



REPUBLIC OF KENYA



**KENYA LAW**  
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**Murimi & another v Okinda & another (Civil Appeal E004 of 2025)  
[2025] KEHC 14602 (KLR) (15 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14602 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E004 OF 2025  
RM MWONGO, J  
OCTOBER 15, 2025**

**BETWEEN**

**SIMON MUGENDI MURIMI ..... 1<sup>ST</sup> APPELLANT**

**DAVID KIMATHI NDEGWA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MICHAEL OKINDA ..... 1<sup>ST</sup> RESPONDENT**

**BURAQ AGENCY ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the ruling of Hon. F. Kyambia delivered  
on 23rd January 2024 in Embu CMCC No. E171 of 2021)*

**JUDGMENT**

**The Appeal**

1. Through a memorandum of appeal dated 27<sup>th</sup> January 2025, the appellants seek the following orders:
  1. That this appeal be allowed.
  2. That the Ruling of the Learned Magistrate dismissing the appellant's preliminary objection dated 3<sup>rd</sup> November, 2021 be set aside and an order be made striking out the Plaintiff/ Respondent's suit in the lower court; and
  3. That the costs of the appeal and of the suit be borne by the Respondents.
2. The appeal is premised on the following grounds:
  1. That the Learned Magistrate erred in law and in fact in dismissing and finding that the appellant's Preliminary objection dated 03<sup>rd</sup> November, 2021 is misplaced and lacks merit without ample justification of the same thereby arriving at a wrongful decision;



2. That the Learned Trial Magistrate erred in law and in fact by disregarding the Appellants duly filed submissions and the binding authorities made on behalf of the appellants without any proper reasons to do so in striking out the preliminary objection;
3. That the Learned Trial Magistrate erred in law and in fact in finding that the Respondent's suit in the nature of special/material damage ought to have been filed within 3 years from the date of the accident thereby arriving at a wrong conclusion and contrary to the law that stipulates that material damage claims cannot be filed after one year has lapsed from the time of the accident; and
4. That the Learned Trial Magistrate erred in law and in fact by exercising her discretion capriciously and not judiciously.

### **Background and Preliminary Objection to plaint**

3. The claim in the lower court arose from a road traffic accident. The 1<sup>st</sup> respondent filed a plaint dated 07<sup>th</sup> October 2021 and amended on 09<sup>th</sup> November 2021. He sought special damages of Kshs.297,890/= and costs of the suit with interest against the appellants and the 2<sup>nd</sup> respondent. He claimed that on 13<sup>th</sup> November 2018, he was lawfully driving his motor vehicle registration number KCG 513L along Embu-Sunrise road when the appellants and 2<sup>nd</sup> respondent carelessly drove their motor vehicle registration number KBM 965F, causing the 1<sup>st</sup> respondent to veer off the road and cause damage to his vehicle.
4. Before amendment, the plaint indicated that the incident occurred on 12<sup>th</sup> October 2018. Through the amended plaint, the date of amendment was indicated as 13<sup>th</sup> November 2018.
5. The appellants filed a preliminary objection to the suit dated 03<sup>rd</sup> November 2021 on the following grounds:
  1. That the plaint as drafted and filed offends the mandatory provisions of sections 27, 28 and 29 of the *Limitation of Actions Act* and Order 37 Rule 6 of the Civil Procedure Rules, having been filed out of time; and
  2. The suit is invalid, irregular, incompetent and an abuse of the court process and it ought to be struck out in limine having been instituted without the requisite authority as per the mandatory provisions of the law.
6. Counsel for the appellants and 2<sup>nd</sup> respondent filed a replying affidavit in response to the preliminary objection. She stated that at the time of filing the suit, it was within the 3 years stipulated period under the *Limitation of Actions Act*. She acknowledged that there had been an error as to the date of the occurrence but the same was corrected through the amended plaint filed on 10<sup>th</sup> November 2021. That the amended plaint was served upon the 1<sup>st</sup> respondent.

### **Ruling of the Trial Court**

7. The preliminary objection was disposed of by way of written submissions which the court considered. The trial court relied on section 4(2) of the *Limitation of Actions Act* and found that the plaint was received in court on 25<sup>th</sup> October 2021, within 3 years of the incident. The preliminary objection was dismissed.
8. It is that ruling which is the subject of this appeal.



