



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CIVIL APPEAL NO. E002 OF 2020**

**AMOS K. CHOMBOI.....APPELLANT**

**VERSUS**

**CHEMJOR CHEPKUTO.....RESPONDENT**

***(Being an appeal from the ruling and order of Hon. P.C. Biwott ,SPM,dated 10/09/2020,***

***in Kabarnet Principal Magistrate's Court in Succession No. 5 of 1991,***

**Chemjor Chepkuto v Amos K. Chomboi)**

**JUDGMENT**

1. The appellant has appealed against the ruling and order of the magisterial court which dismissed his application to reconstruct a skeleton file.
2. The appeal is unopposed although the respondent was served with notice of hearing of the appeal. The hearing therefore proceeded in his absence.
3. The appellant has raised sixteen (16) grounds in his memorandum of appeal to this court.
4. In ground 1 the appellant has faulted the trial court in law in finding that the appellant's application for reconstruction of a skeleton file had no merits even after the court acknowledged that the original court file was lost or misplaced beyond trace.
5. Messrs Karanja-Mbugua advocates for the appellant have submitted that it was not in dispute between the parties that the lower court file was missing in the court registry and that efforts to trace it were unsuccessful.
6. Counsel has further submitted that the lower court dismissed the appellant's application because the appellant failed to disclose his relationship with the deceased. Counsel has submitted that the appellant was not enjoined to establish his relationship with the deceased in an application for reconstruction of a lost file. The relationship would be established once the file is reconstructed and the entire evidence of the parties has been taken.
7. I find merit in the foregoing submission of counsel for the appellant. The succession cause was part heard by the time the file was lost. The issue of the relationship between the deceased and the appellant was a matter to be determined after all the evidence had been taken by the court. This stage had not been reached. Thereafter the parties would have filed submissions if they desired to do so. It therefore follows that the finding of the lower court that the appellant had not established his relationship with the deceased was irrelevant to the issue before the lower court. I therefore uphold counsel's submission in that regard.
8. In ground 2 the appellant has faulted the trial court in law in finding the appellant was not qualified to apply for the reconstruction of a skeleton file and that only the petitioner or the dependant of the estate of the deceased were qualified to make such an application. In this regard, counsel submitted that the appellant was not a stranger to the proceedings, since he was an objector in the succession cause. Counsel has submitted that since the objector was a party to the proceedings, he was entitled to apply for the reconstruction of a skeleton court file. He has further submitted that the reconstruction of a skeleton court file was for the benefit of all parties. I find this submission to be meritorious and I hereby uphold it.
9. The foregoing findings of this court have effectively disposed of the appeal. I therefore find it unnecessary to determine the remaining grounds; since they are now moot and it is not the duty of this court to make findings in respect of moot issues.

10. However, I find it necessary to consider and determine the evidence of the respondent in the lower court which was in the form of a replying affidavit. The reason being that as a first appeal court, I am by law bound to re-evaluate the entire evidence that was adduced in the lower court. I therefore proceed to do so.

11. In that regard, I have perused the replying affidavit of the respondent dated 10<sup>th</sup> August 2020 in respect of the application for the reconstruction of a skeleton court file. In that affidavit the respondent has averred that the application for the reconstruction of a skeleton file is an abuse of the court process. He also averred that the appellant had not established his relationship with the deceased. He further averred that the objection had not been prosecuted for 28 years; which delay had not been explained. He also averred that the issue before the court had been determined by other courts and therefore the doctrine of *res judicata* applied to the application. He finally averred that the application was vexatious and prejudicial to the respondent herein.

12. I have re-assessed the entire evidence of the lower court as a first appeal court. I find that the issues raised in the respondent's replying affidavit were issues to be raised in court after the reconstruction of a skeleton court file. They were not live issues before that lower court.

13. In the premises, I find that the appellant's appeal succeeds with the result that I hereby allow the appeal and set aside the ruling and order of the lower court.

14. There will be no order as to costs since the respondent did not participate in these proceedings.

15. Finally, the application for the reconstruction of the skeleton court file is hereby reinstated; and will now be heard and determined by another magistrate of competent jurisdiction, other than the one who dismissed it.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS 28TH DAY OF SEPTEMBER 2021.**

**J M BWONWONG'A**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. KEMBOI AND MR. SITIENEI, COURT ASSISTANTS.**

**MESSRS KARANJA MBUGUA FOR THE APPELLANT**

**IN THE ABSENCE OF THE RESPONDENT.**