



REPUBLIC OF KENYA



**KENYA LAW**  
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**Osolo v Mutwiri (Civil Appeal E1119 of 2023)  
[2025] KEHC 14254 (KLR) (Appeals) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 14254 (KLR)

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

**APPEALS**

**CIVIL APPEAL E1119 OF 2023**

**LP KASSAN, J**

**SEPTEMBER 17, 2025**

**BETWEEN**

**RUTH OMUKITSA OSOLO ..... APPELLANT**

**AND**

**PATRICK GIKUNDA MUTWIRI ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. G. Omondho delivered on 12th October 2023 in Milimani Commercial Magistrate Court Civil Case No E6131 of 2022)*

**JUDGMENT**

1. This appeal emanates from the ruling delivered on 29.09.2023 by the lower Court in Nairobi Milimani CMCC No. E2436 of 2022 (hereafter the lower Court suit). The history leading to the instant appeal is that Ruth Omukitsa Osolo, (hereinafter the Appellant), the plaintiff before the lower Court, initiated suit by way of plaint as against Patrick Gikunda Mutwiri, (hereinafter the Respondent), the defendant before the lower Court seeking judgment as against the Respondent in the sum of Kshs. 3,326,500/- together with interest from 01.12.2014 until payment in full.
2. The gist of Appellant's averment was that pursuant to criminal proceedings before Makadara MCCR. No. 2295 of 2015, the Respondent was tried, convicted and sentenced on 26.11.2021 to pay a fine of Kshs. 300,000/- or to serve three (3) years imprisonment in default. In the same sentence, the Respondent was further ordered to compensate the Appellant, by paying the sum of Kshs. 3,326,500/- which the Respondent has never paid to date. Therefore, the Appellant's claim against the Respondent was for the aforesaid sum together with interest from 01.12.2014 until payment in full.
3. The Respondent filed a statement of defence denying the key averments in the plaint meanwhile averred that there was an ongoing appeal before the High Court in respect of the conviction and sentence meted in Makadara MCCR. No. 2295 of 2015. Subsequently, the Respondent filed a



Preliminary Objection dated 10.05.2023, as against the Appellant's suit, on grounds that the same offends the mandatory provisions of the Limitation of Actions Act; and that the honorable Court lacks jurisdiction to entertain the Appellant's suit.

4. The Respondent's preliminary objection was disposed of by way of written submissions. By way of a ruling delivered on 29.09.2023, the trial Court upheld the Respondent's preliminary objection and as a consequence dismissed the Appellant's suit.
5. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in her memorandum of appeal as itemized hereunder :-
  1. The trial Magistrate erred in law and fact in entertaining and allowing a preliminary objection which was not based or grounded on a pure point of law.
  2. The trial Magistrate erred in law and fact in finding and holding that the suit before the court had been filed out of time.
  3. The trial Magistrate erred in law and fact in holding that the suit offended Section 4 of the Limitation of Actions Act without stating or deciding when the time for filing the suit started running.
  4. The trial Magistrate erred in law and fact in holding that the Appellant ought to have sought leave to file the suit out of time, yet the Appellant did not need any such leave because the suit had been filed within time.
  5. The trial Magistrate erred in law and fact in failing to appreciate, sufficiently or at all, the provisions of Section 3 and 4 of the Victims Protection of Act, No. 17 of 2014, especially Section 4 thereof, which provides that a compensation order made against a convicted offender may be enforced as a judgement in civil proceedings." (sic)
6. Directions were taken on disposal of the appeal by way of written submissions. The parties duly complied. That said, this Court has considered the rival submissions, authorities relied on alongside the record of appeal.
7. The duty of this Court as a first appellate Court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123 and *Abok, James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
8. The Respondent's preliminary objection dated 10.05.2023 before the trial Court was saliently premised on the twin grounds that the suit offends the mandatory provisions of the Limitation of Actions Act; and that the Court lacks jurisdiction to entertain the Appellant's suit. The trial Court in allowing and or upholding the Respondent's preliminary objection stated *inter alia* that:-
  - “3. I have reviewed the preliminary objection, submission and annexed authorities.
  4. The preliminary objection challenged the jurisdiction of this Court and that the suit offended the provisions of the Limitations Act. The defendant submitted that the suit had been instituted six years from the date when the cause of action had accrued. He argued that the Plaintiff ought to have in the first instance sought leave from the Court to institute the suit out of time.



