Oindi v Cheriro & another (Civil Appeal E058 of 2024)
[2026] KEHC 3054 (KLR) (9 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E058 OF 2024

RN NYAKUNDI, J

MARCH 9, 2026

BETWEEN

ZAIPPELINE OINDI ..... APPELLANT

AND

JOAN CHELANG'AT CHERIRO ..... 1ST RESPONDENT

MARIGI RICHARD WANGUI ..... 2ND RESPONDENT

(Being an appeal against the Ruling of Hon R. Otieno in Eldoret Small Claims Court Case No. E1208 delivered on the 21st day of March 2024)

JUDGMENT

Representation:

Zaippeline Oindi, the Appellant

M/s Korir Davis & Co Advocates

Background

1. The brief background of this appeal is that the Appellant filed a Statement of Claim dated 6th December 2023 at the trial court being Small Claims Court Case No E1208 of 2023 claiming of Kshs. One Hundred and Forty-Two Thousand (142,000/=) allegedly being money received and held for business on diverse dates in June and September 2014 as set out under paragraph (3) of the Statement of Claim and interest on the aforesaid amount. The Appellant averred at the trial court that the said amount was advanced to the 2nd Respondent in pursuance of an agreement entered into between the Appellant and Respondent in the year 2014.

2. In response to the Statement of Claim, the Respondent herein filed a Notice of Preliminary Objection dated 22nd December 2023 opposing the claim challenging the jurisdiction of the trial court on account

that the claim was time barred having being filed beyond six (6) years from the time of accrual of the cause of action contrary to the provisions of section 4(1) of the Limitations of Act. The Claimant subsequently filed Grounds of opposition dated 8th January 2024 to the said Objection. The trial Court delivered its Ruling on 1st February 2024 holding in favour of the Respondent's Notice of Preliminary Objection and consequently struck out the Claimant's Claim in its entirety.

3. The Appellant herein being dissatisfied by the said Ruling of the Trial Court filed a Notice of Motion Application dated 8th February 2024 seeking among other orders to stay, review, set aside and/or vacate the orders of the Ruling delivered on 1st February 2024. The Respondents jointly filed Grounds of Opposition dated 9th February 2024 in response and in opposition of the application. The Trial Court vide its Ruling delivered on 21st March 2024 dismissed the Claimant's/Appellant's application it its entirety because it was devoid of merit.

4. The Appellant being dissatisfied by the Ruling and decree issued by the trial Court appealed against the two rulings vide a Memorandum of Appeal on the following grounds: -

    a. That the Learned Trial Magistrate erred in fact and law by failing to recognize the import of section 2(4)(a) of the Limitations Act as read with section 26 (c) of the same Act in determining whether a suit/claim is time barred, particularly with respect to establishing when a cause of action for the recovery of owed money accrued.

    b. That the Learned Trial Magistrate erred in fact and law by failing to distinguish between the date and/or time of a transaction event and the date and/or time for accrual of a cause of action arising from the transaction event, all within the interpretation of section 26(c) of the Limitations Act as read with section 2(4)(a) of the same Act and applied to the pleadings of the Claimant.

    c. That the Learned Trial Magistrate erred in fact and law in proposing a pleading that should have been brought before court by the Appellant.

    d. That the Learned Trial Magistrate erred in fact and in law fact by failing to fully consider the appellant's submissions and written address to the court for review of its order allowing the preliminary objection.

    e. That the application for appeal is brought without unreasonable delay and within the period prescribed by law.

5. Reasons wherefore, the Appellant sought the following orders from the Honourable Court: -

    a. The appeal be allowed.

    b. The rulings delivered separately on 1st February 2024 and 21st March 2024 be set aside in their entirety and be substituted by a proper finding by this Appellate Court.

    c. The Honourable Court be pleased to make any further orders as may be just and expedient in the circumstance.

    d. Costs be awarded to the Appellant.

6. The Appellant also filed an Amended Memorandum of Appeal dated 21st October 2025 being dissatisfied by the Ruling and decree issued by the Trial Court on 21st March 2024 against the said ruling based on the following grounds: -

a. That the Learned Trial Magistrate/Adjudicator erred in law by dismissing the Claimant's application for review and upholding the wrongful striking out of the claim on grounds of limitation despite the settled law that limitation of actions is a triable issue requiring evidence and cannot be determined summarily or as a preliminary objection.

b. That the Learned Trial Magistrate/Adjudicator erred in law when dismissing the Claimant's application for review by failing to recognize that it was an error apparent on the face of the record to treat the date or time of the transaction event as the date or time of accrual of the cause of action, thereby wrongly concluding that the claim was time-barred.

c. That the Learned Trial Magistrate/Adjudicator erred in law by dismissing the Claimant's application for review on the mistaken premise that it was founded on a misinterpretation or exposition of the law, whereas the application correctly contended that the court failed to determine the accrual date of the cause of action before applying the statute of limitations, an error apparent on the face of the record requiring no further evidence or elaborate argument.

d. That the Learned Trial Magistrate/Adjudicator erred in law by dismissing the Claimant's application for review despite the record clearly showing that he failed to ascertain from the pleadings the exact date on which the cause of action accrued, which was essential for determining when the claim became time-barred.

e. That the Learned Trial Magistrate/Adjudicator erred in law by dismissing the Claimant's application for review and upholding the wrongful striking out of the claim on the ground that the Claimant had not identified a specific error on the face of the record whereas the Claimant had clearly demonstrated that the error lay in the failure to accurately determine when the cause of action accrued for purposes of assessing limitation.

f. That the Learned Trial Magistrate/Adjudicator erred in law by dismissing the Claimant's application for review and upholding the improper striking out of the claim on the basis of a preliminary objection that raised disputable factual issues regarding when the cause of action accrued and its shifting accrual as pleaded in the statement of claim and as pointed out in the grounds for seeking review.

g. That this appeal meets the threshold for the prudent application of the Oxygen principle to avert a miscarriage of justice.

7. Reasons wherefore, the Appellant sought the following prayers from this Honourable Court: -

a. The appeal be allowed.

b. The ruling and decree delivered on 21st March 2024 be set aside in its entirety and be substituted by a proper finding by this appellate court.

c. The Honourable Court be pleased to order the remittance of the original court file back to the trial court for hearing and disposal of the claim before a different Trial Magistrate/Adjudicator and have limitation of actions as one of the issues at the trial upon evidence.

d. The Honourable Court be pleased to make any further orders as may be just and expedient in the circumstance.

e. Costs be awarded to the Appellant.

8. The Appeal was canvassed by way of written submissions.

Appellant's Submissions Summary

9. The Appellant herein Zaippeline Oindi who was representing herself filed written submissions dated 20th November 2025. The Appellant herein submitted that the Learned Trial Magistrate/Adjudicator erred in law by upholding a Preliminary Objection on limitation of actions at an interlocutory stage, contrary to settled jurisprudence. Reliance was placed on Sichuan Huashi Enterprises Corp. Limited Vs Michael Misiko Muhindi and Samuel Mwangi Karogo Vs Attorney General, where the High Court (Gikonyo J) held that limitation of actions is an evidentiary issue that must be determined at trial upon evidence, not summarily through a preliminary objection.

10. The Appellant further relied on binding Court of Appeal authorities including Oruta & Another Vs Nyamato and Divecon Ltd Vs Shirinkhanu S. Samani, as well as persuasive authorities such as El-Busaidy Vs Commissioner of Lands to affirm that limitation raises mixed questions of law and fact requiring evidentiary interrogation. The Appellant also cited Mukisa Biscuit Manufacturing Co. Vs West End Distributors Ltd emphasizing that a proper preliminary objection must not involve contested facts or evaluation of evidence.

11. It was further submitted that even assuming the preliminary ruling was regular, the Trial Court erred in dismissing the Appellant's application for review despite a clear error apparent on the face of the record namely, failure to determine when the cause of action accrued before applying the *Limitation of Actions Act*. In support, reliance was placed on National Bank of Kenya Ltd Vs Ndungu Njau which defines reviewable error as one that is self-evident and does not require elaborate argument.

12. On the distinction between appeal and review, the Appellant cited Nyamogo & Nyamogo Advocates Vs Kogo and Njoroge & 104 Others Vs Savings & Loan Kenya Ltd to demonstrate that the boundary between an error apparent and an erroneous decision is often thin and judicially determined. In the alternative, the Appellant urged the Court to invoke the Oxygen Principle under Sections 1A and 1B of the *Civil Procedure Act* to cure any procedural misstep in pursuing review rather than appeal, in line with Article 159 of *the Constitution* and the approach adopted in Sichuan Huashi (supra) and Samuel Mwangi (supra).

13. Finally, the Appellant submitted that the appeal is meritorious, the impugned ruling should be set aside, the Claim reinstated for hearing before a different Magistrate/Adjudicator, and costs awarded to the Appellant pursuant to Section 27(1) of the *Civil Procedure Act*.

Respondent's Submissions Summary

14. The Respondent filed Written Submissions dated 11th November 2025 in which the Learned Counsel for the Respondent submitted on the following issues for determination: Whether the Claim is barred by effluxion of time by virtue of Section4(1) of the *Limitation of Actions Act*; Whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the Ruling herein; Whether the Appeal herein is Meritorious; and Who should bear the costs of this Appeal?

15. The Learned Counsel for the Respondent Mr. Korir submitted that the claim forming the basis of the appeal is statute-barred under Section 4(1) of the *Limitation of Actions Act* and is therefore incompetent. Counsel argued that the alleged contract between the parties was entered into in 2014 and consequently the limitation period of six years expired in 2020. Since the claim was filed on 6th December 2023, it was instituted more than three years outside the statutory limitation period and therefore the Small Claims Court lacked jurisdiction to entertain the matter. In support of this argument, counsel relied on the decisions in John Omollo Nyakongo t/a H.R. Ganijee & Sons Vs Kenya Power & Lighting Co. Ltd [2022] eKLR and Maersk Kenya Limited Vs Murabu Chaka Tsuma

[2017] eKLR, where the courts affirmed that actions founded on contract must be brought within six years from the date the cause of action accrues unless exceptional circumstances exist.

16. Counsel further submitted that the Appellant's application for review before the Small Claims Court did not meet the legal threshold for review as provided under Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules, Section 41(1)(d) of the *Small Claims Court Act* and Rule 29(1)(a) of the Small Claims Court Rules. He argued that a review can only be granted where there is an error apparent on the face of the record, discovery of new and important evidence or any other sufficient reason. According to counsel, the Appellant merely alleged an error of law, which does not qualify as an error apparent on the face of the record. In support of this position, reliance was placed on Njoroge & 104 Others Vs Savings & Loan Kenya Ltd & Another [1988] eKLR and National Bank of Kenya Ltd Vs Ndungu Njau [1997] eKLR, where the courts held that a mere error of law or a different interpretation of the law cannot be a ground for review.

17. Mr. Korir also submitted that the Appellant had attempted to depart from the original pleadings and raise new issues not presented before the trial court, contrary to the well-established doctrine that parties are bound by their pleadings. In support of this argument, he relied on Raila Amolo Odinga & Another Vs Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR, where the Supreme Court emphasized that parties cannot travel beyond their pleadings.

18. Counsel further argued that the Appellant's actions offend the principle of finality of litigation, noting that once a court determines a matter it becomes functus officio, unless there are valid grounds for review. In support of this proposition, counsel cited Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others [2007] eKLR, where the court emphasized that litigation must come to an end at some point.

19. Additionally, counsel submitted that the appeal lacks merit because the Appellant failed to discharge the burden of proof as required under Sections 107 and 108 of the *Evidence Act*, which provide that he who alleges must prove. In this regard, reliance was placed on Sanganyi Tea Factory Vs James Ayiera Magari [2016] eKLR and Susan Mumbi Vs Kefala Grebedhin (HCCC No. 332 of 1993), where the courts held that the burden of proof rests on the party asserting a claim.

20. Finally, counsel submitted that costs should follow the event in accordance with Section 27(1) of the *Civil Procedure Act* and relied on Peter Muriuki Ngure Vs Equity Bank (K) Ltd [2018] eKLR, where the court reiterated that costs are awarded at the discretion of the court but ordinarily follow the outcome of the case. Consequently, Mr. Korir urged the court to dismiss the appeal in its entirety with costs to the Respondents.

Appellant's Supplementary Submissions

21. The Appellant also filed Supplementary submissions dated 20th November 2025. The Appellant submitted that the Respondents' contention that limitation of actions deprives the Court of jurisdiction is legally incorrect. The Appellant argued that limitation under the *Limitation of Actions Act* operates only as a statutory defence that bars the remedy after the prescribed period but does not extinguish the cause of action or remove the Court's jurisdiction to hear and determine the matter.

22. The Appellant relied on authorities including Rawal Vs Rawal (1990) KLR 275, Dhanesvar Vs Mehta Manilal M. Shah (1965) EA 321 and Iga Vs Makerere University [1972] EA 65, which establish that limitation merely bars the remedy and not the underlying claim. Consequently, the Appellant maintained that the Court must first assume jurisdiction to determine whether the limitation defence is properly invoked and therefore the Respondents' argument that limitation raises a jurisdictional bar is misplaced and should be dismissed.

Respondents Supplementary Submissions Summary

23. The Respondent also filed Supplementary submissions dated 14th November 2025 in further support of the Respondent's submissions dated 11th November 2025. The learned Counsel for the Respondent Mr. Korir submitted that limitation of actions in contractual matters is a pure point of law that goes to the jurisdiction of the court and may therefore be properly raised through a Notice of Preliminary Objection. Counsel argued that the issue arises directly from Section 4(1)(a) of the *Limitation of Actions Act*, which prescribes a six-year limitation period for actions founded on contract.

24. Counsel relied on the decision in Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696, where the Court of Appeal defined a preliminary objection as a pure point of law which, if successfully argued, may dispose of the suit without the need to ascertain facts or adduce evidence. On that basis, he contended that a plea of limitation squarely falls within the category of issues that can be determined through a preliminary objection.

25. Mr. Korir further submitted that the Respondents' Notice of Preliminary Objection was properly raised because limitation is a jurisdictional issue that goes to the root of the court's power to hear the claim. He maintained that the objection required only a cursory examination of the law and pleadings rather than the evaluation of evidence, and was therefore competently before the court.

26. Counsel also argued that a preliminary objection may be raised at any stage of proceedings, particularly where it concerns jurisdiction. In support of this proposition, he cited Republic Vs Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited [2015] eKLR, where the court affirmed that a preliminary objection can be raised at any time, though preferably at the earliest opportunity. Additionally, reliance was placed on Lipton Teas and Infusions Kenya Plc Vs Mokal Investments Limited & 15 Others (2025) KEELC 7812 (KLR), where the court reiterated that a valid preliminary objection must raise a pure point of law and must not involve contested facts or matters requiring evidentiary proof.

27. Counsel therefore submitted that the Respondents properly raised the issue of limitation before the trial court, and that the court correctly downed its tools in line with the principle set out in Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd [1989] KLR, which established that once a court finds it lacks jurisdiction, it must immediately decline to proceed further. In conclusion, Mr. Korir submitted that the appeal is devoid of merit and amounts to an academic exercise and urged the court to dismiss it in its entirety with costs to the Respondents.

Analysis and Determination

28. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In the case of Mbogo & Another Vs Shah [1968] EA 93 where the Court stated: -

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

29. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law lords held by 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally."

30. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of Peters Vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

31. I have read and considered the Memorandum of Appeal herein and the rival submissions by both parties. There are three (3) issues manifest for determination by this Honourable Court: -

    a. Whether the Appellant's claim before the Small Claims Court was statute-barred under Section 4(1) of the *Limitation of Actions Act*.

    b. Whether the Preliminary Objection was properly determined by the Trial Court?

    c. Whether the Appellant met the legal threshold for review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.

Whether the Appellant's claim before the Small Claims Court was statute-barred under Section 4(1) of the *Limitation of Actions Act*.

32. From the facts of this case, the Appellant filed a Statement of Claim dated 6th December 2023 before the Small Claims Court seeking recovery of Kshs. 142,000 allegedly advanced to the 2nd Respondent pursuant to a business arrangement entered into on diverse dates in June and September 2014. The Respondents filed a Notice of Preliminary Objection dated 22nd December 2023 challenging the jurisdiction of the court on the ground that the claim was time-barred having been filed more than six years after the cause of action accrued. The Appellant filed Grounds of Opposition dated 8th January 2024 opposing the objection. Upon considering the pleadings and submissions, the trial court delivered a ruling on 1st February 2024, upholding the preliminary objection and striking out the claim in its entirety.

