



**CKK v JK (Miscellaneous Civil Application E031 of 2021)
[2024] KEHC 15023 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E031 OF 2021
JRA WANANDA, J
NOVEMBER 29, 2024**

BETWEEN

CKK APPLICANT

AND

JK RESPONDENT

RULING

1. The parties herein are an estranged couple who have been tussling over the custody of their 2 children. This Miscellaneous Cause was filed on 22/03/2021 whereof the Applicant sought orders that the suit titled Eldoret Children’s Case No. E38 of 2020 be transferred to the Children’s Court at Nyahururu for trial and disposal.
2. This Ruling is in respect of two Applications, which being related, were agreed by the parties, to be heard and determined together.
3. The 1st Application is, as aforesaid, the one that originated this action and is the Notice of Motion dated 20/03/2021. The same was filed by the Applicant through Messrs Wangechi Wangare & Associates Advocates. The specific orders sought therein are as follows:
 - i. [.....] spent.
 - ii. The Honourable court be pleased to transfer Eldoret Children’s case No. E038 of 2022 – In the matter of ACK and GKK suing through their mother and next Friend JK versus CKK and all proceedings therein to the Children’s court at Nyahururu for trial and disposal.
 - iii. The costs of this application be provided for.
4. The Application is premised on the grounds appearing on the face thereof and is supported by the Affidavit sworn by the Applicant in which he deponed that he is a resident of Nyahururu Town, that he is the biological father of ACK and GKK, the subjects of the said Eldoret Children’s case No. E038



of 2022 and that the Respondent is the children's biological mother. He deponed further that the Respondent, on 7/04/2018, took off from their matrimonial home and abandoned the children who were still very young with the youngest being 1 year old. He deponed that he then took care of the children single-handedly and has struggled with them until ever since, and that he tried to seek the intervention of friends and family to convince the Respondent to return home but the Respondent refused to do so.

5. He deponed further that on 10/05/2018, he reported the matter to the Children's Officer, Nyandarua North pursuant to which the Respondent was summoned to appear before the said office but that she failed to do so and the matter remained pending. He contended that after about 1 year, he met and married another lady with whom they have lived together as a family and who acquired parental responsibility over the children after they were abandoned by their biological mother (Respondent), and that the lady (now his wife) came into the marriage with her own young daughter and who has blended with the rest of the family. He added that the children are now well settled in their lives and it is in their best interest that they are not destabilised by being taken away by their mother who abandoned them for 3 years and has not cared about their welfare. According to him, the Respondent is now a stranger to the children and they cannot even remember her, that the children are enrolled in school in Nyahururu and their progress is excellent, and that since they all reside in Nyahururu where the Children's Officer seized of the matter is based, it is convenient, economical and expedient for all the parties that the suit be heard and determined at the Children's Court in Nyahururu.

Replying Affidavit to the 1st Application

6. The Respondent, in opposition to the 1st Application, filed a Replying Affidavit on 14/04/2021 through Messrs Isiaho Sawe & Co. Advocates. She denied that she ran away from the matrimonial home and deponed that the Applicant, being a prison warder had always been physically violent towards her hence causing her to suffer untold mental and psychological torture, that the Applicant, while taking advantage of his position as a police officer forcefully ejected her from the matrimonial home in the middle of the night after assaulting her and has also threatened her with death. She deponed further that since leaving the home, she resides and works for gain within the territorial jurisdiction of this Court where the children shall also reside should the custody of the children who are of tender years be vested in her, and that having been assaulted by the Applicant on several occasions and threatened with death, she is apprehensive to return to Nyahururu "especially given the current media coverage of husbands killing their spouses".
7. She deponed that transferring the matter to Nyahururu will cause her financial hardships as her meagre salary as a messenger will not sustain the travelling expenses, that the Applicant is only in Nyahururu upon being transferred there as a prison warder and there is possibility of him being transferred elsewhere and that no hardship will be caused to the children since they will not need to travel for Court attendances. She then denied the allegations that she abandoned the children was. Comically, despite then deponing that the issue before this Court is whether Eldoret Children's Case No. E38 of 2021 ought to be transferred to Nyahururu and not who should have the custody of the children, the Respondent herself fell into the same temptation and proceeded to extensively depone on matters that amount to arguing the substantive case before the Children's Court, instead of limiting herself to the Application for transfer of that suit.
8. In a twist of events, the said 1st Application was dismissed on 14/04/2021 by Hon. Lady Justice H. Omondi (as she then was) for want of prosecution when the Applicant's Counsel failed to attend Court on that date. The same was however later reinstated on 17/12/2021 vide the orders made by Hon. Justice S. M. Githinji, upon the Applicant's Application.



9. The 2nd Application is the Notice of Motion dated 13/12/2023 filed by the Respondent through her said Advocates, Messrs Isiaho, Sawe & Co. On its part, it seeks orders as follows:
 - i. That the application dated 20th March, 2021 be dismissed for want of prosecution and non-compliance with the ruling of this court delivered on 17th December, 2021.
 - ii. That the costs of this application be in the cause.
10. The Application is premised on the grounds appearing on the face thereof and is supported by the Affidavit sworn by the Respondent in which she deponed that the Court allowed the Application for reinstatement of the Application dated 20/03/2021 on the condition that the Applicant files Submissions to the Application for transfer of suit, strictly within 14 days of the Ruling, but that the Applicant has never complied with such directions almost, 2 years later. She deponed that the indolence on the part of the Applicant has stalled the prosecution of Eldoret Children Case No. 38 of 2021 at the expense of the children who are currently in the hands of the step-mother, and that their welfare remains unknown since the Respondent has been denied access to them since 2021 when the parties herein parted ways. She added that the Application has been filed in the best interest of the minors, and that no prejudice will be suffered by the Applicant should the orders be granted since the same will pave way to the hearing and disposal of the children's case. She deponed further that the Applicant has since re-married hence the reason the Respondent seeks custody orders in the Children's Court for the reason that there is likelihood of the minors being mistreated by their step-mother.
11. Despite granting the Applicant, on 20/06/2024, a 7 days extension to file a Response to the 2nd Application, up to the time that I concluded this Ruling, I had not come across any response filed by or on behalf of the Applicant.

Determination

12. The issues arising herein for determination are evidently the following:
 - i. Whether this action should be dismissed for want of prosecution and/or for failure to comply with the conditions given by the Court on 17/12/2021.
 - ii. Whether Eldoret Children's Case No. 38 of 2021 should be transferred to the Nyahururu Law Courts.
13. I will begin with the 2nd Application, the one seeking dismissal of this action since determination thereof in favour of the Respondent will render the Application for transfer of the suit otiose.
14. In respect to dismissal for want of prosecution, Order 17 Rule 2 of the Civil Procedure Rules provides as follows:
 - “(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.



(4) The court may dismiss the suit for non-compliance with any direction given under this Order”.

15. It is clear from the foregoing that the Respondent has approached the Court under the provisions of sub-Rule (3) and (4) above (underlined).

16. The principles to be applied in determining whether to dismiss an action for want of prosecution were well set out in the case of *Allen Vs Sir Alfred Mc Alphine & Sons Limited (1968)* where Salmon L. J guided as follows:

“A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff’s failure to comply with the Rules of the superior court or (b) under the court’s inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:

- (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognise inordinate delay when it occurs.
- (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
- (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.”

17. Echoing the above, R.Z. Chesoni (as he then was), in the case of *Ivita vs. Kyumba (1984) KLR 441*, stated that:

“3. The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”

18. The above principles were restated by the Court of Appeal in the case of *Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd (2004) eKLR*, where it stated as follows:

“..... The principle that pervades these decisions is that the court has to be satisfied that the ordinate delay is excusable and if so satisfied, then the court has to consider whether justice can be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done then it will be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not



satisfied that the inordinate delay is excusable then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution.”

19. Borrowing from some of the above authorities, Gikonyo J, in the case of Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited [2014] eKLR broke down the above principles and extrapolated the same in an even more elaborate manner as follows:

“ 10. No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial “sword of the Damocles”. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of *the Constitution* are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of Ivita Vs Kyumbu, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties.”

20. Applying the above principles to the facts of this case, I find that it is not in dispute that, as aforesaid, this action was already dismissed on 14/04/2021 by Hon. Lady Justice H. Omondi (as she then was) for want of prosecution on the part of the Applicant, the same ground now invoked. Upon the Applicant’s Application, the action was reinstated on 17/12/2021 vide the orders made by Hon. Justice S. M. Githinji, and the Court therefore granted the Applicant a “second bite at the cherry”. It is also not in dispute that in reinstating the action, the Court directed the parties to file Submissions on the matter within 14 days of the Ruling. This therefore, as submitted by the Respondent’s Counsel, was a condition precedent imposed on the Applicant for reinstatement of the action. However, a perusal of the record reveals that there has been no action whatsoever in this matter ever since, almost 3 years later. Being the originator of the action, and thus the “owner” thereof, it is the Applicant who will shoulder any adverse consequence that would arise as a result of such inaction and/or dormancy of the matter. This is because, as the one who filed the action, it is him who bears the obligation to prosecute it. In his wisdom, however, the Applicant chose to file any response to the Application for dismissal.
21. The Respondent has submitted that the existence of this action has stalled the substantive suit, Eldoret Children’s Court Case No. 38 of 2021. Although this claim has not been substantiated since it has not been alleged that any order of stay of proceedings was issued suspending prosecution of that suit on the reason of existence of the Application herein seeking transfer of that suit, the allegation may as well



be merited in that any attempt to prosecute the Children's Court suit would most likely be met with the excuse of the existence of this action.

22. The impression I get is that the Applicant has lost interest in pursuing the Application for transfer of the Children's Court suit to Nyahururu. It may be that circumstances have since changed and the issue of the place of litigation may no longer be an issue to the Applicant or perhaps, he has since relocated from Nyahururu and litigating in that town may no longer be convenient. I would not know since the Applicant never filed a response to the Application. Be that as it may, and since the Applicant has chosen not to defend the Application, thus depriving the Court of any explanation for the delay, I have no material before me to consider whether the delay to prosecute is not inordinate or is excusable. In the circumstances, I have no reason not to accept the Respondent's contention that retaining this action will only cause substantial prejudice to the fair trial of the substantive suit before the Children's Court. I am therefore persuaded that the plea for dismissal of this action for want of prosecution is merited and I allow it as prayed.
23. Having found as above, the second issue, namely, whether the Children's Case No. 38 of 2021 should be transferred to Nyahururu Law Courts for hearing and determination is now a purely academic issue as it is overtaken by events. For this reason, I will not belabour it.

Final Orders

24. In light of the above, I order as follows;
- i. I allow the Respondent's (JK) Notice of Motion dated 13/12/2023.
 - ii. Consequently, I dismiss the Applicant's (CKK) Notice of Motion dated 20/03/2021 for want of prosecution and also for failure by the Applicant to comply with the directions imposed by the Court on 17/12/2021 as a condition for reinstatement of the Application which had already, earlier, been dismissed for want of prosecution on 14/04/2021.
 - iii. Since costs follow the event, I award costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 29TH DAY OF NOVEMBER 2024

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Wangechi for the Applicant

Masinde h/b for Ms. Isiaho for the Respondent

Court Assistant: Brian Kimathi

