



**Kabuto Contractors Limited v Attorney General (Civil Appeal
(Application) 638 of 2019) [2025] KECA 898 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 898 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 638 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
MAY 23, 2025**

BETWEEN

KABUTO CONTRACTORS LIMITED APPLICANT

AND

THE ATTORNEY GENERAL RESPONDENT

(An application to restore for hearing the application dated 31st March 2023 being an application for leave to appeal against the decision made on 3rd March 2023 by the Court of Appeal (Okwengu, Warsame & Mativo JJ.A.) in Civil Appeal No. 638 of 2019)

RULING

Background

1. Before us is a Notice of Motion dated 24th July 2024 filed by Kabuto Contractors Limited (the applicant). The application is brought pursuant to Articles 50, 159, 163 (4)(b), 259 of *the Constitution*, Sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 and Rule 58 (3) of the Court of Appeal Rules 2022 (this Court's Rules). The applicant prays for the following orders: -

“

- “1. This Honourable Court be pleased to restore for hearing the Notice of Motion Application dated 31st March 2023 being an application: -
 - i. To certify that a matter or matters of general public importance is or are involved in the intended appeal to the Supreme Court of Kenya against the decision of this Court delivered on 3rd March 2023 by (Hon. Okwengu, Warsame & Mativo JJA) in Civil Appeal No. 638 of 2019 Attorney General vs Kabuto Contractors Limited.



ii. That leave be granted to the applicant to lodge an appeal to the Supreme Court of Kenya against the decision of this Court delivered on 3rd March 2023 by (Hon. Okwengu, Warsame & Mativo JJ.A.) in Civil Appeal No. 638 of 2019 Attorney General vs Kabuito Contractors Limited.

2) That costs of this application be awarded to the applicant.”

The Attorney General is the respondent herein.

2. The application is premised on nine (9) grounds and further supported by the affidavit of Kithinji Marete, Advocate, sworn on even date. Counsel deposed that the instant application seeks to restore the application dated 31st March 2023 for hearing and determination after this Court dismissed it on 26th June 2024.
3. Regarding the reasons that led to the dismissal of the application dated 31st March 2023 counsel submitted that on 25th June 2024 he travelled from Kenya to South Africa on a scheduled trip. That on the same day in the afternoon, he was contacted by Mr. Waigi, learned counsel for the respondent who informed him that when the matter came up for hearing on 26th June 2024, he would be requesting for the same to be taken out of the hearing list. Mr. Marete deposed that he was not opposed to that request on account of his unavoidable absence and he purposed to attend the virtual session on 26th June 2024.
4. Counsel deposed that on account of the unrest resulting from the demonstrations in Nairobi on 25th June 2024, his flight was postponed to 26th June 2024 at 1.00a.m. Counsel further deposed that upon arriving at his intended destination, he endeavoured to obtain the link to the court session but the same was not forthcoming. Counsel further deposed that the link was eventually sent to him by one Mr. Sammy Luvuga who confirmed that the previous email sent to his office email address info@kithinjimareteadvocates.co.ke had not been delivered.
5. Counsel further deposed that when he finally managed to log into the Court platform, this Court (Makhandia, Kantai & Abida-Aroni JJ.A.) the Presiding Judge (Makhandia, JA.) informed him that his application had already been handled and he should accordingly move the Court appropriately. Counsel further deposed that upon his return to Kenya, he learnt that the Court had issued a hearing notice dated 22nd July 2024 for the exact same application dated 31st March 2023. That the hearing was however cancelled vide an email dated 19th July 2024. Counsel deposed that matters beyond his control occasioned his non- appearance in Court on 26th June 2024. Counsel averred that he was prevented by sufficient cause from appearing when the application was called out for hearing.
6. On the claim that the application had been overtaken by events as alluded to by the respondent in its letter dated 25th June 2024, counsel deposed that this is misleading since the application before the Supreme Court was to review the decision of a single Judge of the Supreme Court deeming the applicant’s notice of appeal as withdrawn. Counsel deposed that the Supreme Court in its ruling did not pronounce itself on the right to appeal or leave to appeal and left the determination of that issue to this Court and recognized that the applicant’s path to an appeal was still open after delivery of this Court’s ruling. Counsel further deposed that it was, therefore, a mistake evident from the record to proceed on the assumption that the application had been overtaken by events which mistake in and of itself warrants the review of the decision of this Court as rendered on 26th June 2024.
7. Counsel further deposed that the application dated 31st March 2023 raises weighty constitutional and legal matters. Further, that the issues which the applicant intends to appeal to the Supreme Court are matters of general public importance as they impact on the expectations of the public at large



being, inter alia; whether the Government of Kenya bears any liability for: contracts entered expressly or impliedly; or for contracts performed with its acquiescence. Further, whether the Government of Kenya can benefit from the performance of contracts for which the provider has not been compensated; and whether the principle of quantum meruit applies to the Government of Kenya.

8. Counsel urged that the application dated 31st March, 2023 deserved the adjudication of this Court on its merit and it should be restored for hearing.
9. The respondent did not file any response, despite service. The application as it is, stands unopposed.

