



REPUBLIC OF KENYA



**KENYA LAW**  
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**Dolphine Freighters Limited Justus Kenani Wrongly Sued As Justus Kinania v Njagi  
(Civil Appeal 222 of 2023) [2025] KEHC 2505 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2505 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 222 OF 2023**

**TW OUYA, J**

**MARCH 6, 2025**

**BETWEEN**

**DOLPHINE FREIGHTERS LIMITED JUSTUS KENANI WRONGLY SUED AS  
JUSTUS KINANIA ..... APPELLANT**

**AND**

**PETERSON FUNDI NJAGI ..... RESPONDENT**

*(Being an appeal from the Ruling of the Chief Magistrate's Court at Mavoko by  
Honourable B.Ojoo (S.P.M) made on 9th August, 2023 in CMCC Number 194 of 2021)*

**RULING**

**Background**

1. This is an appeal against the ruling of the Chief Magistrates Court at Mavoko by Hon. B Ojoo (SPM) made on the 9<sup>th</sup> August 2023 in CMCC No. 194 OF 2021. The matter was a material damage claim initiated by Peterson Fundi Njagi (Respondent herein) against Dolphine Freighters ( 1<sup>st</sup> Respondent herein) and Justus Kenani (wrongly sued as Justus Kinania) 2nd appellant herein. The claim arose from a road traffic accident on 7<sup>th</sup> March 2018 between motor vehicle registration number KBP 818V belonging to the appellant and driven by Justus Kenani (2<sup>nd</sup> Appellant herein) and KBP 138H belonging to the respondent whereby the respondent's motor vehicle was extensively damaged.
2. The matter proceeded via formal proof and judgement was entered on the 24<sup>th</sup> March 2022 for the sum claimed and execution process was commenced. The judgement was set aside vide notice of motion application dated 16<sup>th</sup> June 2022 and ruling delivered on 29<sup>th</sup> December 2022 with the appellant granted leave to file appropriate documents to defend the suit.
3. Alongside the compliance documents, the appellants raised a notice of preliminary objection dated 22<sup>nd</sup> May 2023 in response to the above suit that the same was statute-barred pursuant to section 4(2)



- of the *Limitation of Actions Act* (Cap 22 Laws of Kenya) and that the same ought to be struck out. The basis of the preliminary objection was that the suit was filed on 8.3 2021 instead of 7.3.2021 and that the same was done without leave of the court.
4. The trial court considered the preliminary objection alongside the submissions of the parties through their counsel and determined vide ruling date 9th August 2023 that the preliminary objection was disallowed. The court extended the time frame for filing of the suit by one day and deemed that it was properly filed and admitted on record.
  5. The appellants being aggrieved by the said ruling of the Chief Magistrate's Court at Mavoko by Honourable B.Ojoo(S.P.M) appealed to the High Court on the following grounds:
    - a. The Learned Magistrate erred in law and in fact dismissing the Appellant's preliminary Objection dated 22<sup>nd</sup> May 2023.
    - b. The Learned Magistrate erred in law and in fact in unilaterally enlarging time under order 50 Rule 5 of the Civil Procedure Rules,2010 in a material damage claim contrary to the provisions of section 4 (2) of the *limitation of actions Act*, chapter 22 Laws of Kenya.
    - c. The Learned Magistrate erred in law and in fact in placing reliance on Article 159 of *the Constitution* of Kenya.
    - d. The Learned Magistrate erred in law and in fact in introducing the extraneous and irrelevant matter of advocate's mistake.
    - e. The Learned Magistrate erred in law and in fact in failing to consider the appellant's written submissions.
  6. The appellants pray for orders that:
    - i. The ruling of the Chief Magistrate's Court at Mavoko by Honourable B.OJOO (S.P.M) made on 9<sup>th</sup> August 2023 in CMCC No. 194 of 2021 be set aside and replaced with an order upholding the appellant's Preliminary Objection dated 22<sup>nd</sup> May 2023.
    - ii. The respondent's suit Mavoko CMCC No. 194 of 2021 be struck out for being time barred under the provisions of section 4 (2) of the *limitation of actions Act* Chapter 22 Laws of Kenya.
    - iii. The appeal herein be allowed with costs to the appellants.

### **Submissions**

7. This appeal was canvassed by way of written submissions of which this Court has duly considered alongside the original record, the memorandum of appeal and record of appeal. It is clear from the onset that the subject matter of this appeal is the ruling by the trial court dated 9<sup>th</sup> August 2023 disallowing the preliminary objection raised by the appellant herein and expanding time for filing of the respondent's suit. The appellants' submissions largely deal with the application to set aside judgement and to allow the appellant to file his defence. This is a spent aspect and not subject in this appeal. The court will therefore focus on the determination of the preliminary objection.
8. The respondent has argued that the trial court approach invoking the court's unfettered power to enlarge time under Order 50 Rule 3 of the Civil Procedure Rules. The respondent has extrapolated the circumstances under which the filing could not take place being the last day 7<sup>th</sup> March fell on a Sunday, an attempt to file through the court email address from 3<sup>rd</sup> March did not succeed due to malfunction



and that a physical filing attempt did not succeed due to closure of the registry for fumigation exercise on account of Covid-19 pandemic.

## Analysis

9. As a first appellate court, this court's duty is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* [2000] 2EA 212, *Peters v Sunday Post Ltd* [1958] EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* [1968] EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] – 88) 1 KAR 278.
10. The issue before the trial court was a preliminary objection by the appellant to the respondent's case on the basis that the case was filed one day late outside the prescribed period under section 4(2) of the *Limitation of Actions Act*.
11. The present appeal is primarily challenging the decision by the trial court declining to find that the respondent's suit bad in law and therefore striking it out. That the trial court erred in enlarging time by one day and deeming that the respondent's suit was properly filed and admitted on record. The issue for determination before this court is whether the trial court has the power to enlarge time under order 50 Rule 5 in a material damage claim. Indeed, the same sentiment is replicated verbatim in the main ground of appeal that:

“The Learned Magistrate erred in law and in fact in unilaterally enlarging time under order 50 Rule 5 of the Civil Procedure Rules, 2010 in a material damage claim contrary to the provisions of section 4 (2) of the *Limitation of Actions Act*, chapter 22 Laws of Kenya.”

12. This court observes that the arguments between the parties revolve around the limitation period which was expiring on 7th March 2021 which fell on a Sunday. The other argument by the appellant is that the claimant's suit being a material damage suit is excluded by statute from the exemptions provided under sections 4(2) and 27 (1) for the extension of time under the *Limitation of Actions Act* and neither section 27(1) nor the under the Civil Procedure Rules.
13. It is clear from the proceedings that none of the parties contend the date of filing. Similarly, there's no doubt that the subject suit is a material damage claim. Be that as it may, this matter revolves more around the computation of time rather than the trial court's powers to expand time for a matter that would otherwise be deemed statute-barre, or to regularize an invalidate filing without the leave of the court. The requisite law on computation of time is clearly provided under order 50 rule 2 of the civil procedure rules that when time for undertaking any proceedings expires on Sunday or on a date when offices are closed the same shall be held to be duly done on the date when the offices shall be next open:

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

14. On the same subject, the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) section 57 (b) provides that:

“For the purposes of a written law, unless the contrary intention appears—



- a. ....
- b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;”
15. In light of the above statutory provisions, this court is of the view that the respondent’s suit was properly filed on the 8<sup>th</sup> March 2021 being the next working date after the 7<sup>th</sup> March 2021 which fell on a Sunday, an official non-working day.
16. In *Attorney General of Kenya v Anyang’ Nyong’o & 10 others* [2010] RC 1 (KLR), the court enunciated on principles under which an appellate court can interfere with the exercise of a discretion by a trial court that the presiding judge:
- i. Took into accounts some irrelevant factor(s)
  - ii. Failed to take into account some irrelevant factor(s)
  - iii. Did not apply a correct principle to the issue (such as misdirection on a point of law, or misappropriation of facts)
  - iv. Taking into account all the circumstances of the case, the judge’s decision is plainly wrong
17. Having considered the entire material canvassed in this appeal, I am satisfied that the trial court took into account all the relevant factors and applied the right principles to the issues at hand to arrive at a fair determination. I therefore find no reason to tamper with the trial court findings.

**Determination**

18. This appeal is hereby dismissed. The Ruling by Hon. B. Ojoo (S.P.M) made on August 9, 2023 in CMCC Number 194 of 2021 is hereby upheld with costs of the appeal to the respondent. The parties are at liberty to prosecute the main suit before the trial court to a logical conclusion.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY ON 6th DAY OF MARCH, 2025**

**ROA**

**HON. T. W. OUYA**

**JUDGE**

