



REPUBLIC OF KENYA



KENYA LAW
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**Nyambura v Mwangi (Civil Appeal E638 of 2022)
[2025] KEHC 6096 (KLR) (Civ) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E638 OF 2022

JM NANG'EA, J

MAY 9, 2025

BETWEEN

ROSE NYAMBURA APPELLANT

AND

KENNEDY KARIUKI MWANGI RESPONDENT

(Being an appeal arising from judgement and decree of Honourable K G. Odhiambo (SRM) delivered on 8th July, 2022 in Nairobi Small Claims Court' Case No. E158 of 2021)

JUDGMENT

1. The genesis of this Appeal is the Rent Restriction Case No. E1542B of 2017 wherein the Appellant instituted a claim against the Respondent and Icon Auctioneers seeking orders restraining them from levying distress for alleged rent dues. On 3rd September, 2021 the Tribunal struck out the claim and advised the Appellant to seek compensation through the Civil Court as it lacked jurisdiction to entertain the claim.
2. The Appellant then filed SCCC No. E158 of 2021 seeking compensation for the sum of Kshs. 649,400/= as well as costs and interest for loss and damage to property after the Respondent together with his Auctioneers allegedly unlawfully caused raw sewage to sip into her house on 3/4/2018 in a bid to cause her to vacate the house, thereby damaging her property and occasioning loss in the sum of Kshs. 649,400/=. Her property was also said to have been carted away on 16/4/2018 to an unknown place by the Respondent's Auctioneers.
3. The Respondent filed defence traversing the allegation and further contended inter alia that the suit was time barred.



4. After a full hearing the lower court dismissed the claim after finding that, contrary to the Appellant's argument, she had no contractual relationship with the Respondent as the premises she occupied belonged to the estate of one Agnes Nyambura (deceased) and not the Respondent. The learned Trial Magistrate therefore implied that there was no privity of contract between the parties to this matter. Instead the court held that the action was based on tort and therefore time barred as the loss complained of allegedly occurred on 3/4/2018 and 16/4/2018 while the claim was instituted on 19/10/2021. The court reckoned that the suit was filed outside the 3 years statutory period without leave. On the merits of the claim, the court found that, in any event, the Appellant did not tender documentary proof of the pecuniary claim.
5. Aggrieved by the lower court's decision, the Appellant vide Memorandum of Appeal predicated upon the following grounds:-
 - i. That the Learned lower Court Magistrate overlooked the Appellant's written submissions and delivered judgment solely founded on the Respondent's Submissions;
 - ii. That judgment delivered by the Learned Lower Court is violative of the principles of good justice, equity and good conscience as the tribunal ruled in favour of the Appellant whereupon the latter was advised by the tribunal to seek compensation in relevant Court as the tribunal lacked pecuniary jurisdiction
 - iii. That the Honourable SRM failed in law and fact when he directed that the matter was time barred yet time was supposed to begin running from 2021 when the Tribunal dismissed the case because the matter was initially instituted at the Tribunal in 2017.
 - iv. That judgment delivered by the learned Lower Court is contrary to the provisions of law as the Respondent failed, refused and neglected to give the Appellant peaceable enjoyment of the premises and proceeded to cart away her belongings which are the subject matter of the claim.
 - v. That the Learned Lower Court Magistrate erred in law and in fact by failing to consider the evidence on record in a judicious manner. It is evident and well outlined in the records that the Respondent has been defying Tribunal orders and the case is directly connected with the suit which is before the Tribunal.
 - vi. That the findings arrived at by the Learned Magistrate are not supported by the evidence on record because the Appellant was not in a position to produce receipts for the lost items because the respondent carted away all the Appellant's belongings without the Appellant's knowledge and authority, therefore the Magistrate overlooked this fact.
 - vii. That the Learned Lower Court has in a very summary manner and fashion tried to interpose the concept of tort law and the principles under which a party may claim damages in tort yet the claim is arising from a landlord and tenancy arrangement. The Appellant's claim is for compensation for lost items.
 - viii. That the Learned Lower Court has not considered the very fact that the balance of convenience was in favour of the Appellant.
6. The Appellant therefore seeks that the appeal be allowed with the orders of the Trial Court being set aside and substituted with the judgment of this Court.

Appellant's Submissions

7. The Appellant in support of her Appeal submits as follows;



- a. That she was never served with any notice of proclamation and/or attachment of property by Auctioneers and that she paid rent as instructed by the tribunal but her belongings were never released despite the tribunal issuing orders to that effect.
- b. That the Court on 4th October, 2021 instructed the Respondent to pay the Appellant but the Trial Court dismissed her claim on 8th July, 2022 stating it was not founded on contract but on the tort of negligence.
- c. That it was peculiar and strange for the Court to overturn its earlier decision and substitute it with that of 8th July, 2022 without reasons. That the Court had rightfully awarded her Kshs. 649,400 but later changed its mind.

Respondent's submissions

8. The Respondents in seeking dismissal of the appeal submitted that the appeal is incompetent as it runs afoul of Section 38 of the [Small Claims Court Act](#).

Analysis and determination

9. I have looked at the record of appeal and the submissions proffered. Section 38 of the [Small Claims Court Act](#) provides;

“ 38. Appeals

1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
2. An appeal from any decision or order referred to in subsection (1) shall be final.”

10. I further draw guidance from the case of *Watu Credit Limited vs Randu* [2024] KEHC 4430 where the Court in addressing appeals from the Small Claims Court stated:-

“.....an Appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the court of Appeal. The duty of a second Appeal was set out in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR: -

“This is a second appeal. 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 they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).”

11. The duty of the Court under Section 38 of the [Small Claims Court Act](#) supra is therefore to confine itself to considering only matters of the law unless the Appellant demonstrates that the Trial Court considered matters it ought not to have considered or failed to consider matters it ought to have considered. The Court has to be very careful and exercise restraint before delving into matters of fact.



12. In *Mbogo & Another v Shah* [1968] the Court of Appeal stated thus regarding exercise of judicial discretion:-

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been miscarriage of justice....”

13. My perusal of the grounds of appeal highlighted in the Memorandum of Appeal reveals only the following points of law :

- a. Whether the claim is based on contract or tort?
- b. Whether the claim is time barred?
- c. Whether the claim is sustainable on merits.

14. Regarding the first issue, the Claimant’s contention was that in a bid to force her out of the rented premises the Respondent permitted raw sewage into her house leading to damage of her property. PW2 confirmed that the rental property belonged to the estate of Agness Nyambura (deceased) and that he was the Administrator of the estate as evidenced by Grant of Letters of Administration exhibited.

15. The Respondent, a co-administrator of the deceased’s estate, on the other hand contended that the Appellant’s property was taken away for the reason that she had failed to pay rent for a number of months. The Respondent therefore asserts that such claim should have been lodged against the deceased’s estate and not against him in person.

16. I agree with the trial court that the facts and circumstances of this matter show that the action is founded in tort and not contract. The Appellant’s complaint herein is not breach of the tenancy arrangement between her and her landlord but breach of the duty of the Respondent allegedly owed her which resulted to damage to and loss of her property. This claim is therefore founded in tort.

17. As to whether the claim is statute barred Section 4(2) of the Limitations of Actions Act provided that a claim in tort cannot be brought 3 years from the date on which the cause of action arose. The Appellant contends that since the case was filed at the tribunal in 2017 time should have started running from the time the Tribunal delivered its finding in 2021.

18. In *Lilian Njeri Muranja & John Muranja vs Virginia Nyambura Ndiba & Kajiado County Council* (2014) eKLR the court held that:

“...it would be stretching the law of limitation for one to argue that once a suit is filed time ceases to run. The only rider to a plaintiff being allowed to file another suit if the original suit is dismissed for want of prosecution is if the action is still within the limitation period. Certainly, if this were not so then any suit filed would mean time begun to run on the filing of the suit. Effectively, time would never stop. Secondly, I hold the view that merely bringing a suit does not stop statutory periods from running. If the suit is prosecuted of course time stops to run as the action is complete. If the suit is withdrawn or discontinued then, a fortiori, the parties revert to the same position as if the suit had never been filed. The same position would obtain where a suit is dismissed for want of prosecution. That means that time never stops running by the mere filing of the suit. It was counting.”



19. I am persuaded by this decision. The cause of action arose on 3rd April 2018 and 16th April 2028 when the Appellant's goods were allegedly confiscated and damaged. The suit ought to have been filed before a competent court by April 2021 but was only brought in October 2021, some months after the statutory limitation period. Pursuant to section 29 of the *Limitation of Actions Act*, the Appellant ought to have sought and obtained leave to bring the claim out of time but she didn't comply.
20. As the Rent Restriction Tribunal found that it had no jurisdiction time did not stop running from the time this decision was given by dint of the authority of Lilian Njeri Muranja & John Muranja supra since the dispute had not been determined on merits. I accordingly concur with the trial court that the claim was time barred.
21. Regarding the merits of the suit, the Appellant explains that she could not produce receipts to support her complaint of loss because they were destroyed or lost in the course of seizure of her property. It is trite law that special damages are not necessarily proven only by documentary evidence. The Appellant has not, however, presented any opinion of a person skilled in values of the allegedly lost items for the court to gauge their approximate or estimated value (see case law in the Court of Appeal decision in {Mitchell Cotts (K) LTD vs Musa Freighters (2011) eKLR}).
22. Again, there is no ground on which to fault the trial court's order dismissing the claim for want of proof to the required legal standard.

Determination

23. The upshot is that the appeal is dismissed in its entirety given the parties' apparent relationship of tenant and landlord, no order is made as to costs.

J. M. NANG'EA,

JUDGE.

JUDGEMENT DELIVERED VIRTUALLY THIS 9TH DAY OF MAY 2025 IN THE PRESENCE OF;

The Appellant and

Mr Aloo Advocate for the Respondent.

J. M. NANG'EA,

JUDGE.

