



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLAENOUS NO.E131 OF 2017**

**DR. JOSEPH MAINA MACHANGI.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF**

**NYANDARUA & 2 OTHERS.....RESPONDENT**

**RULING**

Before me, for determination is the Respondent/Applicant's Notice of Motion Application dated 23<sup>RD</sup> July 2021. It seeks the following orders **THAT:**

1. Spent.
2. THAT pending arbitration the Respondents do deposit Kshs. 641,610.00 at the Applicants Account number xxxx Standard Chartered Bank, Treasury Square Mombasa, being the salary for the months May 2021, June 2021 and July 2021.
3. THAT pending arbitration the salary of the Applicant be reinstated immediately for the month of August 2021 up until the expiry of the contract.
4. THAT pending arbitration the Respondents do remit Kshs. 2,566,440 being the total cumulative salary for the Applicant from the Month of May 2021 up until the expiry of the contract on 28th April 2022.
5. THAT the honourable court be pleased to issue an order restraining the Respondents and/or their appointed agents, assigns or their servants from interfering with the claimant's duties as Chief Officer of the Division of Agriculture.
6. Any other order the honourable court will deem fit to grant.
7. Costs of the Application

The application is supported by the affidavit of **Dr. Joseph Maina Machangi** herein annexed and based on the following GROUNDS;

1. THAT the Applicant was employed by the Respondents as a County Chief Officer on a contract basis that was executed on 5th May 2020 and was to remain in force for two years up until 28th April 2022.
2. THAT in unclear turn of events the Respondents failed to remit the Applicant's salary in the month of May 2021, June 2021 and July 2021.
3. THAT the Applicant tried to get a response from the Respondents as to why he didn't receive his salary but no action was taken after his complain.
4. THAT the Applicant has not received any letter of termination of his Employment contract.
5. THAT the Applicant has not been called to any disciplinary meeting nor has any warning letter been sent to him.

6. THAT the Respondents ought to be compelled to obey the contract and to remit the salary of the Applicant in due time.
7. THAT the Applicant has been performing his duties diligently and the actions of the Respondents are illegal and unwarranted.
8. THAT unless this honourable court issues orders against the Respondents, the Applicant shall suffer irreparable loss and be denied his right to justice.
9. In his affidavit the Applicant avers that he is yet to receive any valid reason as to why his salary has been stopped. He states that he has neither been called for a disciplinary meeting nor been issued a termination letter. That the actions of the Respondent have caused him to delay on his mortgage payments and go for his medical checkup given that he is diabetic.
10. He avers that this discriminatory act is illegal and amounts to a gross violation of his constitutional rights. That he has tried all reconciliatory means as provided for under his contract but his efforts remain unsuccessful.
11. There has been no appearance and response to the application by the respondent at the date of writing this ruling. There is an affidavit of service on record sworn on 9<sup>th</sup> August 2021 by Patricia Mukala, counsel on record for the Applicant herein.
12. The Applicant's counsel submitted orally on 9<sup>th</sup> August 2021. There was no appearance for the Respondent.

#### **Applicant's Submissions**

13. Counsel prayed that the matter be treated as an undefended suit and the orders sought be granted. She submitted that the Applicant is apprehensive on whether he will receive his salary for the month of August.
14. She submitted that the Applicant has been in contact with the relevant persons in the county but no information has been provided regarding the same. She stated that the Applicant believes that this is a constructive way to get him to resign.
15. Counsel highlighted the proviso for arbitration in the Applicant's contract and urged the court to grant the orders pending said arbitration the delay of which has been caused by the Respondent. She concluded by urging this court to take judicial notice of the fact that the government may take long to resolve the matter and given the Applicant's illness, the conservatory orders be granted.

#### **Determination**

16. The court has observed that according to the Applicants employment contract marked as JEX – 1 there is provision for resolution of disputes which would start with conciliation. The Applicant indicates he has tried to reach out to the Governor of Nyandarua Court but there has been no response. He also wrote a letter dated 29<sup>th</sup> April, 2021 to His Excellency the Governor and seems to have got no response thereto.
17. The employment letter provides for the services of an arbitrator if conciliation fails. The conciliation did not even happen because the respondents did not respond to the applicant's application.
18. Similarly court is aware that arbitration could take a lot of time as it is supposed to commence 60 days after failure the conciliation process. Thereafter the parties have to agree on how to appoint the arbitrator as is not provided in the contract. Thirdly the parties would be required to put a deposit for arbitrator's fees which is not necessarily cheap.
19. Frankly this can take some long time meanwhile the applicant's contractual rights of receiving his salary in respect of work done would be severally breached.

Section 17 of Employment Act stipulates that an employer should pay his employee for work done.

19. If the employer is not satisfied with the employee's performance he should institute disciplinary proceedings and is not legal to just sit pretty and fail to pay his salary.
20. The court is well aware of the Article 9 of the employment contract between the applicant and the respondent but is persuaded that the respondent has infringed on the rights of the applicant by failing to either pay his salary or subject him to the proper disciplinary action.
21. The applicant prays for an order for payment of his unlawfully withheld salary pending arbitration proceedings.

This would be equivalent to a specific performance order to maintain the status quo pending full resolution of any issues on the table.

In the case of **Fred/Mbatia Versus Rashid Too ELR No.242 of 2015** it was held that an order of specific performance is a discretionary order and the court grants the same where there is a valid contract with no defects. It must be also established that there is no other adequate remedy if specific performance is withheld.

The order for specific performance can be withheld also if it can established that granting the same would cause untold suffering to the respondent.

22. Withholding salary is a fundamental breach of employment contract and is also an abuse of the human rights. In the case of **Alinur Muhamed Abdi Versus County Government of Garissa (2021) Eklr Maureen Onyango J.** stated that payment of salary is fundamental to an employment relationship and failure to pay the same constitutes a fundamental breach justifying the termination thereof by an employee.

23. In the case of **Ben Murage Njogu Versus Ramati Warehouse Limited Rika J.** “observed the respondent must make up its mind, clarify whether the claimant is still in employment whether he has been retrenched or laid off, or whether his contract has otherwise been terminated. The respondent must then accept the consequences of this clarification and decision”.

24. As specific performance is an equitable remedy I have thoughtfully considered the pleadings and submissions as well as the law and have come to the conclusion that for the interests of justice and equity I would exercise my discretion and order the respondent to pay the Applicants earned salary as per the applicants prayer 2 of his Notice of Motion dated 25<sup>th</sup> July, 2021.

25. The respondent is a County Government and is not likely to suffer inconvenience by so doing.

26. (i) The respondent is therefore ordered to settle the applicant’s salary in accordance to prayer 2 of his application.

(ii) Settle his salary for August, 2021 and going forward till the expiry of the contract and pending arbitration proceedings.

27. Order 4 and 5 will be dealt with in arbitration or in full hearing as the case may be and so are not granted.

28. No orders to costs.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 17TH DAY OF AUGUST, 2021.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by COVID-19 pandemic this ruling has been delivered via microsoft teams online platform.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**