REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 280 OF 2015

JOHN MUTHINI KAMIA.....PLAINTIFF

VERSUS

MWARIDZO JUMA ZIRO.....DEFENDANT

RULING

(Application seeking orders to set aside judgment; applicant stating that he was never informed by his counsel of the hearing date; application allowed but subject to payment of throw away costs)

1. The application before me is dated 31 August 2020 filed by the defendant. Apart from the order seeking change of counsel after judgment, the principal order sought is for the setting aside of the judgment delivered on 10 March 2020, and for the matter to be reopened to have the defendant testify. The main grounds upon which the application is founded is that the previous counsel on record for the defendant had closed her offices and did not communicate the date to the applicant, and that it was only later that the applicant came to know that the matter was heard and judgment delivered. The application is opposed.

2. The history of the matter is that the plaintiff/respondent sued the applicant to have him permanently restrained from the land parcel Kwale/Diani Beach Block/1576 and for an order to demolish the structures put up on the suit land by the applicant. The applicant filed defence where he denied encroaching into the suit land and further claimed that the suit land is owned by his brother. On 5 November 2019, the matter came before me for mention to take a hearing date. Only Mr. Kinuthia holding brief for Mr. Mutubia for the respondent was present. There was no appearance on the part of M/s S.M Otunga & Company Advocates, for the applicant. I directed the case be heard on 26 February 2019. On the date scheduled for hearing, again, only counsel for the plaintiff/respondent was present. There was an affidavit of service filed, indicating that counsel for the applicant was served with the hearing notice on 13 November 2019. I was satisfied with service and allowed the matter to proceed. The plaintiff testified and closed his case and I reserved judgment for 10 March 2020. On 10 March 2020, again, only counsel for the respondent was present with there being no appearance on the part of M/s. S.M Otunga & Company Advocates for the applicant. I entered judgment in favour of the respondent and issued an order of permanent injunction against the applicant and further ordered the applicant to demolish the structures on the suit land within 30 days. I have seen that a decree was subsequently issued after counsel for the applicant was given opportunity to approve it.

3. In this application, the applicant avers that he was not aware of the hearing date of 16 February 2020 as his erstwhile counsel did not inform him. He has stated that he only became aware of the matter after he was served with a decree on 24 August 2020. He has deposed that he immediately went to the offices of M/s S.M Otunga & Company Advocates and he found that the advocate had closed her office. He has deposed that he is ready and willing to prosecute his case on merit. In respect of the prayer for an order to change counsel, he has attached a consent signed by S.M Otunga Advocate and M/s Martin Tindi & Company Advocate, allowing the latter to come on record.

4. To oppose the application, the respondent filed a replying affidavit sworn by Simon P.M Mutugi, who is also his counsel on record. Mr. Mutugi has deposed that the law firm of M/s S.M Otunga & Company Advocates were properly served with the hearing notice and there is no cogent reason to set aside the judgment. He has further deposed that there is no defence that raises triable issues. He has deposed that the application does not consider that four witnesses testified in the case. He has questioned how the consent to come on record was procured if indeed the offices of M/s S.M Otunga & Company are closed and he believes that the consent is not signed by Ms. Otunga after comparing the signature therein with the signature in the statement of defence. A supplementary affidavit was filed showing an email sent to Ms. Otunga from Mr. Tindi over the change of advocates.

5. I have considered the matter. This is an application for setting aside a judgment and for the applicant to be allowed to change counsel. I will allow the application to change counsel, and despite the protest of Mr. Mutugi on the signature, I really have no evidence that Ms. Otunga did not sign the consent. I think, if the issue was to be explored, it was upon the respondent to call Ms. Otunga to be cross-examined but this has not happened.

6. On the prayer to set aside the judgment, it was my view, and I still hold the view that counsel for the applicant was duly served with the hearing notice. I have seen no reason to disbelieve the process server. Indeed, there is no affidavit from Ms. Otunga, who was then on record, to state that her office was not served with the hearing notice. If Ms. Otunga could sign the consent allowing another counsel to come on record, she could also have sworn an affidavit, if she was never served with the hearing notice.

7. The matter therefore properly proceeded for hearing and the judgment was procedural. It is however possible that the applicant was let down by his counsel and I will give the benefit of doubt that he was not informed to attend court for the hearing. It is a cardinal principle that the mistakes of an advocate should not be visited upon a litigant. The right to be heard is one that should be protected unless there are special circumstances. I am aware that the respondent does not think much of the defence of the applicant but I think the applicant should be allowed to ventilate whatever defence he has.

8. I will thus set aside the judgment, but since the proceedings were proper, the applicant will have to pay throw away costs to the respondent. The order setting aside the judgment will thus be subject to payment of the throw away costs. The respondent incurred costs in serving the hearing notice and incurred witness expenses. The respondent certainly incurred costs of counsel for the hearing and also for extraction and service of the decree. There are also costs in respect of this application and also other incidental expenses. In my discretion, taking all factors into consideration, I am of the view that throw away costs of KShs. 40,000/= will compensate the respondent for the inconvenience and expenses that has now been visited upon him.

9. I therefore allow the setting aside of the judgment but subject to payment of throw away costs of KShs. 40,000/= payable within the next 14 days. If these costs are not paid as directed, the judgment will remain.

10. Orders accordingly.

DATED AND DELIVERED THIS 19 DAY OF NOVEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA