



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 694 OF 2016**

**BETWEEN**

- 1. TIME ABDALLAH**
- 2. HASSAN SAID**
- 3. ATHMAN WACHU**
- 4. MOHAMMED SHUGA**
- 5. SWABIR MOHAMMED**
- 6. MUNGA NDUNE**
- 7. BAKARI FUMO**
- 8. MIKDADI YUSUF**
- 9. ORIPA JAVAN**
- 10. SOFIA KASSIM**
- 11. NURU ALI**
- 12. AMINA CHIZI**
- 13. MERCY SHADRACK**
- 14. ISSA TUNU**
- 15. KONDE KADZENGA**
- 16. MONICA ATHIENO**
- 17. EVERLIN JAKA**
- 18. STEPHEN BAYA**
- 19. JOSEPH OGETO**

**20. BARACK OWINO**

**21. JOSEPH KINUTHIA**

**22. GEORGE ODIEDO..... CLAIMANTS**

**VERSUS**

**1. MOMBASA MAIZE MILLERS LIMITED**

**2. READY CONSULTANCY LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Tolo & Company Associates, Advocates for the Claimants*

*V.N. Okata Advocates for the 1<sup>st</sup> Respondent*

*Marende Birir Shimaka & Company Advocates for the 2<sup>nd</sup> Respondent*

---

**RULING**

1. The 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection dated 27<sup>th</sup> 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 1<sup>st</sup> 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 14<sup>th</sup> July 2016. The Claimants state they were employed by the 1<sup>st</sup> Respondent in various positions, on diverse dates beginning 2008. The 1<sup>st</sup> Respondent then outsourced its Labour Force through the 2<sup>nd</sup> Respondent, placing the Claimants under the 2<sup>nd</sup> Respondent.

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

4. The Claimants state they were orally dismissed by the 1<sup>st</sup> Respondent unfairly and unlawfully, on 16<sup>th</sup> January 2016. They pray for Judgment against both Respondents for:-

a) 1 month salary in lieu of notice.

b) Service pay.

c) Annual leave pay.

d) Public holidays pay.

- e) Compensation for unfair termination.
- f) Declaration that termination was unfair.
- g) Costs.
- h) Any other suitable relief.

The total sum claimed stands at Kshs. 8,600,550.

5. The 1<sup>st</sup> Respondent's Objection is premised on the ground that at the time of termination, the Claimants were Employees of the 2<sup>nd</sup> Respondent. 1<sup>st</sup> Respondent ended its relationship with the Claimants, upon execution of the Outsourcing Agreement, on 1<sup>st</sup> January 2012. If the Claimants had any valid claims against the 1<sup>st</sup> 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 6<sup>th</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 Employees. 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 1<sup>st</sup> Respondent denies having ever employed the Claimants. The 1<sup>st</sup> Respondent categorically denies that the 1<sup>st</sup> Respondent ever employed the Claimants. There are other fundamental questions that cannot be determined preliminarily, chief among them, being whether the Employees were privy to the Outsourcing Agreement; whether the Employees signed new contracts with the 2<sup>nd</sup> Respondent; whether the contracts with the 1<sup>st</sup> Respondent if any, were 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 Claimants, 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 2<sup>nd</sup> Respondent, tellingly, does not agree with the position of the 1<sup>st</sup> 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 1<sup>st</sup> Respondent out of this litigation would have the effect of shutting out the Claimants 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 20<sup>th</sup> day of February, 2017.

James Rika

Judge