Ng'eno v Nation Media Group (Civil Suit E010 of 2020)
[2025] KEHC 16418 (KLR) (Civ) (4 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16418 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E010 OF 2020

SN MUTUKU, J

NOVEMBER 4, 2025

BETWEEN

ERIC NG'ENO ..... PLAINTIFF

AND

NATION MEDIA GROUP ..... DEFENDANT

RULING

The Application

1. By a Notice of Motion (the Application) dated 10th April 2025, Eric Ng'eno (the Applicant) through his advocates, Kinoti & Kibe Co. Advocates, approached this Court under Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 12 Rule 7, Order 45 Rule 1, 2 & 3, Order 51 Rule 1 of the Civil Procedure Rules, Article 159 (d) of *the Constitution* of Kenya and all enabling provisions of the law seeking the following reliefs:

    i. Spent.

    ii. That this Honourable Court be pleased to review, vary and/or set aside the Orders of this Honourable Court entered on 14th October, 2022.

    iii. That this suit herein be reinstated and summons to enter appearance do issue for service to the Defendant/Respondent.

    iv. That this Honourable Court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of this case.

    v. That the costs of this application be provided for.

2. The Application is supported by the grounds stated on the face of it and in the Supporting Affidavit sworn by Mr. Kibe Mungai on 10th April 2025.

3. I have read the grounds in support of the Application as stated on the face of the Application and in the Supporting Affidavit of Mr. Kibe Mungai. In sum, the grounds are that the Order dismissing this suit was made through no fault of the Applicant but due to non-attendance of his counsel occasioned by failure to receive Notice to Show Cause (NTSC); that the advocates fort the Applicant were not aware of the NTSC dated 25th January 2025 because they were not served with it; that non-attendance was not intentional and that the Summons to enter appearance in this suit was still being pursued because no Summons to enter appearance had been issued prior to the dismissal.

4. The Applicant has stated, further, that the suit was filed during the Covid 10 pandemic that disrupted court processes and that at the time of filing this suit, defamation matters were being transferred to the Chief Magistrates' Court in numbers; that failure to attend court during the NTSC was not intentional on the part of the Applicant; that the Applicant has a good case with reasonable chances of success and is keen on prosecuting the case; that the delay in bringing this application is not inordinate and that no appeal has been filed against the order dismissing this suit dated 25th January 2025.

The Replying Affidavit

5. The Application is opposed by the Respondent through a Replying Affidavit sworn by Sekou Owino on 31st July 2025. The Respondent has stated that the publication complained of, the subject of the defamation claim, was published on 4th July 2019; that under section 4(2) of the *Limitation of Actions Act*, the limitation period for a suit founded on defamation is twelve months from the date of publication and therefore, this suit was filed outside the prescribed limitation period and is therefore time-barred.

6. The Respondent has stated that it was not served with Summons to Enter Appearance and only became aware of the existence of the suit when it was served with the instant application; that the Applicant did not take any steps to prosecute the suit leading to a NTSC and the ultimate dismissal; that the Applicant and his advocate did not make efforts to follow up on the progress of the suit after filing in July 2020 and that there is no indication in the Court record that the suit was transferred to the Chief Magistrate's Court.

7. It is stated, further, that if this suit is reinstated, the Respondent will suffer prejudice given the age of the claim and the fact that its witnesses, who were the employees, have already left the Respondent's employment and that their recollection of the facts of this case has been compromised with the passage of time.

8. The Respondent has stated that the Applicant has not established any sufficient cause for the grant of the orders sought and that a suit stands dismissed after two years where no steps have been taken. The Respondent prays that this application be dismissed with costs to it.

9. The application was canvassed by way of written submissions.

Applicant's submissions

10. The Applicant filed his submissions dated1st August 2025. He has reiterated the grounds advanced in the application and the Supporting Affidavit. He has identified two issues for determination, namely:

    a. Whether the Court ought to reinstate the suit.

    b. Who will bear costs of the Application.

11. In respect to the first issue, it was submitted that this court possess the power to reinstate a case that has been dismissed. The Applicant cited Order 12 Rule 7 of the Civil Procedure Rules which provides that:

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

12. The Applicant submitted relied on Murtaza Hussein Bandali T/A Shimoni Enterprises v P.A Willis [1991] KLR 469; [1998-92] to support the view that the court has inherent power to restore a case for hearing after it has been dismissed. He also relied on Patel v E. A Cargo Handling Services Ltd [1974] EA 75 at page 76 C and E where the court held that:

> " There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

13. The Applicant reiterated that the suit was filed during Covid 19 pandemic and at a time when defamation matters were being transferred to the Chief Magistrate's Court, making the Applicant's counsel uncertain whether this suit had suffered similar fate and that Summons to enter appearance had not been issue prior to the dismissal. The Applicant cited Halsbury's Laws of England 4th Edition Vol. 1 page 90 paragraph 74 on rules of natural justice that "no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard...".

14. The Applicant relied on Wachira Karani v Bildad Wachira Civil Suit No. 101 of 2011 (2016) eKLR where it was stated that:

> " Court exists to serve substantive justice to all parties to a dispute before it. both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon merits of the matter. This is the fundamental principle of justice..."

15. It is was submitted that failure by the Respondent to serve upon the Applicant the NTSC was a gross violation of the rules of natural justice; that non-attendance of court on 25th January 2023 by the Applicant's counsel was inadvertent and should not be visited upon the Applicant; that the application was made without undue delay, in good faith and no prejudice shall be suffered by the Respondent.

16. On the second issue, it was submitted that under section 27 of the *Civil Procedure Act*, this Court has discretion to grant costs and that it is trite law that costs follow the events unless special circumstances occur.

Respondent's submissions

17. The Respondent's submissions are dated 29th August 2025. The Respondent has reiterated his Replying Affidavit that the suit sought to be reinstated is time-barred having been filed on 9th July 2020 instead of 4th July 2020; that no Summons to enter appearance were ever served on the Respondent and that the Applicant did not take any steps to notify the Respondent of the proceedings prior to filing the application for reinstatement of the suit.

18. The Respondent submitted that limitation of time is a jurisdictional issue as was held by the Court of Appeal in Thuranira Karauri v Agnes Ncheche [1997] eKLR that:

> "We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Could should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such a suit."

19. It was submitted that the instant suit is incompetent and the application for reinstatement cannot breathe life into a claim that is already extinguished by statute.

20. The Respondent submitted that contrary to the submissions by the Applicant that the suit was dismissed for non-attendance of the Applicant's counsel, the order of dismissal shows that the suit was dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules; that the legal basis for the dismissal, therefore, is the failure by a party to take steps to prosecute the suit for at least one year and not the absence of counsel on the date of the NTSC; that the court is not supposed to serve a NTSC for dismissal upon parties as was stated by the Court in Mwangi S Kimenyi v Attorney General & Another [2014] eKLR that:

> "....there is no mandatory requirement under Order 17 rule 2 of the Civil Procedure Rules that a notice should be given to the plaintiff before a suit which offends the order is dismissed for want of prosecution. Equally, Order 17 rule 2 of the CPR uses the word 'give' and not 'serve'. To give notice is not the same thing as to serve notice within the context of civil procedure.... 'Give' in the context of Order 17 rule 2 of the civil procedure Rules denotes 'to impart or confer by a formal act' whereas to 'serve' in the legal sense denotes 'to make legal delivery of the court process'..... My own view, therefore, is that a notice under Order 17 rule 2 of the Civil Procedure Rules is deemed to have been given by the Court when it is placed in the official website of the Judiciary or in the cause list."

21. It was submitted that the Applicant's assertion that he was not served with a notice to show cause by the court and therefore did not attend cannot be a defence; that the legal requirement of 'giving' notice was satisfied when the matter was listed in the cause list for a notice to show cause why the suit should not be dismissed for want of prosecution.

22. The Respondent invited this court to take judicial notice that Covid 19 restrictions in Kenya came into effect in March 2020 when the Hon. Chief Justice issued Practice Directions governing court proceedings during the pandemic; that the directions provided for electronic filing and remote case management; that despite the restrictions brought about by the pandemic, these cannot credibly explain or justify the Applicant's failure to take any steps either during or shortly after March 2020 or at any time before the suit was dismissed in January 2023.

23. On the issue of transfer of the suit to the Chief Magistrate, it was submitted that there is no evidence demonstrating that the Applicant or his counsel made any inquiry as to whether the suit had been transferred to the Chief Magistrate's Court or not. The Respondent relied on Duale Mary Ann Gurre v Amina Mohamed Mahamood & Another [2014] eKLR where the Court stated that:

> "I have considered the material placed before the court and the reason offered by the Plaintiff for the delay in prosecuting the suit and I am not persuaded I should exercise my discretion in favour of the Plaintiff. Any person who initiates litigation against another has a duty

> and is under an obligation to ensure that the suit he has brought is expeditiously processed and prosecuted in the court by ensuring the necessary preparation and follow up is done to ensure there are no unnecessary delays. The overriding objective of rendering justice expeditiously as envisaged under Sections 1A and 1B *Civil Procedure Act* is anchored on the parties and their legal advisors playing their supportive riles in the chain of justice delivery and as the saying goes justice cuts both ways in every matter."

24. It was submitted that there has been inordinate delay in filing this application; that under Order 17 rule 5 of the Civil Procedure Rules, a suit stands dismissed after two years where no step has been taken to prosecute it; that the Applicant has not taken any steps between July 2020 and January 2023; that at the time of dismissal, Summons to enter Appearance had not been issued and that the Applicant has not demonstrated efforts to obtain and serve the Summons.