33. Subsequently, the Appellant filed a Notice of Motion dated 8th February 2024 seeking review and setting aside of the ruling. The trial court dismissed the application in a ruling delivered on 21st March 2024, holding that the application did not meet the threshold for review. It is this decision of 21st March 2024 which is subject of appeal as per the Amended Memorandum of Appeal filed in this Honourable Court.

34. This appeal is on a point of law specifically section 4(1) of the Limitations of Actions Act. This section provides as follows: -

> 4. Actions of contract and tort and certain other actions
>
> (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
>
> a. actions founded on contract;
>
> b. actions to enforce a recognizance;
>
> c. actions to enforce an award;
>
> d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
>
> e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

35. The philosophy behind limitation of actions is two ways: It serves to protect against indolence and against vindication for matters which have rested due to long lapse of time and so memory. In the case of Rawa Vs Rawa (1990) KLR, 275, the Court emphasized thus: -

> " The object of any Limitation enactment is to prevent a Plaintiff from prosecuting stale claims on one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after long lapse of time."

36. Limitation of actions provides for time for filing suit. Whether a suit is within time is a matter of fact. The law requires that limitation of actions be pleaded to avoid trial by ambush. Order 2 rule 4 of the Civil Procedure Rules provides as follows: -

> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality –
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

37. A question of limitation of actions is not a jurisdictional issue. It has to be raised. In the worst-case scenario, if it is not pleaded, it must be left to the court. Even at appeal level, this court may decide on a different point other than those raised. Before doing so, the court must inform the parties to address that point. Dealing with the issue will otherwise be trial by ambush and contrary to a fundamental rule of natural justice, audi alterum paterm. It must be remembered that the Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant a relief. In the case of Iga Vs Makerere University [1972] EA 65, the court of appeal for the former Eastern Africa [Law Ag V-P, Lutta and Mustafa JJA] as per Mustafa, J. A. posited as follows: -

> " A Plaint which is barred by limitation is a Plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within

the limitation period by showing grounds upon which he could claim exemption the Court "shall reject" his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought."

38. The purpose of the Law of Limitation was stated in the case of Mehta Vs Shah (1965) E.A 321, as follows; -

> " The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

39. In the case of Gathoni Vs Kenya Co-operative Creameries Ltd (1982) KLR 104, the Court of Appeal held as follows;

> " ...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."

40. From the pleadings filed before the Small Claims Court, the Appellant's own case was that the Respondent received the disputed funds during the months of June and September 2014 pursuant to a business arrangement between the parties. The Appellant did not plead any subsequent acknowledgment of the debt, nor did she allege fraud, mistake, or concealment of material facts that might have invoked the exceptions provided under Section 26 of the *Limitation of Actions Act*.

41. The claim was filed on 6th December 2023, which is approximately nine years after the latest pleaded transaction date. Even adopting the most generous interpretation in favour of the Appellant and assuming that the cause of action accrued at the latest possible time in September 2014, the statutory limitation period would have expired in September 2020. The claim was therefore instituted more than three years outside the prescribed limitation period.

42. The law on limitation is not merely procedural; it goes to the very authority of the court to entertain a claim. Courts have repeatedly emphasized that where a suit is instituted outside the statutory limitation period, the court has no jurisdiction to proceed with the matter. This principle was firmly articulated in Owners of the Motor Vessel "Lillian S" Vs Caltex Oil Kenya Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 KLR, where the Court held that jurisdiction is everything and once a court determines that it lacks jurisdiction it must down its tools immediately.

43. The Appellant sought to persuade this Court that the learned trial magistrate failed to properly distinguish between the date of the transaction and the date when the cause of action accrued. However, a careful examination of the pleadings reveals that the Appellant herself anchored her claim on the transactions of 2014, without pleading any subsequent event that would have postponed the accrual of the cause of action. Courts are bound by the pleadings of the parties, and a litigant cannot on appeal seek to introduce new factual theories that were not pleaded before the trial court.

44. This claim is based on a contract that was allegedly entered into on various dates in the year 2014, as stated by the Appellant. From section 4(1) of the *Limitation of Actions Act*, any claim that arises from a contractual arrangement ought to be instituted within a period of six years from the time of accrual

of the cause of action, in this case the year 2014 and the period lapsed in the year 2020 by effluxion of time. The statement of claim filed in the trial court was dated 6th December 2023 and filed on the same day which was three years and 3 months beyond the limitation prescribed in law. Most importantly, the Appellant who was the Claimant at the Trial Court stated at paragraph 3 of the Statement of Claim that the purported contract was allegedly entered into on diverse dates in June and September 2014 and this is in my view authenticates that the time started counting from the said year to date. A perusal of the record also shows that the account transfer forms produced by the Appellant in evidence confirm that the alleged transfers took place in the year 2014.

45. From the above, I take note that the Claimant has not given any sufficient explanation as to the cause of delay in instituting the claim nor has she provided evidence that the time was tolled under section 39 of the *Limitation of Actions Act* nor that Respondents are estopped from pleading limitation of actions. The Court of Appeal in the case of Maersk Kenya Limited Vs Murabu Chaka Tsuma [2017] eKLR held in this regard thus: -

> "In determining whether the claim filed by the respondent was time barred, it is not in dispute that the cause of action arose on 20th November 2006 when the respondent was dismissed from employment. It is also not in dispute that the cause of action arose prior to the enactment of the *Employment Act*, 2007, so that in computing whether the suit was time barred, the applicable law was section 4 (1) (a) of the *Limitation of Actions Act* which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.
>
> When six years is computed from when the cause of action arose on 20th November 2006, there is no question that the suit ought to have been filed latest before 19th November 2012. Instead it was filed four months later on 21st March 2013."

46. In the circumstances, the trial court cannot be faulted for concluding that the cause of action accrued in 2014 and that the claim filed in 2023 was clearly outside the six-year limitation period prescribed by statute being the *Limitation of Actions Act*, Cap 22 Laws of Kenya.

Whether the Preliminary Objection was properly determined?

47. The Appellant contended that the learned trial magistrate erred by determining the issue of limitation through a preliminary objection rather than at trial after the taking of evidence. This argument must be examined against the settled jurisprudence on preliminary objections. On whether the preliminary objection is proper in law, the law on objections is settled. For a party to successfully argue it, the objection should be raising pure question[s] of law capable of disposing of a dispute at once. A Court seized of a preliminary objection must, therefore, ascertain that it is not caught up with factual issues that would necessitate the calling of evidence.

48. The foregoing nature of Preliminary Objections was discussed in Mukisa Biscuit Manufacturers Ltd Vs Westend Distributors Ltd (1969) E.A 696 pg. 700 where the Court observed as follows: -

> "...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

49. In Civil Suit No. 85 of 1992, Oraro Vs Mbaja [2005] 1 KLR 141, Ojwang J, [as he then was], cited with approval the position in Mukisa Biscuit -vs- West End Distributors (supra) and stated as follows on the operation of Preliminary Objections: -

> "…. I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

50. In Omondi Vs National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a Preliminary Objection can look the pleadings and other relevant documents, but it must abide by the principle that it must raise pure points of law. It was held: -

> "…In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

51. An issue of limitation has long been recognized as one of the quintessential examples of a proper preliminary objection because it raises a pure point of law that goes to the jurisdiction of the court. In the present case, the issue required the trial court only to compare two undisputed facts emerging from the pleadings: the date of the alleged transaction and the date when the suit was filed. No evidentiary examination was required to ascertain these facts.

52. The Appellant relied on authorities suggesting that limitation may in some circumstances raise mixed questions of law and fact. While that proposition is correct in principle, it is only applicable where the accrual of the cause of action is uncertain or contested. That was not the case here. The dates relied upon by the Respondent were drawn directly from the Appellant's own pleadings.

53. In those circumstances, the learned trial magistrate was justified in addressing the objection at the preliminary stage and in striking out the claim upon finding that the statutory limitation period had already lapsed.

Whether the Appellant met the legal threshold for review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.

