



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 669 OF 2016

BETWEEN

JULIUS CHARO KAZUNGUCLAIMANT

VERSUS

1. MOMBASA MAIZE MILLERS LIMITED

2. READY CONSULTANCY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company Advocates for the Claimant

V.N. Okata Advocates for the 1st Respondent

Marende Birir Shimaka & Company Advocates for the 2nd Respondent

RULING

1. The 1st Respondent filed a Notice of Preliminary Objection dated 27th October 2016, based on the following grounds:-

- a) The Memorandum of Claim is incurably defective.
- b) The Memorandum of Claim has been filed against the 1st Respondent contrary to the provisions of Section 90 of the Employment Act 2007.
- c) The Claim is clearly an abuse of the process of the Court.

2. The Claim was filed on 14th July 2016. The Claimant states he was employed by the 1st Respondent as a Loader, in July 2008. The 1st Respondent then outsourced its Labour Force through the 2nd Respondent, placing the Claimant under the 2nd Respondent.

3. According to the 1st Respondent, the Outsourcing Agreement between the Respondents was concluded on 1st January 2012.

4. The Claimant states he was orally dismissed by the 1st Respondent unfairly and unlawfully, on 11th April 2015. He prays for Judgment against both Respondents for:-

- a) 1 month salary in lieu of notice at Kshs. 18,000.
- b) Service pay at Kshs. 72,000.
- c) Annual leave pay at Kshs. 105,600.
- d) Costs.
- e) Certificate of Service.
- f) Declaration that his employment was on permanent basis.

5. The 1st Respondent's Objection is premised on the ground that at the time of termination, the Claimant was an Employee of the 2nd Respondent. 1st Respondent ended its relationship with the Claimant, upon execution of the Outsourcing Agreement, on 1st January 2012. If the Claimant had any valid claims against the 1st Respondent, these extinguished under the 3 year limitation period, placed on filing of Claims from the date of accrual, under Section 90 of the Employment Act 2007.

6. The Objection was heard on 6th February 2017, in the presence of the 3 Advocates representing the respective Parties.

The Court Finds:-

7. A similar point of law was raised by the 1st Respondent in this Court's ***Nyamavi Gambo v. Mombasa Maize Millers Limited and Another [2016] e-KLR***. This involved an Employee and the 2 Respondents. The Court took the position that the 1st Respondent was the principal Employer of the Employee, and apportioned liability based on the particular dates when respective Employer was in active control of the Employee. It was not the position of the Court that there was a principal-agent relationship between the Respondents, but rather, a triangular relationship involving 2 Employers and an Employee.

8. A similar situation obtains here, which cannot be resolved merely by affidavit evidence. The triangular relationship must be disentangled, with rights and obligations delineated. The date of the Outsourcing Agreement is not uncontested. The 1st Respondent denies having ever employed the Claimant. The Witness Statement of Ibrahim Mwaro Mangi categorically denies that the 1st Respondent ever employed the Claimant. There are other fundamental questions that cannot be determined preliminarily, chief among them, being whether the Employee was privy to the Outsourcing Agreement; whether the Employee signed a new contract with the 2nd Respondent; whether the contract with the 1st Respondent if any, was formally terminated, and terminal benefits paid; and whether supervisory control changed with the Outsourcing Agreement. Who was the Employer, or who were the Employers, of the Claimant, and at what point in time?

9. These are contested, un-crystallized, unresolved facts, and preliminary issues, as the Court understands them. There is a demand placed on the Court by the law, to give the Parties opportunity to marshal evidence and any other relevant material, in resolving these contested facts.

10. The 2nd Respondent, tellingly, does not agree with the position of the 1st Respondent on the Outsourcing Agreement. There is dispute between the 2 supposed Employers. The Outsourcing Agreement cannot at the outset, be a time indicator, as far as Section 90 of the Employment Act is

concerned. Letting the 1st Respondent out of this litigation would have the effect of shutting out the Claimant from obtaining a full and effective remedy.

IT IS ORDERED:-

a) The preliminary objection is declined.

b) Parties to schedule the dispute for pre-trial directions under Rule 15 of the Court's Rules.

c) Costs in the cause.

Dated and delivered at Mombasa this 20th day of February, 2017.

James Rika

Judge