

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E126 OF 2025

TEACHERS SERVICE COMMISSIONAPPELLANT

VERSUS

STEPHEN KITUU MUTISO.....RESPONDENT

*(Being an Appeal from the Ruling and Orders of the Hon. T. Orlando (PM)
delivered on 2nd April, 2025 in Nairobi CMELRC E958/2024)*

CORAM

Before Lady Justice J. W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling and Orders of the Hon. T. Orlando (PM) delivered on 2nd April, 2025 in Nairobi CMELRC E958/2024 between the parties filed a memorandum of appeal dated the 23rd of April 2025 seeking the following orders:-
 - a) This appeal be allowed with costs.
 - b) The Ruling of Hon. Tom Orlando in NAIROBI CMELRC E958 OF 2024 delivered on 2nd April 2025 and all consequent orders be set aside and substituted with an order upholding the preliminary objection and striking out the Claimant's case with costs.

GROUND OF THE APPEAL

2. The Honourable Trial Magistrate erred in law and fact in finding that the Respondent's claim was not time-barred under the mandatory provisions of Section 89 of the Employment Act.
3. The Honourable Trial Magistrate erred in law and fact in holding that the cause of action arose and started running on 15th July 2022 and not 12th November 2020.
4. The Honourable Trial Magistrate erred in law and fact in equating an appeal/review to a conciliation process under the Labour Relations Act.
5. The Honourable Trial Magistrate erred in law and fact by insinuating that the lacking conciliation process or appeal of the initial decision issued by the Appellant would be an exemption of the application of section 89 of the Employment Act.

BACKGROUND TO THE APPEAL

14. The Respondent filed suit vide a statement of claim dated 30th May 2024 seeking the following orders:-
 - a) A declaration that the disciplinary proceedings against the Respondent were done in gross violation of the Claimant's rights to fair administrative action and fair hearing under Article 47 and 50 of the Constitution of Kenya hence the same is illegal null and void *ab initio*.
 - b) A declaration be and is hereby issued that the dismissal of the Claimant was unfair and unlawful for want of procedural and substantive fairness.

- c) An order directing the Respondent to reinstate the Claimant to his position without loss of status/benefits and to pay him any accruing salary and benefits from the date of his interdiction and termination of employment.
- d) One month's salary in lieu of notice.
- e) 12 month's salary as compensation for unfair dismissal.
- f) Costs of the suit.
- g) Interest on the above at court rates from date of judgment till payment in full.
- h) Any other relief that this Honourable Court may deem fit and just to grant (pages 5-9 of Appellant's ROA dated 2nd July 2025).

15. In support of the claim, the Respondent filed a list of witnesses dated 30th May 2024, a witness statement of the same date, and a list and bundle of documents of the same date (pages 12-64 of ROA).

16. In response to the claim, alongside their defence dated 8th May 2025, and list and bundle of documents of even date (pages 67-173 of ROA), the Appellant filed a notice of preliminary objection dated 24th June 2024 (page 174 of the ROA).

17. Through the said preliminary objection dated 24th June 2024, the Appellant challenged the jurisdiction of the court to hear and determine the claim, on the premise that the same was time-barred contrary to Section 90 of the Employment Act.

18. The court issued directions that the preliminary objection be disposed of by way of written submissions. The parties complied (pages 175-191 of ROA)
19. The Trial Magistrate Court delivered its ruling on the 2nd of April 2025, dismissing the Appellant's preliminary objection for the reason that there was a pending appeal filed by the Respondent herein challenging his termination from employment, which was determined in July 2022. The trial court held that time, for purposes of computation of the three (3) year limitation period established by Section 90 of the Employment Act 2007, began running after the determination of the appeal (ruling at pages 194-195 of ROA).

DETERMINATION

20. The appeal was canvassed by way of written submissions. Both parties filed.

Issues for determination

21. In their submissions dated 24th November 2025, the Appellant submitted generally on the grounds of appeal.
22. On his part, the Respondent identified the following issues for determination in his submissions dated 3rd December 2025.
 - i. Whether the present appeal is proper and whether this Honourable Court can consider the same as urged.
 - ii. Whether the appeal is merited.

