



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 86 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 22(1), 23(1), 23(3), 24(1), 24(2)(b), (c), 25(a), (b),**

**(c), 27(1),(2), 27(5), 28, 29(D), (f), 30(1), (2), 33(1)(c), 41(1), (2)(a), (b),**

**43(1)(a), (b), (c), (d), (e), (f), 45(1), 47(1), (2), 48, 50 (1), (2) (3) OF**

**THE CONSTITUTION OF KENYA , 2010**

**AND**

**IN THE MATTER OF**

**CONSTITUTIONAL VALIDITY OF TERMINATING THE PETITIONER'S  
ALLOWANCES WITHOUT NOTICE, VALID REASONS AND GIVING HIM  
A FAIR HEARING IN TOTAL VIOLATION OF ARTICLE 47(1) AND 47(2) OF  
THE CONSTITUTION OF KENYA AND IN SUBJECTING HIM TO CRUEL,  
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT CONTRARY  
TO ARTICLE 25(A) AND HOLDING HIM TO SLAVERY OR SERVITUDE  
CONTRARY TO ARTICLE 25(B), AND REQUIRING HIM TO  
PERFORM FORCED LABOUR CONTRARY TO ARTICLES 30(1)**

**AND (2) RESPECTIVELY**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT 2007, LAWS OF KENYA**

***BETWEEN***

**DR. MAURICE AJWANG OWUOR.....PETITIONER**

***VERSUS***

**THE CATHOLIC UNIVERSITY OF EASTERN AFRICA.....RESPONDENT**

**JUDGEMENT**

1. The Petitioner, Dr. Maurice Ajwang Owuor filed the instant Petition dated 20<sup>th</sup> May 2019 seeking the following remedies:

- i. Payment of deanship allowances, including special allowance for February and March 2019.*
- ii. Payment of Judicial Supervision arrears from 2008 to 2011 and 2015 to 2019.*
- iii. Payment for Project Supervision from 2015 to 2019.*
- iv. Payable salary from 1<sup>st</sup> March 2019 to 31<sup>st</sup> March 2022.*
- v. Payment for gratuity at the rate of 17% contribution by the employer and 5% by the employee.*
- vi. Damages for violation of Petitioner's fundamental constitutional rights to fair remuneration, and constructive dismissal.*
- vii. Damages for loss of reputation in the manner of unfair dismissal.*
- viii. Damages for breach of contract.*
- ix. Interest on ii, iii, iv and v*
- x. Costs of suit.*
- xi. Further or other relief within the jurisdiction of the Court.*

