



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutua v Kenya Ports Authority (Cause 2 of 2020)  
[2022] KEELRC 1609 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1609 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 2 OF 2020**

**AK NZEI, J  
JULY 28, 2022**

**BETWEEN**

**DOUGLAS WAMBUA MUTUA ..... CLAIMANT**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide a memorandum of claim dated 23<sup>rd</sup> January 2020 and filed in Court on January 24, 2020. The memorandum of claim was filed alongside the Claimant's witness statement dated January 23, 2020 and a list of documents dated the same date, listing some nine documents. On March 9, 2020, the Claimant filed a further list of documents dated 6<sup>th</sup> March 2020, listing seven more documents.
2. On 28<sup>th</sup> September 2020, the Claimant filed an Amended Memorandum of Claim dated 24<sup>th</sup> September 2020 pursuant to the Court's leave in that regard, and pleaded, inter-alia:-
  - a. that the Claimant worked continuously for the Respondent for twenty-two (22) years, four (4) months and twenty-one (21) days until his retirement on 10<sup>th</sup> November 2019 upon attaining the mandatory retirement age of sixty (60) years.
  - b. that the Claimant worked for the Respondent in three (3) phases as follows:-
    - i. from 20<sup>th</sup> June 1997 to 13<sup>th</sup> November 2002, the clamant worked as a casual employee for a period of five (5) years, four(4) months and twenty five (25) days.
    - ii. from 14<sup>th</sup> November 2002 to 3<sup>rd</sup> December 2013, the Claimant was appointed on continuous renewable contracts for eleven (11) years and twenty-one (21) days, and
    - iii. from 4<sup>th</sup> December 2013 to 10<sup>th</sup> November 2019, the Claimant was appointed on permanent and pensionable terms for five (5) years, eleven (11) months and seven days.



- c. that upon retirement on 10<sup>th</sup> November 2019, the Claimant was paid pension dues amounting to ksh. 1,230,409.23, which came to ksh. 1,108,992.44 upon taxation and that the said amount covered only five (5) years, eleven (11) months and five (5) days that the Claimant worked for the Respondent on permanent and pensionable terms.
  - d. that the Respondent refused to calculate terminal benefits for the period that the Claimant served as a casual employee without off days, leave or leave allowance, overtime for hours worked in excess of normal working days and without holiday allowance.
  - e. that the Respondent disregarded the Claimant's attempts to be paid terminal benefits before he was converted to a fixed term employee.
3. The Claimant claimed a total of ksh. 1,635,118 made up of alleged unpaid gratuity, overtime, rest days, salary under payment, unpaid house allowance, unpaid holiday allowance, accrued leave days, unpaid off days worked, unpaid leave allowance and unpaid meals allowance. The Claimant pleaded that the entire claim accrued during the period he worked as a casual employee.
4. The Claimant further prayed that the Court makes a declaration that he was the Respondent's employee from 20<sup>th</sup> June 1997 to November 2019, and worked as a casual employee from 20<sup>th</sup> September 1997 to 10<sup>th</sup> November 2002; and that he (the Claimant) is entitled to the aforesaid claim of Ksh. 1,635,118. The Claimant also sought to be issued with a certificate of service and to be paid costs of the suit.
5. On October 23, 2020, the Respondent filed Response to the Claimant's Amended Memorandum of Claim and pleaded, inter-alia:-
  - a. that the Claimant was first engaged by the Respondent as a casual labourer grade PA12 from June 20, 1997, and consequently held the position upto 11<sup>th</sup> November 2002 when his employment terms were varied from casual labourer to contract terms for a period of three years.
  - b. that the Claimant accepted the offer by the Respondent to be employed as a casual labourer by appending his signature on the letter of offer dated 23<sup>rd</sup> June 1997, which stated that the Claimant was entitled to ksh. 210 per day for 8 hours work and payment for work for lesser periods and deductions for absenteeism calculated on hourly basis, and that the Claimant's terms of employment were subject to the terms of service prescribed for casual staff under Section C13 of the Respondent's Staff Regulations of 1992 and such other notices, rules and regulations applicable for casual staff as would be prescribed occasionally.
  - c. that the Claimant's claim for gratuity ought to have been made after the lapse of the period of his employment as a casual labourer.
  - d. that in the 2<sup>nd</sup> phase of the Claimant's employment, the Claimant was engaged on renewable contract basis (from 14<sup>th</sup> November 2002 to 4<sup>th</sup> December 2013), and was paid gratuity benefits at the end of every contract, save for the period between 5<sup>th</sup> December 2011 to 14<sup>th</sup> December 2013 where the Claimant failed to fill gratuity forms, and that it is upon the Claimant to fill in the gratuity forms for the said period in order for the Respondent to effect payment of gratuity for the period between 5<sup>th</sup> December 2011 and 14<sup>th</sup> December 2013 amounting to ksh. 240,580.46. That the Respondent changed the Claimant's terms of service to permanent and pensionable with effect from 6<sup>th</sup> December 2013 to 10<sup>th</sup> November 2019 when the Claimant attained the retirement age of sixty (60) years, upon which he was paid retirement benefits



