



CANNON ASSURANCE (KENYA) LIMITED.....PLAINTIFF

V E R S U S

1. SHEE HAMISI MSHIPA.....1ST DEFENDANT
2. OMAR ALI NDUNDU.....2ND DEFENDANT
3. LAND REGISTRAR, KWALE.....3RD DEFENDANT
4. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

This Court is asked to decide whether the 1st Defendant should meet the Plaintiff’s costs on the suit.

The Plaintiff filed suit against four Defendants seeking the following main prayers-

(a) A declaration that the entry of the names of the First and Second Defendants and issuance of a title as joint owners of Kwale/Diani/156 made in Part B – Proprietorship Section by the Third Defendant was in abuse of her office and was illegal and fraudulently made in respect of the Plaintiff’s said Plot without the prior knowledge or consent of the Plaintiff and that the First and Second Defendants have not thereby acquired any lawful right or interest over the Plaintiff’s said Plot to entitle them to sub-divide, enter, occupy, charge, sell and/or to take possession of the Plaintiff’s land and that all entries endorsed in the Part B – Proprietorship Sections of the Property as stipulated herein and all transactions carried out by the First or Second or Third Defendants in respect of the Property be expunged and declared as null and void ab initio;

(b) That Orders do issue directed to the Third and Fourth Defendants to revoke all entries made in Part 8 – Property Section of the Property which are registered in the names of the First and Second Defendants and to rectify and cancel the said entries in Part B – Proprietorship Section and to enter the Plaintiff’s name therein so as to reinstate the Plaintiff as the lawful registered proprietor of Kwale/Diani/156.

On 25th January 2010 the 1st Defendant entered appearance in the suit through the firm of J. O. Magolo & Co. Advocates. For some reason no defence was filed within the time prescribed by law and so on 15th February 2010 judgment was entered against the 1st Defendant in that default. Three days later, on 18th February 2010, the 1st Defendant filed a statement of Defence which was by all means an admission of the Plaintiffs claim. This Defence was filed inspite of the default judgment already obtained by the Plaintiff and without an order setting it aside. These slips come with a price!

As the Plaintiff was wont to, it set the matter down for formal proof and on 20th May 2012 a consent was recorded between the Plaintiff and the 1st Defendant allowing all prayers in the plaint save that on costs.

I have a clear view of the matter. Had the Statement of Defence of the 1st Defendant been regular then no costs would be payable by him. This is because the “Defence” did not controvert the Plaintiffs claim but also because the 1st Defendant stated that no demand had been made by the Plaintiff before filing suit. But unfortunately for the 1st Defendant the Defence is not properly on record. There was already

default judgment which had not been set aside. All the good things said by the 1st Defendant in that Statement of Defence counts for nothing and no advantage can be gained by him from the contents.

The consent entered by the two parties on 20th May 2012 was a consent entered in formal proof proceedings in which there was already an interlocutory judgement against the 1st Defendant. That consent affirmed the Plaintiffs claim and that event of success must be rewarded with costs. That is my determination. The 1st Defendant shall meet the costs of the Plaintiff.

It may be of some consolation to the 1st Defendant that the costs against him will be taxed on the lower scale as the cause was compromised undefended.

Dated and delivered at Mombasa this 27th day of August, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Karega for Khanna for the Plaintiff

Magolo for the Defendant - absent

Court clerk - Moriasi

F. TUIYOTT
JUDGE