REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2183 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS X. O. K'OMBUT.....PLAINTIFF

VERSUS

UNIVERSITY OF NAIROBI.....DEFENDANT

JUDGMENT

The plaint herein was originally filed in Milimani Commercial Court as Civil Case No. 5666 of 2012. It was transferred to this court by an order dated 26th June 2015.

In the plaint dated 1st August 2012, the Plaintiff avers that he was employed by the Defendant, the University of Nairobi. That on or about 25th November 1994 he was promoted to the position of Chief Technologist in the Defendant's Bio-Chemistry Department. That the promotion placed him under Terms of Service of Lecturers, Senior Library and Academic Staff and he was entitled to the same salary and benefits as a Lecturer.

The Plaintiff avers that under the Defendant's Module II Programme he was paid a salary of Kshs.41,235.55 while the salary of lecturer under Module II Programme was Ksh.73,769.85. That this disparity existed despite clear provision that a Chief Technologist fell in the same salary scale as a Lecturer, and in violation of the Terms of Service.

The Plaintiff avers that other Departments, including the Department of Medical Physiology, offered Chief Technologists the same salary as a Lecturer under Module II Programme.

It is his averment that despite being notified of the discrepancy the Defendant refused, neglected and or otherwise failed to honour its obligation to pay him the salary arrears as stipulated in the terms of service, which as at the time he left service of the Defendant had accumulated to Kshs.3,458,537.90.

He prays for the following remedies –

a) Kshs.3,458,537.90.

b) Costs of the suit.

c) Interest on (a) and (b) above.

d) Any other relief that this court may deem fit to grant

The Defendant entered appearance on 26th October 2012 but never filed a defence. It however filed a notice of preliminary objection dated 14th July 2017 on the following Grounds _

1. That the Court does not have jurisdiction to hear and adjudicate this suit in view of the express provisions of Section 90 of the Employment Act which provides as follows:

"Notwithstanding the provisions of Section 4(1) of the Limitations of Actions Act (Cap 22) no civil action or proceedings based

or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within 3years next after the act, neglect or default complained or in the case continuing injury damage within 12 months next after the cessation thereof"

2. That the claim for salary arrears is for the year 2004 and this suit was instituted in 2012 a period exceeding eight (8) years and as such, Section 4(1) of the Limitation of Actions Act applies making any claim beyond six years time barred.

3. That Section 90 of the Employment Act reduced the six year limitation under Section 4(1) in the Limitation of Actions Act to three (3) years and as such, the Plaintiff is not entitled to lodge any claim for salary arrears due from 2004, in 2012 being 8 years later.

4. That this suit is therefore fatally defective and should be struck out at the first instance with costs.

Directions were given on 23rd April 2018 that parties proceed by way of written submissions on the preliminary objection but the Defendant failed to comply. On 23rd April 2018 the court directed that the preliminary objection be heard together with the main suit.

Evidence

At the hearing on 12th February 2020, the Plaintiff testified that he was employed by the Defendant in 1980 as a Senior Technologist Non-Academic. In September 1994 he was appointed as a Chief Technologist which position is equivalent to a Lecturer. That he was entitled to the same salary as a lecturer together with house allowance and duty free cars.

He testified that in 1998 the University established University of Nairobi Enterprise (UNES) following the introduction of parallel programs. He testified that under UNES academic staff were paid 35% of the fees paid by parallel student. That he was grouped with Senior Technologists instead of being grouped with Lecturers and therefore paid less than the Lecturers.

He testified that he calculated the difference between what he was paid and what he was supposed to be paid being the salary of Lecturers from February 1999 to 2012.

The Plaintiff testified that as he was approaching his retirement date in 2012 he met with the Vice Chancellor Administration and Finance who approved payment of the difference between what he was paid and what was paid to Lecturers. He thereafter wrote to seek payment but his request was declined. He referred the court to the many letters he wrote to the Defendant on the issue as reflected by correspondence he attached to the plaint. He prayed for payment as per plaint.

Under cross examination the Plaintiff testified that he used to teach the practical sessions to Masters students. He testified that he was never given an appointment letter as a Lecturer, and did not know if a Lecturer was required to be a holder of a Masters. He stated that he was aware there were three categories of staff – Lectures, technical and administrative cadres. He testified that his department only had two cadres, lectures and technical staff.

The Plaintiff testified that the circular for payment stated that 35% of fees was for direct service staff and he was a direct service staff. That he was not a member of any union and that is way he filed this suit as an individual. He stated that he did not benefit from the CBA between UASU and the University and that UASU did not create UNES.

The Plaintiff testified that after promotion his terms of service were equivalent to a lectures, that there was a letter to that effect enclosed with his letter of promotion.

Referring to the Terms of Service, he stated that his position fell within scales in Table 2 at Clause (3). He testified that UNES was not paying his salary, that he was earning two salaries, one from UNES and another from the University. That what he was claiming is from Module II paid by UNES and that he had not joined UNES to this suit. He testified that payments for Module II started in 1999 and that he did not have a letter stating he will be paid the 35% from Module II.

In re-exam the Plaintiff testified that everybody was getting the second salary from UNES including the cleaner. That the figure varied every month because it was based on 35% of income from module II. That he was receiving the same remuneration as a Lecturer from 1994 to April 2012. He referred to letter dated 29th July 2004 at document 6 of Plaintiff's bundle titled *"Implementation of Revised Salaries and Housing Allowances"*. That at paragraph 2 the letter stated "Senior Administrative Staff on Terms that are currently equivalent to Academic and Teaching Staff are to be paid same salary and house allowance as Lecturers and academic staff. He stated that salary scale D of Terms of Service shows Chief Technologist is in the salary scale as lecturers.

Defendant's Case

Counsel for the Defendant closed its case without calling a witness as there was no defence filed by the Defendant. Parties thereafter filed written submissions.

Plaintiff's Submissions

The Plaintiff submitted that in view of the fact that the Defendant did not file a defence, judgment should be entered for him. He relied on the cases of Kenya Pipeline Company Limited v Mafuta Products Limited (2014) eKLR, Kennedy Makasembo v Kenya Union of Post Primary Education Teachers (2017), eKLR, Linus Nganya Kiongo and 3 Others v Town Council of Kikuyu (2012) eKLR as quoted in Mary

Njeri Murigi v Peter Macharia and Another (2016) eKLR in which the Court stated –

> *"… in the case of Motex Knitwear Mills Limited Milimaui IICC 834/2002 Honourable Lessit J citing Autar Singh Bahia & Another Vs Raju Govindji IICC 548 of 1998 stated:*
>
> > *"Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail …"*
>
> *Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure lo adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged…"*

On Defendant's averment as raised in the notice of preliminary objection that the plaint is time barred, the Plaintiff submitted that the preliminary objection did not satisfy the principles in Mukisa Biscuit Company Limited v West End Distributors Limed (1969) E.A 696. That in Cause 849 of 2011 Justus Aulo Ashioya v Aksher Team Security Limited, Cause 1029 of 2011 Mussawa Zaccheus Mumali v Nzoia Suga Company Limited (both unreported) and in Benjamin Wachira Ndiithi v Public Service Commission (2014) eKLR, the courts held that accrual of cause of action in a claim emanating from an employment contract takes effect from the date of termination of employment.

On his claim of discrimination, the Plaintiff submitted that from 30th September 1994 when he was promoted to Chief Technologist in the Department of Bio-Chemistry he was on the same terms of service as a lecturer and even benefited from import duty free car as well as house allowance as a lecturer.

That when the Defendant introduced Module II parallel degree programme, the Chief Technologist was in the same salary scale as a Lecturer in the Terms of Service. It is submitted that the Chief Technologists in the Department of Medical Physiology received the same salaries as Lecturers. The Plaintiff relied on Section 5(3) of the Employment Act and the Cause 1227 of 2011 G.M.V v Bank of Africa Limited (2013) eKLR where the court found that once an employee established a prima facie case the burden shifts to the employer to show articulate, specific and non-discriminatory reasons for the disparity.

The Plaintiff further relied on ILO Publication titled *"Equal Pay, An Introductory Guide' by Martin Oelz, Shanna Olney and Manuel Tomei, ILO Labour Standards Department, Conditions of Work and Equality Department-Geneva: ILO 2013"* which states that it is the fundamental right of every worker to receive equal pay for the same or similar work. This may entail equal pay for doing completely different work, but which is, based on objective criteria, of equal value.

The Plaintiff submitted that the Terms of Service, the Memos and various correspondences shown to the court showed that a Chief Technologist fell under the Senior Academic and Teaching Staff. That the Plaintiff's colleagues in the same salary scale but different departments received the same salary as Lecturers.