Analysis and determination

25. I have read and considered the application and the grounds in support. I have read the Replying Affidavit of the Respondent in opposition. In my considered view, the issues arising for determination can be condensed into one major issue, namely, whether the application is merited.

26. First, I have noted an error on the part of the Applicant as captured in prayer 2 of the Application. This prayer seeks to have the Order of this Court issued on 14th October 2022 reviewed, varied and/or set aside. I want to believe that this an error on the part of the drafters of this application. From reading the application and the grounds supporting it as well as the submissions and Replying Affidavit, it is clear to me that the order sought to be reviewed, varied and/or set aside is the order dismissing the suit. That order, as record shows, was issued on 25th January 2023. Indeed, under the ground (a) found on the face of the application in support of the same refers to the Order of dismissal made on 25th January 2023.

27. This error escaped the Applicant who ought to have sought amendment. However, in the best interest of justice and going by the pleadings and submissions, the intention of the Applicant is clear that the order he is challenging is the one issued on 25th January 2023 dismissing the suit under Order 17 Rule 2 (1) of the Civil Procedure Rules. Article 159 (2) (d) of *the Constitution* comes to his aid.

28. The Respondent has raised a preliminary issue that the claim by the Applicant was filed outside the time and is therefore time-barred. To address this issue, I have read the Plaint. It is dated 8th July 2020. The subject matter of the suit is a publication dated 4th July 2019 said to have been printed in the Daily Nation Newspaper.

29. The relevant legal provisions addressing the time within which a claim for defamation should be filed is Section 4 (2) of the *Limitation of Actions Act*. It provides that:

> An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
>
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

30. The above provision is clear and specific that an action for libel or slander ought to be filed within 12 months from the date the cause of action accrued. Twelve months translates into one year. The publication the subject matter of this case is said to have been done on 4th July 2019. My calculations bring me to 4th July 2020 as the last day.

31. The Plaint bears the Court Stamp dated 10th July 2020. This confirms that the Plaint, which is dated 8th July 2020, was filed on 10th July 2020. Consequently, I agree with the Respondent that this suit was filed outside time.

32. Having concluded as shown under paragraph 31 above, I need not proceed further with the determination of this matter. However, I have chosen to proceed and determine the other issues arising, notwithstanding my finding above.

33. I have considered the arguments for and against the application. The Order sought to be reviewed, varied or set aside is dated 25th January 2023. It reads as follows:

> "Notice having been given to show cause why this suit should not be dismissed and there being no satisfaction response, the suit is hereby dismissed under Order 17 Rule 2 (1) of the Civil Procedure Rules."

34. It is not true, as argued by the Applicant, that the dismissal was as a result of non-attendance in court of his advocates. The dismissal was anchored on Order 17 Rule 2(1) of the Civil Procedure Rules, which provides that:

> 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.

35. The record of the court shows that this court issued a Notice to show cause dated 16th December 2022. That Notice shows that after the case was filed on 10th July 2020, no other action was taken in the matter. The Applicant, who is the Plaintiff was notified to attend court on 25th January 2023 to show cause why the suit should not be dismissed for want of prosecution.

36. The Applicant, through his counsel, has claimed that he was not served with the Notice of show cause. Even if this court were to believe this argument as true, there is no evidence to demonstrate what efforts the Applicant made towards following up the suit after filing the same, Covid 19 notwithstanding. There is no evidence exhibited including a letter or any other communication to the Deputy Registrar enquiring whether the matter was transferred to the Chief Magistrate's Court, or even pursuing issuance of Summons to enter appearance.

37. Further, court record shows that the suit was dismissed on 25th January 2023. The Applicant did not bring the instant application until 10th April 2025, over two years after the dismissal.

38. An application for review of court orders is brought by a party on account of:

    i. 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

    ii. On account of some mistake or error apparent on the face of the record, or

    iii. For any other sufficient reason.

39. The application for review must be filed without unreasonable delay.

40. The Applicant has not demonstrated that his application qualifies for review under all, or any of the above headings. Besides, it is my considered view that a delay of over two years is by any means unreasonable. He did not demonstrate discovery of new and important matter or evidence that was

not within his knowledge, or mistake or error apparent on the face of the record or show any other sufficient reason.

41. I support the view that mistakes of counsel should not be visited on the client. However, I wish to state that a case belongs to a party and it is upon that party to employ pressure on his counsel on following up on a matter in court. Besides the dismissal was not due to non-attendance but due to want of prosecution. Had the Applicant been vigilant, he would have pursued his case to know the status.

42. Consequently, after considering all the issues arising from this matter, it is my finding that the Notice of Motion dated10th April 2025 lacks merit for the reasons given in this ruling. It is hereby dismissed with costs to the Respondent.

43. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 4TH NOVEMBER 2025.

S. N. MUTUKU

JUDGE