23. The court, on perusal of the grounds of appeal and submissions, discerned that the issue for termination in the appeal is whether the trial court erred in failing to find the claim was time-barred.
24. The impugned decision arises from the ruling of Hon. Tom Mark Orlando (Trial Court), delivered on 2nd April 2025, on the preliminary objection by the appellant dated 24th June 2024. The Notice of Preliminary Objection was follows-*'The Respondent herein shall at the hearing hereof raise and argue a Preliminary Objection on the grounds that the Claimant's Claim herein is time barred and grossly offends the mandatory provisions of Section 90 of the Employment Act No. 11 of 2007 and shall pray that the entire Claim be struck out with costs to the Respondent.'* The parties submitted on the Notice of Preliminary Objection, and the trial court, in a ruling dated 2nd April 2025, held as follows- *'I have considered the application together with the submissions and replying affidavit and I find that indeed the suit was filed more than three years after the cause of action arose, which is against the law, as the time limit is three years. However, the respondent in his affidavit states that he had filed an appeal, which was dismissed in July 2022. The applicant did not deny that the claimant had appealed, and the appeal was only determined in July 2022. As stated in the case of KNPSWU VS The Watchdog Limited Nairobi ELRC NO. 1308 OF 2017, it is true that once a dispute is submitted for conciliation by the minister and a conciliator appointed, the pace and conclusion of the conciliation process are beyond the control of the claimant, and it would be unfair to include the period spent during conciliation in reckoning limitation. Since it is not denied that the delay was as a result of the appeal which had been filed by the claimant, I find that the time only starts to run after the determination of the*

appeal. I thus find that the suit is not time bared and the preliminary objection lacks in merit. The same is dismissed for want of merit Cost to be in the cause.”

25. The appellant was aggrieved by the decision and raised various grounds of appeal, the gist of the appeal being whether the trial court erred in failing to uphold the preliminary objection.
26. The question at the heart of the appeal is when the cause of action arose for the time to start running. First, the court states that the preliminary objection was based on section 90, which, vide amendments of the Employment Act in 2022 (Employment (Amendment) Act, 2022 (Act No. 15 of 2022) on 22 April 2022]), now reads section 89 of the Employment Act. The court will not delve into the issue of whether section 89 was pleaded, as submitted by the respondent, which issue the court opines is a mere technicality, as only the numbering of the law changed; the content of section 90 was retained in the amendment. *Section 89 (formerly 90) reads as follows- “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.”*
27. The appellant submitted as follows- The Appellant submits that the suit before the Learned Magistrate is time barred by virtue of the provisions of Section 89 of the Employment Act. Accordingly, the Magistrate has no jurisdiction to preside over the suit. The Respondent's service was terminated with effect from 29 October 2020 and the decision communicated

vide a letter issued on 12 November 2020. Therefore, the cause of action in the matter arose on 12 November 2020 when the Appellant informed the Respondent (Page 138 and 139 of the record of Appeal) of his dismissal and removal from the register of teachers. Accordingly, the Respondent ought to have challenged the decision within three (3) years from 12 November 2020 which expired on 12 November 2023. Regrettably, the Claimant's suit was filed on 30 May 2024 six months after time lapsed, hence it is time barred. The law is now settled that no cause of action founded on a contract of employment under the Employment Act, 2007 can be brought after three years from the date the cause of action accrued. In *Msa Industrial Court Petition 1 of 2013 Josephat Ndirangu v Henkel Chemicals (EA) Ltd* [2013] eKLR the Court held thus; "To my mind, similar principles in respect of what the Court of Appeal stated about section 4(1) of the Limitation of Actions Act apply in respect of section 90 of the Employment Act and I would for the sake of clarity state that no employee has the right or power to bring after the end of three years from the date of dismissal or termination, an action founded on a contract of service and that the Industrial Court has no right or power to entertain such claims or extend time for bringing such action. I state so bearing in mind that the Employment Act, 2007 has no provision for grant of leave to institute claims out of time or to extend time within which to commence such actions". Similarly, in *Maxwell Sifuna v Teachers Service Commission* [2022] eKLR this Court held that: "The provisions of Section 90, Employment Act, 2007 on limitation of time is a juridical issue and not discretionary. The Court has no choice but to down its tools in the matter. The Court has no jurisdiction to issue prayers sought under the Petition for the claim is time barred. The Petitioner was dismissed from service on the January 19, 2017 and filed the Petition on the June 4, 2021 outside the three year limitation period under Section 90 of

