



REPUBLIC OF KENYA



**Kenya Wildlife Service v Murithi (Civil Appeal E010 of 2023)
[2025] KEHC 9624 (KLR) (1 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E010 OF 2023
SM GITHINJI, J
JULY 1, 2025**

BETWEEN

KENYA WILDLIFE SERVICE APPELLANT

AND

JULIUS MURITHI RESPONDENT

*(Being an Appeal from the Ruling of Hon. M. C. Nyigei (SRM) in
Maua CMCC No. 186 of 2021 delivered on 6th December, 2022)*

JUDGMENT

1. This Appeal arises from the ruling of the learned Senior Resident Magistrate Hon. M. C. Nyigei delivered on 6/12/2022 in Maua Civil Suit No. 186 of 2021.
2. Aggrieved by the dismissal of its Preliminary Objection dated 23/9/2022, the Appellant set forth the following grounds in the Memorandum of appeal dated 10th January, 2023;
 1. The Learned trial Magistrate erred in law and fact by dismissing the Appellant's Preliminary Objection dated 23/9/2022.
 2. The Learned trial Magistrate erred in fact and law by failing to appreciate that the court order issued allowing the Respondent to file suit out of time was erroneous and offending the provisions of Section 27 of the *Limitation of Actions Act*.
 3. The Learned trial Magistrate erred in law and fact by failing to appreciate the appellant's submissions as to the issues raised in their Preliminary Objection dated 23rd September 2022.

Appellant's Submissions

3. The Appellant through the firm of Wanjiru Christine Advocate filed submissions dated 10/4/2024 contending that the provisions of section 27 (1) of the *Limitation of Actions Act* do not envisage the



extension of time for matters that are not of personal injury in nature, and cited *Mary Osundwa v Nzoia Sugar Co. Ltd* (2002) eKLR, *Emmanuel Kidaho Ruhengeri v Sadry Dhala* (2017) eKLR and *Willis Onditi Odhiambo v Gateway Insurance Co. Limited* (2014) eKLR. Counsel faulted the trial court for failing to consider the Appellant's submissions which had been duly filed and served upon the Respondent.

4. The Respondent through the firm of Ngunjiri Michael & Co. Advocates filed submissions dated 3/6/2024. Counsel submitted that an objection to leave granted to file a suit out of time could only be taken at the hearing and not by a preliminary point of law, and cited *Yunes K. Oruta & Anor v Samwel Mose Nyamalo* (Civil Appeal No. 96 of 1984) (UR) and *Julius Njue Mukangu v Augustino Kinyua Njiru and another* (2019) eKLR.

Determination

5. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
6. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held as follows: "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."
7. I have considered the appeal herein, the trial court's ruling which is the subject of this appeal as well as the submissions by counsel.
8. From the grounds of appeal, the twin issues for determination are whether the leave to file the suit out of time was irregular and whether the Appellant's submissions were considered.
9. On 13/10/2021, the Respondent instituted these proceedings after successfully obtaining leave on 21/9/2021, for a cause of action which arose on 8/10/2016.
10. In those proceedings, the Respondent sought compensation for damaged crops resulting from an elephant invasion. That is not one of the causes of action where extension of time is permissible under the *Limitation of Actions Act*.
11. Section 27 (1) of the *Limitation of Actions Act* provides that; "(1) Section 4 (2) does not afford a defence to an action founded on tort where— (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and (d) the requirements of subsection (2) are fulfilled in relation to the cause of action."
12. That section was expounded by the Court of Appeal in *Mary Osundwa v Sugar Company Limited* [2002] eKLR as follows; "This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort."



13. Similarly in *Willis Onditi Odhiambo v Gateway Insurance Co. Ltd* [2014] eKLR, the Court of Appeal had this to say; “Under Section 27, as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is found on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort. The section clearly does not give jurisdiction to the court to extend time for filing suit in cases involving execution of decrees. In the matter before us, it matters not that the original suit was founded on the tort of negligence and damages claimed were in respect of personal injuries as a result of the tort of negligence.”
14. As correctly pointed out by the Appellant, the law does not envision extension of time for causes of action which are not of personal injury in nature. It is thus trite that extension of time strictly applies to personal injury claims.
15. I find that the trial court fell into error when it purported to extend time to file a suit out of time for a cause of action where such leave was impermissible under the *Limitation of Actions Act*.
16. It was immaterial that the reasons advanced by Respondent for his failure to institute the suit within the stipulated time, to wit an alleged sickness for 2 years and lack of funds to instruct an advocate, were plausible.
17. It has been suggested by the Respondent that an objection to leave granted to file a suit out of time could only be taken at the hearing and not by a preliminary point of law. The Appellant became aware of the ex parte order extending time to file the suit when it was served with the pleadings and summons to enter appearance. It could not therefore be reasonably expected to object to the said leave before the trial commenced. The Appellant probed the Respondent during cross examination on the reasons for the delayed institution of the suit. It then raised the Preliminary Objection after the close of the Respondent’s case.
18. In *Mary Wambui Kabugu v Kenya Bus Services* [1997] eKLR, the Court of Appeal (Shah JA) espoused that; “In a situation such as I have outlined the defendant only becomes aware of the order extending time when he is served with the summons, plaint and the order extending time. There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In my humble view the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts.”
19. I find that the suit was improperly filed out of time on the basis of irregularly enlarged time, and thus it was statute barred.
20. On whether the Appellant’s submissions were considered, the trial court erroneously noted in its impugning ruling that the Appellant did not file any submissions, notwithstanding the fact that those submissions were duly filed on 14/11/2022. Nonetheless, it has been countlessly held that submissions are neither pleadings nor evidence and their consideration or lack thereof cannot in itself be a ground to interfere with the discretion of a trial court.
21. I draw guidance from *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR where the Court of Appeal elucidated that; “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”



22. The upshot from the foregoing analysis is that the appeal is merited and it is hereby allowed. The trial court's order dismissing the Appellant's Preliminary Objection dated 23/9/2022 is hereby set aside and substituted with an order striking out the suit.

23. Parties to bear own costs.

DATED AND DELIVERED AT MERU 1ST THIS JULY, 2025

S.M. GITHINJI

JUDGE

Appearances:-

Mr. Mutai holding brief for Miss Wanjiru for the Appellant.

Mr. Ngunjiri's firm is for the Respondent (absent).

