



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSIGA & GATEMBU, J.J.A)

CIVIL APPEAL NO. 8 OF 2015

BETWEEN

THE CLERK, COUNTY ASSEMBLY OF VIHIGA 1ST APPELLANT

VIHIGA COUNTY ASSEMBLY SERVICE BOARD2ND APPELLANT

AND

ABIGAEL NYANDOYA1ST RESPONDENT

VICTOR CHADIVA2ND RESPONDENT

FRIDAH MBATI MIKALI 3RD RESPONDENT

PETER KAMISI EDEMBA 4TH RESPONDENT

BYRUM ANGOTE 5TH RESPONDENT

(An Appeal from the ruling and or the orders of the Industrial Court at Kisumu

(Wasilwa, J.) dated 3 December, 2014

in

CLAIM NO. 295 OF 2014)

JUDGMENT OF THE COURT

1. This appeal brings to the fore one of the teething problems the County Governments are experiencing as they settle down into the devolved system of government. Although listed as appellants the tag of war in this appeal is between the Clerk to the County Assembly of Vihiga (the 1st appellant) and the Vihiga County Assembly Service Board (the Service Board). The latter claimed it regularly employed the respondents while the former contends otherwise.

2. In their statement of claim dated 3rd November 2014, the respondents claimed that in response to an advertisement in the local media, they applied for employment and were competitively recruited by the Service Board which issued them with letters of appointment dated 28th March, 2014. Despite that, the respondents claim that the appellants have barred them from accessing their places of work and have, to date, refused to pay them their salaries. They therefore claim a declaration that they are bonafide employees of Vihiga County Government entitled to work and be accorded all the benefits of employees of Vihiga County Government.

3. In his response, the 1st appellant denied the respondents' claim asserting that they were irregularly engaged.

4. Contemporaneous with the filing of their claim on 5th November, 2014, the respondents filed a Notice of Motion dated 3rd November, 2014 in which they claimed payment of their salary arrears pending the determination of the claim

5. In her ruling dated 3rd December, 2014, Wasilwa, J. allowed the application and directed the appellants to forthwith pay the respondents salary arrears and benefits pending the hearing and determination of their claim. The learned Judge also ordered the 1st appellant to pay the costs of the suit. This appeal is against that ruling.

6. Arguing the appeal before us, Mr. Musiega, learned counsel for the 1st appellant, faulted the learned Judge for determining the entire claim through the Notice of Motion before hearing the parties on the matter. He said payment of salaries to the respondents plus cost of the suit would compromise the 1st appellant's defence in the claim which is yet to be heard. He therefore urged us to allow this appeal and set aside the learned Judge's said order.

7. The Service Board and the respondents did not appear before us during the hearing of the appeal. As they had been served with the hearing notice, we saw no good reason for adjourning the matter and instead, we allowed counsel for the 1st appellant to argue the appeal ex-parte

8. Since this is an appeal against an interlocutory order arising from a claim which is still pending for hearing before the Employment and Labour Relations Court, we are constrained to say as little as possible lest we compromise the hearing of the claim. With this caveat in mind, having perused the record we agree with counsel for the 1st appellant that allowing the learned Judge's ruling to stand will compromise the 1st appellant's defence in the claim. We say no more than that. Consequently, we allow this appeal and set aside the orders of the learned Judge made on 3rd December, 2014. The 1st appellant shall have the costs of this appeal against the respondents.

DATED and delivered at Kisumu this 3rd day of June, 2015.

D.K.MARAGA

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JUDGE OF APPEAL

D.K.MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCI Arb

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR