



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mbakaya v Shitelo (Civil Appeal E161 of 2023)
[2025] KEHC 8266 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8266 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E161 OF 2023**

**AC BETT, J
JUNE 13, 2025**

BETWEEN

FRANCIS MBAKAYA APPELLANT

AND

ROBERT LUSENO SHITELO RESPONDENT

*(Being an appeal from the Judgement and Decree of the Honourable
Caroline Cheruiyot, R.M/Adjudicator delivered on the 11/10/2023
in the Small Claims Court at Kakamega in SCCCOM/E418/2023)*

JUDGMENT

Introduction

1. The Appeal herein was precipitated by a Ruling of the Small Claims Court dated October 11, 2024 on a Notice of Preliminary Objection dated 18th September, 2023.
2. Pursuant to the said Ruling, the trial court upheld the preliminary objection which was mainly predicated on an assertion that the said Appellant's claim offended the provisions of section 4(1)(a) of the Limitations of Actions Act.
3. The Learned Trial Adjudicator is also faulted for failing to take into account the minor soft tissue injuries suffered by the Respondent considering comparable reasonable awards thereby arriving at an erroneous estimate of the corresponding compensatory award which was excessive in the circumstances.
4. The Appellant thus asked the court to allow the appeal, set aside and/or vary the trial court's decision and the Appellant be allowed a chance to be heard on merit.



Issues for Determination

5. In view of the parties' pleadings, submissions, evidence and the grounds of appeal highlighted above, this court construes the following singular issue for determination:
 - i. Whether the Notice of Preliminary Objection dated 18th September, 2023 was merited

Analysis and Determination

Whether the Notice of Preliminary Objection dated 18th September, 2023 was merited

6. In his statement of claim dated 23rd August, 2023, under paragraph 3 thereof, pleaded that on diverse dates between 16th October 2016 and 1st June 2023, he had loaned the Respondent a total sum of Kes 880,000/= out which the Respondent had refunded Kshs 30,000/=,only.
7. In support of his claim, the Appellant attached a schedule containing transactions allegedly proving the Respondent's indebtedness.
8. In response, the Respondent admitted having received Kshs 15,000/= from the Appellant. The Respondent also alleged that he has since repaid the debt as is evident from the agreement dated 16th October 2016.
9. It is on this background that the Notice of Preliminary Objection was lodged. As earlier stated the Preliminary Objection was premised on an assertion that the Appellant's claim was time-barred.
10. In striking out the claim, the Learned Trial Adjudicator reasoned that the cause of action was premised on breach of a contract dated 16th October 2016 and considering the claim herein was filed on 23rd August 2023 six years ten months after the statutory limit of six years, the delay was inordinate as no explanation had been tendered.
11. In the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR, the Supreme Court citing the celebrated case of Mukhisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696 held:-

“As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in Mukhisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, in the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, Mukhisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.’



12. In view of the foregoing decision of the Supreme Court this court has to satisfy itself whether the instant preliminary objection was premised on a pure point of law construed on the premise that the facts were settled and/or uncontested.
13. Were the facts settled in this case? I am afraid not. A keen look at the pleadings herein clearly indicates otherwise. The Claimant on the one hand asserted that he had advanced monies to the Respondent on diverse dates between 16th October 2016 and 1st June 2023, that he had loaned the Respondent a total sum of Kshs. 880,000/= out of which the Respondent had refunded Kshs. 30,000/=, only.
14. The Respondent on his part admitted having received Kshs 15,000/= from the Appellant but also averred that he has since repaid the debt as is evident from the agreement dated 16th October 2016. The pleadings therefore raised an issue to be determined by way of evidence which is whether the Appellant had made a single advance to the Respondent on 16th October 2016 or several advances between the two dates indicated in the claim.
15. Clearly, the circumstances relating to when the cause of action arose was not settled. Rather, a further interrogation of facts was needed to ascertain when the cause of action actually arose. In the circumstances, this court finds that the Learned Trial Adjudicator erred in determining that the Appellant's claim was time barred.
16. In finding so, I am also guided by the decision of the court *Kigwor Company Limited v Samedy Trading Company Limited* [2021] KECA 810 (KLR) where the Court of Appeal faced with a similar issue held:

“We have discussed above at least three possible times when the cause of action may be said to have accrued, if anything to demonstrate that the question as to when the cause of action accrued is contested and is indeed subject to some facts being proved by adducing evidence. This removes this matter from the ambit of matters that can be determined by way of preliminary objection. The appellant is trying to use the preliminary objection as a sword and not as a shield. We hold the view that from the material placed before the learned Judge, it was clear that the issue of limitation of time was not crystal clear and it was necessary that parties be availed opportunity to call evidence in support of their respective assertions as to when the cause of action had accrued.” (emphasis added)

17. That said, this appeal must succeed and the same is allowed in the following terms:
 - i. The Ruling dated October 11, 2023 is set aside in its entirety.
 - ii. This matter is hereby remitted to the Small Claims Court to be heard on merit before another Adjudicator other than Hon. Caroline Cheruiyot, Adjudicator/Resident Magistrate.
 - iii. The Appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 13TH DAY OF JUNE 2025.

A. C. BETT
JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: Polycap

