## REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MILIMANI LAW COURTS

ELRC MISC. APPLICATION NO. OF 20..

IN THE MATTER OF: AN APPLICATION FOR LEAVE BY MKENYA HALISI MKENYA TO COMMENCE JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS;

IN THE MATTER OF: ARTICLES 10, 47, 162 (2) (a) & 162 (3) OF THE CONSTITUTION OF KENYA;

IN THE MATTER OF: THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, CHAPTER 234B OF THE LAWS OF KENYA;

AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT, NO.17 OF 2012.

BETWEEN

MKENYA HALISI MKENYA ..............................................................EXPARTE APPLICANT

AND

THE COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE,

COUNTY GOVERNMENT OF KANAIRO..........................................................RESPONDENT

 COUNTY PUBLIC SERVICE BOARD, KANAIRO………...….............INTERESTED PARTY

## CERTIFICATE OF URGENCY

I CYRUS MAINA, an Advocate of this Honourable Court practising as Messrs C.M ADVOCATES LLP do hereby certify that this matter is urgent and should be heard and determined instantly on the GROUNDS THAT:

1. The Respondent has un-procedurally, unreasonably and without authority purported to interdict the Applicant who is the Economic Advisor to the Governor of Kanairo County vide a letter dated 23rd July 2021.
2. Interdiction being a disciplinary control measure is a preserve of the County Public Service Board as clearly stipulated at Section 59(1) e which provides for one of the functions of the County Public Service Board **as to exercise** **disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part**;
3. The unlawful and unprocedural interdiction puts the *Exparte Applicant* at a financial disadvantage and will cause him great pecuniary embarrassment as the Applicant will be on half a salary which cannot meet the various obligations he currently has including a bank loan taken based on the strength of the employment contract with the Interested Party.
4. The Respondent’s actions are manifestly illegal and actuated by ill. If this application is not heard immediately and leave granted for the Applicant to apply for Judicial Review orders of *certiorari, prohibition and mandamus* against the decision of the Respondent; and such leave be made to operate as a stay of execution of the said decision of the Respondent, the Applicant stands to suffer irreparable damage and delivery of important public services will suffer.

DATED at NAIROBI this \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20…

CM MAINA ADVOCATES

ADVOCATES FOR THE APPLICANT

(CYRUS MAINA, Practice No. **LSK/20…../…….)**

DRAWN AND FILED BY:

## REPUBLIC OF KENYA

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COUNTY PUBLIC SERVICE BOARD, KANAIRO…………….............INTERESTED PARTY

**EX PARTE CHAMBER SUMMONS**

*(Under Articles 10, 23, 25, 41, 50, 162(2) & 236 of the Constitution of Kenya, Sections 12 and 20 of the Employment and Labour Relations Court Act, Regulation 7(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016, Section 8 and 9 of the Law Reform Act, Cap 26 of the Laws of Kenya, Section 11 of the Fair Administrative Action Act No. 4 of 2015, Laws of Kenya and Order 53 Rule 1 of the Civil Procedure Rules and all enabling provisions of the Law.*

LET ALL PARTIES CONCERNED attend to the Honourable Judge in Chambers on the \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20…. at 9.00 O’clock in the forenoon or soon thereafter for the hearing of an Application by Counsel for the Exparte Applicant FOR ORDERS THAT:

1. This application be certified urgent and be heard forthwith and *ex-parte* in the first instance;
2. The Applicant be granted leave to apply for:
3. AN ORDER OF CERTIORARI to remove into this Honourable court and quash the decision by the Respondent against the Applicant as contained in the Respondent’s letters dated **4th July, 2021** and **23rd July, 2021** respectively.
4. AN ORDER OF DECLARATION declaring that the Respondent’s is a breach of the Applicant’s rights to fair administrative action, freedom and right to secure protection of the law.
5. AN ORDER OF PROHIBITION restraining and prohibiting the Respondent from exercising and or purporting to exercise disciplinary control over the Applicant.
6. The grant of leave herein does operate as a stay of **execution of the decision by the Respondent against the Applicant as contained in the** Respondent’s letters dated **4th July, 2021** and **23rd July, 2021** respectively.
7. The Respondents be ordered to pay the Applicant the costs of this Application.