5. The Plaintiff on the other hand opposed the preliminary objection and submitted that it did not meet the threshold required to qualify as a demure. She submitted that the Section 4 of the Limitations Act did not apply by dint of the fact the suit herein sought to enforce the contract of supply of the goods which the Defendant received but failed to pay following the order issued on 26<sup>th</sup> November, 2021 by Hon. Nyaga, Chief Magistrate in Criminal Case No. 2295 of 2015 – *Republic v Patrick Gikunda Mutwiri* which required the Defendant to compensate the Plaintiff.
  6. From the foregoing, I am of the opinion that the Plaintiff ought to have sought leave to file the instant suit and cited reason for the delay as being that the suit was premised on the outcome of Criminal Case No. 2295 of 2015 – *Republic v Patrick Gikunda Mutwiri*. In my view, this explanation would have sufficed and the Court would have enlarged time and granted leave for the suit to be filed out of time.
  7. Failure to seek leave is not a technicality that can be cured by Article 159 of the Constitution of Kenya as this is a substantive issue that gives rise to the suit herein.
  8. I am inclined to agree with the Defendant and find that the suit herein offends Section 4 of the Limitation Act. Consequently, the preliminary objection dated 10<sup>th</sup> May, 2023 is upheld and the suit herein dismissed for the above stated reasons.
  9. There are no orders as to costs.” (sic)
9. As earlier captured in this judgment, the Appellant’s suit was dismissed on the premise of the Respondent’s preliminary objection. At the outset, one of the Appellant’s contestations concerning the impugned ruling is that the trial Court erred by entertaining the preliminary objection which was not based or grounds on a pure point of law. As to the nature of a preliminary objection, the same has since been settled within our jurisdiction in the celebrated decision of *Mukisa Biscuits Manufacturing Company Ltd*. It was held therein that -;

“So far as I am aware, 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

See also-; *Oraro v Mbaja* [2005] KLR 141 and *Kigwor Company Limited v Samedy Trading Company Limited* [2021] KECA 810 (KLR)



10. In *Mulemi v Angwenye & Another* (Civil Appeal 170 of 2016) [2021] KECA 214 the same Court further distilled the definition of a preliminary objection as elucidated in *Mukisa Biscuits (supra)* by stating as follows-;
- “i) It must be a pure point of law;
  - ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
  - iii) If argued as a pure point of law, it may dispose of the suit;
  - iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court’s discretion”.
11. *Ex facie*, the Respondent preliminary objection did not cite any specific provision of statute that it was anchored on. It merely took issue with the Appellant’s suit for contravening the *Limitation of Actions Act* and the fact that the Court lacked jurisdiction to entertain the suit. Despite the same not specifically being anchored on any provision of statute, the Respondent duly pleaded the same by taking issue with jurisdiction of the Court to entertain the suit as presented. That said, it would further appear from the Respondent’s submissions before the trial Court and subsequently by the impugned decision, both the Respondent and the trial Court implicitly angled the limitation question on Section 4(1)(a) of the *Limitation of Actions Act*. That suit was premised on contract and therefore caught up by limitation.
12. This position was correspondingly advanced on this appeal with Respondent relying on among other decisions *Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited* 2017 eKLR, *Divecon vs Samani* (1995-1998) EA 48, *Beatrace Kabai Adagala v Postal Corporation of Kenya* [2015] KECA 257 (KLR), *Njenga v Mugo & 3 others* [2023] KECA 18 (KLR), *Maersk Kenya Limited v Murabu Chaka Tsuma* [2017] eKLR, *Anacet Kalia Musau v Attorney General & 2 Others* [2020] eKLR, *Gathoni v Kenya Co-operative Creameries Ltd* [1982] eKLR, *Mwadime t/a Mwadime Enterprises Limited v Kenya Power and Lighting Company* [2023] eKLR and *Dennis Nyandu v Francis Aburi Oyaro* [2021] eKLR to shore up the fact that the suit was caught up by limitation.
13. However, it warrants mentioning that not much industry was expended by the trial Court in analyzing the Appellant suit alongside Section 4(1)(a) of the *Limitation of Actions Act*. Particularly and as rightly argued by the Appellant, when the cause of action accrued and or when time began to run.
14. Therefore, to answer whether the Appellant’s suit was statute barred on the premise of the pleadings presented before the trial Court? The gist of the respective parties’ pleadings had earlier been captured in this judgment. It would seem that the Appellant’s suit was founded on an order for compensation rendered by the Court in Makadara MCCR. No. 2295 of 2015.
15. An order for compensation and expenses in criminal proceedings is anchored on the provision of Section 175 of the *Civil Procedure Code* as read alongside Section 31 of the *Penal Code*. The former provides that-;
- (1) A court which—
    - (a) on convicting a person of an offence, imposes a fine, or a sentence of which a fine forms part; or



