



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION NO. 19 OF 2017**

**ABDUL KARIM OMAR .....DEFENDANT/APPLICANT**

**VERSUS**

**STEPHEN NGUMBAU KITHUKA.....PLAINTIFF/RESPONDENT**

**RULING**

**[Notice of Motion Application dated 5<sup>th</sup> April, 2017]**

1. Abdul Karim Omar, the Applicant through the Notice of Motion application dated 5<sup>th</sup> April, 2017 sought two substantive orders. The first one was a prayer for an order arresting the delivery of a ruling slated for 7<sup>th</sup> April, 2017 before the taxing master in Malindi ELC No. 92 of 2011 Stephen Ngumbau Kithuka v Abdul Karim Omar. This particular prayer was granted ex-parte on 6<sup>th</sup> April, 2017 by Chitembwe, J. The second prayer is an order for the reconstruction of the entire court file in Malindi ELC No. 92 of 2011 and placement of such file under lock and key in the Malindi High Court Registry. The application is supported by the grounds on its face and a supporting affidavit sworn on the date of the application by the Applicant.

2. The Respondent, Stephen Ngumbau Kithuka opposed the application through a replying affidavit sworn by his advocate, Jackline Chepkurui Chepkwony on 2<sup>nd</sup> May, 2017.

3. The Applicant's case as can be gleaned from his pleadings is that on 21<sup>st</sup> June, 2015 the court file in respect to Malindi ELC No. 92 of 2011 went missing and/or was misplaced in the chambers of the Deputy Registrar while pending delivery of a ruling. At the time, the firm of Michira Messah advocates was acting for the Applicant.

4. Letters were subsequently exchanged resulting in the reconstruction of the lost file. The ruling was then slated for 13<sup>th</sup> December, 2016 but put off to 13<sup>th</sup> February, 2017. It is the Applicant's case that on 13<sup>th</sup> February, 2017, in the absence of his counsel, the delivery of the ruling was put off to 7<sup>th</sup> April, 2017.

5. The Applicant's complaint is that the genus of the ruling the Deputy Registrar intended to deliver on 7<sup>th</sup> April, 2017 was unknown to the parties. Further, that he intends to appeal against the judgement in ELC 92 of 2011 and if the Deputy Registrar's ruling touches on execution then his intended appeal will be rendered nugatory.

6. The Applicant in his submissions asserts that the right procedure for reconstructing a lost file is by filing an application and serving it upon all the parties who will then exchange copies of the documents for purposes of verifying that the said documents are the same as those that were already filed.

7. It is the Applicant's case that no formal application for reconstruction of the file was made in this matter as the Respondent simply wrote to the Deputy Registrar asking for reconstruction. The Applicant contends that in this particular case the Deputy Registrar informed his counsel that she could open a skeleton file on her own motion. The Applicant wonders how the court can reconstruct a file without involving the parties to the matter. He urges the court to find that the right procedure was not followed in reconstructing his file.

8. It is the Applicant's case that although the file went missing in the custody of the Deputy Registrar, she has not written to the parties informing them of the steps she has taken to trace the file. The Applicant asserts that a thorough search for the file should have been done before the opening of a skeleton file.

9. The Applicant's position is that if indeed there was need to reconstruct the file then the entire file ought to have been reconstructed. It is his case that the decision to reconstruct the file only in so far as it relates to the application that was before the court is discriminatory and contrary to the spirit of the Constitution as it would deny him the opportunity to lodge an appeal. The Applicant asserts that he also needed the pleadings and proceedings for purposes of filing an appeal and that he had instructed an advocate to file an appeal on his behalf. He states that he instructed an advocate to file an appeal on his behalf immediately the judgement was delivered by the Environment & Land Court. It is his case that unless the original file is availed, his intended appeal shall be rendered nugatory.

10. The Respondent in opposition to the application avers that the Applicant has all along been aware of the nature of the ruling that has been pending before the Deputy Registrar. His case is that the Applicant was always attending the mentions in regard to the ruling and the instant application is made in bad faith so as to delay the court process. The Respondent points out that no notice of appeal or memo of appeal has been attached to the application.

11. The Respondent explains that the ruling pending before the Deputy Registrar is in respect of a notice to show cause why the Applicant should not be committed to civil jail for failing to pay costs taxed at Kshs. 683,174. The Respondent accuses the Applicant of delaying the process of the recovery of costs by making several applications for stay, review and requesting the court to be allowed to pay the decreed costs in installments.

12. The Respondent's view is that the Applicant is aware of the nature of the application before the Deputy Registrar and is simply using this application to delay justice.

13. Submitting in support of his position, the Respondent told the court that this matter is before the wrong forum since Section 34 (1) of the Civil Procedure Act, Cap. 21 provides that all questions, between parties to a case, relating to a decree shall be determined by the court executing the decree and not in a separate suit.

