



**Kenya Wildlife Service v Kisui & 2 others (Civil Appeal  
3 of 2018) [2022] KEHC 11131 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11131 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL 3 OF 2018  
HPG WAWERU, J  
JUNE 23, 2022**

**BETWEEN**

**KENYA WILDLIFE SERVICE ..... APPELLANT**

**AND**

**AUGUSTUS MWANGIA KISUI ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER COMMANDING STATION, NANYUKI POLICE STATION .... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. This ruling concerns the application by notice of motion dated 23/02/2021 filed by the Appellant which seeks the main order that the court be pleased –

“...to vary, review, set-aside and/or vacate the ex parte order and proceedings made...on 08/02/2021 and to make an order reinstating and/or readmitting the...appeal herein”.

By the said order of 08/02/2021 this court dismissed the Appellant’s appeal in following words –

“...The appeal herein was lodged on 14/03/2018. It is against a money decree passed on 21/02/2018. The memorandum of appeal was served upon the 1<sup>st</sup> Respondent on 14/03/2018, nearly three (3) years ago. Since that time the Appellant has not set the appeal down for hearing; nor has the Appellant taken any other step towards advancing the appeal towards disposal. In these circumstances the appeal is hereby dismissed under Order 42, Rule 35(2) of the Civil Procedure Rules. It is so ordered.”

2. The grounds for the application on the face thereof include –



- i. That the appellant was not served with any notice to attend court on 08/02/2021.
- ii. That the ex parte proceedings of 08/02/2021 and the order made thereon were thus irregular and against the law.

The application is supported by the affidavit of one Lisper Nyaga, learned counsel for the appellant.

3. The 1<sup>st</sup> defendant filed a replying affidavit on 10/03/2021 sworn by him. In response to the replying affidavit the appellant filed a supplementary affidavit on 23/03/2021. I have read and considered the supporting and opposing affidavits, as well as the written submissions filed on behalf of the appellant and the 1<sup>st</sup> respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have never made any representation in the appeal.
4. The application at hand is stated to be brought under Order 42, Rule 21 of the Civil Procedure Rules, 2010 and also under sections 1A, 1B and 3A of the Civil Procedure Act, cap 21. Articles 50(1) and 159(2) (d) of the Constitution of Kenya, 2010 are also cited.
5. The first thing to note is that Rule 21 of Order 42 is erroneously cited. This is because the appeal was not dismissed under Rule 20 of Oder 42; it was dismissed under Rule 35(2) of Order 42 which provides –

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

Rule 20 of Order 42 on the other hand states –

- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed.
  - (2) Where the appellant appears, and the respondent does not appear and has not filed a declaration under rule 16(3), the appeal may be heard ex parte.”
6. Although the appellant herein did not cite Order 45 of the Rules on its application, its main submissions are made under that rule, which provides for applications for review of decrees or orders in its Rule 1. Its main argument is that it had no notice of the proceedings of 08/02/2021 when its appeal was dismissed, and that therefore the order of dismissal ought to be set aside and the appeal reinstated for hearing.
  7. As already pointed out, the appeal was dismissed under Rule 35(2) of Order 42. The present application thus provided the appellant with the opportunity to show cause why the appeal should not have been dismissed under that rule; in other words, to explain why, apparently, it had taken no steps towards prosecution of the appeal for so long.
  8. The record of the court provides the relevant background leading to the dismissal order of 08/02/2021. As already noted, the appeal was lodged on 14/03/2018 by filing of the memorandum of appeal. The appeal was against a money decree passed on 21/02/2018. The memorandum of appeal was served upon the 1<sup>st</sup> Respondent on 14/02/2018, the day the appeal was lodged.
  9. On 26/10/2020 the 1<sup>st</sup> respondent’s advocates addressed a letter to court asking that the Deputy Registrar do act under Order 42, Rule 35(2) of the Civil Procedure Rules and list the appeal in chambers before the judge for dismissal. Upon the court record being placed before the judge on 02/12/2020,



the court set the appeal down for dismissal under the aforesaid rule on 20/01/2021 and directed that Notice to Show Cause do issue to the parties. The court did not sit on 20/01/2021; on the following day, 21/01/2021, it set the Notice to Show Cause down for 08/02/2021 in the presence of counsel for the 1<sup>st</sup> respondent and directed that notice be served upon the appellant.

10. Come 08/02/2021, there was no appearance for the appellant. The court was satisfied by an affidavit of service filed that morning that the appellant's advocates had been duly served with notice for 08/02/2021 and proceeded to dismiss the appeal as already seen.
11. The appellant has disputed that there was such service upon its advocates; however, it has not sought to cross-examine the deponent of the affidavit of service so that the issue of that service, or lack thereof, can be properly tried and ruled upon. Nevertheless, because the notice served was for "mention" as opposed to "notice to show cause why the appeal should not be dismissed" under Rule 35(2) of Order 42, this court will consider any reason given in the present application for non-prosecution of the appeal up to the time of its dismissal on 08/02/2021.
12. In paragraphs 10, 11, 12 and 13 of the supporting affidavit the appellant's learned counsel has deponed that the appellant has always been ready and willing to prosecute the appeal but that the delay has been caused by the lower court in providing to the appellant copies of the proceedings and judgment, which were applied for on 01/07/2020 but were supplied on 18/02/2021; that the appellant's counsels were then (at the time of swearing the affidavit on 23/02/2021) in the process of filing the requisite record of appeal so as to have the appeal heard and determined expeditiously once reinstated; and that the appeal is well-grounded and arguable.
13. It has already been noted that the decree appealed against was passed on 21/02/2018. The appeal was lodged on 14/03/2018 and the memorandum of appeal served upon the 1<sup>st</sup> respondent on that same day. No explanation has been offered at all why the appellant applied for copies of proceedings and judgment on 01/07/2020, more than two years after the decree was passed and appeal lodged!
14. The appellant's learned counsel has deponed that copies of the proceedings and judgment were supplied on 18/02/2021. There is no certificate of delay by the lower court such as it contemplated in section 79G of the Act certifying such period of time as may have been requisite for the preparation and delivery to the Appellant of copies of the proceedings and judgment. Even after stating that they were in the process of filing the record of appeal, by the time that the court file was brought to chambers on 29/03/2022 for preparation of this ruling, no record of appeal had been lodged by the appellant.
15. As already noted, the present application provided the Appellant with the opportunity to provide good and sufficient cause for not prosecuting its appeal, or even taking some action towards its disposal, from the time it lodged it on 14/03/2018 to when it was dismissed on 08/02/2021, a period of nearly three (3) years. The Appellant has not provided such good and sufficient cause. If it had the court would not have hesitated in exercising its discretion in its favour to set aside the order of dismissal and reinstate the appeal.
16. In the result I find no merit in the Appellant's application by notice of motion dated 23/02/2021. It is hereby dismissed with costs to the 1st respondent. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 22ND DAY OF JUNE 2022**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 23RD DAY OF JUNE 2022**

