



**REPUBLIC OF KENYA**  
**IN INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**CAUSE NO. 85 OF 2012**

**Sila Onyango Maugo.....1<sup>st</sup> Claimant**  
**Wisdom Mwachala Mwandwiro.....2<sup>nd</sup> Claimant**  
**Jeremiah Owuor Amuok.....3<sup>rd</sup> Claimant**  
**Francis Mwanja Kilunda.....4<sup>th</sup> Claimant**  
**Otieno Okongo Ahomo.....5<sup>th</sup> Claimant**

**v**

**Kaluworks Limited.....espondent**

**RULING**

1. The five Claimants' were all employed by Kaluworks Limited at various times until the termination of their services in 2009. However, there is a dispute as to under what status they were employed, with the Respondent asserting that they were casual employees.
2. In their Reply to Defence filed on 30 August 2012, the Claimants' exhibited several documents to demonstrate that they had been employed by the Respondent on different occasions starting from the year 1999 for the 5<sup>th</sup> Claimant, a recommendation letter dated 3 April 2004 to the 1<sup>st</sup> Claimant and a casual workers daily payment sheet for a week in 2006. The Claimants' even annexed a schedule indicating their final dues.
3. Assuming that the Claimants' pleadings are correct, it therefore beats me how the Respondent can so strenuously deny that the Claimants were not its employees and if they were its employees, then that they were casuals.
4. The Claimants' also pleaded and produced an annexure to their Reply to Defence a schedule of final dues to several employees including the Claimants' which had been agreed on but which the Respondent reneged on.
5. At the time of the terminations in 2009, the Employment Act, 2007 was already in operation and it is explicit in section 37 on the conversion/deeming of casual terms of employment to be a periodic contract where wages are paid monthly and therefore implicating section 35(1)(c) of the Employment Act.
6. And again, assuming the record of the pleadings is correct, there may appear to be issues of concern about the labour practices at the Respondent, which may require examination. Unfortunately, I cannot go into the merits because what the Court is confronted with is the Preliminary Objection by the Respondent.

7. The Preliminary Objection was to the effect that the Cause was statute/time barred pursuant to the provisions of section 90 of the Employment Act. The section provides that:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

8. It is not in dispute that the Claimants' contracts of service were terminated on or about 6 February 2009. According to the Respondent, that is the day the Claimants' cause of action accrued and therefore they had until 6 February 2012 to commence their action. The Respondent also submitted that there is no statutory provision for extension of time to file claims in employment disputes where the time allowed has elapsed.
9. In response, Mr. Sila Onyango Maugo, the first Claimant who addressed the court on behalf of the other Claimants' stated that the Claimants' had serious challenges after their termination and therefore they could not file the Claim any sooner. The Claimants' further submitted that they were engaged in negotiations with the Respondent after filing the Cause but the negotiations did not end in an out of Court settlement.
10. Regarding the time of filing the Cause, the Claimants' submitted that although the Cause was filed on 2 March 2009, it was dated 24 February 2009 and that their attempts to have the issues in dispute settled through Kituo cha Sheria bore no fruit.
11. The Claimants' pleaded with the Court to consider that their rights guaranteed in the Bill of Rights were at stake and therefore the Court should do justice to the claim by subjecting it to a hearing and dismiss the preliminary objection.
12. In my view, limitation of time in section 90 of the Employment Act is an ingredient of the cause of action so that a cause of action becomes extinguished on the expiration of the time set and it is not only the remedy which has been barred by lapse of time. I say so because on the lapse of the three years the Respondent had acquired an accrued right entitling it to plead immunity from the cause of action.
13. Under these circumstances, unfortunate as the result may be, my hands are tied and I find that the Claim herein is statute/time barred pursuant to the provisions of section 90 of the Employment and I dismiss the Claim with no order as to costs.
14. But just for emphasis, I need to repeat that employers should ensure that they do not retain the so called '*casual workers*' for periods beyond those set out in the Employment Act or engage in such practices which may amount to an unfair labour practice which has been outlawed by Article 41 of the Constitution.

**Dated, delivered and signed in open court in Mombasa on this 20<sup>th</sup> day of December 2012.**

**Justice Radido Stephen**

**Judge of the Industrial Court**

**Appearances**

Sila Onyango Mauga 1<sup>st</sup> Claimant On behalf of All the Claimants

Mr. Nanji instructed by Kishore Nanji Advocate For Respondent