Pondeni Farmers' Cooperative Society Limited & another v Commissioner for Cooperative Development & 4 others (Petition 3 of 2010) [2024] KEELC 3599 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3599 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

PETITION 3 OF 2010

FO NYAGAKA, J

APRIL 4, 2024

BETWEEN

PONDENI FARMERS' COOPERATIVE SOCIETY LIMITED ..... 1ST APPLICANT

NATHAN MUTALI NMAS ..... 2ND APPLICANT

AND

COMMISSIONER FOR COOPERATIVE DEVELOPMENT .... 1ST RESPONDENT

FRANCIS O. KISIA (IN HIS CAPACITY AS LIQUIDATOR) . 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

LUKAS CHIRAKA CHITAI ..... 4TH RESPONDENT

PATRICK A. BOYO (IN HIS CAPACITY AS LIQUIDATOR) . 5TH RESPONDENT

RULING

1. Before me is a Notice of Motion dated 16th November 2023. It is brought by the Petitioners, under Articles 50 and 159 of *the Constitution* of Kenya, 2010, Sections 1, 3, 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and Orders 12 Rule 7 and 51 Rule 1 of the Civil Procedure Rules, 2010 and "all rather enabling provisions of the law." It seeks order that:-

    1. ...Spent.

    2. The Honorable Court be pleased to set aside its orders made on 16th November, 2023, dismissing the Petitioners/Applicants petition/suit.

    3. The Honorable Court be pleased to reinstate the Petitioners' Petition upon terms which the Honorable Court may deem fit in just to grant in order for the ends of justice to be made (sic).

    4. An order to be made as to costs.

2. The application is based on 10 grounds, the first one being that the parties in the petition appeared before Court, save their counsel, who did not make it to court. The petitioners did not willfully neglect to attend court on the material day, save their learned counsel, who was engaged in a legal training on curriculum review sessions at the Kisii University, School of Law and by the time he made it to Nairobi in the late morning of 16th November 2023 due to travel constraints, he was informed that the Petition had been dismissed. That the exercise of curriculum review was set to continue on Wednesday 22nd November, 2023and Thursday 23rd November 2023. That save for the 16th November 2023, counsel and his clients, who represent members of the Petitioners, had always attended court. That though the date of 16th November 2023, was set down by consent the Petitioners could have attended court if the unavoidable circumstances which befell them did not occur.

3. That the subject matter of the Petition touched on land which is sensitive and sentimental pertaining to a cooperative society with over 5000 members, and in the circumstances would be highly prejudiced if the Petition stood dismissed. The Petitioners planned to prosecute the petition to its logical conclusion. The respondents who were state officers would not suffer any prejudice, monetary or otherwise, if the orders prayed for were granted since the Attorney-General had already lodged on record (sic). That the applicant was not guilty of any delay in petitioning the honourable Court for relevant reliefs. That the Court has unfettered and/ or unlimited jurisdiction to grant the orders sought.

4. The application was supported by the Affidavit of learned counsel Thomas Maosa, which he swore on 16th November 2023. He deposed that the representatives of the petitioners appeared before court on 16th November 2023 save for their learned counsel. That learned counsel did not willfully neglect to attend court on the material dates, except that he was engaged in a curriculum review in the Kisii University School of Law. He annexed and marked the end TNM1 a copy of the attendance and schedule of proceedings. He repeated the rest of the contents of the grounds in deposition form. Thus, this court need not repeat the same. He prayed that the application be granted in the interest of justice.

5. The Application was opposed strongly through a Replying affidavit sworn by M. W. Odongo on 29th November 2023. He deposed that the Motion was without merit and a grope in the dark and a non-starter. That the affidavit in support thereof was full of falsehoods and misrepresentations. That the Petition was fixed for hearing on the 29th September 2023, by consent of both the petitioners and respondents. The Petitioners had not given a reason why they or their learned counsel did not attend court as scheduled. That it was false for the Petitioners' learned counsel to allege that the petitioners' representatives attended court on 16th November 2023, contrary to the record. That while the Petitioners' counsel alleged, he did not attend court on 16th November 2023 for reasons that he was engaged in a curriculum review of the School of Law of Kisii University, he did not provide any evidence to support the allegation. That the annexture TNM1 was for a workshop in respect of the School of Law, which was held between that 31/10/2023 and 02/11/2023.

6. He deponed further that the program did not refer to the Petitioners' learned counsel anywhere, and neither was it in respect of a workshop held on 16th of November 2023. That the Petitioners' counsel did not indicate by any evidence that he, indeed, attended the alleged meeting of 16th November 2023. That their Petitioners counsel failed to prove his invitation to, and instructions and role in, the alleged meeting of 16th November 2023. Having failed to justify the nonattendance of the petitioners and their counsel, the petition was properly and justifiably dismissed.

7. That in accordance with the Rules of Procedure and the need for parties to attend court as scheduled, the rules were handmaidens to substantive justice and expeditious disposal of disputes. But in any event, court business was equally as serious matter, which could not be merely overshadowed by administrative work. Further, that it is trite that justice delayed is justice denied. And in the instant

case, the application was another attempt to revive a stale cause and unnecessarily clog the wheels of justice. The petitioners had clogged the wheels of justice by sustaining this matter in court for 13 years, and as such they could not be termed diligent ones.

8. Lastly, he deposed that the matter dismissed was not purely a land matter, but a commercial dispute over cancellation of the first petitioners' registration, challenging the appointment of liquidators, discrimination of petitioners and restoration of cancellation of certificates and damages. And the instant application was just a mere abuse of the court's precious time. That the only relief dealing with land involved an injunction which was moot and has been overtaken by events hence there was no good basis for the application.

9. The petitioners filed another further affidavit sworn by one Peter Walucho on 11th December 2023. He deposed that he had been attending court proceedings whenever the petition came up for the prosecution. That when the Petition was fixed for hearing for 16th of November. 2023, learned counsel duly notified them of the date and he took note thereof. On the material date he attended Court and waited to see his lawyers and for the matter to be called out. He waited all the time and when the court adjourned, due to anxiety, he went to the registry to inquire what transpired. He was informed that the matter was finalized and he should contact his lawyers. That he was prepared to testify if demanded to confirm that he was at the law courts on 16th November 2023.

10. He deponed further, that he was in communication with the learned counsel for the petitioners who had not made it to court on the material date. When the petition was dismissed their lawyers confirmed that they had lodged the instant application seeking to reinstate the petition. That the Petitioners had over 5000 disparate members who had suffered great injustice. That the dismissal of the petition would greatly adversely affect the Society. That he wished to personally state that Mr. Odongo and his colleagues had always made derogatory remarks against the Society and its officials to the extent that he treated them with disdain. That it was incumbent on the court that an innocent Society should not be punished or suffer from default of learned counsel. That the affairs of Bondeni Farmers Cooperative Society were a matter of public interest, which the court should take into account given the number of members involved.

Submissions

11. The applicants began their submissions by summarizing the content of the application. Then the set out eight issues for the court would determine. One was the operations (sic) of Article 50 and 159 of *the Constitution* of Kenya; two, Sections 1 and 3 of the Civil Procedure Rules Act, Chapter 21 of the Laws of Kenya, three, the overriding effect of Order 12 Rule 7 of the Civil Procedure Rules, four, the Common Law tradition conferring, overriding, and unfettered jurisdiction to grant suitable orders, five, whether the petitioner acted within reasonable time in instituting the motion, six, consideration of this subject of this petition, seven, the principle of the ends of justice being met, and eight, the element of the deponent to the affidavit in support of the motion being an advocate with an office of the court.

12. Regarding the first issue they submitted that it was the obligation of the Court to be fair and just they submitted that the prevailing circumstances permitted the application of Article 50 of *the Constitution* and it would be fair and just to allow the Petitioners to exercise their fundamental right to be heard in terms of Article 51. In regard to time, they argued that the application was brought on 16th of November 2023, immediately after the dismissal of the Petition, hence it demonstrated that the Petitioners were desirous to be heard. On judicial discretion they submitted that sections 1 and 3 and 3A of the *Civil Procedure Act* confer power to the honourable court to make a decision based on evaluation on individualized circumstances of each case, as for this case. About the common law jurisdiction as enshrined in section 3 of the *Civil Procedure Act* and the court had immense power and

authority to grant the order sought. They relied on a decision the referred to as Times Savings and Credit Cooperative Society Limited versus. Another (Embu High Court Civil Appeal No. E033 of 2021) (sic) and Republic versus Speaker of the Nairobi City Council Assembly and another ex parte, (2017) eKLR (sic), and Prime Bank Limited versus Paul Otieno Nyamodi (2017) eKLR. On the issue of the subject matter, they submitted that it was a land matter and which was emotive and it involved a lot of people hence was a matter of public interest. Regarding prejudice towards the Respondents it was their submission that they were Public servants hence they would not suffer any prejudice if the application was reinstated and set down for hearing.

13. On the issue of being an officer of the Court they submitted that the Replying Affidavit was sworn by Mr. Odongo who was an officer of the Court, and officers of the Court were under duty to promote proper administration of justice. They were under a duty to tell the truth, including avoiding dishonesty or evasion about the reasons for not appearing. That as officers of the court, lawyers should be treated with dignity. In regard to the affidavit sworn by Mr. Odongo on 29th of November 2023, they submitted that some depositions therein were derogatory against counsel for the applicants, particularly paragraphs 4, 6, 8, and 9. They submitted that the deponent had not distinguished which information was within his knowledge, and which he may have gained through his sources, and therefore the issue was a matter of two learned counsel who had sworn affidavits.

14. On that issue they submitted that Mr. Odongo should have sought leave of the Court to cross-examine the deponent of the supporting affidavit, Mr. Thomas Maosa but Mr. Maosa had since explained the circumstances leading to his non-attendance of Court. That in absence of that Mr. Maosa should be given a benefit of doubt about his absence on 16th of November 2023.

15. On their part, the Respondents began by summarizing the Application. They submitted that that the applicants had failed to attend the hearing on the material date. Further, that it was because of the dismissal that the application herein had been. They argued that the allegations in the supporting affidavit that learned counsel was, on the material date, attending a Workshop in the School of Law of Kisii University as evidenced in annexture TNM 1 were not true since the annexture did not refer to a workshop on that date. Rather it referred to a workshop that took place between 31/10/2023 and 02/11/2023.

16. Regarding the subject matter, it was their submission it was purely commercial. On whether the application met the threshold of Order 12, Rule 7 of the Civil Procedure Rules, they submitted that each case should be determined purely on discretion and depending on the circumstances of it. They relied on the case of Stanley Mungai Waweru versus Keziah Wamaitha Waweru and another [2019] eKLR where the Court said that it was not in doubt that the power to reinstate a suit dismissed for want of prosecution but the power is discretionary and applicant must satisfy the court that he deserves the discretion. They argued that the burden was upon the applicant to show justification that would persuade the court to exercise discretion in his favour. Further, they submitted that the Petitioners were dishonest in the sense that, at first, they claimed the petitioner was unable to attend court for reasons that learned counsel was engaged in a workshop. However, the annexture to the affidavit to support the fact did not show that fact. Additionally, the petitioners argued that they attended court on the material date yet the court record showed otherwise. That it was untrue that the respondent was sitted in Court when the Petition was dismissed. That a litigant who clearly lied to Court was not worth of the equitable right of reinstatement of a dismissed matter.

17. They relied on the case of Yusuf Athman Hassan & another (suing as beneficiaries of Administrators of the Estate of Athuman Hassan Maliphunzo alias Athuman Gunia (deceased)) v District Land

Registrar, Kwale & another: Iddi A.M. Ganguma & 6 others (Interested Parties) [2020] eKLR. In the matter the Court held as follows:-

> "I have considered the matter. This suit was dismissed properly for non-attendance since the petitioners and their counsel were absent. In as much as counsel for the petitioners has deposed under oath that the petitioners were present in court, the fact of the matter is that the petitioners were absent. The record indeed reflects that position. It is sad that counsel would depose to a falsehood within the same application that seeks the discretion of the court. This Court does not entertain persons lying under oath in order to gain advantage, and by that alone, I have every entitlement to dismiss this application for it is not filed with clean hands. I must admonish counsel for swearing a falsehood under oath and that falsehood makes me doubt every disposition that counsel has made in her affidavit."

18. They also relied on the case of J.M.A v. R.G.O. [2015] eKLR which held that the court should consider whether an applicant had come before it with hands. They argued that the application was non-starter and a groping darkness. Lastly, regarding the complaint raised against Mr. Odongo they submitted that these were strange accusations in the sense that submissions were meant to respond to matters which were factual. They prayed that their application be dismissed.

19. I have considered the application before me. I have taken into account the law and the submissions of the rival parties. There are only two issues for determination, being, whether the reasons for the prayer to set aside are merited hence the application merited and who to bear the costs of the application.

20. On the first issue, the Applicant's contention is that on the material date when the Petition came up for hearing, the Petitioners were present in Court but the matter was not called out yet it was dismissed. They argue further that the matter was dismissed because learned counsel for them was absent for reasons he has given in the supporting affidavit. In essence the applicants contend that the Petition was dismissed on two reasons, one is absence of learned counsel for them and the other a mistake on the part of the Court: that for them they were and are innocent.

21. The law on applications of this nature stems from court's orders made pursuant to Order 12 of the Civil Procedure Rules, 2010. In regard to the specific prayer herein the applicable rule upon which the impugned order was made is Order 12 Rule 3. The Rule, particularly sub-rule 1 stipulates that:

> "If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

22. Then Order 12 Rule 6 (2) provides that,

> "When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action."

23. Further, Order 12 Rule 7 then stipulates 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."

24. It is clear from Rule 3 above that before a Court dismisses a suit, claim or Petition or appeal for reason of non-attendance of a party, it has to satisfy itself that the party whose claim is under consideration for dismissal was aware of the hearing and he/she/it is absent from the proceedings at the appointed

time and place. Further, the Court has the duty to find out of there is good cause why the Plaintiff or Petition is not in court before dismissing the claim, suit or petition. One of the ways of ascertaining that the claimant or party has good reason to be absent from court is for the Court to not only call out the matter in court but also outside the court room. Where the matter is called out and the party is not in Court or outside the Court, and the Defendant does not admit any part of the claim, the Court has a corresponding duty to dismiss the matter unless there is good cause for not doing so.

25. One of the good causes constitute circumstances where the Court was going to adjourn the matter anyway. For instance, where the Court had other commitments or is unwell and would whichever way have adjourned the matter. One other good cause is where, although the party is absent and is represented by learned counsel who is absent the said counsel has designated another to hold his brief and explain both his absence and that of his client(s). It may also that both counsel and client may be absent from court and have not given any reason yet but another officer of the Court draws the Court's attention to factors beyond the control of the party and client which have made them not to attend Court or send a representative to inform the Court of the reason.

26. Absent of any such causes, the Court ought to dismiss the matter and once that is done, the burden is on the Plaintiff or claimant who applies to court to set aside the order (or judgment) to demonstrate to the Court that he has reasons which can make it exercise its discretion in his favour. Regarding the exercise of discretion under Order 12 Rule 7 of the Civil Procedure Rules, 2010, there is no dearth of decisions of courts of this level or higher. In Patel v E.A Cargo Handling Services Ltd [1974) E.A 75; "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just..."

In Shah v Mbogo & Another [1967] EA 116.) the Court held, inter alia, that:

> " 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. The discretion 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 course of justice..."

27. Applying the principles in the above decisions to the instant case, there is no doubt that this Court has wide discretion to set aside the order it made on 16th November 2023. The only limitation it has is that the discretion ought to be exercised judiciously. A Court acts judiciously when it applies its mind on the law, the facts of the case and balances the interests of the parties as against the interests of justice. Further, it means the judge has to avoid being whimsical or capricious in his decision.

28. In this application, there are two arguments put forth by the applicants in support thereof. I will deal with them sequentially. First is the reason that their advocate did not attend Court for reason that he was prevented by reasons beyond his control: that he attended a workshop in the Kisii University Law School and on the material date by the time he got to Nairobi late morning on 16/11/2023 he was informed that the matter had been dismissed. He supported that fact with annexture TNM 1 which was a copy of an attendance sheet. In his submission he stated that the evidence was sufficient to show that the failure to attend Court was an advocate's mistake hence should not be visited on his clients. On their part the Respondents submitted that the argument that the learned counsel did not attend court since on the material date he attended a workshop was not factually correct. He argued that the annexture was for a workshop for 30/10/2023 to 02/11/2023 and not 16/11/2023.

29. I have carefully analyzed the annexture TNM 1. Indeed, it is evidence of a workshop held between the 30/10/2023 and 02/11/2023 at the Kisii University Law School. It cannot therefore be that it was in relation to the material date when the petition was dismissed. Thus, I would be inclined to agree with the Respondents in their submissions over the issue that learned counsel's explanation about is absence. However, since learned counsel pleaded with the Court to give him the benefit of doubt, I do, as explained below.

30. This Court is alive to the fact that learned counsel are not infallible. They make and will always make mistakes. But in their profession, learned counsel are careful. They do not err every other day, and when they do, they too realize that they have done so. They should be able to state so, and if they do so, some of such mistakes should not be visited on their clients. Thus, in Grace Njeri Mbugua v Hannah Wanjiku Thong'ote [2019] eKLR the Court of Appeal stated that,

> " [It] is also not in dispute the Check List was signed by all counsel present. We are further cognizant of the principle that ordinarily, mistake of counsel should not be visited upon a client."

31. . In the case of Berber Alibhal Mawji Vs Sultan Hasham Lalji & 2 others (1990 – 1991) E.A 337, the Court held thus:-

'Inaction on the part of an advocate as opposed to error or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake which ought not to be visited on the client".

32. . Also, in the case of Trust Bank Vs Portway Stones (1993) Ltd and others Nairobi (Milimani) HCC No. 413/1997; LLR 1310 (CCK) (2001) 1 EA 269, Ringera J. held as follows:-

> " There are no reasons why errors of commission and omission by a duly instructed advocate who is obviously the agent of the instructing party should not be visited on his principal. If the acts and omissions of the agent with actual or ostensible authority in other spheres of life are not without consequences to their principals, why should it be to the legal profession?".

33. . Thus, the starting point to settle the whole matter herein is the holding by the learned Ringera J (as he then was) in the Trust bank case (supra) that it is not a blank cheque given to parties that they assert that learned counsel committed a mistake and they are good to go. The agency contour of the client-advocate gives rise to a conjoined relationship which ought to be severed only in exceptional cases.

34. . In the instant case, this Court therefore takes it that indeed learned attended a workshop in the said institution on the material date and for that reason was prevented from attending Court, and that learned counsel's mistake should not be visited on the client. But as a parting shot on the point, courts should move away from unsubstantiated assertions by clients or parties that learned counsel committed a mistake, especially where the learned counsel is no longer on record since it ends up condemning the counsel unheard and taints their record and career ex parte. And where such allegations are made, courts need to always consider whether the learned counsel has owned to the mistake, by way of an admission of sorts or affidavit, and if not, then a clear detailed demonstration by the client how the act or omission alleged was a mistake (which the advocate has refused to own up) and how the advocate caused it so that these facts may form the basis of a future contest as between the client and advocate if need be after the court's finding on it if learned counsel wished to take it to challenge the same since such contests are likely to be numerous in the immediate future in this era of a litigious populace. This Court is prepared to excuse the mistake of learned counsel in this matter.

