



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 263 OF 2009**

JONATHAN MALINDA .....PLAINTIFF

VERSUS

1. LOTA MOTORS LTD.  
2. WENDY JANET HETNIER..... DEFENDANTS

ANTI-PEST (K) LIMITED .....INTENDED 3<sup>RD</sup> DEFENDANT

**RULING**

1. The Plaintiff's suit is for damages in negligence. His case as pleaded in the plaint dated 7<sup>th</sup> May 2009 is that on 13<sup>th</sup> April 2008 he was violently knocked down as he lawfully cycled along the side of **Karen Road, Nairobi** by motor vehicle registration number **KAS 933 L** (hereinafter the **accident motor vehicle**) owned by the 1<sup>st</sup> Defendant while the 2<sup>nd</sup> Defendant was the beneficial owner thereof "in control and/or ownership and/or the authorized driver, employee, agent and/or servant thereof".
2. Interlocutory judgment in default of appearance or defence was entered against the 2<sup>nd</sup> Defendant on 5<sup>th</sup> February 2010. Similar judgment was entered against the 1<sup>st</sup> Defendant on 8<sup>th</sup> June 2012.
3. On 23<sup>rd</sup> May 2013 the interlocutory judgment against the 2<sup>nd</sup> Defendant was by consent set aside with liberty to defend the suit. The 2<sup>nd</sup> Defendant filed a statement of defence on 12<sup>th</sup> June 2013.
4. The Plaintiff then filed **notice of motion dated 23<sup>rd</sup> July 2013**, which is the subject of this ruling. The application, which is stated to be brought under **sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 (the Act)** and also under **Order 8, rules 3, 5 & 7 and Order 37, rule 6(2) of the Civil Procedure Rules, 2010 (the Rules)** seeks the following main orders –
  - i. Leave to file suit out of time against one **Anti-Pest (K) Ltd** (hereinafter called **Intended 3<sup>rd</sup> Defendant**).
  - ii. If prayer (i) is granted, leave to amend the plaint as necessary. A draft amended plaint is annexed.
5. The grounds for the application stated on the face thereof include –

- i. That information regarding the beneficial owner of the accident motor vehicle was not available to the Plaintiff at the time of filing suit.
- ii. That the delay in filing suit against the Intended 3<sup>rd</sup> Defendant is not inordinate.
- iii. That the intended amendment to the plaint is to enjoin the beneficial owner of the accident vehicle in the suit.
- iv. That no prejudice will be occasioned to any of the parties by the orders sought.
- v. That it is in the interests of justice to grant the orders sought.

6. There is a supporting affidavit which is sworn by the Plaintiff's advocate, **Gladys Gichuki**. It is stated in the affidavit, in effect, that the Plaintiff came to know that the Intended 3<sup>rd</sup> Defendant was the beneficial owner and the insured of the accident motor vehicle from the 2<sup>nd</sup> Defendant's application to set aside the interlocutory judgment against it (notice of motion dated 26<sup>th</sup> April 2013). That application was allowed by consent on 23<sup>rd</sup> May 2013.

7. The Intended 3<sup>rd</sup> Defendant has opposed the application by **grounds of opposition dated 28<sup>th</sup> August 2013**. Those grounds are –

- i. That the Plaintiff's claim against the Intended 3<sup>rd</sup> Defendant is time-barred under **section 4(2) of the Limitation of Actions Act, Cap. 22**.
- ii. That the Plaintiff has not met the requirements of **sections 27, 28 and 30** of Cap 22.

8. The application was canvassed orally on 8<sup>th</sup> October 2013. I have considered the submissions of the learned counsels appearing, including the cases cited.

9. It is to be noted that under Order 37, rule 6(2) of the Rules this

application is supposed to be *ex parte*. I therefore cannot understand why it was served upon the Intended 3<sup>rd</sup> Defendant. The application is not merely for joinder; it is essentially for leave to bring suit against the Intended 3<sup>rd</sup> Defendant out of the period of limitation. Joinder would be merely incidental if leave to bring the suit is granted. But having been served with the application the Intended 3<sup>rd</sup> Defendant was entitled to make representation.

