



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Bowen v Muchungu & another (Civil Case E007 of 2021)
[2023] KEHC 27407 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E007 OF 2021
DO CHEPKWONY, J
SEPTEMBER 29, 2023**

BETWEEN

JANE BOWEN PLAINTIFF

AND

DAVID KAMAU MUCHUNGU 1ST DEFENDANT

MUTISYA JONES 2ND DEFENDANT

RULING

1. The Plaintiff's case against the Defendants is that on 13th April, 2018 she was A lawful passenger in Motor Vehicle Registration Number KAP 130A which collided with Motor Vehicle Registration Number KBG 254K. She filed the Plaint dated 9th April,2021 against the Defendants who were respectively the owner and driver of Motor Vehicle Registration Number KBG 254K.
2. The Defendants entered appearance and filed their Defence and statements Thereafter, they filed the *Exparte* Chamber Summons Application dated 7th November, 2022 which is now the subject of this ruling.
3. The Application seeks the following orders:
 - a. That leave be and is hereby granted to the Defendants/Applicants to take out Third Party Notice out of time.
 - b. That the said Third Party Notice be filed and served on Jonathan Paul Sivage and Adam Bowen out of time.
 - c. That costs be in the cause.
4. The Application is based on the Supporting Affidavit of Susan Murage sworn on 7th November, 2022 and the following grounds:



- a. The suit is based on a road traffic accident that occurred on 13th April, 2018.
 - b. That the owner/driver of Motor Vehicle Registration Number KAP 130A was entirely liable for the said accident that occurred on 13th April, 2018.
 - c. That in the alternative the owner/driver of Motor Vehicle Registration Number KAP 130A greatly contributed to the occurrence of the said accident and should therefore be liable to contributory negligence.
 - d. That due to the above, the Defendants should be entitled to indemnity.
 - e. That grant of the orders will enable the court to adjudicate fully all the issues of liability in this matter.
 - f. That it is in the interest of justice to grant the orders hereby being sought.
5. The Plaintiff opposed the Application through Grounds of Opposition dated 1st December, 2022 on the basis that the application is statutorily time barred by dint of Section 4(2) of the Limitation of Actions Act since three years have lapsed since the cause of action against the said Jonathan Paul Sivage and Adam Bowen arose on 13th April, 2018.
 6. The court directed the application to be canvassed by way of written Submissions. The Defendants/Applicants filed their Submissions dated 17th April, 2023 and the Plaintiff/Respondent filed their Submissions dated 5th May, 2023 all which the court has considered.

Analysis and Determination

7. Having considered the prayers being sought and the submissions that have been made in support and in opposition thereof, the main issues for considerations from are as follows:
 - a. Whether the Application is statute time barred.
 - b. Whether the Application has merits to warrant the orders sought.
8. On the issue of whether the application is statutorily time barred, the court concurs with the authority cited by the Defendants/Applicants, being the case of Mary Njeri v Aga Khan Health Services [2008] eKLR where the court held as follows,

“As regards the cause of action between the defendant and the intended 3rd party being time barred, the court, makes findings that case law as well as construction of Section 5 of the Limitation of Actions Act Cap. 22, Laws of Kenya, and Section 3 of the Law Reforms Act Cap. 26, Laws of Kenya, makes it clear that a cause of action on contribution and indemnity starts running from the date of judgment for a period of two years. There is no judgment in place herein yet and so the cause of action has not yet arisen as between the defendant and first 3rd party.

The defendant’s action of bringing in the 1st 3rd party at the trial stage is for purposes of having liability between them and that between the defendant and the plaintiff decided at the same trial for convenience purposes and also for saving on costs and time.”

9. As a matter of fact, neither has judgment been entered nor hearing taken place in this matter. It therefore cannot be said that the application is statutorily time barred.



Whether the Application has merits to warrant the orders sought.

10. With regard to whether the application has merit to warrant the orders sought, the guiding provision is enshrined under Order 1 Rule 15 (1) of the *Civil Procedure Rules* which stipulates that:

“ 15.

- (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
 - (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit...”

11. These provisions of Order 1 Rule 15 (c) of the *Civil Procedure Rules* are clear and in mandatory terms that the Defendants ought to make an application for leave of the court to issue Third Party Notice within 14 days from the close of pleadings. The next question that then follows is when do pleadings close? In the case of *Joseph Kipkirui Mutai v Richard Kibet & another* [2015] eKLR, the court held as follows:

“When are pleadings said to be closed?”

‘9. Order 7 Rule 7 (1) of the *Civil Procedure Rules* provides;

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.’

From this provision, pleadings close fourteen days (14) after the service of the defence or last of the defences on the Plaintiff. After closure of the pleadings a party may only file subsequent pleadings with the leave of the Court.”



12. In this case, the Defendants filed their Defence on 28th July, 2021 and the pleadings closed 14 days after that. The Defendants then ought to have filed the present application within 14 days from the time of the service of the Defence upon the Plaintiff. It is worth noting that the Defendants have not explained to the court why it took them more than one year to file the application. However, the court has discretion to enlarge time but the reason for the delay must be given to its satisfaction.
13. This issue of delay was addressed by the court in the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR where it was held that,
- ‘The law does not set out any minimum and maximum period of delay. All it state is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.’
14. Further, for a court to allow a Third Party Notice to issue it must establish that the cause of action between the Defendants and the intended third Party is the same as the original cause of action between the Plaintiff and the Defendants. In the case of *Interactive Advertising Limited & another v Equity Bank Limited & 2 others* (2016)eKLR where the court relied on *Yafesi Walusimbi v Attorney General of Uganda* (1959) EA 223 where the court stated:
- “in order to join a third party the subject between the third party and the Defendant and the original cause of action must be the same.”
15. In this case, the cause of action is similar to that between the Third Party and defendant hence the need for this party to be enjoined in the suit so that it can assist in determination of liability in case of the suit accident. However, it is worth of note that the Defendants have failed to adhere to the set timelines as provided for by the law and there being no sufficient reasons given for the said delay, the court declines to allow the Application. Third Party Notice to issue.
16. In the circumstances the *Exparte* Chamber Summons application dated 7th November, 2022 be and is hereby dismissed with costs to the Plaintiff.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 29TH DAY OF SEPTEMBER, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ondieki counsel for Defendant/Applicant

Mr. Olala holding brief for Mr. Litoro for Respondent

Court Assistant - Martin

