



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO. 925 OF 2003**

**MARY WANJIKU NDIRANGU**  
**Suing as Administratrix of The Estate Of RICHARD NDIRANGU .....**  
**APPLICANT**

**VERSUS**

**EVARALD STEPHEN KONGO .....1<sup>ST</sup>**  
**RESPONDENT**  
**TELKOM KENYA LIMITED .....2<sup>ND</sup>**  
**RESPONDENT**  
**POSTAL CORPORATION OF KENYA .....3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

Before the court is a Notice of Motion dated 6<sup>th</sup> January, 2011 premised under Sec. 1A, 1B and 3A of Civil Procedure Act Cap 21 seeking an Order to set aside the Orders made by this court on 22<sup>nd</sup> June, 2010 granting the 3<sup>rd</sup> Defendant's application dated 14<sup>th</sup> April, 2010 as prayed. This application is premised also on the grounds set forth on the face thereof as well on the supporting affidavit sworn by one Daniel Ngaca Ngacugia an advocate of the High Court of Kenya. The said affidavit was sworn on 6<sup>th</sup> January, 2011, but I do note that the application is filed on 22<sup>nd</sup> March, 2011, almost after the lapse of three months.

The application is opposed and the 3<sup>rd</sup> Respondent has filed grounds of opposition dated 29<sup>th</sup> June, 2011.

The application is basically supported on the ground that on 22<sup>nd</sup> June, 2010, which was the date fixed for hearing interparte of the application dated 14<sup>th</sup> April, 2010, the Defendant's counsel did not attend court due to an oversight and/or clerical omission. It is thus contended that the failure to attend the court was inadvertent and not intentional.

Further it is averred in the supporting affidavit, that, on 22<sup>nd</sup> July, 2008, the Plaintiff had to seek an order to enjoin the 3<sup>rd</sup> Defendant on the ground that the Kenya Posts and Telecommunication Corporation, though shown as the owner of the motor vehicle registration no. KAJ 612S as at 7<sup>th</sup> September, 2000, which is the centre of the claim in this suit, the said corporation was later split into Telkom Kenya and Postal Corporation of Kenya (the 3<sup>rd</sup> Defendant herein). Thus there was necessity to include Postal Corporation as the 3<sup>rd</sup> Defendant in this suit.

I would note that, despite the aforesaid averments made in paragraph 5 of the supporting affidavit, the Plaintiff had originally joined Telkom Ltd. which is one of the splinter corporations of Kenya Post and Telecommunication Corporation as the 2<sup>nd</sup> Defendant. It is further urged that the dismissal of suit against the 3<sup>rd</sup> Defendant vide application dated 14<sup>th</sup> April 2010, is a drastic step which will result in dismissal of the suit should it turn out that the motor vehicle in question actually belonged to the 3<sup>rd</sup> Defendant.

Mr. Ngaca submitted that as **Hon. Lady Justice Sitati** on 22<sup>nd</sup> July, 2008 allowed the Plaintiff's application to enjoin the 3<sup>rd</sup> Defendant by way of an Amended Plaintiff, it is not open for the Plaintiff to raise the issue of limitation. He relied on the case of **BARCLAYS BANK D.C.O –VS- SHAMSUDIN (197)3 EA Kenya 451**. It is true that Hon. Charan Singh J. did not allow the issue of Limitation raised by the Defendant's lawyer in the said case. However, having perused this case, it becomes apparent that all the facts, which led the Plaintiff to apply for amendment and which was granted were pleaded by the Defendant in the Statement of Defence. Because of peculiar and special circumstances of the referred case, the court did not allow the issue of Limitation raised by the Defendant. The principle when the issue of Limitation can be declined has been clearly considered in the referred case. The case of **CHARAN DAS –VS- AMIR KHAN (1920) I.A. 255** was cited wherein the Privy Council observed:-

***“Though [the power of the Court to amend the plaintiff] should not as a rule be exercised where its effect is to take away from a Defendant a legal right which has accrued to him by lapse of time, yet there are cases: see, for example, Mohamed Zahir Ali v. Rutta Koer (11 M.L.A. 468, 485) where such considerations are outweighed by the special circumstances of a case.”***

Thereafter, the Supreme Court of India in **LEACH & CO. –VS- JARDINE SKINNER & CO. (1957) S.C.R 438** has also observed as follow:-

***“It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion and to whether amendment should be ordered and does not affect the power of the Court to order it, if that is required in the interests of justice.”***

I would have no hesitation to adopt the aforesaid principles of law which have been time tested even in our jurisdiction. There is no doubt that the court has inherent jurisdiction to do justice which has been donned to the court by way of overriding objectives of the Civil Procedures as well as the duty of the Court to do justice vide Sec. 1A, 1B of the Civil Procedure Act. The inherent jurisdiction also is granted under Sec. 3A of the Civil Procedure Act. The overriding objectives of the Civil Procedure Act is to facilitate the justice, expediency, proportionate and affordable resolution of the civil dispute. This case is obviously governed by the Civil Procedure Act and the said principles are applicable herein. I have gone through the records of the case and there is nothing so far, since 2003, to show that the 3<sup>rd</sup> Defendant is the registered owner of the motor vehicle in question. It is also not in dispute that the amendment to include the 3<sup>rd</sup> Defendant as a party was granted by consent of the parties preserving the right of filing the statement of defence by the 3<sup>rd</sup> Defendant. In the said defence, the issue of Limitation was raised and the application dated 14<sup>th</sup> April, 2010 was filed by the 3<sup>rd</sup> Defendant raising the same issue and seeking the orders to dismiss the suit.

Though the said application was heard ex-parte due to non-appearance of the Plaintiff, which fact had been accepted by the Plaintiff, the application was heard on merit and after hearing the said issue on merit, I made a ruling on 22<sup>nd</sup> June 2010. So, it is obvious that the legal issue was submitted and considered. So far there is nothing before me to show that because the leave to amend the Plaintiff was granted and consequently the 3<sup>rd</sup> Defendant was enjoined, the issue of limitation has been overtaken by events and cannot be agitated or determined.

The pleadings were filed wherein the issue of Limitation has been raised and which was lawfully considered. After that, I agreed that the suit against the 3<sup>rd</sup> Defendant is time-barred. I do also note that it was a legal issue which has been determined by me and if so, I cannot even review my ruling thereon.

Moreover, I do appreciate that the application is under the inherent jurisdiction of this court and not as a matter of review. While considering this issue I shall note the following points:

1. The ruling was delivered on 22<sup>nd</sup> June, 2010.
2. This application is dated 6<sup>th</sup> January, 2011, but filed on 22<sup>nd</sup> March, 2011. The affidavit does not even make any effort to explain the delay of almost 9 months from the date of the ruling. Paragraph 4 of the supporting affidavit just avers cursorily, and I quote:

**“4. THAT accordingly, on the 22<sup>nd</sup> June, 2010 when the said application was coming up for hearing in court, I inadvertently failed to attend court on the premise that I had no matter only to learn later while reviewing the office file that the application indeed came up for hearing and the orders sought were granted as prayed in my absence.”**

It doesn't even aver when the learned counsel realized that the orders in question were made.

3. The learned counsel did not try to explain the delay of almost 3 months between the preparation of the application and filing thereof.

With the above facts, the applicant is in my considered opinion guilty of the delay which is not sought to be explained. I may only note that the expediency is one of the objectives which the court has to follow.

The learned counsel for the 3<sup>rd</sup> Defendant/respondent has relied on the case of **Mohamed & Another –vs- Shoka (1990) KLR 463**, wherein the Court of Appeal has determined the principles under which a default judgment and/or ex-part order can be quashed. The explanation of the delay is one of the factors to be considered by the court, which is not before me. I do note further that even if I quash my order as prayed for, I have nothing before me at this moment to show any connection of the 3<sup>rd</sup> Defendant with the Plaintiff's claim. Obviously, continuation of this case will prejudice the 3<sup>rd</sup> Defendant. It is a separate entity and the cause of action would commence from the date of filing this case against the 3<sup>rd</sup> Defendant which is obviously time barred.

In the premises, unfortunately, I have no ground which can justify the grant of orders prayed by the Plaintiff in this application which I dismiss with costs.

Orders accordingly.

**Dated, signed and delivered** at Nairobi this 19<sup>th</sup> day of **September, 2011**

**K. H. RAWAL**  
**JUDGE**  
**19.09.2011**