



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI

ELC CASE NO. 58 OF 2013

RODGERS MUNDU MUNGA.....PLAINTIFF

VERSUS

1. PATRICK CHISHENGA MUNGA

2. EDISON KASHINDO MUNGA

3. BENSON RUNYA MUNGA.....DEFENDANTS

RULING

1. By this Notice of Motion application dated and filed herein on 9th March 2017, the three Defendants pray for orders that the Plaintiff's suit be dismissed with costs for want of prosecution. The application which is supported by an affidavit sworn by Patrick Chishenga Munga(1st Defendant) is premised on the grounds:-

i) That the Plaintiff is sitting on an order(of injunction) and has no intent on fixing the matter for hearing;

ii) That is now more than three years since the matter was filed and it has never been fixed for hearing;

*iii) That it is only fair and just that the matter be dismissed so that the defendants can proceed with their developments agenda;
and*

iv) That the suit is an abuse of the Court process as the Plaintiff and the Defendant(s) are brothers.

2. In a Replying Affidavit sworn and filed herein on 26th June 2018, the Plaintiff Rodgers Mundu Munga avers that this is a land matter and that the same can only be determined through a *viva voce* hearing and not through the manner sought by the Defendants herein.

3. The Plaintiff further avers that the Defendants have an equal responsibility under the law to fix the matter for hearing since they also have a Counter Claim which they filed on 1st October 2015.

4. I have considered the application and the response. I have equally considered the written submissions as filed by the Learned Advocates for the parties.

5. Order 17 Rule 2 of the Civil Procedure Rules stipulates that:-

“(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 expeditions hearing of the suit;

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

(4) The Court may dismiss the suit for non-compliance with any direction given under this order.

6. Accordingly, it is permissible for any party to a suit to move the Court for dismissal in situations where no application has been made or any step taken by either party for one year or more.

7. From the records herein, it is evident that prior to the filing of the present application on 9th March 2017, the Defendants had filed a Notice of Motion application dated 7th March 2014 seeking to amend their Defence to include a Counterclaim. The said application was allowed by the Honourable Justice Angote then seized of the matter on 20th September 2016 and the Amended Defence was required to be filed and served within 14 days from that date. No such amended Defence appears to have been filed herein.

8. As it were, on 9th March 2017 when the present application was filed one year had not lapsed since the Court granted the orders of 20th September 2016 allowing the amendment of the Defence.

9. Arising from the foregoing, this application by the Defendants was made prematurely and it must fail. The same is dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE