



**Nation Media Group Ltd v Nyachae & another (Civil Appeal E340 of 2024)
[2025] KEHC 377 (KLR) (Civ) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 377 (KLR)

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

CIVIL

CIVIL APPEAL E340 OF 2024

LP KASSAN, J

JANUARY 23, 2025

BETWEEN

NATION MEDIA GROUP LTD APPELLANT

AND

KEN NYACHAE 1ST RESPONDENT

RADIO AFRICA LTD T/A THE STAR 2ND RESPONDENT

(Being an appeal from the ruling of Hon. Ruguru. N. (SPM) delivered on 9th February 2024 in Nairobi Milimani CMCC No. 47 of 2023 -formerly Nairobi Milimani HCCC No. 126 of 2019)

JUDGMENT

1. This appeal emanates from the ruling delivered on 09.02.2024 in Nairobi Milimani CMCC No. 47 of 2023. Ken Nyachae, the Plaintiff before the lower Court (hereinafter the 1st Respondent) commenced proceedings by way of a suit founded on the tort of defamation as against Nation Media Group Ltd, (hereinafter the Appellant) and Radio Africa Ltd t/a The Star (hereinafter the 2nd Respondent) the 1st & 2nd Defendant respectively before the lower Court seeking *inter alia* general damages; aggravated & exemplary damages; an injunction restraining the Appellant and 2nd Respondent from further publishing or causing to be published defamatory words against the 1st Respondent; an order directing the Appellant and 2nd Respondent to retract, apologize and publish or cause to be published a full and unequivocal apology which should be published in the same manner and degree as the defamatory publication complained off; costs of the suit; interest on the above; and any other relief the Court deems fit to grant.
2. The Appellant filed a statement of defence admitting publication however denied the other key averments in the plaint. In the alternative, the Appellant averred that the publication was true,



- consisted of a fair comment on a matter of profound public interest, constituted qualified privilege whereas the same was published in discharge of its duty without malice or ill will and in the genuine or bona fide belief that the facts set out in the article were true.
3. The 2nd Respondent equally filed a statement of defence admitting publication however denied the other key averments in the plaint. In the alternative, the 2nd Respondent likewise averred that the publication was true, consisted of a fair comment on a matter of public interest and was published on occasion of qualified privilege.
 4. On 09.07.2020, the 1st Respondent filed a consent dated 09.03.2020, that was to the effect that the whole claim or suit between the 1st Respondent and the 2nd Respondent was marked as fully settled with costs as per the consent entered by the parties on 26.02.2020. However, there is no indication from the record whether the consent was adopted an order of the Court. Soon thereafter, the matter came up for pre-trial directions before Meoli, J. on 29.03.2023, who in turn transferred the suit to the Chief Magistrates Court, reasons whereof that will be discussed later in this judgment.
 5. Upon the matter being transferred to the lower Court, the Appellant proceed to file a motion expressed to be brought under Article 50(1) & 159(2)(d) of the Constitution and Sections 1A 1B & 3A of the Civil Procedure Act (CPA) seeking *inter alia* that that the Court be pleased to set aside the orders made by Chepkwony, J. on 11.05.2022 striking out the Appellant's witness statement dated 06.05.2022; that the Court be pleased to grant leave to the Appellant to file and serve the witness statement dated 06.05.2022 signed by Sekou Owino; that the witness statement be deemed to have been properly filed; and that the Court be pleased to grant the Appellant leave to file its list and bundle of documents. The grounds on the face of the motion were amplified in the supporting affidavit sworn by the Saadia Abdi, counsel having conduct of the matter on behalf of the Appellant.
 6. The gist of her deposition was that on 11.05.2022, the matter was scheduled for hearing, whereupon an oral application by the 1st Respondent's counsel, Chepkwony, J. struck out the Appellant's witness statement on the basis that it was filed without leave of the Court whereafter she directed that the Appellant seek leave of the Court for late filing of the same. That the witness statement raises triable issues and is not a mere denial of the allegations in the plaint meanwhile there is no prejudice that would be occasioned upon the 1st Respondent if the motion is allowed given that the matter is yet to proceed for hearing. She went on to depose that delay in filing the witness statement was inadvertent on the part of erstwhile counsel having conduct of the matter who left the firm and that the same was not occasioned by negligence or bad faith. That if the Court were not to grant the orders sought, the Appellant would suffer prejudice by way of being condemned unheard therefore mistake of counsel ought not to be visited on the Appellant meanwhile the 1st Respondent would be sufficiently compensated with costs for any delay and inconvenience occasioned.
 7. The 1st Respondent opposed the motion by way of a Notice of Preliminary Objection (PO) on grounds:- that the motion as filed and presented before the lower Court is fatally and incurably defective and bad in law for want of jurisdiction particularly due to the fact that the Appellant sought to have orders granted by Chepkwony, J. on 12.05.2022 set aside by the trial Court; and that on the premises, the proceedings are untenable, bad in law and unmaintainable as against the 1st Respondent to wit the motion ought to be dismissed with costs.



8. The motion and PO were contemporaneously disposed of by way of written submissions. The lower Court's ruling dismissing the Appellant's motion provoked the instant appeal, which is based on the following grounds: -

- “ 1. The learned Magistrate erred both in law and in fact in finding that it did not have jurisdiction to set aside the orders issued by Chepkwony, J. on 12.05.2022 striking out the Appellant's witness statement dated 06.05.2022 and further directing the Appellant to move the Court appropriately
2. The learned Magistrate erred in both law and fact in failing to grant the Appellant leave to file the witness statement dated 06.05.2022 and or directing the Appellant to move the Court appropriately.
3. The learned Magistrate erred in law and in fact by failing to appreciate the factual background in the instant case and thereby considered extraneous matters beyond those stipulated in law.
4. The learned Magistrate erred in law and in fact in failing to consider the comparable authorities as cited by the Appellant in its submissions.
5. The learned Magistrate erred in law and in fact by predisposing her mind to a proposition against the Appellant and thereby failed to exercise her discretion fairly and judiciously.” (sic)

9. The instant appeal was canvassed by way of written submissions of which this Court has duly considered. That said, alongside the submissions, the Court has equally considered the record of appeal and the pleadings before the lower Court. The duty of this Court as a first appellate Court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See: - *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123; [James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR.

10. As earlier noted, the Appellant's motion before the lower Court was expressed to be brought inter alia pursuant to Sections 1A, 1B & 3A of the [CPA](#). The trial Court in dismissing the Appellant's motion stated inter alia in part that: -

“From the Applicant's application on record, the supporting affidavit in support thereof, the Respondent's Preliminary Objection as well as the rival submissions by both parties, the following issues present themselves for determination thus:

- i. Whether this honorable Court should set aside the orders made by Lady Justice Dora Chepkwony on 11th May 2022?
- ii. Whether the 1st defendant/applicant's witness statement should be deemed properly filed and admitted?
- iii. Who should bear the costs of the application?

Whether this honorable Court should set aside the orders made by Lady Justice Dora Chepkwony on 11th May 2022?

From the evidence on record, it is crystal clear that on the 16th December, 2019 when the matter came up to confirm compliance with Order 11 of the *Civil Procedure Rules 2010* the



1st Defendant was given fourteen days to file and serve the witness statement. Similarly, on the 13th February 2020, the 1st Defendant had not yet complied with the directions of filing the witness statement and on the 11th May 2022 the same was struck out before the matter was transferred to this Court by the High Court Judge Chepkwony.

Section 3 of the *Magistrate Court's Act* provides: -

.....

The provision is clear that the Magistrate Court shall be subordinate to the High Court and bound by the decision of the said Court. It will be absurd for this Court to overturn the decision of the High Court in striking the 1st Defendant's witness statement for it being filed out of time.

I am not cogently persuaded by the Applicant's reliance on the principle of counsel's mistake not being revisited on the client and wish to state the same is not applied blindly especially where a party has been inadvertently blind on their rights before the Court of justice. Similarly, there are not plausible reasons advanced by the party/1st defendant/applicant for this Court to exercise its discretion, the same is not applicable in this circumstance. The 1st defendant has been employing delaying tactics and is not keen in helping this Court to justifiably enhance the finality of the dispute herein. By reason of the foregoing premises, it is my holding and finding that this Court being a subordinate Court has no jurisdiction or discretion to set aside orders made by Lady Justice Chepkwony in striking out the 1st defendant's witness statement dated 06.05.2022. Furthermore, this Court is not impelled in extending the time frame for putting up pleadings as parties are fervently advised to be acquainted with the rules of engagement.

In the result it is my holding and view that:

I. The Court lacks the jurisdiction to set aside orders made by Justice Chepkwony and thus the witness statement by the 1st defendant is consequently struck out and application dated 28.03.2023 dismissed with costs to the plaintiff." (sic)

11. Evidently, by the Appellant's motion alongside the provisions of Article 50(1) & 159(2)(d) of the *Constitution*, it saliently invoked the provisions of Section 3A of the *CPA*, the latter which reserves the inherent power of the Court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court". This Court has repeatedly observed that the purport of the said provision was reasonably addressed by the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR, wherein it was observed that: -

"Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd v West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that:

"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."



The Supreme Court went further in Board of Governors, *Moi High School Kabarak & Anor v Malolm Bell* [2013] eKLR, to add the following: -

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.” (sic)

12. The grant or refusal of an application seeking to set aside or vary such judgment or any consequential decree or order, is discretionary. The discretion is wide and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. Therefore, in considering this appeal, the Court is guided by the principles enunciated by Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR stated: -

“This Court ought not to interfere with the exercise of a Judges’ discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a Court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (supra):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”.

See also: - *United India Insurance Co. Ltd v. East African Underwriters (K) Ltd* [1985] E.A 898”.

13. The object of the discretion conferred by Section 3A of the *CPA* was espoused in the case of *Shah v Mbogo and Another* [1967] EA116:

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

14. The principles enunciated in *Shah v Mbogo* (supra) were amplified further by Platt JA in *Bouchard International (Services) Ltd vs. M’Mwereria* [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein would apply in equal degree in this matter.

15. With the above in reserve, it would be pertinent at this juncture to consider the preliminary question raised by the 1st Respondent on whether the trial Court was endowed with jurisdiction to entertain the said motion seeking to set aside the orders of Chepkwony, J. issued on 12.05.2022. In addressing the foretated, it would be germane to set out the history of the matter as can be discerned from the original record and record of appeal. The lower Court matter was originally filed before this Court as *Nairobi Milimani HCCC No. 126 of 2019*. When the matter came up before the Deputy Registrar (DR) on 13.02.2020 in the presence of counsel for the 1st Respondent’s and the then 2nd Respondent, the DR



having heard representation from respective counsel proceeded to certify the matter ready for hearing while equally observing that the Appellant having been accorded ample opportunity to comply with pre-trial direction failed to do so. Subsequently, the matter came up for hearing before Chepkwony, J. on 11.05.2022 wherein counsel appearing for the 1st Respondent brought it to the attention of the Court that the Appellant had filed a further witness statement without leave. Upon hearing representation made by counsel for the Appellant and 1st Respondent, Chepkwony, J. proceeded to state as follows –

“Indeed, I have perused the record and confirm that the pleadings in this case were closed a year ago. This being the case, it is a requirement if a party wants to file and or include any witness statement of evidence after the close of pleadings leave of Court must be sought and reasons for it given so that a Court then exercises its discretion to grant leave and allow a party to file or introduce evidence and or documents in the proceedings already filed.

A witness statement is the evidence a party relies on in support of its case and it is important that the same be subject to scrutiny by opposing party and Court for it to be adopted as part of evidence hence the need for leave of Court to be sought first.

.....

In view of these.....reasons, I direct the 1st defendant to follow due process for the plaintiff to respond to them and the Court make a determination. Mention on 25.05.2022 before the presiding judge of this division for re-allocation of the matter before another judge for direction” (sic)

16. Later, when the matter came up for pre-trial directions before Meoli, J. on 29.03.2023, she observed and directed as follows; -

“The 1st Defendant has filed an application for leave to file witness statement and list of documents but the Plaintiff has complied.

The dispute herein can be heard before the subordinate Court. Therefore, the suit is hereby transferred to the CM’s Court at Milimani for hearing and determination. Mention before the Court on 18.04.2023” (sic)

17. Having set out the above, while calling to aid the unreported decision in *Miguna Miguna v Nation Media Group and Musine v Osamo (Sued as co-administrator of the Estate of Stephen Osamo (Deceased))* (Miscellaneous Application E012 of 2022) [2023] KEHC 20217 (KLR), the Appellant has argued on appeal that once the file was transferred to the Magistrate’s Court, the Court had the jurisdiction to exercise its constitutional, statutory and inherent jurisdiction to entertain all matters that would aid it to determine the suit. That the ex tempore ruling striking out the witness statement went to the root of the adjudication process before the Magistrates Court therefore the learned Magistrate had the requisite jurisdiction to hear the parties and determine the motion to wit the trial Court’s finding that it lacked jurisdiction was in error.
18. In rebuttal, the 1st Respondent, relied on Article 165(6) of the *Constitution* and Section 3 of the *Magistrates Court Act* to summarily contend that inviting the learned Magistrate to set aside an order made by the High Court, was inviting the former to perform an illegality, and the trial Court was right to decline such an invitation. He further posited that when a matter is transferred to the subordinate Court from the High court, the former has the jurisdiction to hear and determine such matters, however, the said jurisdiction does not mean that the Court can set aside orders that had already been made by the High Court.



19. Ex facie this Court’s mandate and or authority to transfer a matter to a competent subordinate Court is donated by Section 18(1)(a) as read with Section 11 of the *CPA*. Invariably, the High Court’s original jurisdiction to entertain civil matters is donated by Article 165(3)(a) of the *Constitution* as also read with Section 5 of the High Court (Organization and Administration) Act whereas jurisdiction of the Magistrates Courts in civil matters is prescribed in Section 7 of the *Magistrate’s Court Act*.
20. Prior to the transfer orders by Meoil, J., the Court considered the claim as originally filed in *Nairobi Milimani HCCC No. 126 of 2019* and was persuaded that it was a matter falling within the jurisdiction of the Magistrates Court and or raised issues that would for all intents and purposes, be competently tried and disposed of by the lower Court. Upon transfer of a case to a subordinate Court, that Court assumes all powers and authority of a trial Court to deal with any outstanding motions and issues arising and to hear and determine the suit, this notwithstanding any other orders that may have issued earlier by the High Court. A matter transferred to lower court does not move with “relics” of the High Court which at the time was seized off the matter. The moment a Judge transfers a matter to the lower court, all orders issued while the High Court was handling the matter breath their last breath because of transfer of jurisdiction. A Magistrate in the lower court must have unfettered discretion to handle the matter just like other matters. By precluding a Magistrate from freely handling the matter because of an order issued by a Judge before the transfer, the High Court will be interfering with free and fair hearing which would be against the Constitution. The only order that a Magistrate must adhere to is that of “transfer” alone. It would be certainly pointless if not downright illogical, and a waste of the judicial time if the position as advanced by the 1st Respondent were to obtain. At the risk of repetition, despite any prior orders having issued by the High Court on matters affecting the suit itself, the trial Court was duly vested with jurisdiction to consider the Appellant’s pending motion seeking among other orders to set aside the orders issued by Chepkwony, J. on 11.05.2022 striking out the Appellant’s witness statement dated 06.05.2022. By the order of transfer the subordinate Court was endowed with jurisdiction as Court of first filing to wit it would proceed and hear any pending application in spite of the fact that there existed earlier orders within the matter that had been issued by a superior Court.
21. In the end, the trial Court’s decision, in respect of the 1st Respondent’s Preliminary Objection and the resulting order dismissing the Appellant’s motion for want of jurisdiction must be faulted and set aside. For avoidance of doubt the appeal herein is allowed by way of an order setting aside the ruling of the trial Court rendered on 09.02.2024 whereas the commending order would that the Appellant’s pending motion dated 28.03.2023 be heard before any other Magistrate other than Hon. Ruguru. N (SPM). The Appellant is awarded costs of the appeal in any event.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

Okeyo holding brief for Asman for the Appellant

Onguti for Respondent

Guyo - Court Assistant