10. In my respectful view, this is not the proper time for the defence of limitation to be pleaded. There is nothing to stop the Intended 3<sup>rd</sup> Defendant from pleading limitation in its defence in the event that leave to file suit out of time against it is granted. The hopelessness of a plaintiff's case cannot be a basis for denying him the right to bring suit against a defendant. A plaintiff does not require the defendant's consent to bring suit against him.

11. The issue that is germane to this application is, **Whether the Plaintiff has met the requirements of sections 27, 28 and 30 of Cap 22?**

12. As for section 27, the same provides –

**“27. (1) Section 4 (2) does not afford a defence to an action founded on tort where**

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- 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 contract 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 purposes 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 included 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.**

**(3) This section does not exclude or otherwise affect –**

**(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or**

**(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”**

13. The Plaintiff’s action is for damages for personal injuries arising out of alleged negligence of the Intended 3<sup>rd</sup> Defendant. The requirements of section 27(1) (a) & (b) are thus met.

14. As for section 27(1) (d), the Plaintiff has pleaded that he did not know that the intended 3<sup>rd</sup> Defendant was the beneficial insured owner of the accident motor vehicle until the 2<sup>nd</sup> Defendant filed her application to set aside the interlocutory judgment against her. Ownership of the accident motor vehicle was indeed a material fact relating to the cause of action that was of a decisive character in that such owner, apart from the driver of the motor vehicle, is the proper person to sue.

15. I am satisfied, from the material now before the court, that the Intended 3<sup>rd</sup> Defendant’s beneficial ownership of the accident motor vehicle was at all material times outside the knowledge, actual or constructive, of the Plaintiff until he was served with the 2<sup>nd</sup> Defendant’s aforesaid application about May 2013. This was **after** the three-year period of limitation prescribed for the Plaintiff’s pleaded cause of action. It was also **not earlier** than one year **before** 19<sup>th</sup> May 2009 when the suit was filed.

16. The requirements of section 27 (1) (d) of Cap 22 have thus been met.

17. With regard to section 28 of the Cap 22, as the application has been brought after commencement of the action, the relevant sub-section of that section is (3). It provides –

**“(3) Where such an application is made after 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 the like evidence would 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 fulfil the requirements of section 27(2) in relation to that cause of action;**

**and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27) to afford a defence under section 4(2).”**

18. I am satisfied that the fact of the beneficial ownership of the accident motor vehicle by the Intended 3<sup>rd</sup> Defendant and the pleaded circumstances of the accident leading to the Plaintiff’s injuries would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action against the Intended 3<sup>rd</sup> Defendant, apart from any defence under section 4(2). I have already held that the requirements of section 27(2) have been met. I have also already found that the fact of the Intended 3<sup>rd</sup> Defendant’s beneficial ownership of the accident motor vehicle was outside the Plaintiff’s knowledge (actual or constructive) until after commencement of this suit.

19. I am therefore satisfied that the requirements of section 28(3) of Cap 22 have been met.

20. Regarding section 30 of Cap 22, what is pleaded against the Intended 3<sup>rd</sup> Defendant at paragraph 4 of the draft amended plaint is vicarious liability. That meets the requirement of subsection (1) (c) of the section. Sub-section (2) is also met in that the beneficial ownership of the accident motor vehicle by the Intended 3<sup>rd</sup> Defendant, in conjunction with the pleaded negligence of the driver thereof, are facts which a reasonable person, knowing those facts and having obtained appropriate advice from an advocate in respect to them, would have regarded at that time as determining, in relation to the Plaintiff’s cause of action, that (apart from section 4(2) his action would have a reasonable prospect of succeeding and of resulting in an award of damages sufficient to justify the bringing of the action.

21. Finally, sub-section (3) of section 30 is met in that the Plaintiff did not know that the Intended 3<sup>rd</sup> Defendant was a beneficial owner and the insured of the accident motor vehicle; he had obtained a police abstract on the accident which did not reflect that fact, notwithstanding that such abstract is usually the first source of such information; and he had taken all reasonable appropriate steps to find out who the owner(s) of the vehicle was (were).

22. In the circumstances I will allow the application and grant leave to the Plaintiff to bring suit out of time against the Intended 3<sup>rd</sup> Defendant who shall be joined in this suit as the 3<sup>rd</sup> Defendant in the amended plaint to be filed within fourteen (14) days of delivery of this ruling.

23. Costs of the application shall be in the cause. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER 2013**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2013**