



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 124 OF 2016

BAKARI SAID MAJENI.....PLAINTIFF

VERSUS

SHAFI SAID MWANYOTA.....1ST DEFENDANT

MOHAMED SULEIMAN MWADZUNGWE2ND DEFENDANT

RULING

(Application to set aside judgment; applicant asserting that his counsel was never served with a hearing notice; affidavit of service indicating that the office served is on a different floor from that indicated in the address of service; there being doubt if service was properly effected; application allowed; judgment set aside; status quo before execution of the judgment be maintained)

1. The application before me is that dated 27 June 2019 filed by the defendant. The application seeks to set aside the judgment entered on 15 February 2019. The defendant/applicant contends that the matter proceeded as if it was he had not filed a defence, yet there was a defence on record. It is also averred that his counsel was not served with any hearing notice. The application is supported by the affidavit of the applicant and is opposed by the respondent.

2. I have gone through the record. I note that this suit was commenced through a plaint which was filed on 3 September 2015. In the plaint, the plaintiff contended that he is the registered proprietor of the land parcel Kwale/Ukunda/4806. He claimed that the defendant had trespassed into it and in the suit he wanted him permanently restrained from the land and general damages. On 22 September 2015, the applicants entered appearance in person. On 26 August 2016, the applicants appointed M/s Steve Kithi & Company Advocates to act for them.

3. The matter came up for a hearing on 18 January 2018, when Mr. Busieka, counsel holding brief for Mr. Kithi, applied for adjournment, which adjournment was allowed. The case was then fixed for hearing on 21 May 2018. The file does not appear to have been taken to court on this day, and I note that a representative of counsel for the respondent took the hearing date of 12 July 2018. On this day, counsel for the plaintiff was present and ready to proceed whereas there was no appearance on the part of counsel for the applicants. The matter proceeded for hearing before my predecessor, A. Omollo J, and the respondent as plaintiff closed his case. The case of the applicants, as defendants, was marked closed due to their absence. Directions were then given on the filing of submissions and the matter directed to be mentioned on 30 July 2018. On that day, Mr. Muyala appeared for the plaintiff, but there was no appearance on the part of counsel for the applicants. Mr. Muyala mentioned that he had served the date and sought a date for judgment. The court gave 30 July 2018 as the date for judgment though judgment was eventually delivered on 15 February 2019. A decree was subsequently extracted and executed, which led to the demolition of the applicant's structures on the suit land.

4. In his supporting affidavit, the applicant has faulted the manner in which the matter proceeded in his absence. He has averred that it was an error of the court to believe that no defence had been filed in the matter and he has asserted that his counsel on record was never served with any hearing notice and that the affidavit of service which stated that his counsel was served was fraudulent.

5. The respondent filed a replying affidavit where he went at length on the history of his entitlement to the suit property. He also deposed that the applicants failed to file appearance and defence as required by law. He has contended that counsel for the applicants was duly served and has annexed the affidavit of service. He has also annexed another affidavit of service where counsel for the respondents was served with a mention notice for submissions. He has deposed that counsel was served with a judgment notice. He has further mentioned that eviction of the applicants has already taken place.

6. I have taken note of all the above.

7. There is no question that the matter proceeded ex-parte in the absence of counsel for the applicants. There is an affidavit of service which indicates that counsel was served with a hearing notice. There are actually two affidavits of service, one sworn on 3 July 2018 and the other sworn on 12 July 2018. They are both sworn by Maurice O. Abuoro a private court process server. In the first affidavit, he has deposed inter alia that he served the offices of Steve Kithi & Company Advocates on 13 June 2018 with the hearing notice at their offices at 4th Floor Canon Towers, along Moi Avenue. He deposed that he served the Hearing Notice upon the court clerk who accepted service but refused to sign. In the second affidavit, he has more or less made the same depositions, only that this time he has specified that he served the court clerk known as Brian, in the said firm, who refused to sign.

8. The applicants have averred that their advocate is not situated at 4th Floor Canon Towers, but at 1st Floor, New Canon Towers, Moi Avenue Mombasa. This is not disputed by the respondent. There is therefore in my view, serious doubts as to whether the hearing notice was ever served. It certainly was not served at 1st Floor, New Canon Towers, and if it was served at 4th Floor, I wonder which office was served.

9. That doubt on whether counsel for the applicant was served has to be construed to the benefit of the applicants. I am thus I persuaded that the applicants have made out a case that their counsel was never served with the hearing notice. That being the case, the proceedings were irregular and the judgment must be set aside. I hereby set the same aside.

10. Within the application, the applicants have asked for orders of injunction. The eviction was done pursuant to a judgment that has now been set aside. In my view, the status quo that was prevailing before the execution of the judgment ought to be reverted to and that status be maintained until this case is heard and finalized.

11. In summary, the ex-parte judgment is hereby set aside and I direct that the matter do commence de novo. Further as directed, the status quo before the eviction of the applicants be reverted to and the same be maintained until this suit is heard and determined.

12. The applicants shall have the costs of this application.

13. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of January 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Kithi for the applicants.

Mr. Muyala holding brief for Mr. Asige for the respondent.

Court Assistant; David Koitamet.