

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMMERCIAL APPEAL NO. E036 OF 2023**

**HODO JAMA**

**SAID.....APPELLANT**

**AND**

**ARDHAD UL HAQ NIAZ.....1<sup>ST</sup>**

**RESPONDENT**

**DAUD JAMAA.....2<sup>ND</sup>**

**RESPONDENT**

**AL HAQ HOLDINGS LIMITED.....3<sup>RD</sup>**

**RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. W. Mbulikah PM dated 11<sup>th</sup> December 2024 at the Magistrates Court, Milimani in Civil Case No.E1027 of 2023)***

**JUDGMENT**

**Introduction and Background**

1. By the Memorandum of Appeal dated 7<sup>th</sup> February 2025, the Appellant seeks to set aside the ruling of the subordinate court dated 11<sup>th</sup> December 2024 that found that the suit before it was

statute barred. The Appellant faults the Learned Magistrate for incorrectly applying **section 4(1)(a)** of the ***Limitation of Actions Act(Chapter 22 of the Laws of Kenya)***, focusing on technicalities rather than substance, contrary to **Article 159(2)(d)** of the ***Constitution*** and failing to properly evaluate the evidence presented before delivering the ruling. The Appellant has canvassed the appeal through written submissions that I have considered and I will be making relevant references to the same in my analysis and determination below. The Respondents did not participate in this appeal.

### **Analysis and Determination**

2. Since this is the first appeal, this court is enjoined by the provisions of **section 78** of the ***Civil Procedure Act(Chapter 21 of the Laws of Kenya)*** to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of ***Selle v Associated Motor Boat Co. Ltd (1968) EA 123*** where the Court of Appeal outlined the duties of a first appellate court as follows:

*[An appellate 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...*

3. With the above in hindsight, the court is to determine whether the subordinate court arrived at the correct conclusion both in law and fact in its finding that the Respondents' preliminary objection was merited and that the suit before it was time barred.
4. The Appellant submits that she was a tenant in *Al-Haq Plaza*, occupying three shops, that the tenancy began in 2005 under an oral agreement and that she paid a refundable deposit totaling USD 15,006, paid in two installments in 2005. That after the tenancy ended, she requested a refund but was told she would need a court order as ownership of the premises changed from the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent without her knowledge. She avers that she had previously sued for the deposit

of one shop and obtained judgment in her favor and that the suit before the subordinate court related to the deposit for the remaining two shops.

5. The Appellant submits that the subordinate court misapplied **section 4(1)(a)** of the **Limitation of Actions Act** on the 6-year limitation period for actions founded on contract as the tenancy agreement was oral, not written, that the claim is not purely contractual but involves fraud and concealment and that under **section 26** of the **Limitation of Actions Act**, the limitation period runs from the date of discovery of fraud or concealment. The Appellant submits that she discovered the secret change of ownership during the proceedings, making the suit timely.
6. The Appellant further submits that the subordinate court prioritized procedural technicalities over substantive justice and she claims that her daughter had made continuous efforts to recover the deposit, showing the claim was not abandoned. She claims that the Learned Magistrate made a blanket ruling without analyzing the evidence which included affidavits confirming the tenancy and deposit, efforts made by her daughter to recover the money,

fraudulent concealment of the change in ownership and she argues that she proved her case on a balance of probabilities and the ruling was unjustified. For these reasons, she urges the court to set aside the subordinate court's ruling in its entirety, allow the matter to proceed for hearing and award costs of this appeal to the Appellant.

7. It is not in dispute that under **section 4(1)(a)** of the ***Limitation of Actions Act***, "*actions founded on contract*" must be brought within six years from the date the cause of action accrued. The Appellant herself states that the tenancy began in 2005 and that the deposits were paid in August and October 2005. The tenancy ended at some point thereafter, and the refund became due upon expiry. Even if the tenancy ended after like one or two years, the six-year period expired by 2013 or 2014 at the latest. The suit before the subordinate court was filed in 2023 which is more than a decade later. The Appellant has argued that **section 26** of the ***Limitation of Actions Act*** applies because the change in ownership of the premises was allegedly concealed from her, and this amounted to fraud. The said provision provides as follows:

## **26. Extension of limitation period in case of fraud or mistake**

*Where, in the case of an action for which a period of limitation is prescribed, either—*

*(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or*

*(b) the right of action is concealed by the fraud of any such person as aforesaid; or*

*(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:*

*Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—*

*(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or*

*have reason to believe that any fraud had been committed; or*

*(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.*

8. The alleged fraud is the secret sale of the company which the Appellant admits, was allegedly discovered during the proceedings before the subordinate court which was after filing the suit. My reading and simple interpretation of the aforementioned provision is that it does not automatically extend time indefinitely. It requires that the right of action was concealed by fraud, and time runs from the date of discovery and it is logical and expected that the suit is filed after the fraud has been discovered and not before.
9. It is also of note that the claim is for a refund of a deposit which is essentially and admittedly a contractual debt. The identity of the owner does not affect the accrual of the cause of action and neither does **section 4(1)(a)** of the ***Limitation of Actions Act*** exclude oral contracts. The debt itself was due upon termination of the

tenancy, which occurred long before 2011 and moreover, the Appellant already obtained judgment for one shop's deposit in 2011 in **CMCC 1984 of 2011**. It leaves me to wonder, if the remaining deposits were also due, why did the Appellant not claim them at that time? This undermines the Appellant's argument that the cause of action was concealed or unknown.

10. Going through the subordinate court's ruling I find that the Learned Magistrate relied on binding decisions clarifying that extension of time under **section 27** applies only to tort claims for personal injuries, not contracts; confirming that a time-barred suit cannot be entertained and; affirming that jurisdiction is foundational; without it, the court must down its tools. I find no fault in her conclusion that the claim was founded on an oral contract, that no provision in the **Limitation of Actions Act** allows extension of time for contract-based claims and therefore, the subordinate court lacked jurisdiction.

11. The Appellant has also heavily invoked **Article 159(2)(d)** of the **Constitution**, which directs courts to administer justice without undue regard to procedural technicalities. However, limitation is not a mere technicality but a substantive legal bar that goes to

the jurisdiction of the court. Courts have consistently held that **Article 159** cannot be used to override clear statutory limitation periods (see **Joram Sire Malit & 199 others v Municipal Council Of Kisumu & another [2015] KEELRC 951 (KLR)**). In the end, what remains is that the claim for the deposit was due more than six years before the suit was filed, and no legal basis exists to extend time for a contract claim. Even if the ownership changed or the Appellant's daughter made efforts to recover the money, those efforts do not reset the limitation clock. Limitation runs from the date the cause of action accrued, not from the date of last demand.

### **Conclusion and Disposition**

12. The upshot is that the subordinate court cannot be faulted for its conclusion. The appeal as presently argued fails and it is dismissed but with no order as to costs.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this**

**8<sup>th</sup> DAY of MAY 2026**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. Ms. Wachira for the Appellant
2. N/A for the Respondents
3. Amos- Court Assistant

ORIGINAL