



REPUBLIC OF KENYA



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In re Estate of the Late Samuel Mungai Njeraine (Deceased) (Citation Cause E001 of 2020) [2025] KEHC 6868 (KLR) (20 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CITATION CAUSE E001 OF 2020
RN NYAKUNDI, J
MAY 20, 2025**

**IN THE MATTER OF THE ESTATE OF THE LATE
SAMUEL MUNGAI NJERAINI (DECEASED)**

AND

IN THE MATTER OF A CITATION

BETWEEN

DAMARIS WACEKE MUNGAI CITOR

AND

JOSEPH KIMANI MUNGAI CITEE

RULING

1. The citor herein filed a citation to accept or refuse letters of Administration Intestate dated 2nd October 2020 stating that it appears by the Affidavit of Damaris Waceke Mungai sworn on the 24th day of September, 2020 on her own behalf that the above named Samuel Mungai Njeraine of Racecourse who died on 6th April 2019 intestate leaving the children named thereunder.
2. The citor also stated that this is to direct the said Joseph Kimani Mungai that within fifteen (15) days after service thereof inclusive of date of such service to do so a cause an appearance to be entered for him in the Probate and Administration Registry and accept or refuse letters of administration of all the estate by which the law devolves to and vests in the personal representative of the deceased or such limited grant of letters of administration or show cause why the same should not be granted to any person interested in the estate of the above named herein.
3. The Citee also filed his Replying Affidavit averring the following:
 - a. That I wish to state that I have not refused to apply for Letters of Administration intestate of the late Samuel Mungai Njeraine.



- b. That the main reason being, that I have been in the process of assembling all the necessary documents pertaining to the estate of the deceased and the unavailability of most of the documents resulted in the current delay.
 - c. That I have secured some of the above mentioned documents including the Chief's letter and now I am ready to file the succession cause.
 - d. That now we have secured the Chief's letter we are now able to commence the process.
 - e. That there the citation as filed herein by the Citor is devoid of any merits as there is no justifiable reason why I should be summoned to show cause why I have not petitioned for letters of Administration.
4. It is critical to note that this matter appeared last in court on 24th March 2023 for directions before the Deputy Registrar. The record indicates that since then, there has been no steps taken by the parties to the case to advance the prosecution of the citation.

Decision

5. The power to dismiss a suit for want of prosecution is governed by Order 17 of the *Civil Procedure Rules*. Under Order 17 Rule 2(1) of the *Civil Procedure Rules*, 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.”
6. Further Order 17 Rule 2(3) of the *Civil Procedure Rules*, states thus: “Any party to the suit may apply for its dismissal as provided in sub-rule 1”
7. Evidently, the statutory threshold of Order 17 Rule 2 of the *Civil Procedure Rules* is that a suit qualifies to be dismissed for want of prosecution if either party makes no application in it or fails to take steps in it for at least one year preceding the presentation of a notice to show cause for dismissal by the court or an application by a party who seeks dismissal of the suit.
8. I am alive to the fact that before any court can dismiss a suit for want of prosecution, the test to be applied is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. In other words, if the court is satisfied with the Appellant's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties, and hence the action would be not to dismiss the suit but direct that it be heard at the earliest time possible and available.
9. This test was elucidated in the case of *Nilesh Premchand Mulji Shah & another T/A Ketan Emporium v MD popat and others & another* [2016] eKLR, the court stated as follows:
- “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 v Kyumbu* [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.”

10. Simply put in *Invesco Assurance Co. Ltd v Oyange Barrack* [2018] eKLR, regarding the exercise of discretion in the circumstances where a dismissal of this nature would be raised, the court stated:

“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.”

11. Guided by the aforementioned authorities, it is clear to me that the discretion of Court to set aside an order for dismissal ought to be when a suit is dismissed for a want of prosecution, it means that the parties therein failed to aid court in meeting its overriding objective.
12. Therefore, 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.
13. The suit was last in court on 24th March 2023 and therefore has been inactive for a period of 1 year 11 months as at 10th February 2025 when the citation herein was filed. The matter is therefore ripe for dismissal
14. From the foregoing, this suit is dismissed for want of prosecution. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH MAY 2025

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R. NYAKUNDI
JUDGE

