



**Muthumbi v SAP East Africa Limited & another (Civil Appeal
E744 of 2024) [2026] KECA 404 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KECA 404 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E744 OF 2024
SG KAIRU, K M'INOTI & P NYAMWEYA, JJA
FEBRUARY 27, 2026**

BETWEEN

MARY WAGAKI MUTHUMBI APPELLANT

AND

SAP EAST AFRICA LIMITED 1ST RESPONDENT

DELOITTE CONSULTING LIMITED 2ND RESPONDENT

*(An appeal from the Ruling of the High Court of Kenya at Nairobi
(Aleem Visram J.) dated 5th June 2023 in HCCC No. E076 of 2022)*

JUDGMENT

1. A ruling was delivered on 5th June 2023 by the High Court of Kenya at Nairobi, (Aleem Visram J.) in Civil Case No. E076 of 2022, in which two preliminary objections dated 23rd November 2022 and 13th July 2022 respectively filed by SAP East Africa Limited and Deloitte Consulting Limited (the 1st and 2nd respondents herein), were found to be merited and upheld. The result was that the suit that had been filed in the High Court by Mary Wagaki Muthumbi, the appellant herein, was struck out with costs for offending section 4 (2) of the *Limitation of Actions Act*.
2. The appellant had in the said suit sought judgment against the respondents for general and special damages for loss of business and employment opportunities as a result of the unlawful use of her personal identification number. In summary, her claim was that she was employed by the 1st respondent from 1st January 2012 to 6th August 2013, and in the year 2017, she endured a challenge while trying to obtain a Tax Compliance Certificate, and upon investigations, found out that her personal identification number (PIN) had been unlawfully used by the 1st respondent through their agent, the 2nd respondent and her iTax account had the income returns of one Sisay Azalea Wassihun, an employee of the 1st respondent. The appellant averred that due to her inability to obtain an Individual Tax Compliance Certificate, she could not obtain a Tax Compliance Certificate for her company Guava



Well-being Partners, and this led her to miss out on business opportunities as and was unable to file Nil returns from 2017. The appellant detailed in her plaint the financial and personal challenges she subsequently endured.

3. The 1st respondent denied the appellant's assertions in its defence, and averred that the appellant ceased being in its employment on 6th August 2013 and any liability against it was time barred. They denied any unlawful and fraudulent intent in the use of the appellant's PIN or that the appellant missed business and employment opportunities. The 1st respondent simultaneously with their defence filed a Notice of Preliminary Objection dated 23rd November 2022 seeking to strike out the appellant's suit on the ground that the High Court had no jurisdiction to try the suit, the plaint did not disclose any cause of action in law, and the cause of action upon which the appellant sought to bring the suit was time barred pursuant to section 4 (2) of the [Limitation of Actions Act](#), as the action complained of accrued in 2017.
4. The 2nd Respondent similarly denied the appellant's allegations in their defence dated 13th July 2022, and stated that in early February 2014, the 2nd respondent provided a list of employees with PIN numbers to its clients to confirm details for the 2014 employment annual returns and also for the intended conversion by the Kenya Revenue Authority (KRA) to the iTax Platform, and in the process of collating the details, the 2nd respondent inadvertently assigned the appellant's PIN to another employee with the results that the PAYE for the other employee was credited to the Appellant from February 2014 to September 2018. They denied that the inadvertent mix-up constituted an unlawful utilization of the appellant's PIN as alleged or that the appellant's inability to file nil returns with KRA to the present day was attributable to the allocation of her PIN to another employee in the periods between 2014 to 2018. In addition, that the mix-up in the PIN numbers was brought to its attention in October 2018 after which it promptly took steps to correct the error with KRA and took the necessary steps to rectify the records. However, despite numerous requests, the appellant had failed and refused to provide it with details of the Tax Compliance Certificates submissions she has made, which would enable it assess the reasons why the certificates have not been issued.
5. The 2nd respondent also filed a Notice of Preliminary Objection dated 13th July 2022, against the entire suit on the grounds that the cause of action was expressly time barred by virtue of Section 4 of the [Limitation of Actions Act](#), having allegedly accrued in 2017; the plaintiff's right to sue for the alleged tortious act had lapsed and she lacked capacity to agitate any cause against the defendant; and the Court therefore had no jurisdiction to entertain the claim.
6. In response, the appellant filed a replying affidavit sworn on 18th August 2022, wherein she asserted that the actions complained of were continuing to date since she was not able to file her returns on the KRA iTax Portal because the tax returns belong to Sisay Azalea Wassihun. The Respondents, despite her requests, refused to write to or visit KRA over her complaint to have the wrong data entered officially expunged to enable her regularize her tax records. She stated that she was the owner of the account but could not use the file return option. She reiterated the actions of the respondents were continuing wrongs and therefore the limitation period could not be said to apply until the wrong ceased. In addition, that the 2nd respondent could not claim statutory limitation of action when she did not have sufficient facts to embark on a complaint against them before June 2019 and she filed the suit on 6th May 2022.
7. The preliminary objections were canvassed by way of written submissions in the High Court, and after considering the threshold for upholding a preliminary objection, the trial Judge was satisfied that the facts were not in dispute and that if successful, the preliminary objections will dispose of the suit. The trial Judge found that the general position is that the cause of action accrues at the time when the



plaintiff suffers the damage, even though the consequences may not appear until later, and in this case the trial Judge was satisfied that the time the plaintiff actually suffered the damage was either in 2017, or 2018, when she realized that there had been a mix up with her PIN, and she was unable to obtain a Tax Compliance Certificate, Lastly, that the Plaintiff has not disclosed 'a repetition of the wrong' or a series of acts on the part of the respondents, and based on the undisputed facts, there was a single act, with regrettable long-term effects. With these findings, the trial Judge found that the Preliminary Objections dated November 23, 2022 and July 13, 2022 were merited and struck out the appellant's suit with costs, for offending section 4(2) of the *Limitation of Actions Act*.

8. Being dissatisfied with the decision of the High Court, the appellant filed this appeal and has raised eight (8) grounds of appeal in the Memorandum of Appeal dated 25th September 2024 which she collapsed to three issues, namely whether the preliminary objections was on a pure point of law, whether there was repetition of a wrong over time so as to constitute a continuing tortious violation, and whether section 4(2) of the *Limitation of Actions Act* was properly applied to continuing torts. However, given that the impugned ruling was arising from preliminary objections, all these issues turn on one issue, being whether the preliminary objections raised a pure point of law. We heard the appeal on this Court's virtual platform on 30th July 2025. Learned counsel Mr. Rasugu Kinara appeared together with learned counsel Mr. Adrian Onginjo for the appellant; learned counsel Mr. Kahura appeared for the 1st respondent, while learned counsel Ms. Michi Kirimi appeared for the 2nd respondent. Mr. Kinara highlighted the written submissions dated 26th February 2025, and Ms. Kirimi likewise highlighted her written submissions dated 28th March 2023. Mr. Kahura indicated that the 1st respondent had not filed any submissions and was supporting the 2nd respondent's position.
9. In commencing the determination of this appeal, we are mindful that this being a first appeal on an interlocutory ruling where no evidence was tendered, our mandate is to re-assess, re-evaluate and re-analyse the record of appeal so as to reach an independent finding as we are mandated under Rule 31(1) (a) of the Court of Appeal Rules, 2022. The main issue for our determination is whether the issues raised in the preliminary objection were pure points of law. It is necessary to point out at the outset that a preliminary objection can only be raised when it involves a pure point of law.
10. Counsel for the appellant's main submission was that the violation and injury the appellant complained of was ongoing and therefore limitation had not kicked in and could not kick in until the respondents took steps to remove data from her PIN by writing to KRA. Further, that since the cause of action is a continuing tort, section 4(2) of the *Limitation of Actions Act* ceased to apply.

Therefore, that the holding by the High Court that only a single act had occurred sometime in 2017 or 2018 with regrettable long-term effects was incorrect and should not have been made without a thorough examination of the facts. Consequently, that the respondents' preliminary objections were not founded on pure points of law.
11. The decisions by the by this Court in Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) vs Mwatsami [2024] KECA 579 (KLR) and Mutungi v FEP Sacco Society Limited & 2 others [2024] KECA 494 (KLR), as well as by the Supreme Court of Kenya in Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 others [2015] eKLR were cited by the appellant in support of the submission that the preliminary objection did not meet the threshold of a preliminary objection as set out in Mukisa Biscuit Company vs Westend Distributors Limited [1969] EA 696.
12. The submissions by counsel for the 2nd respondent were that whether or not a suit is statute barred is a pure question of law, which can be determined on the basis of the pleadings without any reference to evidence, and in considering a preliminary objection, the Court must be satisfied that there is no



proper contest as to the facts regarding the question of limitation. From the pleadings filed before the High Court it was not contested by the respondents that the appellant stated that she was unable to obtain her tax compliance certificate to July 2017 and contacted the 1st respondent in September 2018 regarding the issue. Further, that the 1st respondent only denied the allegation that it had any unlawful and fraudulent intent in using the appellant's KRA PIN and the 2nd respondent corroborated the timelines confirming that the issue was brought to its attention in October 2018 after which it took steps to correct the error.

