



1. *Civil Appeal*

2. *Subject of Subordinate Court case*
 - a. *Master/servant*
 - b. *Declaration and stoppage of work unlawful*

 - c. *Employee seeks to be reinstated to work alternatively*
 - d. *Employee seeks to be paid dues*

 - e. *Trial Magistrate held only entitlement is Kshs.7,757.10 in line of nature of one member as an award.*

 - f. *Employee appeals.*
3. *Appeal*
 - a. *Judgment against weight of evidence.*
 - b. *Hon. Trial Magistrate erred in law and fact reaching conclusion not supported by evidence*

 - c. *Holding that the stoppage of plaintiff salary amounted to termination of employment.*
4. *In reply:*
 - a. *Trial magistrate reached correct decision*
5. *Held:*

- a. *Appeal allowed*
- b. *Judgment as prayed in the plaint*
- 6. *Case Law*
- 7. *Advocates*
 - i. *J. S Namada instructed M/s Namada & Co. Advocates for the appellant*
 - ii. *C. L Onindo instructed by M/s E. N. Omotii & Co. Advocates for the Respondent*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO.945 OF 2003

**ELKANA MWESELI MUGODO.....APPELLANT/ORIGINAL
PLAINTIFF**

VERSUS

**THE CITY COUNCIL OF NAIROBI.....RESPONDENT/ORIGINAL
DEFENDANT**

*(Being an appeal from the judgment, decree and order of the hon. Mrs. Owino, Principal Magistrate,
Milimani Commercial Courts Nairobi at CMCC 9506 of 2002 dated 4th January 2003)*

I. BACKGROUND

1. Elkana Mweseli Mugodo was officially employed with the City Council of Nairobi on 22 March 1994 as a field assistant III with the City Planning and Architect Department. (Town Clerk Z. M. Wandera) field assistant II (3April 1997) (for Town Clerk CI Muiruri) Revenue Clerk (City Treasurer Department) (18 March 1998) (Town Clerk Z. M. Wandera).
2. He was granted study leave for 12 months to undertake a course at the Kenya College of

Accountancy.

3. According to the Trial Magistrate findings Mr. Mogodo applied to be transferred to the Audit Section from the Stores Department with effect from 12 January 2000. He was granted leave but on his return was asked to come again whilst looking for space.

4. The transfer letter of 6 July 1999 was then enclosed on 12 January 2000 with the words (Hand written).

“We have no accommodation, please deploy else where”

5. It was then that Mr. Mugodo went back and forth between the Audit Department and the Chief Administration Officer. Every two weeks he was required to return.

6. This went on for almost a year.

7. On 2 January 2001, his salary was ordered to be stopped by the Chief City Superintendent. The reasons being “for abscondment” while investigation to establish the delegation.”

8. From February 2001 to 9 May 2002, no salary was paid, a letter of 9 May 2002 was written by Mr. Mugodo’s lawyer demanding to know why the salary had been stopped. A second reminder was written on 5 July 2002.

9. On 26 November 2002, a suit against the City Council of Nairobi was filed.

10. The prayer sought was for a declaration that the stoppage of the salary was ... unlawful

i. That he be reinstated on the payroll and be paid his unpaid salary and he be deployed to a work station and be assigned duties.

ii. In the alternative, he be paid all his unpaid salary and benefits at a base salary of Kshs.6,510/= leave and benefits

11. The defence had always been a denial. In the alternative, that the termination was lawful

12. The trial Magistrate in her findings held that the

“Council may not have given him a letter of dismissal but may have it on record that he now (is) self employed...”

The trial magistrate then proceed to award 1 month notice in lieu of notice amounting to Kshs.7,757.10 only, together with interest

13. Being dissatisfied with this award, an appeal was preferred to this High Court.

II. APPEAL

14. Only three grounds were preferred to:

i. That the Hon. Magistrate erred in law and facts in arriving at a judgment against the weight of evidence tendered in court.

ii. in reaching conclusions not supported by evidence.

iii. ...[in] making a factual finding that the stoppage of the plaintiffs salary amounted to termination of the plaintiffs employment.

15. In this submission, the advocate for the applicant stated the fact that a finding was made by the trial magistrate that the appellant “**may not have [been] given a letter of dismissal**” was proof enough to show that there was indeed never any termination of employment.

16. The respondent in reply stated that indeed there was termination lawfully so if employment that the decision aimed at by the trial magistrate was correct.

III. OPINION

17. It had been proved in evidence by the appellant that he had been deployed to another section within the council. That he was shuttled around from one person to the other for about a year without really being deployed.

18. The trial Magistrate found his salary was being paid up to February 2001 when the said employment was stopped.

19. It had also been established in evidence that at no time did the respondent terminate that employment. All that occurred was the stoppage of the employment salary payment.

20. The trial Magistrate realized this. It was then that a finding was made that where a notice had not been given. The trial Magistrate did so by awarding one months salary in lieu of that notice.

21. I find herein that the Hon. Trial Magistrate erred in her findings. The appellants inability to work was caused by his employer, the respondent who deliberately moved him from one place to another but unable to assign him duties. The cause of this was entirely on the employer.

22. I would hereby agree with the submissions by the appellant. I would set aside the judgment entered and substitute the same with the prayers as stated in the plaint paragraph (a) (b) and (c) to date.

23.I award the costs of this appeal together with the costs of the Lower Court suit to the appellant.

JUDGMENT DATED THIS 3RD MAY OF JUNE 2011 AT NAIROBI

M. A. ANG'AWA

JUDGE

Advocates

- i. *J. S Namada instructed M/s Namada & Co. Advocates for the appellant-present*
- ii. *C. L Onindo instructed by M/s E. N. Omotii & Co. Advocates for the Respondent- present*