



**Kibe v Gitau (Suing as a Representative of the Estate of Peter Njoroge Gitau)
(Civil Appeal 355 of 2023) [2025] KEHC 5056 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 355 OF 2023
FN MUCHEMI, J
APRIL 25, 2025**

BETWEEN

DAVID KIBE APPELLANT

AND

STEPHEN KIRIIYA GITAU RESPONDENT

**SUING AS A REPRESENTATIVE OF THE ESTATE OF PETER NJOROGE
GITAU**

*(Being an Appeal from the Judgment and Decree of Hon. S. Atambo (CM)
delivered on 19th September 2023 in Thika CMCC No. 870 of 2016)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment Thika Chief Magistrate in CMCC No. 870 of 2016 arising from a motor vehicle accident whereby the trial court apportioned liability at 100% in favour of the respondent as against the appellant and awarded the respondent general damages of pain and suffering at Kshs. 20,000/- loss of expectation of life at Kshs. 100,000/- and loss of dependency at Ksh. 1,000,000/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact by finding that the reasons advanced by the respondent in support of his application to file suit out of time satisfied the test set out in Sections 27 and 28 as read with section 30 of the *Limitation of Actions Act*.
 - b. The learned trial magistrate erred in law and in fact in finding the appellant was liable for the accident which finding was not supported by evidence.



- c. The learned trial magistrate's award for general damages for pain and suffering, loss of expectation of life and loss of dependency was so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the deceased or the estate of the deceased.
 - d. The learned trial magistrate's award of special damages was erroneous and arbitrary as the same was not strictly pleaded and proved as required by law.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that the accident occurred on 3rd February 2013 and he contested the leave granted by the trial court in Thika Misc. App. No. 68 of 2016 in his defence stating that the suit was bad in law for having been filed outside the period prescribed by the *Limitation of Actions act*. The appellant further submits that the reasons advanced by the respondent in support of his application of leave to sue out of time did not meet the requirements of Section 27 of the *Limitation of Actions Act*. The appellant further submits that the trial court in holding that the issue of leave was a non-issue as it had already been overtaken by events erred in principle. To support his contentions, the appellant relies on the cases of Republic vs Principal Magistrate P. Ngare Gesora Principal Magistrate's Court & 2 Others ex parte Nation Media Group Ltd [2013] eKLR and Mary Wambui Kabugu vs Kenya Bus Service Ltd C.A. Civil Appeal No. 195 of 1995 and submits that a defendant is allowed to challenge the leave at trial and the trial court is expected to satisfy itself that the plaintiff satisfied the statutory conditions for overcoming the time bar.
5. The appellant refers to Section 27 and 30(3) & (5) of the *Limitation of Actions Act* and the case of Francis Mugo Ndegwa vs Amboseli Court Limited [2012] eKLR and submits that the reasons given by the respondent include that the letters of administration that he had obtained had been lost or misplaced by the clerk at his advocate's office. The appellant argues that the fact that the respondent had gone to the extent of moving the succession court for letters of administration is evidence that he was aware of material facts and had obtained the advice of a competent person which in the current case is his advocates. The appellant further argues that even if the said allegations were true, and keeping in mind that there was no proof of having applied for the said letters, the same would not have sufficed for the purposes of Section 27, 28 as read with Section 30 of the *Limitation of Actions Act*. The appellant submits that Section 30(3) of the Act is quite clear as to what amounts to and is relevant to such an application for leave and the mistakes of an advocate is not one of the reasons.
6. The appellant relies on the case of Peter Kimani Ndai & Another vs Peter Gitau Njoroge [2008] eKLR and submits that it is incumbent upon the plaintiff to satisfy the trial court that he did indeed satisfy the mandatory conditions set out in Sections 27 and 28 of the *Limitation of Actions Act*.
7. The appellant further relies on the cases of Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR) and Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR and submits that parties are bound by their pleadings. The appellant further argues that the respondent pleaded that the accident allegedly occurred on 3rd February 2013 whereas the evidence differs. The police abstract dated 12th February 2013 produced by PW1 indicates that Thika police station received a report of an accident that occurred on 4th February 2013 at 7pm and the said accident was recorded under OB No. 16/4/2/2013. The appellant argues that although the witness implies that the variance in the dates was in error. He did not produce the occurrence book entry. That notwithstanding, the witness on re-examination testified that the accident happened on 30th January 2013 and not 4th February 2013. The appellant thus concludes that he cannot be linked to the pleaded accident of 3rd February 2013.



8. The appellant refers to the case of Florence Mutheu Musembi & Geoffrey Mutunga Kimiti vs Francis Karengi [2021] KEHC 8336 KLR and submits that a police abstract is merely evidence that a report of an accident has been made to the police unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The appellant submits that there was no information regarding the outcome of the investigations which was indicated to have been still pending. Thus, the police abstract could not have been the basis of finding liability on his part.
9. The appellant further refers to the cases of Frida Kimotho vs Ernest Maina HCCC No. 3720 of 1995 and Kennedy Nyangoya vs Bash Hauliers [2016] eKLR and submits that the police officer testified that he did not visit the scene nor was he the investigating officer and he did not produce the occurrence book entry.
10. The appellant submits that at the time of the accident, the deceased was 13 years old and he did not witness the accident nor did the respondent ever record a statement with the police at any point. The respondent further confirmed that he did not know who was to blame for the accident and further he led no evidence to support the assertion that the appellant was involved in the accident. To support his contentions, the appellant relies on the cases of Evans Mogire Omwansa vs Bernard Otieno Omolo & Another [2016] eKLR and David Kajogi M'mugaa vs Francis Muthomi (2012) eKLR.
11. The appellant refers to the cases of P.I. vs Zena Roses Ltd & Another [2015] eKLR and Richard Shikuku vs Rose Namalwa Masinde (sued as the legal representative of Cleophas Wanyongo (Deceased) [2017] eKLR and submits that the deceased died instantly and thus Kshs. 10,000/- is reasonable compensation under the head of pain and suffering.
12. On the issue of loss of expectation of life, the appellant submits that an award of Kshs. 80,000/- would have been sufficient compensation as the deceased was 13 years at the time. To support his contentions, the appellant relies on the cases of Devshibhai & Sons Limited vs Lule Kaluve Nyamai & Another (Suing as the legal representatives of Francis Kilonzo Lelu (Deceased) [2019] eKLR and AINU SHAMSI HAULIERS LIMITED vs MOSES SAKWA & ANOTHER (Suing as the administrators of the Estate of Ben Siguda Okach (Deceased) [2021] eKLR.
13. The appellant argues that since the deceased child had not earned any income that would have guided the trial court in determining a multiplicand and multiplier, the trial court ought to have awarded a global sum. To support his contentions the appellant relies on the cases of Palm Oil Transporters & Another vs W. W. N [2015] eKLR and Kitale Industries Ltd & Another vs Zakayo Nyende & Another [2018] eKLR and submits that an award of Kshs. 500,000/- would suffice.

The Respondent's Submissions

14. The respondent relies on Section 79G of the *Civil Procedure Act* and the cases of Muita Muindi ya Matiba Auctioneers vs CFC Stanbic Ltd & Another (2015) eKLR; West Kenya Sugar Co. Limited vs James Angulu Bungoma HC Civil Appeal No. E004 of 2024 and Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & Others (2014) eKLR and submits that the impugned judgment was delivered on 19th September 2023 and uploaded in the CTS and thus the statutory period within which the appeal ought to have been filed lapsed on 18th October 2023 and hence the appellant filed his memorandum of appeal one day after the expiry and yet he has never bothered to move the court to seek extension of time. The respondent thus urges the court to strike off the memorandum of appeal.
15. The respondent argues that there is no dispute that the accident occurred on 3rd February 2013 in which case the statutory three-year period within which the suit ought to have been instituted lapsed



on 2nd February 2016. The suit was however filed on 10th August 2016 meaning that there was a delay of five months and two days. The respondent submits that he was not inactive during the said period but upon realizing that he had been caught up by the statute of limitation, pursuing leave of the court, in order to enable him institute the suit in the subordinate court.

16. The respondent submits that the reason for delay was caused by the fact that the limited grant enabling him to commence the suit in the subordinate court, despite having been promptly obtained within 7 months from the date of the accident, was misplaced by his advocates and a copy thereof could not be obtained from the court since the court file could not be traced but however the same was eventually traced at the time he moved the court seeking the extension of time.
17. The respondent submits that once leave is granted to file the suit out of time, the only time the defendant can challenge it is during the trial in the main suit after which the court would decide on whether the order giving rise to the leave so granted has met the threshold. The respondent submits that the appellant did not challenge the said order to file the suit out of time. The appellant then amended his statement of defence dated 16th November 2022 and raised the issue of challenging the order giving rise to the leave granted in Misc. Application No. 68 of 2016. The said amended statement of defence was accompanied by a witness statement of Rovina Koske filed on 30th January 2023 whereby she described herself as the legal officer of APA Insurance Company and on 16/5/2023 she proceeded to adopt her said witness statement.
18. The respondent argues that the failure to recall or cross examine him on the reasons advanced leading to the issuance of granting of leave to file a suit, the appellant was estopped from raising or challenging that order which he has done at length in his submissions reason being that its common knowledge that submissions amount to a marketing tool for the parties in an attempt to convince the court to adjudge in their favour.
19. The respondent relies on the case of Wangongu vs Kithinji & 2 Others C.A. No. 293 of 2023 (2024) KEHC 6272 (KLR) (6 June 2024) and submits that PW1, the police officer clarified that the date of 4th February 2023 was erroneous as indeed according to the occurrence book, the accident took place on 3rd February 2013 and no serious challenge was advanced by the appellant on that explanation. Furthermore, the appellant's witness in cross examination stated that the accident involved two deceased persons, mother and son. The respondent submits that discrepancy of the date of the occurrence of the accident in the police abstract, an accident had taken place on 3rd February 2013 wherein a son and mother sustained fatal injuries. The appellant through his insured had compensated the death of the mother but not of the son, the subject of the instant appeal.
20. The respondent refers to the cases of Gilbert Wanjala Twamba vs P.N. Mashru (2016) KEHC 6837 (KLR); Kenya Breweries Limited vs SARO (1991) eKLR; Daniel Mwangi Kimemi & 2 Others vs the Estate of JGM & SMM (2016) eKLR and Kenya Wildlife Service vs Kombe (legal representatives of the Estate of Aisha Jumwa Kazungu alias Aisha Kazungu Charo (2024) KEHC 5783 (KLR) and submits that the deceased was 13 years in class 7 and a scout, footballer, used to rear rabbits and assist in farming activities with his deceased mother. Thus the respondent argues that the award given by the trial court was reasonable and this court has no reason to disturb the same.

The Appellant's Supplementary Submissions

21. The appellant relies on Section 79G of the [Civil Procedure Act](#) and submits that the memorandum of appeal was filed on 19th October 2023 which was the last day out of the statutory period within which to file the appeal. the appellant further relies on the cases of Republic vs County Secretary, Nairobi City County & Another ex parte Mohammed Tariq Khan [2017] KEHC 8852 (KLR); Soloh Worldwide



Inter-Enterprises vs County Secretary Nairobi County & Another [2016] KEHC 7751 and Njenga Mwangi Wachira & Partners vs The County Secretary City Council of Nairobi [2017] KEHC 4172 (KLR) and submits that Article 159(2)(d) of *the Constitution* enjoins the court to administer justice without undue regard to technicalities of procedure as long as the rules of natural justice are adhered to.

22. The appellant argues that the case of County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] KESC 16 (KLR) relied on by the respondent to justify leave to file his suit out of time, is not applicable herein as the cited decision was dealing with an application for leave to extend time within which to lodge an appeal from the Court of Appeal.
23. The appellant refers to the case of Mary Wambui Kabugu vs Kenya Bus Service Ltd C.A Civil Appeal No. 195 of 1995 and submits that the term ‘challenge the same at trial’ is not a hard and fast rule requiring direct examination and in any event, he called a witness who challenged the same in her evidence in chief. No question posed to her in cross examination cured the lapse on the part of the respondent. The appellant further argues that the fact that his underwriter settled one claim does not satisfy the requirements of the *Limitation of Actions Act*. Thus, the appellant submits that he satisfactorily challenged the same at trial.

Issues for determination

24. The main issues for determination are:-
 - a. Whether the leave to file suit out of time was properly granted to the respondent. If yes;
 - b. Whether liability apportioned by the trial court was against the weight of the evidence adduced.
 - c. Whether the award of damages under the *Fatal Accidents Act* and *Law Reform Act* were manifestly excessive.

