



**Kisima Homes Limited v Atik (Commercial Case E002 of 2026)
[2026] SCC 20 (KLR) (11 February 2026) (Ruling)**

Neutral citation: [2026] SCC 20 (KLR)

**REPUBLIC OF KENYA
IN THE SMALL CLAIMS COURT AT LAMU
COMMERCIAL CASE E002 OF 2026
FM MULAMA, RM
FEBRUARY 11, 2026**

BETWEEN

KISIMA HOMES LIMITED CLAIMANT

AND

ATHMAN ALI OMAR ATIK RESPONDENT

(On the application dated 19th January 2026)

RULING

A. Background.

1. The claimant/Applicant took out an ex parte originating summons seeking leave to commence civil proceedings against the respondent out of time and subsequent to the grant of the said order, the applicant to file the intended claim within 7 days from the date of the order.
2. The application is premised on 15 grounds on the face of the application and the affidavit of John Kioi Gitau. The 15 grounds can be condensed into 2 germane ones to wit; the delay in filing a suit to recover the debt was neither intentional nor inordinate but was hampered by the need to conclude the said ELC Case No. E005 of 2022 which was concluded less than one (1) year ago and that now the debt has since been recognized by the honourable court in the judgment dated 28/2/2025 vide MC ELC No. E005 of 2022.
3. I have considered the application, the supporting grounds, the supplementary affidavit and the submissions.

B. Issues for Determination.

4. The following issue commends itself for determination by this court.
 - a. Whether the application dated 19th January 2026 should be allowed.



C. Analysis and Determination.

a. Whether the application dated 19th January 2026 should be allowed.

5. The main reason why the claim was defeated by the Limitation of Actions was the deliberate inaction by the applicant to delay the filing of the claim pending the conclusion of the ELC matter.
6. It is based on that ELC matter that the applicant has sought refuge under Section 23(3) of the Limitation of Actions Act on the sole basis that the intended respondent acknowledged the debt vide his witness statement filed in the ELC matter.
7. Section 23(3) of the Limitations Act provides as follows;

Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment (emphasis mine)
8. In support of this position, I have perused the witness statement marked JKG-1 in the further affidavit at paragraph 4 there is indeed an admission that the amount in question was merely a loan which was to be refunded at a later date.
9. Section 23(3) aforementioned decrees that in instances of admission or acknowledgement of debt the right accrues on the date of acknowledgment. In essence time starts running on the date of the admission, in this case is 23rd May 2023.
10. This test was also discussed in the case of Afrofreight Forwarders Ltd vs African Liner Agencies [2009] eKLR where the judges of appeal found that the learned resident magistrate was right in reaching the conclusion that time started to run from the date of the letter in which the debt was acknowledged.
11. I see no reason to depart from the finding of the court of appeal not only because it is binding on me but it reflects and appreciates the import of the said Section 23(3). In the circumstances, I do find and hold that pursuant to the said section and the witness statement of the intended respondent dated 23rd May 2023, time started running upon acknowledgment of the debt to wit on 23rd May 2023.
12. As I conclude this ruling I wish to point out to the applicant to state the true position of any proceedings in court. The dismissal of the suit on 18/7/2025 was and still is not a procedural. An issue to do with jurisdiction is never a procedural issue. It is a substantive issue. As it is said in the case of "Lillian S" jurisdiction is everything. It is indeed as a result of that judgment that this application has been filed. The suit was dismissed primarily on account of the claim being statute barred and no arguments were presented in light of section 23(3).
13. In addition, the application of 18/8/2025 sought to set aside the judgment of the court and the applicant be allowed to regularize their application for leave to file the suit out of time and the view the court took which is the true position of the law, there is no way the applicant would seek to set aside a judgment to regularize that which the court pointed in judgment. The jurisdiction of review is limited and the application never met the test for review. Furthermore, an application seeking leave to institute claim out of time is always filed as a miscellaneous.
14. There has always been a temptation by litigants to file a statute barred suit then seek to regularize the same which is always akin to putting the cart before the horse. It does not work like that.



15. I also note that that the applicant herein has fell into the same mistake again despite a clear advice by the court and filed this application as a commercial claim yet it should have been as a miscellaneous. I have none the less considered the application on merit and my failure to consider the application on that account is what would amount to procedural technicality.

16. This being an exparte application, costs do not arise and none is awarded in the circumstances.

D. Conclusion And Disposition.

17. The application dated 19th January 2026 is allowed and leave is granted to commence civil proceedings against the respondent.

18. Let a fresh suit be filed within the next 7 days in the spirit of order 2 of the application.

19. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED AT LAMU LAW COURT THIS..11TH DAY OF FEBRUARY, 2026.

F.M. MULAMA

RESIDENT MAGISTRATE

In the presence of:

Court Assistant:- Damise Daniel.

Ms. Achieng for the applicant.