- (b) on appeal, revision or otherwise, confirms such a sentence, may, when passing judgment, order the whole or any part of the fine recovered to be applied in defraying expenses properly incurred in the prosecution of the offence.
- (2) A court which—
- (a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and
- (b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party"), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.
- (3) No order shall be made under subsection (2)—
- (a) so as to require payment of an amount that exceeds the amount that the court making the order is authorised by law to award or confirm as damages in civil proceedings; or
- (b) in any case where, by reason of—
- (i) the complexity of evidentiary matters affecting the quantum of damages;
- (ii) the insufficiency of evidence before it in relation to such damages or their quantum;
- (iii) the provisions of the *Limitation of Actions Act* (Cap. 22); or
- (iv) any other circumstances,
- the court considers that such an order would unduly prejudice the rights of the convicted person in respect of the civil liability.
- (4) No order under this section shall take effect—
- (a) before the expiry of the time limited for appeal against the conviction or sentence in respect of which the order was made; or
- (b) while any such conviction or sentence is the subject of appeal, unless and until the conviction or sentence, and the order, are confirmed by the court determining the appeal.
- (5) A court determining an appeal referred to in subsection (4) shall affirm, quash or vary an order under this section, as justice requires.
- (6) An order under this section that has taken effect is enforceable in the same manner as a judgment in civil proceedings for the amount awarded by the order.
- (7) An award by order under this section in respect of a civil liability is, to the extent of the amount awarded, a defence in any subsequent proceedings instituted in respect of that liability.



16. Where Section 31 of the *Penal Code* provides that-;

Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.

17. Alongside the aforecaptioned provisions, Article 50(9) of the *Constitution*, concerning legislation providing for the protection, rights and welfare of victims of offences, was operationalized by enactment of the *Victim Protection Act*. Section 23 of the *Act* provides for the Right to Compensate Victims. Specifically, Section 23(3) of the *Act* provides that -; A victim has the right to restitution of any property or right to property of which the victim is deprived as a result of an offence in respect of which the victim is entitled to the rights and remedies specified in this Act whereas sub-section (4) of Section 23 provides that-; A compensation order made against a convicted offender may be enforced as a judgment in civil proceedings. Section 24 provides for an Award for Compensation by a Court whereas Section 25 provides that Compensation or restitution order not being part of a sentence.

18. Meanwhile Section 26 of the *Act* provides for Victim Restitution to the extent that -;

- (1) Where a person is convicted of an offence under any written law, the court may, in addition to any other penalty prescribed under that law, order the person to make restitution or compensate the victim for—
  - (a) the cost of any damage to the property of the victim;
  - (b) the costs of any medical or psychological treatment incurred the victim;
  - (c) the costs of necessary transportation, accommodation and other living expenses relating to the court proceedings leading to the conviction; or
  - (d) any other relief that the court may consider necessary.
- (2) Where the Court orders payment of both a fine and compensation, the enforcement of the compensation order shall take precedence.
- (3) In every case, the enforcement of an order for compensation, restitution or restoration shall be governed by the *Civil Procedure Rules*.

19. Indubitably neither does the *Criminal Procedure Code*, the *Penal Code*, the *Victim Protection Act* nor the *Civil Procedure Act* provide for the manner or form in which enforcement of a compensation order takes and or the limitation period within which to enforce a compensation order. Nevertheless, my deduction of Section 23(4) of the *Act*, is that a compensation order made against a convicted offender may be enforced as a judgment in civil proceedings, would translate that such an order constitutes, what can be construed and or perceived as judgment of the Court.

20. To the foregoing end, as to the limitation period with respect to a judgment of the Court, the same is settled by the prescription of Section 4(4) of the *Limitation of Action Act* which provides that -;

An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.



21. By the Appellant's pleadings, the Respondent was tried, convicted and sentenced on 26.11.2021. The Respondent's retort to the above averment in his statement of defence was that there is an ongoing appeal before the High Court challenging the conviction and sentence whereas the same is still pending. In this Court measured deduction, the time element with respect to the Appellant's cause of action began to run on 26.11.2021 however as to whether the suit can sustain in light of the Respondent's defence, the same is answered by Section 175(4)(b) of the *Criminal Procedure Code*. In any event, the Respondent can move the lower Court appropriately to assuage the situation.
22. As earlier noted, the lower Court did not expend much industry to establish when time began to run with respect to the Appellant's claim so as to render the suit time or statute barred. The lower Court suit having been filed on or about 21.02.2022, it cannot be stated that the same was time barred in light of the conviction and sentence on 26.11.2021 as juxtaposed alongside Section 4(4) of the *Limitation of Action Act*. As such the trial Court's finding that the Appellant's suit offended Section 4 of the *Limitation of Action Act* must be faulted and set aside.
23. Consequently, it is my judicious belief that I have addressed myself sufficiently to the matter appertaining the instant appeal and as to whether the lower Court could in fact entertain the Appellant's suit is filed. In the end, the learned Magistrate's decision having been faulted by this Court is accordingly set aside by dismissing the Respondent's preliminary objection thereby allowing the appeal with costs in favour of the Appellant.
24. Finally, the resultant commending order would further entail that the suit be heard before any other Magistrate other than Hon. B. Cheloti.
25. Orders Accordingly!

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2025**

**L. P. KASSAN**

**JUDGE**

In the presence of:

Amuga for Appellant

Wanjiru holding brief Oduk for Respondents

Court Assistant – Caro.

