



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 1248 OF 2007**

**1. SAMSON OYANGO OMONDI**  
**2. MARY AWINO ONYANGO.....PLAINTIFFS**

**VERSUS**

**1. AKAMBA PUBLIC SERVICE LTD**  
**2. BERNARD G. KAMAU.....DEFENDANTS**

**AND**

**THE ATTORNEY-GENERAL .....INTENDED 3<sup>RD</sup> DEFENDANT**

**RULING**

1. In this application (**notice of motion dated 16<sup>th</sup> June 2010**) the Plaintiffs seek the main order that time be extended “within which to join and/or file suit against the Attorney-General”. There is an alternative prayer, without prejudice to the main prayer, for an order to join the Attorney-General as a defendant in this suit.

2. The application is stated to be brought under **sections 27 and 28 of the Limitation of Actions Act, Cap 22** and also **section 3A of the Civil Procedure Act, Cap 21. Order I, rule 10(2) of the old Civil Procedure Rules (the Rules)** is also cited.

3. The main grounds for the application appearing on the face thereof are-

(i) That the Attorney-General is a necessary party pursuant to the **judgment dated 30<sup>th</sup> September 2004 in Nairobi HCCC No. 63 of 2001 (Consolata Akinyi – vs – Akamba Public Road Services Ltd and Bernard G. Kamau – t/a Shaggy Investments)**.

(ii) That in the said judgment the learned judge (Ang’awa, J) made a finding that the accident occurred when one of the accident motor vehicles was avoiding a pot-hole”.

(iii) That it is the Government's responsibility to maintain and repair public roads.

There is a supporting affidavit sworn by the 2<sup>nd</sup> Plaintiff.

4. The Attorney-General has opposed the application by grounds of opposition dated 24<sup>th</sup> and filed on 25<sup>th</sup> August 2010. Those grounds are-

(i) That the application is fatally defective, bad in law and an abuse of the process of the court.

(ii) That the suit is *res-judicata*.

5. At the hearing of the application the following additional grounds of opposition were urged -

(iii) That the application does not satisfy the provisions of sections 27, 28, 29 and 30 of Cap 22.

(iv) That the intended action against the Attorney-General will be grossly out of time.

(v) That the Plaintiffs are guilty of indolence having become aware of the judgment in Nairobi HCCC No. 63 of 2001 in 2004.

(vi) That if the application is allowed there will be prejudice to the Attorney-General because due to the passage of time he would not be able to properly defend the suit.

6. I have considered the submissions of the learned counsels appearing, including the cases cited.

7. A brief back-ground is necessary. On 29<sup>th</sup> March 2000 a horrible accident involving two buses occurred along Kericho-Nakuru road. 8. The buses collided head-on and one of them caught fire. There were many deaths and injuries. Many suits were subsequently filed, including the present suit and also Nairobi HCCC No. 63 of 2001.

9. On 22<sup>nd</sup> November 2002 the then **Chief Justice, B. Chunga**, directed that **Nairobi HCCC NO 63 of 2001 be heard as a test case on the issue liability**. In that case the plaintiff was CONSOLATA AKINYI and the Defendants were AKAMBA PUBLIC ROAD SERVICES LTD (1<sup>st</sup> defendant) and BERNARD G. KAMAU – t/a/ Shaggy Investments (2<sup>nd</sup> defendant). The plaintiff in that suit had been a passenger in one of the buses. The two defendants blamed each other for the accident.

10. The case was heard and on 30<sup>th</sup> September 2004 the court (**Ang'awa, J**) rendered **judgment on liability**. The learned judge found as follows-

**"I find in this case that the 2<sup>nd</sup> Defendant (Shaggy bus) was negligent in that he was driving at a high speed ... he was (also) driving a motor bus ... that carried passengers over and above ... the required numbers... (T)he said bus was trying to avoid a pot-hole which it could have done but for the heavy load of passengers it was carrying... (It) was unable to return to its lane. This therefore means that (the) collision occurred due to the negligence of 2<sup>nd</sup> Defendant's driver (now deceased).**

**"The 2<sup>nd</sup> Defendant as owner of the said vehicle is liable vicariously for the acts of his agent and/or servant.**

**"The 1<sup>st</sup> Defendant having filed a notice upon the 2<sup>nd</sup> Defendant under Order I, rule 21 Civil Procedure Rules I am required by law to determine how the liability ought to be approved (sic). I do so by stating that the liability against the 2<sup>nd</sup> Defendant be and is hereby computed at 100%...."**

11. Earlier in the judgment Ang'awa, J had observed as follows -

**“From the foregoing what is very clear was that a lot of blame has been placed on the pot-hole. All parties agree that this pot-hole was the cause of the accident.**

**“It is the Government of Kenya which maintains the road. They (sic) being responsible would have been sued as co-defendant to this suit but were not.”**

12. It is upon this observation of Ang’awa, J in her judgment that the present application is founded.

13. As already seen, the application is in two parts. There is the main prayer for extension of time to file suit against the Attorney-General. Then there is the alternative prayer for joinder of the Attorney-General as a defendant in the present suit. I will deal with the two prayers in turn.

14. With regard to extension of time to file suit out of time, it will be remembered that ordinarily the time limit within which to sue the Attorney-General is one year. The accident in this case occurred in the year 2000. So, we are talking of reviving a cause of action that expired over eleven (11) years ago!

15. In any event, the issue of liability has already been determined, and the 2<sup>nd</sup> Defendant in Nairobi HCCC No. 63 of 2001 found to be 100% liable for the accident. Would this not be an absolute defence available to the Attorney-General?

16. Ang’awa, J did **not** make a positive finding that the Government was liable for the accident for failure to maintain the road. The learned judge merely observed that all the parties before her were blaming the pot-hole in the road for the accident, and that therefore the Government should have been joined in the suit. But with regard to the parties then before the court, the learned judge found that the 2<sup>nd</sup> Defendant was 100% to blame for the accident.

17. In the present suit the Plaintiffs have sued as 2<sup>nd</sup> Defendant the party found in the **test suit (Nairobi HCCC No. 63 of 2001)** to be 100% liable for the accident. In effect they already have judgment against the 2<sup>nd</sup> Defendant on liability. Why do they want to sue the Government at this late hour? There are no readily discernible legal reasons necessitating this course of action.

18. In any event, suing a party more than 11 years after a cause of action occurred would no doubt cause injustice and prejudice as there would be obvious constraints to mounting a proper defence due to the passage of time.

19. I am also not satisfied that the very strict requirements of **sections 27 (2) and 28 of Cap 22** have been met by the Plaintiffs, given the fact that they were aware of the judgment in the test suit from the time it was delivered in the year 2004. They have applied six (6) year later without any or sufficient explanation for the delay.

20. As to the alternative prayer for joinder of the Attorney-General in this suit as a defendant, I need only repeat that the issue of liability having been determined in the test suit in the year 2004, it is now too late in the day. In any event, someone else having been found 100% liable for the accident, the Attorney-General cannot be a necessary party. The issue of liability in this suit is no longer outstanding. It was determined in the year 2004 in the test suit!

21. In the circumstances, the notice of motion dated 16<sup>th</sup> June 2010 is not only misconceived, but also lacks merit and must be refused. It is dismissed with costs. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JUNE 2012**

.....  
**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE 2012**