The Law

25. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
26. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.
27. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-



- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the leave to file suit out of time was properly granted to the respondent

28. The appellant argues that leave to file suit out of time ought not to have been granted to the respondent since he did not meet the requirement of Section 27 and 28 of the *Limitation of Actions Act*. The appellant further argues that the trial magistrate erred by failing to inquire into the circumstances and reasons for which the court granted leave to the respondent to file suit out of time but instead held that the issue was already overtaken by events and therefore a non issue.
29. From the pleadings in the lower court, it is evident that at paragraph 9A of the appellant's Amended Statement of Defence dated 16th November 2022, the appellant challenged the leave granted to the respondent to file his suit out of time. During the hearing, the respondent testified on 8th February 2022, before the appellant amended his defence and therefore did not cross examine the respondent about the leave. The appellant then amended his defence and called one witness who adopted her statement as examination in chief which challenged the leave granted to file the suit out of time. However, the appellant did not recall the respondent to cross examine him on the leave granted to file the suit out of time. The trial court then rendered its judgment on 19th September 2023 and held that since the respondent had produced an order in Thika Misc. Appl. No. 68 of 2016 dated 17th June 2016 granting him leave, the issue was already overtaken by events hence a non issue herein to be addressed during the delivery of the judgment.
30. It is trite law that where an order has been made extending time, such order is not final but is merely provisional and the defendant will have every opportunity of challenging the facts and law during trial and the court must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. The learned magistrate is not in the least bound by the provisional order of leave as spelt out in Section 27 of the Limitations of Actions Act. This principle was enunciated in *Mary Wambui Kabugu vs Kenya Bus Services Ltd Civil Appeal No. 195 of 1995* cited with approval in *Republic vs Principal Magistrate P. Ngare Gesora Principal Magistrate's Court & 2 Others ex parte Nation Media Group Ltd [2013] KEHC 71 (KLR)* where Shah JA expressed himself as follows:-

By virtue of Section 28(1) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya (the Act) an application for leave of the superior court (for that matter of the subordinate court) has to be made ex parte. The proposed defendant is not a party to that application. Indeed he cannot be for the simple reason that Section 28(1) mandated that such an application "shall be made exparte." This situation is reinforced by the provision of Order 36 Rule 3C of the Civil Procedure Rules....In a situation such as outlined above the defendant only becomes aware of the order extending time when he is served with summons, plaint and the order extending time. There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In the court's view, the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is a dispute as to facts. It will be to the judge presiding at the trial to decide the issue but not as a preliminary point.....



31. Akiwumi JA stated:-

When the judge of the superior court grants leave ex parte, under the Limitation Act to institute proceedings which can be challenged at trial, he in a way, does no more than a judge does when he for instance grants an ex parte injunction, which can also be successfully challenged before another judge at its inter parties hearing. Furthermore the question of a judge of the superior court sitting on appeal on the granting of an ex parte order under the Limitation Act by another judge of the superior court, does not in the particular circumstances arise. In general a party affected by an ex parte order can apply to discharge it but the procedure under the Limitation Act is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the judge to decide the application on hearing one side only. No provision is made for the defendant being heard. It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar.

32. The principles in the foregoing decision expressly, the trial court provide that the magistrate or judge hearing an objection to an order of leave during the trial is duty bound to inquire into whether the conditions set out under Sections 27 and 28 of the *Limitation of Actions Act* had been met at the time of granting of the order for leave to file the suit out of time. In my considered view, the trial court erred in law by holding that the issue had been overtaken by events and therefore a non-issue. The magistrate ought to have dealt with the issue and made a ruling on it which she failed to do. As such, this court has power on appeal to inquire into whether the respondent established the requirements of Sections 27 and 28 of the Act.

33. Thus, this court is called upon to re-evaluate and reconsider the evidence being a first appellate court. On perusal of the Record of Appeal, the respondent applied for leave vide Misc. Application No. 68 of 2016 whereby he indicated that the cause of action arose on 3rd February 2013. The respondent attributed his reasons for delay in filing his suit to the fact that although he was issued with letters of administration on 18th September 2013, the said letters were misplaced by the clerk working in his appointed advocates offices and the said advocates traced the letters earlier in the year 2016.

34. The *Limitation of Actions Act* provides that certain causes of action may not be brought after the expiry of a particular period of time. Section 27 of the Limitation of Action Act provides:-

1. Section 4(2) does not afford a defence to an action founded on tort where:-
 - a. The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contractor or written law); and
 - b. The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - c. The court has, whether before or after the commencement of the action, granted leave for the purpose of this section; and
 - d. The requirements of subsection (2) are fulfilled in relation to the cause of action.
2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or include facts of a decisive character



which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:-

- a. 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
- b. In either case, was a date not earlier than one year before the date on which the action was brought.

35. Section 28 of the *Limitation of Actions Act* provides:-

1. An application for the leave of the court for the purposes of section 27 shall be made ex parte except in so far as rules of the court may otherwise provide in relation to applications made after the commencement of a relevant action.
2. Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would be in the absence of any evidence to the contrary, be sufficient:-
 - a. To establish that cause of action, apart from any defence under Section 4(2); and
 - b. To fulfill the requirements of Section 27(2) in relation to the cause of action.

36. Section 30(3) of the Limitation Act provides:-

Subject to subsection (4) of this section, for the purpose of Sections 27, 28 and 29 of this Act a fact shall be taken at any particular time, to have been outside the knowledge (actual or constructive) of a person, if but only if -

- a. He did not know that fact; and
- b. In so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and
- c. In so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

37. From the above it is evident that to justify the granting of leave to file a suit out of time an applicant must satisfy the following conditions:-

1. That the claim is one for damages for negligence, nuisance or breach of duty.
2. That the claim consists of or includes damages for personal injuries.
3. That material facts relating to the cause of action including facts of a decisive character, were at all times outside the actual or constructive knowledge of the applicant until a date after the 3 years limitation period or a date not earlier than one year before the end of the limitation period.
4. That the action was brought not more than one year from the date the facts came to the applicant's knowledge.



5. That the applicant has adduced evidence upon which the court is of the view that if the action was brought, that evidence would be in the absence of any evidence to the contrary, be sufficient to establish the cause of action, and also fulfill the requirements of Section 27(2) in relation to that cause of action.
38. The respondent attributed his reasons for delay in filing his suit to the fact that he was issued with letters of administration on 18th September 2013 which letters got misplaced by the clerk working for the firm of advocates who were on record for him. The said advocates traced the letters earlier in the year 2016 when time for filing the suit had lapsed. During trial, the respondent produced the order dated 17th June of leave to file the suit out of time and it is on that premise that the trial magistrate failed to inquire into whether the conditions set out under Section 27 and 28 of the Limitation Act had been met at the time of granting the leave. Furthermore, it was upon the respondent to satisfy the trial court that the conditions set out in Section 27 and 28 of the *Limitation of Actions Act* were met. That burden did not at all shift to the appellants. Based on the reason given by the respondent, the respondent did not show that the material facts relating to the cause of action were outside his knowledge (actual or constructive) as he went through the process of obtaining grant of letters of administration. Furthermore, the reason given by the respondent does not fall under Sections 27, 28 and 30 of the *Limitation of Actions Act*. This was portrayed in *Mary Wambui Kabugu vs Kenya Bus Services Ltd Civil Appeal No. 195 of 1995* cited with approval in *Republic vs Principal Magistrate P. Ngare Gesora Principal Magistrate's Court & 2 Others ex parte Nation Media Group Ltd [2013] KEHC 71 (KLR)* where Shah JA stated:-
-it would appear that notwithstanding the provisions of Section 27 of the Act, the question whether or not the plaintiff was entitled to extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom ex parte order has been made can apply to the court which made the order to set aside...The judge who heard the application for extension of time must first hear it (in case of an application filed before filing suit) ex parte. He has no discretion in the matter. He is bound by the requirements of the Act. If the evidence shows prima facie that the requirements of the Act are satisfied, leave should be given. It is in the action only that the defendant can challenge the facts in due course. This is, because the requirements of Section 27 are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy or because the applicant did not know the law etc.
39. The respondent argued that the fact that the appellant failed to cross-examine him on the issue of the order of leave, the appellant was estopped from challenging the order. I do not agree with this argument because this is an issue of law which speaks loudly for itself and can be decided in the same manner as a preliminary objection during a trial. Furthermore, the respondent had a duty to establish before the court that he had complied with the law while obtaining the said order. The respondent did not discharge this duty before the trial court.
40. Consequently, I find that the order issued by Hon. Omodho in Thika Misc. Civil Application No. 68 of 2016 on 17th February 2016 is null and void for want of compliance with Section 27 and 28 of the Limitations of Actions Act thus, rendering the suit Thika CMC No. 1870 of 2016 and the judgment moot.
41. As such, I hereby set aside the orders for leave and the entire judgment delivered on 19th September 2023 in Thika CMCC No. 870 of 2016.
42. Each party to meet their own costs of this appeal.
43. The appeal is therefore successful.



44. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF
APRIL 2025.**

F. MUCHEMI

JUDGE