Submissions by Counsel

10. At the hearing of the application, learned counsel Mr. Marete appeared together with learned counsel Ms. Lena Lumumba for the applicant. There was no appearance from the respondent and neither did they file written submissions.
11. Mr. Marete highlighted his written submissions dated 26th November 2024 that the reason why he did not attend court was due to the anomaly on the part of this Court's Registry's sending the Court link to a wrong email address. Counsel asserted that the circumstances leading to his non-appearance for the hearing on 26th June 2024 have been sufficiently explained.
12. Counsel further submitted that the application dated 31st March 2023 has not been overtaken by events as stated by the respondent's counsel. Mr. Marete submitted that in fact the Supreme Court stated that once the question of leave to appeal and certification is determined by this Court, the appellant can proceed to file the relevant notice of appeal afresh.
13. Counsel placed reliance on the principles settled in the case of *Githiaka vs Nduriri (2004) 1 KLR 67* which underscored the exercise of this Court's jurisdiction to do justice to the parties before it.

Determination

14. We have considered the application, the affidavit in support thereof, the oral and written submissions by the applicant, the authorities cited and the law. The sole issue for determination herein is whether the application for reinstatement is merited.
15. An application for reinstatement of a dismissed application is governed by Rule 58 (3) and (4) of the Court of Appeal Rules which provide as follows: -
 3. Where an application has been dismissed or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to rehear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called on for hearing.
 4. An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days after that party's first hearing of that decision.
16. According to this Court's Rules, the two conditions for reinstatement of an application which has been dismissed or allowed for non - attendance, is if a party shows that he was prevented by any sufficient cause from appearing at the hearing; and whether the application is made within 30 days of the decision or 30 days after a party who ought to have been served but was not served first hears of the decision.
17. We have considered the evidence adduced by the applicant to justify the non-attendance in Court on 26th June 2024 for the hearing of the application dated 31st March 2023. The reason stated for the



non-attendance was that Counsel did not receive the link directing him to Court, on time. From the evidence exhibited as 'KM-1' it is evident that the email sent to info@kithinjimareteadvocates.co.ke could not be found. We have also considered the time stamp on the emails sent by Mr. Marete asking for the link and they range between 9.12 a.m. to 9.44 a.m. on 26th June 2024.

18. It is trite that the decision to reinstate an application for non-attendance is discretionary and that an applicant seeking reinstatement orders should demonstrate his bona fides. In *CMC Holdings Ltd vs James Mumo Nzioki* [2004] KECA 143 (KLR) this Court stated that:

“ [T]he discretion that this court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

19. We have little difficulty in finding that the failure to attend court on time at the hearing of 26th June 2024 was not in any way orchestrated by the applicant's counsel's fault. The only way that counsel could access the virtual court room was through a court link which did not find its way into his email on time. Despite the setback, from the record, counsel applied industry and ensured that he obtained the court link and joined the Court later only to find that the application had been dismissed. We find that there is sufficient cause explained by Mr. Marete on his failure to attend court on time on 26th June 2024.

20. From the record, the application seeking certification to the Supreme court was dismissed on 26th June, 2024 on the ground that counsel for the applicant was absent and that the application had been overtaken by events. The notice of motion seeking reinstatement is dated 24th July 2024.

21. In determining an application such as the instant one, we are refrained from determining the merits of the application dismissed as it was rightly pointed out by Shah, JA in *Peter Nyamu Kabeu vs Eliud Karani Civil Application No. Nai. 293 of 2000* as follows: -

“ In an application seeking to reinstate an earlier application which was dismissed for want of prosecution the Court must keep in mind the fact that it is not dealing with the merits or demerits of the application which is sought to be reinstated lest it trespasses upon the territory of another judge should that dismissed application ever come up for hearing.”

22. This Court in *B. N. Kotecha & Sons Limited V United Millers Limited* [2020] eKLR held as follows:

“ What we have to decide is whether the applicant has shown that counsel was prevented by any sufficient cause from appearing when the application was called on for hearing. That is the discretion donated to this Court by Rule 56(3) (now Rule 58(3)) of this Court's Rules.”

23. In the instant application, counsel for the applicant has offered what we respectfully think is a plausible explanation; that he travelled on a scheduled flight to South Africa; that his flight was delayed due to the ongoing demonstrations that took place on 25th June 2024 in Nairobi;

that counsel for the applicant made diligent efforts to obtain the court link on time; and that this Court's Registry sent the correct link to the applicant late and by the time counsel for the applicant was able to join the court session, the matter had been dismissed. We discern



no prejudice to the respondent, who did not file a replying affidavit or written submissions in response to the instant application.

24. In the circumstances, we find that the dismissed application dated 31st March 2023 deserves to be heard and determined on merit. In the result, we allow the notice of motion dated 24th July 2024, set aside the orders issued on 26th June 2024 and direct that the notice of motion dated 24th July 2024 be restored for hearing on merit.

25. We make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