## **Background**

1. The Petitioner avers that he worked for the Respondent for eleven (11) years as a lecturer, senior lecturer, Head of Department and Dean of the Faculty of Law, from January 2005 to September 2011 and again from 1<sup>st</sup> October 2015 to the date of the suit respectively.
2. The Petitioner avers that in August 2015, the Petitioner was employed at Mount Kenya University where the Respondent approached him seeking his services. This was in light of the fact that the Council of Legal Education had issued a notice to the Respondent demanding the closure of the Respondent's law faculty or a plan addressing the deficiencies that had been noted by the Council of Legal Education (CLE).
3. The Petitioner was brought on board after going through an interview process during which he elaborately explained the interventions he would put in place to avert the threats of imminent closure of the Respondent's Faculty of Law. These included: assisting the Respondent to acquire a license from CLE to run its law program, introducing short courses to supplement its income, introducing bi-weekly lectures to raise the research activity and knowledge of both staff and students, empowering students through mentorship programs and consequently raising the profile of the faculty among others. He states that he had achieved all the objectives save for one which the Respondent had failed to facilitate by way of remunerating resource persons.
4. It is the Petitioner's averment that in persuading him to join its institution, the Respondent undertook to provide a salary package which included a negotiated special allowance in addition to other allowances as a precondition for the conclusion of the contract of service. This special allowance would match and exceed the salary he was earning then.
5. The Petitioner further states that the Respondent had on more than one occasion written to Standard Chartered Bank a letter stating that he was employed under permanent and pensionable terms for purposes of assisting the Petitioner to secure personal loans. The second recommendation was issued with a year left to the expiry of his contract, which he assumed implied that the Respondent was prepared to extend the contract for three more years. He states that his work had been positively assessed by the Vice Chancellor and the students on numerous occasions.
6. The Petitioner avers that on 18<sup>th</sup> February 2019, he received a letter terminating his deanship and stopping his special allowance. That this was done without notice or hearing. He states that the Respondent, without his and his bank's consent reduced his loan repayment remittances in breach of his repayment arrangements. He states that his allowances constituted more than half of his salary and the net effect of the Respondent's actions left him working with no pay. He states that by so doing, the Respondent constructively terminated his services by creating a hostile work condition.
7. The Petitioner further avers that the bank had expressed the intention of reporting the Petitioner to the Credit Reference Bureau which would have the effect of deeming him credit unworthy and would in turn deny him the capacity to meet the requirements for future job applications.
8. The Petitioner states that his allowances were stopped two months before the expiry of his deanship contract and that the position was filled on 1<sup>st</sup> March 2019, a month before the lapse of his contract. He avers that these actions smirke of extreme bad faith. That all his attempts of having the matter settled amicably have fallen on deaf ears with his salaries for the months of February to April 2019 not having been wired to the bank.
9. The Petitioner contends that the Respondent violated his fundamental Constitutional rights inter alia to fair labour practices and as provided for under Articles 41(1), (2)(a) and (b) and to fair administrative action provided for under Articles 47(1), (2), (3)(A) (B)

respectively of the Constitution. That the Respondent has also violated his right to inherent dignity under Article 28 and his freedom from torture and servitude under Articles 29 (d) (f) or to be held in slavery or servitude contrary to the provisions of Article 30 (1) or to perform forced labour vide Article 30 (2) of the Constitution.

10. The Respondent filed a replying Affidavit sworn on 30<sup>th</sup> May 2019 by the Human Resource Manager, Mr. Eric Omondi Njiri.
11. The affiant states that the Petitioner was indeed employed as a Senior Lecturer and Dean, Faculty School of Law for a fixed term of three years from 1<sup>st</sup> October 2015 to 31<sup>st</sup> March 2019. That before the end of his contract, the Respondent had written to the Petitioner vide a letter dated 19<sup>th</sup> December 2018 reminding him of the option for renewal but the Petitioner neither responded to the letter nor applied for the said renewal.
12. Mr. Omondi avers that at the end of January, the Petitioner suddenly absconded from duty without any explanation. He states that the Petitioner's position required his constant presence within the school to supervise and conduct administrative issues in the faculty.
13. Due to his absconding, the affiant states that the Respondent was placed in such difficulty that the only way out was to appoint an Acting Dean pending substantive appointment. That the Petitioner was invited to hand over the office of the Dean Faculty of Law and all that pertained to it to the incoming person which was done via a Handing Over Report dated 28<sup>th</sup> March 2019, executed by the Petitioner, the incoming Dean and the Dean's Secretary.
14. Mr. Omondi states that the Respondent, instead of summarily dismissing the Petitioner which decision would result in serious ramifications, opted for the most lenient route which was to pay him for his remaining months, fill his position and renew his contract as a senior lecturer.
15. Despite this renewal as senior lecturer, the Petitioner did not report to work. The Respondent served him with a notice to show cause why disciplinary action should not be taken against him on the 4<sup>th</sup> of July 2019, which he ignored or refused to respond to. As a result of this, a decision was made by the Respondent to dismiss the Petitioner for absconding duty without leave and for insubordination. The Petitioner did not appeal against the said decision.
16. The affiant avers that the Respondent continued to remit his salary as a senior lecturer even after absconding duties. That the deanship allowances were only stopped after the Petitioner failed to provide the Respondent with the services he was hired for, both as a dean of faculty of law and a senior lecturer.
17. Further, the affiant avers that the letter to Standard Chartered Bank was only to the extent of informing the aforesaid Bank that the Petitioner had authorized it to deduct Kenya Shillings One Hundred Sixteen Thousand, Three Hundred and Forty-One, from his monthly salary (being a permanent employee of the Respondent at that time), to offset the loan that the Petitioner was advanced by the said bank until payment in full.
18. That as part of the authorization there was a provision that in the event that the Petitioner's employment with the Respondent was terminated. The Respondent was also to remit to the bank any final dues, which was what the Respondent did in line with the aforesaid letter. He avers that the allegations that he was recommended by the Respondent's officials to Standard Chartered Bank with respect to the loan is a fallacy.
19. The Affiant avers that the positive remarks made by the then vice chancellor was in respect of the entire faculty of law and not particular to the Petitioner as an individual.
20. He concludes by stating that the Petitioner admitted the existence of the contract between the Respondent and the bank which explains the remittances of salaries and allowances. That the allegation by the Petitioner that it was unjust for the Respondent to issue pay slips that read "zero" is thus a non-starter. He therefore urges the court to dismiss the petition with costs.