the Employment Act, 2007." The provisions of Section 89 of the Employment Act are mandatory and based on a sound legal foundation to ensure an employee whose rights have been violated is able to get appropriate redress within 3 years of termination and for the employer to be protected against indolent claimants who unreasonably delay filing suits. The learned Magistrate erred in law and fact by holding that the cause of action for the claim arose and started running on 15th July 2022 and not 12th November 2020. The accrual date of the cause of action has a direct bearing on running of time. The Appellant submits that the cause of action accrued on 12th November 2020 when the letter of dismissal was issued to the Respondent and not 15th July 2022 when the Commission conveyed the Appeal/Review decision. Indeed in his ruling the learned magistrate acknowledged that the claim had been filed more than three years had passed after the cause of action arose thus was against the law. However, he went on to find that time started running after determination of the appeal (Page 194 of the Record of Appeal). It is the Appellant's submission that the Appeal/Review process did not stay the dismissal decision and the Respondent was entitled to file a claim once the dismissal decision was conveyed vide letter dated 12th November 2020. He had a cause of action at the time of dismissal and not when his appeal/review decision was made. Reliance is made on the Court of Appeal decision in G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR where the court held that: "Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law." See also Malindi Civil Appeal No. 39/40 Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another [2016] Eklr. Thus, the Appellant submits that the learned magistrate erred in finding that time started running after the appeal decision thus inferring that an appeal/review was

an exemption to the application of Section 89 of the Employment Act. The Learned Magistrate erred in law and fact in failing/declining to consider the Appellant's submissions and authorities on the Preliminary Objection which raised substantial issues of law. The Appellant submits that the Learned Magistrate did not consider its submissions on the preliminary objection which produced authorities from the High Court on accrual of time in employment matters. The Magistrate's Court was bound with that decision which would have properly aided the Learned Magistrate in making his Ruling. The Learned Magistrate erred in basing his decision on the letter dated 15th July 2022 which conveyed the appeal decision. In attaching weight on the letter of the appeal decision the Learned Magistrate failed to appreciate the holding in Nrb Industrial Cause No. 1375 of 2012 Hillarion Mwabolo v Kenya Commercial Bank [2013] eKLR.19. In conclusion, the Appellant submits that the decision to dismiss the Respondent was communicated to him on 20th November 2022. He had the right to approach the Court to either quash or challenge the impugned decision within the time provided under statute but he did not and the Claim is time barred. Accordingly, the Respondent's suit is time barred thus we pray that the appeal be allowed, the preliminary objection upheld and Claim dated 30th May 2024 struck out.

28. Conversely, in opposition to the appeal, the respondent submitted on whether the appeal is merited as follows- Even if the Honourable Court were to infer that the Appellant's appeal was meant to be a challenge on the subordinate court's finding on section 90 of the Employment Act instead of section 89 as expressly pleaded in the Memorandum of Appeal, it is our humble submission that the said appeal would still be devoid of merit. From the very onset , it is not in dispute that the Respondent was the Appellant's employee, that he

