



**Nation Media Group Limited & 4 others v Jeruiyot (Civil Appeal
E718 of 2021) [2024] KEHC 1700 (KLR) (Civ) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1700 (KLR)

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

CIVIL

CIVIL APPEAL E718 OF 2021

DAS MAJANJA, J

FEBRUARY 22, 2024

BETWEEN

NATION MEDIA GROUP LIMITED 1ST APPELLANT

STEPHEN GITAGAMA 2ND APPELLANT

MUTUMA MATHIU 3RD APPELLANT

PAMELLA MAKOTSI SITTONI 4TH APPELLANT

HILLARY KIMITU 5TH APPELLANT

AND

BRENDA JELAGAT JERUIYOT RESPONDENT

JUDGMENT

Introduction and Background

1. By a Plaintiff dated 16.07.2020, the Respondent filed suit in the Subordinate Court against the Appellants seeking general, exemplary, aggravated and punitive damages arising out of stories, which she alleged defamed her, published in the 1st Appellant's newspaper in its print online editions of 30.05.2019 and 04.06.2019, which publications the Respondent claims were defamatory to her.
2. The Appellants filed a defence denying the claim and an application dated 20.04.2021 seeking to strike out the suit on the ground that it was statute barred under the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya). They averred that the Respondent ought to have filed her claim on or before 30.05.2020 and 04.06.2019 as the subject articles were published on 30.05.2019 and 04.06.2019 respectively. The Appellants contended that pursuant to section 4(2) of the *Limitation of Actions Act* the Respondent's claim having been filed on the 22.07.2020 was filed outside the one (1) year statutory period and was therefore barred by limitation.



3. The Appellants' application then triggered the Respondent to respond with an application dated 24.05.2021 seeking leave of the court to enlarge time for filing the suit out of time. The Respondent admitted that the suit was indeed filed out of time but explained that the delay was due to the prevailing COVID-19 curfew that delayed forwarding documents to her advocates for her signature and thereafter getting a lawyer to commission them. That her advocates prepared the pleadings in good time and through their letter dated 06.12.19, invited her to come over to sign them but she was out of Nairobi and was unable to see the advocates in good time. The Respondent averred that if the periods when time does not run like the Summer vacation which commences on 1st August and terminates on 15th September, the Christmas vacation which commences on 21st December and terminates on the 13th January, the Easter vacation which commences on the second Thursday before Good Friday and terminates on the Tuesday after Easter week and Public Holidays are taken into account, then the Respondent was 46 days late which is not unduly or unreasonably long.
4. In the circumstances, the Respondent pleaded that it will only be just and equitable that the court allow her to file the suit out of time as the Appellants would not suffer any prejudice. The Respondent relied on Article 159 of *the Constitution* and the overriding objective set out in the Civil Procedure Rules and urged the court to sustain the suit and administer justice without undue regard to procedural technicalities. In response to the Appellants' application, the Respondent filed Ground of Opposition dated 31.05.2021 restating the grounds highlighted in her application for leave to file the suit out of time.
5. The Appellants opposed the Respondent's application through Grounds of Opposition dated 23.07.2021. They stated that the application offends the mandatory provision of section 4(2) of the *Limitation of Actions Act* and section 20 of the *Defamation Act* (Chapter 36 of the Laws of Kenya). That the claim being one for defamation, the Subordinate Court lacked the jurisdiction to extend time of filing the suit outside the prescribed one-year period.
6. In a ruling on 30.09.2021 ("the Ruling"), the Subordinate Court considered whether it had the power to enlarge time to allow the filing of a defamation action out of time limited by the *Limitation of Actions Act*. In summary, though the Respondent's justifications for failure to file suit on time were not substantiated by evidence, the Subordinate Court held that the Appellants would not suffer any prejudice if leave was granted and the Respondent allowed her day in court by filing the suit out of time. The trial court allowed the Respondents' application and in effect dismissed the Appellants' application to strike out the suit, the time for filing having been enlarged.
7. The Appellants are aggrieved by the Ruling. They have filed an appeal through their memorandum of appeal dated 30.10.2021 where they seek to set aside the Ruling. They pray that this court dismiss the Respondent's application dated 24.05.2021 and allow their application dated 20.04.2021. The appeal has been canvassed by way of written submissions which I have considered and will make relevant references to my analysis and determination.

Analysis and Determination

8. The Appellants are challenging the trial magistrate's exercise of discretion to enlarge time for the Respondent to file the suit in the subordinate court. It is now settled that an appellate court will not interfere with a discretionary decision of a trial court unless it is satisfied that the court, in exercising the discretion has ignored some material matters or took into account immaterial matters and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of their discretion and that as a result there has been an injustice



(see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR).

9. The limitation period for defamation actions is set out in section 4(2) of the *Limitation of Actions Act* which provides:

4(2) 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. [Emphasis mine]

10. The Respondent admitted that she filed her suit was outside of the statutory 12-month period aforesaid and that is why she filed an application to enlarge time for filing the suit. The Appellants contention is that the Subordinate Court lacked jurisdiction to enlarge time as the suit was already time-barred. As submitted by the Respondent, the Court of Appeal in *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijwe* NYR CA Civil Appeal No.124 of 2003 [2007] eKLR held as follows in respect of the phrase “may not” that runs through some provisions of the *Limitation of Actions Act*:

This appeal raises the question of the true construction of section 4 (4) of the Act. Firstly, there is the problem of the construction of the words “may not” in the phrase: “An action may not be brought” The learned Judge construed the phrase “may not” as giving the court discretion whether or not to allow the enforcement of a judgment after the expiration of twelve years from the date of delivery. But does the court have any discretion in law? It is noticeable that the phrase “may not” is not confined to section 4 (4) of the Act only. The same phrase is used throughout in Part II of the Act in relation to the other causes of action. It is also used in the whole of section 4 of the Act in relation to actions founded on contract and other related actions. It is used in section 4 (2) of the Act in relation to actions founded on tort and in section 4 (3) regarding actions for accounts. It is also used in section 7 in relation to actions to recover land and in section 8 in actions to recover rent. It is again used in relation to other causes of action in sections 10 (3), 19 (1), 19 (2) of the Act. The use of the phrase “may not” does not however give the court absolute discretion whether or not to apply the limitation periods prescribed for various causes of action. If the legislature intended to give absolute discretion to the courts it would have expressly provided so in the Act. The Act should be construed as a whole in order to discover the legal meaning of the phrase. After prescribing limitation periods for various actions, the legislature provided safety mechanism or escape routes from the rigours of the Act to avoid injustice by providing for the extension of limitation periods in the restricted cases specified in part III of the Act. These include cases where a person to whom the cause of action accrues is under disability. Indeed, section 3 of the Act provides that part II of the Act which specifies various limitation periods is subject to part III which provides for extension of the periods of limitation. It provides:

“This part is subject to part III which provides for the extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud, mistake and ignorance of material facts”.

If the legislature used the phrase “shall not” instead of “may not” in relation to causes of action specified in part II of the Act, then, part II would have been repugnant to part III.

The learned Judge erred in construing the phrase “may not” in isolation and thus arrived at a wrong finding. It is an erroneous construction of section 4 (4) of the Act or other sections



in part II where the same phrase is used to say that the court has a discretion. The true construction in our respectful view, is that, the periods of limitation prescribed by the Act in part II are not absolute as they are subject to extension in cases where a party brings himself squarely within the ambit of the provisions of part III.

11. From the above exposition of the Court of Appeal, it follows that even though the court has discretion to allow extension for some periods of limitation, this discretion is not absolute and can only be exercised in restriction if a party brings itself under Part III of the *Limitation of Actions Act* which provides that the only instances where periods of limitations can be extended are in cases of “disability, acknowledgment and part payment, fraud, mistake and ignorance of material facts”. I note that the Respondent did not bring herself into any of the grounds aforementioned. Her grounds were that she was out of Nairobi and thus unable to sign the pleadings in time as a result and effect of the disruptions of the COVID-19 pandemic. In any case, the time when the High Court is in recess is not excluded from the computation of time under the *Limitation of Actions Act*.
12. As the Court of Appeal observed in *M’ikiara M’rinkanya & Another (Supra)*, grounds that are not covered by Part III aforesaid could not extend the limitation periods under the Limitation of Action Act. In finding that it had discretion to enlarge time, the Subordinate Court relied on this court’s decisions in *Royal Media Services Ltd v Valentine Mugure Maina & another [2019] eKLR* and *Nation Media Group Limited & 2 others v Margaret Kamene Wambua [2021] eKLR*. In both cases, the court held that it had the power to enlarge time for filing a defamation suit. Ultimately, whether a plaintiff succeeds must depend on the facts presented and whether they fall within the conditions set out in Part III of the Act. The Respondent, in this case, failed to prove that it was entitled to relief. Having reached this decision, I do not think it is necessary to determine whether the court can extend time in defamation cases.

Disposition

13. Having found that the Respondent did not advance valid reasons for the Subordinate Court to exercise its discretion in her favour, I allow this appeal on the following terms:
 1. The Respondent’s application dated 24.05.2021 be and is hereby dismissed and the Appellants’ application dated 20.04.2021 be and is hereby allowed hence the Respondent’s suit before the Subordinate Court be and is hereby struck out.
 2. The Respondent shall pay the Appellants costs of the suit before the Subordinate Court.
 3. The Respondent shall pay costs of this appeal assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Ms Odumo instructed by Archer and Wilcox Advocates for the Appellants.

Mr Simiyu instructed by KTK Advocates for the Respondent.