#### **Petitioner's Submissions**

21. The Petitioner submitted that in dismissing him, the Respondent had breached several rights accorded to him under the constitution and the rules of natural justice.
22. He submitted that by being paid zero salary, he was aggrieved by the unlawful limitation of his rights to life, dignity, and equality before the law, freedom from discrimination, shelter and medical facilities contrary to Articles 24(1), 25, 27 and 28 of the Constitution.
23. That his constructive dismissal and its ensuing consequences was in breach of Article 29 of the constitution on the right to freedom and security including the right not to be subjected to torture in any manner, whether physical or psychological.
24. He submitted that the zero payment of his salary was contrary to the provisions of Articles 30 of the Constitution on freedom from slavery and 41 on the right to fair labour practices.
25. The Petitioner submitted that the mistreatment he was subjected to by the Respondent violate his rights under Article 47 of the Constitution.
26. Further, he submitted that the argument that he was served with a show cause letter and a letter of dismissal or that he participated in any disciplinary process was unfounded. He relied on the case of **CMC Aviation Limited v Mohamed Noor (2015) eKLR** where the trial

court held that dismissal of the Respondent was in violation of various laws and the rules of natural justice.

27. He submitted that the burden of proof in administrative action against an employee lies on the employer. He relied on the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2019] eKLR** where the court of Appeal held that the employer must prove that the termination was in accordance with fair procedure and that the burden on the employee is only limited to asserting that an unfair termination had occurred.

28. In support of the amounts sought in his petition, the Petitioner relied on the cases of **Magare Gikenyi J. Benjamin v County Government of Nakuru & 4 others [2020] eKLR; Kenfreight E.A Limited (supra)** and **Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] eKLR**.

### **Respondent's Submissions**

29. The Respondent submitted that the Petitioner had not appealed against the decision to dismiss him as provided for under the Section 1.11 (vii) of its Human Resource Policies and Procedures Manual which is backed up in law by Section 60, 62 and 63 of the Universities Act No. 42 of 2012, that provides for the duties and powers of the Council and guidance on fair administrative actions. That despite being aggrieved, he needed to respect the laid down Constitutional mechanisms for dispute resolution, as provided under Article 159(2)(c) of the Constitution of Kenya 2010.

30. In support of the above, the Respondent relied on the case of **Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR** where the court of Appeal held that it is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked.

31. On the deanship, the Respondent submitted that by virtue of handing over the office peaceably, the Petitioner is estopped from raising the deanship issue under the doctrine of equitable estoppel. That the Petitioner cannot be heard to approbate and reprobate at the same time. It quoted the Court of Appeal case of **Fursys (Kenya) Limited v Southern Credit Banking Corporation Limited [2015] eKLR** where the Court held that it was improper and at variance with proper pleading and is vexatious.

32. The Respondent submitted that the petition is bad in law having been prematurely instituted and is ripe for dismissal.

33. On the termination, the Respondent submitted that the Petitioner's absconding of duty amounted to gross misconduct which actually warranted summary dismissal as per section 1.14.1 (i) of the human resource policy. It also relied on the case of **Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR** to support its position that the reason for termination was fair and related to the employee's conduct, capacity or compatibility and based on the operational requirements of the employer.

34. It submitted that the Respondent did all it could to retain the Petitioner in its employment and that the termination was in accordance with the disciplinary procedures in the institution.

35. On whether the claimant is entitled to the reliefs sought, the Respondent submitted that the general rule is that specific/special damages have to be proved by the person claiming the same, that without such proof, the Petitioner cannot be granted the aforesaid reliefs as sought. It relied on the case of **Herbert Hahn v Amrik Singh [1985] eKLR** where the court upheld the above position.

36. It submitted that the claim for damages has not been specified as it has not been specifically pleaded in exact figures. It added that a party is bound by its pleadings and if the pleadings are not clear, the same cannot be excused.

37. The Respondent further submitted that the purpose of damages is to place one in the position they would have been had the contract been intact. Given that the Petitioner breached his own contract and failed to adhere to the Respondent's regulations, he cannot be allowed to unjustly enrich himself.

38. The Respondent, in conclusion prayed that the petition be dismissed as it amounts to frivolous action which seeks to waste the court's resources.

### **Analysis and Determination**

39. Having considered the pleadings and submissions the issues arising of determination are the following:

- (i) *Whether the Petitioner's Constitutional rights were violated by the Respondent;*
- (ii) *Whether the Petitioner's employment was unlawfully terminated or he absconded duty;*
- (iii) *Whether the petitioner is entitled to the prayer sought.*

40. In the petition, the petitioner set out the constitutional rights that according to him had been breached by the Respondent inter alia : Articles 25(a), (b), (c), 27(1), (2), 27(5), 28, 29(d), (f), 30(1), (2), 33(1)(c), 41(1), (2)(a), (b), 43(a), (b), (c), (d), (e), (f), 45(1), 47(1), (2), 48, 50(1), (2), (3) of the Constitution of Kenya, 2010. He states this was contrary to Article 20(1) of the Constitution provides that, "*The Bill of Rights applies to all law and binds all State organs and all persons.*" The Petitioner avers his rights have been breached as herein under:-

- i. *The Constitution permits the Petitioner to institute legal proceedings vide Article 22(1) of the Constitution provides that, 'Every*

person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

ii. The Petitioner having been aggrieved by the unlawful stoppage of "deanship allowances, including the special allowance" had the right to file suit in the High Court vide Article 23(1) of the Constitution provides that, 'The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.'

iii. The Petitioner having been aggrieved as mentioned above had the right to seek legal remedies vide Article 23(3) of the Constitution provides that, 'In any proceedings brought under Article 22, a court may grant appropriate relief, including-

iv. A declaration of rights,

v. An injunction

vi. A conservatory order

vii. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;

viii. An order for compensation and

ix. An order of judicial review

x. The Petitioner being paid zero salary was aggrieved by unlawful limitation of his constitutional rights inter alia to life, dignity, equality before the law, freedom from discrimination, shelter, medical facilities et cetera contrary to Article 24(1) of the Constitution provides that, 'A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors', and Article 24(2) providing exceptions to 24(1).

xi. Denying the Petitioner a salary was in effect denying him his livelihood and a violation of fundamental rights and freedoms inter alia; freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude contrary to Article 25 of the Constitution which provides for fundamental rights and freedoms that may not be limited.

