



**Sakwa v Aminga & another (Civil Appeal 75 of 2023)
[2025] KEHC 4432 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 75 OF 2023**

**RK LIMO, J
APRIL 8, 2025**

BETWEEN

JUSTUS SIMIYU SAKWA APPELLANT

AND

MALACHI OIRIGIA AMINGA 1ST RESPONDENT

TOBIAS MUWANGA WAFUBWA 2ND RESPONDENT

JUDGMENT

1. This is an appeal against the Ruling of Hon S.K. Mutai Senior Principal Magistrate delivered on 30/10/23 vide Kitale CMCC No.205 of 2017.
2. The said Ruling was a subject of a preliminary objection dated 1/8/2023 raised by the appellant. The basis of the said preliminary objection was that the respondent's suit was time barred by operation of Section 4(2) of the Limitations of Actions Act.
3. The trial court entertained the preliminary objection which was canvassed by way of written submissions and found that the suit filed on 15/7/2021 was indeed filed out of time but found at the same time that the respondent had given plausible reason for filing the suit out of time. It also found that allowing the preliminary objection would shut the door of justice to the respondent leading to being condemned unheard, contrary to the rules of natural justice.
4. The appellant felt aggrieved and filed this appeal raising the following grounds namely;
 - i. The learned trial magistrate erred in law and facts in finding that the appellant will be condemned unheard contrary to the rules of natural justice if the preliminary objection dated 1/8/23 was allowed.
 - ii. The learned magistrate erred in law in not finding that the suit was time barred.



- iii. That the learned magistrate erred by not finding that the suit was filed in abuse of due court process.
 - iv. That the learned magistrate erred in law and fact in finding that the explanation given by the 1st respondent's counsel was plausible.
 - v. That the ruling delivered did not conform with the law and the same is not based on any provision of the law.
 - vi. That the learned magistrate misconstrued the facts and law and arrived at a wrong conclusion.
5. In his written submissions dated 19/3/2024 done through learned counsel M/s R.E Nyamu and Co Advocates the appellant insists that the 1st respondent's suit by dint of Section 4(2) of Limitation of Actions Act was time barred. He submits the law stipulates that an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action occurred.
 6. He points out that going by the plaint filed the accident occurred on 20/3/2024 and the suit was filed on 15/7/2017 which was more than 3 years after the accident occurred. He relies on the case of Bosire Ogero –vs- Royal Media Services (2015)eKLR where the court held that where an action is statute barred the court has no jurisdiction to entertain it.
 7. He faults the respondents for abuse of court process stating that apart from filing suit out of time, they took out summons which they never served.
 8. He faults the trial court for finding that the respondents had given plausible reason for filing suit out of time when the 1st respondent ought to have sought leave of court first to file suit out of time.
 9. The 1st respondent has opposed this appeal laying blame on counsel. He contends that his counsel sat on his case due to an oversight and led to the case being filed out of time.
 10. He submits that the provisions of Section 4(2) of Limitation of Actions Act are rules of procedure which in his view should not be elevated to defeat substantive justice. According to him Section 4(2) of the Limitation of Actions Act is a technicality.
 11. He pleads with this court not to allow this appeal arguing that he will suffer injustice yet he agreed by consent to set aside an exparte judgment in the lower court adding that the appellant would not suffer prejudice if the appeal is disallowed.
 12. This court has considered this appeal and the reasons advanced. I have considered the response made by the 1st respondent.
 13. The parties in this appeal are both in agreement that the suit filed in the lower court was filed out of time. The finding of the trial court in that regard was also of a similar view.
 14. The 1st respondent contends that the provisions of Section 4(2) of Limitations of Actions Act is a technicality which should not be elevated to defeat substantial justice but is it? Section 4(2) of Limitation of Actions Act provides as follows;

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”.
 15. When a statute stipulates a timeline upon which an action should be taken or filed, it is mandatory to comply with that timeline because compliance in that regard is crucial as it gives the court jurisdiction to entertain the matter. Where the statute gives a window of opportunity for a non-compliant party



to seek for extension or enlargement of time as it is in this case, then that opportunity can be utilized. The provisions of Section 27 of *Limitation of Actions Act* gives a party liberty to apply for extension of limitation period and give good reasons why the court should exercise its discretion in his favour. Without enlargement of time, a suit filed out of time is incompetent and the court lacks jurisdiction to entertain it.

16. In this instance the trial court appears to have fallen into error by finding that the 1st respondent had given plausible reason for filing suit out of time when the issue before it was whether or not the suit had been filed out of time. The trial erred by proceeding as though he was handling a matter for enlargement of time which issue was not relevant to the issue at hand.
17. This court notes from the proceedings that the 1st respondent appears to have realized rather belatedly that he had made a big mistake because after the trial court had issued directions on how the preliminary objection was to be canvassed on 28/8/23 and fixed the case to be mentioned on 18/9/23 to find out if parties would have complied, the 1st respondent filed an application dated 8/9/23 for extension or enlargement of time to enable him file his suit out of time.
18. When the matter came up for mention on 18/9/23, both parties confirmed filing of submissions on the preliminary objection and asked for a ruling date on the preliminary objection and the court gave a ruling date for 2/10/23.
19. The 1st respondent tried later that afternoon to be heard first on his application for enlargement of time but the trial court overruled him and set a date for the ruling on the preliminary objection for 30/10/23. By declining the attempt by the 1st respondent to have his application for leave heard first, the trial court in effect sealed the fate of the first respondent because of the clear provisions of Section 4(2) of *Limitation of Actions Act*. The hands of the trial court were tied because what was before it was a suit filed out of time without leave. The suit was incompetent to that extent and it mattered not whether the 1st respondent had good explanation or what he termed “plausible” reasons for filing it out of time. The trial court would have been in order and well directed to make such a finding if it was entertaining an application for enlargement of time but he was not and that is where the misdirection lies. There was no competent suit to be entertained thereafter because the court did not enlarge time.

In the premises this court finds merit in this appeal. The ruling of the trial court delivered on 30/10/2023 flew in the face of the cited clear provisions of the law and must, which I hereby do set aside.

In its place the preliminary objection dated 1/8/23 is sustained. The result of this is that the 1st respondent’s suit filed vide Kitale CMCC NO.205 of 2017 is hereby struck out with costs for being incompetent. The 1st respondent ought to have sought leave of court for enlargement of time first before filing the suit out of time.

DELIVERED, DATED AND SIGNED AT KITALE THIS 8TH DAY OF APRIL , 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of;

Mr Nyamu for Appellant

Miss Masinde for 1st Respondent

Court assistants- Duke/Chemosop

