



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT
AT MOMBASA
CIVIL CASE NO. 144 OF 2009

CANNON ASSURANCE (K) LTDPLAINTIFF

- V E R S U S -

1. ALI HAMADI MWAGUDE}
2. FAIZA WANJIKU MAINA}
3. MOHAMED OMAR
IBRAHIM.....}DEFENDANTS
4. LAND REGISTRAR KWALE}
5. THE HON. ATTORNEY GENERAL}

RULING

[1] The application herein is made under 1A, 1B and 3A of the Civil Procedure Act and under Order 51 Rule 1 of the Civil Procedure Rules.

The applicant asks the Court to strike out the 4th and 5th defendants statement of defence and costs of this application. The applicant swears an affidavit to support the application dated 11th February 2013. In that affidavit Mr. Ushwin Khanna Learned Counsel for the applicant argues that on 28th March 2011 this Court directed the 1st ,4th and 5th defendants to answer the interrogatories within 14 days. The 1st defendant has since died and the suit against him has abated. The applicant argues that the 4th and 5th defendants defence should be struck out since the defendants have not complied with the Court order.

[2] The 4th and 5th defendants filed grounds of opposition. They argued that striking out would be contrary to the overriding objectives as provided by Section 3 of the Environment and Land Act 2011. That the prayer for striking out shall occasions great prejudice to 4th and 5th defendants. Further that interrogatories can be easily obtained by the plaintiff by applying for certified copies of the register. And finally that the plaintiff has not availed any evidence of denial of their rights under Article 35 of the Constitution of Kenya and Section 34 of the LRA 2012.

[3] The applicant stated that it filed an application on 18th August 2010 invoking Order 10 Rule 11,

2, 2A and 11 and Sec. 23 of the Civil Procedure Act. This was an application to deliver interrogatories to the applicant. The application was not opposed by the 4th and 5th defendants. The same was heard and determined on 28th February 2011 and the orders were granted. The applicant argues that the grounds of opposition should have been argued at leave stage. That the 4th and 5th defendants should comply to the Court order. The applicant argued that the 4th and 5th defendants should be struck out.

[4] The 4th and 5th defendants argued that Section 1A,1B and 3A of the Civil Procedure Act and Order 51 Rule 1 do not provide for striking out. That the only time a defence can be struck out is under Order 3 Rule 1. That the applicants should not rely on technicalities. That it should affect all parties time to be heard. They relied on Section 159 of the Constitution. The 4th and 5th defendants said that they shall be highly prejudiced if their defence is struck out. They argued that the onus of proving this case is purely on the plaintiffs door step. That the plaintiff should not use shortcuts to a favourable judgment by having the 4th and 5th defence being struck out. They urged the Court to dismiss the application.

[5] I have heard and considered the argument by the applicant and the response by the 4th and 5th defendants. I must say at the outset that Court orders must be obeyed. No party has a choice as to what court orders he must obey. All orders given must be obeyed.

The 4th and 5th defendant were given 14 days to supply interrogatories. They did not. They cannot be heard to say that those interrogatories can be obtained by doing a search in the registry. That is contemptuous and arrogant. I have perused the claim herein. The same is that the suit land was grabbed and sub divided into many pieces of land mentioned in the plaint herein. These are grave issues that must be canvassed with the presence of 4th and 5th defendants who have been accused of wrong doing. The 2nd defendant has filed a notice to co-defendants the 4th and 5th defendants for indemnity against them for any loss in Kwale/Diani/1859 as a result of the 2nd defendant loss and Kshs. 1,800,000 paid to the 1st respondent as consideration of the suit property. If I were to strike the defence of 4th and 5th defendants I will deny them a chance to reply to these allegations. This being an allegation of fraud in a land matter every opportunity should be granted to the parties to prosecute and defend their allegations as the case may be.

[6] Article 159 of the Constitution enjoins the Court to deal with substance and avoid technicalities and deal with real issues between the parties. This Court therefore makes the following orders:

1) That the 4th and 5th defendants shall supply interrogatories as ordered by this Court to the applicant within 14 days from the date of this ruling. If the 4th and 5th defendants do not do so within the time specified, their defences shall automatically be struck off.

2) This application shall be dismissed with costs to the applicant.

3) The suit shall be fixed for hearing on merit after compliance with Order 11 of the Civil Procedure Rules.

It is so ordered.

Dated and delivered in open Court at Mombasa this 26th day of July, 2013.

S.N. MUKUNYA

JUDGE

26.7.2013

In the presence of:

Asige Advocate for Khanna Advocate for the plaintiff

Kamoti & Co. Advocates for the 1st defendant

Mr. Ndegwa Muthama & Katisya for 2nd defendant

Miss. Tsuma for 3rd defendant - present

Mr. Eredi for 4th defendant.