



**Ngure v King'ara & another (Civil Appeal E040 of 2023)
[2025] KEHC 6869 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E040 OF 2023
FN MUCHEMI, J
MAY 15, 2025**

BETWEEN

FRANCIS NJOROGE NGURE APPELLANT

AND

MWANGI KING'ARA 1ST RESPONDENT

JOSEPH MURIGI 2ND RESPONDENT

*(Being an Appeal from the Ruling of Hon. Sylvia A. Wayodi (RM/Adjudicator)
delivered on 16th November 2023 in Thika Small Claims Court SCCC No. E648 of 2023)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika Resident Magistrate/Adjudicator in SCCC No. E648 of 2023 whereby the trial court allowed a preliminary objection dated 23rd August 2023 based on the ground that the claim was time barred under Section 4 of the Limitations of Actions Act.
2. Dissatisfied with the court's ruling, the appellant lodged this appeal citing 6 grounds summarized as follows:-
 - a. The learned trial magistrate erred in law by allowing the preliminary objection dated 23rd August 2023 wholly disregarding the evidence adduced and the submissions adduced by the appellant.
 - b. The learned trial magistrate erred in law and in fact in failing to observe that the appellant had sufficiently proved or demonstrated substantive reasons why he filed his case out of time as stipulated in the Limitations of Actions Act.
3. Parties disposed of the appeal by way of written submissions.



The Appellant's Submissions

4. The appellant submits that the matter arose out of a traffic accident that occurred on 1st July 2020 to which he filed a Statement of Claim on 25th July 2023. The appellant argues that he filed his suit after the lapse of time as he encountered a problem with the judiciary e-filing system at Thika. The same was caused by the transition from filing through email to filing through the e filing portal.
5. The appellant submits that he produced email records which showed that his advocates on record made an effort of going to the court physically but the systems were down and thus the claim could not be filed with ease. Further, the court admitted that they had an issue with production and issuance of receipts thus causing inconveniences in filing of claims. The receipt was issued after the lapse of three years yet the filing had been done earlier on in advance.
6. The appellant refers to the case of Spin Knit Dairy Ltd & Mwaniki Anderson [2019] eKLR and submits that he provided enough evidence showing that filing the claim out of time was beyond his control. The claim was later on approved on the e-filing portal and given a date thus there was no chance to put in an application to file out of time. The appellant argues that the circumstances were exceptional and the court was well aware of the circumstances. To support his contentions, the appellant relies on the case of Agip (Kenya) Limited vs Highlands Tyres Limited (2001) KLR 630 and submits that he offered good reasons for the delay and provided sufficient evidence as to why there was a delay. The appellant further argues that the delay did not prejudice the respondent in any way.
7. The appellant relies on the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR and submits that costs follow the event. Thus the appellant urges the court to grant him costs of the suit.

The 1st Respondent's Submissions.

8. The 1st respondent submits that the cause of action arose on 1st July 2020 when the appellant's motor vehicle registration number KCR 658W was involved in an accident with his motor vehicle registration number KAR 483H. The claim was premised on material damage to the appellant's vehicle. The 1st respondent submits that the appellant filed the claim before the trial court on 25th July 2023 which was after the lapse of three (3) years from the date of the cause of action.
9. The 1st respondent submits that he filed a preliminary objection challenging the court's jurisdiction on the grounds that the appellant had not sought leave for an extension of time to file a case after the cause of action had effluxed. The 1st respondent relies on Section 4 of the *Limitation of Actions Act* and the case of Bosire Ogero vs Royal Media Services [2015] eKLR and submits that the cause of action arose on 1st July 2020 and the period for presenting the said claim lapsed on 1st July 2023 yet the claim was filed on 25th July 2023, after the effluxion of time. Therefore, the trial court had no jurisdiction to hear and determine such a claim. Further, the 1st respondent argues that the appellant did not seek leave to file the claim out of time pursuant to Section 27 and 28 of the *Limitation of Actions Act*.
10. The 1st respondent refers to the cases of Toyota Kenya Limited vs Beatrice Njoki & Another [2015] eKLR and Mary Ojundwa vs Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 and submits that the claim is one of material damage where the court does not have the discretion to extend the time to bring a claim.

Issue for determination

11. The main issue for determination is whether the appeal has merit.



The Law

12. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

13. In distinguishing between matters of law and fact the Court of Appeal stated in *Kenya Breweries Ltd vs Godfrey Odoyo* [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

Whether the appeal has merit.

14. The appellant argues that filing his claim out of time was beyond his control as the e-filing system was encountering issues. From the record, the cause of action arose from a road traffic accident on 1st July 2020 between motor vehicles registration numbers KCR 658W and KAR 483H. The appellant in his claim sought to be compensated for material damage for his vehicle of Kshs. 245,674/- The claim was against the 1st respondent on behalf of his insurer Britam General Insurance Company Limited who are entitled to all the benefits of the claim under the doctrine of subrogation.
15. As pleaded in the Statement of Claim, the accident occurred on 1st July 20220 and the Statement of Claim was filed on 14th July 2023. Thus it is evident that the claim is founded on a tort of negligence. Pursuant to Section 4(2) of the *Limitation of Actions Act*, an action founded on tort may not be brought after the end of three years from the date the cause of action accrued. In the instant case, the time for filing the claim in the trial court lapsed on 1st July 2023. Therefore, the appellant ought to have sought leave to file his claim out of time pursuant to Section 27 and 28 of the *Limitation of Actions Act*. However upon perusal of Section 27(1)(b) of the Act, time can only be extended for an action for personal injuries but not for material damage to a vehicle. The Court of Appeal in *Mary Ojundwa vs Nzoia Sugar Company Limited* [2002] KECA 203 (KLR), when dealing with a similar application held:-

Section 27 of the *Limitation of Actions Act* clearly lays down that in order to extend time for filing a suit, the action must be founded on tort and must relate to the tort of negligence



nuisance or breach of duty and the damage claimed must be in respect of personal injuries to the plaintiff as a result of tort.

16. The appellant had no basis in law to give reasons for filing the suit out of time before the trial court since the law under the Limitations Actions Act Section 27 provided that he had no such remedy available in law. As such, the Magistrate cannot be faulted for upholding the preliminary objection because she acted within the law.
17. Thus, the appellant could not seek leave to file the claim out of time as the law does not allow extension of time in respect of material damage claims. It is my finding that the preliminary objection was merited based on the law applicable.
18. I find no merit in this appeal and it is hereby dismissed with costs to the respondent.
19. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE

