REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 857 OF 2005

JOAN MARIE SCHULTZ..PLAINTIFF

VERSUS

GEORGE MBURU WACHIRA..........................1ST DEFENDANT

JOSEPH NGIGE MACHAGA.............................2ND DEFENDANT

RULING

The plaintiff filed this suit against the defendants jointly and severally for damages following injuries sustained as a result of a road traffic accident that took place on 12th July, 2002 involving a collision between motor vehicles registration No. KAP 140D and KWT 608. The plaintiff was travelling as a passenger in the 1st defendant's motor vehicle registration No. KAP 140D.

For some reason this case has remained all this while without determination. On 27th February, 2015 the case was cited for dismissal under Order 17 Rule 2 (1) of the Civil Procedure Rules and placed before Onyancha J. Counsel for the plaintiff was absent but Mr. Chacha appeared for the 1st defendant.

Counsel for the 1st defendant asked for dismissal of the suit with costs which was allowed by the court.

There is now before me an application by way of Notice of Motion seeking the setting aside the dismissal order made on 27th February, 2015 and reinstate the suit for hearing and determination on merit. The grounds upon which the orders are sought appear on the face of the application alongside the supporting affidavit sworn by the advocate for the plaintiff.

The application is opposed and there is a replying affidavit sworn by the legal manager of the insurer of the 1st defendant. Both counsel have filed submissions and cited several authorities which I have considered. The order sought is discretionary.

There is no doubt that this case has remained pending determination for quite some time. It is the principle of court to maintain a suit rather than dismiss it because the ultimate objective is to do justice to both parties. Justice however looks at both sides. In the event the plaintiff does not prosecute his or her suit within the provisions of law and procedure as set out, the defendant has the option of setting down the suit for hearing or applying for its dismissal.

At the same time the court at its own motion like in the present case, may give notice to parties for the dismissal of a case. Going by the pleadings there is all indication that the plaintiff has a cause of action against the defendants jointly and severally. Whatever defence the two defendants have, is subject to

liability amongst the two. The affidavit of counsel for the plaintiff has explained, in my view, the reasons for delay which in my assessment appear plausible.

As correctly observed in the case of **Mobile Kitale Services Vs. Mobil Oil Kenya Limited & Another, citing the case of Nilani Vs. Patel (1969) EA 341,**

> ***"It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the court towards that end as soon as it is convenient by either applying for its dismissal or setting down the suit for hearing. …..Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died ……documents may have been mislaid, lost, destroyed and memory tends to fade."***

The foregoing notwithstanding, in the case of **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103** Aploo J.A said as follows,

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer a penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline**."

It is a drastic measure to shut out a party from having his day in court. To drive a party out of the seat of justice should be the last step by the court and only if the situation is irredeemable.

Just before the matter came up for dismissal, counsel for the plaintiff had indicated interest to pursue the plaintiff's claim by a letter addressed to the court and copied to the defence counsel. I am unable to conclusively say that, that letter was prompted by the notice issued by the court for the dismissal of the suit.

Even after the suit had been dismissed the plaintiffs counsel wrote another letter which referred to the earlier letter, but after receipt of the said letter counsel for the defendants did not inform the plaintiffs' counsel that the matter had been dismissed.

The record demonstrates that at least every year the plaintiff took a step in this matter showing her interest to have the suit prosecuted. The plaintiff met the defendant's requirement for a medical examination and on at least three occasions after the closure of pleadings, hearing dates were taken.

References have been made to letters of invitation addressed to the defendants to take a hearing date dating from 2008 to 2013. The only year the plaintiff did not exhibit a letter of invitation to the defendants to take a hearing date is 2014 and the reason is that the court file was missing. There is evidence of several letters in the year 2015 by the plaintiff's counsel inquiring about the file.

In the record, the occurrence of the accident is not in dispute and therefore there will be little prejudice to the 1st defendant, considering there is already judgment against the 2nd defendant. Taking everything into consideration, I am persuaded that there is every reason to set aside the dismissal order.

Accordingly, the application is allowed, the dismissal order is hereby set aside and the suit reinstated for hearing and determination.

Considering the age of this case, it behoves both counsel to expedite its determination, and therefore I direct that parties shall comply with the provisions of Order 11 of the Civil Procedure Rules within 60

days from the date of this ruling and thereafter take a hearing date on priority. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 14th Day of December , 2017

A. MBOGHOLI MSAGHA

JUDGE