



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 126B OF 2011

MHANDISI ENTERPRISES LIMITED.....PLAINTIFF

-VERSUS-

MOHAMMED SWALEHE MWAJEMBE.....1ST DEFENDANT

RAMA OMARI CHIMWEGA.....2ND DEFENDANT

DISTRICT LAND REGISTRAR KWALE.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

MARY NDALE KAI.....5TH DEFENDANT

OMAR ATHUMANI.....6TH DEFENDANT

ATHUMANI JUMA.....7TH DEFENDANT

MUHAMED SWALLEHE.....8TH DEFENDANT

KWALE DISTRICTY SURVEY OFFICE.....9TH DEFENDANT

RULING

(Application to set aside judgment; suit proceeding in absence of counsel for the applicants; applicants stating that their advocate never informed them of the hearing date; no reason to doubt this averment; suit involving two titles over the same land; plaintiff having one title and the applicants the other; applicants asserting that it is their title which is the genuine title; applicants having a defence that deserves to be ventilated; application allowed subject to payment of throw away costs)

1. The application before me is that filed before this court on 4 October 2018 by the 1st and 2nd defendants. The principal order sought is to review or set aside the judgment delivered on 20 September 2018 and for leave for the applicants to change counsel to a new firm of advocates.

2. By way of background, this suit was commenced through a plaint which was filed on 14 November 2011. The plaintiff, a limited liability company, averred that it was on 26 November 1992, registered as proprietor of the land parcel Kwale/Diani Beach/653 and was issued with a title deed. It was pleaded that on 22 April 2009, the plaintiff got wind of another title to the suit land and commenced investigations. Its investigations revealed that on 11 December 2006, the applicants were registered as proprietors of the suit land and a caution was placed by the Land Registrar, sued as the 3rd defendant. The plaintiff complained that the 3rd defendant was unlawfully maintaining two green cards for the same property. It also pleaded that all its documents are now missing from the Kwale land registry. It pleaded that on 20 August 2011, a letter written by the 3rd defendant was received where the 3rd defendant directed the applicants to surrender their title as it was fraudulent. It pleaded that the 6th, 7th and 8th defendants have taken advantage of the confusion to invade the land. In the suit, the plaintiff sought orders to have the defendants permanently restrained from the land and for a declaration that the rightful owner of the suit land is the plaintiff. It also sought eviction of the 6th, 7th and 8th defendants from the land. Together with the plaint, the plaintiff filed an application for injunction to restrain the defendants from the suit land pending hearing and determination of the suit. The application was compromised through a consent entered into on 8 July 2013 where parties inter alia agreed to maintain the status quo.

3. The applicants and the 8th defendant filed a joint statement of defence through M/s Gikandi & Company Advocates, wherein they asserted to have been resident on the suit land for a long time and faulted the title held by the plaintiff. Later on 21 January 2014, the applicants filed a Notice that they will be acting in person.

4. On 12 February 2014, the plaintiff filed an application seeking to have the applicants and the 3rd defendant committed to civil jail for disobeying the order of 8 July 2013. The plaintiff complained inter alia that the applicants had facilitated the erection of a wall on the suit property and also altered the rates records in the County Government of Kwale. The application was allowed through a ruling delivered on 18 September 2014 by Mukunya J and they were jailed for 4 months on 6 November 2014. The applicants subsequently filed an application dated 25 November 2014 seeking inter alia to set aside the consent of 8 July 2013. Pending hearing of the application, they were released from jail on their own personal bond. The application was dismissed and the personal bonds cancelled.

