



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. E 654 OF 2021**

**VIOLET AVOGA OYANGI.....CLAIMANT**

**VERSUS**

**NAIROBI CITY COUNTY.....RESPONDENT**

**RULING**

1. The notice of motion application dated 9<sup>th</sup> August, 2021 was filed by the claimant on 10<sup>th</sup> August, 2019, praying for an order in the following terms:-

1. Spent

2. **THAT** the Honourable Court be pleased to order the Respondent to forthwith release and pay to the claimant all her irregularly withheld salary and allowances currently amounting to **Kshs 1,956,700/=**.

3. **THAT** upon hearing this motion interpartes, the respondent be ordered to forthwith reinstate the claimant to her employment (ante) as held before her irregular interdiction.

4. Costs be provided for.

2. The application is premised on grounds set out on the face of the Notice of Motion and buttressed in the supporting affidavit of the claimant the nub of which is that she is an employee of the respondent in the position of County Legal Officer and the respondent irregularly interdicted the applicant on 23<sup>rd</sup> April, 2018 and proceeded to maliciously subject her to prosecution vide Milimani Chief Magistrate's Court Criminal Case No. 829 of 2018.

3. That meanwhile, the claimant was placed on ½ salary, yearly increment, non-practising, commuter and leave allowance which has now accumulated to Kshs 1,956,700 set out at paragraph 8 of the Notice of Motion.

4. That on 3<sup>rd</sup> December, 2020, the claimant was found by the Magistrate Court to have no case to answer and was acquitted under Section 210 of the Criminal Procedure Code.

5. The Ruling of Hon. Mutuku (Chief Magistrate) dated 4/12/2020 is attached to the application at page 10 to 27. The payslip of the applicant is also attached indicating that the claimant monthly earnings were Kshs.74,075 less deductions as at March, 2021 leaving a net pay of only Kshs.610.85 per month.

6. That the respondent continues to withhold the claimant's salary for no justifiable cause despite four (4) formal demand letters by the claimant to the respondent three(3) years after interdiction and 8 months after acquittal.

7. That the conduct by the respondent has embarrassed the claimant and her family financially and that there is no prejudice the respondent is likely to suffer if the orders are granted.

8. The respondent filed a replying affidavit sworn to by **Abweo Erick Odhiambo** acting County Solicitor who deposes that the suit was filed prematurely, is a non-starter and an abuse of Court process.

9. That the interdiction was to pave way for the respondent to carry out investigations.

10. That the prosecution was done by the state based on available evidence and was not maliciously instigated by the respondent.
11. That the claimant did not avail a copy of the judgment of the magistrate to the Human Resource Department of the respondent to be acted upon after his acquittal.
12. That the claimant has not exhausted all internal mechanisms to request for consideration for reinstatement and payment of the amounts due.
13. That had the judgment acquitting the claimant been received, same would have been debated by the County Public Service Board and a decision made by the Human Resource Department.
14. That the sum of Kshs 1,956,700 claimed is subject to statutory deductions and that can't be paid in full.
15. That the application lacks merit and it be dismissed.
16. The parties filed written submissions and the issue for determination is whether the applicant has satisfied the requirement for grant of a mandatory injunction to cancel the interdiction and reinstate the monthly salary of the claimant.
17. From the facts presented by both parties, it is apparent that the claimant was interdicted on ½ pay pending conclusion of a criminal case instituted against the claimant in Milimani Criminal Case No. 82 of 2018.
18. It is without a doubt that the case was prosecuted and the claimant acquitted by the Court by a ruling dated 4<sup>th</sup> December, 2020 attached to the application for no case to answer in terms of Section 210 of the Criminal Procedure Code.
19. Despite attachment of the Ruling of the Magistrate's Court, the respondent mischievously continues to deny knowledge, receipt, and or existence of the Ruling of the Court acquitting the claimant which was apparently served on them.
20. The Court is of the finding that the respondent lacks any stint of good faith in this matter and the defence advanced against this application is hollow and devoid of any merit at all.
21. In Industrial Court of Kenya at **Nairobi Cause No. 747 of 2014, [2014] eKLR, Fredrick Saundu Amolo –vs- The Principal Namanga Mixed Day Secondary School and 2 Others**, the Court held that:-

***“Therefore before an interdiction can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure. This is what can be cited as the 3 – dimension criteria:-***

***(i) First the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a prima facie case.***

***(ii) Secondly, there is some objectively justifiable reason to deny the employee access to the work place based on the integrity of any pending investigation into the alleged misconduct or some relevant factor that would place, the investigation or the interest of the affected parties in jeopardy.***

***(iii) Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict is made.”***

22. The respondent has not indicated that there is any pending investigation and/or contemplated disciplinary action against the claimant since her acquittal on 4<sup>th</sup> December, 2020.
23. As at the time of filing this application, the claimant had been on interdiction for a period of three (3) years and over 8 months had lapsed since she was acquitted.
24. There is clear evidence that the claimant notified the respondent of the acquittal vide three (3) demand letters but the respondent did not take any action to resolve the hiatus. The conduct is manifestly unreasonable, unjust, and oppressive considering the circumstances of the case at this stage.
25. The applicant has satisfied the triple requirements for grant of mandatory injunction set out by the Court of Appeal in **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR** in that he has established a *prima facie* case with a probability of success; that he has suffered and continues to suffer irreparable injury that could not be remedied by an award of damages in the due course and that the balance of convenience is overwhelmingly in favour of grant of the mandatory injunction. The threshold of the triple requirements is more onerous in the case of a mandatory injunction such as the one prayed for in this case.
26. The Court is satisfied that the applicant has satisfied the triple requirements to the required standards.
27. Accordingly, the application is granted and the following orders made:-

***(i) The respondent is to forthwith release and pay to the claimant all her irregularly withheld salary and allowances currently***

*amounting to Kshs 1,956,700 payments less statutory deductions.*

*(ii) That the interdiction of the claimant by the respondent is set aside forthwith and the* claimant is reinstated to her employment Cadre as held before her irregular interdiction.

*(iii) The costs be in the cause.*

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021.**

**Mathews N. Nduma**

**Judge**

**Appearances**

Ngugi B.G. & Co. Advocates for the claimant

Karanja and Partners Advocates for the Respondent

Ekale –Court Assistant.