as a permanent and pensionable employee amounting to ksh. 1,230,409 and repatriation allowance of ksh. 81,500.

- e. that the Claimant's claim should be dismissed with costs for being in contradiction with section 66 of the [Kenya Ports Authority Act](#) (cap 391) and for being an abuse of this Court's process.
6. On October 23, 2020, the Respondent filed a list of documents dated 22<sup>nd</sup> October 2020, listing thirteen documents. On 21<sup>st</sup> December 2020, the Respondent filed a further list of documents dated December 20, 2020, listing eight documents. Also filed by the Respondent was a witness statement of one Linda Shako, the Respondent's Principal Human Resource Officer (Manpower Service) dated October 23, 2020 and filed in Court on 4<sup>th</sup> November 2020.
7. When trial opened on April 14, 2022, the Claimant adopted his witness statement dated 23<sup>rd</sup> January 2020 as his testimony and produced in evidence the documents listed on his list of documents and further list of documents dated January 23, 2020 and 6<sup>th</sup> March 2020 respectively; save for the document listed as item no. 9 on the list dated 23/1/2020. The Claimant further testified, both in chief and under cross examination, that his claim was based on the period he served as a casual, as all payments regarding his service on contract and as a permanent employee had been made to him by the Respondent.
8. The Claimant further told the Court that on November 18, 2002, he wrote to the Respondent asking for his dues (Claimant's exhibit no. 13). It is to be noted that this letter is shown to have been written by the Claimant upon the lapse of the period his employment as a casual labourer. The Claimant did not tell the Court what further legal action he took against the Respondent if any dues arising from his first phase of employment (as a casual labourer) stood unpaid as he transitioned to the 2<sup>nd</sup> phase of employment on renewable term contracts. Any cause of action regarding any such dues, if at all, arose on November 11, 2002 when the Claimant's employment terms are shown to have been varied from casual labourer to term contract. It is at this time that time started running regarding such dues. Any continued non-payment of the alleged dues cannot be said to have been a continuing injury as referred to in section 90 of the [Employment Act](#) and section 66(b) of the [Kenya Ports Authority Act](#).
9. The Respondent called one witness, Linda Shako, who adopted her witness statement dated 23<sup>rd</sup> October 2020 as her testimony and produced in evidence the documents listed on the Respondent's list of documents and supplementary list of documents dated 22<sup>nd</sup> October 2020 and December 20, 2021 respectively. The witness (RW-1) testified that while working as a casual labourer from June 1997, the Claimant was engaged on day to day basis with wages being paid on daily basis, and that his terms and conditions were to be found in KPA Staff Regulations 1992, Regulations C.13. that the Claimant was appointed as a casual staff vide a letter dated 23<sup>rd</sup> June 1997 (Respondent's exhibit no 1) which clearly stated that the Claimant would be subject to the Respondent's Staff Regulation C.13. the Claimant signed the said letter in acceptance. The Respondent produced in evidence its Staff Regulations C.13 (Exhibit no. 2), which states:-

“casual employees are persons engaged on day to day basis, the terms of whose engagement provide for the payment of wages at the end of each day and who are not engaged for a longer period than 24 hours at a time. Their engagements are terminable at the end of any day and they earn no leave, gratuity, or medical or other benefits. This type of engagement is appropriate for semi-skilled and unskilled labour required only for lesser periods than three months in any one case.”



