



REPUBLIC OF KENYA



KENYA LAW
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**Musungu v Mutambo (Civil Appeal E146 of 2023)
[2025] KEHC 3814 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E146 OF 2023
RN NYAKUNDI, J
MARCH 27, 2025**

BETWEEN

COLLINS LUKORITO MUSUNGU APPELLANT

AND

FAITH VUGUTZA MUTAMBO RESPONDENT

RULING

1. Before this court is a Chamber Summons expressed under Section 10 of the [High Court \(Organization and Administration\) Act](#), 2015 and rule 17 of the High Court (Organization and Administration) (General) rules 2016 expressed under the following orders:
 - a. That service of this application be dispensed with in the first instance.
 - b. That the applicant's motion be admitted to hearing during the August Recess of the High Court
 - c. That the costs of this application be provided for Which Application is based on the grounds:
 - a. That the High Court is currently on August Recess
 - b. That a party to an urgent matter must file an application for
2. In response to the Application, is a replying affidavit which provides as follows:
 - a. That I am the Respondent herein hence competent to swear this affidavit
 - b. That the application is fatally defective, incompetent, bad in law and should be dismissed with costs
 - c. That this court delivered its judgement on 14th July, 2023 in which the court ordered as follows:
 - i. The Plaintiff shall have actual/physical custody of the minor herein



- ii. The legal custody of the minor shall be shared jointly between the plaintiff and the Defendant
 - iii. The Defendant shall have unlimited access to the child, subject to prior arrangements being made between parties
 - iv. The defendant shall provide school fees and other school-related expenses when the child attains school-going age
 - v. The Defendant shall provide for the child's medical needs whenever they arise, The Defendant is further directed to enroll the child in the employer's current medical scheme.
 - vi. The Plaintiff shall provide shelter for the minor
 - vii. The Defendant shall provide maintenance for the child at Kshs 10,000/= per month to cater for the child's clothing, food and house help
 - viii. Each party to bear their own costs.
3. That prior to that this court had delivered its ruling on 30th March, 2023 pending the hearing and determination of the suit in which it ordered thus:
 - a. That the Applicant shall have physical custody of the minor herein
 - b. The Applicant shall provide shelter and parental care to the minor herein
 - c. The Defendant/Respondent shall provide food at Kshs 4,000/= and clothing at Kshs 3,000/= per month.
 - d. The Defendant /Respondent shall immediately enroll the minor in this medical cover
 - e. Costs of the Application shall be in the cause
4. That the Appellant/Applicant has to date neglected and/or refused to abide by the ruling issued on 30th March, 2023 and the ultimate judgement delivered on 14.7.2023
5. That I filed an Application dated 8th September, 2023 seeking the following orders
 - a. Spent
 - b. That the court be pleased to issue Notice to show cause against the Defendant /Judgement debtor why he should not be arrested and committed to civil jail for non-payment and/or compliance with order issued on 30th March 2023 and the judgment of 14th July, 2023
 - c. That the court be pleased to issue an order for attachment of the Defendant /Respondent's salary in the tune of Kshs 10,000 for monthly maintenance effective of 1st September, 2023 to date and all other accumulated amounts making a total of Kshs 33,000 as at 1st September 2023
 - d. That the National Police Service, the employer of the Respondent be directed to be releasing the said sum of kshs 10,000 monthly maintenance to the Guardian Ad litem/applicant through account number 0120025XXXXXXXXX in the name of Mccadonald ModanI held at National Bank every month for the minor maintenance in compliance with the judgment of this court
 - e. That costs of this suit be borne by the Defendant/judgement debtor



6. The primary duty of any litigant is to take steps to progress his or her case and not to leave it to drag in court for timeless periods without any sufficient cause. The law is settled in the following authorities as to what constitutes inordinate delay to warrant dismissal of a cause of action or an appeal for that matter.

D.t Dobie (k) Ltd V Joseph Muchina (1980) Eklr Mary A. Atineo V Kwega Bus Service And Communication Courier & Another V Telkom(k) Ltd (1999) Eklr. Ivita V Kyumbu (1984) Klr 441, Chesoni J Communciaitons Courier & Another V Telkom (K) LTD (1999)eKLR

“The primacy on the jurisprudence on the above Caselaw is that the test is whether the delay is prolonged and in excusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and Defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will 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 favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay. The action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

7. The continuous pendency of these proceedings would occasion prejudice and injustice to the Respondents, More so on negatively impacting on the principles of the best interest of the child universally recognized in our Children’s Act together with the International and Regional Instruments as envisaged in Article 2(5) & (6) of *the Constitution*. The Supreme Law of the Land further provides in Article 53 1(e) that every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. Similarly in Section (2) “ a child’s best interests are paramount importance in every matter concerning the child”
8. Furthermore, Section 2 of the *children Act*, 2022 defines the best interest of the child as the principles that prime the child’s right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53(1) of *the Constitution* and Section 8 of the Act.
9. In keeping within the scope of *the constitution*, the International and Regional Instruments and the current Children’s Act 2022, any delay to determine the children specific rights within a reasonable time the court runs the risks of falling short of its constitutional mandate to enforce the doctrine of the best interests of the child. The Children’s Act imposes parental responsibility for children on both of their biological parents whether they are married to each or not at the time of the child’s birth. This legal position is also affirmed by *the constitution* 2010.
10. In the instant case the contestation between the intended Appellant and the Respondent is with regard to the nature and realization of the rubric survival rights, economic, social, and cultural rights and they are of an immediate nature which cannot be derogated by any of the parents, guardian, or care giver under his or her custody in which the subject child finds protection by birth or by court order or any such institution.
11. For those reasons, this intended Appeal which has not been prosecuted for more than 2 years should not be allowed to continue holding back the enjoyment of the minimum core obligations on the



Welfare and best interests of the child imposed by the Constitution and statute upon both parents. The intended Appeal stands dismissed for want of prosecution and the judgement and orders of Honorable K.G Odhiambo delivered on 14th day of July 2023 at Chief Magistrate's Court, Eldoret in Children Case No E055 of 2023 be left to carry the day in favour of the Respondent

GIVEN UNDER THE SEAL OF THIS COURT AND PUBLISHED ON 27TH DAY OF MARCH 2025

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R. NYAKUNDI

JUDGE

