IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MUSINGA, (P), MUMBI NGUGI & TUIYOTT, JJ.A.)

CIVIL APPEAL NO. 657 OF 2019

BETWEEN

FRANCIS KIMANI KIIGE.....APPELLANT

AND

THE NATIONAL HOSPITAL INSURANCE FUND … RESPONDENT

*(Being an appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Nairobi (**Byram Ongaya, J**.) delivered on 16th November 2018*

in

ELRC Cause No. 376 of 2015)

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JUDGMENT OF THE COURT

[1] In a judgment dated 16th November 2018, **Ongaya, J.** (as he then was) held as follows:

> ***"The Court returns that the administrative appeal process did not stay or defer or adjourn the running of the time of limitation.***
>
> ***Hence the Court returns that the present suit was time barred."***

This holding is called into question in the appeal before us.

[2] Prior to a termination communicated in a letter of 17th September, 2007, Francis Kimani Kiige (**the appellant**), was employed by the now defunct National Hospital Insurance

Fund (NHIF). The letter terminating his services gave the appellant an opportunity to appeal against the decision within twenty-eight (28) days of the letter. Ten (10) days later, on 27th September, 2007, the appellant wrote to the Chief Executive Officer of NHIF appealing against the decision.

[3] The determination of the appeal was slow in coming and this forced the appellant to take out judicial review proceedings being **Nairobi Misc. Application No. 13 of 2009** to compel NHIF to give a verdict on the appeal. The cause was successful and on 27th March, 2012, **W.K. Korir, J**. (as he then was), directed NHIF to give the appellant a decision on his appeal against dismissal within 60 days from the date of the judgment. Before the end of the deadline, the Chief Executive of NHIF, in a letter of 25th April, 2012, communicated the decision of its Staff Advisory Committee disallowing his appeal for lack of merit.

[4] Aggrieved, the appellant moved the Employment and Labour Relations Court (ELRC) at Nairobi on 13th March, 2015 challenging the termination and sought special, general and exemplary damages. The matter went to full hearing but the learned trial judge decided the matter on

the basis of

limitation of actions and found the appellant's claim to be time barred.

[5] Although the appeal was filed on the basis of five (5) grounds, the appellant collapsed them to two, contending that the judge erred in law;

(i) in deciding the suit on issues not canvassed by the parties;

(ii) and fact, by finding that the suit was time barred.

[6] At plenary hearing of the appeal, learned counsel, **Mr Kimani**, appeared for the appellant, while learned counsel, **Ms Katila,** represented NHIF. Both highlighted written submissions filed on behalf of their clients.

[7] On the first ground, the appellant submitted that the issue of limitation was neither pleaded nor canvassed by the defence, and the court is bound by the pleadings and issues framed by the parties (**Charles C. Sande v Kenya Co-Operative Creameries Limited, Civil Appeal No. 154 of 1992 (unreported)** and **Bhang Bhari v Medhi Khan (1964) 2 EA 94)**. We were also referred to **Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139**, for emphasis

that cases must be decided on issues on record. It is argued that

by determining the suit on an uncanvassed issue, the trial court condemned the appellant unheard, contrary to Article 50 of the Constitution. While acknowledging that the issue of limitation is a jurisdictional one which a judge has the right to consider, the appellant cites **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR)** for the proposition that it should be raised at the earliest opportunity and be evident in the pleadings. The appellant posits, further, that limitation acts to bar a claim or remedy, not to extinguish the suit or action itself (**Iga v Makerere University (1972) EA 65** and **Dhanesvar v Mehta vs Manilal M. Shah [1965] EA 321**).

[8] On the second ground, counsel for the appellant cites **Letang vs. Cooper [1964] 2 All ER 929** and **Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688** where a cause of action was defined as a factual situation entitling a person to a remedy or an act by the defendant giving a plaintiff a cause for complaint. It does not arise where a decision which one cannot complain on has been

rendered. The appellant argued that he diligently followed the internal administrative process, including an appeal against his

termination as per the Employee Code of Conduct. It is contended that this period and the period when he was pursuing Judicial Review to compel a decision on his appeal, should be deemed to be frozen. The appellant seeks support in **Hawkins Wagunza Musonye v Rift Valley Railways Kenya Limited [2015] KEELRC 950 (KLR)** which recognized that labour disputes go through a multiplicity of dispute resolution mechanisms and during which time may be deemed to be frozen.

[9] In response, regarding jurisdiction, NHIF contends that the trial judge correctly exercised his judicial mandate by downing his tools when he dismissed the suit (**Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (supra)** and **Re: The matter of the Interim Independent Electoral Commission (Constitutional Application 2 of 2011) [2011] KESC 3 (KLR)**).

[10] Concerning whether the suit was time-barred, NHIF recalled that the appellant was dismissed by a letter dated 17th September, 2007, effective 20th March, 2007. It is

contended that the judge correctly observed that the Employment Act, 2007 had not yet commenced and the applicable provision

governing time was section 4 of the Limitations of Actions Act Cap 22, which limits the institution of an action in contract to six (6) years from the date the cause of action arises. In support, NHIF cites **Gathoni v Kenya Co-operative Creameries Ltd [1982] KECA 10 (KLR)**, in which it was observed that the law of limitation is intended to protect defendants against unreasonable delay and expects plaintiffs to take reasonable steps in their own interest. NHIF submitted that the existence of administrative remedies did not stop the running of time, citing **Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye and another [2016] KECA 213 (KLR)** for the holding that "*time does not stop running merely because the parties are engaged in out of court negotiations*". It is the position of NHIF that the dismissed employee need not have awaited the outcome of the internal appeal process as the appellant had a clear cause of action upon receiving the letter of termination. Cited in support is the decision of Waki, JA. in **Attorney General & another v Andrew Maina Githinji & another [2016] KECA**

817 (KLR).

[11] The issues raised in this appeal are questions of law which must be determined on the basis of the material that was before the trial court. For reasons that will become apparent shortly, we begin with the second ground of appeal.

[12] At the time of his dismissal, the appellant was a clerical officer at NHIF. He was arrested on 29th October, 2003 in connection with a fraudulent claim and charged for irregularly issuing certification of contributions paid (CCP) book to a firm not registered with NHIF. He was placed on suspension through a letter dated 17th November, 2003, the suspension being effective from 1st November, 2003. In a letter of 10th January, 2005, the CEO of NHIF informed him that the management contemplated taking severe disciplinary action against him for his conduct and invited him to show cause why such action should not be taken. He responded, denying the allegations and asserting that he would leave it to a court of law to make a decision on the allegations.

[13] In a letter of 17th September, 2007, the CEO of NHIF informed the appellant that the Staff Advisory Committee had, in a meeting of 20th March, 2007, resolved to terminate his

services with effect from the date of the meeting (20th March, 2007) due to loss of trust. The letter closes with the following words:

> ***"However, you are hereby given an opportunity to appeal against this decision within twenty-eight (28) days from the date of this letter, failure to which, it will be assumed that you have no more defence to offer, and the matter shall be treated as concluded."***

[14] Clause 14.21 of the Employee Code of Conduct sets out the forms of punishment that can be meted out on an employee as a result of disciplinary proceedings under the Code. One such punishment is termination of services (14.21.1). Sub- clause 14.21.5 on appeals provides:

> ***"Appeals***
>
> ***An employee to whom punishment has been meted by a Senior Officer including a Sectional Committee/Departmental Committee, the Chief Manager Personnel and Administration, the Personnel Advisory committee or the Chief Executive, and is dissatisfied with the decision or the punishment, shall have the right to appeal to the next higher authority, thus: -***
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> ***(a) against the decision of the Departmental committee to the Personnel Advisory committee through the Chief Manager Personnel and Administration;***
>
> ***(b) against the decision of the Chief Manager, Personnel and Administration and/or the***

Personnel Advisory committee to the Chief executive; and

(c) against the decision of the Chief Executive to the Chairman, of the Board of Directors.

Any such appeal must be made in writing within fourteen days from the date of the punishment, and shall be heard and decided on as early as possible."

[15] The invitation by the CEO to the appellant to file an appeal against termination must be seen in this context. It was a right provided for in the Code and therefore in the contract of employment. This has a significance that we shall return to.

[16] The appellant timeously appealed against the decision through a letter of 27th September, 2007. On 8th November, 2007, the CEO informed the appellant that his appeal would be forwarded to the Staff Advisory Committee for deliberations and the outcome communicated to him. To be observed is that under the provisions of the Code, an appeal is to be "*heard and decided on as early as possible*." Here, although the decision to disallow the appeal was made on 23rd May, 2008, it was not until four (4) years later, on 25th April, 2012, that the decision was communicated to the appellant. And only then under the compulsion of a writ of

mandamus.

