



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

**Civil Case 262 of 1999**

**JANET WANGARI MWANGI.....PLAINTIFF**

**VERSUS**

**JAMES MUCHOKI KARIUKI.....1<sup>ST</sup> DEFENDANT**

**BIDCO OIL REFINERIES LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Defendant, Bidco Oil Refineries Ltd has raised a preliminary objection to the plaintiff's amended plaint claiming that the suit against the defendant was barred by the provisions of the **Limitation of Actions Act (Cap 22 Laws of Kenya)**. Mr. Mahida for the defendant submitted that in the original plaint filed in 1999, the plaintiff did not plead vicarious liability against the 2<sup>nd</sup> defendant – Bidco Oil Refineries Ltd. He submitted that the amended plaint which was filed by the plaintiff on 1<sup>st</sup> of November, 2006 raised the issue of vicarious liability for the first time. It was Mr. Mahida's submission that the accident in question occurred on the 21<sup>st</sup> of June, 1996. The plaintiff could not therefore raise an issue which was not pleaded initially, ten years after the event. He argued that **Section 4(2)** of the **Limitation of Actions Act** prohibits any suit founded on tort to be filed after a period of three years. He urged the court to allow the preliminary objection and dismiss the suit against the defendant with costs.

Mr. Karanja for the plaintiff opposed the application. He submitted that the amended plaint was allowed with the leave of the court. He submitted that the issue raised by the defendant in the preliminary objection ought to have been raised when the application for amendment was being argued. He submitted that the defendant had earlier made an application to have the suit dismissed because the plaintiff had not pleaded vicarious liability. The said application was dismissed by this court. He further submitted that in accordance with the provisions of **Order VI A Rule 3(3)** of the **Civil Procedure Rules**, once pleadings have been amended, it is deemed to have been filed when the original plaint was filed. He argued that the amended plaint did not infringe the **Limitation of Actions Act**. He urged the court to dismiss the preliminary objection with costs.

In response, Mr. Mahida submitted that the application for amendment was allowed by the court without parties making any arguments. He reiterated that the amended plaint brought in a different cause of action against the defendant which cause of action was barred by the **Limitation of Actions Act**. He urged the court to uphold the Preliminary Objection.

I have carefully considered the rival arguments made by Mr. Mahida and Mr. Karanja in this application. The issue for determination by this court is whether the Amended Plaint raises a new issue which was not pleaded in the original plaint and therefore the said amended plaint ought to be struck out for being in breach of the limitation period. Mr. Mahida argued that since the original plaint did not raise the issue of vicarious liability, the defendant cannot be held liable for the acts of the driver of the motor vehicle that was involved in the accident. The defendant's argument is that the amended plaint ought not to be allowed because it raised a new issue, which if allowed to stand, would mean that the plaintiff would have been allowed to bring a new cause of action beyond the period barred by the **Limitation of Action Act**. I have perused the original plaint. In the said plaint, Bidco Oil Refineries Ltd is sued as the 2<sup>nd</sup> defendant. In paragraph 4 of the original plaint, the plaintiff pleaded that the motor vehicle involved in the accident was owned by Bidco Oil Refineries Ltd. In paragraph 5 of the amended plaint, the plaintiff introduced

the element of vicarious liability. The plaintiffs pleaded that the defendant ought to have been found vicariously liable for the acts of its employee, James Muchoki Kariuki, who was the driver of the motor vehicle involved in the accident.

Is the introduction of vicarious liability in the amended plaint a new issue which is barred by the **Limitation of Action Act**? I do not think so. Bidco Oil Refineries Ltd was sued in the original plaint as the owner of the motor vehicle that was involved in the accident. Although vicarious liability was not pleaded, it was implied in the paragraph 4 of the original plaint. Further I agree with the Ruling of Onyango Otieno, J (*as he was then*) in **Molu & Anor. Vs Kenya railways & Anor. [200] 2 KLR 555** at page 555 when he held that;

***“I think the reason why amendments to pleadings are generally granted without much fuss particularly before hearing is because such amendments help to have all matters between the parties in the suit availed to the court so that the court may be in a better position to have an informed view of the entire case and that ensures justice.”***

I further hold that the introduction of vicarious liability in the Amended plaint did not infringe the provisions of the **Limitation of Actions Act. Order VI A Rule 3(3)** of the **Civil Procedure Rules** recognizes that there are times where amendments may result in introduction of a new party long after the Limitation period had expired. I associate with the opinion of Visram J, in **Kuloba vs Oduol [2001] KLR 647** at page 652 when he held that;

***“What I am trying to bring out is that the courts had recognized the need for allowing certain amendments which were outside the period of Limitation and or which sought to introduce a new cause of action even before Order VI A Rule 3 of the Rules was enacted. Such amendments are those which flowed from the same facts as the originally pleaded claim. The rationale of allowing such amendments is that they do not cause any prejudice to the other party who is taken to have knowledge of such cause at the time the original pleading is filed.”***

In the present case, the amended plaint brought out clarity to the issues in dispute between the plaintiffs and the defendant. I need not say more. The Preliminary Objection lacks merit and is hereby dismissed with costs.

**DATED at NAKURU this 24<sup>th</sup> day of OCTOBER 2007**

**L. KIMARU**

**JUDGE**