



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 303 OF 2016

**BETWEEN**

ABOUD SULEIMAN SALIM.....CLAIMANT

**VERSUS**

KENYA POWER & LIGHTING COMPANY LIMITED...RESPONDENT

RULING

1. The Claimant was employed by the Respondent State Corporation as a General Worker Grade II (Cleaner), at Lamu, with effect from 15<sup>th</sup> October 1984. He was later promoted, becoming Artisan 1 and Team Leader.
2. He was suspected of committing, arrested and tried in a Criminal Court for, the offence of corruptly soliciting for a benefit contrary to Section 39(3)(a) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. He was acquitted on 5<sup>th</sup> March 2009.
3. He was dismissed by the Respondent while the criminal trial was on-going, on 21<sup>st</sup> May 2008.
4. He filed Petition Number 22 of 2011 against the Respondent, at the High Court in Mombasa, on 18<sup>th</sup> April 2011, seeking the following orders:-
  - (a) Respondent's withholding of his half salary during the criminal trial was unfair administrative action.
  - (b) Failure to reinstate him upon acquittal was unconstitutional.
  - (c) The Respondent is ordered to pay all pending salaries and allowances to the Petitioner.
5. In a Judgment dated 13<sup>th</sup> March 2015, Hon. Judge Edward Murithi declared the matter to fall within the exclusive province of the Employment and Labour Relations Court. He made an order for transfer. The matter was registered as Petition Number 3 of 2015 at the recipient Court.
6. The Advocates for the respective Parties appeared before this Court on 25<sup>th</sup> May 2015 for directions. They indicated they wished to have the matter disposed of through oral evidence. They were directed to

amend their Pleadings, to conform to the Industrial Court (Procedure) Rules 2010. Hearing was rescheduled for 9<sup>th</sup> September 2015.

7. The Parties were not ready to be heard on 9<sup>th</sup> September 2015, and had not amended their papers. The matter was stood over generally, with the order that Parties would move the Court when ready.

8. On 15<sup>th</sup> April 2016, the Claimant filed the Cause herein, seeking the same remedies as sought in the Petition.

9. The Respondent filed a Statement of Response on 20<sup>th</sup> June 2016. Accompanying the Statement is a Notice of Preliminary objection, raising the following grounds:-

(a) The Suit is statutorily time barred pursuant to Section 90 of the Employment Act, and the same ought to be struck out with costs.

(b) The Suit is in abuse of the process of this Court in view of Petition Number 3 of 2015, between the Parties, which is pending before this Court.

10. The Claimant filed an Application on 3<sup>rd</sup> February 2017, asking the Court to consolidate Petition Number 3 of 2015 and the Cause herein.

11. The Objection by the Respondent, and the Application by the Claimant, were both heard on 13<sup>th</sup> February 2017.

***The Court Finds:-***

12. The Cause herein was filed through misapprehension by the Claimant, of the procedural directions issued upon transfer of the Petition from the High Court to the E&LR Court.

13. Parties were to amend their Pleadings to align them with the procedure governing E&LR Court proceedings. They were not to go about this by filing of fresh Claim.

14. If there was no clarity on the way forward, the Parties should have reverted to the Court for further directions, under Petition Number 3 of 2015.

15. As has been pointed out by this Court in the past, transfer of matters from the High Court to the E&LR Court is not without legal hurdles, particularly as there is no procedural law governing how transferred matters should be dealt with. The High Court and the E&LR Court are regulated by different rules of procedure.

16. Directions issued by the Court upon transfer, therefore follow discretion of Individual Judge. There are Parties who are able to agree on a clear mode of proceeding upon transfer.

17. A Petition filed under the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (Mutunga Rules), should have no challenges on transfer from the High Court to E&LR Court, as these Rules specify 'High Court' to include Courts with Equal Status.

18. The Petition at the High Court was filed under the Practice and Procedure Rules of 2006, which did not extend to the E&LR Court, (then Industrial Court of Kenya).

19. Civil Claims transferred from the High Court to the E&LR Court are normally initiated and processed up to the point of transfer, under the Civil Procedure Rules. Upon transfer the undersigned has been directing Parties to amend Pleadings to reflect entry of the transferred Claim into the realm of E&LR Court Procedure Rules.

20. These are challenges of various transitions taking place within our Court System. Courts in exercising their respective mandates, have an obligation to act in comity and co-operation, recognizing there is no single and seamless procedure regulating how the Courts interact.

21. Parties likewise must assist the Court, and assist each other, in achievement of expeditious administration of justice.

22. While the Cause herein should not have been filed, the Court views its filing as a result of the shortcomings pointed out above, in the procedure to be applied in transfer, processing and proceeding with a Claim, from one legal regime to another.

23. The Claimant initiated the Petition at the High Court, well within the timelines that would have applied to him, had he approached the E&LR Court with a direct Claim, under the Employment Act 2007.

24. The Petition at the High Court, the Petition at the E&LR Court, and the Claim herein are essentially one dispute. The Claimant instituted his Claim, but in the wrong Court, within 3 years applicable to employment Claims. Subsequent actions were in continuation of the dispute, rather than what would be deemed in strict sense, as commencement of fresh Claims.

25. To find the Cause herein to have been filed out of time, and to order it is struck off, would not assist the Parties in resolving the substantive dispute. The issues in the Petition and the Cause are the same. The Cause serves the same purpose the amendment of the Petition would have served. It clarifies the procedure, without compromising Parties' substantive positions.

***IT IS ORDERED***

***a) Petition Number 3 of 2015 and Cause Number 303 of 2016 are hereby consolidated.***

***b) Hearing and disposal of the matter to proceed under Cause Number 303 of 2016.***

***c) Parties shall set down the Claim for hearing upon complying with Rule 15 of the E&LR Court (Procedure) Rules 2016.***

***d) Costs to the Respondent, as conceded by the Claimant.***

**Dated and delivered at Mombasa this 24<sup>th</sup> day of March 2017.**

**James Rika**

**Judge**