## REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MILIMANI LAW COURTS

ELRC J.R . CASE NO. OF 20..

IN THE MATTER OF: AN APPLICATION FOR 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

REPUBLIC …………………… ..............................................................EXPARTE APPLICANT

AND

THE COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE,

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

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

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

**NOTICE OF MOTION**

*(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.)*

**(FILED PURUSANT TO LEAVE GRANTED BY JUSTICE XXXXXX ON THE…….. OF ……..20….)**

TAKE NOTICE that this court shall be moved 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. AN ORDER OF CERTIORARI to remove into this Honourable court and quash the decision by the Respondent against the *Ex Parte* 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 action as contained in the letters dated 4th July, 2021 and 23rd July 2021 is a breach of the *Ex Parte* 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 Ex Parte Applicant.
4. The Respondent be ordered to pay the Ex *Parte* 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….

XXXX ADVOCATES LLP

ADVOCATES FOR THE APPLICANT

(XXXX, Practice No. **LSK/…………………….)**

DRAWN & FILED BY:

TO BE SERVED UPON:

***NOTE: “If any party served does not attend Court at the time and place above mentioned such Orders will be made and proceedings taken as the Court may think just and expedient”***

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REPUBLIC …………………… ..............................................................EXPARTE APPLICANT

AND

THE COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE,

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

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

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

**SUPPORTING/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 economic and financial 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 standard requirement that 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, procedural 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 this matter has been brought with utmost promptitude.
6. THAT there is no other pending case between the parties on the subject matter in a court of competent jurisdiction.
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 OATH

DRAWN & FILED BY: