Wasike v Oguk (Matrimonial Cause 8 of 2023)
[2025] KEHC 14132 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MATRIMONIAL CAUSE 8 OF 2023

RN NYAKUNDI, J

OCTOBER 9, 2025

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2014

AND

IN THE MATTER OF SECTION 7, 8 9 11 14 AND 17 OF THE MATRIMONIAL PROPERTY ACT

AND

IN THE MATTER OF SETTLEMENT OF MATRIMONAIL PROPERTY

BETWEEN

JANET NAKHUNGU WASIKE ..... APPLICANT

AND

DR CHARLES OCHIENG OGUK ..... DEFENDANT

RULING

1. Before this court is a Notice of Motion seeking the following orders:

    i. The application be certified urgent and service be dispensed with in the first instant

    ii. The orders issued by the honourable court on 30th May 2025 dismissing the suit for want of prosecution be reinstated and heard on merit

    iii. Costs of this application be in the cause which application is made on the following grounds:

    i. That on 30th May 2025 this suit was dismissed for want of prosecution

    ii. That the plaintiffs advocate to move the court and have the matter fixed for hearing have been frustrated because the court file has been missing from the high court civil registry

iii. That the applicant is still interested in prosecuting the case to its logical conclusion

iv. That the dismissal of the suit was occasioned not by indolence but by a conference of procedural missteps and administrative lapses none of which can be laid squarely at the feet of the Applicant

v. That dismissing the instant suit is a great prejudice to the applicant and should be granted an opportunity to be heard on merit

vi. That the court ought to be mindful of *the constitution* imperative under Article 159(2) of *the constitution* to administer justice without undue regard to procedural technicalities

vii. That the instant application has been made in good faith and promptly

2. It is annexed by an affidavit sworn by David Rioba Omboto which states as follows:

a. That I am an advocate of the High Court of Kenya in conduct of this suit hence competent and duly authorized to swear this affidavit

b. That on 30th May 2025 the honourable court dismissed the present suit for want of prosecution

c. That I have been unable to move the court and have the matter filed for hearing as the court file has been missing from the civil registry

d. That I have severally written to the Deputy Registrar of the High Court to help me have the file traced in vain

e. That I as an advocate my mistake ought not be visited upon innocent litigant

Decision

3. The dismissal of suit for want of prosecution is based on non-compliance with the timelines set in the statutory framework governing the various causes of action. In the Social Transformation Through Access to Justice by the Chief Justice as read with Performance Management and Measurement Understanding of the Judiciary classifies backlog of cases as those which have not been heard and determined within one year. In the Civil Procedure Rules Orders 17 Rule 1, 2 & 3 of the CPR the Policy Framework is provided to the courts to dismiss suits which parties have not taken a step more than one calendar year.

4. The basis of which was discussed by the Court in Njuki Gachungu v Githii (1977) KLR 108 in the following statement: “When the delay in bringing civil actions to speedy conclusion is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or both,the court may in its discretion dismiss the action straightaway. On the other hand this power should be exercised unless the court is satisfied: (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or(2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between each other or between them and a third party. As regards the defendant the Rules of the Supreme Court give to the plaintiff the initiative in bringing his action for trial. The pace at which it proceeds through the various steps of issue and service of writ, of pleadings and discovery, of order for directions and setting down for trial is in the first instance within his control. The rules also provide machinery whereby the plaintiff can compel the defendant to take promptly those steps preparatory to the trial, which call for positive action on his part and provide an effective sanction against unreasonable

delay by the defendant.They enable the plaintiff to sign judgment against the defendant in default and so obtain forthwith the remedy for which the action was brought. The times within which these successive steps should be taken are laid downy the rules, though subject to extension by agreement or order of the court; but under the adversary system the only sanction for their observance by either party is dependent upon the other party's choosing to make an application to court. Where the delay is on the part of the plaintiff, there are some steps such as obtaining an order for directions or setting down the action for trial, which the defendant may take himself; but it is seldom in the defendant's interest to press on with the trial of the action, whatever the view he takes of the plaintiff's chances of success. He has in any event the use during the period of the delay of any money, which he may ultimately have to pay in damages. It is thus inherent in an adversary system which relies exclusively upon the parties to an action to own case, that the defendant, instead of spurring the plaintiff to proceed to trial, the plaintiff's action for want of prosecution on the ground that so long a time is a substantial risk that a fair trial of the issues will not be possible. See Allen v Sir Alfed Mcalpine and Sons Ltd [1968] 1 All ER 543.

5. In considering whether an action should be dismissed for want of prosecution the court may take into account the delay before the issue of the writ in ascertaining whether the subsequent delay after proceedings have commenced is inordinate, inexcusable and prejudicial to the defendant, even though the earlier delay was permissible under the rules governing the limitation of actions; where, however, the defendant has been prejudiced as a result of the earlier "permissible" in commencing the action, but has not been put in any worse position in consequence of the plaintiff's subsequent inordinate and inexcusable delay in prosecuting the action, it is open to the court to dismiss the action for want of prosecution since there is no sufficient nexus between the plaintiff's inexcusable delay and the prejudice to the defendant.

6. From the perspective of this principles and within the notion of Art 48 & 50 of *the constitution* I hereby exercise discretion to review the ex-parte order of dismissal and have it substituted with reinstatement of the suit with a condition precedent that the same be set down for hearing within 45 days from today's date. It is so ordered.

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 9TH DAY OF OCTOBER, 2024.

.....

R. NYAKUNDI

JUDGE