



Teachers Service Commission v Macharia (Employment and Labour Relations Appeal E345 of 2024) [2025] KEELRC 2152 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2152 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E345 OF 2024**

**JW KELI, J
JULY 18, 2025**

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

ZAKARIA KANYANJUA MACHARIA RESPONDENT

(Being an Appeal from the Ruling and Orders of the Hon. G. Omodho (PM) delivered at Nairobi on the 12th day of July, 2023 in Nairobi Misc Civil Application No. E588 of 2023)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling and Orders of the Hon. G. Omodho (PM) delivered at Nairobi on the 12th day of July, 2023 in Nairobi Misc Civil Application No. E588 of 2023 between the parties filed An undated memorandum of appeal seeking the following orders:-
 - a. The Appeal be allowed.
 - b. The orders of Hon. G. Omodho (PM) delivered on 12th July, 2023 in Nairobi Misc Civil Application No. E588 of 2023 be set aside.
 - c. Nairobi CM ELRC NO. E1539 of 2023 be struck out with costs to the Appellant.
 - d. The costs of this appeal be awarded to the Appellant.

Grounds Of The Appeal

2. The Honourable Trial Magistrate acted without jurisdiction and grossly erred in law by granting a relief which is contrary to the provisions of Section 90 of the *Employment Act*. In doing so, she failed to appreciate that Section 90 is couched in mandatory terms and negates the court of any power to extend time.



3. The Honourable Trial Magistrate grossly misinterpreted and misapplied the relevant law and the facts and arrived at an erroneous conclusion of law.
4. The Honourable Trial Magistrate erred in law and in fact when she made a decision that is contrary to the law, judicial authorities and jurisprudence. In doing so, she violated the doctrine of stare decisis which is key in the justice system.
5. The Honourable Trial Magistrate erred in law when she failed to deliver a reasoned ruling highlighting the points for determination, the decision thereon, and the reasons for such decision.
6. The Honourable Trial Magistrate erred in law and in fact by failing to appreciate and find that the Respondent's cause of action against the Appellant did not warrant extension of time neither is the same envisaged under Section 90 of the Employment Act.
7. The Honourable Trial Magistrate erred in law when she condemned the Applicant unheard contrary to the provisions of Articles 47, 48 and 50 of the Constitution and the rules of natural justice.
8. The Honourable Trial Magistrate erred in law and in fact by failing to appreciate that the application by the Respondent was otherwise an abuse of court process.

Background To The Appeal

9. The Respondent filed an ex-parte Originating Summons brought under certificate of urgency dated the 25th of April 2023 seeking the following orders:-
 - a) Leave be granted to the Applicant to file a suit against Teachers Service Commission after the limitation period.
 - b) That costs of this application abide the results of the intended suit.(Pages 5-44 of the ROA dated the 13th of December 2024).
10. Vide an order issued on 27th April 2023, the Trial Magistrate ordered that the application be served upon the Appellant herein and that parties return before her on 7th June 2023 for inter partes hearing (See page 45 of ROA).
11. While the Respondent expressed a desire to respond to the application on 7th June 2023 which culminated in the issuance of a date for mention to take directions, that is 12th July 2023, on the said 12th July 2023, counsel for the Respondent was absent and had not filed a response to the application (pages 49-50 of ROA).
12. On 12th July 2023, the Trial Magistrate Court delivered its Ruling on the allowing the Respondent's application dated 25th April 2023 (Order at pages 46 of ROA).

Determination

13. The appeal was canvassed by way of written submissions. Both parties filed.
14. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound



necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. Further on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

16. In their submissions dated the 23rd of April 2025, the Appellant submitted generally on the grounds of appeal.
17. The Respondent identified the following issues for determination in his submissions dated the 13th of May 2025:-
- i. Whether the Appellant is entitled to raise new legal issues, including jurisdiction, for the first time on appeal.
 - ii. Whether the Appellant, by failing to participate in the trial proceedings, waived its right to challenge the outcome.
 - iii. Who should bear the costs of this suit.
18. The court having perused the grounds of appeal of appeal found the issue for determination to be whether the trial court erred in law in allowing the application for extension of time under the limitation of time under section 89 (then 90) of the *Employment Act*.

Appellant's submissions

19. The appellant submits that we wish to reiterate the relevant provision of the law being section 90 (as it was) of the *Employment Act* which provided that;- "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." That the above proviso of the law is couched on mandatory terms in that, it provides for the limitation period for actions arising from employment relations and does not provide for enlargement of this time or even anticipate for such time enlargement.
20. The trial court in allowing the Respondent's Application appeared to arrogate itself powers to enlarge the statutory time beyond what is provided in section 90 of the *Employment Act* and we invite this Honourable Court to hold that such holding is outside the confines of the law. That Parliament, in its wisdom, did not think that parties to an employment relation should be granted leave to file actions arising from the relation outside the timelines that are set in section 90 of the *Employment Act*. The trial court should not have enlarged such timelines. The Court of Appeal in *Divecon versus Samani* [1995-1998] 1 EA 48 in addressing the question of the court jurisdiction to extend time beyond the limitation period under section 90 of the *Employment Act*, 2007 held as follows;- No one shall have



the right or power to bring after the end of six years from the date on which cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.” To buttress the foregoing, Courts have over time distinguished between causes of action was founded on tort or contract. In *Maria Machocho versus Total (K) Industrial Cause No. 2 of 2012* the court held as follows;”Section 90 of the *Employment Act* has now amended the *Limitation of Actions Act* to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the *Employment Act*. I now have to determine whether this Court has the jurisdiction to grant leave or extend time in respect to causes of action based on breach of contract generally and breach of contract of service or actions arising out of the *Employment Act* specifically. The precedent in this regard was set out by the Court of Appeal in *Divecon Ltd v Samani [1995-1998] 1 EA 48 at 54* that section 4(1) of the *Limitation of Actions Act* was clear beyond any doubt and that the section meant that no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that 'the wording of section4(1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked.”

21. Similarly, the Court of Appeal in Civil Appeal *Beatrice Kahai Adagala versus Postal Corporation of Kenya [2015] eKLR* held as follows;...Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act* 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of *Divecon Limited -vs- Samani [1995-1998] 1 EA P.48*, a decision relied upon by *Radido. J. in Josephat Ndirangu - vs - Henkel Chemicals (EA) Limited, [2013] eKLR*. the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act*. The Court of Appeal in *Malindi Civil Appeal No. 39/40 Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another [2016] eKLR*, was of the view that the E&LRC had employed judicial craft in granting the Employees leave to bring an expired Claim against the Employer, under the *Employment Act*. It further held that; "there are no exceptions to the three-year limitation period under Section 90 of the *Employment Act*. save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof.”
22. The allegation by the Respondent that he was unwell hence unable to lodge his claim within the statutory timelines is unfortunate but we hold that the trial Court should not have been facilitated him to access justice through grant of the desired leave. In any case, we note that the medical records relied on are dated 2023 which was still outside the 3 years prescribed by the *Employment Act*.
23. The reliance on section 27 and 28 of the Limitations of Actions Act by the Respondent to seek extension of time is erroneous and meant to mislead the court as the cause of action arose from the employer/employee relationship which is within the purview of the *Employment Act*. Further, Courts have held that the time extension anticipated within the Limitations of Actions Act are for claims in tort which is not the case in this instant matter noting that this is an employment contract.



24. The Court in *John Kiiri Njiiri vs. University of Nairobi* [2021] eKLR held that; "The limitation period is never extended in matters based on an employment contract. The period can only be extended in claims founded on tort and only when the Applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act* which provisions do not apply in employment and labour relations claims."
25. The Appellant wishes to rely on the decision of the Court of Appeal in Kisumu in Civil Appeal No.6 of 2015 *Kenya Airports Authority v Shadrack Abraham Kisongochi*, where the court overturned the decision of the Court in ELRC Kisumu Cause No.20 of 2014 wherein the trial court had granted leave to the applicant to file suit out of time. In rendering the judgment, the Court of Appeal held- The application for extension of time was filed under the provisions of sections 27 and 28 of the *Limitation of Actions Act*. Section 27 relates to extension of limitation period in case of ignorance or material facts in actions founded on tort where negligence is alleged. Section 28 basically sets out the procedure of filing the applications provided for by the preceding section 27. The respondent's suit had nothing to do with the tort of negligence and therefore the trial court had no jurisdiction to entertain the application for extension of the statutory period for filing the suit.'

Respondent's submissions

26. The respondent filed a replying affidavit to the appeal dated 23rd January 2025 in opposition to the appeal stating that the trial magistrate acted under her jurisdiction under section 27 and 28 of the limitation of action act and considered the unique circumstances of his ce which included mental challenges and incapacitation as detailed in the proceedings, that section 90 of the *Employment Act* was not absolute and can be addressed under the overriding objective of the law. The respondent contended that the appellant waived its right to object by failing to participate in the proceedings before the lower court.
27. In written submissions the respondent submitted as follows:-

On Whether the Appellant is entitled to raise new legal issues, including jurisdiction, for the first time on appeal. The Respondent invites this Honourable Court to first address the procedural propriety of the In submit Central to the Appellant's arguments is the contention that the learned magistrate acted without jurisdiction by entertaining a claim allegedly barred under Section 90 of the *Employment Act*, 2007. However, it is a cardinal rule of appellate litigation that an appellate court can only consider matters that were raised, argued and determined at the trial court. The current attempt by the Appellant to raise a jurisdictional point and invoke Section 90 for the first time at this stage is procedurally untenable and should be rejected. The rationale behind this rule is twofold: first to uphold the principle of fair hearing, and second to preserve the integrity of the trial process by ensuring that appellate courts do not substitute themselves as courts of first instance. Hancox, JA – as he then was in the Court of Appeal case of *Kenya Commercial Bank Limited v/s James Osede* (1982) eKLR pronounced himself in part thus:- "...where the right of appeal is statutory, it is to be confined on points of law raised before and decided by the trial judge...it is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal...such an issue should not be decided on appeal." In the matter before this court, the Appellant never challenged the trial court's jurisdiction when served with the Notice of Motion dated 25th April 2023. The Appellant did not enter appearance, neither did it file a response nor appeared to contest the motion. No objection was raised regarding Section 90 or the limitation of actions at the trial stage. Therefore, to now assert that the court lacked jurisdiction and challenge the legal basis of the ruling



- without having made these arguments before the trial court - is procedurally flawed and legally dishonest. Appellate litigation is neither a platform to litigate afresh and raise legal arguments that were never placed before the trial court; nor a corrective tool for a party who sat on their hands while the matter was being determined on merit. Moreover, Section 3A of the *Civil Procedure Act* and Article 159 (2) (b) and (d) of *the Constitution* of Kenya require that justice be administered efficiently and without undue technicality. Allowing a party introduce entirely new issues on appeal when they failed to raise them at the proper stage would fly in the face of these provisions.

28. It must be noted that the Appellant could, and ought to have, filed an application to set aside the ex-parte ruling before opting to appeal. That would have given the trial court the opportunity to review its ruling in light of any challenge to jurisdiction. However, the Appellant chose to ignore this, instead rushing to the appellate court with fresh arguments. We submit that the appellate court is not a forum to circumvent trial procedure. The jurisprudence is clear; a party who fails to raise a critical point at trial cannot seek a second bite at the cherry by crafting appellate arguments after the fact. The Appellant is procedurally barred from introducing new legal arguments at the appellate stage, having failed to raise them before the trial court. The principles of appellate jurisprudence, fair hearing, and finality of litigation prohibit parties from ambushing the other side with fresh arguments on appeal. Consequently, we humbly submit and urge this Honourable Court to find that this appeal offends the well-established procedural doctrine and is therefore unsustainable.
29. On Whether the Appellant, by failing to participate in the trial proceedings, waived its right to challenge the outcome. The second issue for this Honourable Court's determination is whether the Appellant, by failing to respond to the Respondent's application despite due service, waived its right to challenge the trial court's decision. The doctrine of waiver, both in its procedural and substantive dimensions, applies squarely to the Appellant's conduct. Waiver occurs where a party, with full knowledge of their legal rights, chooses not to exercise them, either expressly or through conduct that is inconsistent with their enforcement. In the litigation context, waiver may be inferred where a party deliberately fails to respond to a duly served application, thereby acquiescing to the court's jurisdiction and the reliefs sought. This is particularly so when the said party makes no subsequent effort to set aside the orders obtained ex - parte. The aspect of waivers was discussed in the case of *Banning v/s Wright (1972) 2 ALL ER 987* where the court held as follows: "The primary meaning of a waiver in the legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession or abandonment of the right."
30. In the case at hand, the Appellant was fully aware of the legal proceedings initiated by the respondent. It was served with the application and the hearing notice yet it elected to take no action - no response, no appearance and no application for adjournment or extension of time. It is therefore not just that the Appellant was silent, it was strategically absent. This conduct is entirely inconsistent with a party that intended to challenge the matter substantively or procedurally. Additionally, it must be emphasized that the doctrine of waiver is intertwined with estoppel. By failing to object to the proceedings and allowing the matter be concluded without its participation, the Appellant is estopped from challenging the resultant orders. Moreover the court in *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR* stated that: "Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice."



Decision

31. The Respondent filed before the trial court originating motion dated 25th April 2019 seeking for 2 orders-
- a. That leave be granted to the applicant to file suit against Teachers Service Commission after the limitation period.
 - b. The costs of this application abide the results of the intended suit.
32. The grounds of the application disclosed that the Respondent was dismissed after disciplinary hearing on allegation of immoral behaviour with a student. The dismissal letter was dated 24th September 2015. The respondent was also charged with a criminal offence on same allegation and acquitted on 14th July 2015. The Respondent in support of his case annexed proceedings before employer, criminal case decision, Consultant psychiatrist report Dr Alfred Gitonga dated 12th April 2023 to effect that he was diagnosed with mental health condition and had been a patient of Mathari National Teaching Referral Hospital since 26th August 2016. The applicant further annexed medical notes for the year 2023 indicating he was still a patient. The applicant further annexed medical treatment notes of colon adenocarcinoma in 2018. The appellant did not file a response despite indicating so to the trial court on the 7th June 2023 and being given opportunity to do so by the trial court when the court gave date of 12th July 2023 for directions. On 12th July 2023 the lower court record indicates that only the respondent appeared and informed the court the application was unopposed. The trial court then stated:
- “ application dated 25/4/2023 is unopposed so I proceed to allow and extend time. File closed.”
33. The respondent in his application recognised that he was outside the statutory limitation of time for filing employment claims as stated in section 89 (then 90) of the *Employment Act* to wit- ‘89. 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.’” The question the court asked itself is whether the provisions of section 89 (90) of *Employment Act* was mandatory or was an issue of discretion of the court. Could the court extend time taking into account the circumstanced of the delay under section 89 (formerly 90) of the *Employment Act* ? The other question for the court to address was whether by failing to file response the appellant waived the defence of limitation. The Court of Appeal had opportunity to address the interpretation of the meaning and impact of section 90 (now 89) and the decision is precedent. The Court of Appeal in Malindi Civil Appeal No. 39/40 Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & another [2016] eKLR, was of the view that the E&LRC had employed judicial craft in granting the Employees leave to bring an expired Claim against the Employer, under the *Employment Act*. It further held that; “there are no exceptions to the three-year limitation period under Section 90 of the *Employment Act*, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof.” The Court of Appeal in Kisumu in Civil Appeal No.6 of 2015 Kenya Airports Authority v Shadrack Abraham Kisongochi, where the court overturned the decision of the Court in ELRC Kisumu Cause No.20 of 2014 wherein the trial court had granted leave to the applicant to file suit out of time. In rendering the judgment, the Court of Appeal held-“The application for extension of time was filed under the provisions of sections 27 and 28 of the *Limitation of Actions Act*. Section 27 relates to extension of limitation period in case of ignorance or material facts in actions founded on tort where negligence is alleged. Section 28 basically sets out the procedure of filing the



applications provided for by the preceding section 27. The respondent's suit had nothing to do with the tort of negligence and therefore the trial court had no jurisdiction to entertain the application for extension of the statutory period for filing the suit.' The foregoing decisions were cited by the appellant. The respondent in submissions did not cite any authority to the contrary. This court is bound by authorities of the Court of Appeal unless overturned. The cause of action was a contract. The law is that time in a cause of action based on contract cannot be extended. The Court of Appeal has further held there are no exceptions. The claimant slept on his rights from 2015 to 2018 when his claim expired. The excuse of being unwell is unfortunate but the law is the law and the court has no authority by judicial craft to sidestep the law. The time cannot be extended in the cause under contract and the trial court erred in making such a decision which was not even justified.

34. Did the failure to file response waive the defence of limitation? The limitation of time is a legal question which goes to the root of the cause and jurisdiction and the court must satisfy itself of the same. The court finds that limitation of time is a jurisdictional issue and can be raised at any stage of proceedings. That the court can thus not adjudicate a claim time-barred under section 89 (then 90) of the Employment Act as that would be acting without jurisdiction. The court cannot act without jurisdiction as held in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR where Nyarangi JA citing Words and Phrases Legally defined – Volume 3: I – N Page 113 observed- 'Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given" See Words and Phrases Legally defined – Volume 3: I – N Page 113"(emphasis given of limitation of jurisdiction by statute like in the case of section 89 (then 90) of the Employment Act. The law bound the trial court to down its tools for want of jurisdiction and the issue could be raised at any stage. The court found that the failure to file defence did not amount to a waiver of right to appeal the decision which extended time to file the expired claim.
35. In the upshot the appeal is allowed. The Ruling and Order of the Hon. G. Omodho (PM) delivered at Nairobi on the 12th day of July, 2023 in Nairobi Misc Civil Application No. E588 of 2023 is set aside and substituted with an Order that the application by way of Exparte Originating Summons dated 25th April 2023 is dismissed. Taking into account the circumstances of the Respondent being a former employee of the appellant and unwell, to temper mercy with justice I make no order as to costs in the application and in this appeal.
36. The file is marked as closed.
37. It is so ordered.



DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant: Jusa h/b Ngere

Respondent: Ms. Mwangih/b Muli

