

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 243 OF 2019

ERICK NG'ENO.....PLAINTIFF/APPLICANT

-VERSUS-

THE STAR PUBLICATION

LIMITED 1ST DEFENDANT/RESPONDENT

RADIO AFRICA LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. For determination is **Erick Ng'eno's** (*hereafter the Plaintiff/Applicant*) **motion dated 09/04/2025** filed pursuant to **Section 1A, 1B, 3 & 3A** of the **Civil Procedure Rules (CPR), Order 12 Rule 7** and **Order 45 Rule 1, 2 & 3** of the **Civil Procedure Rules (CPR)** seeking as against **The Star Publication Ltd** and **Radio Africa Ltd** the following orders-;

- a) *Spent*
- b) *That this honorable Court be pleased to review, vary and or set aside the orders of this honorable Court entered on 14/10/2022.*
- c) *Spent*
- d) *That the suit be reinstated for hearing.*
- e) *That the honorable 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 circumstance of this case.*
- f) *That the costs of the application be provided for.*

2. The **motion is premised on grounds** found at the supporting affidavit sworn by **Kibe Mungai Advocate** on **even date**, who cites being counsel on record for the Plaintiff.
3. **The Star Publications Ltd** and **Radio Africa Ltd** (*hereafter the 1st & 2nd Defendant/Respondent*) oppose the Plaintiff's motion by way of a **replying affidavit** deposed by **Mercy Gichoya**, dated **03/06/2025**, who on her part cites being counsel on record for the Defendants.
4. Despite directions being taken on disposal on the Plaintiff's motion by way of written submissions, neither of the parties complied. That said, the Court has duly considered the rival affidavit material on record, to wit, the Court postulates that the issue(s) presenting for determination as can be garnered from the rival material **concerns -:**
 - a) ***Whether the Court ought to set aside and or review its orders of 14/10/2022?***
 - b) ***Whether the Court ought to reinstate the Plaintiff's suit for hearing?***
 - c) ***Who ought to bear the costs of the motion?******Whether the Court ought to set aside and or review its orders of 14/10/2022 and as a consequence reinstate the Plaintiff's suit for hearing?***
5. In presenting the instant motion, the Plaintiff among other provisions of the CPA cites **Section 3A** which specifically 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"", to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in **Rose Njoki**

King'au & Micugu Wagathara v Shaba Trustees Limited & City Council of Nairobi [2018] KECA 216 (KLR) and requires no restatement.

6. Alongside the above provision, the Plaintiff relies on **Order 12 Rule 7** of the **CPR**, 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.”* The Plaintiff also cites **Order 45 Rule 1, 2 & 3** of the **CPR** that concerns -; *grounds upon which an application for review may be premised upon; to whom an application for review may be made; and whether the Court may grant or reject an application for review.*
7. Nevertheless, from the record, the Court notes that the Plaintiff's suit was dismissed on 14/10/2022, by **Sergon J.** for want of prosecution, pursuant to **Order 17 Rule 2(1)** of the **CPR**. Notably, **Rule 2(6)** of **Order 17** provides that *“A party may apply to the Court after dismissal of a suit under this Order”*.
8. Therefore, the aptly applicable provision with respect to the Plaintiff's motion would be **Order 17 Rule 2** and not **Order 45** or **Order 12** of the **CPR** as cited by the Plaintiff. In any event, neither of the grounds, available in **Order 45 Rule 1(1)** of the **CPR**, upon which an application for review may be anchored on, have been advanced by the Plaintiff in the grounds in support of the motion or affidavit material.
9. With the above in reserve, it is since settled that the power to grant or refuse to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and

unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside conferred upon the Court was spelt out in the case of **Shah v Mbogo and Another [1967] E.A 116** thus;

“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.”

10. The principles enunciated in **Shah v Mbogo** (supra) were amplified further by **Platt JA** in **Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193**. Although the Courts in the above cases were contemplating applications to set aside *ex parte* judgments, the principles pronounced therein apply with equal force in this matter. Indeed, the dismissal order issued herein is equivalent to a judgment as it determined the suit by way of dismissal.
11. The events leading up to the instant motion have, in part, been captured by the rival affidavit material. However, for the benefit of the Court and parties hereto, it necessitates setting out the same in brief, in order to contextualize the disputation presently for consideration before the Court.
12. The Plaintiff filed the instant suit in 2019 whereinafter the Defendants entered appearance and filed defence in 2020. Since filing suit, there was no activity in the matter up until the Deputy Registrar (DR) of the High Court - Civil Division, issued a Notice to Show Cause (NTSC), for hearing on 24/02/2022,

pursuant to **Order 17 Rule 2** of the **CPR**, on why the suit ought not to be dismissed.

13. From the record alongside the Case Tracking System (CTS), on the latter date, the matter seems not to have taken off, as the Court was not sitting. On the premise of the latter the Deputy Registrar (DR) of the High Court issued another Notice to Show Cause (NTSC), for hearing on 14/10/2022, on why the suit ought not to be dismissed.
14. *Ex facie*, a perfunctory view of the Notice to Show Cause (NTSC), was addressed to the respective counsel representing the parties as per their addresses on their pleadings before this Court. A return of service by the Court process server is equally attached thereto, capturing the said Notice to Show Cause (NTSC), were mailed to the respective counsel for the parties, through the last known address.
15. It is on the premise of the above that when the suit came up before **Sergon, J.** on 14/10/2022, upon being satisfied with service of the Notice to Show Cause (NTSC) and considering representation from counsel for the Defendants, who was in attendance on the said date, the Court proceeded to pronounce itself as follows-;

*“Notice having been given to show cause why this suit should not be dismissed and there being no satisfactory response, the suit is hereby dismissed under **Order 17 Rule 2(1) of the Civil Procedure Rules (CPR).**”*
16. While the discretion of the Court to set aside a dismissal order is unfettered, a successful Applicant is obligated to adduce

material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in their favor.

17. By the Plaintiff's affidavit material, counsel posited that the Plaintiff did not deliberately or otherwise sought, whether by evasion or otherwise, to obstruct or delay the cause of justice, save for inadvertent actions or inactions which were not the Plaintiff's instructions. Counsel goes on to depose that the dismissal made on 14/10/2022 was made through no fault or wrongdoing on the part of the Plaintiff. Whereas, the suit was dismissed for non-attendance of counsel occasioned by a mix-up in Court dates, inadvertently brought about by the Court not sitting on the date the NTSC was scheduled to come up.
18. Counsel further deposed that he was not served with the notice for 14/10/2022 therefore non-attendance on the latter date was unintentional whereas despite an earlier date for the NTSC being issued on 24/02/2022, the same did not proceed, to wit, no new date was taken out.
19. That parties had equally been negotiating on an amicable out of Court settlement whereas the Country had equally been marred by Covid-19 Pandemic, prior to dismissal of the suit, thus destabilizing and severely disrupting Court processes. Counsel concludes by stating that the Plaintiff is keen on prosecuting the suit, has a good case with reasonable chance of success as against the Defendants meanwhile there has been no delay in filling the motion, as such, it ought to be allowed as prayed.

20. The Defendants, likewise through counsel, assail the Plaintiff's motion by stating that since filing the suit the Plaintiff never took any steps towards preparing and or prosecuting it. The Defendant further takes issue with Plaintiff's motion by stating that despite the Plaintiff having been served with a NTSC, neither the Plaintiff nor his counsel on record filed an affidavit in response to the NTSC towards explaining the delay.
21. That delay in bringing the instant motion since dismissal of the suit is inordinate and unexplained. The Defendants further contend that no negotiations on the matter have been attempted since filing suit. That it is the duty of the Plaintiff to prosecute his suit, to wit, the instant motion is an afterthought that amounts to pure abuse of the Court process. Therefore, allowing the motion would only serve to occasion prejudice upon the Defendants as such it ought to be dismissed with costs.
22. With above in reserve, applying my mind to the dicta in **Shah v Mbogo** (supra), while it is true that the Deputy Registrar (DR) of the High Court - Civil Division, first issued a NTSC for 24/02/2022, as rightly stated by counsel for the Plaintiff, the Court was not sitting then. However, the Deputy Registrar (DR) subsequently issued a NTSC for 14/10/2022, which from the record appears to have been duly served upon the parties. The latter is manifested by the fact that counsel for the Defendants appeared on 14/10/2022 when the NTSC came up for hearing.
23. The Court is equally not convinced by the Plaintiff's counsel argument that it was not served with the NTSC for 14/10/2022. *Ex facie*, the first NTSC captures the Plaintiff's advocates address as similar to the second NTSC. Therefore it is quite

peculiar that the Plaintiff can now purport that it was not served with the NTSC yet it has not challenged the address appearing in its pleadings and replicated as the address of service for counsel for the Plaintiff. In any event, and at the risk of repetition, the NTSC must have been served given the attendance in court of the Defendants counsel on 14/10/2022.