xii. The Petitioner in view of the cause of action inter alia unlawful stoppage of allowances and constructive dismissal, contends that he has a right to equal treatment before the law vide Article 27(1) of the Constitution provides that, 'every person is equal before the law and has the right to equal protection and equal benefit of the law. In addition, Article 27(2) of the Constitution provides that, 'equality includes the full and equal enjoyment of all rights and fundamental freedoms'

xiii. The Petitioner in view of their discriminatory treatment by the Respondent felt aggrieved and that their treatment was in breach of Article 27(5), of the Constitution provides that, 'a person shall not discriminate directly or indirectly against another on any of the grounds specified or contemplated in clause (4)'

xiv. The Petitioner's constructive dismissal, ensuing joblessness, default in loan repayment, default in school fees and rent payments, exclusion from medical cover et cetera all in the hands of the Respondent is in breach of Article 28 of the Constitution provides that, 'every person has inherent dignity and the right to have that dignity respected and protected.'

xv. The above consequences (joblessness, default in payment of financial obligations et cetera) of the Respondent's actions on the Petitioner is contrary to Article 29 (d) of the Constitution which provides that, 'Every person has the right to freedom and security of the person, which includes the right not to be - subjected to torture in any manner, whether physical or psychological;

xvi. The successive zero salary payment of the Petitioner as evidenced in February, March, April 2019 is contrary to Article 30 (1) of the Constitution provides that, 'a person shall not be held in slavery or servitude and article 30 (2), provides that, 'a person shall not be required to perform forced labour.'

xvii. The Petitioner's forthrightness and outspokenness should be appreciated vide Article 33(1)(c), of the Constitution provides that, 'every person has the right of freedom of expression, which includes-

xviii. Academic freedom and freedom of scientific research'

xix. The Petitioner being paid a zero salary while rendering services is in breach of Article 41(1), of the Constitution provides that, 'every person has the right to fair labour practices and 41(2)(a), (b) provides that, 'every worker has the right -

xx. To fair remuneration

xxi. To reasonable working conditions

xxii. The Petitioner having been constructively dismissed from employment has been exposed to destitution contrary to Article 43(1)

of the Constitution provides for economic and social rights including health, housing, freedom from hunger, right to; clean water, social security and education.

xxiii. The Respondent's unlawful stoppage of the Petitioner's allowances has rendered him destitute and threatened the wellbeing of his family, contrary to Article 45 of the Constitution provides that, "the family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the state."

xxiv. The mistreatment which the Petitioner has been subjected to by the Respondent violates Article 47 (1), of the Constitution which provides that, 'every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

xxv. The Respondent's punitive administrative actions against the Petitioner violate Article 47 (2) of the Constitution which provides that, 'if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action'

xxvi. xviii. The Petitioner's suit is in conformity with Article 48, of the Constitution which provides that, 'the state shall ensure access to justice for all persons'

xxvii. xix. This Petition is in line with Article 50 (1) of the Constitution which provides that, 'every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body

xxviii. Article 50 (2) of the Constitution provides that, 'every accused person has the right to a fair trial'

xxix. The Petitioner contends that the Respondent violated the Petitioner's fundamental Constitutional rights inter alia to fair labour practices as provided in Article 41(1), (2)(a), (b) and to fair administrative action as provided in article 47(1), (2), (3)(a) and (b) of the Constitution, and the right to inherent dignity vide Article 28 of the Constitution and freedom from torture in any manner or cruel, inhuman or degrading treatment vide Section 29(d), (f) or to be held in slavery or servitude vide Article 30(1), or to perform forced labour vide Article 30 (2) and subject to provisions of the Employment Act 2007

41. He submits that the Respondent violated his constitutional rights by paying him a zero salary which limited his right to life, equality before the law, freedom from discrimination, shelter, medical facilities "et cetera".

42. In the celebrated case of **Anarita Kirimi Njeru v Attorney General** the court stated that a party seeking reliefs through a constitutional petition on the basis of violation of Constitutional rights and fundamental principles must plead with precision the Constitutional provision, the manner of violation and the jurisdictional basis under litigation.

