



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 295 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 3rd December, 2014)

- 1. ABIGAEL NYANDOYA**
- 2. VICTOR CHADIVA**
- 3. FRIDAH MBATI MIKALI**
- 4. PETER KAMISI EDEMBA**
- 5. BYRUM ANGOTE CLAIMANTS**

-VERSUS-

- 1. CLERK COUNTY ASSEMBLY VIHIGA**
- 2. VIHIGA COUNTY ASSEMBLY SERVICE BOARD.... RESPONDENT**

RULING

The application before court is the one dated 3.11.2014. The application was brought through a notice of motion and brought under Rule 16(1) of the Industrial Court (Procedure) Rules 2010, Articles 28 & 41(1) of the Constitution of Kenya 2010, and Section 18(2) of the Employment Act 2010. The applicants through the firm of K. N. Wesutsa & Co. Advocates sought orders that:-

- 1. That this matter be certified as urgent and service be dispensed of in the first instance.**
- 2. That pending the determination of the main suit this honourable court be pleased to order the respondents to forthwith pay the applicants their salaries and benefits arrears.**
- 3. That costs be provided for.**

The application was based upon the affidavit of the 1st applicant and the following grounds:-

- 1. That the applicants were competitively employed by the respondents to work in the County Assembly of Vihiga Service ('the service').**
- 2. That the respondents executed Employment Contracts with each specific applicant.**
- 3. That the applicants have been in employment from the 1st day of April 2014.**
- 4. That however, the applicants have never been paid any salaries or benefits as stipulated in the Employment Contracts since they began working for the service.**
- 5. That failure to pay the claimants salaries and benefits is a violation of provisions of Articles 28 and 41(1) of the Constitution of Kenya, 2010 and Section 18(2)(c) of the Employment Act.**

The 1st respondent opposed this application through a replying affidavit sworn by one Josephat Musambayi the clerk to County Assembly of Vihiga sworn on 17.11.2014 and filed through Aggrey B. L. Musiega of the County Government of Vihiga.

The 1st respondent contends that the prayers sought in the application are those sought in the main suit

and if the said orders are granted, the main suit will be compromised. They aver that the applicants are not known to them as their letters of employment are signed by the chairperson of the County Assembly Service Board and not the clerk who is the authorized officer in terms of S. 13(4) of the County Government Act. They also aver that the applicants have filed another petition before the High Court in Kakamega being Case No. 18 of 2014 where they seek similar orders and are therefore misleading the court.

The 2nd respondent filed a replying affidavit however sworn by one Daniel Chitwah, the Speaker of the County Assembly of Vihiga sworn on 20.11.2014. It is his contention that the application by applicants has merit as the 2nd respondent passed a resolution that the applicants are *bona fide* employees of the respondents and should be paid their salaries.

Having considered the averments of both parties and upon consideration of their respective submissions, the issue for determination is whether the applicants application has merit and whether orders sought can be granted.

The applicants have exhibited their letters of appointment signed by the Speaker and Chairman of the Vihiga County Assembly Service Board. The 1st respondent had submitted that those letters are not *bona fide* as they were issued and signed by unqualified persons who have no authority to do so.

The 1st respondent is an officer appointed under S. 13 of the County Government Act 2012. Under this section, the functions of the clerk is an authorized officer. Section 13(5) states that:-

“The office of the clerk of the County Assembly and the Offices of Members of the Staff of the clerk of the County Assembly shall be offices in the County assembly service.”

My reading of this section is that the clerk and other staff are employees of the County Assembly Service Board and do act under the direction and control of the Board.

On the face of the court record are minutes of the County Assembly Service Board dated on 25.8.2014 at 3.45 pm where the County Assembly Service Board resolved that the applicants be paid their salaries.

It is the duty of the 1st respondent to implement this action/decision which he declined to do and this even earned him a show cause letter dated 6.8.2014.

From the submissions, it is the finding of this court that the applicants case has merit and they are entitled to be paid their salary arrears as prayed as failure to pay them infringes on their right to fair Labour Practices as envisaged under Article 41 of the Constitution. The orders sought will not finalize the main cause as the main cause seeks orders which go beyond what is sought in the application.

I therefore find for the applicants and grant order in terms of 2 & 3 as follows:-

1. **That pending the determination of the main suit, this honourable court orders that the respondents do forthwith pay the applicants their salaries and benefits arrears.**
2. **The 1st respondents pay costs of this suit.**

HELLEN S. WASILWA

JUDGE

3/12/2014

Appearances:-

Omondi h/b Wesutsa for claimant/applicants

Musiega for respondents

CC. Wamache