



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 625 OF 1979

KITETA KIVUVAAPPLICANT

VERSUS

REX MOTORS LTD & 2 OTHERS.....DEFENDANTS

RULING

This suit was filed by the plaintiff as the personal representative and administrator of the estate of the late Kivuva Muyanga who was allegedly killed in the accident that took place on the 14th day of July, 1977. The plaint was first amended with leave adding the 3rd defendant for who an appearance and defence were entered.

The plaintiff again applied by chamber summons for a further amendment on 18th October, 1983. This chamber summons came before me for hearing on 23rd July, 1985, when the parties by consent left the matter to be decided by me on the basis of the arguments put forth to Todd J and the written arguments to be forwarded by the advocates which they did on 7th January, 1986 and 25th April, 1986. Unfortunately my attention was not drawn to this consent order and the matter remained in abeyance. I was reminded of this application again on 5th of August, 1987. I regret the delay caused by the indifference of the advocates for the parties.

By the present application filed on 18th October, 1983, the plaintiff in effect seeks to abandon his claim against the defendants and substitute for himself one Nduki Kivuva, a widow of the deceased as the deceased's dependant. He has acknowledged that he has no cause of action against the defendants and the description of himself as a legal representative and administrator in the original plaint may be untenable.

The application is supported by an affidavit sworn by Mr Kivuitu, the advocate for the original plaintiff and the widow. In my view, in such a serious application, the proper person to swear an affidavit was the widow herself, but in any case, that has no bearing on the consideration of this application, which is entirely opposed on the basis of law only.

The advocates for the 1st and 3rd defendants in their submissions and the authorities quoted have based their argument on the provision of the law that the amendment, if allowed, would in effect allow the widow to bring her claim against the defendants which is time-barred under section 4(1) of the Limitation of Actions Act (cap 22) and also under section 4(1) of the Fatal Accidents Act (cap 26).

They submitted in their written submissions that before this application for amendment was filed, the widow should have made an application for an extension of time under section 27 of the Limitation of Actions Act and that in order to succeed in that application she would have had to satisfy the court that

the requirements of sub-section (2) of section 27 had been fulfilled and the provisions of sections 28, 29 and 30 would have governed her said application.

Mr V R D Patel for the 1st defendant relied on the following cases:

(1) *Nzirane v Lukwago* (1971) E A P 328;

(2) *Marshal v London Passenger Transport Board* (1936) 3 All ER 83;

and (3) *Mweu v Kabai & Another* (1972) EA 248.

Having carefully gone through the pleadings and having considered the submissions and having thoroughly appreciated the circumstances of this case, I am persuaded that the submissions of the counsel for the 1st and 3rd defendants are well founded. I cannot agree that a plaintiff can be substituted in a time-barred cause of action without first obtaining leave to extend the time under the Limitation of Actions Act.

Consequently, I dismiss the application by Chamber Summons filed on 18th October, 1983, with costs.

Orders accordingly.

Dated and Delivered at Nairobi on this 13th Day of October, 1987

A.S. RAUF

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JUDGE