14. He strengthens this argument by referring to the Court of Appeal decision in **Odhiambo Owiti & Company Advocate v CFC Stanbic Bank Limited [2015] eKLR**

15. The Respondent submits that it was not necessary for the entire file to be constructed as the file was lost while pending ruling in respect to his notice to show cause dated 22<sup>nd</sup> May, 2015 and the

Applicant's notice of motion dated 13<sup>th</sup> May, 2015 which were argued together by way of written submissions. It is the Respondent's case that the Applicant has not exhibited a memorandum of appeal nor notice of appeal in order to support his claim that the entire file ought to have been reconstructed so as to enable him appeal. The Respondent contends that all the pleadings and submissions relating to the matters that were pending for ruling before the Deputy Registrar were availed to the court for purposes of reconstructing the file.

16. It is the Respondent's position that the Applicant cannot claim not to know the genus of the ruling slated for 7<sup>th</sup> April, 2017 since he filed submissions dated 27<sup>th</sup> April, 2015 in respect to the notice to show cause dated 22<sup>nd</sup> May, 2015 and the notice of motion dated 13<sup>th</sup> May, 2015. Further, that the Applicant's advocate attended all the mentions that were fixed after the loss of the file.

17. It is the Respondent's submission that the decree he seeks to execute was issued on 4<sup>th</sup> November, 2014 and the Applicant is only interested in delaying the execution. This, the Respondent asserts, is evidenced by the fact that no appeal against that decision has been filed by the Applicant. That, even if an appeal has been filed, the same cannot act as stay of the decree.

18. The Respondent therefore urges this court to dismiss the application.

19. In my view, the issue here is whether the Applicant has laid the basis for arresting the delivery of the ruling. From the pleadings and submissions, it emerges that the Respondent was the Plaintiff in Malindi ELC No 92 of 2011 whereas the Applicant was the Defendant. At the conclusion of the trial, judgement was entered in favour of the Respondent. He was also awarded the costs of the suit. The costs were taxed and what was before the Deputy Registrar were a notice to show cause and an application to review downwards the monthly installments that the Applicant had earlier been directed to make to the Respondent. After submissions had been filed, the Deputy Registrar took the file into her custody. The file got lost before the delivery of her ruling. The circumstances of the loss of the file are not before this court.

20. The Applicant's complaint is that the Deputy Registrar did not follow the right procedure in partially reconstructing the file and that she ought to have reconstructed the entire file.

21. The Applicant's position is that a file can only be constructed upon the making of an application. The Respondent's view is that the Deputy Registrar followed the correct procedure in reconstructing the file.

22. The parties did not draw to my attention any rule or practice applicable to the reconstruction of lost files and the opening of skeleton files.

23. In the 2<sup>nd</sup> Edition of the High Court of Kenya Registry Operation Manual at pages 33-34, paragraph 4.6 the following guidelines on tracing and reconstruction of missing files are found: -

**"If a file is missing, the Registry will take the following steps:-**

**a) The Registry Supervisor checks the file movement register to identify the person in whose possession the file was last recorded. The Supervisor instructs him/her to trace the file.**

**b) If the file is not traced, the Registry Supervisor circulates a memo to all staff in the Station/Registry asking them to check whether the file is in their possession. If the file is not found within 24 hours, the Supervisor will notify the Deputy Registrar.**

**c) The Deputy Registrar then initiates a special search.**

**d) If the file is not traced after this first search, the Registry Supervisor writes the words 'original file missing', in pencil, on the relevant case register.**

**e) The Registry Supervisor then enters the details of the missing file in the register of missing files which is maintained by the Registry Supervisor.**

**f) After a fruitless search of 14 days, the Deputy Registrar issues a certificate to confirm the loss and recommends the reconstruction of the file.**

**g) Parties are informed of the non-availability of the file in writing by the Deputy Registrar with a recommendation for reconstruction.**

**h) In the event that a missing file is traced, the date of recovery is recorded in the case register and its availability is communicated to the parties concerned by the Deputy Registrar within 24 hours of its tracing. A certificate confirming the recovery is issued.**

**i) The file once traced is merged with any skeleton file that may have been opened.”**

24. Whether a formal application for opening of a skeleton file, as suggested by the Applicant, should be made is not clear from the Manual. It is, however, clear that most of the processes are internal processes which do not involve the affected parties.

25. The Applicant is correct that all the parties to a case should be involved in the reconstruction of a missing file. Whether that was done in this case is not quite clear. Be that as it may, as matters stand now, the file has been reconstructed.

26. Among the matters pending determination by the Deputy Registrar is a notice of motion filed by the Applicant. A party who has submitted his case for arbitration should be anxious to know the outcome. The Applicant's posture is, however, different. He pretends not to know what is before the Deputy Registrar yet the letters he has himself exhibited disclose that he knows what is pending before the Deputy Registrar. It is the Respondent who pushed for reconstruction of the file and was only interested in the pleadings and submissions that were relevant to the ruling that was yet to be delivered. I therefore find no error in the partial construction of the file by the Deputy Registrar. Indeed the Applicant has not exhibited any evidence of an appeal against the decree that the Respondent is trying to execute. He is also at liberty to seek a reconstruction of the entire file.

27. I find no merit in the instant application. I also note that as this issue involved a file belonging to the Environment & Land Court, the application ought to have been placed before the Judge of that Court.

28. This application was indeed not necessary. The same is dismissed. The Applicant must meet the Respondent's costs and that is my order.

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of September, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**



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