



**In re Estate of David Kiprugut Bor (Deceased) (Matrimonial Cause E030 of 2023) [2025] KEHC 11972 (KLR) (11 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11972 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MATRIMONIAL CAUSE E030 OF 2023  
RN NYAKUNDI, J  
AUGUST 11, 2025**

**IN THE MATTER OF ESTATE OF DAVID KIPRUGUT BOR (DECEASED)**

**BETWEEN**

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**STEPHEN KAPKITONY SITIENEI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID KIPRUGUT BOR) ..... APPLICANT**

**AND**

**BERNEDINE JEBET CHERUTICH ..... RESPONDENT**

**RULING**

1. On 21<sup>st</sup> June 2023, the Applicant herein filed a Notice of Motion Application seeking the following orders:
  - a. That the Honourable Court be pleased to enlarge the time and grant leave to the Applicant herein to file a Notice of Appeal and thereafter a Memorandum of Appeal against the Ruling of the Honourable Court delivered on therein *Eldoret High Court Succession Cause No. E123 OF 2021* by Hon. R. Nyakundi Judge.
  - b. That this Honourable Court be pleased to stay further or any other proceedings with respect to this matter pending the hearing and determination of the Intended Appeal.
  - c. Costs of this application.
  - d. Any other order that the court deems just and expedient to grant.
2. A look at the record shows that this matter was last in court on 5<sup>th</sup> July 2023. 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. Dismissal of proceedings for want of prosecution is well established in Kenya. Order 17 Rule 2(1) of the [Civil Procedure Rules](#), which governs dismissal of suits for want of prosecution, 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.”
4. Clearly, the statutory threshold set out under Order 17 Rule 2 of the [Civil Procedure Rules](#) is that a suit qualifies to be dismissed for want of prosecution: if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.
5. In [Argan Wekesa Okumu v Dima College Limited & 2 others](#) [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita v Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”
6. Whether to exercise the power of dismissal for want of prosecution under Order 17 is, however, a matter that is within the discretion of the court. In its decision in [Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another](#) [2016] eKLR, the court stated as follows:

“11. 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 Kyumba* [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.”



7. The jurisprudential principles governing dismissal of suits for want of prosecution were comprehensively articulated in the case of *Ivita v Kyumbu* (1984) KLR 441 which I have already pointed above where the Court established that the test is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite such delay. This principle recognizes that justice must be administered not only to the petitioner but also to the respondents, who have a legitimate expectation that matters brought against them will be prosecuted diligently.
8. I take cognisance that the record shows that this matter was last in court on 5<sup>th</sup> July 2023. 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.
9. 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 lapsed since the matter was last in court on 5th July 2023 which is 1 year 8 months.
10. In view of the foregoing, this suit is dismissed for want of prosecution. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11<sup>TH</sup> AUGUST 2025**

.....

**R. NYAKUNDI**

**JUDGE**

