



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 235 OF 2013**

**AMBASSADOR YVONNE SHIBIKHWA KHAMATI.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MARK MASAI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SAMMY KIMATU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This Court had served the Parties' Advocates with a Notice to show cause why the suit should not be dismissed for want of prosecution. The Notice to show cause was heard on 3<sup>rd</sup> November, 2017 whereupon the Plaintiff/Applicant explained the delay and the Court ordered that the suit be prosecuted within 5 months from the date thereof. The Applicant was not able to prosecute the case within the 5 months' period and therefore filed the instant Notice of Motion dated 5<sup>th</sup> May, 2018 under the provision of sections 1A, 1B and 3A of the Civil Procedure Act Cap 21, Orders 45, 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking orders that;

- (a) this Honourable Court be pleased to review and extend the time – limit order issued on the 3<sup>rd</sup> November, 2017;
- (b) the Honourable court be pleased to reinstate the suit;
- (c) this court be pleased to grant a convenient pre-trial hearing date; and
- (d) Costs of this application be provided for.

2. The application is supported by the Affidavit of the Applicant's Counsel, **KEVIN WAKWAYA**. He depones that from the period between November, 2017 to February 2018, he was involved in three election petitions and it is upon conclusion of the petitions that he reviewed his files and noticed that the time given in this matter was about to expire. Counsel further deponed that on or about 25<sup>th</sup> April, 2018, he invited the defendant's Advocates to fix the suit for pretrial directions and that on 3<sup>rd</sup> May, 2018 when they attended the registry to set the matter down, the registry officials refused to grant a date on the erroneous assumption that time had expired and the suit stood dismissed. The Applicant therefore depones that he has moved without delay to have the orders reviewed and/or extended to enable the prosecution of this suit and that the defendants shall not be prejudiced by the same.

3. The Defendant/Respondent opposed the application and filed Grounds of Opposition dated 6<sup>th</sup> June, 2018 being that there is no mistake on the face of the record, that the Applicant has not given sufficient reason to warrant the review of the orders of 3<sup>rd</sup> November, 2017 and that there has been inordinate delay in filing the application and the time period of five months within which to prosecute the suit lapsed before the applicant took any step.

4. The application was argued orally in court and I have considered the submissions of the parties' counsel. The Court order of 3<sup>rd</sup> November, 2017 was to the effect that the applicant was to prosecute the suit within a period of 5 months from 3<sup>rd</sup> November, 2017. It has been deponed that Counsel was busy with Election petitions upto February, 2018. However, from that period, Counsel waited until 3<sup>rd</sup> May, 2018 to invite the Defendants to fix the suit down for directions. On that date, it was deponed that the registry officials refused to grant a date on the erroneous assumption that, time had lapsed and the suit stood dismissed. The Applicant depones that he was within the time limits as there was a December vacation to be considered.

5. The December vacation is provided for in **Order 50 Rule 4 of the Civil Procedure Rules** that, "4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any

order of the court) for the amending, delivering or filing of any pleading or the doing of any other act”. “provided that this rule shall not apply to any application in respect of a temporary injunction”

6. Therefore in light of the above and factoring in the December holiday, the 5 months period ought to have expired on 27<sup>th</sup> April, 2018 and it goes without saying that the applicant in seeking to obtain a date from the registry on 3<sup>rd</sup> May, 2018 was operating outside the time given by the court. After a careful consideration of the application, I find that the applicant has not explained the reason for the delay in adhering to the court order in prosecuting the suit within the 5 months. The Plaintiff’s counsel has not at all explained the delay from February when he depones that he finalized the Election petitions.

7. The court also notes that the defendants had earlier filed an application dated 12/2/2011 seeking to dismiss the suit for want of prosecution which the court declined to allow in the broad interest of justice but condemned the plaintiff to pay costs of the same. The record shows that, notwithstanding that reprieve, the plaintiff failed to take any step in the matter until the court issued a notice to show cause why the suit should not be dismissed for want of prosecution.

8. For the above reasons, I am not satisfied that the Plaintiff is desirous of prosecuting this suit. The delay in prosecuting the same within the time ordered by the court has not been sufficiently explained. The application dated 5/5/2018 is therefore dismissed. The costs of both the application and the suit are awarded to the defendants.

Dated, Signed and Delivered at Nairobi this **20<sup>th</sup>** day of **September, 2018**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... *For the Plaintiff/Applicant*

..... *For the Defendant/Respondent*