



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 22 OF 2016

SOLIAN INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

KSC INTERNATINAL LIMITED IN RECEIVERSHIP

(FORMERLY KNOWN AS

KUNDAN SINGH CONSTRUCTION LIMITED...1ST DEFENDANTS

CHIEF LAND REGISTRAR.....2ND DEFENDANT

REGISTRAR OF LANDS KILIFI.....3RD DEFENDANT

REGISTRAR OF TITLES.....4TH DEFENDANT

DISTRICT SURVEYOR KILIFI.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 13th September 2018 and filed herein on 18th September 2018. By the said application KSC International Ltd (the 1st Defendant) prays that an amended Defence filed on 3rd September 2018 and served upon the Respondents on 4th September 2018 be admitted as duly filed.

2. The application is supported by an affidavit sworn by the Applicant's Advocate Greg Karungo and is based on the grounds that:-

i) The Applicant is the proprietor of all that parcel of land known as Mtondia/Roka/11(the suit property) and is a key and material party to the suit deserving the right to be heard;

ii) The Applicant was served with the Plaintiff's Further Amended Plaintiff on 23rd September 2016 but owing to an ongoing dispute between the Receivers and the Applicant's directors in Nairobi HCCC No. 446 of 2015, the Applicants inadvertently failed to file their Amended Defence on time;

iii) The applicants were only able to file the Amended Defence on 3rd September 2018 after writing to the Plaintiff's Advocate on 30th August 2018 seeking their indulgence; and

iv) It is in the interest of justice that the application be allowed as the Plaintiff shall not suffer any prejudice as a result thereof.

3. The Plaintiff is however opposed to the application. In Grounds of Opposition herein on 3rd October 2018, the Plaintiff opposes the said application on the grounds that:-

1. The said application is brought on the day this matter was listed for hearing after a period of almost two years after the pre-trial directors had been given and confirmed on 5th December 2016.

2. No leave was obtained from this Honourable Court to file and serve the Amended Defence out of time in abuse of the process of the Court (sic).

3. The Orders allowing the 1st Defendant to file its Amended Defence were made by consent on 24th August 2016 which the 1st Defendant has breached and this Honourable Court has no jurisdiction to vary the same.

4. No proper or reasonable explanation has been given for the gross delay in making this application.

5. The application should be dismissed under the doctrine of laches.

6. Article 159 of the Constitution of Kenya entitles the Honourable Court to administer justice without undue regard to procedural technicalities only but does not come to the aid of parties who have failed to follow the procedural rules or otherwise have abused the due process of the Court due to their conduct.

7. The filing of this application on the same day as the case was set down for hearing has prejudiced the Plaintiff/Respondent being adjourned and delayed for hearing to next year.

4. I have considered the application and the grounds filed in opposition thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the parties.

5. The claim herein is not a liquidated claim or a claim for general damages. If it were a liquidated claim, and no defence was filed, Order 10 Rule 4 would apply and Judgment would be entered in default. If it were a claim for general damages Order 10 Rule 6 would apply and interlocutory Judgment could be entered.

6. However this being a claim for land, no interlocutory Judgment was entered even though the 1st Defendant did not file a Defence for more than two years after the Plaintiff amended its claim and an order was made requiring the 1st Defendant to do so.

7. According to the 1st Defendant, its directors were embroiled in a dispute with the Receivers Managers over the assets of the company and the issue of filing pleadings herein was momentarily forgotten. While this Court has little sympathy for parties who deliberately file their documents late, I think in the circumstances of this case, striking out the Amended Defence as filed on 3rd September 2018 would be too draconian.

8. Given that this matter is yet to be heard, I think it is only fair that every person be given an opportunity to plead their case as they deem fit and proper. I will therefore admit the Amended Defence even though it was filed and served out of time and without the leave of this Court.

9. That Defence was however filed only a few days before a date when the matter was coming up for hearing. The Plaintiff was made to fix the matter for hearing when the 1st Defendant failed to file its pleadings. It cannot therefore be said that the Plaintiff has suffered no prejudice. It was greatly inconvenienced having prepared for hearing on 25th September 2018.

10. Accordingly, the Amended Defence is admitted but on condition that the Defendant will pay to the Plaintiff throw away costs of Kshs 50,000/- within 14 days. If these costs are not paid within the time prescribed, then the Amended Defence will stand struck out.

11. It is so ordered.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

J.O. OLOLA

JUDGE