WHICH APPLICATION is based on the GROUNDS THAT:

1. By a letter dated 7th August 2021 the Respondent interdicted the Ex parte Applicant in total disregard of laid down procedures of disciplinary control in the Public Service.
2. The Respondent has by purporting to exercise powers given to the interested party to interdict the Exparte Applicant usurped the powers of disciplinary control measures preserved for the Interested Party herein, as clearly stipulated under Section 59 (1) (e) of the County Governments Act, No.17 of 2012 which provides for one of the functions of the County Public Service Board ***is to exercise******disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part****.*
3. Therefore, the decision of the Respondent is manifestly ultra vires, illegal, irrational, and unreasonable and in violation of fundamental rights of the Applicant.
4. Subjecting the Applicant to the impugned decision without due process would, taking into account all the relevant factors and circumstances be unjust, traumatic, unreasonably expensive and against the spirit and intentions of the administration of justice and the Constitution of Kenya.
5. The impugned decision is unreasonable, unlawful, based on irrelevant considerations, manifestly oppressive; violates the Applicant’s right to fair administrative action and violates the Applicant’s legitimate expectations to fair and just application of the due process.
6. It is only fair and just that this application be heard and determined urgently, and orders sought herein granted; otherwise the Applicant stands to suffer utmost prejudice and undue hardship and injustice at the hands of the Respondent.

WHICH APPLICATION is supported by the STATEMENT and VERIFYING AFFIDAVIT of MKENYA HALISI MKENYA and other or further grounds to be adduced at the hearing hereof.

DATED at NAIROBI this \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20….

CM ADVOCATES LLP

ADVOCATES FOR THE APPLICANT

(Cyrus Maina , Practice No. **LSK/…………………….)**

DRAWN & FILED BY:

TO BE SERVED UPON:

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AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT, NO.17 OF 2012

BETWEEN

MKENYA HALISI MKENYA .............................................................. EXPARTE APPLICANT

AND

THE COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE,

COUNTY GOVERNMENT OF KANAIRO ..........................................................RESPONDENT

KANAIRO COUNTY PUBLIC SERVICE BOARD…………….............INTERESTED PARTY

**STATEMENT**

[Under Sections 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya and Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and all enabling provisions of the Law]

A NAME AND DESCRIPTION OF THE APPLICANT

1. The Applicant is a male adult of sound mind resident in Kanairo County.
2. The Applicant’s address for purposes of this suit is care of Messrs CM ADVOCATES LLP, I & M BANK HOUSE, 7TH FLOOR, 2ND NGONG AVENUE, P.O. BOX 22588 -- 00100, NAIROBI.

B. THE RELIEFS SOUGHT

 The Applicant seeks:

1. AN ORDER OF CERTIORARI to remove into this Honourable court and quash the decision by the Respondent against the Applicant as contained in the Respondent’s letters dated 4th July 2021 and 23rd July, 2021 respectively.
2. AN ORDER OF DECLARATION declaring that the Respondent’s is a breach of the Applicant’s rights to fair administrative action, freedom and right to secure protection of the law.
3. AN ORDER OF PROHIBITION restraining and prohibiting the Respondent from exercising and or purporting to exercise disciplinary control over the Applicant.
4. The grant of leave herein does operate as a stay of execution of the decision by the Respondent against the Applicant as contained in the Respondent’s letters dated 4th July, 2021 and 23rd July, 2021 respectively.
5. The Respondents be ordered to pay the Applicant the costs of this Application.

C. THE GROUNDS UPON WHICH THE RELIEFS ARE SOUGHT:

1. The Applicant, an Certified Financial Analyst of good standing, was appointed by the County Public Service Board as Economic Advisor in the Office of the Governor in the Kanairo County Public Service vide an appointment letter dated **21st September, 2021** for a period of **5 Years**.
2. The Applicant performed his duties diligently and his performance has been above board since appointment. All the matters that the advice and performance of the Applicant were sought have all been performed and done.
3. The Applicant has been down with covid-19 in the recent days and undergone a series of therapies while in isolation.
4. With the emergence of the Covid-19 pandemic, the Ministry of Health issued Guidelines on combating COVID 19 and among the Guidelines staff were encouraged to work from home unless the physical presence was absolutely necessary.
5. Kanairo County Public Service also adopted the Guidelines.
6. Moreover, the nature of the Applicant’s work being mainly advisory through opinions, advisories, research, review of documents and drafting when asked do does not require mandatory physical presence unless asked to physically give clarifications and attend meetings.
7. Despite the foregoing, the Applicant reported to work at Kanairo town in adherence to the Covid 19 Guidelines.
8. Precisely three weeks ago, that is on the 4th of July 2021, the Applicant was diagnosed with Covid -19 at the Kanairo’s Level 5 Referral Hospital and advised to immediately self – isolate and undergo a series of therapies while in isolation. The diagnosis and recommended care was notified immediately to the Respondent and Interested party via email on the same day and even acknowledged by the Director in charge of Human Resources.
9. On the 22nd of July 2021, whilst in isolation the Applicant received a letter requiring him to show cause why disciplinary action should not be taken against him for absconding duty. The notice to show case was issued by the Respondent and required the applicant to respond within 14 days of the date of the letter.
10. Before the 14 days within which the Applicant was to show cause lapsed, the applicant received another letter dated 7th August 2021 via email from the Respondent purporting to exercise Displinary Control over the applicant by interdicting the Applicant.
11. Interdiction being a form of disciplinary control measure is a preserve of the County Public Service Board, the Interested Party herein, as clearly stipulated under Section 59 (1) (e) of the County Governments Act, No.17 of 2012 which provides for one of the functions of the County Public Service Board ***as to exercise******disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part****.*
12. On the other hand, the procedure for dealing with Absence from Duty without Leave in the County Public Service is contained at **Section D. 20 of *the County Public Service Human Resource Manual, 2013*** by the Public Service Commission.
13. To the contrary, not even a scintilla of the process was invoked with regard to the Applicant as evidenced from the impugned letters.
14. Therefore, the decision of the Respondent is manifestly ultra vires, illegal, irrational, and unreasonable and in violation of fundamental rights of the Applicant.
15. The application herein seeks leave to bring a motion for judicial review orders of certiorari, prohibition and mandamus against the Respondent in terms prayed herein.
16. This application for leave and stay and the substantive motion for judicial review will be rendered nugatory unless the Applicant is heard and the orders sought herein issued.
17. The Respondent has abused the power granted to him by exercising that power arbitrarily and without due process or justification.
18. Subjecting the Applicant to the impugned decision without due process would, taking into account all the relevant factors and circumstances be unjust, traumatic, unreasonably expensive and against the spirit and intentions of the administration of justice and the Constitution of Kenya.
19. The impugned decision is unreasonable, unlawful, based on irrelevant considerations, manifestly oppressive; violates the Applicant’s right to fair administrative action and violates the Applicant’s legitimate expectations to fair and just application of the due process.
20. The decision is without basis and run contrary to the public interest, the interests of administration of justice and the need to prevent abuse of the legal process in the exercise of usurped powers by the Respondent.
21. There is no other pending case between the parties on the subject matter in a court of competent jurisdiction.
22. It is only fair and just that this application be heard and determined urgently, and orders sought herein granted; otherwise the Applicant stands to suffer utmost prejudice and undue hardship and injustice at the hands of the Respondent.

