



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATION COURT**

**AT NAIROBI**

**PETITION NO. E008 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27,  
28, 29, 41, 47, 48, 159, 162, 165, 258 AND 259 OF THE CONSTITUTION.**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTIONAL RIGHTS  
AND FREEDOMS AS ENshrined UNDER ARTICLES 27, 28, 29, 41, 47  
AND 48 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: THE CONSTITUTIONAL PRINCIPLES OF FAIRNESS,  
REASONABLENESS AND LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF: SECTION 5, 26, 27, 40 AND 87 OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF: SECTION 3 AND 12 OF THE INDUSTRIAL COURT ACT, NO. 20 OF 2011**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION)  
HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**PROF. FRANCIS MWIHURI NJERUH.....PETITIONER**

*VERSUS*

**UNIVERSITY OF NAIROBI.....RESPONDENT**

## JUDGMENT

The Petitioner is an Associate Professor of Public Health within the Department of Public Health, Pharmacology and Toxicology, College of Agriculture and Veterinary Science at the University of Nairobi. The Respondent, University of Nairobi is a public university established under Section 3 of the University of Nairobi Charter.

In 2006, the Petitioner took unpaid leave of absence from the Respondent to take up an engagement as Deputy Vice Chancellor, Administration, Planning and Development (DVC-APD) at Jomo Kenyatta University of Science and Technology (JKUA).

It is the Petitioner's case that while at the JKUAT, the University's terms and Conditions of work, which are the negotiated terms of service between the Public Universities' Vice Chancellors and Councils through the Inter Public University Council Consultative Forum applied to him. The Petitioner avers that the exit clause of the Petitioner's terms of service provided that at the end of the contract or upon termination, the Petitioner would continue with the basic salary and house allowance which are personal to him, by the University he exited to.

That pursuant to the Petitioner's Appointment as DVC-APD at JKUAT, the Petitioner's basic Salary and house allowance, personal to him were Kshs.430,895.00 and Kshs.80,518.000 respectively.

That on 1<sup>st</sup> August 2014, the Petitioner returned to the employment of the Respondent and took up his teaching duties as a Professor in the Department of Public Health, Pharmacology and Toxicology, a position he holds to date.

That following the said return, the Petitioner was entitled to among other things the Basic salary and House allowance that he had been earning at JKUAT but agreed to vary and abandon the other entitlements under the negotiated exit package in his terms and conditions of service save for the Basic Salary and House allowance.

That on the 24<sup>th</sup> of August 2014, the Respondent through the then Vice Chancellor wrote and confirmed that the Respondent had approved the Petitioner's earnings of a Basic Salary of Kshs.430,895.00 and a House Allowance of Kshs.80,518.00.

That on the 24<sup>th</sup> September 2014, the Respondent unilaterally and without any legal basis varied the Petitioner's terms of engagement and reduced the Basic Salary to Kshs.340,340.00 and the House Allowance to Kshs.78,737.00 a move that was opposed by the Petitioner.

That even before the dispute on the reduction of salary could be settled, a further reduction of Basic Salary to Kshs.172,960.00 and House Allowance to Kshs.63,800.00 was communicated vide a letter dated 3<sup>rd</sup> August 2015, the justification being a Circular Ref No PO/SCAC.1/12(11) dated 14<sup>th</sup> May 2015, a circular that related to Terms and Conditions of Service for retired Chief Executive Officers of State Corporations who revert to serve in the same institutions in other capacities.

That following the said communications and circular, the Petitioner moved to Court in ELRC JR Misc. App No 73 of 2015 in which the court quashed the circular dated 14<sup>th</sup> May 2015, Ref No. OP/SCAA.1/12(11) and prohibited the Respondent herein from amending, varying, vacating or in any manner interfering with the Petitioner's remuneration based on the impugned circular.

The Petitioner avers that no stay orders exist in respect of the judgment of the Court in ELRC JR Misc. Application. No 73 of 2015 nor has the same been set aside.

The Petitioner avers that he has on several occasions demanded compliance with the judgment of the court and payment of arrears together with a Monthly Basic Salary of Kshs.430,895.00 and house allowance of Kshs.80,518.00.

He avers that the Respondent has continued to underpay the Petitioner even after the court prohibited it from varying, vacating or in any manner interfering with the Petitioner's remuneration based on the impugned circular.

That instead of Complying with the court orders, the Respondent has once again unilaterally and without any legal justification written a letter dated 6<sup>th</sup> July 2020 in which it informs the Petitioner of the reduction of his salary to Kshs.172,960.00 and house allowance of Kshs.63,800.00.

The Petitioner avers that he has accumulated arrears as at the end of June 2020 of Kshs.6,463,520.00.

The Petitioner avers that he is entitled to equal protection and equal benefit of the law including full and equal enjoyment of all rights and fundamental freedoms.

