



Big Tree Farm Limited v Rono & 25 others (Environment & Land Case 104 of 2018) [2022] KEELC 4873 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 104 OF 2018
FO NYAGAKA, J
SEPTEMBER 22, 2022**

BETWEEN

BIG TREE FARM LIMITED PLAINTIFF

AND

MARY ANGOLA RONO & 25 OTHERS DEFENDANT

RULING

1. The Plaintiff's Notice of Motion Application dated May 25, 2022 and filed on the same date relied on the provisions of Article 159 (2) of *the Constitution*, Section 1, 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 12, Rule 7 and Order 51, Rule 1 of the *Civil Procedure Rules*. It sought:
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 2. ...spent
 3. That the proceedings and orders of this Honorable Court of February 1, 2022 and orders dismissing the Plaintiff's case/suit and all the consequential orders thereto be reviewed, varied and/or set aside and the Plaintiff's suit/case therein be reinstated and the suit be heard and determined on a priority basis.
 4. That costs of this Application be in the cause.
2. The Application is supported by the grounds on its face and Affidavit of Gladys Nakhumicha Wabuge, a director of the Plaintiff Company. The facts stated in the Application are that the suit was dismissed on February 1, 2022 as the Plaintiff or its former Counsel, Messrs Simiyu Wafula & Company Advocates, failed to furnish sufficient reasons to obtain an adjournment. Due to a communication breakdown from 2020, the Plaintiff was never made aware of neither the hearing of the matter slated for 01/02/2022 nor the denial of adjournment.



3. The Plaintiff accused its former Advocates of having a propensity to and actively not apprising it of the developments in the matter as and when they occurred. The said Advocates, and in particular Mr. Michael Wafula Simiyu, ignored the Plaintiff's calls and text messages and was never available in his chambers when the deponent or her representative visited his chambers.
4. The Applicant's contention was that on May 18, 2022, the deponent was informed by a court clerk that the matter was poised to be mentioned on May 23, 2022 to confirm the filing of submissions on the Defendant's substantive counterclaim. Since the Plaintiff's former Advocates were still unavailable as at May 20, 2022, the Plaintiff instructed another firm of Advocates who came on record on May 24, 2022. It annexed the Notice of Change of Advocates to the Affidavit marked GNW1.
5. Further it was argued that once the present Advocates came on record, it was discovered upon perusal of the court file on May 23, 2022, which the Plaintiff suit had been dismissed on February 1, 2022 as, in their terms, learned counsel on record gave unsatisfactory reasons in applying for an adjournment. But the fact is that the file was placed aside to enable Mr. Wafula address the court personally as he had instructed another Advocate to hold his brief and adjourn the suit. He was waited for more than half a day. However, he did not show up leading to the dismissal of the Plaintiff's case.
6. It urged that the mistake of an Advocate should not be visited upon the client. It stated that it was in the interest of justice that the Application be allowed as it desired to prosecute its case. A denial of the orders sought would occasion a miscarriage of justice. It thus prayed that the Application be allowed as prayed.

The Response

7. The Application was opposed by the 7th, 11th, 21st and 24th Defendants. Their joint Replying Affidavit was sworn by the 21st Defendant on June 2, 2022 and filed on that day. They opined that the Application was misconceived, bad in law and an abuse of the process of the court. They accused the Plaintiff of misleading the court as it was well aware of the date fixed for hearing which was taken in the presence of all parties' respective Counsel. They deposed that the suit was dismissed in the presence of the Plaintiff who was aware that the matter had a last adjournment order on record. They added that in spite of being given ample time to prepare their case, the Plaintiff failed to do so; it was not serious. They cited that there was a delay in filing the instant Application. If the Application is allowed, it would occasion a miscarriage of justice upon the Defendants. Furthermore, the Plaintiff was not deserving of the orders sought as he had approached the court with unclean hands having failed to pay costs per the court orders of on November 4, 2019 and November 17, 2021. They urged this court to dismiss the Application with costs.

Submissions

8. Parties agreed to dispose of the Application by way of written submissions. The Plaintiff submitted that the Defendants will suffer no prejudice if the Application is allowed. It submitted that the Plaintiff took diligent steps to establish the progress of the matter but the same was an exercise in futility as its former Advocates failed to brief the Plaintiff. It maintained that it was vigilant and not indolent. The Plaintiff contended that the subject matter concerned a very substantive property of land. It was thus in the interest of justice that the suit be heard on its merits rather than dismissed on technicalities. It fortified its submissions by relying on Articles 25 (1), 48, 50 and 159 of *the Constitution*. It advanced that the subject of the litigious proceedings herein raised triable issues with high chances of success. For those reasons, they pleaded with the court to grant the reliefs sought.



9. On the part of the 7th, 11th, 21st and 24th Defendants, it was submitted that no sufficient reasons had been advanced to warrant the grant of the orders sought. They adopted the contents of their Replying Affidavit imploring this court to dismiss the Application with costs.

