REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO 52 OF 1976

PERES ATIENO...PLAINTIFF

VERSUS

MOSES ANGURA OMORO..............................DEFENDANT

J H MINET...DEFENDANT

JUDGMENT

July 8, 1985, **Trainor J** delivered the following Judgment.

The unfortunate plaintiff in this case was a passenger in a bus property of the first defendant on January 22, 1975 when it was involved in a collision.

The plaintiff was very seriously injured and was taken to hospital in a state of unconsciousness. She has, I understand from the medical evidence, recovered to be as well as she will ever be. That condition, however, means that she has a permanent limp due to a shortening of her right leg and also has some very ugly scars on her right arm.

On January 8, 1976, fourteen days before the expiration of the statutory period within which to bring an action for tort, a plaint was filed on her behalf claiming damages from the owner of the bus and also from J H Minet. Minet was, I understand, an incorrect title for certain insurance brokers.

On July 26, 1976 an amended plaint was filed. It was amended by the deletion of J H Minet and substituting Alice Nzima as the second defendant.

No application was made to the court for permission to add the second defendant apparently on the basis that in the circumstances the addition of the new second defendant was an amendment of the plaint and not an addition of a party, made before the close of pleadings and the consent of the court was not necessary.

Both defendants denied negligence but the second defendant also pleaded the Limitation of Actions Act (cap 22).

The plaintiff gave evidence and the effect of it was, in a nutshell, that the driver of the first defendant’s bus was driving at a sedate and reasonable speed on the correct side of the road when the lorry, if I

remember correctly came around a bend in the road.

The plaintiff said that the lorry crossed over on to its incorrect side of the road and struck the bus on the middle of the offside about where the plaintiff was sitting. There was not in all her evidence anything to suggest, much less prove, negligence on the part of the bus driver and I must dismiss her claim against the first defendant with costs.

Mr Gitau who appeared for the substituted second defendant argued that at the time she was added to the plaint over three years had elapsed since the date of the accident and, therefore, the plaintiff's claim against his client was statute barred. He argued his case on the basis of order VIA rule 3 of the Civil Procedure Rules and maintained that such an amendment required the approval of the court.

Order VIA rule 3 commences that:

> "3 (1) Subject to order 1, rules 9 and 10 ... and the following provisions of the rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings"

As will be seen order VIA rule 3 states that it is subject to order 1 rule 10 which order provides for substitution or addition of parties.

Sub-rule 2 of rule 10 commences:

> "The court may at any stage of the proceedings either upon or without the application of either party, (my emphasis) and on such terms as may appear to the court to be just, order that the name of the party improperly joined, whether as a plaintiff or defendant be struck out".

The effect of that sub-rule clearly gives to the court the power to strike out any party improperly joined.

Mr Hayanga maintained that what was before the court was an amended plaint and order VIA (1) applied. It provides:

> "(1) A party may, without the leave of the court, amend any pleading of his once at any time before the pleadings are closed"

and that the amendment dated from the date of the plaint. He said that the name J H Minet was inserted in error as J H Minet was the insurance broker of the second defendant. He said that as such a broker J H Minet was served with a notice of the accident because Minet was the agent of both the now second defendant and her insurers. He said that many letters were sent to the now second defendant but all were returned, so the plaintiff was left with no choice but to sue her agents J H Minet. He said that all that was done by the amendment was correctly to substitute the principal for the agent and that the amendment dates from the time of the original plaint.

I do not intend to present all the arguments of learned counsel for the parties but so far as those presented on behalf of the plaintiff are concerned I hold they are without substance. Even, if one were to concede for the sake of argument, and I most certainly would not concede it otherwise, that J H Minet was the agent of the second defendant for the purpose of effecting insurance on her motor vehicle, how could he be liable, vicariously or in any other way, for the negligence of the second defendant her servant or agents, in the care, control and management of the second defendant's lorry. The suggestion is untenable.

That letters to the second defendant never reached her is no justification for suing another person even though he be such an "agent" as is alleged on the plaintiff's behalf. If the second defendant were not available then the plaintiff should have applied for leave for substituted service.

The position with regard to the effect of the Limitation of Actions Act where a party is added is now so well established that it requires little comment. Mr Gitau referred to many cases on the point some dating

a long way back but I do not intend to cite them. I prefer to cite the latest decision of this court and in which reference is made to an English decision which in turn refers to, or cites some of the cases cited before me.

In the unreported case of *Waweru Mangere v Silingi ole Kuriti.* Civil Suit No 554 of 1973 and Originating Summons 192 of 1979 were consolidated. The parties had entered into an agreement for the sale of certain land and the plaintiff went into possession. No consent was obtained from the Land Board and, consequently the transaction became void on April 19, 1965.

On March 13, 1973 the plaintiff sued the defendant, who had become registered as owner, for specific performance of the contract and defendant counter claimed for the return of the land. The advocates of the plaintiff later advised him that he could not succeed, and the plaint was withdraw and judgement on the counterclaim was given in favour of the defendant.

An application to set aside the judgement was filed on February 29, 1978 and on January 23, 1979, the Originating Summons 192 of 1979 was filed. The judgment on the counterclaim was set aside and the proceedings continued in a consolidated form and on oral evidence.

In his judgment Trainor J said at page 9:

> "The number of cases that have been reported dealing with applications to amend proceedings by adding a new party are many. The position now seems to be well established. Where the application is granted the new party will not be prejudiced. Any defence that is open to him at the time the application is granted is available to him as if proceedings were first instituted against him at that time. To put it another way, the Act may be relied on as a defence if the period has expired. It would appear from the cases that I have found, and there are many, that time is calculated up to when the proceedings are instituted; in the case of an added party time continues to run until the amendment adding him as a defendant is ordered.
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> A very helpful case, and one which one might well have anticipated being opened to the court by the counsel for the defence, is *Lipton's Cash Registers and Business Equipment Ltd v Hugin (G B) Ltd and others* [1982] 1 ALL E R 595. In it a very thorough review, if I may respectfully say so, of a great number of cases over the years is made. In it it was held, *inter alia.*
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> > "(3) Accordingly the appeal would be allowed and the orders made in May and June giving leave to amend the writ by adding the third and fourth defendants would be restored, subject to the adding of the new defendants being treated as operative only from the date when the amendment was made, ie 16th June, 1978."
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> In his judgment His Honour Judge Hawser said that the amending order would be treated as if there had been a fresh writ issued on the date the orders were made."

To permit the present proceedings to continue against the second plaintiff as if the amendment took place with retroactive effect to the date the original plaint was filed would most certainly be prejudicial to the rights conferred on her by the Limitation of Actions Act.

The Civil Procedure Rules make a clear distinction between the substition or addition of a party to proceedings and the amendment of the pleadings, and the position in the instant case is governed by order 1 rule 10.

At the time the name of the present defendant was added the plaintiff had lost the right to sue her. There is only one case in which proceedings may be instituted or continued out of time and that is when section 27 of the Limitation of Actions Act (cap 22) applies. That section, which involves obtaining the leave of the court, has no application in this case.

As the plaintiff had lost her right of action against the now second defendant that defendant was

improperly joined. In those circumstances I order that she be struck out.

Lest I be held to be wrong on that I hold on the facts established before me that at the time the second defendant was added to the proceedings she was entitled to have recourse to all defences open to her at that time.

As more than three years had lapsed since the accident she was entitled to avail of section 4 (2) of the Limitation of Actions Act (cap 22):

> “An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

On either ground the case against the second defendant is dismissed with costs.

Dated and delivered at Nairobi this 8th day of July, 1985.

J.P TRAINOR

JUDGE