



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. SUCC NO. 32 OF 2013

IN THE ESTATE OF THE ESTATE OF THE MBUITU NDEGWA- DECEASED

TABITHA WANGUI MWANGI APPLICANT

V E R S U S

WAGICHUGU MBUITU RESPONDENT

RULING

1. The applicant Tabitha Wangui Mwangi vide an application dated 27/12/2018 brought under **Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya** seeks orders that a skeleton file be opened for this matter. That thereafter the re-constructed file be placed under lock and key.

2. The application is based on the grounds that the court file has been missing since 9/3/2016. That though the matter is finalized the applicant is dissatisfied with the Judgment and that it is necessary to have the file reconstructed so that she can file her pleadings.

3. The application is supported by the affidavit of Alex Ngugi Chomba who is an Advocate of the High Court and has conduct of this for the applicant. He depones that the matter was last in court on 5/12/14 when it came up for judgment. Around April 2015 he sent his Clerk to the court registry to locate the file for the purpose of getting the pleadings therein but the file could not be traced. Thereafter he has sent the Clerk severally to the Registry but all in vain as the file could not be traced. The applicant is anxious to have the grievances addressed. He prays that he be allowed to construct a skeleton file. The respondent filed grounds of opposition based on the following grounds:-

i. That the application is vexatious and an abuse of the due process of the court.

ii. That as per the applicant's annexures, judgment was delivered on 5th December 2014 in the presence of the applicant. No further papers, including but not limited to Notice of Appeal was filed within the statutory period.

iii. That as per paragraph 3 of the supporting affidavit, the court file allegedly could not be traced since April 2015. This application was filed in February 2019, more than 3 years later. No letter has been annexed requesting for the court file or confirmation letter from the court that the file is missing.

iv. That the application should be dismissed with costs.

4. Parties agreed to file submissions. For the applicant it is submitted that the applicant has annexed all the proceedings that are necessary for the reconstruction of the file. They have demonstrated that the file is missing. That the grounds of opposition do not disclose any reason as to why the file cannot be reconstructed. The applicant submits that the application is in line with the guidelines on missing files set out in the 2nd edition of the High court Registry Operation Manual, Page 32-34. He relies on the decision in **Abdul Karim Omar –v- Stephen Ngumbau Kithuka Misc. 19/2017H.C Malindi, Justice Korir.**

5. For the respondent it is submitted that for the court to order reconstruction of the file, the guidelines on tracing and reconstruction of the file must be followed. He submits that the applicant has not exhibited any letters informing the Deputy Registrar that the file is missing. The Deputy Registrar has not written to the parties informing them that there is need to have the file reconstructed. That there is no conclusive evidence that the file is missing.

6. The respondent further submits that the applicant has not availed evidence to show that she has filed notice of Appeal or Memorandum of Appeal in order to support her claim that the file should be reconstructed.

7. The respondent further submits that the applicant has not proved the ingredients to warrant this court to order the reconstruction of the file.

8. I have considered the application. It is brought under **Section 3A of the Civil Procedure Act**. The Section provides:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

9. The section speaks to the inherent powers of the courts to make orders that are necessary in the interests of justice and to prevent abuse of the court process.

10. No rule or provision was cited on reconstruction or opening of skeleton file. Both sides referred to the guidelines in High Court Registry Operation Manual. In the **2nd Edition of the High Court of Kenya Registry Operation Manual at Page 33-34 Para 46** the following guidelines on tracing and reconstruction of missing files is given.

11. If a missing 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 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.

i) A certificate confirming the recovery is issued.

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

12. These are the internal processes which are supposed to be followed by the registry staff for opening of a skeleton or reconstruction of a file. It excludes the parties from the process but requires that the parties be involved at every stage by being informed. The Registry Supervisor is supposed to communicate the information to the parties that the file is missing.

13. It is not clear from what has been presented before me whether this process has been followed. It is also not clear whether the complaint of the missing file has been brought to the attention of the Registry Supervisor and escalated to the Deputy Registrar. As submitted by Mr. Maina for the respondent, the applicant has not annexed letters showing that he had complained to the registry that the file is missing. Be thus as it may the applicant has deponed that attempts to get the file have been fruitless.

14. The applicant has shown that the file has been missing. In his grounds of opposition and the submissions, though the respondent is an interested party who would also suffer if the file is missing, he has not stated that the file is available at the registry. The averments by the applicant that the file is missing has not been disapproved. I am of the view that the applicant has proved that the file is missing from the registry.

15. The guidelines in the Registry Manual are Internal mechanisms to be followed by the staff in the registry even without prompting by the parties. Where they fail to comply with the guidelines nothing prevents the party from seeking an order for reconstruction of the court file. The application is property before this court.

16. The applicant has deponed that he was dissatisfied with the Judgment and intends to appeal. He would be prejudiced if the file is not reconstructed. I find it prudent to order the reconstruction of the file in the interest of justice. The respondent does not stand to suffer any prejudice.

In Conclusion:-

The application has merits. I order as follows:-

1. The application is allowed.

2. The Deputy Registrar to have the skeleton file opened.

3. The parties to present the documents which they have to the Deputy Registrar within 30 days for the purpose of reconstructing the file.

Costs to the applicant.

Dated at Kerugoya this 30th January 2020.

L. W. GITARI

JUDGE

30/1/2020