The Petitioner avers that the Respondent's refusal to pay his basic Salary and house allowance at the rate of Kshs.430,895.00 and Kshs.80,518.00 respectively as per the exit package and the agreement between the Respondent and the Petitioner and continuously wanting to reduce the Basic Salary and Allowances unilaterally was malicious and unjustifiable within the legal and constitutional labour practices.

It is the Petitioner's submission that the Respondent herein has conceived a scheme to punish the Petitioner by subjecting him to financial misery which will deeply affect his social and economic rights by reducing his pay without basis.

The Petitioner submits that the conduct of the Respondent by malicious and intentional withholding payment of his full basic Salary and House Allowance as per the agreed terms of engagement upon reverting to the employment of the Respondent is **illegal and unfair**.

The Petitioner prays for the following remedies in the petition: -

1. *AN ORDER OF CERTIORARI*, moving into this Court and quashing the Respondent's letter dated 6<sup>th</sup> July 2020 Ref No CN/8508 Vol. 11 (44)
2. A *PERMANENT INJUNCTION*, restraining the Respondent herein either by itself, employees, servants and/or agents from interfering with Petitioner 's basic Salary of Kshs.430,895.00 and a House Allowance of Kshs.80,518.00.
3. A *PERMANENT INJUNCTION*, restraining the Respondent herein either by itself, employees, servants and/or agents from discriminating against the Petitioner while working with the Respondent
4. *AN ORDER OF MANDAMUS* compelling the Respondent Not to Vary negatively, the Petitioner 's remuneration, particularly the Basic Salary of Kshs.430,895.00 and House Allowance of Kshs.80,518.00.
5. Damages.
6. Costs of the Petition.

The petition was filed simultaneously with a notice of motion in which the Petitioner seeks the following orders: -

1. Spent.
2. A temporary injunction do issue against the Respondent by itself, its servants and agents, restraining it from interfering with the applicant's remuneration, particularly the Basic Salary and House allowance of Kshs.430,895.00 and Kshs.80,518.00 respectively, pending the hearing and determination of this application.
3. A temporary injunction do issue against the Respondent by itself, its servants and agents, restraining it from interfering with the applicant's remuneration, particularly the Basic Salary and House allowance of Kshs.430,895.00 and Kshs.80,518.00 respectively, pending the hearing and determination of this petition.
4. Cost of this application be provided for.

The grounds in support of the notice of motion are that: -

1. The Petitioner/applicant is and has been at all material times been an employee of the University of Nairobi.
2. The Respondent is executing an elaborate but illegal scheme designed purposely to frustrate the Petitioner by reducing his salary fundamentally and force him to resign from work.
3. The Respondent has already issued a letter directing reduction of basic Salary and House allowance unilaterally and without legal justification, even when its aware of the judgement in **ELRC JR Misc. Application No 73 of 2015**, a letter that is to take effect immediately.
4. The Respondent intends to recover an unknown amount of money with immediate effect in the name of salary overpayment, which does not exist, without explaining how the same will be done, the effect being that it will force the applicant out of employment constructively.
5. The Respondent is aware of its earlier decision of paying the Claimant a basic salary of Kshs.430,895.00 and a House allowance of Kshs.80,518.00, even before the court's Judgement in the Judicial Review orders in **ELRC JR Misc. Application No 73 of 2015**.
6. The Respondent herein has acted in total violation of Article 41 of the Constitution of Kenya and all legal provisions relating to termination of Contract of Employment as particularized under the Employment Act and is only using the excuse of salary reduction, to justify an illegal scheme to constructively dismiss the Petitioner /applicant.
7. It is in the interest of justice and fairness that this Application be certified as urgent and disposed of expeditiously.

The application is further supported by the affidavit of Prof. Francis Mwihuri Njeruh in which he reiterates the grounds on the face of the application and the facts as set out in the petition.

**Respondent's Case**

The Respondent filed a replying affidavit of Peter Mwai Muturi, its then Acting Registrar, Administration, in opposition to the petition.

It is the Respondent's position that the petition is *res judicata*, the same issues having been the subject of Nairobi ELRC JR Misc. Application no. 73 of 2015 where the court dealt with the issues raised therein to finality.

It is further the Respondent's position that the substratum of the Petition is the alleged Order issued in Nairobi **ELRC JR Misc. Application case no. 73 OF 2015 (Republic v Chief of Staff of the Public Service & 2 others ex parte Prof. Francis M. Njeru)**. That enforcement of Court judgments or rulings is within the suit that gave orders and not independent proceedings.

It is the Respondent's position that this Petitioner is a vexatious litigant. The Respondent avers that the Petitioner is estopped from filing a multiplicity of suits and proceedings for an intended conclusion that is the subject of a concluded suit.

The Respondent avers that it filed a Notice of Appeal on 29<sup>th</sup> October 2018 against the entire judgment of the Court delivered on 15<sup>th</sup> October 2018 in ELRC JR Misc. Application No. 73 of 2015.

