



REPUBLIC OF KENYA



**Nduta v Radio Africa Limited & 5 others (Civil Suit E045 of 2020)  
[2025] KEHC 14986 (KLR) (Civ) (21 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14986 (KLR)

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

**CIVIL  
CIVIL SUIT E045 OF 2020**

**JM OMIDO, J**

**OCTOBER 21, 2025**

**BETWEEN**

**JOSEPH MWANGI NDUTA ..... PLAINTIFF**

**AND**

**RADIO AFRICA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GHETTO RADIO LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CAPITAL GROUP LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**CONTENT AGGREGATION LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**THE STANDARD GROUP PLC ..... 5<sup>TH</sup> DEFENDANT**

**MEDIAMAX NETWORK LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

**A. Background.**

1. The instant suit, based on the tort of defamation, was commenced by way of a plaint dated 6<sup>th</sup> August, 2020, seeking from the Defendants general, exemplary, aggravated and punitive damages for defamation, orders of permanent injunction restraining the Defendants from making further publications of alleged defamatory material of the Plaintiff, orders compelling the Defendants to retract the alleged defamatory publications, costs and interest.
2. All the Defendants entered appearance and resisted the Plaintiff's claim by filing their respective statements of defences.
3. From the record, the matter was on 24<sup>th</sup> June, 2021 placed before this court's Deputy Registrar (Hon. L. Mbacho) who directed and ordered that the Plaintiff serves all the Defendants with his pretrial



bundle by close of business on 25<sup>th</sup> June, 2024. Hon. Mbacho further directed that the matter be placed before a Judge on 21<sup>st</sup> July, 2021 for further directions.

4. When the file was placed before the court (Meoli, J.) on 21<sup>st</sup> July, 2021, my sister ordered, as was the practice then, that a hearing date be fixed at the registry by the parties.
5. It would appear that there was inaction in the matter for a substantial period of time that resulted in the court issuing a Notice to Show Cause (NTSC) dated 16<sup>th</sup> December, 2022, why the case should not be dismissed for want of prosecution. The NTSC was issued under Order 17 of the Civil Procedure Rules and served upon the parties. A date was fixed for the NTSC for 27<sup>th</sup> January, 2023.
6. When the matter was placed before Visram J. on 27<sup>th</sup> January, 2023, my brother called upon the Plaintiff, who was present in court in person, to respond to the NTSC and the record bears it that the Plaintiff stated as follows:

“Plaintiff: I have terminated the service of my Counsel and appear for myself. I have no affidavit setting out the reasons for the delay. My lawyer was in politics and was not responding to me and I did not know the civil procedure rules. I then found out there was a notice.”

7. All the Defendants, save for the 2<sup>nd</sup> Defendant who was not represented in court on that day supported the proposed dismissal of the suit. Visram J. rendered himself as follows on the NTSC:

“Court: Having served the Plaintiff with Notice to Show Cause application; and upon the failure by the Plaintiff to file an affidavit in support of the reasons for the delay, and having considered the submissions made by Counsel and in person, I am not convinced that cause has been shown why this suit should not be dismissed.

Pursuant to Order 17 Rule 2 of the Civil Procedure Rules, the suit is dismissed with costs to the Defendants.”

8. Pursuant to the order of dismissal of the suit, the Plaintiff filed the Notice of Motion dated 2<sup>nd</sup> February, 2023 in which the substantive orders sought were as follows:

“3. The orders of this Honourable Court issued on 26<sup>th</sup> January, 2023 by Hon. Mr. Justice Visram Aleem Alnashir dismissing the suit for want of prosecution and any subsequent order thereto be and is hereby varied and/or set aside.

4. Consequent to the grant of prayer (3) above, the suit be reinstated and set down for mention to take directions on hearing.”

9. The motion dated 2<sup>nd</sup> February, 2023 was placed before the court on 24<sup>th</sup> April, 2023 and the same was struck out, for being incompetent, with costs to the Respondents as the firm of Advocates that filed it had not properly come on record for the Plaintiff.

#### **B. The Notice Of Motion Dated 13<sup>th</sup> October, 2023.**

10. The Plaintiff filed the Notice of Motion dated 13<sup>th</sup> October, 2023 is expressed to be brought under Articles 50(1) and 159(2)(d) of *the Constitution* of Kenya, Order 12 Rule 7, Order 17 Rule 2(2) and



Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya in which he now seeks the following orders:

- “ 1. The orders of this Honourable Court issued on 26<sup>th</sup> January, 2023 by Hon. Mr. Justice Visram Aleem Alnashir dismissing the suit for want of prosecution and any subsequent order thereto be and is hereby varied and/or set aside.
  2. Consequent to the grant of prayer (2) above, the suit be reinstated and set down for mention to take directions on hearing.
  3. This Honourable Court be pleased to grant such other or further orders as may be appropriate.
  4. Costs of the application be provided for.”
11. The application is premised on 13 grounds listed on its face, which are in precis that: That the Plaintiff's erstwhile Advocates, K.K. Katsiya & Co. Advocates who were in conduct of the matter at the time of its dismissal had prior to the order of dismissal of the suit failed to take appropriate action as per the Plaintiff's instructions. That the Plaintiff later learnt that the said law firm had in fact filed an application to cease acting for him on the false grounds that the firm had lost contact with him whereas he was as a matter of fact in regular contact with the law firm. That in the premises, the Plaintiff cannot be blamed for failing to prosecute his suit. That the Plaintiff stands to suffer immense prejudice and injustice if the orders sought in his motion are not granted. That the application has been brought timeously.
  12. The application was supported by the Plaintiff's affidavit sworn on 13<sup>th</sup> October, 2023. The affidavit serves to restate and expound on the above grounds on oath.
  13. The Defendants opposed the application by filing their respective responses to it. The grounds upon which the application is opposed are collectively as follows, as discernible from the respective responses: That the application is incompetent, bad in law and an abuse of the court process. That there is inordinate, unexplained and inexcusable delay in bringing the application. That no tenable reasons have been given by the Plaintiff as to why no action was taken in prosecuting the suit over the substantive period of inaction.

### **C. Analysis And Determination.**

14. The NTSC pursuant to which the Plaintiff's suit was dismissed was issued by the court under Order 17 Rule 2 of the Civil Procedure Rules. Let us read the said provision:
  2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]
    - (1) 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.
    - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
    - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
    - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.



- (5) A suit stands dismissed after two years where no step has been undertaken.
- (6) A party may apply to court after dismissal of a suit under this Order.
15. There is no dispute that the parties, particularly the Plaintiff was notified and/or was aware of the date that the court set for him and/or his Counsel to appear before the court to give reasons as to why his suit should not be dismissed for want of prosecution.
16. As is instructive from the record, the Plaintiff addressed the court on 26<sup>th</sup> January, 2023 and the court considered his presentation before making the order for dismissal of the suit. That then means that the proceedings and order of dismissal of the suit made on 26<sup>th</sup> January, 2023 were not ex parte as the Plaintiff was present in person and was accorded an opportunity to address the court and give reasons as to why his suit should not be dismissed.
17. The affidavit in support of the application before me seeks to explain why the Plaintiff's suit was not prosecuted over the lengthy period that no action was taken. The Plaintiff is now attempting to give an explanation as to the delay. My very respectful view is that that explanation ought to have been made on 26<sup>th</sup> January, 2023 and not at this stage.
18. It is to be noted that the application before me is not one for review of the order of dismissal of the suit, which would ordinarily be sought under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, on the strength of the grounds set out under the two provisions, but one seeking the setting aside of the dismissal of the suit and the reinstatement of the same for hearing.
19. As I have stated above, the orders that Visram J. made on 26<sup>th</sup> January, 2023 were not ex parte. Unlike an ex parte order, a substantive order made by a court upon hearing the parties cannot be set aside by another court of concurrent jurisdiction, unless the court has been moved through review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
20. The application before me is not for review. None of the grounds under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules have been cited as the basis upon which the Plaintiff seeks for his desired orders. The application seeks the setting aside of my brother's orders that were not issued ex parte.
21. The central issue that emerges and that I will want to address is whether a Judge of concurrent jurisdiction may set aside or vary, other than through an application for review, the order made by another Judge of the same court.
22. The law on this point is settled. A Judge of the High Court cannot sit on appeal over or vary the decision of another Judge of concurrent jurisdiction. The proper recourse for an aggrieved party is either to move the court for review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, or to file an appeal to the Court of Appeal.
23. I opine that proceeding to grant the orders as sought would amount to sitting on appeal on Visram J.'s ruling and orders, which I have no jurisdiction to do. The proper way, in my view, that the Plaintiff would have pursued in his quest to upset the orders of dismissal of the suit that were issued on 26<sup>th</sup> January, 2023 was to prefer an appeal from the same or apply for review if the grounds for the same were available.



24. In *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others* [1996] eKLR, the Court of Appeal held:

“It would be a bad practice and procedure if a judge of concurrent jurisdiction were to purport to set aside or review the decision of another judge. The proper remedy is to move the court appropriately either by review before the same judge or appeal to a higher court.”

25. This position has been consistently followed. In *William Koross v Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, the Court of Appeal held that:

“Courts of concurrent jurisdiction cannot purport to overturn each other’s decisions. To do so would undermine the principle of finality and judicial certainty.”

26. Accordingly, I find that I have no jurisdiction to grant the orders sought in this application. In his canonical words in the case of *The Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 Nyarangi JA stated as follows on jurisdiction:

“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 downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.”

27. The notice of motion dated 13<sup>th</sup> October, 2023 is therefore, for the reasons stated above, struck out with costs to the Respondents.

28. This file is hereby closed.

29. Orders accordingly.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 21<sup>ST</sup> DAY OF OCTOBER, 2025.**

**JOE M. OMIDO.**

**JUDGE**

For Plaintiff: Mr. Wanyingi.

For 1<sup>st</sup> Defendant: No Appearance.

For 2<sup>nd</sup> Defendant: No Appearance.

For 3<sup>rd</sup> & 6<sup>th</sup> Defendants: No Appearance.

For 4<sup>th</sup> Defendant: Mr. Munyori.

For 5<sup>th</sup> Defendant: Ms. Cheptanui.

Court Assistants: Mr. Ngoge & Mr. Juma.

