

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAPSABET
CIVIL DIVISION
CIVIL CASE NO. 12 OF 2021

MARGY CHEPKOSGEI
LETTING:.....PLAINTIFF

VERSUS

WILFRED KIRWA
LETTING:.....DEFENDANT

RULING

1. Basically, the Notice of Motion by the Defendant/ Applicant dated 1st April 2025, seeks the main order that this suit be dismissed for want of prosecution. On the basis of the grounds set out in the motion supported by the averments contained in the supporting affidavit/ deposed on 13th November 2024 by counsel for the Applicant, **Ms. Rachel Moraa.**

The Respondent/ Plaintiff filed a replying affidavit dated 24th September 2025, in opposition to the application.

2. Order **17 Rules [1][3], Order 2 Rule [15] of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** provided the foundation for the application. **Order 17**

Rule 3 Civil Procedure Rule is of significant importance and provides that: -

“Where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in order of the modes directed in that behalf by Order 12, or make, such other order as it thinks fit.”

And, **Rule 3[1]** of **order 12** provides that: -

“If one the day fixed for hearing, after the suit has been called for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

3. It is the Applicant’s contention that this suit was filed on 17th August 2016 and close to nine [9] years since then the Plaintiff has never moved to prosecute it despite several notifications to her.

Further to the foregoing and as an alternative, the Applicant contends that the Plaintiff’s suit discloses no reasonable cause of action against the Defendant.

In her rejoinder, the Plaintiff/ Respondent contends that she is willing and energetic enough to proceed and prosecute her

case to the end. She attributes the delay in the prosecution of her case to the failure by her erstwhile Advocate to provide her with accurate and correct communication on the status of her case whose subject matter is property she considers to be matrimonial property part of which is occupied by a third party.

4. The record shows that this case was filed in court on 17th August 2016 for orders "*interalia*" to compel the Defendant/Applicant to allow the Plaintiff/Respondent access her matrimonial home standing on the parcel of land described as **Nandi/Kipsigak/158**. The Defendant/Applicant is said to be husband or spouse to the Plaintiff, but denied the allegation in his statement of defence and contended that he is married to one wife called Emmy Letting with whom they own the aforementioned parcel of land on which stands their matrimonial home.

Whether or not there exists a marriage relationship between the Applicant and the Defendant is a matter raising valid triable issues which may only be resolved by a complete and full hearing of this case which in the circumstance, cannot be said to be frivolous, vexatious and an abuse of the court process to warrant its summary dismissal.

5. Evidently, since the closure of the pleadings and the determination of an interlocutory application the Plaintiff/Respondent has been rather slow in prosecuting her case to

its logical conclusion. She blames her previous advocate for the delay but fails to demonstrate how the advocate is to blame. Nonetheless, failure by an advocate not to act expeditiously in prosecuting a matter could offer the Plaintiff/ Respondent a lame excuse for the delay in the prosecution of this matter.

6. Consequently and while giving the Plaintiff/ Respondent the benefit of doubt for the delay in the prosecution of this case it would be in the interest of justice that the present application be disallowed and the Plaintiff be given at opportunity to be heard in order that her case against the Defendant/ Applicant be determined on the merits.

The application is accordingly dismissed with each party bearing their own costs and on condition that the Plaintiff do ensure that her case is prosecuted and concluded within the next for [4] months from this date hereof. In default, the case, shall stand dismissed for want of prosecution, with costs to the Defendant.

Ordered accordingly.

Dated and Delivered this 5th day of March 2026

**HON. J. R. KARANJAH,
JUDGE**