was terminated and/or that he lodged an appeal challenging his dismissal as per the Appellant's own internal dispute resolution mechanisms. The issue that would then arise in this appeal for determination is whether the Preliminary Objection as was raised by the Appellant was merited and whether the subordinate court erred in dismissing the same. In addressing this issue, the relative question that then arises is the application of Section 90 of the Employment Act, 2007 vis-à-vis the date when the limitation period began to run. It is our humble submission that the Appellant's assertion that the Respondent's claim before the subordinate court is time-barred hinges on an incorrect computation of time. Section 90 mandates that the limitation period runs from the date of the "act, neglect, or default complained of" or from the "cessation of a continuing injury." The Respondent's dismissal became effective on October 29th, 2020, and the appeal process concluded on July 15th, 2022. The limitation period should therefore clearly run from the latter date, as the appeal and internal review processes constituted an internal Dispute Resolution Mechanism to which the Appellant was mandated to exhaust under the doctrine of exhaustion before moving a court of law for redress. There is indeed evidence on record that it is this dispute resolution mechanism that occasioned the said delay. This interpretation aligns with the decision in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR, where the Court held that such an allegation of pursuing internal dispute resolution mechanism must be backed by evidence. The Court held as follows; On the respondent's contention that the parties were undergoing a conciliation process which occasioned a delay in the respondents' filing suit pending the outcome of the conciliation process, we note that there is no documentary evidence to prove that contention. Indeed, there appears to have been no evidence to prove this fact before the learned Judge. From the above Court of

Appeal decision, it is evident that where there is evidence confirming that there was an internal dispute resolution mechanism ongoing, then computation of time must be looked at through the length of the said internal dispute resolution mechanism. For emphasis, Section 159 of the TEACHERS SERVICE COMMISSION CODE OF REGULATIONS FOR TEACHERS states as follows with regards to termination of teachers from the Respondent's Employment vis a vis the time when the employment contract ceases to exist; The Commission may upon concluding disciplinary proceedings, dismiss a teacher on the grounds contemplated under Part XI which dismissal shall take effect from the date of the determination of the disciplinary proceedings. The Teachers Service Commission (TSC) Code of Regulations for Teachers provides clear guidance on the termination of a teacher's employment following disciplinary proceedings. Specifically, it states that a teacher's dismissal takes effect on the date the disciplinary proceedings are determined. This provision is particularly relevant to the matter before this Honourable Court, as it directly informs the date on which the employment relationship between the Appellant and the Respondent was severed. In this case, the Respondent's dismissal was communicated as effective October 29th , 2020, but the Appellant's disciplinary process continued beyond this date, culminating in the rejection of the Respondent's appeal on July 15th , 2022. By the Appellant's own regulations, the employment contract can only be deemed to have ceased upon the conclusion of the disciplinary process, which must of course include the determination of any appeal lodged by the affected teacher. Accordingly, the effective date for calculating the limitation period under Section 90 of the Employment Act is July 15th, 2022, when the disciplinary process was finalized. It is thus our humble submission that the Appellant's reliance on the date of dismissal as the starting point for limitation is misplaced

and contrary to its own Code of Regulations. The Respondent acted in good faith by exhausting internal remedies before seeking redress in a Court of law as courts of law themselves have resound times without a number that the same ought to be done. In particular, the Court of Appeal held as follows in *Muthinja & another v Henry & 1756 others* (Civil Appeal 10 of 2015) [2015] KECA 304 (KLR), “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution. We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs’ disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.” Therefore, we urge this Honourable Court to find that the claim was filed within the statutory period, as the limitation period commenced on the date the disciplinary proceedings were conclusively determined, in line

with the TSC Code of Regulations for Teachers which entailed the internal appeal process. The doctrine of exhaustion is a indeed well-established principle in law that requires parties to fully utilize all available and prescribed remedies within a particular framework or institution before seeking redress from a court of law. This doctrine is rooted in the principles of judicial economy, procedural efficiency, and the need to allow specialized bodies the opportunity to resolve disputes within their jurisdiction. We urge this Honourable court to be persuaded by the decisions in *D.T Dobie Company Kenya Limited v Muchina* 1982 KLR 1 at page 6; the case of *Speaker of the National Assembly v Karume* (1992) KLR and *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 Others* (2015) eKLR, where the Courts upheld the doctrine of exhaustion. It thus our submission that the delay in filing the suit was caused by the Respondent who failed to render its decision in good time. The above-mentioned cases affirm the critical importance of exhausting internal or alternative dispute resolution mechanisms before invoking the jurisdiction of the courts. In *D.T. Dobie*, the Court emphasized that the judiciary must only be approached when other mechanisms have been utilized and failed to provide resolution. Similarly, in *Speaker of the National Assembly v Karume*, the Court underlined that where a specific procedure is prescribed by law or regulation, it must be strictly adhered to before a party can approach the courts. *Geoffrey Muthinja Kabiru* further reinforced this position by clarifying that parties cannot bypass alternative remedies unless they can show that such remedies are unavailable, inadequate, or inappropriate. In the present case, the Respondent diligently pursued the internal disciplinary and appellate mechanisms provided by the Appellant, acting in line with the principle of exhaustion. He adhered to the doctrine of exhaustion by pursuing the Appellant's internal disciplinary process and appeal mechanisms in good faith.