24. With respect to negotiations as evinced by **Annexure KM-2**, in the affidavit in support of the motion, having taken the liberty of perusing the same, the Court's deduction of the same is that, the correspondences appear to be letter before action, with the last letter by Plaintiff counsel drawn on 22/08/2019. From the record the instant suit was filed on 06/11/2019, to wit, I am inclined to agree with the Defendants that no negotiations on the matter have been attempted since filing of the suit.
25. As may concern, the adverse effects of the Covid-19 Pandemic, while the Court is alive to the challenges the pandemic presented, it is a matter of public record that as early as 2020 the Judiciary Leadership transitioned Court processes and proceedings to electronic and virtual platforms at the onset of the Covid-19 pandemic. Nothing precluded the Plaintiff from availing itself of the Court's virtual and electronic platforms in the progression and prosecution of the suit, at the time.
26. And in any event, while the Plaintiff was alive to the fact that there was NTSC towards dismissal of the suit, the Plaintiff and or counsel made no attempts to file an affidavit in response to deflect the NTSC, as is the practice. Neither was an attempt made by the Plaintiff, to explain by way of affidavit the steps it took, since instructing counsel, either by inquiring on the status

of the matter or imploring counsel to progress the matter. As is, the Plaintiff has left the momentous attempt to reinstate the suit to counsel, whereas it is trite that cases belong to the litigants who file them and not counsel.

27. The suit was dismissed on 14/10/ 2022 and it is not until 2025, three years thereafter that the Plaintiff, through counsel moved to reinstate the suit. No explanation has been offered for the delay within that period and filing the instant motion. Undoubtedly, the total delay in this matter is inordinate and unexplained in any event. A party seeking to vary, set aside an order and or reinstate a suit must show candour, rather than attempt to explain lethargy, with frail excuses, as done here. The total delay here is almost three (3) years, and no good cause, beyond laying blame on peripheral quarters.
28. It is trite that a party seeking to set aside an order and or reinstate suit must not be seen to presume on the Court's discretion. *Good and sufficient* cause is what would unlock the said discretion whereas **Makhandia JA in Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui [2019] KECA 112 (KLR)**, exhorted that-;

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained; hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”

29. Further, **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] KECA 987 (KLR)** the Court held that part that

“Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

30. The same Court in **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] KECA 674 (KLR)** held that:

*“..... (in **Mwangi v Kariuki [1999] LLR 2632 (CAK) Shah, JA.** ruled that “mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.” The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.”*

31. The cause of action in this case allegedly arose in 2019. Although the Plaintiff’s right to be heard is constitutionally guaranteed, it is not absolute and must be balanced against the corresponding right of the party who has been dragged to Court to have the dispute expeditiously determined. At a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute his case at leisure, in total disregard of the overriding objection encapsulated in **Section 1A** and **1B** of the **CPA** by which parties and counsel are duty bound to cooperate with the Court in furthering the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.

32. Regarding the latter provisions, the Court of Appeal stated the following in **Karuturi Networks Limited & another v Daly & Figgis Advocates [2009] KECA 8 (KLR)**

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court.”

33. **The Court having considered the foregoing is not persuaded that the Plaintiff has made a case warranting the reinstatement of his suit. It would be a travesty of justice to reinstate this suit to continue limping unresolved, and appears likely, for another elongated period. The Plaintiff's actions since filing the matter manifestly exhibits lethargy towards hearing and disposal of his suit. The Court is of the firm view that the justice of the matter lies in dismissing the Plaintiff's motion dated 09/04/2025 with costs to the Defendants. It is so done.**

Orders Accordingly.

Delivered Dated and Signed at Nairobi this 26th day of February, 2026.

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JANET MULWA.

JUDGE

ORIGINAL