10. RW-1 further testified that the forgoing Staff Regulation applied to the Claimant for the entire period that he worked as a casual, upto 2002. That during the said period the Claimant was paid on daily basis, but payment statement would be given on weekly basis on earnings earned during the week. That the Claimant was paid all his wages for the period he worked as a casual, and that as a casual he did not earn any leave or gratuity.
11. The Claimant did not deny having signed the casual letter of appointment dated 23<sup>rd</sup> June 1997, and pleaded to having worked as a casual from June 1997 upto November 2002.
12. As already stated herein, the Respondent pleaded section 66 of *Kenya Ports Authority Act*.
13. Having considered the pleadings filed herein and evidence presented by both parties, issues that present for determination, in my view, are as follows:-
  - a. whether the Claimant's claim herein is statute barred.
  - b. whether the Claimant is entitled to the reliefs sought.
14. On the first issue, section 66 of the *Kenya Ports Authority Act* (cap 391) provides:-

“where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution or intended execution, of this Act or any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect:-

  - a. the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and/or intention to commence the action or legal proceedings, has been served upon the Managing Director by the plaintiff or his agent.
  - b. the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of continuing injury or damage, within six months next after the cessation thereof”
15. As already stated in paragraph 7 of this Judgment, the Claimant's alleged cause of action herein arose on 11<sup>th</sup> November 2002 when the period of his employment as a casual lapsed. He on 18<sup>th</sup> November 2002 wrote to the Respondent on his claim for dues as a casual, and requested that the same be calculated by the Respondent and paid to him. The said letter, which is not shown to have been served on the Respondent and/or its Managing Director, is not shown to have been responded to by the Respondent, and the Claimant did not institute any legal proceedings against the Respondent within twelve months from 11<sup>th</sup> November 2002, and did not do so until 24<sup>th</sup> January 2020, over seventeen years down the line.
16. The alleged non-payment of the said alleged accrued dues was not a continuing injury or damage that can be said to have ceased when the Claimant retired from the Respondent's service on 10<sup>th</sup> November 2019. The Claimant's claim herein is statute-barred pursuant to both section 66(b) of the *Kenya Ports Authority Act* and section 90 of the *Employment Act* 2007.
17. On the second issue, it follows that reliefs sought by the Claimant are not open to consideration by this Court as it has no jurisdiction to do so, the Claimant's claim being statute barred.



18. The Respondent referred this Court to the Court of Appeal's decision in *Kenya Ports Authority -vs- Cyrus Maina Njoroge* [2018] eKLR, where the Court stated as follows:-

“...In this case, nothing stopped the Respondent from filing suit within 1 year from 17<sup>th</sup> August 2007 pursuant to Section 66 of the Act.

(23) we think we have said enough to demonstrated that the Respondent's claim was statutorily time barred under Section 66 of the Act and the High Court had no jurisdiction to entertain it.

It follows therefore that any other orders predicated on the cause of action that was time barred are invalid and cannot be sustained. This inevitably means that we do not need to go into the rest of the grounds raised in this appeal.

The appeal has merit and we allow the same but with no orders as to costs given the Respondent's pecuniary status vis a vis that of his former employer.”

19. The Respondent further referred to the case of *Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others* [2012] eKLR where the Supreme Court held as follows:-

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law, has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the Court cannot entertain any proceedings.”

20. Having established that the Claimant's cause of action, and therefore the suit, is statute barred, I find and hold that this Court is without jurisdiction to either entertain or determine the issue of whether or not the Claimant is entitled to the reliefs sought by him. The Court must down its tools.

21. Consequently, the Claimant's suit is hereby struck off for being statute barred, with no order as to costs.

22. The Respondent pleaded that the Claimant is entitled to ksh. 204,580 being pending service gratuity for the period between 5<sup>th</sup> December 2011 to December 4, 2013, and that the only reason the Respondent has not paid it to the Claimant is because the Claimant has not filled in the relevant gratuity forms. The Respondent's witness (RW-1) stated as much in her witness statement dated 23<sup>rd</sup> October 2020, which the witness adopted as her testimony in Court. The Claimant did not, however, claim the said sum in the suit herein.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**



**JUDGE**

Appearance:

..... for Claimant

..... for Respondent

