



**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 2<sup>nd</sup> defendant, Bidco Oil Refineries has made an application under **Order VI rule 13(1)(a) of the Civil Procedure Rules** seeking the orders of this court to strike out the plaint filed by Janet Wangari Mwangi, the plaintiff herein on the grounds that it disclosed no cause of action against the 2<sup>nd</sup> defendant. The grounds in support of the application are that the 1<sup>st</sup> defendant James Muchoki Kariuki had died, and no application to substitute him had been made before the suit against him abated. The 2<sup>nd</sup> defendant states that, since the plaintiff did not plead that the 2<sup>nd</sup> defendant was vicariously liable for the negligence of the 1<sup>st</sup> defendant, there was therefore no cause of action against the 2<sup>nd</sup> defendant. The application is opposed. The plaintiff filed grounds in opposition to the application. She stated that her pleadings disclosed a reasonable cause of action since the 2<sup>nd</sup> defendant and the Third Party had even agreed to apportion liability between themselves at the ratio of 50:50. She stated that it will not be in the interest of justice if her suit is therefore struck out.

At the hearing of the application, I heard the arguments that were made by Mr. Mahida for the 2<sup>nd</sup> defendant and Mr. Githui for the plaintiff. Mr. Wamaasa for the Third Party supported the application of the 2<sup>nd</sup> defendant. Having carefully considered the arguments made, the issue for determination by this court is what happens to a suit where a party who alleges to have been injured as a result of a road accident involving a motor vehicle, files suit against the driver and the owner of the said motor vehicle, and the suit against the said driver abates after his death.

In the instant application, Mr. Mahida has submitted that once a suit against a driver who is alleged to have negligently caused the accident dies, and the suit against him abates, where the plaintiff did not specifically plead that the owner of the motor vehicle was vicariously liable, then there can be no cause of action against such an owner. In this case, it is the 2<sup>nd</sup> defendant's argument that the plaintiff did not plead that it was vicariously liable for the negligence of its driver. Mr. Githui has responded by arguing that although the suit against the 1<sup>st</sup> defendant (*the driver of the motor vehicle which was involved in the accident*) abated, it does not in law imply that the 2<sup>nd</sup> defendant as the owner of the motor vehicle which was involved in the accident is absolved from liability. He submitted that an owner of a motor vehicle does not escape liability just because the driver was not a party to the suit.

I have perused the plaint in this case. The plaintiff pleaded that the 1<sup>st</sup> defendant was the driver of motor vehicle registration number KAE 351K Isuzu lorry. She further pleaded that the said lorry was owned by the 2<sup>nd</sup> defendant. She averred at paragraph 4 of the plaint that the 1<sup>st</sup> defendant was "acting

as a servant, employee and or agent of the 2<sup>nd</sup> defendant” negligently drove the said motor vehicle that he permitted it to collide with motor vehicle registration number KWD 668 wherein the plaintiff’s daughter, Esther Wangechi (*the deceased*) was fatally injured. Although the plaintiff did not state that the 2<sup>nd</sup> defendant was vicariously liable for the acts of the 1<sup>st</sup> defendant, it is clear in her plaint that she intended for the 2<sup>nd</sup> defendant to be ultimately liable to her in damages as the administrator of the estate of the deceased. I do not therefore agree with the argument made by Mr. Mahida that the fact that the plaintiff did not specifically plead that the 2<sup>nd</sup> defendant was vicariously liable for the acts of the 1<sup>st</sup> defendant (*against whom the suit has abated*), means that there is no cause of action against the 2<sup>nd</sup> defendant.

Furthermore, as was held by the Court of Appeal in the case of **Samuel Gikuru Ndungu –vs- Coast Bus Services Limited Civil Appeal No. 177 of 1999, (unreported) (Nairobi)** at page 4 of its judgment:

*“From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and evidence in support of the claim. Vicarious liability of the employer is not pegged to the employees’ liability but to his negligence. Having come to that conclusion we are unable to agree with Aganyanya J. that the non-joinder of a driver in an action as the one which gave rise to this appeal renders the suit incompetent. “*

In the instant case, the fact that this court ruled on the 28<sup>th</sup> of September 2004 that the suit against the 1<sup>st</sup> defendant (*who died on the 28<sup>th</sup> of August 1999*) had abated, does not absolve the 2<sup>nd</sup> defendant from liability.

For the reasons stated therefore, the application filed by the 2<sup>nd</sup> defendant lacks merit. I think the same was filed by the 2<sup>nd</sup> defendant in the vain hope that this court would allow it. The application is therefore dismissed with costs to the plaintiff.

**DATED at NAKURU this 19<sup>th</sup> day of May 2006.**

**L. KIMARU**

**JUDGE**