## Parties' Submissions on appeal

9. The appeal herein was canvassed by way of written submissions.
10. The appellants relied on the cases of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 and urged the court to re-examine the evidence brought before the trial court. They also relied on *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR) on the scope of application of a preliminary objection. They referred to the plaintiff's witness statement and investigation report which formed part of the plaintiff's list of documents. It was their argument that the accident occurred on 07<sup>th</sup> October 2018; that the plaint was received on 25<sup>th</sup> October 2021, more than 3 years later; and that this contravened section 4(2) of the *Limitation of Actions Act*. Finally, the appellants urge that the amended plaint was filed after the preliminary objection had been filed in a bid to circumvent justice. They further relied on section 27 of the *Limitation of Actions Act* and the case of *Masulal Maganlal Rawal v Maneklal Maganlal Rawal* [1989] KEHC 93 (KLR).
11. In response, the respondents submitted that according to the amended plaint, the cause of action arose on 13<sup>th</sup> November 2018 but the plaint was first filed on 07<sup>th</sup> October 2021, within the 3 years allowed under the *Limitation of Actions Act*. They relied on sections 27, 28 and 29 of the *Limitation of Actions Act* and the cases of *Mehta v Shah* [1965] EA 321 and *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KECA 10 (KLR). According to them, the suit is not time barred.

## Issue for Determination

12. The sole issue for determination is whether the trial court erred in dismissing the preliminary objection.

## Analysis and Determination

13. The appellate court makes its decision based on the record of the trial court as was held in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* (supra), thus:

“...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...”
14. The preliminary objection was premised on grounds that the suit was time barred. The trial court considered the date of filing the plaint vis a vis the date when the cause of action arose. According to the plaint, the accident occurred on 12<sup>th</sup> October 2018, but in the amended plaint, it occurred on 13<sup>th</sup> November 2018. By the time the amended plaint was being filed, the preliminary objection had already been filed. The plaint was first filed on 25<sup>th</sup> October 2021. Once the plaint was amended, the court should be guided by the amended plaint.
15. The statement of defense was filed on 03<sup>rd</sup> November 2021 together with the preliminary objection. The amended plaint was filed 10<sup>th</sup> November 2021, seven days later. This amended plaint was properly filed before close of pleadings. Order 2, rule 13 of the Civil Procedure Rules provides for close of pleadings as follows:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence,



notwithstanding that any order or request for particulars has been made but not complied with.”

16. Moreover, no leave needed to be sought, given the timelines, before filing of the amended plaintiff, despite the fact that it was filed after the preliminary objection. The amended plaintiff thus complies with Order 8 of the Civil Procedure Rules. Once the amended plaintiff properly became part of the court’s record as a pleading in accordance with the CPR, it meant that the date on which the cause of action arose is that stated in the amended plaintiff and not the plaintiff. However, the date of filing of the plaintiff is the one that informs computation of time with reference to when the cause of action arose, which was that stated in the amended plaintiff.
17. Therefore, between 13<sup>th</sup> November 2018 and 25<sup>th</sup> October 2021, there is a period of 2 years, 11 months and 12 days, being less than 3 years. Section 4(2) of the *Limitation of Actions Act* provides:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.” [Emphasis added]
18. At the point of raising the preliminary objection, parties are strictly bound by their pleadings. The point of law raised must not be one that would demand examination of evidence to determine. In other words, it is not one that is determinable through examination of facts. It should be one that appears outrightly through the pleadings and the arguments made at that preliminary stage. The date of occurrence of the accident should not be one that the court ought to investigate since the hearing of the substantive suit has not even begun. The trial court properly based its findings on the pleadings filed before it in accordance with the law, when determining the objection raised.
19. For a preliminary objection to hold, it is paramount that a pure point of law be raised therein, such that if the objection succeeds, the suit will be determined altogether. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at 700, the Court of Appeal held:

“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.... A preliminary objection is in the nature of 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.”

### **Disposition**

20. In this case, the preliminary objection indeed raised a pure point of law, which is computation of time. However, as stated hereinbefore, the suit was properly filed before the end of 3 years as stipulated under section 4(2) of the *Limitation of Actions Act*.
21. Accordingly, the appeal lacks merit and is hereby dismissed with costs to the 1<sup>st</sup> respondent.
22. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 15<sup>TH</sup> DAY OF OCTOBER, 2025.**

**R. MWONGO**

**JUDGE**



Delivered in the presence of:

1. Ms. Mugane for Appellant
2. Ms. Kiplimo for Respondent
3. Francis Munyao - Court Assistant

