



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.80 OF 2012

HAMISI MRAMBA THOYA.....PLAINTIFF/RESPONDENT

=VERSUS=

1. DAVID MWANGI MUIRURI.....1ST DEFENDANT/APPLICANT

3. ABDULHALIM MOHAMED SADIKI.....2ND DEFENDANT

R U L I N G

1. The Application before me is dated 7th April 2015. The Application is seeking to have the entire suit dismissed for want of prosecution pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules and to allow the 1st Defendant's counterclaim dated 28th February 2013 to proceed for hearing.
2. In his Replying Affidavit, the Plaintiff deponed that he went away from Watamu when he was accused of having been involved in a motorbike theft; that he has not lost interest in prosecuting the suit and that the Application has been filed under the wrong provisions of the law.
3. The Applicant submitted that the last time this matter was in court was when a Ruling for application for summary judgment was delivered on 10th February, 2014.
4. The 2nd Defendant's counsel supported the Application.
5. This matter was last in court on 10th February 2014 when the court dismissed the 1st Defendant's Application.
6. The current Application was filed after the lapse of one year and two months after the delivery of the said Ruling.
7. The Plaintiff has deponed that he did not fix the matter for hearing or for pre trial directions within one year because he ran for his dear life after he was accused of being involved in motorcycle theft within Watamu township.
8. Although the Defendants are seeking to have the suit dismissed for want of prosecution, the 1st Defendant has not told the court why he did not fix the suit considering that he has a Counterclaim.
9. A Counterclaim is a cross-suit and the principles applicable to the striking out of the suit applies to the Counterclaim.
10. It is contradictory therefore for the 1st Defendant to urge the court to strike out the Plaintiff's suit for want of prosecution and allow the Counterclaim.
11. Both the Plaintiff and the 1st Defendant are guilty of laches. However, in the interest of justice, and considering that the Plaintiff has satisfactorily explained why he did not fix the suit for hearing, I shall disallow the 1st Defendant's Application dated 7th April 2015 on condition that the

Plaintiff's suit is fixed for hearing within 90 days from the date hereof, excluding the days when the court will be on vacation.

12. Each party shall bear his or her own costs.

Dated and delivered in Malindi this **11th** day of **September** 2015.

O. A. Angote

Judge