

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 555 OF 2009

G.B.M. KARIUKI.....PLAINTIFF/APPLICANT

-VERSUS-

THE NATION MEDIA

GROUP LIMITED.....1ST DEFENDANT/RESPONDENT

SHARLENE SAMAT.....2ND DEFENDANT/RESPONDENT

JASMINE MISTRI.....3RD DEFENDANT/RESPONDENT

CAHRLES KIARIE.....4TH DEFENDANT/RESPONDENT

RULING

1. For determination is the motion **dated 26/06/2025** filed by **G.B.M. Kariuki** (*hereafter the Plaintiff/Applicant*) pursuant to **Order 10 Rule 11** and **Order 12 Rule 7** of the **Civil Procedure Rules (CPR)** seeking as against **The Nation Media Group Ltd, Sharlene Samat, Jasmin Mistri** and **Radio Africa Ltd** (*hereafter the 1st & 2nd Defendant/Respondent*) the following orders-;
 - a) *Spent*
 - b) *That this honorable Court be pleased to set aside and or vacate its orders dismissing the suit and reinstate the suit for hearing on merits.*
 - c) *That the costs of the application be provided for.*
2. The **motion is premised on grounds** found at the supporting affidavit sworn by **G.B.M. Kariuki, on an even date.**
3. The **Defendants** opposes the Plaintiff's motion by way of a **replying affidavit** deposed by **Sekuo Owino, dated**

19/09/2025, who on his part cites being general counsel of the 1st Defendant.

4. Despite directions being taken on disposal on the Plaintiff's motion by way of written submissions. Neither party 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 vacate the orders dismissing the Plaintiff's suit and reinstate it for hearing on merit?*

b) *Who ought to bear the costs of the motion?*

Whether the Court ought to set aside and or vacate the orders dismissing the Plaintiff's suit and reinstate it for hearing on merit?

5. In presenting the instant motion the Plaintiff relies on **Order 10 Rule 11** of the **CPR** which provides that "where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just". Notably, **Order 10**, concerns consequences of non-appearance, default of defence and failure to serve. Alongside the above provision, the Applicant 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."
6. Nevertheless, from the record, the Court notes that the Plaintiff's suit was dismissed on 27/02/2015, by **Ngaah, J.** for want of

prosecution, pursuant to **Order 17 Rule 2(1)** of the **CPR**. Pursuant to **Legal Notice No. 22 of 2020**, **Order 17 Rule 2** of the **CPR** was amended by inserting **Sub-Rule 2(6)**, which provides that “A party may apply to the Court after dismissal of a suit under this Order”. Therefore, the aptly applicable provision with respect to the Plaintiff’s motion would be **Order 17 Rule 2** and not **Order 10** or **Order 12**, as cited by the Plaintiff.

7. 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**:

“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.”

8. 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 on 27/02/2015, is equivalent to a judgment. It in essence, determined the suit by way of dismissal.

9. 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.
10. The Plaintiff filed the instant suit in 2009 whereinafter the Defendants entered appearance and filed defence in 2010. The Defendants thereafter moved the Court to strike out the Plaintiff's suit vide a motion dated 01/12/2011, which motion, was dismissed by **Odunga, J.** (as he then was) in a ruling delivered on 26/11/2012. Subsequently there was no activity in the matter up until the suit was dismissed on 27/02/2025.
11. By the Plaintiff's affidavit material, he states that he instructed **M/s Macharia Kahonge & Co. Advocates** in 2011 to take over conduct of the matter from **Musalia Mwenesi Esq Advocate**. He goes on to state that while he was still a public officer and prior to delivery of the ruling on 26/11/2012, he made efforts without success to contact **M/s Macharia Kahonge & Co. Advocates**, as the latter was never in his office and his enquiries from the Law Society of Kenya, established that his whereabouts were unknown.
12. That it was around August 2024, when he discovered that the suit had been dismissed in 27/02/2015, to wit, he proceeded to instruct his present counsel on record to take up conduct of the matter on his behalf whereas the dismissal of the suit was not within his knowledge.
13. The Defendants, through **Sekuo Owino**, assails the Plaintiff's motion by stating that alongside the instant matter the Plaintiff

filed **Nairobi HCCC No. 556, 560 & 562** of **2009** as against the 1st Defendant alongside this suit, with the latter suits being consolidated. That parties negotiated on settlement of the matters wherein it was agreed that the instant matter would be settled at Kshs. 2,500,000/- and the consolidated matters be settled at Kshs. 2,250,000/- thus totaling Kshs. 4,750,000/-

14. On 31/07/2014, the Plaintiff's advocate **M/s Macharia Kahonge & Co. Advocates** informed the Defendant's advocate on having instructions to settle the matter as proposed, to wit, the proposal was accepted by the Defendant's advocate and consents executed to the foretold effect. He states that on 29/08/2014, the Plaintiff's advocate on record at the time was paid Kshs. 750,000/- by the Defendants' insurer whereas the balance of Kshs. 4,000,000/- was paid by the 1st Defendant. That to the best of his belief the matter was effectively settled as between the parties.
15. In any event, he goes on to depose that there was inordinate delay in prosecution of the suit; that the 3rd and 4th Defendant left the employment of the 1st Defendant, to wit, their whereabouts are unknown; that it would be difficult to defend the claim to due lack of documents which has since long been disposed by their advocates on record due to effluxion of time, as such, the Defendant would suffer prejudice which cannot be compensated by an award of costs if the suit is reinstated.
16. At the outset, a perfunctory review of the documentation annexed as "**SO-1**" in the Defendants affidavit in support of the motion I garner from the correspondences therein between **M/s Macharia Kahonge & Co. Advocates** and the Defendants

advocate on record that parties indeed were negotiating on settlement of the consolidated matters **Nairobi HCCC No. 556, 560 & 562 of 2009** alongside the instant suit, to wit, the proposal advanced by the former was accepted by the latter and a compromise arrived at. I further note from the said bundle of annexures that sometime in 28/08/2014 & 29/08/2014, the 1st Defendant's insurer, credited **M/s Macharia Kahonge & Co. Advocates** account with a total sum of Kshs. 750,000/- whereafter the balance of Kshs. 4,000,000/- was settled on 29/09/2014.

17. That said, it is conspicuous that no retort was offered by the Plaintiff in the face of the aforestated documentary evidence availed by the Defendants, to wit, given the material evinced by the Defendants it would be problematic not to conclude that the suit was indeed compromised.
18. In any event, even if the latter was not the position, concerning the merits of the motion, applying my mind to the dicta in **Shah v Mbogo** (supra), it is not in dispute that since filing suit there was inactivity in the matter. Save for the Defendants motion that was dismissed by **Odunga, J.** (as he then was). Therefore, record is explicit with the Plaintiff's want of an attempt towards prosecuting the suit or attempts at prosecuting the suit since its inception.
19. The Plaintiff has by way letters evinced in annexure "**GBM2**" occasioned to explain the attempts he undertook to find out the whereabouts of erstwhile counsel. The earliest of the said letters is in 2018, addressed to erstwhile counsel, and the subsequent letter in 2022, is addressed to **M/s Wanjama & Co. Advocates**

inquiring the whereabouts of the erstwhile counsel and lastly another letter Investigator in 2023, to an investigator.

- 20.** While I appreciate the industry employed by the Plaintiff through his latter letters there is no demonstration of any attempts to prosecute the suit made since filing of the suit in 2009 until its dismissal in 2015.
- 21.** It is not in doubt that up until sometime in 2018 the Plaintiff was serving as a Judge of the Court of Appeal, his service in public office was not a hindrance to the prosecution of his case as instituted. Therefore, some industry ought to have been employed, to inquire about the matter between 2009 and 2015. Lastly, even after discovery that the suit was dismissed in August 2024, it was not until May 2025 that the instant motion was filed.
- 22.** It is trite that cases belong to the litigants who file them and not counsel. Here, the suit was dismissed in 2015 and it is not until 2025, that the Plaintiff, through counsel moved this Court. Further no explanation has been offered for the identifiable delay between 2009 to 2015; and when the Plaintiff discovered the suit was dismissed, to filing the instant motion. Undoubtedly, the total delay in this matter is inordinate and unexplained in any event.
- 23.** A party seeking to vary, set aside an order and or reinstate a suit must show candour, rather than attempt to explain lethargy. No good cause has been demonstrated from the affidavit beyond laying blame on peripheral quarters.
- 24.** 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.....”

25. Further, **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] KECA 987 (KLR)** the Court held in 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.”

26. 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.”

27. As earlier noted, the suit was filed 2009 with the cause of action therein originating earlier. 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. Further, the Court is inclined to believe that given the age of the matter, reinstating the suit is likely to cause prejudice against the Defendants due to unavailability of witnesses, as deposed.
28. That said, at a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute their 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 co-operate with the Court in furthering the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.
29. Regarding the above 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.”

30. Aside from the earlier deduction, that the suit must have possibly been compromised, in the absence of any rebuttal by the Plaintiff on the issue, and the Court having equally considered the facts in support of the motion, I am not persuaded that the Plaintiff has made out a case to warrant the setting aside of the dismissal order and reinstatement of his suit.
31. For the foregoing the Court is of the firm view that justice in the matter lies in dismissing the Plaintiff’s motion **dated 26/06/2025, which is hereby dismissed with costs to the Defendants.**

Orders accordingly.

Delivered Dated and Signed at Nairobi this 12th March, 2026.

.....

JANET MULWA.

JUDGE