REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1169 OF 2012

BETWEEN

PETER LICHUNGU …………………………………………………………………………….. CLAIMANT

VERSUS

KENYA POWER AND LIGHTING COMPANY ……………………………………… RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Weloba Advocate instructed by Cootow & Associates, Advocates for the Claimant

Mr. Okeche Advocate instructed by the Federation of Kenya Employers [F.K.E.] for the Respondent

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RULING

1. This dispute comes up for a ruling, on a preliminary challenge raised by the Respondent, based on the law of time limit on filing of employment Claims, imposed by Section 90 of the Employment Act 2007. The law is in the following words:

‘’*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.*’’

2. There is agreement that the Claimant was employed by the Respondent on 2nd January 1997 as Supplies Officer 3. The Respondent terminated the Claimant’s contract of employment with effect from 21st May 2008 under Clause 13 of the contract, which allowed either party to terminate the contract by written notice of three months, or payment of salary of three months in lieu of such notice. The Claimant was dissatisfied with the decision made by the Respondent and filed Claim on 11th July 2012. He avers that the Respondent breached Sections 41, 43 and 45 of the Employment Act 2007, and seeks the following orders-:

a. Reinstatement without loss of salary and benefits;
b. Back salaries from May 2008 to the date of reinstatement, with interest at commercial rates;

c. Costs of and incidental to the Claim; and
d. Any other award the Court may deem fit to grant.

3. It is conceded by the time the Claim was filed, the time given for filing of the Claim from the date of termination, of three years had lapsed. The Respondent submits the Court is compelled to enforce the law under Section 90, and supported this argument through the past rulings of the Industrial Court on the subject.

4. The Claimant explains that the preliminary challenge is misplaced. The cause of action only arose upon the completion of the internal disciplinary appeal process. After termination the Claimant launched a series of appeals, the last of which the Respondent answered to, on 11th February 2010. Time did not start running therefore, until 11th February 2010, when the Respondent sealed the Claimant's fate, to use the Claimant's words.

The Court Finds and Orders-:

5. It is clear termination of the Claimant's contract of employment occurred on 21st May 2008, while the Employment Act 2007, legally entered into operation on 2nd June 2008. The Claimant did not show that the appeals he wrote to the Respondent were made under any clause in the contract of his employment. The Court was not directed to any clause in the contract of employment, or human resource procedure and/or policy manual, which had the effect of staying the decision made on 21st May 2008 pending appeal. The Claimant wrote several appeals, none of which was shown to have been based on a specific contractual or legal provision. It would be difficult for the Court to know how many appeals were allowed, which was the first or last appeal, and if the argument by the Claimant is correct, when time would begin or stop running. Employees would just write numerous letters of appeal after termination, to circumvent time limit, if the position taken by the Claimant is to be upheld.

6. The Court has in the past stated that where the contract, or the law clearly requires the employee to appeal the decision of the employer on termination, such an appeal, and exhaustion of the internal appellate procedures, must be allowed to take their course. Where the employee has sought reprieve in a recognized non-adjudicatory dispute settlement mechanism, the Court may consider the time to have stopped running. Time would be deemed to start running when a final decision under the internal processes or under the non-adjudicatory dispute settlement mechanisms, has been rendered. As submitted by Mr. Weloba, parties in resolution of trade disputes, not only under the Constitution of Kenya 2010, but preceding this era, are encouraged to settle outside the Court. If settlement can be achieved through the internal appellate procedures, the Court may aid such settlement by a liberal approach on the running of time.

7. The Claimant pleads the Employment Act 2007 in seeking his remedies, and the law of limitation under Section 90 generally bars him from coming to Court 4 years after he left employment. He did not show the Court that there were other mechanisms, based on his contract of employment, or the law governing his contract of employment, which compelled him not to come to Court before their exhaustion. There is no basis for the Court to find that time at one point, stopped running from 21st May 2008. Such a consideration would only be made, based on clear contractual or legal provisions. The Claimant cannot plead the Employment Act 2007 on breach and remedies, while avoiding the effect of Section 90 of the same Act on his Claim***. The Court finds the Claim is improperly before it, and is dismissed with no order on the costs.***

Dated and delivered at Nairobi this 30th day of January 2014

James Rika

Judge