



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. E6503 OF 2020**

JOHNSON ORIENTO ADERA.....1<sup>ST</sup> CLAIMANT/APPLICANT

NAYLOR SHIVACHI MUKUFU.....2<sup>ND</sup> CLAIMANT/APPLICANT

VERSUS

ANTI-COUNTERFEIT AUTHORITY.....RESPONDENT

SALARIES AND REMUNERATION COMMISSION.....INTERESTED PARTY

**RULING**

1. The applicants filed a Notice of Motion Application dated 30/11/2020 seeking for an order *interalia* that:-

***“An interim or temporary injunction do issue against the Respondent stopping it from breaching the Claimant’s contract by removing the payment of non-practicing allowances from the monthly salaries of the Claimants pending the hearing and determination of the Claim.”***

2. The application is premised on grounds set out on the face of the Notice of Motion and in the supporting affidavit of the 1<sup>st</sup> applicant the nub of which is that the respondent and the interested party have mischievously and with malice, conspired to write a letter dated 18/11/2020 that makes the Applicants ineligible for payment of non-practicing allowance in breach of their contracts of employment as Legal officers. That the Court should stop that unlawful process pending the hearing and determination of the suit.

3. That the Respondent and interested party are aware of the decision of this Court in **Nairobi Cause No. 547 of 2018, Erastus K. Gitonga – vs- National Environmental Management Authority and Law Society of Kenya** in which the Court stated that all Legal personnel in the Public Service including state corporations are eligible for payment of non-practicing allowance.

4. The applicants pray that the application be granted with costs.

5. The respondent filed a replying affidavit of **Fridah Kaberia**, the Acting Executive Director of the 1<sup>st</sup> respondent in which he states that the Legal officers of the 1<sup>st</sup> respondent including the applicants now receive non-practicing allowance. That when the applicants were engaged, the non-practicing allowance was not factored in their contracts and were therefore not paid between the period 1/12/2011 to 30/6/2016 in the sum of Kshs. 2,750,000.

6. That the applicants seek payment of arrears and the matter was considered by the Board and an advisory was sought from the interested party who on 9/6/2020 advised that the matter was *subjudice* and it could not give an advisory opinion whilst the matter was before Court.

7. However, by a letter dated 18/11/2020, the interested party advised that the Legal personnel are not entitled to payment of non-practicing allowance hence this suit was filed on 30/11/2020 to injunct the respondent and interested party from implementing the recommendations by the interested party.

8. That the respondent has not implemented the said advisory from Salaries and Remuneration Commission (SRC) and therefore the suit is premature and the application be dismissed with costs.

9. That Salaries and Remuneration Commission (SRC) regulates the salaries of public officers including employees of the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent is bound by the recommendations by Salaries and Remuneration Commission (SRC).

10. That **Cause No. 547 of 2018** (*supra*) is not applicable since the Respondent is still paying non-practicing allowance to the applicants.

#### Determination

11. The issue for determination is whether the applicants have satisfied the requirements for grant of a temporary injunction set out in ***Giella –vs- Cassman Brown [1973] E.A. 358*** by establishing a *prima facie* case with probability of success; that they would suffer irreparable harm if the injunction is not granted and are eventually successful in the main suit and if in doubt, the Court to apply balance of convenience.

12. The Court has considered the rival deposition and submissions and is satisfied that though the applicants have established a *prima facie* case, they may not suffer any irreparable harm not capable of compensation by way of damages if the injunction is not granted. Indeed, the applicants continue to enjoy the non-practicing allowance to-date and the issues for determination in the main suit are whether the applicants/claimants ought to be paid the non-practicing and non-prosecutorial allowance for the period they were not paid in arrears and whether the Salaries and Remuneration Commission (SRC) advisory ought to be implemented.

13. Despite the foregoing, it is in the interest of justice and fair play that the status quo be maintained pending hearing and determination of suit, the above finding on the issue of irreparable harm notwithstanding.

14. Therefore, the applicants to continue enjoying the practicing and prosecutorial allowance and the advisory by Salaries and Remuneration Commission (SRC), the interested party dated 18/11/2020 not be implemented until this suit is heard and determined.

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Kenyatta Odiwuor & Co. Advocates for Claimants/Applicants

M/s Akuno for Respondents

Ekale – Court clerk.