Analysis and Disposition

10. I have considered the Application, the grounds as well as the Affidavit in support. I have also considered the Replying Affidavit and the filed submissions. The Plaintiff seeks to reinstate its suit. The Application is anchored on Order 12, Rule 7 of the *Civil Procedure Rules*.
11. The principles governing setting aside ex-parte judgments and orders is now well settled in our jurisdiction. I cite the case of *Shah -vs- Mbogo & another* [1967] EA 116 which extensively dealt with the issue. In it the learned judge held thus:
- “I have carefully considered, in relation to the present Application, the principles governing the exercise of the court’s discretion to set aside a judgment obtained *ex-parte*. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
12. The Plaintiff/Applicant pleaded with this court to reinstate the instant suit in order that it may ventilate its case. The Plaintiff blamed its former Advocates on record for failing to inform it of the progress of the matter including the date the matter was listed for hearing. It added that the communication breakdown had spanned for over two (2) years since 2020. The Plaintiff maintained that it was intent on prosecuting its case that was merited. It urged this court not to dismiss its claim on account of technicalities. By the Applicant contending lack of communication with the learned counsel representing them, this Court was called upon to consider the issues the Applicant raised vis-à-vis the conduct of the Plaintiffs’ case prior to the material date and on the material date: that is to say, the totality of the conduct of the Plaintiff’s case leading up to the date of dismissal and particularly the reasons given for its non-attendance on the date of dismissal.
13. First, the Plaintiff contends that they lost contact with the Advocates for almost two years. If at all the allegations were anything to go by, one wonders why they failed to instruct another Advocate or in the alternative proceed with the matter pro se since it is the one that instituted the present suit. This does not manifest vigilance and intent to prosecute a matter that the Applicant wants this Court to believe that it has in the conduct of this matter. One would expect its vigilance to reflect on record by including an establishment in the position of the file as often as possible due diligence and zeal towards finding out, including in writing even to the Court or its then learned counsel as to what to do in the circumstances of not reaching its then Advocates rather than waiting for the tide when high to cry foul.
14. The general aphorism is that a mistake by an Advocate should not be visited upon his client. Consequently, as was stated in *Winnie Kibinge & 2 others -vs- March Electricals Limited* Civil Case No. 222 of 2010 “it does not follow that just because a mistake has been made, a party should suffer the penalty of not having his case heard on merit.”
15. Having said that, I discourage the conduct of parties to automatically blame their former Counsel when orders are entered against them. In such scenarios as is the present one, the erstwhile Advocates are not given the benefit of tendering evidence to demonstrate whether or not they discharged their duties as officers of the court. Be that as it may, the interest of justice dictates that suits are for sustaining rather than dismissing.



16. The Plaintiff contended that he was not aware of the progress of the matter and has every desire to proceed with the matter accordingly. However, I take note of the proceedings of February 1, 2022. The Plaintiff sought an adjournment in light of one of the directors' indisposition. To that extent it is clear that at all times the Advocate was in touch with the client. Therefore the argument by the Applicant that he was not in touch with the Advocate is wholly contradictory to the position was put forth by the Advocate on the material date. When two clashing facts are given by parties who are believed to know them well, it goes without saying that one of the two must be lying. There cannot be two opposites of the same fact and they be true.
17. It must be recalled that this is a Court of justice. It is one which expects to be presented with truth at all times, no matter how costly or painful that truth can and will be to the parties. Presentation of lies to the Court by a party in order to get away with orders or reliefs is a practice which must and should be abhorred completely. Actually, once it is discovered it should be punished severely. It does not matter whether the lie was presented on oath or otherwise. As long as it is presented to the Court for purposes of misleading it, it is punishable. In any event, if it is criminal and punishable Section 129 (a) of the Penal Code, Chapter 63 of the Laws of Kenya, in ordinary parlance, for one who gives false information to a person employed in the Public Service, so it should be for one who lies to Court. After all, Judges and Judicial Officers perform public service and should not be given false information in the course of their performance of duty. It is time legislators thought of enacting a law that goes to punish lies in courts beyond perjury.
18. To deliberately mislead the Court is one aspect of the practice that lawyers swore, upon admission to the Bar, never to do. It goes without saying that once the Advocate informed this Court that the client or witness was unwell, that was to be taken to be true, and further that the said Advocate was in touch with the client on that date or just before and confirmed that indeed it was true. If it turns out that the said individual who was said to be unwell gives another reason for non-attendance, it clearly shows that either he or his Advocate were intent on misleading the Court. That being so, this Court cannot, in its right mind, rely on an untruth to set aside its orders. Much less when there is no Affidavit from the learned counsel who attended Court and indicated to it otherwise than that he was not in touch with his client. Such variances are the ones that call for statements on oath as to who of the two is stating the truth because in the very least, they make a fuss of the Court and taint the sacredness of the Court process. And the Judge cannot shy away from aligning himself with the sentiments of Madan J (as he then was) when he stated in *N vs. N [1991] KLR 685* in the following terms:
- “I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”
19. Turning to the facts as were on the material date in this matter, no explanation was advanced by learned counsel who held brief for the Plaintiff's to explain why, in view of the Plaintiff having had two directors did not avail the other director in court on that day to testify, if one was unwell. If indeed, one of the director's was indisposed, why wasn't the other director called to testify? The Plaintiff appeared to indicate that it was only calling one director as a witness, which was not the case. That was one other reason why the Court found on the said date that the reason advanced by the Plaintiff for adjournment was unmerited.



20. In my view, the Plaintiff is not interested in prosecuting its case. Otherwise, the hearing would have commenced on February 1, 2022. For this reason, I find that the Application lacks merit and I hereby dismiss the same with costs to the Respondents.

21. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

