



REPUBLIC OF KENYA



**In re Estate of Miriam Kavindu Andrew (Deceased) (Succession Cause 107 of 2019) [2025] KEHC 2139 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2139 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**SUCCESSION CAUSE 107 OF 2019**

**RN NYAKUNDI, J**

**FEBRUARY 14, 2025**

**IN THE MATTER OF THE ESTATE OF MIRIAM KAVINDU ANDREW (DECEASED)**

**AND**

**IN THE MATTER OF GRANT AD COLLIGENDA BONA DEFUNCTI**

**AND**

**IN THE MATTER OF SECTION 67 OF THE LAW OF SUCCESSION ACT CAP 160, AND RULE 36 OF THE PROBATE AND ADMINISTRATION RULES**

**IN THE MATTER OF**

**CAROLYNE JEPTOO KIPKORIR ..... APPLICANT**

**RULING**

1. On 28<sup>th</sup> August 2019, the Applicant herein filed summons premised under section 67 of the [Law of Succession Act](#), Cap 160 and Rule 36 of the Probate and Administration Rules petitioning this Honourable Court for a grant of letters of Administration Ad Colligenda Bona Defuncti of the Estate of the above named Miriam Kavindu Andrew who died while domiciled in Kenya on the 12<sup>th</sup> Day of October 28, limited for the purpose of accessing the deceased's joint Bank Account Number 1199442658 KCB MTRH Branch and withdrawing monies from the said account for their maintenance, payment school fees and other related expenditures.
2. The Applicant stated that it is only proper for this Honourable Court:
  - a. Do issue an order to the above named bank for the purposes of accessing the said cash for their maintenance, payment school fees and other related expenditures.
  - b. Allow the applicant together with the other two signatories to withdraw monies from the account number 1199442658 KCB MTRH Branch.



3. A clear look at the record indicates that this matter last came for mention on 23<sup>rd</sup> October 2023 before the Deputy Registrar for further directions and the parties were thereby notified accordingly. However, since that date, the court record reveals a conspicuous absence of any steps taken by the Applicant to advance the prosecution of the application.

### Decision

4. Dismissal of proceedings for want of prosecution is well established in Kenya. Order 17 Rule 2(1) of the Civil Procedure Rules, which governs dismissal of suits for want of prosecution, provides as follows: “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.”
5. Clearly, the statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution: if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.
6. In *Argan Wekesa Okumu Vs Dima College Limited & 2 others* [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3<sup>rd</sup> Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita –vs-Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

7. Whether to exercise the power of dismissal for want of prosecution under Order 17 is, however, a matter that is within the discretion of the court. In its decision in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another* [2016] eKLR, the court stated as follows:

“11. Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita vs Kyumba* [1984] KLR 441 espoused that: “The test applied by the courts in the 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 the 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 of and in the discretion of the court.”

8. The jurisprudential principles governing dismissal for want of prosecution were comprehensively articulated in the case of *Ivita -vs- Kyumbu* (1984) KLR 441 which I have already pointed above, where the Court established that the test is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite such delay. This principle recognizes that justice must be administered not only to the petitioner but also to the respondents, who have a legitimate expectation that matters brought against them will be prosecuted diligently.
9. The record in this case indicates that this matter last came for mention on 23<sup>rd</sup> October 2023 before the Deputy Registrar for further directions and the parties were thereby notified accordingly. However, since that date, the court record reveals a conspicuous absence of any steps taken by the Applicant to advance the prosecution of the application.
10. Having carefully considered the circumstances of this case, I am satisfied that this is a proper case for the exercise of this court's discretion to dismiss the petition for want of prosecution. This is because the full one-year period contemplated under Order 17 Rule 2(1) has elapsed since the matter was last in court on 23<sup>rd</sup> October 2023 which is 1 year 3 months.
11. Consequently, this suit is dismissed for want of prosecution.
12. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 14<sup>TH</sup> FEBRUARY 2025**

.....

**R. NYAKUNDI**  
**JUDGE**

