IN THE COURT OF APPEAL AT

NAIROBI

(CORAM: NAMBUYE, G.B.M KARIUKI & OUKO J.A)

CIVIL APPEAL NO. 278 OF 2005

BETWEEN

ABDULLAHI IBRAHIM AHMED

(Suing as the personal representative of the Estate

of Anisa Sheikh Hassan (deceased)) …..................…..…..…………….. APPELLANT

AND

LEM LEM TEKLUE MUZOLO …...........................……….…....... RESPONDENT

(Being an appeal from the Ruling and Decree of the High Court of Kenya at Nairobi Hon. Justice M.A Ang'awa delivered on the 27th May, 2004)

in

HCCC NO. 91 OF 2001)

****

JUDGMENT OF THE COURT

This is an appeal from the ruling and decree of the High Court at Nairobi (Ang'awa, J.) dated **27th May, 2004**.

The genesis of this appeal is that on **30th May, 1998** at about 4:00 p.m **Anisa Sheikh Hassan** aged 26 years (the deceased) was walking along 12th street road in Eastleigh Estate within Nairobi when she was run over by motor vehicle registration number **KAA 948 L**.

At the time of the accident, the motor vehicle was being driven by one **Nigusu Worde,** the first defendant in the High Court. The appellant, **Abdullahi Ibrahim Ahmed** brought a suit in the High Court as the personal representative of the estate of the deceased against **Nigusu Worde** on **22nd January, 2001.** However, it later emerged that Nigusu Worde was not the registered owner of the motor vehicle. According to the records from the Registrar of Motor Vehicles one **Simon Kimathi Murugu** was named as the registered owner of the motor vehicle KAA 948 L the subject matter of this suit. Consequently, the appellant filed an amended plaint on **6th July, 2001** joining **Simon Kimathi Murugu** as the second defendant in the suit.

In the process of effecting service on Simon Kimathi Murugu through a firm of private investigators and process servers called Novell System's, the appellant again learnt that there had been another owner of the motor vehicle as at the date of the accident, namely,. **Lem Lem Teklue Muzolo** the respondent herein. She is a refugee from Ethiopia issued with a Republic of Kenya Refugee Identity Card Number ***[particulars withheld***] under United Nations High Commission for Refugees. The appellant made an application to have **Lem Lem Teklue Muzolo** as the only defendant which application was granted by Ransley J. on **27th June, 2003**. As a result, the appellant filed a further amended plaint **21st July, 2003** with **Lem Lem Teklue** as the only defendant. The further amended plaint was filed about 5 years from the time the accident occurred.

The respondent neither entered appearance nor filed a defence whereby a request for interlocutory judgment was made by the appellant. The Deputy Registrar duly granted the request and entered judgment on **10th February, 2004** and subsequently the suit set down for formal proof on **18th May, 2004,** before Ang'awa J. On her own motion, the learned Judge raised the issue whether the suit before her was barred by limitation of time. She directed the appellant's counsel to address her on that question before she could decide whether or not to proceed with the formal proof.

In a ruling dated **27th May, 2004** the learned judge held that she had no jurisdiction to hear the case. She further ordered that the interlocutory judgment be set aside and the plaint struck out.

Aggrieved by that decision the appellant filed the instant appeal and raised the following six grounds;

> **"1. The learned Judge erred in law and in fact in granting or making orders to struck *(sic)* out the suit when there is** *(sic)* **no such application before her.**

2. **The learned Judge erred in law and in fact by declaring that the court had no jurisdiction to hear the suit.**
3. **The learned Judge erred in law and in fact by ordering that the suit was time barred.**
4. **The learned Judge erred by making and finding that the suit was brought out of time.**
5. **The decision rendered by the learned Judge was wrong in principle and unjust in effect.**
6. **The decision of the learned judge was not based on the proceedings before her."**

When the appeal came before us for hearing on **26th June, 2013 Mr. Muchoki,** learned counsel for the appellant submitted that the respondent whose whereabouts are unknown neither participated in the High Court proceedings nor entered appearance. On the question as to whether the suit was time barred, Mr. Muchoki argued that the appellants were granted leave to file a further amended plaint introducing the respondent herein. The respondent having failed to enter appearance or file a defence despite being duly served interlocutory judgment was entered on **10th February, 2004** against her. Mr. Muchoki submitted that Section 4 (2) of the Limitation of Action Act states that action founded on tort may not be brought after the end of three years from the date which the cause of action accrued. He added that order 1 rule 10 (2) of the former Civil Procedure Rules provided that the court in its own motion can order the joinder of party. In his opinion, it is the claim that is limited to three years but parties can subsequently be joined and there is no need to seek leave under the Limitation of Actions Act. He highlighted the case **Mitchell V. Harris Engineering Company Limited** [1967] 2 ALL ER 682 and submitted that Order VI Rule 4 of the former Rules and Order 11 Rule 4 of the 2010 Rules state that for the issue of limitation of time to be raised, it has to be pleaded. Mr. Muchoki submitted that the respondent did not file any defence and therefore the judge erred in raising the issue *suo moto.*

For the reasons that will become clear shortly, we do not intend to deal with those submissions, save to reiterate what is now settled law that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion. The second principle we need to restate in this appeal is that

court must only deal with matters brought before it by parties. Regarding the first principle we can do no better than to repeat what was said by this court in the case of **Felix Mathenge V. Kenya Power & Lighting Co. Ltd.** Civil Appeal No. 215 of 2002 that:-

> **"The role of the Court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages."**

The issue of limitation was never before the learned judge. Indeed, the respondent never participated in the suit. She neither entered appearance nor filed a defence pleading despite being served. The issue of statutory limitation was brought up by the learned Judge *suo moto* during formal proof, interlocutory judgment having long been entered. In terms of **Order 2 Rule 4 (1)** the issue of limitation must be specifically pleaded before a court can act on it. **Order 2 Rule 4 (1)** of the **Civil Procedure Rules** states that:-

> **"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality;**
>
> **a) which he alleges makes any claim or defence of the opposite**
>
> **party not maintainable;**
>
> **b) which, if not specifically pleaded, might take the opposite**
>
> **party by surprise; or**
>
> **c) which raises issues of fact not arising out of the preceding**
>
> **pleading."**

In the case of **Achola & Another V. Hongo & Another LLR No. 4007 [CAK]** this Court quoting **Halburys Laws of England, fourth edition, volume 36** at paragraph 48 page 38 headed; "**Matters which must be specifically pleaded"** stated;

> **"The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality."** (Emphasis supplied)

It seems to us that the greater part of the respondent's woes lies with her lack of interest in this matter. The court of equity will not come to the aid of the indolent and the learned judge went out of her way to shop for a suitable defence for an uninterested party. The words of the Court in the case of **Gandy V. Caspair [1956] EACA 139** are instructive;

> **"Unless pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record.** (Emphasis are ours).

Perhaps, as we conclude we need to refer to the remarks Madan J.A made obiter in **D.T Dobie & Company (Kenya) Limited V. Muchina [1982-88] 1 KAR 1** on the circumstances when a court will strike out pleadings;

> **“This court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”**

The learned judge was in error in finding that she had no jurisdiction to entertain the action and in striking out the suit when there was no application before her. In the result, we allow the appeal, set aside the orders of Ang’awa, J. issued on 27th May 2004 and remit the case to the High Court for formal proof before any other judge, apart from Ang’awa J. Costs to the appellant.

Dated and delivered at Nairobi this 18th day of October 2013.

R. NAMBUYE

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

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W. OUKO

....

JUDGE OF APPEAL

I certify that this is true

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<u>DEPUTY REGISTRAR</u>