43. In **Meme v Republic [2004] eKLR**, the Court reiterated that –

*"where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed".*

44. Precision in pleading is vital in Constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication. It helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement. This was well stated by the Supreme Court in the case of **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** thus:-

*"[349] Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..."*

45. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, the appellant argued that apart from citing omnibus provisions of the Constitution, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court. He maintained that the failure to draft the petition with precision had prejudiced the appellant and the other respondents. Responding to this submission, the Court of Appeal stated;

*"[41] We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point"*

46. In the instant petition, the petitioner has not pleaded with precision how the payment of a zero salary of itself is a violation of the Constitutional rights and fundamental freedoms pleaded. In fact in his submissions he set out the issues in dispute for determination before the Court as follows:

*i. Was the stoppage of the deanship allowance and special negotiated allowance forthwith vide letter dated 18th February 2019, before the expiry of the contract without notice or reason lawful?*

*ii. Was the payment of Zero salary in February and March lawful?*

*iii. Was the notice to show cause dated 4th July 2019 served on the Petitioner?*

*iv. Was the petitioner availed an opportunity to be heard via a valid notice?*

*v. Was the dismissal vide the letter dated 19<sup>th</sup> July 2019 of the Petitioner procedural?*

*vi. Did the Petitioner in view of his performance have legitimate expectations that his contract would be renewed in light of the letter of appointment dated 2<sup>nd</sup> October 2015, paragraph 2 which provides in relation to his appointment, "...for a period of three (3) years (renewable once) subject to satisfactory performance." And confirmation of appointment letter dated 29<sup>th</sup> June 2016?*

*vii. Is the Petitioner entitled to compensation in view of the above?*

47. This is a clear indication that there are no Constitutional issues set out by the Petitioner for determination but rather, issues about the breach of his contract of employment.

#### **Whether the petitioner was unlawfully terminated or he absconded duty**

48. According to the Petitioner, the Respondent constructively dismissed him by the withdrawal of his negotiated allowances which resulted in his earning zero salary. The Respondent on the other hand insists that the petitioner absconded duty following which he was dismissed.

49. From the facts on record, the Petitioner's Deanship allowances were withdrawn by letter dated 18<sup>th</sup> February 2019. The letter is reproduced below.

*"Our Ref: HRM/ALL/02/2019/01*

*18<sup>th</sup> February 2019*

*Maurice Ajwang Owuor*

*Faculty of Law*

*CUEA*

*Dear Dr Owuor*

#### **RE: DEANSHIP ALLOWANCES**

*Following expiry of your contract as the Dean Faculty of Law, we wish to inform you that your Deanship Allowances have been stopped forthwith awaiting management directive in relation to the aforesaid renewal of contract.*

*Yours sincerely*

*SIGNED*

*MR. ERICK OMONDI NJIRI*

*HUMAN RESOURCES MANAGER"*

50. By another letter dated 26<sup>th</sup> March 2019, the Respondent offered to renew the Petitioner's contract as a Senior Lecturer. The letter is reproduced below:

*"Our Ref: SMN/HRM/REC/03/2018/1*

*26<sup>th</sup> March 2019*

Dr. Maurice Ajwang Owuor

Faculty of Law

CUEA

Dear Dr. Owuor

**RE: RENEWAL OF EMPLOYMENT CONTRACT AS A SENIOR LECTURER**

As you are aware, our contract of employment will be expiring on 31<sup>st</sup> March 2019.

I am glad to inform you that your contract has been renewed with effect from 1<sup>st</sup> April 2019 for a period of three (3) years.

Kindly sign the contract form attached if you accept the terms and conditions of service herein and return it to the office of Human Resources within 14 days from the date of this letter.

Yours sincerely

SIGNED

Very Rev. Prof. Stephen Mbugua NGARI

VICE CHANCELLOR”

51. In his letter of appointment as Senior Lecturer and Dean, faculty of Law, the petitioner was offered the following package:-

Basic salary..... Kshs.77,752.00

House allowance..... Kshs.52,800.00

Responsibility allowance..... Kshs.40,000.00

Entertainment allowance..... Kshs.10,000.00

Transport allowance..... Kshs.12,000.00

Telephone allowance (negotiated)..... Kshs.157,448.00

**Total..... Kshs.358,000.00 (taxable)**

52. The appointment was to run for 3 years from 1<sup>st</sup> October 2015. The Petitioner was however on probation for 6 months and was confirmed by letter dated 29<sup>th</sup> June 2016 which set out his terms of engagement as follows:

“Our Ref: JGM/HRM/ACAD/CFM/06/2016/1

29<sup>th</sup> June 2016

Dr. Maurice Ajwang Owuor

Faculty of Law

CUEA

Dear Dr. Ajwang

**RE: RENEWAL OF EMPLOYMENT CONTRACT AS A SENIOR LECTURER**

Please refer to your letter of provisional appointment dated 2<sup>nd</sup> October 2015 appointing you as a Senior Lecturer and Dean of the School of Law with effect from 1<sup>st</sup> October 2015.

Having completed the requisite period of service on probation and having fulfilled conditions precedent to your confirmation, you are hereby confirmed in your appointment with effect from 1<sup>st</sup> April 2016 for a contract of three (3) years (renewable).

You shall also join the Provident Fund where the University shall contribute 17% and yourself 5% of your basic salary per month.

It is my sincere hope that you will continue to be dedicated, committed, honest, faithful and responsible to your duties and to the growth and development of the University.

Congratulations and best wishes in your career.

Kindly sign the attached contract of service in acceptance of the terms and conditions of your employment and return it to the Office of Human Resources within 14 days from the date of this letter.

Yours sincerely

SIGNED

Prof. Justus G. MBAE

VICE CHANCELLOR”

53. The contract was thus to lapse on 31<sup>st</sup> March 2019. For this reason, the letter dated 18<sup>th</sup> February 2019 withdrawing the Deanship Allowance was premature for two reasons. First the petitioner’s appointment was for the position of Senior Lecturer and Dean of the faculty of Law. It was not divisible into separate contracts of Senior Lecturer on the one hand and Dean of the Faculty of Law on the other. The benefits attached to the job was a package and indivisible.

54. Secondly, the Petitioner’s contract had not lapsed as at 18<sup>th</sup> February 2019 when his “Deanship Allowances” were stopped forthwith.”

55. I therefore find that the Respondent prematurely and without due process, terminated the Petitioner’s appointment as Senior Lecturer and Dean of the Faculty of Law. The termination was thus unfair and in breach of the petitioner’s employment contract.

56. Having found that the Respondent prematurely terminated the petitioner’s employment, I further find that the petitioner did not abscond duty.

#### Remedies

57. The Petitioner prayed for the remedies set out at the beginning of this judgment.

(i) He is entitled to payment of Deanship allowance for February and March which **I award him**

(ii) No evidence was adduced to prove the prayer for payment of financial supervision arrears from 2008 to 2011 and 2015 to 2019.

(iii) No evidence was adduced to prove the prayer of payment for project supervision from 2015 to 2019.

(iv) The salary for 1<sup>st</sup> March 2019 is payable and **I award** the petitioner the same.

(v) The salary for April 2019 to March 31<sup>st</sup> 2022 is not payable as the Petitioner’s contract expired on 31<sup>st</sup> March 2019 and hence there is no evidence to prove that the same was renewed.

(vi) In any event, no services were offered to the Respondent and hence is no basis for grant of salary from 1<sup>st</sup> April 2019 to March 2022.

(vii) The Petitioner’s contract did not provide for gratuity and the same is not payable.

(viii) Having found that the Petitioner’s contract was prematurely terminated without compliance with due process, I award him four (4) months’ gross salary as compensation in the sum of **Kshs.1,074,000**.

#### Conclusion

58. In conclusion, I award the Petitioner the following:

(i).. **The shortfall in his salary for February and March 2019..... Kshs.430,896.00**

(ii). **Compensation..... Kshs.1,432,000.00**

**Total      Kshs.1,862,896.00**

**(iii). The Respondent shall pay the petitioner's costs and the decretal sum shall accrue interest at court rates from date of this suit in respect of item (i) and from date of judgment in respect of item (ii) above.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF NOVEMBER 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**