



REPUBLIC OF KENYA



In re IN (Adoption Cause 2 of 2022) [2025] KEHC 1799 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1799 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
ADOPTION CAUSE 2 OF 2022
RN NYAKUNDI, J
FEBRUARY 14, 2025
IN THE MATTER OF THE CHILDREN ACT 2001
AND
IN THE MATTER OF CUSTODY AND GUARDIANSHIP BY EM
AND
FOR ADOPTION AND CUSTODY OF IN

RULING

1. The Applicant herein EM filed a Notice of Motion Application dated 21st December 2021 where she sought the following orders:
 - a. Spent.
 - b. That the Applicant be granted an adoption order for IN
 - c. That costs of this application be in the cause.
2. The record indicates that upon filing of the application, certain orders were issued on 23rd February 2022. 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

3. Firstly, it is appropriate to first address the applicable provisions of the *Civil Procedure Rules* governing the dismissal of suits for want of prosecution. In this view, I find it necessary to set out the entire order 17 rule 2 of the [Civil Procedure Rules](#). It states;

“(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. Thus, under sub- rule 1 of rule 2, upon expiring of one year without any steps being taken on the suit, the court can issue notice to the parties; under sub- rule 3 a party may apply for dismissal as provided under sub rule 1, that is at the expiry of one year; and finally under sub-rule 5 the suit automatically stands dismissed if the suit has remained dormant for two years.

5. What is the consideration when a court is determining an application of this kind? The principles were set out in the case of *Ivita v Kyumbu* (1984) KLR 441, where the court held:

"So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. The defendant must satisfy the court that he would be prejudiced by the delay, or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.....where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume the delay is not only prolonged but is also inexcusable....."

6. In the case of *Mwangi Kimenyi v Attorney general and another* Misc 720/2009(2014) KLR, the court reiterated the same of the principles in *Ivita* case (*supra*) but set out the principles as follows;

1. "Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case;
2. Whether the delay is intentional, continuous and, therefore, inexcusable;
3. Whether the delay is an abuse of the court process;
4. Whether the delay gives rise to substantial risk to fair-trial or causes serious prejudice to the defendant;
5. What prejudice will the dismissal occasion the plaintiff?;
6. Whether the plaintiff has offered a reasonable explanation for the delay; Even if there has been delay what does the interest of justice dictate"

7. 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

8. The suit was last in court on 23rd February 2022 and therefore has been inactive for a period of 2 year 11 months as at 10th February 2025 when the application herein was filed. The matter is therefore ripe for dismissal.

9. From the foregoing, this suit is dismissed for want of prosecution.

10. It is so ordered.

DELIVERED VIA CTS DATED AND SIGNED AT ELDORET ON THIS 14TH FEBRUARY 2025



R. NYAKUNDI
JUDGE