The Plaintiff submitted that is has been held that similarly qualified employees must be paid equally when they perform the same work in equivalent conditions. Work of equal value, he emphasized, is work which is different in content, involving different responsibilities, requiring different skills or qualifications.

Defendant's Submissions

The Defendant submitted that the plaint offends Section 4(1) of the Limitation of Actions Act as it claims salary arrears from 2004 while the suit was instituted in 2012. That the plaint further offends Section 90 of the Employment Act and is therefore a non-starter. The Defendant relies on the decision of the Court of Appeal in David Ngugi Waweru v Attney Gnenrla and Another (2017) eKLR where the court quoted with approval the case of Andrew Maina Githinji to the effect that Section 90 of the Employment Act is intended to protect both the employer and employee from irredeemable prejudice arising from claims where memories have faded, documents lost, witnessed died or are untraceable.

The Defendant further relied on the decision in African Highlands Produce Limited v John Kisorio (2001) eKLR where the court discussed the principle of mitigation of losses.

The Defendant further raised the issue of the wrong Defendant having been sued stating that the suit should have been filed against UNES and not the Defendant. The Defendant relied on the decision in Salomon v Salomon (1887) AC 22 as referred to by the Court of Appeal in Charles Ray Makuto v Almkony Limited and Another (2016) eKLR on the principle that a company is in law a separate person distinct from its members. It submits that the Plaintiff admitted on oath that the claimed amounts were to be paid by UNES.

The Defendant's third issue is that the Plaintiff did not prove discrimination as defined in the case of Peter Waweru v Republic (2006) eKLR being the failure to treat equally where no reasonable distinction can be found between those favoured and those not favoured. It further relied on Article 4 of the Convention concerning discrimination in respect of Employment and Occupation, 1958 where discrimination is defined.

The Defendant further relied on the Court of Appeal decision in Ol Pajeta Ranching Limited v David Wanjau Muhoro (2017) eKLR to the effect that there is always need on the part of the Plaintiff to establish comparators for purposes of showing unequal pay in comparison to the comparators.

Finally, the Defendant submittted that the Plaintiff failed to discharge his burden of proof of the amount he claims. That the Plaintiff further failed to prove that the Defendant was his employer. The Defendant relied on the provisions of Section 107 of the Evidence Act and the decision in China Wuyi and Co. Limited v Samson K Metto (2014) eKLR, where the court emphasised that *"he who alleges must prove"* as is provided in Sections 107 and 108 of the Evidence Act.

The Defendant further relied on the case of Christina Mwigina Akonye v Samuel Kariru Chege (2017) eKLR where it was stated that special damages must be proved, citing the Court of Appeal decision in Hahn v Singh (1985) KLR 716. The Defendant further relied on the decisions in Capital Fish Limited v The Kenya Power and Lighting Company Limited (2016) eKLR; Kipkebe Limited v Peterson Ondieki Tai (2016) eKLR and Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & Another (2015) eKLR where the Court of Appeal quoted the case of Hon. Daniel Turoitich Arap Moi v Mwangi Stephen Muriithi (2014) eKLR.

On the Plaintiff's submission that judgment be entered against the Defendant in default of defence, the Defendant submitted that the court having allowed the Defendant to participate in the suit and to cross examine the plaintiff, there is need for formal proof of the amount claimed in the suit.

The Defendant prayed that the claim be dismissed with costs.

Determination

Having considered the pleadings, evidence and submissions on record, the issues for determination are the following: -

1. Whether the claim herein offends Section 4(1) of the Limitation of Actions Act and Section 90 of the Employment Act.

2. Whether the Plaintiff has sued the wrong Defendant.

3. Whether the Plaintiff has proved discrimination and breach of terms of service.

4. Whether the Plaintiff is entitled to the prayers sought.

Limitation

In the Defendant's notice of preliminary objector dated 8th November 2012, it avers that the Court lacks jurisdiction to adjudicate the suit herein as it offends Section 5 of the Civil Procedure Act as read with Section 45 and 87 of the Employment Act and Section 12 of the Labour Institutions Act. Further, that the suit is incurably defective. Section 5 of the Civil Procedure Act provides as follows –

5. Courts to try all civil suits unless barred Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

Section 45 and 87 of the Employment Act provides as follows –

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where—

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any pervious warning letters issued to the employee.

Further, Section 12 of the Labour Institutions Act which was repealed by Section 12 of the Employment and Labour Relations Court Act (formerly the Industrial Court Act) provides as follows –

12. Jurisdiction

(1) The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employer's organisation and a trade union or between a trade union, an employer's organisation, a federation and a member thereof.

(2) An application, claim or complaint may be lodged with the Industrial Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Commissioner for Labour or the Minister.

(3) The Industrial Court may consolidate claims for the purpose of hearing witnesses as appropriate.

(4) In the discharge of its functions under this Act, the Industrial Court shall have the powers to grant injunctive relief, prohibition, declaratory order, award of damages, specific performance or reinstatement of an employee.

(5) In deciding on a matter, the Industrial Court may make any other order it deems necessary which will promote the purpose and objects of this Act.

(6) Any decision or order by the Industrial Court shall have the same force and effect as a judgment of the High Court and a certificate signed by the Registrar of the Industrial Court shall be conclusive evidence of the existence of such decision or order.

(7) Any matter of law arising from a decision at a sitting of the Industrial Court and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the presiding judge of the Industrial Court provided that on all other issues, the decision of the majority of the members shall be the decision of the Industrial Court.

(8) The Industrial Court may make an order for payment of costs, according to the requirements of the law and fairness and in so doing, the Industrial Court may take into account the fact that a party acted frivolously, vexatiously or with deliberate delay during conciliation proceedings and in bringing or defending a proceeding.

(9) The Industrial Court may refuse to determine any dispute before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(10) Unless the parties to a dispute agree to a longer period, a dispute shall, on the expiry of thirty days from the date of appointment of a conciliator, be deemed to be unresolved.

(11) A certificate issued by a conciliator stating that a dispute remains unresolved after conciliation is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(12) The Industrial Court may review?

(a) the performance or purported performance of any function provided for in any written law or any act or omission of any person or body in terms of any written law on any grounds that are permissible;

(b) any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law; or

(c) deal with all matters necessary or incidental to performing its functions in accordance with this Act or any other law.

However, in its submissions the Defendant has cited Section 4(1) of Limitation of Actions Act and Section 90 of the Employment and Labour Relations Court Act. It would appear that the Defendant abandoned the grounds in its preliminary objection and instead raised the issue of limitation as a matter of law in the submissions rather than on the basis of the preliminary objection.

Be that as it may, the Defendant's submissions are based on accrual of cause of action in 2004. It is not clear where this date is reckoned from as the Plaintiff was in the service of the Defendant from 1980 and retired from service in 2012. The claim herein was filed in 2012. The claim relates to underpayments or arrears of salary arising, according to the Plaintiff, from payment of his salary under the wrong scale. The Plaintiff only filed this claim after the Defendant rejected his appeal for adjustment of salary by its letter dated 7th March 2012. It is on the date of that letter that the cause of action accrued.

As was stated in the case of Justus Atulo Ashioya v Akshar Team Security Limited (supra)

> *''The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching, over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of termination, the Employee should be accorded all benefits arising under the contract of employment. The event that triggered this Claim happened on or about 26th January 2011, and the Claim to enforce the full range of benefits was filled on 11th August 2011, well within the period created under Section 90 [of the Employment Act 2007]."*

Section 90 of the Employment Act refers to the cause of action arising within 3 years from cessation of the act, neglect or default complained of, or within 12 months it if it a continuing wrong.

The claim herein was therefore filed within the limitation period under Section 90 of the Employment Act of Section 4(1) of the Limitation of Actions Act as it was field well within the limitation period.

For these reasons, I find no merit in the preliminary objection filed by the Defendant which as I have already observed above appears to have been abandoned, or the submissions made in that respect.

2. Whether the Plaintiff has sued the wrong party

The Defendant submitted that the person who should have been sued was UNES and not the Defendant. It relies on the Plaintiff's response to questions put to him during cross examination.

The Plaintiff has whoever relied on his letter of appointment which is by the Defendant. He has further relied on his letter of promotion by the Defendant, terms of service for the Defendant and correspondence from the Defendant.