54. This issue concerns the ruling delivered on 21st March 2024, in which the trial court dismissed the Appellant's application seeking review of the earlier decision. The law on Review is based on section 80 of the *Civil procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010. It is salient to note that this court's power must be exercised within this circumscribed legal framework. Section 80 of the *Civil Procedure Act* provides as follows: -

Any person who considers himself aggrieved -

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

55. On the other hand, Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

1. Any person considering himself aggrieved-

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

56. From my reading and understanding of the two provisions above, it is clear that section 80 of the *Civil Procedure Act* gives the power of Review while Order 45 of the Civil Procedure Rules 2010, sets out the rules. The rules limit the grounds applicable for Review as follows: -

a. The discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the Decree was passed or the Order made.

b. On account of some mistake or error apparent on the face of the record.

c. Any other sufficient reason and that the Application has to be made without unreasonable delay.

57. Courts of superior jurisdiction have moreover interpreted the provisions of section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules. In Republic Vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR the Court set out the principles to consider in the review of its own decisions. It was observed;

a. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

b. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

c. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

d. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

e. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

f. While considering an Application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

g. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

h. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

i. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

j. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

58. The Court of Appeal in Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau, remarked on review applications as follows: -

> " ...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."

59. In Republic Vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR), the Court considered the import of some mistake or error apparent on the face of the record as captured in Order 45 of the Civil Procedure Rules. It rendered itself thus: -

> " ...Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent

on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible."

60. In Nyamogo & Nyamogo Vs Kogo (2001) EA 170 the Court discussed what would constitute a long-drawn process. It observed as follows;

> " .... An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.

61. Under the provisions as cited above, review may only be granted where there is discovery of new and important evidence, where there is an error apparent on the face of the record, or where there exists some other sufficient reason. The Appellant's application did not rely on newly discovered evidence. Instead, the Appellant argued that the court had misapplied the law by failing to properly determine the date when the cause of action accrued. However, the distinction between an erroneous decision and an error apparent on the face of the record has been clearly drawn in Kenyan jurisprudence. In National Bank of Kenya Ltd Vs Ndungu Njau (1997) eKLR, the Court of Appeal explained that a review is not available merely because the court may have reached an incorrect legal conclusion. A review is only justified where the error is self-evident and does not require elaborate argument to establish.

62. The arguments advanced by the Appellant in the application for review essentially sought to persuade the court to reconsider the legal reasoning of its earlier decision. That is the proper function of an appeal in the appellate court, not a review. The learned trial magistrate therefore correctly held that the application did not satisfy the statutory threshold for review.

63. In view of the foregoing, after considering the grounds raised in the Amended Memorandum of Appeal, the Court finds that the appeal essentially invites this Court to re-litigate matters that were correctly determined by the trial court. The chronology of events is clear: the alleged transactions occurred in 2014, the statutory limitation period expired in 2020 and the claim was filed only in December 2023. The trial court was therefore correct in holding that the claim was statute-barred and in declining jurisdiction. Equally, the court properly dismissed the application for review for failure to meet the threshold set by the law.

64. In Magbul Ahmad and Ors vs Onkar Pratap Narain Singh and Ors A.I.R 1935 PC 85 which states as follows: It had been held that the court cannot grant an exemption from limitation on equitable consideration or on the ground of hardship. The court has time and again repeated that when

mandatory provision is not complied with and delay is not properly, satisfactorily and convincingly explained, it ought not to condone the delay on sympathetic ground alone

> It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute."(see Basawaraj and Anr vs Special Land Acquisition Officer (2013 14 SCC 81)

65. In the end, the reasoning of the learned trial magistrate cannot be said to have been based on any misdirection of law or fact. On the contrary, the decisions rendered by the trial court were consistent with both the statutory framework and the settled principles of Kenyan jurisprudence on limitation of actions, preliminary objections and review of court orders. For those reasons, this Court finds no basis upon which to interfere with the rulings of the trial court. The appeal is therefore devoid of merit.

66. Accordingly, this Court makes the following orders: -

    a. That the law of limitation is based upon public policy that there should be an end of litigation by forfeiting the right to remedy rather than the right itself.

    b. That the Appeal herein be and is hereby dismissed in its entirety for it is patently barred by limitation of time which apparently is stated to have been more than 6 years

    c. That the Amended Memorandum of Appeal dated 21st October 2025 is found to be without merit.

    d. That the rulings of the Small Claims Court delivered on 1st February 2024 and 21st March 2024 are hereby upheld.

    e. The Appellant shall bear the costs of this appeal.

    f. It is so ordered.

DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 9TH DAY OF MARCH 2026

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R. NYAKUNDI

JUDGE

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