



**Nation Media Group Limited v JA Abuodha & Co Advocates & 2 others (Civil Appeal 129 of 2011) [2023] KEHC 18624 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18624 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 129 OF 2011  
DKN MAGARE, J  
MAY 15, 2023**

**BETWEEN**

**NATION MEDIA GROUP LIMITED ..... APPELLANT**

**AND**

**JA ABUODHA & CO ADVOCATES ..... 1<sup>ST</sup> RESPONDENT**

**INVESCO ASSURANCE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This appeal was filed on 19/7/2011. It was served on the same day. Justice J. Mwera, as then he was, admitted the Appeal on 23/4/2012. The matter then proceeded in Court for the last one decade and 2 years. Directions were thereafter given on hearing. Surprisingly this matter has been active for all these years but for one reason or another, it is still in the corridors of justice.
2. I took over the matter and gave directions for highlighting on 27/3/2023 and Judgment date for today 15/5/2023. Despite being served none of the Respondents bothered to attend court. The first Respondent, who is the true and who stood to lose everything filed her submissions way back on 3/4/2015. However, she did not attend Court to highlight the same. I am not amused such conduct.
3. From the record, almost half of the file is full of affidavits of service filed by the advocates counsel. For one reason or the other the matter could not proceed due to non- attendance

**Background**

4. The 1<sup>st</sup> respondent was reportedly arrested and arraigned in court over certain infractions related to fraudulent filing of claims. The cases were terminated on in 2008. The Appellant, a media house, classified as a newspaper of wide circulation published the events leading up to to the arrest and



arraignment. The 1<sup>st</sup> respondent, took the publication as defamatory. She filed suit on 20/8/2010 claiming for the following reliefs: -

- a. General damages for Malicious prosecution and wrongful detention
  - b. General, Exemplary and aggravated damages.
  - c. (though not in the prayers, in paragraph 18 of the plaint), she sets out a case for defamation against the defendants. This is said to have been on 16/7/2007.
5. The 1<sup>st</sup> respondent is said to have been arraigned in court on 16/7/2007 and charged in two criminal cases, being Mombasa RMCR 2389 of 2007 and 2235 of 2007.
  6. The cases are said to have been terminated. Subsequently, she sought and was granted leave to extend time within which to file suit. Armed with that order, she filed the suit in the lower court, a subject of this appeal.
  7. The 1<sup>st</sup> Respondent's pleadings are not the best that can be. I am trying my best to decipher what the pleadings were saying. The date such leave was granted or the acquittal was done, are not pleaded. However, I note from pleadings that the termination of the criminal case was in 2008.
  8. The Appellant filed an application dated 15/11/2010 supported by the affidavit of Zehrabanu Janmohammed, now, SC., The application sought the following orders: -
    - a. The Plaintiff's suit against the first defendant be dismissed as the same is scandalous, frivolous vexatious and an abuse of the court process.
    - b. The costs of this application be awarded to the First Defendant.
  9. The Application was opposed. The court, Hon. L Mutende, as then she was, after hearing the application dated 15/11/2010, dismissed the application with costs on 21/6/2011. The reason she gave was that the order was issued by a magistrate, just like her hence she cannot set it aside. hence this Appeal. The Appellant filed a 6-ground memorandum of Appeal dated 18/7/2011 seeking to overturn the ruling of the court.

### Issues

- a. Whether the Court had jurisdiction to extend time to file suit for a claim in respect of: -
  - a. Defamation
  - b. Malicious falsehood
  - c. Wrongful detention.

### The Appellant submissions

10. The Ruling of Hon. Mutende in Mombasa CMCC 2223 of 2020 is being challenged. An application was made dated 15/11/2020. Stating that the Court could not extend time to file suit for the causes of Action. The applicant filed an application for review which was dismissed. The Appellant posits that Limitation for defamation is 12 months from the date the cause of action arose. The time for filing for a cause of Action was 17/17/2020 as the Publication was on 16/7/2007. They rely on the authorities of *Wycliffe A. Swaye v Toyota EA Ltd. & Another* [2009] eKLR. David Githumbi Thande v Dairy Farmers Co-operative Society & Others [2010] eKLR and *Mary Osundwa v Nzoia Sugar Co. Ltd.* Ca 244/2010.



### The 1st Respondent's submissions.

11. The 1<sup>st</sup> respondent filed submissions 9 years ago on 3/4/2014. They submitted that the cause of action arose from defamation. They stated that the 2<sup>nd</sup> Respondent had been wound up and they had closed ship.
12. They view that technicality should not hinder justify I must confess, that I did not understand what the 2<sup>nd</sup> respondent was staying in the last paragraph.

### Analysis

13. The court was technically correct to the extent that she cannot sit on appeal on the decision of the chief magistrate who granted the orders sought. However, the court was not being asked to sit on appeal.
14. There are two aspects of this case. In matters of extension of time, the order is issued *ex parte*. For tort, the order can only be challenged at the hearing. For other, limbs where no right to extend time, then, the Defendant can apply to have the same set aside. An order made *ex parte* may be set aside. Order 51 rule 15 states follows: -

15. Setting aside *ex parte* order

The court may set aside an order made *ex parte*.

15. It is there not inconsistent with the law to apply and set aside an *ex parte* order. This will apply to contracts. I disagree with the holding of justice S. Chitembwe in the case of *Nation Media Group Limited & 2 others v Margaret Kamene Wambua* [2021] eKLR, the court stated as doth: -

“I am in agreement with the sentiments of Justice Jairus Ngaa as expressed in the case of *Royal Media Services Ltd v Valentine Mugure Maina & Another* (Supra) that the court has discretion to enlarge time even if the claim is one based on defamation. It would be unusual for the law to allow the filing out of time of other claims such as claim for damages resulting to personal injuries but exclude claims based on defamation which equally results to injury to one’s reputation. I am satisfied that the trial court was correct in granting the respondent leave to file the suit out of time. There is the contention relating to Article 33 of the *Constitution* on freedom of expression. Once leave was granted to file the suit out of time and the claim was admitted out of time, the issue of Article 33 on respecting other peoples’ reputation became a non-issue. What remained was whether the plaintiff had been defamed.”

16. The said decisions were made *per incurram*. The correct and settled position was espoused by Justice J. K. Serگون, where the court held as follows: -

15. From the foregoing, it is clearly brought out that the instances in which a court can extend the time required to file a suit are in cases involving negligence, nuisance or breach of duty. Malicious prosecution claims such as the present one are not catered for under the above provision.

16. The position remains that this court’s jurisdiction does not and cannot extend to malicious prosecution claims. In so finding, I am both supported and bound



by the Court of Appeal decision in the case of *Mary Ofundwa v Nzoia Sugar Company Limited* Kisumu CA No. 244 of 2009 thus:

“This section clearly lays down the circumstances in which the court, would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the Plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.”

17. In the case of *Omari Ismael Mazzha v Office of the Director of Public Prosecution (ODPP) & another* [2021] eKLR with the court reasoning that:

“In the case at hand, the Applicant is seeking damages in respect of the tort of malicious prosecution which is not covered by Section 27 of the *Limitation of Actions Act*. In that regard I am persuaded by the holding in the case of *Peter Gichuki Mwangi v Kenya Copyright Board & 3 others* [2018] eKLR where it stated: -

“In the instant application, the Applicant’s claim would be seeking damages for malicious prosecution for which Section 27 and 28 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya, a claim for damages based on malicious prosecution is not included. The extension of time is limited to the nature of claims for damages limited under Section 27 of the *Limitation of Action Act* and no other. This court cannot act beyond the express provisions of the law and extend the period of filing suit out of time for which the law do not allow or where the requirements which are specifically set out have not been satisfied.”

18. In the case of *Divecon Ltd v Samani* [1995-1998] 1 EA 48 at 54 that section 4(1) of the *Limitation of Actions Act* was clear beyond any doubt and that the section meant that;

“... no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that ‘the wording of section 4(1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked.”

19. A perusal of Authorities show that extension of time applies only to certain torts, mainly arising out on negligence or fraud. Contracts and defamation are not covered under extension of time.
20. In the case of *YH Wholsalers Limited v Kenya Revenue Authority* [2021] eKLR, the court stated as doth: -



27. In *Oadi Odhiambo v Gateway Insurance Co. Ltd* [23] the Court of Appeal faced with the same set of circumstances as in this case observed:
- “Under Section 27 (1) of the *Limitations Act*, time to file a suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort.”
28. The applicants supporting affidavit tried to depict how the Respondent is to blame. What is required at this stage is not a merit evaluation of the case, but the applicant must bring himself within the grounds in section 27 and to also, an explanation for the delay. Lord Green MR said it all in *Hilton v Sultan S. Team Laundry*
24. “But the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights.
21. The Court of Appeal in *Oruta & another v Nyamato* [1988] eKLR stated as follows;
- “The procedure for obtaining the extension of time for the purpose of section 27 of the Act is set out in section 28. It is also provided for in order XXXVI rule 3C of the *Civil Procedure Rules*. The application is to be made ex-parte and the defendant is not in a position to oppose the application. In fact he only becomes aware of the order, if obtained, when the order is served together with the plaint. However, there is no provision for the application to set aside the order in the Act but the defendant can raise the matter as an issue at the trial. Now that the preliminary point has been raised before the trial, it now calls for interpretation of the section as to the reason of the enactment providing for the application to be made ex-parte. Why shouldn't the defendant be afforded a chance to oppose the application before the order is granted and before the suit is filed so as to minimize costs”
22. The tort of defamation is unlike any other under Section 27 of the *Limitation of Actions Act*, the Court has jurisdiction to extend time as doth: -
- “27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.
- (1) Section 4(2) does not afford a defence to an action founded on tort where—
- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and



- (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.
- (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
    - (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
    - (b) in either case, was a date not earlier than one year before the date on which the action was brought.
  - (3) This section does not exclude or otherwise affect—
    - (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
    - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.
23. An action for defamation is not included in the said Section. This is for a good cause, that is;
- a. The tortfeasor is known.
  - b. There can be no fraud in defamation.
  - c. Negligence is not one of the ingredients of defamation.
24. There is a third reason, though unwritten. Defamation has immediate consequences. If no action is filed, the same has no effect on the character or a past time when it is no longer news.
25. An action founded on tort is limited to 3 years. However, an action founded on libel and slander is limited to 1 year, that is 12 months.
26. There is no provision for extension of time for slander and contracts. This is because the parties are known upfront. In fact, under Section 23 of the *Limitation of Actions Act*, it is the parties themselves who extend through partial payment.
27. This protection is not afforded to the tort of libel and slander.
28. In the case of *David Githumbi Thande & Another v Githunguri Dairy Farmers Ltd & Others* [2010] eKLR, Justice J. Mwera, as then he was held as doth: -
- “Having heard counsel, perused the law applicable and the circumstances of this case, this court is inclined to agree and it agrees with the defendants that the orders of 29.4.05 granting



the plaintiffs time beyond the statutory 12 months to sue for damages in defamation be reviewed. Extending time to sue in tort matters is limited to negligence, nuisance, breach of duty where damages are confined to personal injuries of a personal nature. And to succeed in getting the orders to sue out of time, a party has to satisfy the court in accordance with section 28 of the Act. Defamation is not covered here and so the review sought is granted. It was in error to grant the orders of 29.4.05 when the law did not provide for such, i.e suing on account of defamation after the statutory 12 months. The application dated 12.1.05 ought to have been dismissed and the whole suit struck out.”

29. The question is not whether there are reasons for the extension, but whether the Court was entitled to extend time in the particular causes action.

30. In the former, challenge can only be done in the suit itself. In *Trans world Safaris Kenya Limited v Somak Travel Ltd* [1997] eKLR, Judges Kwach, Shah and Paul JJA as they were, stated as doth:-

“Extending time under the (Limitation of Actions) Act, can in our view apply to ordinarily negligence which results in death or bodily injury to the claimant.”

31. Thus, the general Rule is that extension can be challenged at the hearing. however, where extension of is given without jurisdictions, then, the Court is entitled to intervene. In matters contract defamation and suits against government the, Court must be satisfied that it has jurisdiction to do so.

32. In Lilian S, Justice Nyarangi JA stated as doth: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

33. In *S.K. Macharia* the Supreme Court stated: -

“(24) In response, Mr. Oraro asserts that the jurisdiction of any Court is derived from the law. He relies on the Supreme Court’s decision in, In the Matter of Advisory Opinions of the Court under Article 163 of the *Constitution*



(Constitutional Application No. 2 of 2011 at para. 30), where the Court stated:

“...a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”

34. Essentially, where a court has jurisdiction it must take it up. Where, the Court has no jurisdiction, it has to down the tools. In the case, the Court wrongfully declined jurisdiction it had to handle the Application.
35. I have the option to return the balance of the claim for the lower court to deal with the question whether the cases against the other defendants ought to be struck out for being filed out of time. I decline to return the matter for the Court to decide. It has been 12 years since the last decision. The libel and slander, is not among the causes of action that the court can extend time. The Court was not being asked to be an Appellate Court.
36. The application dated is dated 15/11/2020 ought to have been allowed. Consequently, the Ruling given on 21/6/201 is therefore set aside in its entirety.
37. In lieu thereof, I substitute it with an order allowing the application dated 15/11/2010, and setting aside the orders granting leave to file suit. I find the suit is an abuse of the court process, consequently, I struck out the entire suit in limine.
38. However, after I have allowed the setting aside the order for extensions leave, to file suit, the entire suit falls, not just against the Appellant, but also against all the parties. There is no suit remaining after setting aside the leave granted.
39. The suit in the lower Court, been Mombasa CMCC 2223 of 2020 is therefore dismissed with costs of Ksh. 100,000/= to the Appellant. The Appellant will also have costs of the suit in the lower court.

#### **Determination**

40. The upshot of the foregoing is that I allow the Appeal herein is allowed in the following terms;
  - a. The Ruling dated 22/6/2011 I set aside, in lieu thereof an order is issued strike out the entire suit in the lower court with costs, to the Appellant.
  - b. The Appellant will have costs of Ksh. 100,000/= for the Appeal.
  - c. The other parties did not participate therefore they shall bear their own costs in this Appeal and in the Court below.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF MAY,2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

**Mr. Odunga for the Appellant**

**Abuodha for the 1<sup>st</sup> Respondent**

**Court Assistant - Firdaus**

