



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PETITION NO.E160 OF 2021**

**EDWARD OMBWORI GICHANA.....CLAIMANT**

**VERSUS**

**ADAH ONYANGO.....1<sup>ST</sup> RESPONDENT**

**THE NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD...2<sup>ND</sup> RESPONDENT**

**RULING**

The petitioner filed application dated 13<sup>th</sup> October, 2021 under the provisions of Article 48, 50 and 159 of the Constitution, section 1A, 1B, 3A & 3B, Order 51 Rule 1, the County Assembly Services Act, the County Government Act and seeking for orders that;

*a) In lieu of the Court of Appeal ... issued on 4<sup>th</sup> June, 2021 an order be and is hereby issued compelling the respondent to urgently reinstate the petitioner's salary, allowances and medical cover pending the hearing and determination of the instant application and petition.*

*b) Pending hearing an determination of this application and petition inter-parties, the court be pleased to issue Orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents by themselves, their agents or servants from terminating, withdrawing, withholding and/or suspending the applicant's salary and allowances.*

*c) Pending hearing of the petition, the court be pleased to issue orders*

*restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents by themselves, their gents or servants from suspending, dismissing, reshuffling, purporting to send on compulsory leave or doing anything prejudicial to the petitioner.*

*d) To make any necessary, incidental or consequential orders.*

The application is supported by the petitioner's affidavit and on the grounds that the petitioner was appointed as the Clerk of the Nairobi City County Assembly upon being interviewed by the 2<sup>nd</sup> respondent and issued with letter of appointment dated 23<sup>rd</sup> July, 2020.

On 4<sup>th</sup> June, 2021 the Court of Appeal vide ruling enjoined the petitioner and one Jacob Ngwele from exercising power or duties of the office of Clerk, Nairobi City County Assembly pending the hearing of the appeal and to which appeal the petitioner was not a party.

The petitioner stepped aside as directed by the Court of Appeal and which led to the appointment of the 1<sup>st</sup> respondent as the Acting Clerk and upon assuming office she maliciously terminated the petitioner's salary and allowances. Despite advice through letter dated 17<sup>th</sup> June, 2021 that employment had not been terminated, the 1<sup>st</sup> respondent has refused to reinstate the salary and allowance due to the petitioner.

The Senior Legal Counsel and the Director Human Resources wrote to the respondents to reinstate the salary and allowances due to the petitioner but have failed to oblige and leading to this petition.

For over 4 months the petitioner has been without a salary due to the unilateral action of the 1<sup>st</sup> respondent and despite demand both respondents have failed to pay.

In his Affidavit, the petitioner avers that he is the sole breadwinner for his family which has been rendered destitute, he is unable to take care of their basic needs, and his medical cover has been suspended causing him untold suffering. That this is an infringement of his rights under the Constitution and the law.

The respondents filed Grounds of Opposition that the application is defective and without any good cause against the 1<sup>st</sup> respondent. That the petitioner is seeking or the interpretation of the Orders issued by the Court of Appeal in Civil Application No.NAI E351 of 2020 and which deny this court jurisdiction and he has failed to disclose that he has made a similar application pending before the Court of Appeal.

On 26<sup>th</sup> October, parties attended and the respondents were given time to file a Replying Affidavit and attend court on 8<sup>th</sup> November, 2021 for oral submissions but there was no compliance.

The petitioner was heard on his application.

The gist of the petitioner's application is that *Court of Appeal ... issued [in the ruling delivered] on 4<sup>th</sup> June, 2021 an order be and is hereby issued compelling the respondent to urgently reinstate the petitioner's salary...* which he states was stopped by the 1<sup>st</sup> respondent after she assumed office of Acting Clerk, the 2<sup>nd</sup> respondent.

The petitioner has attached the Orders from the Court of Appeal delivered on 4<sup>th</sup> June, 2021 and which injuncted the petitioner together with another from exercising the powers of the Clerk, Nairobi City County Assembly; directed for stay of execution of the judgement of this court, ELRC Petition No.194 of 2019 delivered on 16<sup>th</sup> October, 2020; and the respondents were restrained from advertising, shortlisting, recruiting or appointing a substantive holder of the officer of Clerk of the Nairobi City County Assembly pending the hearing and determination of the intended appeal.

This court reading of the Orders of the Court of Appeal on 4<sup>th</sup> June, 2021 is as above summarised.

There is no matter directing for payment of salary or allowances to the petitioner or any party pending hearing of Court of Appeal Civil Application No. NAI E351 of 2020.

The matter before the Court of Appeal followed judgement from ELRC Petition No.194 of 2019 which judgement is not attached herein for the court to assess the nature of claim and the matter now before the Court of Appeal under Civil Appeal No.NAI E351 of 2020 for this court to then direct that salary and allowances be paid to the petitioner.

Unless the court is able to hear the petition on the merits, at this stage to issue the orders sought even in the absence of a Replying Affidavit by the respondents would not meet the ends of justice.

**Orders sought in the instant application shall not issue at this stage. The respondents are given 14 days to reply to the petition. Pleadings shall close in**

**30 days after which time parties shall be allocated a hearing date at the registry. Costs in the petition.**

**DELIVERED IN COURT AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

.....and.....