



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onchwari v Kan Travellers (Civil Appeal E076 of 2022)  
[2025] KEHC 19197 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19197 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E076 OF 2022  
MS SHARIFF, J  
DECEMBER 17, 2025**

**BETWEEN**

**RUTH MORAA ONCHWARI ..... APPELLANT**

**AND**

**KAN TRAVELLERS ..... RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrate's Court in Bungoma in Civil Case No. 360 of 2019 delivered by Hon. H. Getenga (SRM) on 26TH July 2022)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the ruling of Bungoma Senior Resident Magistrate in CMCC No. E360 of 2019 whereby the trial Court allowed a Preliminary Objection dated 21<sup>st</sup> May 2021 based on the ground that the claim was time barred under Section 4 of the Limitations of Actions Act.

**The Appeal**

2. Dissatisfied with the Court's ruling, the Appellant lodged this appeal dated 25<sup>th</sup> August 2022, and filed in Court on 30<sup>th</sup> August 2022 citing 6 grounds summarized as follows:-
  - a. The learned trial magistrate erred in law by allowing the preliminary objection dated 21<sup>st</sup> May 2021, which was not proved.
  - b. The learned trial magistrate erred in law and in fact in failing to observe that the Appellant had sufficiently proved or demonstrated that the suit was filed within the period of 3 years in the computation of time under Order 50 of the Civil Procedure Rules.
  - c. The learned trial magistrate erred in law and in fact in dismissing the Appellant's application for extension of time to file her suit.



3. This appeal was canvassed by way of written submissions.

### **The Appellant's Submissions**

4. Vide written submissions dated 17<sup>th</sup> September 2025, the Appellant submitted that the reasons for the delay in filing the suit were excusable and reasonable. Counsel for the Appellant contended that the trial magistrate erred in holding that the suit was time-barred and should have exercised discretion to allow the extension of time. Further, Counsel emphasized that procedural technicalities should not override the administration of justice, as per Article 159(2)(d) of *the Constitution*.
5. Counsel for the Appellant argued that the Civil Procedure Rules should apply to the matter, and the trial magistrate's interpretation of the rules was misplaced. Counsel urged this Court to find the appeal merited, allow the same, and award costs to the Appellant.
6. Counsel placed reliance on the following Legal Provisions:
  - i. Section 27 and 28 of the *Limitation of Actions Act*: These sections allow a Court of competent jurisdiction to extend the time to file a suit.
  - ii. Order 37 Rule 6(1) & 21 of the Civil Procedure Rules: These provisions outline the procedure for seeking leave to file a suit out of time or for an extension of time to file a suit.
  - iii. Order 50 Rule 4 of the Civil Procedure Rules: This provision excludes the period between 21<sup>st</sup> December and 13<sup>th</sup> January (24 days) from the computation of time. The Appellant argued that this exclusion meant the suit was filed within 3 years and 72 days, and thus not time-barred.
  - iv. Article 159(2)(d) of *the Constitution* of Kenya, 2010: This article emphasizes that justice should be administered without undue regard to procedural technicalities.

### **Respondent's Submissions**

7. The Respondent did not comply with the Court directive.

### **Analysis and Determination.**

#### **A. Whether the Appeal has merit.**

8. This being a first appeal, this Court is under a duty to re-evaluate, re-analyze and re-scrutinize the evidence adduced before the trial Court and make its own conclusions while taking into account the fact that, unlike the trial Court, it did not have the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly enunciated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424.
9. The Appellant argues that the suit was brought under Order 50 Rule 4 & 6 and Order 37 Rule 6 (2) of the Civil Procedure Rules as well as Sections 3A & 1A of the *Civil Procedure Act* and Section 27 & 28 of the Limitations Act. She argues that she lacked the requisite funds to institute the suit within the statutory timelines and that her parents failed to follow up on her case with the advocate. She insisted that the delay was not intention and the same could be mitigated as delay was for only sixty (60) days which could be cured under Order 50 Rule (4) of the Civil Procedure Rules.
10. The Respondent in the lower Court argued that the suit emanated from a road traffic accident that occurred on 31<sup>st</sup> August 2016, and it was filed on 30<sup>th</sup> October 2019, three years and two months after the cause action arose; contrary to the provisions of Section 4 (2) of the Limitations of Actions Act.



Further, the Respondent argued that the Appellant proceeded to file her suit without the leave of the Court.

11. It is evident that the Appellant's claim is founded on a tort of negligence. Pursuant to Section 4(2) of the Limitation of Actions Act, an action founded on tort may not be brought after the end of three years from the date the cause of action accrued. In the instant case, the time for filing the claim in the trial Court lapsed on 30<sup>th</sup> November 2018. In addressing this issue, I note that the Appellant in his submissions argued that his suit was not time barred for reasons that under Order 50 Rule 4 of the Civil Procedure Rules as the computation of time in relation to the Courts Christmas recess, judicial time did not run during the period between 21<sup>st</sup> December and 13<sup>th</sup> January. The said Order 50 rule 4 stipulates as follows;

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleadings or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

12. In the case of *Gathoni vs. Kenya Co-Operative Creameries Ltd* [1982] KLR 104, Potter, JA at page 107 expressed himself thus:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

13. In the case of *Maersk Kenya v Murabu Chaka & Suma* [2017] eKLR as relied upon by the trial Court, Court of Appeal while dealing with a similar issue held as follows;

“The question at this juncture is whether the learned judge rightly applied order 50 rule 4 of the Civil Procedure Rules to hold that the six-year period stipulated by the Limitation of Actions Act could be extended in each year from 2006 to 2012 by exclusion of the period between 21<sup>st</sup> December and 13<sup>th</sup> January. In other words, did time stop running in each year from 2006 to 2012 during the period between 21<sup>st</sup> December and 13<sup>th</sup> January thereby extending the time specified by the Limitation of Actions Act for filing of the respondent's claim? In determining the issue, a consideration of section 33 of the Interpretation and General Provisions Act will be of necessity. It provides;

“An act shall be deemed to be done under an Act by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act, it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act.”

14. I concur with the trial Court, that it is clear that Order 50 Rule 4 applies specifically to computing time under the Civil Procedure Rules, or in accordance with an order of the Court. Nothing in the Rule shows that it was intended to be applied to the time limits fixed by the Limitation of Actions Act, which is a different Act from the Civil Procedure Act and the Rules.



15. Moreover, the issue of Christmas recess does not apply to the Magistrates Courts where the suit was filled and dismissed. I am guided by the holding by the above Court of Appeal, which I adopt herein. The period of *Limitation of Actions Act* cannot be overrun by the Civil Procedure Rules.
16. On the issue of leave for extension of time to file the lower Court suit out of time, pursuant to Section 27 of the *Limitation of Actions Act*, it is elaborate that the Appellant failed to demonstrate she was unaware of material facts until a date which: either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and in either case, was a date not earlier than one year before the date on which the action was brought. Therefore, I concur with the trial Court's holding and I am disinclined to enlarge time and grant the Appellant's leave to file the suit out of time.
17. The upshot is that the learned trial Magistrate did not err in law and in fact in arriving at the decision she made declaring the Appellant's suit as being statute barred. The Appeal is therefore found to lack merit and is dismissed with costs to the Respondent.

Orders accordingly

**DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF DECEMBER 2025.**

**MWANAISHA.S. SHARIFF**

**JUDGE**

In the presence of:

N/A by Parties and their counsels

Peter Machoni – Court Assistant