13. Counsel sought to distinguish the decisions cited by the appellant, on the ground that the circumstances raised in the said decisions are different from the present case, as the objections in the cited cases were based on contested facts, whereas there is no dispute in this case that the appellant's challenges with her KRA account began in 2017, and that she discovered the cause of the challenge in 2018. Therefore, that the preliminary objections were properly raised and based on a question of law. According to counsel, the appellant's claim that the 2nd respondent's action was not a single act but the repetition of a wrong over time as to constitute a continuing tort is incorrect. The inadvertent use of her KRA PIN was a one-off event which completed the cause of action in 2017 when she claims to have suffered damage.
14. We have considered the arguments by the parties, and in determining whether the respondents' preliminary objections met the threshold set by law, we begin by noting the nuanced difference between "a point of law" and "a pure point of law" as explained in *Mukisa Biscuit Manufacturing Co. vs. End Distributors Ltd* (supra). Law JA explained what a point of law entails in a preliminary objection as follows at page 700:

“...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 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.”
15. Sir Charles Newbold, P. added as follows at page 701 on when a “pure point of law” arises:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”
16. The difference between a "point of law" and a "pure point of law" hinges on whether the issue requires an examination of contested facts, or if it can be decided solely on the legal interpretation of facts that are already agreed upon or admitted. Whereas a point of law is a general question regarding the application or interpretation of a statute, case law, or constitutional provision and may still require factual determination, a pure point of law is narrower, and is used in preliminary objections to dispose of a suit without going to trial. Therefore, a point of law that arises from facts that are contested and require evidence to prove, is not a pure point of law and cannot be raised in a preliminary objection.
17. Put differently, it is not all points of law that can be raised by way of preliminary objection, but only those points of law or legal issues that can be decided solely by interpretation of the law, assuming that



all facts stated in the pleadings are true. The Supreme Court clarified the position as follows in *Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 others* (supra):

“Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

18. The preliminary objections before the High Court that gave rise to this appeal raised the question of the application and interpretation of section 4(2) of the *Limitation of Actions Act*, which principally provides for a time limit within which actions based on tort may be brought, and specifically provides that 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. It is evident from the respective parties’ arguments as set out in the foregoing, that the nature of the cause of action raised by the appellant and the date of its accrual was disputed, with the respondents stating that it was a case involving negligence which accrued in 2017, whereas the appellant insisted that it was a continuing tort, and that limitation of time would not set in until the offending data was purged from the appellant’s PIN and she was able to regain use of her PIN to file her own returns.
19. This fact was specifically pleaded by the appellant in the plaint dated 5th May 2022 that she filed in the High Court in paragraph 12 as follows:
 - “12. Despite demands being duly made, the Defendants have refused, failed, and/or neglected to make good of the Plaintiff’s claim. Further, in spite of knowing that the records of their employee, they have failed to request the assistance of the Kenya Revenue Authority to expunge her income records from the Plaintiff’s iTax system and thereby enable her to file her returns from 2017 as the system iTax system demands. This fraudulent use of the Plaintiff’s iTax Account has brought upon her misery untold.”
20. Accordingly, there were contested facts raised by the plaint that could not be disposed of by way of a preliminary objection. It is notable that the Trial Judge did acknowledge that the appellant’s “cause of action would be extended for as long as the effects of her injuries continue”, and that such an interpretation in the Honourable Judge’s view “would have the effect of rendering Section 4 (2) of the Limitation period obsolete because a court would have to first undertake a fact- finding mission to determine whether or not the injury persists; and only then-go on to determine if a cause of action subsists. To my mind, this is the very task that the *limitation of actions Act* sought to avoid”. It appears to us that the trial Judge conflated the requirements of a preliminary objection with his interpretation of section 4(2) of the *Limitation of Actions Act* and its purpose.
21. In addition, we note that the trial Judge ended up addressing the disputed facts without hearing the parties, which is expressly disallowed in determining a preliminary objection, by holding as follows:
 - “28. Further, I am satisfied that the time the Plaintiff actually suffered the damage was either in 2017, or 2018, when she realized that there had been a mix up with her PIN, and she was unable to obtain a Tax Compliance Certificate. I say so because, based on the undisputed facts as set out above, at that time, the Plaintiff knew of the harm; she contacted the 1st Defendant in relation to the same; and she could have filed suit for compensation. Regrettably, she did not do so.



29. Further, I am not persuaded that the facts in the present matter are the same as set out in the case of Emanuel Hatangi Mbabazi (supra), because the Plaintiff has not disclosed "a repetition of the wrong" or a series of acts on the part of the Defendants.(emphasis ours) Based on the undisputed facts, it would appear to me, that there was a single act, with regrettable long-term effects”.

22. It is thus evident that whereas there was a question of law to be answered, which is whether the appellant’s suit was time barred, the route to the answer required the parties to adduce evidence as regards the nature of the cause of action and the manner it arose. The dispute before the High Court did not therefore involve a pure point of law and was not amenable to disposal of by way of a preliminary objection.

23. This appeal is therefore found to have merit and is allowed. The result is that the ruling delivered on 5th June 2023 by the High Court of Kenya at Nairobi, (Aleem Visram J.) in Civil Case No. E076 of 2022 is hereby set aside in its entirety, and the suit in Civil Case No. E076 of 2022 is accordingly reinstated and shall proceed to full hearing before a Judge of the High Court other than Aleem Visram J. The costs of the proceedings in the High Court and of this appeal are awarded to the appellant.

24. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2026.

S. GATEMBU KAIRU F.CI Arb, C.Arb

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