The Appellant's own procedures is not in dispute, indeed required the Respondent to appeal the decision to dismiss him, and he duly complied. These processes were not only mandatory under the Teachers Service Commission's (TSC) Code of Regulations but also consistent with Article 159(2)(c) of the Constitution of Kenya, which promotes the resolution of disputes through alternative mechanisms. It is our submission that the delay in filing this suit was not due to any inaction or negligence on the part of the Respondent but was instead caused by the Appellant, who failed to render its decision in a timely manner. The Respondent herein had not control of the same and was compelled to wait for the final determination of the internal processes, which only concluded on July 15, 2022, with the rejection of his appeal. As such, the only correct and just interpretation of computing time under section 90 of the Employment Act ought to be from the date the internal appeal process determined which indicates that it is at this point that a cause of action ripe for a court of law's consideration and determination had accrued. We submit that it would be contrary to justice and the doctrine of exhaustion to penalize the Respondent for the delay caused by the Appellant itself. It is trite that this being a court of equity, cannot allow the Appellant to benefit from its own wrongdoing as it is the source of the present circumstance. The courts in the cited cases have consistently upheld the principle that procedural fairness and the need to exhaust available remedies are integral to ensuring justice. Therefore, we urge this Honourable Court to find that the time taken to finalize the internal appeal process tolled the limitation period under Section 90 of the Employment Act, and that the Claimant filed this suit within the prescribed timeframe. It was is the Respondent's claim before the subordinate court that the Appellant grossly violated his constitutional rights, including the right to fair labour practices, the right to fair administrative action, and the right to a fair

hearing during the disciplinary proceedings culminating to his dismissal. As a result, the entire process was conducted in bad faith, rendering it fundamentally flawed and an abuse of due process. The Respondent further contends that the Appellant's actions have not only contravened the principles of justice but also caused severe harm to his professional reputation and career, which he diligently built over many years as a teacher. The Appellant's Preliminary Objection however seeks to drive him away from the seat of justice without being heard by dismissing the claim without allowing it to be heard on its merits when it was its own internal disciplinary process that culminated/resulted in the filing of the claim before the subordinate court when the Respondent did. The Claimant relies on the provisions of Article 159(2)(c) of the Constitution of Kenya, which encourage the resolution of disputes through alternative mechanisms. Initiating internal appeals as an alternative to direct legal action is consistent with this principle. It would therefore be inequitable and unjust for the Respondent's claim to be struck out as being timebarred when he was diligent in pursuing the internal dispute resolution mechanisms in good faith before moving the court. In light of the above, the Respondent submits that the limitation period under Section 90 of the Employment Act commenced upon the conclusion of the internal appeals process, and the suit was filed within the permissible timeframe. The Preliminary Objection should therefore be dismissed, and the matter should proceed to a full hearing on its merits.

29. The cause of action was defined in *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. (cited by

the Court of Appeal in Francis Kiamni Kiige v The National Hospital Insurance Fund (Nairobi Civil Appeal 657 of 2019) Judgment delivered on the 20th February 2026-UR).