DATED at NAIROBI this \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2021

CM ADVOCATES LLP

ADVOCATES FOR THE APPLICANT

(Cyrus Maina , Practice No.LSK/……./………)

DRAWN & FILED BY:

TO BE SERVED UPON:

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BETWEEN

MKENYA HALISI MKENYA ..............................................................................APPLICANT

AND

THE COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE,

COUNTY GOVERNMENT OF KANAIRO ..........................................................RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF KANAIRO ……….............INTERESTED PARTY

**VERIFYING AFFIDAVIT**

I MKENYA HALISI MKENYA **of** c/o P.O. Box 99234 - 00100, Nairobi within the Republic of Kenya do hereby make oath and state as follows:

1. THAT I am a male adult of sound mind, Applicant herein, well versed with the facts of this case hence competent to swear this affidavit.
2. THAT I was appointed by the County Public Service Board of Kanairo , the Interested Party herein, as the Economic Advisor in the Office of the Governor within its County Public Service vide Letter of Appointment dated **21st September, 2017** for a contract period of **5 years**.

***(Annexed hereto and marked “MHM - 1” is a copy of my appointment letter).***

1. THAT I performed my duties diligently and my performance has been above board since my appointment, to date.

***(Annexed hereto and marked “MHM-2” are a bundle of documents including my quarterly performance review results marked against my performance contract for the year 2018 to 2020.***

1. THAT on the strength of my employment contract as contained in the appointment letter and the legitimate expectation that I would serve till the expiry of the Contract in **August, 2022**, I applied for and was advanced a loan facility by Equity Bank Kenya. The outstanding loan balance is **Kshs.1,523145.20/=** which I service through check off.

***(Annexed hereto and marked “MKM - 3” is a copy of a certified Bank Statement from my Account Manager at Equity Bank communicating the loan balance).***

1. THAT I am aware that with the emergence of the Covid-19 pandemic, the Ministry of Health issued Guidelines on combating COVID-19 and among the Guidelines, staff were encouraged to work from home unless the physical presence was absolutely necessary.

***(Annexed hereto and marked “MHM - 4” is a copy of the Circular dated 20th July 2020 from the Head of Civil Service titled “Compliance with Workplace Guidelines on Covid 19 Pandemic” Reference OP/CAB.26/1/3A).***

1. THAT the Kanairo County Public Service within which I am employed also adopted the Guidelines the County Secretary issued a Circular to this effect.
2. THAT the nature of my work being mainly advisory through opinions, advisories, l research, review and analysis of documents and drafting when asked to does not require mandatory physical presence unless asked to physically give clarifications and attend meetings.
3. THAT despite the above, I have diligently reported to work at Kanairo town in adherence to the Covid 19 Guidelines but throughout the Covid-19 pandemic period there was no assignment for me like it had been previously and so my work was mainly research and reviews.
4. THAT during the COVID-19 pandemic period (which is still ongoing), no request or communication whatsoever has ever been made to me for any physical meeting. My email address and phone number are known both to the Respondent and interested party.

1. THAT on or about **30th of June 2021** I started experiencing the symptoms of COVID-19 which I tried to ignore and hoped I will be well but the symptoms became worse.
2. THAT thus on **3rd of July, 2021** I went for a Covid-19 test at the Kanairo County Referral Level 5 Hospital upon which I tested Positive for Covid-19.

***(Annexed hereto and marked “MHM - 5” is a copy of my Covid 19 test).***

1. THAT the doctor prescribed medication for me and recommended self-isolation, among other directions.

1. THAT I was shocked and depressed with the results and the symptoms had gotten worse with difficulties in breathing and nonstop fever and fatigue.
2. THAT despite the state of affairs I gathered some strength and communicated to the Director of Human Resource Management via *email* of having contracted the Covid-19 virus and that I was in self-isolation.
3. THAT when the symptoms of Covid-19 subsided, I went for another test but I was still Covid-19 Positive. It was therefore recommended that I continue being in isolation until I test negative.
4. THAT I continued to work from home and in strict adherence to the Covid-19 Guidelines and would on a daily basis call the Executive Secretaries of the Respondent to see if there is any assignment for me but there was none save from some isolated work that would come up for follow up.
5. THAT on **23rd of July 2021** while still in isolation, I was surprised and shocked to receive an email containing the letter dated **22nd July 2021** requiring me to show cause for prolonged absence from duty without any form of communication to the Respondent as appointing Authority”. The Letter require a response within 14 days contrary to the standra reqiiredment ath a show cause be responded to within 21 days of issuance.

***(Annexed hereto and marked “MHM - 6” in a bundle are the forwarding email and the by the Respondent purporting to dismiss me for alleged absence from duty.***

1. THAT even before the dust settled, I received another letter dated **7th August, 2021** this time titled “interdiction.”

***(Annexed hereto and marked “MHM - 7” is a copy of the letter dated 7th August 2021.***

1. THAT my appointing authority is the Interested Party and not the Respondent as can be evidenced by my Letter of Appointment aforesaid.
2. THAT I am thus aggrieved by the Respondent’s decision which is ultra vires, unprocedural and in violation of my Constitutional right to a Fair Administrative Action.
3. THAT dismissal being a disciplinary control measure is a preserve of the County Public Service Board as clearly stipulated at Section 59 (1) (e) of the County Governments Act, No.17 of 2012 which explicitly provides for one of the functions of the County Public Service Board as to exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part.

1. THAT moreover, the procedure for dealing with Absence from Duty without Leave in the County Public Service is contained under Section D. 20 of ***the County Public Service Human Resource Manual, 2013*** by the Public Service Commission.

***(Annexed hereto and marked “MHM - 8” is a copy of the relevant pages of the County Public Service Human Resource Manual, 2013 for ease of reference).***

1. THAT to the contrary, not even a scintilla of the process was invoked with regard to my physical absence from duty as evidenced from the letter of dismissal. The Respondent simply states he is greatly concerned and then just purports to dismiss me without process. He does not even purport to have had any process.

1. THAT it is my reasonable apprehension that the decision of the Respondents is manifestly illegal, irrational, and unreasonable and in violation of my fundamental rights.
2. THAT subjecting me to the impugned decision without due process would, taking into account all the relevant factors and circumstances be unjust, traumatic, unreasonably expensive and against the spirit and intentions of the administration of justice and the Constitution of Kenya.
3. THAT the decision is without basis and run contrary to public interest, the interests of administration of justice and the need to prevent abuse of the legal process in the exercise of the Respondent’s powers.
4. THAT this application for leave and stay and the substantive motion for judicial review will be rendered nugatory unless I am heard and the orders sought herein issued.
5. THAT there is no other pending case between the parties on the subject matter in a court of competent jurisdiction.
6. THAT this matter has been brought with utmost promptitude.
7. THAT it is only fair and just that this application be heard and determined urgently, and orders sought herein granted; I stand to suffer utmost prejudice and undue hardship and injustice at the hands of the Respondent.
8. THAT all that I have deponed to herein are true to the best of my knowledge and belief save those based on information, the sources of which I have disclosed.

SWORN at NAIROBI

By Mkenya Halisi Mkenya \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Deponent

This \_\_\_\_ day of \_\_\_\_\_\_\_\_\_, 2021

BEFORE ME:

COMMISSIONER FOR OATHS

DRAWN & FILED BY:

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COUNTY GOVERNMENT OF KANAIRO ..........................................................RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF KANAIRO ……….............INTERESTED PARTY

**NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**Order 53 rule (1) (3) of the Civil Procedure Rules**

**THE *EX PARTE* APPLICANT** hereinabove named **HEREBY GIVES NOTICE** that the application for leave to apply for Judicial Review as detailed in the Statement referred to herein below, will be made on or after the day succeeding hereto.

Copies of the Statement and the Affidavit are lodged herewith.

**DATED** at **NAIROBI** this \_\_\_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ 20…

**CM ADVOCATES LLP**

**ADVOCATES FOR THE *EX PARTE* APPLICANT**

**Drawn & filed by**: