



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NUMBER 54 OF 2013**

**CAROLINE WAMBUI KINYUA. .... PLAINTIFF**

**VERSUS**

**SUSAN WANJIKU KARIUKI. .... 1<sup>ST</sup> DEFENDANT**

**NATION MEDIA GROUP LIMITED. .... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The court has been called upon to determine the 2<sup>nd</sup> Defendant's Application dated the 20<sup>th</sup> day of August, 2015.

The Application has been brought under Order 17 Rule 2 (3), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

The Application seeks for orders: -

- 1. That the Plaintiff's suit against the 2<sup>nd</sup> Defendant be dismissed for want of prosecution.**
- 2. That the costs of this Application and suit herein be awarded to the 2<sup>nd</sup> Defendant.**

The same is premised on the grounds set out on the body of the Application and it's supported by annexed Affidavit of Zehrabanu Janmohamed sworn on the 20<sup>th</sup> day of August, 2015.

The summary of the facts as captured in the replying affidavit are that, the suit herein was filed on the 22<sup>nd</sup> day of February, 2013 in respect of a cause of action that occurred on the 17<sup>th</sup> day of December, 2012.

The 2<sup>nd</sup> Defendant filed a Memorandum of Appearance on the 24<sup>th</sup> day of April, 2013 and a defence on the 14<sup>th</sup> day of May, 2013. Since then, the Plaintiff has not taken any steps to prosecute the matter.

The Plaintiff has shown no interest in prosecuting the suit not even taking pre-trial directions under Order 11 of the Civil Procedure Rules. Failure to prosecute the matter has caused prejudice to the 2<sup>nd</sup> Defendant on the basis that the alleged cause of action accrued over two (2) years ago. As a result of the delay, several witnesses that the 2<sup>nd</sup> Defendant intended to call are not available. It is for these reasons that it requests the court to dismiss the suit for want of prosecution.

The Application is not opposed, it came up for hearing on the 1<sup>st</sup> December, 2015 and there was no

representation on the part of the Plaintiff though the firm of Nzako and Nzako Advocates had been duly served with a hearing notice on the 25<sup>th</sup> November, 2015.

The Application has been brought under Order 17 Rule 2 (3) of the Civil Procedure Rules among other provisions.

Order 17 Rule 2(3) provides: -

***“any party to the suit may apply for its dismissal as provided for in subrule 1.”***

While Order 17 Rule 2(1) provides: -

***“In any suit in which no Application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”***

Under sub-rule 1, the law does not give a party the right to apply for the dismissal of the suit for want of prosecution. It is only the court that can give notice in writing to the parties to show cause why the suit should not be dismissed yet subrule 2(3) gives the discretion to a party to apply for dismissal under sub-rule 1. In my view there is a contradiction, but since the Application has also been brought under Sections 1A, 1B and 3A, the court will consider the same under its inherent jurisdiction and pursuant to the provisions of Article 159 (2) (d) of the Constitution.

The principles to be applied in a case such as the one before the court, are set out in the case of **Allen Vs Sir Alfred Mc Alphine & Sons Limited (1968)** where Salmon L. J stated as follows: -

***“(i) There has to be inordinate delay. It is not possible to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary from case to case but it should not be too difficult to recognize inordinate delay when it occurs.***

- i. ***THAT this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.***
- ii. ***THAT the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the Plaintiff, or between each other, or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater likelihood of serious prejudice at the trial.”***

The above principles have been followed in Kenya in the case of **Inter Vs Kyumba (1984) KLR 441** where it was held inter alia: -

***“The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”***

In the matter before me, the Plaintiff was filed on the 22<sup>nd</sup> February, 2013 and since then, no action has been taken in the matter. It is now over three years and yet no action has been taken to date. Even after the Plaintiff was served with the Application herein, she did not file a Replying Affidavit to it yet there is evidence that the Advocate was served.

**I find that there is inordinate delay in prosecuting this matter which has not been explained by**

the Plaintiff by her failure to file a replying affidavit.

The second Defendant in its supporting Affidavit states that the delay has caused it prejudice in that several of its witnesses that it intended to call in this matter are not available any more. In my view, this is a great prejudice on the part of the 2<sup>nd</sup> Defendant in that it will not be possible for it to defend the case without witnesses.

In the premises foregoing, I find that the Application dated 20<sup>th</sup> August, 2015 has merits and allow the same with costs of the Application and the main suit to the 2<sup>nd</sup> Defendant.

Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of February, 2016.

.....

L NJUGUNA

JUDGE

In the presence of

..... *for the Plaintiff*

..... *for the 1<sup>st</sup> Defendant*

..... *For the 2<sup>nd</sup> Defendant*