[17] Can it then be said that this litigation proceedings commenced on 13th March, 2015 were time barred?

[18] We agree with counsel for the appellant that the answer lies in when the cause of action accrued as this has a direct bearing on when time started running for purposes of limitation. Would it be when the first communication of termination was received by the appellant or when he received the letter advising him that his appeal against termination had been disallowed?

[19] We accept that as defined in ***Drummond Jackson***, a cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.

[20] It is of course true that the letter communicating the decision to terminate the contract was dated 17th September, 2007. While it may not be clear when it was received by the appellant, he responded to it on 27th September, 2007. Ordinarily, therefore, the cause of action would have arisen at least by 27th September, 2007 when it was obvious that he was aware of the termination.

[21] It may not be so here as the Code of Conduct under which the employee operated gave him a right of appeal against a

decision of termination. Indeed, the letter of termination invited the appellant to utilise the right of appeal. In its preamble (sub-clause 14.1), the Code declares that it *"constitutes an integral part of the TCS and must be read alongside them".* TCS is an abbreviation of 'Terms and Conditions of Service'. The Code of Conduct was therefore part of the terms and conditions of service of the appellant and his contract of employment. As a corollary, the right of appeal was a right that was embedded in the contract of employment. Failure to pursue the right and to instead commence court proceedings directly would be failure to exhaust the internal disciplinary process available to the appellant under the contract of employment. This would be even more pronounced here because the employer had expressly invited the employee to exhaust his right of appeal.

[22] To be deduced is that the termination communicated through the letter of 12th September, 2007 was tentative until the right to appeal was either waived or exhausted. Up to that point, there was no real grievance that could found a cause of action. This right of appeal is distinguishable from pursuit of out of court negotiations which are not provided or required

in a contract of employment or as held by this Court in ***Rift Valley Railways (Kenya) Ltd*** that are not "*court-based and conducted within the law*".

[23] So too is this matter distinguishable from the decision of this Court in ***Andrew Maina Githinji*****.** There, the respondent chose to await the outcome of criminal proceedings before mounting a civil claim for unfair or wrongful termination and in the process breached limitation. The majority (**Waki** and **Kiage, JJ.A.**) held that the outcome of the criminal proceedings was not a prerequisite for a claim for unlawful or wrongful dismissal as the cause of action did not arise upon the acquittal of the plaintiff in a criminal trial. Here, it is common ground that the decision disallowing the appeal against termination was not communicated until 20th April, 2012. It was only then that the appellant could be said to be truly aggrieved, hence the accrual of a cause of action.

[24] The cause of action having accrued on 25th April, 2012 and not in 2007, the applicable statute on that date was the Employment Act, 2007 which commenced on 2nd June, 2008. Section 89 on limitation provides:

"Limitations

> ***Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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."***

[25] The appellant's suit, filed on 13th March, 2015, was on time as it was instituted within three years after the cause of action arose. We must therefore fault the decision of the trial court. This finding alone is dispositive of this appeal.

[26] For this reason, we need not consider the first ground of appeal which sought to impeach the decision as being based on a matter that was neither pleaded nor arose in the hearing. This is also another reason why we avoid determining that ground. The parties approached it on the basis that the trial court was correct in holding that the applicable law was the provisions of the Limitations of Actions Act and not the provisions of limitation in the Employment Act, 2007. We have found this to be incorrect. We do not know whether the arguments by the parties would have been different if they addressed the issue of limitation in the context of the provisions of limitation in the Employment Act, 2007. We are

reluctant to make a decision without the benefit of those arguments.

[27] In the end, we allow the appeal and set aside the judgment of 16th November, 2018. We remit the matter to the ELRC for disposal on the basis that it was filed on time. The court (a judge other than **Ongaya, J**. (as he then was)) shall decide whether to hear the matter *de novo* or to dispose of it on the evidence on record. We further direct the ELRC file together with this judgment be placed before the Presiding Judge of the ELRC within **14** days of this decision for directions on expedited hearing.

Dated and delivered at Nairobi this 20th day of February 2026.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.