35. The above finding leaves this Court with the second argument by the applicants, as borne out in the Further Affidavit sworn on 11/12/2023, that on the material date, one Peter Walucho attended Court, waited to see his lawyers and for the matter to be called out, waited all the time and when the court adjourned (and impliedly apparently the matter was not called court) he went to the registry to inquire the position of the file only for him to be informed that the matter was concluded and he should contact his advocate.

36. . What I hear the deponent to say is that the Court did not do as required under Order 12 Rule 3(1) of the Civil Procedure Rules, as explained in paragraph 24 above. Further, I understand him to say then that, for reason of absence of the petitioners' learned counsel, the Court did not bother to call out the matter but perhaps, as he wants the whole world to believe, permitted learned counsel for the Respondents to address the Court and ask that the Petition be dismissed and proceeded to dismiss the same. This is an extremely serious allegation, and a lie on oath at that. The Court record bears out that the both learned counsel and the petitioners were absent without any explanation and the State Counsel applied for the Petition to be dismissed, and it was so. This Court remembers vividly that on the material date, as it always does in all matters, and it has done on previous occasions in the instant matter when learned counsel delayed to attend Court, the Court called out the parties both inside the Court and outside, to confirm whether they were in. This Court reminds the parties herein that its practice has always been to always be cautious and slow to give drastic orders such as dismissal of a matter before giving parties the greatest chance to ventilate their case. Thus, when a party makes such a grave allegation against the Court it leaves the Court mesmerized at what length parties can go to have from courts orders they wish granted.

37. . And, what further disturbs this Court more is that learned counsel for the Applicants was given this lie from his clients and he decided to depone to it as truth. Against these two falsehoods on oath the Court takes exception. Further, this Court has never wished to entertain lies on oath designed to mislead it and it will not give chance for any to pass to the disadvantage of those who rely on the truth. This Court has found that learned counsel's mistake herein was excusable and not to be visited on the Client. But when the party comes to court with lies to coat facts with other 'niceties' to mislead the Court it robs of the party the equitable right to and privilege of the exercise of the discretion of the Court. Such a party comes to equity with soiled hands and cannot merit the favour of equity: equity calls for purity from parties who approach it. How I wish the lies herein did not pass into the instant application, the Court had winked at the mistake of learned counsel! Had the applicants even deponed that they came to Court and walked away when they did not see learned counsel or that they came late only to find the matter already dealt with this Court could have granted the application. But to lie that the Court did not do as required by the law by calling out the matter and making a finding that they were absent and dismissing the Petition it is egregious. No wonder the applicants were intent on making further unsubstantiated depositions against the person of the learned state counsel about him and his colleagues mocking or always made derogatory remarks against the Society and its officials to the extent that he treated them with disdain, yet at no point in time all the time the matter has come before the Court that the Petitioners have raised the issue so that the judge cautions the learned state counsel. In my view this is an untrue allegation designed to whip sympathy from the Court. This Court shall not buy these. The Court is neither one of sympathy nor of emotions but of impartiality and justice.

38. . In Motuka; Henry Abuga County Surveyor, Nyamira & 2 others (Interested Parties) (Environment and Land Judicial Review Case E001 of 2022) [2022] KEELC 15466 (KLR) (21 December 2022) (Ruling) Mugo Kamau the learned judge stated;

> " Although it is normally pleaded that mistakes of Counsel should never be visited upon an innocent client there are instances when the client may not be innocent, say like when he fails to turn up at the Advocate's office to sign documents needed to be filed in Court or fails to do so in time."

39. . From the above authority, this Court needs then to consider whether Petitioners herein are innocent. If this Court were to rely on the falsehoods herein to set aside the orders of 16th November,2023 what precedent shall it be setting? A very dangerous one that those who lie are innocent: that parties can walk to Court with lies and get reliefs as they want. The upshot of the analysis is that for the reasons of the falsehoods of the Petitioners' representative, one Peter Walucho the Application dated 16th November, 2023 is wholly unmeritorious. It is dismissed with costs to the Respondents.

40. . Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 4TH DAY OF APRIL, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.