



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 15 OF 2018

ALLEN PATRICK NGOBA PLAINTIFF

VERSUS

ROBERT GITHINJI MUREITHI1ST DEFENDANT

MOHAMED KHAMIS BALLETY2ND DEFENDANT

LIFESPAN TOURS AND SAFARIS LIMITED 3RD DEFENDANT

MALINDI MUSKETEERS LIMITED4TH DEFENDANT

LAND REGISTRAR – KILIFI5TH DEFENDANT

HON. ATTORNEY GENERAL6TH DEFENDANT

RULING

1. By the Notice of Motion dated and filed herein on 11th March, 2019, Malindi Musketeers Limited (*the 4th Defendant/Applicant*) prays for an order that this Court be pleased to dismiss this suit for want of prosecution. The application which is supported by an affidavit sworn by the 4th Defendant's Director Daniel Ricci is premised on the grounds:

- (i) *That the suit was instituted by way of a Plaint filed on 23rd January, 2018 and summons to enter appearance were served upon the 4th Defendant on 26th January, 2018;*
- (ii) *That the 4th Defendant entered appearance vide a Memorandum of Appearance and a Statement of Defence filed on 20th February, 2018 and served upon the Plaintiff on 21st March, 2018;*
- (iii) *That the Plaintiff/Respondent filed a reply to the 4th Defendant's Defence on 28th March, 2018 and the same was served upon the 4th Defendant on the same day;*
- (iv) *That since then the Plaintiff has neglected, failed and/or refused to set down the suit for hearing and/or otherwise take any steps to prosecute the same for a period of over twelve (12) months; and*
- (v) *That it is evidence that the Plaintiff is not interested in prosecuting the case and has lost interest in the suit.*

2. Allen Patrick Ngoba (*the Plaintiff/Respondent*) is opposed to the application. By his Replying Affidavit sworn on 18th March, 2019 and filed herein on 28th March, 2019, the Plaintiff admits that he instituted this matter on 23rd January, 2018 against the six (6)

Defendants herein. It is however his case that while the 4th Defendant was served and did enter appearance, his Advocates on record have been unable to serve the 1st, 2nd and 3rd Defendants with the Summons.

3. The Plaintiff further avers that the application as filed is premature and meant to mislead the Court as the parties are yet to comply with **Order 11 of the Civil Procedure Rules** and/or to proceed for pre-trial.
4. It is further the Plaintiff's case that the subject matter of the dispute is weighty and it is in the interest of justice that parties be granted a chance to canvass the same in Court.
5. I have carefully perused and considered the application and the response thereto. I have equally perused and considered the rival submissions as placed before me by the Learned Advocates for the parties.
6. The legal framework on dismissal of a suit for want of prosecution is provided under **Order 17 Rule 2 of the Civil Procedure Rules** as follows:

“2(1) In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the Court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

7. Arising from the foregoing, it is evident that under the said framework, the Court may *suo motu* or on the application of a party dismiss a suit for want of prosecution. In order to succeed in such an application however, the applicant must first and foremost satisfy the Court that a period of one year had lapsed since either party made an application or took any step towards the prosecution of the suit.
8. In the matter before me, it is apparent from the 4th Defendant's own application that that Plaintiff took the step of filing a reply to the 4th Defendant's Defence of 28th March 2018. That being the case, it was apparent to me that the application before me was premature as at the 11th day of March, 2019 when the 4th Defendant filed the present application, a period of one year had not lapsed since the Plaintiff last took the step of filing a Reply to the Defence.
9. That being the case, the Motion dated 11th March, 2019 is misconceived, premature and without merit. It is dismissed with costs to the Plaintiff.

Ruling dated, signed and delivered virtually at Nyeri via Microsoft Teams this 28th day of April, 2022.

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Court Assistant – Kendi

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J. O. OLOLA

JUDGE