It is the Respondent's position that the Petitioner has misconstrued the orders of the Court in Nairobi ELRC JR Misc. Application 73 of 2015 and is unduly engaging this court's limited judicial resources and subjecting the Respondent to unwarranted costs. It is the Respondent's case that it adhered to the orders of this court and has not relied on the impugned circular to place the Petitioner in his correct grade of employment as an Associate Professor earning a basic salary of Kshs.172,960.00 and allowances of Kshs.63,800.00 respectively. It is the Respondent's position that the impugned circular applied only to Chief Executive Officers, that the Petitioner did not qualify to be affected by the circular as he was a former Deputy Vice Chancellor, not a Chief Executive Officer.

The Respondent avers that the Petitioner did not revert to serve in the capacity of a Deputy Vice Chancellor at the Respondent's institution to warrant him to be paid a basic salary of Kshs.430,895.00 and a House Allowance of Kshs.80,518.00 yet the Salaries and Remuneration Commission policy on basic salary and house allowance for the Grade of Associate Professor provide for Kshs.172,960.00 and Kshs.63,800.00 respectively.

The Respondent avers that the Petitioner was paid all his terminal benefits upon dismissal from employment as Deputy Vice-Chancellor, PAD at JKUAT.

It is the Respondent's position that the petition does not establish a prima facie case with likelihood of success and the prayers sought are not available to the Petitioner.

The Respondent avers that the Petitioner deceitfully and intentionally failed to disclose facts on his termination status and payment of salary and gratuity upon his return to the Respondent's institution, for which he has been pursuing a quest to compel the Respondent to use JKUAT terms and conditions of service to pay him an unenforceable and illegal salary.

Further, that the Petition is scandalous, frivolous and an extreme abuse of the court process and should be dismissed with costs.

When the parties appeared before the court on 12<sup>th</sup> October 2020, directions were issued that parties proceed with the application together with the petition by way of written submissions. Only the Petitioner filed submissions. The Respondent's submissions were not on record as at the date of writing judgment.

### **Determination**

I have considered the pleadings and the submissions on record. The issues arising for determination are the following: -

1. Whether the petition is *res judicata*.
2. Whether the Respondent has violated the Petitioner's constitutional rights.
3. Whether the Petitioner is entitled to the orders sought.

### **Res judicata**

In ELRC Judicial Review Application No. 73 of 2015, the Petitioner herein, who was the ex parte Applicant in the judicial review application, sought the following orders; -

After hearing the parties, the court issued the following orders: -

- a) That an order of Certiorari do issue to remove to the Employment and Labour Relations Court and Quash the Circular Letter by the 1<sup>st</sup> Respondent Reference No. OP/SCA.1/12 (11) dated 14<sup>th</sup> May 2015.
- b) That an order of prohibition do issue prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from amending, varying, vacating or in any manner interfering with Applicant's remuneration of Basic Salary of Kshs.430,895.00 and House Allowance of Kshs.80,518.00 as

set out in the 3<sup>rd</sup> Respondent's Letter of confirmation of such payments to the applicant dated 26<sup>th</sup> August 2014.

c) That the costs incidental to the entire proceedings be awarded to the Ex-Parte Applicant.

Although I have already set out the prayers in the petition elsewhere in this judgment, I will set them out here again for purposes of comparison with the prayers in ELRC JR 73 of 2015.

The petition seeks orders that: -

**1. AN ORDER OF CERTIORARI, moving into this Court and quashing the Respondent's letter dated 6<sup>th</sup> July 2020 Ref No CN/8508 Vol. 11 (44)**

**2. A PERMANENT INJUNCTION, restraining the Respondent herein either by itself, employees, servants and/or agents from interfering with Petitioner 's basic salary of Kshs.430,895.00 and a House Allowance of Kshs.80,518.00.**

**3. A PERMANENT INJUNCTION, restraining the Respondent herein either by itself, employees, servants and/or agents from discriminating against the Petitioner while working with the Respondent**

**4. AN ORDER OF MANDAMUS compelling the Respondent Not to Vary negatively, the Petitioner 's remuneration, particularly the Basic Salary of Kshs.430,895.00 and House Allowance of Kshs.80,518.00.**

**5. Damages.**

**6. Costs of the Petition.**

It is clear from the prayers that the substratum of both ELRC JR 73/2015 and the instant petition is the preservation of the Petitioner's salary of Kshs.430,895.00 and House Allowance of Kshs.80,000.00. The only difference is the reference to the letter dated 6<sup>th</sup> July 2020 which triggered the filing of this petition and the fact there were other Respondents in ELRC JR 73/2015.

What the Petitioner ought to do is not to file a fresh suit but to seek implementation of the judgment in ELRC JR 73/2015.

**I therefore agree with the Respondent that this matter is *res judicata*. I accordingly strike out the petition with no orders for costs.**

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