



**Kenya Wildlife Service v Sea Star Malindi Limited (Civil Application  
44 of 2021) [2022] KECA 1339 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1339 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION 44 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**KENYA WILDLIFE SERVICE ..... APPLICANT**

**AND**

**SEA STAR MALINDI LIMITED ..... RESPONDENT**

*(An application for restoration of an application dismissed for want of prosecution)*

**RULING**

1. The applicant, Kenya Wildlife Service, presented an application to Court dated May 25, 2021 seeking orders of stay of execution of a decree of the Environment and Land Court pending the hearing and determination of its intended appeal. That application was fixed for hearing before the Court (Makhandia, Mbogholi & M. Ngugi, JJ.A) during court recess on August 3, 2021. It was dismissed for want of prosecution on account of non-appearance by the parties.
2. On learning of the dismissal, the applicant, by its application now before us dated August 5, 2021, moved the court under sections 3A and 3B of the *Appellate Jurisdiction Act* and Rule 56(3) of the Court of Appeal Rules, 2010 (presently Rule 58(3) of the *Court of Appeal Rules*, 2022) seeking an order for setting aside the dismissal order of 3<sup>rd</sup> August 2021 and for restoration of the application of 25<sup>th</sup> May 2021 for hearing.
3. Rule 56(1) of the *Court of Appeal Rules*, 2010 provided that if on the day fixed for hearing of an application, the applicant does not appear, the application may be dismissed, unless the court sees fit to adjourn the hearing. Under Rule 56(3), where an application has been dismissed under Rule 56(1):

“...the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that



he was prevented by any sufficient cause from appearing when the application was called on for hearing.”

4. In the case of *Okiya Omtata Okoiti and another v The Attorney General and 4 others*, [2016] eKLR cited before us by learned Senior Counsel Mr. Kiragu Kimani for the applicant in urging us to allow the application, this court expressed that there are two pre-requisites to be fulfilled for the court to exercise its discretion in favour of an applicant seeking to have an application restored for hearing. The first is that the application is made in a timely fashion. The second is that the applicant should demonstrate that it was prevented by sufficient cause from appearing when the application was called on for hearing.
5. On the first pre-requisite, the application before us was filed on August 5, 2021. That is two days after the order dismissing the application sought to be restored was made. We are satisfied that there was no delay in making the present application.
6. As for sufficient cause, the application is supported by an affidavit sworn by Mugambi Mutua, an advocate in the firm of Hamilton Harrison & Mathews Advocates for the applicant. In that affidavit, the steps taken by the applicant upon filing the application dated May 25, 2021 and the challenges it encountered in a bid to have it certified as urgent and to have it heard are set out in detail. It is deponed that the applicant ultimately sought the intervention of the President of the court to expedite the matter. It is deponed further that on August 2, 2021, the applicant received e-mail communication from the Mombasa court registry that the application had finally been certified as urgent; that the next communication the applicant received thereafter was another email from the court sent on August 3, 2021 forwarding court returns for the day in which it was indicated that the application was before the court on that day and dismissed; that on the same day, the advocates for the applicant wrote an email to the court pointing out that the dismissal was in error as “the date for hearing of the application was not communicated” to them.
7. Mr. Kimani submitted that in the foregoing circumstances, the applicant’s right to a hearing was violated as none of the parties had been notified of the hearing and none of the parties were therefore present when the application was called out for hearing on May 3, 2021. It was urged that sufficient cause has therefore been shown why the application should be restored for hearing.
8. In opposition to the application, Mr. Andrew Njenga, learned counsel for the respondent, relied on the respondent’s grounds of opposition as well as his written submissions dated November 1, 2021. It is submitted for the respondents that the application is misconceived and an abuse of the process of the court; that even if notice of hearing of the application of May 25, 2021 had been given, it would not have been heard as it had not been served on the respondent; that there is no properly instituted appeal due to non-compliance with Rule 82(2) of the *Court of Appeal Rules* and the decision dismissing the application should be upheld by invoking Rule 83 of the *Court of Appeal Rules*.
9. Counsel for the respondent submitted further that the firm of Hamilton Harrison and Mathews Advocates is not properly on record as they ought to have filed a notice of change of advocates not having acted for the applicant in the previous proceedings; and that the application is not made in good faith and the intention of the applicant is drag the “David versus Goliath legal war” endlessly through the court system.
10. Having considered the application, the affidavits and the submissions, we are satisfied, as already stated, that there was no delay on the part of the applicant in presenting this application. It was presented on August 5, 2021 a couple of days after the advocates for the applicant became aware of the order dismissing the application of May 25, 2021.



11. As to whether the applicant has demonstrated that it had sufficient cause for not appearing before court on August 3, 2021, it is conceded by counsel on both sides that no notice of hearing was served on the parties for the hearing that was scheduled for August 3, 2021. Indeed, the Recess-Cause List for August 3, 2021 which we have perused indicates that the matter was to be heard on the basis of, “written submissions-no appearance of counsel”. In other words, the application was to be considered by the Court on basis of written submissions. However, in his affidavit in support of the application, Mugambi Mutua exhibited emails sent to the court on May 28, 2021; June 2, 2021; June 11, 2021; June 24, 2021; July 5, 2021 enquiring on the fate of the application of May 25, 2021. There does not appear to have been communication from the Court registry to the parties informing them that the application would be disposed of on the basis of the written submission and requiring them to file written submissions. In those circumstances, and having regard to the provisions of Rule 56(3) of the Court of Appeal Rules and the applicable principles as expounded in *Okiya Omtata Okiiti and another vs. The Attorney General and 4 others* (above), we are satisfied that there is a basis for the court to exercise its discretion in favour of the applicant by restoring the application dated May 25, 2021 for hearing.
12. As regards the contention that the advocates for the applicant are not properly on record not having acted for the applicant in the lower Court, there is nothing in the rules of this Court that require that the advocate who represented a party in the lower court must continue to represent that party before this Court absent a notice of change of advocates. Proceedings before this Court are, for purposes of representation, distinct from those in the lower court. See *Mary Nchekei Paul v Francis Mundiya Ruga* [2019] eKLR and also *Oscar Githanji Mburu v Faith Githongo & another* [2021] eKLR.
13. In the result, we allow the application dated August 5, 2021. We set aside the order of this court made on August 3, 2021 dismissing the applicant’s application dated May 25, 2021. The application dated May 25, 2021 is restored for hearing. The same having been certified as urgent, we direct that it shall be fixed for hearing in the registry on basis of priority.

We make no orders as to costs.

***Dated and delivered at Mombasa this 2<sup>nd</sup> day of December 2022.***

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