The only reference to UNES was with respect to the sharing of funds under Module II. This is confirmed in an Internal memo dated 3rd September 2002 which is reproduced below; -

> *"UNIVERSITY OF NAIROBI*
>
> *INTERNAL MEMO*
>
> *FROM: Vice Chancellor DATE: September 3,2002*
>
> *TO: College Principals REF: CIR4/Vol.V/42*
>
> *TECHNOLOGISTS RENDERING SERVICES UNDER THE MODULE II PROGRAMMES*
>
> *The University Management Board in its meeting held on August 8, 2002 resolved that technologists are members of the University's academic staff. Therefore, where they render services under Module II programmes, they should be paid out of the 35% of the Module II funds allocated for direct service providers along with other members of the academic staff.*
>
> *SIGNED*
>
> *PROF. C. M. KIAMBA*
>
> *VICE CHANCELLOR"*

From the Internal Memo, it is evident that it was written by the Defendant. It is further evident that the programme refereed to is the Defendant's and the staff to be paid are the Defendant's employees. UNES was only the source of funding for payment of the Defendant's staff engaged in providing services in the Module. There is no evidence that UNES had any employees of its own or that it made any decisions over payments for services rendered. It is evident that UNES was only a fund used to pay for services rendered by staff of the Defendant intended to separate Module II funds from other funds of the Defendant.

I thus find no merit in the Defendant's averment that the Plaintiff sued the wrong person.

3. Whether the Plaintiff has proved discrimination

Discrimination was defined in Peter Waweru v Republic (supra) as: -

> *"Failure to treat equally where no reasonable distinction can be found between those favoured and those not favoured."*

In the circumstances of this case, what the Plaintiff has proved is that he was not paid in accordance with the Terms of Service for Academic, Senior Library and Administrative Staff of the Defendant. He has however not proved discrimination as he did not submit conclusive evidence that other employees in the same grade as himself were remunerated differently.

As was stated by the Court of Appeal in Ol Pajeta Ranching Limited v David Wanjau Muhoro (supra) in claims of discrimination in pay there is always need on the part of the Plaintiff to establish comparators for purposes of showing unequal pay in comparison to the comparators.

I therefore find that the Plaintiff has not proved discrimination.

Whether the Plaintiff is entitled to the prayers sought

The Plaintiff has stated that he was paid Kshs.41,235.55 while the salary of a lecturer under Module II Programme in the same grade as himself was Kshs.73,769.85. This he has proved by way of the salary scales in the Terms and Condition of Service where at Table II of Annexure 1 thereof, the Plaintiff was in grade (d) whose particulars are set out therein as follows –

> *Lecturer, Research Fellow, Assistant Registrar, Executive Secretary, Chief ICT Officer, Assistant Dean of Students, Senior Accountant II. Librarian, Maintenance Officer, Medical Officer, Games Tutor, Counsellor, Pharmacist, Chief Technologist & Equivalent.*
>
> *Kshs.42,960 x 1,428 – 47,244 x 1,626 – 53,742 x 1,848 - 57,438 p.m."*
>
> [Emphasis added]

The Plaintiff further submitted a letter dated 3rd September 2002 wherein the Vice Chancellor approved payment of Technologists rendering service under Module II programs which letter is reproduced above dated 3rd September 2002.

What is not clear is how the Plaintiff arrived at the tabulation of the Kshs.3,458,537.90 that he has claimed as he did not provide a breakdown of the same to the court. He further did not give parameters or details for the court to use in tabulation of the same to ascertain the correctness of the figure he has claimed. This is made more difficult by the fact that the Plaintiff adduced evidence that some payments under Module II which were based on 35% of income, resulted in different payments every month.

In view of the fact that the Plaintiff has established that he was entitled to payments but has not proved the figure due to him, it would be against substantive justice to deny him the payment only on grounds that he has not proved the actual figure payable.

Section 10 and 74 of the Employment Act requires employers to keep records that are sufficient to ascertain the payments due to an employee at the time of termination and to produce the same in any court proceedings failing which the burden of proof shifts to the employee. This being the case, I make the following orders –

1. I find that the Plaintiff was paid less than what he was entitled to under the Terms and Conditions of Service for Academic, Senior, Library and Administrative Staff of the Defendant.

2. I direct the Defendant to tabulate and present to court the amount payable to the Plaintiff under those Terms of Service less what was paid to the Plaintiff within 60 days for purposes of final judgment. Should the Plaintiff not agree with the tabulation of the Defendant, he should within 30 days, file his own tabulation and present to court for final determination.

3. The case will be mentioned after 3 months on a date to be set at the time of judgement.

4. The Defendant shall pay the Plaintiff's costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF DECEMBER 2020

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 15th March 2020 and subsequent directions of 21st 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