



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

**CIVIL CASE NO. 706 OF 2009**

**CATHERINE NYAMBURA KAMAU..... PLAINTIFF**

**VERSUS**

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

**JOSEPH ODIDO ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF KENYA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1) Nation Media Group and Joseph Odido, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively, took out the motion dated 19<sup>th</sup> August 2015, in which they sought for the suit to be dismissed for want of prosecution. The motion is supported by the affidavit of Zehrabanu JanMohamed. When served, Catherine Nyambura Kamau, filed a replying affidavit she swore to oppose the same. There was no response from the office of the Attorney General despite having been served.

2) I have considered the oral submissions presented by learned counsels appearing in this matter together with the material placed before this court. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have urged this court to dismiss this suit on the basis that the Plaintiff has lost interest in prosecuting this case since she has never set down the suit for hearing yet pleadings closed long ago. It is specifically deponed that this suit was listed for hearing by the Plaintiff on 20<sup>th</sup> November 2012 but the same did not proceed as it was taken out of the day's cause list and has since not been fixed for hearing. The Defendants further argued that the continued pendency of this matter prejudices them in that witnesses may forget their testimonies and or that they may simply not be available.

3) The Plaintiff has on the other hand beseeched this court not to dismiss the suit because her advocates kept on fixing hearing dates but on the due dates the matter is either not listed or that the court is not sitting. The Plaintiff also stated that other cases including hers were stayed pending outcome of **Civil Appeal no. 187 of 2014 Standard Group Ltd – Vs = Christopher Ndarathi Murungaru** and that due to shortage of judges only two matters would be fixed per day. The Plaintiff also alluded that parties were negotiating for an out of court settlement.

4) M/s Janmohamed, learned advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is of the view that the Plaintiff did not sufficiently answer the Defendants motion. She pointed out that there was no order attached to the replying affidavit to show that there was a blanket court order staying all suits related the current case.

The learned advocate further averred that the Plaintiff relied on correspondences which are on a without prejudice basis hence they cannot be relied upon.

5) Having carefully considered the rival submissions and the grounds stated on the face of the motion plus the facts deponed in affidavits, it is clear to me that the Plaintiff has given a comprehensive response to the Defendants' motion. This suit was filed on 2<sup>nd</sup> December 2009 in which the Plaintiff claims she was defamed, arrested and wrongfully detained. The record shows the suit has not been heard. The question to be determined is whether or not the Plaintiff has taken any steps to have the suit fixed or ready for hearing. The record shows that pleadings closed as of 2<sup>nd</sup> June, 2010. The annexure attached to the supporting affidavit and marked as C.N.K.1 indicates that the Plaintiff's advocate had invited the Defendant's advocate on 19.06.2013 to visit the registry to fix a hearing date. The annexure shows the respective stamps to acknowledge receipt of the invitation. However the court record does not show that the parties met at the registry on the aforesaid date.

6) Attached also to the replying affidavit is the letter dated 7<sup>th</sup> May 2012 in which parties had begun to start negotiations for an out of court settlement. The cover letter has an attachment of quantum which is under '**a without prejudice basis**'. The law is clear that the correspondences which are exchanged on "a without prejudice" cannot be used in evidence. It was therefore erroneous for the Plaintiff to annex such evidence to her replying affidavit. In strict observance of the law I will ignore such piece of evidence. I will however consider the contents of the covering letter minus the attached "quantification". It is apparent from the cover letter that parties were negotiating for an out of court settlement. The Plaintiff further stated that on 15.10.2014 and on 24.02.2015 the hearing of this suit amongst others were stayed pending the outcome of **Civil Appeal no. 187 of 2014, Standard Group Ltd = vs = Christopher Murungaru**. The Respondent attached cause lists of the matters. The Defendants' advocate correctly pointed out that the actual order staying proceedings was not attached to the supporting affidavit. A critical look at those cause lists will show that the matters the Plaintiff is talking about were actually being taken out because the judges scheduled to hear the matters were out to attend trainings organized by the Judiciary Training Institute. I do not find any merit on this ground. The only ground which stands out to buttress the motion is the ground that parties were negotiating for an out of court settlement. In my view, I do not think this ground alone can resist the motion. The fact that parties were engaged in negotiations for an out of court settlement did not bar the Plaintiff from fixing her case for hearing.

7) The allegation that the Plaintiff could not get hearing dates in 2014 because there was a directive that only two matters would be fixed for hearing per day appears convincing. However, there is no evidence that the Plaintiff took steps to visit the registry to fix distant hearing dates this year. The delay in prosecuting this suit is not properly explained nor excusable in law.

8) In the end, I am convinced that the Plaintiff has failed to give a plausible explanation for the delay in having this suit timeously prosecute. I find the motion dated 19.8.2015 to be well founded . it is allowed as prayed.

Dated, Signed and Delivered in open court this 11<sup>th</sup> day of December, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant