



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 121 OF 2008**

**ANGELA KATUMI NZUKI ..... PLAINTIFF**

**VERSUS**

**MUSA SHARIFF .....1<sup>ST</sup> DEFENDANT**

**MEMSAAB LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

This suit was filed on 2<sup>nd</sup> April, 2008. It is a claim for damages arising from a road traffic accident. In that suit the plaintiff blamed the 1st defendant for the accident and injuries sustained. Subsequently, the plaint was amended vide an amended plaint filed on 21<sup>st</sup> March, 2012 adding a 2<sup>nd</sup> defendant to the suit. After service of summons, the defendants entered appearance and filed a statement of defence on 3<sup>rd</sup> November, 2014 whereby they denied the plaintiff's claim.

From the time the defence was filed no action was taken by the plaintiff to advance the hearing of the suit. On 27<sup>th</sup> February, 2015 this suit was placed before Onyancha J under Order 17 Rule 2 (1) of the Civil Procedure Rules for dismissal for want of prosecution. The Judge signed the said order on the said date.

There is now before me an application by way of Notice of Motion under Sections 3 and 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules to review the dismissal order and reinstate the suit for hearing. The application is supported by grounds set out on the face of the application alongside an affidavit sworn by the plaintiff. The defendants filed grounds of opposition raising the fact that the application was brought after inordinate and inexcusable delay, thereby subjecting them to substantial risk that no fair trial is possible. Additionally, immense prejudice may befall the defendants if the prayers are granted.

It is true that the delay in bringing the application has not been adequately explained by the plaintiff. There is however, an issue raised of inability to access the court file which, I must state, is a systemic challenge that cannot be overlooked.

I have also looked at the record in terms of the timelines contemplated under Order 17 Rule 2 (1) which must apply before any matter is placed before a Judge for dismissal orders. The notice contemplated under Order 17 Rule 2 (1) must satisfy the condition that no application or step had been taken by either party for one year, and that the court may give notice in writing to the parties to show cause why the suit should not be dismissed. Additionally, if no cause is shown to the satisfaction of the court, then the court may dismiss the suit.

The first point is that, an order for dismissal is purely at the discretion of the court. Most importantly however, is my observation that, since the defence was filed on 3<sup>rd</sup> November, 2014 any adverse consequence under this rule would come into operation in November, 2015. As at 27<sup>th</sup> February, 2015 no adverse order could be made under the said rule, because a period of one year had not ended from 3<sup>rd</sup> November, 2014 being the last time action had been taken in the file. It follows therefore, the order of dismissal was premature and caused prejudice to the plaintiff's cause.

Even if one year had expired without any action as contemplated under the said rule, the court was obliged to give notice, and in writing to the parties, to show cause why the suit should not be dismissed. No such notice is on record. It follows therefore that, the application to set aside the dismissal order is well merited.

In view of the foregoing, the dismissal order by Onyancha J dated 27<sup>th</sup> February, 2015 is hereby set aside and the suit reinstated unconditionally.

I direct that the parties shall now comply with the provisions of Order 11 of the Civil Procedure Rules expeditiously so that the suit may be listed for hearing on merit.

Costs in the cause.

Orders accordingly.

**Dated, signed and delivered at Nairobi this 7<sup>th</sup> Day of May, 2020.**

**A. MBOGHOLI MSAGHA**

**JUDGE**