30. The appellant issued the Respondent with the decision of dismissal dated 12th November 2020 which stated as follows- *‘Pursuant to the hearing of your discipline case held on 29/10/2020 I am directed by the Teachers Service Commission to inform you that, the Commission has carefully considered your case and has determined that you are guilty of the charges leveled against you and that you are hereby Dismissed with effect from 29/10/2020 for the following reasons:*

You breached clause a (i) of the third schedule of the act in that you are of immoral behavior in that you had sexual intercourse with Charity Ndeto Nzioki Admission number 4249, a Form Four (4) student of year 2019 at Precious Blood Secondary School Kilungu on 02/11/2018 in a lodging in Machakos town at around 12.00 p.m. while a teacher at Kaeani Primary School.

*As per the provision of Regulation 156 (4) of the Code of Regulations for Teachers, you have a right to appeal for review against the decision within ninety (90) days.’’ (page 30 of ROA). The claimant exercised the right of review as stated by the employer and lodged his review against the dismissal (pages 48-51 of ROA). The appellant issued its decision dated 15th July 2022 on the review as follows- *‘DECISION OF A REVIEW CASE**

Pursuant to the hearing of your review case held on 7/07/2022, I am directed by Teacher’s Service Commission to inform you that, after carefully considering case, it has been determined as follows:

1. Dismissal and Removal from the Register of Teachers Upheld

Please note that as per regulation 156 (9) of the TSC code of Regulations for Teachers, this decision of the Review Committee is final.”(page 59 of ROA)

31. The respondent then filed suit dated 30th May 2024 with the Summons issued on 13th June 2024 (page 4 of ROA). The suit was thus within 3 years of the review decision. The appellant contends the cause of action arose on 12 November 2020 when it informed the respondent of the dismissal. The court disagreed on the authority relied on by the trial court to effect that time stopped during the period of conciliation or in pursuit of an alternative dispute resolution mechanism. That decision is not good law. The Court of Appeal in G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR held that: *"Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law."* The court finds that the instant case was not about alternative dispute resolution but about the employer's internal disciplinary processes. The appellant relied on the decision in Maxwell Sifuna v Teachers Service Commission [2022] eKLR where this Court held that:

"The provisions of Section 90, Employment Act, 2007 on limitation of time is a juridical issue and not discretionary. The Court has no choice but to down its tools in the matter. The Court has no jurisdiction to issue prayers sought under the Petition for the claim is time barred. The Petitioner was dismissed from service on January 19, 2017, and filed the Petition on June 4, 2021, outside the three-year limitation period under Section 90 of the Employment Act, 2007." This decision is no longer good law. The Court of Appeal in most

recent decision at (Nairobi Civil Appeal No. 657 of 2019) vide decision of 20th February 2026, Francis Kimani Kiige v The National Hospital Insurance Fund (Musinga JA (Judge President of the Court of Appeal), Ngugi JA and Tuiyott JA) held that where there exists a contractual right of appeal in disciplinary process and it is invoked by the employee, time starts running after determination of the appeal by the employer. The court stated as follows- *'... 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, J.J.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:

.....

....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." The facts in the case are relevant to this appeal. In the instant case it was a contractual right of the respondent to file appeal for review as informed by the employer in letter dismissal as follows- *'As per the provision of Regulation 156 (4) of the Code of Regulations for Teachers, you have a right to appeal for review against the decision within ninety (90) days.'* The code of conduct is part of the respondent's contract of employment. The claimant exercised that right to appeal and, on receipt of the appeal decision, filed the claim before the lower court within the window period of 3 years under section 89 of the Employment Act. The Court of Appeal decision is binding on this court. The court further

agreed with the rationale in the decision in the Court of Appeal (Nairobi Civil Appeal No. 657 of 2019) vide decision of 20th February 2026, Francis Kimani Kiige v The National Hospital Insurance Fund, and upheld the same to apply in the determination of the instant appeal. The court consequently holds the claim before the lower court is not time-barred as the same was filed within 3 years of exhaustion of contractual right of appeal. The appeal is dismissed with costs to the respondent. The Ruling and Order of the Hon. T. Orlando (PM) delivered on 2nd April, 2025 in Nairobi CMELRC E958/2024 between the parties is upheld.

32. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY
OF FEBRUARY, 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant : Manyasa

Respondent: Bulowa h/b Khaemba