend the probationary period for up to six (6) months after which the Petitioner would be confirmed as an employee of the Respondent.
3. That the Petitioner dutifully, industriously and faithfully discharged his duties from the **30<sup>th</sup> April 2019 to 14<sup>th</sup> October 2019** when the Probation period was by consent extended by a further three months which was to run until the **14<sup>th</sup> January 2020**. That after lapse of the extended probationary period, there was no communication from the Respondent and the Petitioner continued to offer services to the Respondent until **2<sup>nd</sup> March 2020** when he received a letter dated 2<sup>nd</sup> March 2020 further extending the probation period by a further month till 31<sup>st</sup> March 2020.
4. That the Respondent's further extension of probation by the Respondent was strange and baseless as the Petitioner had already completed his probation period. Further that the letter dated 2<sup>nd</sup> March 2020 introduced unreasonable conditions that were arrived at arbitrarily, was not based on any market study or known basis and was a well-choreographed scheme aimed at terminating the Petitioner's employment.
5. That on the 31<sup>st</sup> March 2020, the Respondent issued to the Petitioner a letter dated 31<sup>st</sup> March 2020 in which he conveyed a message terminating an un-existing probation and denied the Petitioner the opportunity of being heard.
6. That the reasons advanced by the Respondent for the termination were vague, ambiguous, superfluous and a wild goose chase as they did not raise any specific issues touching on any alleged failure on the Petitioner's performance.
7. The Petitioner further avers that he was a stranger to the targets contained in the dismissal letter since he was seeing them for the first time and that the Respondent failed to adhere to the stipulated statutory procedure of terminating employment as provided for under Sections 41 and 45 of the Employment Act.
8. That the Respondent breached the Petitioner's right to be heard when it merely wrote to him communicating the termination of employment which it guised as termination of probation.
9. The Respondent, through a Replying Affidavit dated 13<sup>th</sup> June 2021 and sworn by Austin Harris, the Respondent's Chief Operating Officer, opposed the instant petition.
10. The Respondent admits that the Petitioner was its employee and served as its Sales Managing director. Further that the employment Contract executed by the parties on 30<sup>th</sup> April 2019 provided that the Petitioner would be placed on probation for 6 months with the option of extending the same for a further 6 months.
11. That before lapse of the said 6 months, the Petitioner's performance was found to be wanting and after consultation with the Petitioner, a decision was made to extend his probation by 3 months.
12. That after completion of the probation extension, the Respondent reviewed the Petitioner's performance and subsequently decided to extend his probation for a further 1 month.
13. That the decision to extend was conveyed to the Petitioner who consented to the decision and the targets he was to meet by 31<sup>st</sup> March 2020.
14. That despite the aforementioned extensions, the Petitioner's performance never improved and consequently, a decision to terminate employment was reached and communicated to him vide a letter dated 31<sup>st</sup> March 2020.
15. The Respondent denies the assertion that the Probation was to run until 14<sup>th</sup> January 2020 and maintains that the reasons for terminating the Petitioner's probationary contract are justifiable in that the Petitioner consented to the probation extension to allow him pull up his performance but he failed to do so.
16. The Respondent prays that the petition be dismissed with costs. Parties agreed to dispose off the petition by way of written submissions.

#### **Petitioner's Submissions**

17. The Petitioner through his Counsel set out the following issues for determination:
  - a) *Whether there was an implied confirmation of the claimant's employment?*
  - b) *Whether the Petitioner's termination under the circumstances was lawful and in breach of the Petitioner's fair labour guarantees?*
18. On the first issue, Counsel submits that from the set of circumstances in the instant petition there is an implied confirmation of the Petitioner's employment by dint of the conduct of the Respondent by continuing to pay the Petitioner his salary after completion of the agreed probation period.

19. Counsel advances two arguments: First he submits that parties are bound by Agreements that they enter into and that it is a universally recognized principle that parties to any agreement are to observe the same in "utmost good faith". Secondly, Counsel submits that the Respondent's act and conduct of keeping silent after lapse of probation period led to an implied confirmation of employment.

20. To support his argument Counsel urges the Court be guided by the sentiments of the Court in **Narry Philemons Onaya-Odeck v Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR** where the Mbaru J. opined thus:

*"The sanctity of the employment contract cannot be gainsaid. The parties herein agreed to be bound in the employment relationship by the contract of service and under it the terms and conditions of service. The contract of service carried with it rights and duties, responsibilities and obligations on either party. In this case, the claimant was required to be on probation for a period of six (6) months and upon which he would be reviewed and confirmed into full employment.*

21. In support of the second argument, Counsel relies on the case of **Narry Philemons Onaya-Odeck v Technical University of Kenya [Formerly, the Kenya Polytechnic University College]** where the court stated:

*"In this case, the contemplated 6 months of probation for the claimant came and went. The claimant was not reviewed and was not issued with a letter of confirmation. Such process did not take place as agreed. The Respondent sought to review the claimant's employment for purposes of confirmation 8 months into his employment. The inaction of the Respondent as the employer cannot be visited upon the claimant. The benefit of this lapse can only apply to protect the claimant's rights in the employment relationship.*

22. The Petitioner also relies on the case of **Elizabeth Mwikali Mwendwa v Kenya Investment Authority [2018] eKLR** where it was held that an employer-employee relationship crystalizes by operation of law where the probation period runs out under the contract on agreement of the parties or the statutory period runs out and an employer fails to confirm an employee or parties conduct themselves as if they are in an employer-employee relationship.

23. Counsel submits that based on the above finding, the benefits of the Respondent's lapse in judgement/ and or inaction on its part can only serve to protect the Petitioner's rights under Article 27(1) which guarantees equality before the law to all persons without distinction. Further that the failure by the Respondent to have systems in place so as to have the claimant's employment reviewed in time and before the probation period lapsed cannot be visited upon the Petitioner as an employee.

24. On whether the Petitioner's termination was in breach of his rights, Counsel submits that there being an implied confirmation of the Petitioner's employment by operation of the law the only manner in which the Respondent could terminate the Petitioner's employment was in strict compliance with Sections 40, 44 and 45 of the Employment Act, 2007.

25. It is the Petitioner's further submission that failure by the Respondent to inform the Petitioner of the reasons for termination rendered the termination unlawful as it was contrary to Section 45(2), (4)(b) and 5(a) of the Employment Act.

26. That failure by the Respondent to observe these fundamental safeguards guaranteed both under the constitution and the Employment Act, 2007 constituted a grave breach of the Petitioner's right to fair labour practice under Article 41 and his right to fair administrative action under Article 47 and Section 4 of the Fair Administrative Action Act, 2015.

27. Counsel urges the court to be guided by inter alia, the sentiments of Mbaru J. in **Narry Philemons Onaya-Odeck supra** where she held that:

*"The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve a reasonable length of time.*

*An employer who fails to manage the performance of their staff, lacks moral authority to tell the staff that they have underperformed".*

28. Thus, the Petitioner contends that the Respondent having failed to observe due process in terminating the Petitioner's services violated his right to fair administrative action under Article 47 and Section 4 of the Fair Administrative Action Act, 2015 and by extension his fair trial rights under Article 25 and 50 of the Constitution.

29. Counsel therefore, implores this Court to allow the petition as prayed.

### **Respondent's Submissions**

30. The Respondent through its Counsel on record proposed the following issues for determination;

- a) *Whether there exists presumption of employment on delay of communication of extension of probation and performance appraisal/review*
- b) *Hearing before termination of probationary contract*
- c) *Alleged violation of Articles 27(1), (2) and (3), 28, 41(1), 48 and 50 of the constitution*
- d) *Whether this honorable court can grant the Petitioner the judicial review orders sought*

- e) Whether the Petitioner is entitled to the sought sum of Kshs.16,200,000 being the alleged total salary to him till his retirement
- f) Whether the Petitioner is entitled to one month salary in lieu of notice

31. On whether there was an automatic confirmation of the Petitioner, Counsel submits that it was agreed by the parties during the signing of the extension letter on 14<sup>th</sup> October, 2019 that he would be evaluated before a decision was made on his probation or before the probation period is fully completed. That the performance review of his entire probation was completed and communicated to him vide the letter dated 31<sup>st</sup> March 2020.

32. Further that the performance evaluation was carried out within the period agreed by the parties that fell within the Employment Act limit on extension of probation. Counsel cites Section 42(2) of the Employment Act which provides that:

"A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee".

33. Counsel further submits that the parties by their conduct and written communication agreed to the extension of the probation period. Reliance is made on the case of **Dinah Musindarwezo v African Women's Development And Communication Network (FEMNET) [2012] eKLR** where it was held as follows:

*"... It is an acceptable principle of law of contract that parties to a contract may by their own conduct vary or extend a term or the entire contract. Whereas the Employment Act provides that probationary period may be extended for a period not exceeding six months with the consent of the employee, the Act does not specify how such consent should be evinced. It is therefore open to a Court of law to infer such consent based on the circumstances of each case. The Court therefore finds that the claimant and the Respondent by their own conduct extended the probation period indefinitely pending the appraisal but subject to the statutory ceiling of six months.*

*Appraisal as per the Respondent's Personnel Guidelines and Policy was an essential step in confirmation or otherwise of the claimant's contract. Although the Personnel Policy and Guidelines required it to be done one month prior to the expiry of the probation period, omission to do so would not necessarily result in automatic confirmation of an employee. The contention by the claimant that her confirmation became automatic when the mandatory period of carrying the appraisal had lapsed therefore fails."*

34. Counsel urges the court to be guided by the case of **Dinah Musindarwezo (supra)** and inevitably reach a conclusion that from the conduct of the parties herein, it was clear that consent to extend the probation period could be inferred for the following reasons:

(a) *The initial written agreement extending the probation period dated 14<sup>th</sup> October, 2019 clearly set out that the Petitioner would actually be reviewed and a decision made on his performance before the close of the probation period and later confirming his employment accordingly.*

(b) *The fact that no such performance evaluation ever occurred or communicated to him means that he carried the legitimate expectations to have the same reviewed within the allowable maximum probation period.*

(c) *The Petitioner was duly aware of the resignation of his line manager and therefore it was highly probable that his evaluation could be impacted in the organization.*

(d) *By a letter dated 2<sup>nd</sup> March 2020 which was written barely 36 days after the expected date of evaluation (24<sup>th</sup> January, 2021) clearly communicated to him the actual reasons for the delay in performing his evaluation.*

(e) *As a result of the said delay, the Respondent's letter dated 2<sup>nd</sup> March 2020 clearly stipulated that the Petitioner was to serve an extended probation period up to 31<sup>st</sup> March 2020 which period ended on the said date.*

(f) *The Petitioner never raised any objection to the extended probation period or the targets set for the extended probation period and he assumed responsibilities until 31<sup>st</sup> March 2020.*

35. On the issue as to whether the Petitioner was entitled to be heard before termination of his probationary contract Counsel submits in the negative. He relies on section 42(1) of the Employment Act and the case of **Kelvin Gatemo Kariuki & 4 others v Office of the Auditor-General & 2 others [2021] eKLR** where the Court held as follows:

*"Petitioner's' contracts were within the probation period of 6 months at the time the 1<sup>st</sup> Respondent dishonored them. Probation was for 6 months under contract.*

*They cannot claim under unfair termination law, theirs having been probationary contracts, terminable by 7 days' notice, or 7 days' salary, without the necessity of a hearing or giving of other reasons in justifying termination."*

36. On whether the rights of the Petitioner have been violated, Counsel submits that the instant petition is entirely a contractual dispute rather than a constitutional dispute and the Petitioner ought to have entirely sought remedy from the Employment Act and from within the contract he alleges to have been issued by the Respondent.

37. On the prayer for an order of Certiorari to quash the decision of the Respondent in extending the probation period by one month vide letter dated 2<sup>nd</sup> March 2020, Counsel submits that such orders cannot issue as the employment contract herein was not a public act or a matter of public law but a contractual relationship governed by private law and that judicial review remedies are not efficacious in the circumstance of this case as the Petitioner had the opportunity to pursue private law remedies. Counsel relies on the case of **Republic v Kenya Ordnance Factories Corporation Ex Parte Anne Gichimo (2014) eKLR**.

38. On the prayer for one month's salary in lieu of notice Counsel submits that the same must fail as the Petitioner was still on probation and that he received 1 week's salary in compliance with the executed contract between the parties.

39. On the prayer for Kshs.16,200,000 being the salary till retirement, Counsel submits that the same is not tenable, has no basis and amounts to unjust enrichment. Counsel relies on the case of **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011)**, where the court held as follows:

*"There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word permanent employment."*

40. Counsel submits that the Petition herein lacks merit and urges this Court to dismiss it with costs.

#### **Determination**

41. From the foregoing appreciation of the pleadings of the respective Claimants, the responses thereto, the submissions and decisions relied on, the following issues arise for determination: -

a) Whether at the time of termination of his employment the Petitioner was still on probation or whether there was implied confirmation of the claimant's employment;

b) Whether the Petitioner's termination was unlawful and whether he is entitled to the reliefs sought.