5. In between these happenings, on 23 September 2013, the plaintiff gave evidence before Mukunya J, through one John Morison Aswani Litondo, who is its director. He continued his evidence, now before Omolo J (as Mukunya J had by then been transferred from Mombasa) on 29 July 2015. On this day, there was no appearance on the part of M/s Ojode, Udoto & Ongoro Advocate, who had been appointed to act for the applicants and the 5th, 6th and 8th defendants. The plaintiff's witness testified and closed the plaintiff's case. Ms. Kiti, learned State Counsel appearing for the 3rd defendant, then applied for an adjournment which was allowed and the case adjourned to 2 October 2015 for the Land Registrar, to attend court to testify. On 2 October 2015, the Land Registrar did not appear, but there was mention that the register relating to the suit land may be rectified in favour of the plaintiff. Given that position the court gave a mention date to confirm whether this had been done. On 8 March 2015, a consent judgment was entered between the plaintiff and the State on behalf of the 3rd, 4th and 9th defendants in the absence of counsel for the applicants. The consent was to enter judgment in favour of the plaintiff for a declaration that the plaintiff owns the suit land; a permanent injunction restraining the defendants from the suit land and an order of eviction against the defendants as prayed in the plaint. The parties also agreed to canvass the other prayers in the suit, that is, general damages, special damages, costs and interest, by way of written submissions. On the same day, the suit against the 6th, 7th and 8th defendants was withdrawn, on the basis that they have moved out of the land. The consent was adopted and the parties directed to file written submissions and for the matter to be mentioned on 23 May 2018. On this day, Mr. Wangalwa was present for the plaintiff alongside Ms. Kiti for the State and parties took 27 July 2018 for judgment. The judgment was eventually delivered on 20 September 2018. There was no presence in respect of the applicants for the dates of 23 May 2018 and 20 September 2018. In the judgment, the court (Omolo J) did not find merit in the claim for general and special damages.

6. In this application, the applicants in their quest to set aside the judgment contend that the law firm of M/s Oduto Ojode & Onjoro Advocates, who were on record for them, did not inform them of the dates when the case came up for hearing until they later discovered that judgment has already been entered in the matter. They aver that their failure to attend court was because their advocate never informed them. They assert that they have a good defence and they should be allowed to ventilate it.

7. The plaintiff did not file a replying affidavit or grounds of opposition to reply to the application. Instead, the plaintiff filed a Preliminary Objection which principally was to the effect that the applicants cannot be heard because they had not purged the contempt. On the part of the State, grounds of opposition were filed, stating that the application is frivolous and an abuse of the court process, that the applicants are the authors of their own misfortune, and that the applicants are guilty of laches.

8. The application came up for inter partes hearing on 5 February 2020, Ms. Atieno, counsel holding brief for Mr. Wangalwa for the plaintiff, pointed to the preliminary objection but I was not persuaded to hear it and I directed the application to proceed for hearing. She then stated that she had no instructions on the application and therefore did not make submissions on it. Mr. Gitonga, learned counsel for the applicants relied fully on the affidavit in support, while Ms. Kiti, learned counsel for the State, relied on the Grounds of Opposition.

9. I have considered the motion. Before I go to the gist of the application, there is a prayer for the law firm of M/s Karanja, Gitonga & Waweru Advocates, to come on record for the applicants after judgment. I see no problem in granting this prayer and henceforth the applicants will be deemed to be represented by this law firm.

10. The substantive order in the application is whether the judgment should be set aside and the applicants given a chance to ventilate their defence. Their advocate and the applicants were certainly not present when the matter proceeded for hearing and the applicants aver that they could not have been present because counsel did not communicate the hearing date to them. I have no evidence to contradict this averment and no reason to doubt this statement. I will therefore assume that their counsel did not communicate to them the hearing date. I am also of the opinion that the applicants deserve to be given a chance to be heard on their defence, for it is their view that it is their title which is the valid title, and not that of the plaintiff. This cannot be considered a frivolous defence. I do not think that the applicants should be prejudiced and denied a chance to present their case because their advocate failed to communicate to them the hearing date. I am aware that the judgment herein with regard to ownership of title was by consent, but the applicants were not parties to that consent and I do not see how they can be bound by the consent. For the plaintiff, other than suffering extra costs, I do not see any other prejudice that may be visited upon her. The applicants will thus pay thrown away costs which I assess at Kshs. 100,000/= within 30 days of this ruling. If they do not pay the costs, within this time, the judgment will remain in force and this application will have failed. In arriving at this figure, I have factored in the several attendances during the hearing of the case and after, and the fact that the plaintiff and his counsel are based in Nairobi and not in Mombasa where this case is filed.

11. For the above reasons, and subject only to the payment of throw away costs as directed, I do allow this application and set aside the judgment herein. I will give further directions on how to proceed after I deliver this ruling.

12. I make no orders as to the costs of this application.

13. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

No appearance on the part of M/s Wangalwa Oundo & Co. Advocates for the plaintiff/respondent.

No appearance on the part of M/s Karanja, Gitonga & Waweru Advocates for the applicants.

No appearance on the part of the State Law Office for the 3rd, 4th & 9th defendants.

Court Assistant; David Koitamet.