



**Pevans East Africa Limited & 4 others v Nation Media Group Limited & 7 others
(Civil Case E018 of 2022) [2023] KEHC 2932 (KLR) (Civ) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E018 OF 2022

JK SERGON, J

MARCH 31, 2023

BETWEEN

**PEVANS EAST AFRICA LIMITED 1ST PLAINTIFF
MILESTONE GAMES LIMITED 2ND PLAINTIFF
RONALD KAMWIKO KARAUTI 3RD PLAINTIFF
NIKOLOV GUERASSIM NIKOLOV 4TH PLAINTIFF
GENE GRAND 5TH PLAINTIFF**

AND

**NATION MEDIA GROUP LIMITED 1ST DEFENDANT
JOHN KAMAU 2ND DEFENDANT
FINANCE UNCOVERED LIMITED 3RD DEFENDANT
PAUL WAFULA 4TH DEFENDANT
PAUL WANDERI NDUNGU 5TH DEFENDANT
GOOGLE LLC 6TH DEFENDANT
YOUTUBE LLC 7TH DEFENDANT
GOOGLE KENYA LIMITED 8TH DEFENDANT**

RULING

1. Before me for consideration and determination are three (3) applications. The first is the Notice of Motion dated November 24, 2022 (“the first application”) brought by the 5th defendant and supported



by the grounds laid out on its face and the facts stated in the affidavit of the 5th defendant, who sought for the following orders:

- i. Spent.
 - ii. Spent.
 - iii. That this Honourable Court be pleased to review and set aside its ruling delivered on March 25, 2022.
 - iv. That pursuant to the order for review, this Honourable Court do make such order and/or directions with regards to the re-hearing of the plaintiff's application dated January 31, 2022.
 - v. That costs of the application be provided for.
2. The 1st to 5th plaintiffs put in the replying affidavit sworn by advocate Ronald Kamwiko Karuri on February 16, 2023 to resist the first application.
3. The Motion dated August 10, 2022 ("the second application") was brought by the plaintiffs herein. The second application is sustained by the grounds presented on its face and the facts stated in the affidavit of Ronald Kamwiko Karuri. The second application sought for the orders listed hereunder:
- i. Spent.
 - ii. That summons be issued by this Honourable Court against the 5th defendant / respondent (the Contemnor) herein to show cause why he should not be committed to civil jail for such term as the Honourable Court may deem just for wilful disregard and disobedience of a valid court order issued by this Honourable Court on the 25th day of March, 2022.
 - iii. That Paul Wanderi Ndungu (the 5th defendant/respondent), the Contemnor herein, be committed to civil jail for a period of six (6) months or other period or any other sanction that this Court may deem fit and appropriate, and ordered to pay a fine for an amount in Kenya Shillings as will be determined by this Honourable Court for wilful disobedience of a valid court order issued by this Honourable Court on the 25th day of March, 2022.
 - iv. That Paul Wanderi Ndungu, the Contemnor, be further restrained from writing, publishing or communicating any materials defamatory to the 1st, 2nd and 3rd plaintiffs/applicants and any contents which are subject of the instant case and further be compelled to fully comply with the orders issued by this Honourable Court on March 25, 2022.
 - v. That costs of the application be provided for.
4. The 5th defendant swore a replying affidavit on February 28, 2023 to resist the second application.
5. The 1st, 2nd and 4th defendants subsequently filed the Notice of Motion dated March 22, 2023 ("the third application") supported by the grounds laid out on its face and the facts stated in the affidavit of Sekou Owino. The third application sought similar orders as those being sought in the first application, namely:
- i. Spent.



- ii. That the order made on March 25, 2022 be reviewed and set aside.
 - iii. That the plaintiff's application for injunction dated January 31, 2022 be heard afresh.
 - iv. That costs of the application be provided for.
6. The third application was opposed by way of the replying affidavit sworn by advocate Ronald Kamwiko Karuri on February 28, 2023 on behalf of the plaintiffs. The plaintiffs also put in the Grounds of Opposition dated February 22, 2023.
 7. At the interparties hearing of the instant Motion, the parties were directed to file and exchange written submissions.
 8. I have considered the grounds set out on the face of the three (3) applications; together with the facts deponed in the affidavits supporting and opposing the respective applications; the Grounds of Opposition and the contending written submissions and authorities cited.
 9. I will first address the first and third applications contemporaneously, seeing as the substantive orders sought therein are similar: namely, orders for the review and setting aside of the ruling delivered by this court on March 25, 2022 and for the reinstatement of the plaintiffs' application dated January 31, 2022 for hearing afresh.
 10. To support the first application, the 5th defendant states and submits that the ruling delivered by this court on March 25, 2022 contains various typographical errors and further that, in making the said ruling, this court erroneously found that the defendants had not filed their responses to the plaintiffs' application dated January 31, 2022 which was the subject of the aforementioned ruling and which sought for injunctive orders against the defendants.
 11. The 5th defendant also states and submits that the ruling contains an error apparent on its face upon finding that the 5th defendant's application dated February 15, 2022 was to be treated as a response to the plaintiffs' application dated January 31, 2022 when this was not the case and relies on the case of *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR wherein the Court of Appeal detailed the following:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
 12. The 1st, 2nd and 4th defendants echoed the above sentiments in the third application and further state that they stand to be greatly prejudiced as a result of the orders made on March 25, 2022 since the plaintiffs have filed an application seeking to have them found to be in contempt of court for disobeying the said orders.



13. The aforementioned defendants by way of their submissions have urged this court to consider the following reasoning offered by the court in the case of *George Gichana Karanja & another v Mwangi Nderitu Ngatia* [2019] eKLR:

“The Court of Appeal in *Nyamongo & Nyamongo Advocates v Kogo*, [2001] 1 EA 173, addressed its mind to the definition of that term and expressed itself as follows:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record.”

14. In retort, the plaintiffs state and contend that both the first and third applications have been brought in bad faith and are aimed at hindering the progress of the suit, especially the contempt proceedings lodged by the plaintiffs and against the 5th defendant.
15. The plaintiffs further state and submit that both applications do not meet the threshold for a review within the meaning of Order 45 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act*, since the errors mentioned therein are not self-evident but would require a long-drawn process, and do not therefore constitute errors apparent on the face of the record.
16. To buttress their arguments above, the plaintiffs make reference to the case of *Delta Connections Limited v Alfred Mwaringa Deche* [2021] eKLR in which the court determined thus:

“The application herein challenges the merits of the decision and orders issued on October 13, 2020 on ground that the court failed to consider its grounds of opposition and replying affidavit. It seems that the line of argument counsel has taken is that the court gave an erroneous decision by not considering the grounds of opposition and replying affidavit. This is not one of the grounds for review but a ground for appeal if a party is not satisfied with the outcome of the court order. There was no error apparent on the face of the record.”

17. It is also the argument by the plaintiffs that in any event, the defendants who filed the third application have filed a notice of appeal indicating their intention to challenge the aforementioned ruling and hence a review does not lie.
18. For the above reasons, the plaintiffs urge this court to dismiss both the first and the third applications, with costs.
19. The germane principles to guide this court in deciding whether to review its decision are found under Order 45 of the *Civil Procedure Rules, 2010* and reaffirmed under Section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya and set out in the manner below:

“ Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or



(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

20. The following are the instances in which a court can review a decision already in place:

- a) the discovery of new and important matter or evidence, or
- b) some mistake or error apparent on the face of the record, or
- c) any other sufficient reason.

21. From my study of the first and third applications, it is clear that the respective defendants have come under the principle of “error apparent on the face of the record” in the manner set out hereinabove.

22. The Court of Appeal in the case of *National Bank Of Kenya Limited v Ndungu Njau* [1997] eKLR cited in the submissions by the defendants, had the following to say regarding an error on the face of the record:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

23. From my consideration of the explanation given by the defendants to support their argument that there is an error apparent on the face of the record and from my perusal of the ruling in question and which ruling granted an interlocutory injunctive order against the defendants, I am of the view that the purported error cannot be termed as being so self-evident as to not require further arguments or elaborations.

24. In view of all the foregoing circumstances, I am not satisfied that the defendants have demonstrated any error apparent on the face of the ruling delivered on March 25, 2022 and which would warrant an order for a review. Consequently, the Notice of Motion dated November 24, 2022 and the Notice of Motion dated February 22, 2022 are each dismissed with costs to the plaintiffs.

25. Turning to the second application, as earlier mentioned, the same sought for various orders to the effect that the 5th defendant is in contempt of the aforementioned ruling of March 25, 2022.

26. To support the orders sought, the plaintiffs aver that the 5th defendant; being aware as to the existence of the above ruling issuing interlocutory injunctive orders and being at all material times represented by counsel, republished defamatory material concerning the plaintiffs, in total violation of and disregard for the ruling.

27. In reply, the 5th defendant states and contends inter alia, that no formal order was extracted by the plaintiffs and further, that he was never served with a copy of the ruling of March 25, 2022, quoting the case of where the court reasoned that in the absence of proof of service of the order in question, an application for contempt of court is incompetent.

28. The 5th defendant therefore pleads with this court to dismiss the second application with costs.



29. Section 5 of the *Judicature Act*, Cap 8 Laws of Kenya is the paramount substantive law granting superior courts the power to punish for contempt. The section stipulates the following:
- “(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts...”
30. The term ‘contempt’ is defined in the *Black’s Law Dictionary* as follows:
- “a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”
31. The guiding principles in determining whether there has been contempt of court orders, as expressed in *Pinnacle (K) Travel and Safaris Limited v Omar Faruk Osman & 5 others* [2017] eKLR and echoed in the case of *Samuel MN Mweru & Others v National Land Commission & 2 others* [2020] eKLR are:
- a) That the order was clear, unambiguous and binding on the defendant.
 - b) That the defendant had knowledge of or proper service of the terms of the order.
 - c) That the defendant acted in breach of the terms of the order.
 - d) That the defendant’s conduct was deliberate.
32. On the first principle above, it is not contested that this court vide the ruling delivered on March 25, 2022 granted the plaintiffs an interlocutory injunction against the defendants, thereby restraining them from further publishing any defamatory material concerning the plaintiffs, pending the hearing and determination of the suit.
33. Concerning the second principle, upon my study of the record, it is apparent that the 5th defendant would reasonably have had knowledge of the terms of the aforementioned ruling at all material times by virtue of being represented by counsel.
34. In respect to the third and fourth principles, upon my study of the record, it is apparent that the 5th defendant by republishing the defamatory material set out in the second application subsequent to the ruling delivered on March 25, 2022, went against the terms of the order resulting from the said ruling.
35. Moreover, in the absence of any credible evidence to the contrary, I am inclined to find that the actions taken by the 5th defendant are deliberate in the circumstances. I am not convinced that the explanation given by the 5th defendant is excusable.
36. In the end therefore, the following orders are hereby made:
- i. The Notice of Motion dated August 10, 2022 brought against the 5th defendant succeeds in terms of prayers (ii) and (iv).
 - ii. Summons be and are hereby issued to the 5th defendant herein to appear before the court on April 25, 2023 and show cause why he should not be committed to civil jail for such term as the Honourable Court may deem just for wilful disregard and disobedience of a valid court order issued by this Honourable Court on the March 25, 2022.



iii. The 5th defendant be and is hereby restrained from further writing, publishing or communicating any materials defamatory to the 1st, 2nd and 3rd plaintiffs and any contents which are subject of the instant case and further be compelled to fully comply with the orders issued by this Honourable Court on March 25, 2022.

iv. The plaintiffs shall have the costs of the abovementioned Notice of Motion dated August 10, 2022 to be borne by the 5th defendant.

v. The Notices of Motion dated November 24, 2022 and February 22, 2023 are hereby dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 31ST DAY OF MARCH, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... **for the Plaintiffs**

..... **for the 1st, 2nd and 4th Defendants**

..... **for the 3rd Defendant**

..... **for the 5th Defendant**

..... **for the 6th Defendant**

..... **for the 7th Defendant**

..... **for the 8th Defendant**