42. The instant petition turns on whether the Petitioner was still on probation at the time of termination or whether he was automatically confirmed upon lapse of time.

43. On the part of the Petitioner it was argued that the employee-employer relationship crystallized on 14<sup>th</sup> January 2021 after the Respondent failed to either confirm or extend the Petitioner's Probation period. The Respondent on the other hand posits that confirmation was conditional upon evaluation and that parties extended the probation period by a further month and that the Petitioner's probation was to lapse on 31<sup>st</sup> March 2020.

44. It is not in dispute that the Petitioner was employed by the Respondent and that the employment relationship commenced on 30<sup>th</sup> April 2019. As per the executed Employment Contract, the Petitioner was to be placed on probation for 6 months from the date of commencement and the Respondent could extend the probation period for up to a further 6 months.

45. On 14<sup>th</sup> October 2019, the Petitioner's probation was extended via a letter addressed to the Petitioner. The said letter was executed by both parties with the Petitioner herein accepting the extension of his probationary period by 3 months.

46. Upon lapse of the aforesaid three months there was no communication from the Respondent on whether it would be extending the Petitioner's probation or would confirm him to employment. However, the Petitioner received a letter dated 2<sup>nd</sup> March 2020 informing him that his probation would be extended by a further one month. The Petitioner accepted the extension and the conditions set out in the said letter by appending his signature on 5<sup>th</sup> March 2020.

47. The issue in contention in the instant suit is whether the letter dated 2<sup>nd</sup> March 2020 effectively extended the Petitioner's probation by one month or whether the letter was of no legal consequence bearing in mind that it was received after the agreed probation period had lapsed.

48. It is trite law that, an employer- employee relationship crystalizes by operation of law where the probation period runs out under the contract on agreement of the parties or the statutory period runs out and the employer fails to confirm an employee or parties conduct themselves as though they are in an employer-employee relationship. It was so stated in the case of **Elizabeth Mwikali Mwendwa v Kenya Investment Authority [2018] eKLR**.

49. Further, Section 42(2) does not provide for several piecemeal extensions of probationary period but "*a further period of not more than 6 months*". The Respondent already extended the probationary period by a further three months. The law does not provide for more than one extension as is evident from the words "*a further period*" meaning one further period. The second extension is thus not provided for by the law.

50. It is further not in dispute that the 3 months extended period had lapsed before the Respondent made any communication. The fact that on 5<sup>th</sup> March 2020, the Petitioner signed the impugned letter dated 2<sup>nd</sup> March 2020 indicating that he had accepted the extension of probation by a period of one month on the conditions set out in the said letter cannot and does not change the legal provisions.

51. I therefore find that the probationary employment of the Claimant lapsed upon the expiry of the three months extension of the same. He was thus not on probation at the time when his employment was terminated.

**Was the termination of the Claimant's employment lawful and fair?**

52. In the case of **Evans Kiage Onchwari v Hotel Ambassadeur Nairobi [2016] eKLR** Ndolo J. observed as follows: -

*“I however find it necessary to comment on the constitutionality of Section 42(1) of the Employment Act which ousts the procedural fairness requirements under Section 41 as far as probationary contracts are concerned ... the Court was referred to decisions of Rika J in **Danish Jalang'o & another v Amicabre Travel Service Ltd and Dixon Andama v Amani Tiwi Beach Resort** where my brother Judge held that in terminating probationary contracts, the substantive justification and procedural fairness requirements under Sections 43 and 45 are not obligatory. I hold a different view. Article 41 of the Constitution guarantees employment and Labour rights for all. To my mind these rights may only be limited to the extent that is permitted under Article 24 of the constitution. To limit enjoyment of a right by the mere reason of the length of service does not in my view meet the threshold of Article 24. To this extent I agree with the holding of Lenaola J in **Samwel G. Momanyi v The Attorney General & Another** that Section 45 (3) of the Employment Act is unconstitutional. I venture to add that Section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected.”*

53. Lenaola J (as he then was) in the **Momanyi Case** relied on by Ndolo J observed in material part as follows concerning Sections 45 and 46 of the Employment Act.

*“Reading the two sections together with Articles 27 and 48 of the Constitution, there is obvious discrimination and the applicant and those in his situation have been denied equal protection and equal benefit of the law and they have also been denied the full and equal enjoyment of all rights and fundamental freedoms to the extent expected by the Constitution. They have been denied access to justice. I have held as above because I am in agreement with the Petitioner that there is no explanation offered by either the 2<sup>nd</sup> Respondent and the AG why a person who has worked for one year and one month is the only one who can claim that his employment has been unfairly terminated ...”*

54. The same was also the holding of the Court in **Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR** where after reviewing previous decision in both Kenyan courts and courts outside the jurisdiction held as follows –

55. *Labour rights are part of the Bill of Rights by virtue of Article 41 of the Constitution. Article 24 of the Constitution prohibits the limitation of a right or a fundamental freedom in the Bill of Rights except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.*

56. ...

57. *Any legislation therefore which intends to limit or qualify a labour right, ought to be to the extent that the limitation or qualification is reasonable and justifiable in an open and democratic society.*

55. From the foregoing, it follows that the termination of the Petitioner's employment which was without observation of the requirements of Sections 41 and 43 of the Employment Act on procedural fairness and substantive fairness respectively, was unfair within the meaning of Section 45(2) of the Act.

56. There is a further issue that was raised by the Respondent which this Court must address for completeness of the determination herein; that contractual relationships governed by private law should not attract judicial review remedies such as an order of certiorari to quash the decision of the Respondent extending the probation period. This may be so. However, Section 12(3) of the Employment and Labour Relations Court Act provides as follows with respect to the remedies that this Court may grant in any matter before it –

**(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—**

- (i) interim preservation orders including injunctions in cases of urgency;**
- (ii) a prohibitory order;**
- (iii) an order for specific performance;**
- (iv) a declaratory order;**
- (v) an award of compensation in any circumstances contemplated under this Act or any written law;**
- (vi) an award of damages in any circumstances contemplated under this Act or any written law;**
- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or**

(viii) any other appropriate relief as the Court may deem fit to grant.

57. In the case of **Martin Lemaiyan Mokoosio & Emmanuel Toyanka Mokoosio v Reshma Praful Chandra Vadera, Simon Joseph ole Karasha, Bindu Kumar Chhotalal Vadera & Ngong Matonyok Wholesalers Ltd [2021] eKLR**, Odunga J. held that a matter that ought to be brought as an ordinary civil suit but was framed as a constitutional petition does not deprive a Court jurisdiction over the matter. This would therefore be a matter that the Court would deal with under Article 159 of the Constitution as a procedural lapse that ought not to deny a litigant the right to a determination of the suit on the merits.

58. Of course where the litigant does not deserve judicial review orders or any other prayer for that matter, but prays for the same, the Court cannot grant such orders.

59. I would however agree with the Respondent that the suit herein is a pure employment matter and should have been filed as a claim rather than a petition. I shall therefore offer remedies as if I was dealing with a memorandum of claim.

#### **Remedies**

60. Having found the termination of the Claimant's employment unfair, he would be entitled to pay in lieu of notice which I award him at **Kshs.150,000/=**.

61. The Petitioner is further entitled to compensation. The sum claimed of Kshs.16,200,000 being salary entitlement to the date of retirement is however what I would refer to as Ojwang J. (as he then was) referred to the case of **Menginya Salim Murgani v Kenya Revenue Authority [2008] eKLR** as injudicious and founded upon sanguine assessments of prospects. As was stated in the case of **Engineer Francis N. Gachuri v Energy Regulatory Commission (supra)** the only remedies an employee whose employment had been unfairly terminated can be awarded are those provided for in law.

62. Section 49 of the Employment Act provides for remedies available to an employee whose employment has been unfairly terminated by an employer. Section 49(4) further provides for the factors to be considered by the Court before granting any remedy.

63. In the instant suit, the Claimant had barely done one year in his employment. Taking all relevant factors into account, it is my view that three months' salary is reasonable compensation in the circumstances of his case and I award him the same in the sum of **Kshs.450,000/=**.

64. The prayers for a declaration that the Respondent was in breach of Articles 27(1), (2) and (3), 41(1), 48 and 50 of the Constitution must fail as in my view no breach of any constitutional provisions was proved, this having been only a breach of terms of a contractual relationship.

65. The prayers for an order of judicial review of *certiorari* to quash the decision of the Respondent to extend the probationary period must also fail as the same is only a breach of a statutory provision that does not lend itself to such remedy.

66. **In conclusion, judgment is entered for the Petitioner against the Respondent in the total sum of Kshs.600,000/=.**

67. The Respondent shall pay the Petitioner's costs of this suit and interest shall accrue at court rates from the date of judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF NOVEMBER 2021**

**MAUREEN ONYANGO**

**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.

**MAUREEN ONYANGO**

**JUDGE**