



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 1079 OF 2002 (O.S.)

**(IN THE MATTER OF AN APPLICATION BY BETH NTHENYA MBUVI, PLAINTIFF IN
NAIROBI CMCC NO 1490 OF 2003)**

SULEIMAN MBANGO.....PLAINTIFF

V E R S U S

- 1. MBOYA WAMBUA**
- 2. SAMUEL MAINA KAVETU**
- 3. EQUATOR AUTO MOBILES**
- 4. G. KINGOO**
- 5. F K MUKORA.....DEFENDANTS**

R U L I N G

- 1.** Following a road accident on 5th December 2001 very many suits for damages in negligence (no fewer than 27 of them) were filed in various courts in Nairobi, Machakos and Kangundo. Those suits include the present suit (Nairobi HCCC No. 1079 of 2002) and **Nairobi CMCC No. 1490 of 2003 (Beth Nthenya Mbuvi – vs – Mboya Wambua)**.
- 2.** By an **order entered herein on 8th May 2003**, it was directed that this present suit be tried as a **test suit** on the issue of liability in respect to all the related suits, and the judgment on liability rendered in the test suit to bind all those suits. All the other cases were thus stayed pending disposal of the test case on the issue of liability.
- 3.** Over ten (10) years down the line the test suit (which is the present suit) has not yet been determined. The plaintiff in Nairobi CMCC No. 1490 of 2003 cannot wait any longer and has applied by **chamber summons dated 5th April 2013** for an order that her suit be released from the order of test suit made herein in order to enable her to prosecute her suit independently.
- 4.** I have considered this application in light of opposition by the Plaintiff (**replying affidavit filed on 27th September 2013**). Ten (10) years is too long to wait for the test suit to be heard and determined. It need not be the Plaintiff's fault in that the test suit has not been disposed of. The trial thereof was conducted by two judges: **Osiemo, J** took the Plaintiff's case before he retired from the bench. **Rawal, J** took the defence case before she was elevated to the **Court of Appeal** and later to the office of **Deputy Chief Justice** of the Republic of Kenya. Hearing concluded before her on 26th January 2012 and the parties filed submissions.

5. In the course of typing the proceedings so that another judge might take on the task the preparing judgment, it was discovered that the defence case which was apparently recorded by a stenographer was missing from the record. Efforts to trace the same, or even to identify the stenographer, have been futile. The possibility is that the defence case may have to be taken again.

6. In these circumstances should the plaintiff in Nairobi CMCC No. 1490 of 2003 be made to wait any longer? I think not. It would not be just to make her wait a single more day!

7. I will allow her application by chamber summons dated 5th April 2013. Her case is hereby removed from the **test suit order** herein to enable her to prosecute it independently. Costs of the application will be in her said suit. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF APRIL 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 4TH DAY OF APRIL 2014