



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 380 OF 1992

HADAD M. KARUKWA.....1ST APPELLANT

WAWERU KARUKWA.....2ND APPELLANT

VERSUS

JOHN MWANGO KARIUKI.....RESPONDENT

RULING

1. By a Notice of Motion dated 19th October 2018, the appellants approached this court seeking orders that the court file be reconstructed and that costs of the application be provided for.
2. The application is based on grounds that the original court file went missing on 25th October 2016 and efforts to trace it have been unsuccessful to date.
3. In the supporting affidavit sworn on 19th October 2018, learned counsel for the appellants *Mr. Kimani* deponed that since the court file went missing on 25th October 2016, he has severally written to the Deputy Registrar of this court seeking her assistance in having the file traced. He annexed several letters addressed to the Hon. Deputy Registrar to substantiate his claim. The same are in the bundle of annexures marked BNK 1. He further deponed that since the original file cannot be traced in the court registry, it is necessary to have it reconstructed.
4. The application is contested by the respondent. In his replying affidavit sworn on 23rd May 2019, the respondent deposed that the court is *functus officio* in this case and lacks jurisdiction to entertain the instant application since it rendered its judgment in the case on 9th June 1998 (*Hon. Justice E. Owuor*) which was the subject of an appeal to the Court of Appeal. The respondent did not however disclose the outcome of the said appeal.
5. The respondent in addition averred that the appellants are guilty of non-disclosure of material facts as their advocate did not disclose that the 1st appellant was now deceased, a fact which was well within his knowledge. He urged me to find that the application was frivolous, vexatious and a waste of the court's time and should be dismissed with costs.
6. To counter the respondent's depositions in the replying affidavit, *Mr. Kimani* swore a supplementary affidavit on 20th June 2019 in which he *inter alia* disclosed the outcome of the appeal lodged in the Court of Appeal. He annexed a copy of the judgment delivered by the Court of Appeal on 17th November 2004 in which this court's judgment was set aside and a retrial ordered. He also admitted that the 1st appellant is deceased but averred that the 2nd appellant was desirous of proceeding with the appeal. Counsel implored me to allow the application as doing so would not occasion the respondent any prejudice.
7. The application was prosecuted by way of oral submissions. In his submissions, besides reiterating the depositions made in his supporting and supplementary affidavits, *Mr. Kimani* stated that he had annexed a record of appeal which was complete save for the documents that were in the possession of the respondent; that the respondent was ordered by this court to release those documents to the appellant which order he refused to comply with; that the opposition to the instant application was designed to frustrate the appellant's application to have him committed for contempt of court for disobeying the aforesaid court order.
8. Learned counsel for the respondent, *Ms Nanjira* in riposte invited me to find that ordering reconstruction of a file without all the documents would be discriminatory and against the spirit of the constitution. She disputed the appellant's claim that the court file was missing. She invited me to dismiss the application as in her view, the Deputy Registrar had not certified that the original file was lost. In support of her submissions, she relied on the authority of *Abdul Karim Oman V Stephen Githuka, Misc Appln No. 19 of 2017.*

9. I have given due consideration to the application, the affidavits filed in support and in opposition thereto and the documentation annexed to the supporting, supplementary and further affidavits sworn on behalf of the 2nd appellant. I find that though *Ms Nanjira* referred to some annexures in her oral submissions, nothing was annexed to the replying affidavit sworn by the respondent.

10. Having studied all the material placed before me, I find that the only issue which crystallizes for my determination is whether the 2nd appellant has sufficiently demonstrated by evidence that the original file in this appeal is actually lost or missing from the court registry and that there is therefore need for its reconstruction.

11. The appellant's claim that the original file went missing in the year 2015 is substantiated by the letters authored by the law firm of *M/s Ndumu Kimani & Company Advocates* addressed to the Hon. Deputy Registrar which are annexed to the supporting affidavit. The letters are dated 3rd February 2016, 9th June 2016, 16th February 2017, 1st August 2017 and 6th June 2018. All these letters were received in the court's Civil Appeals Division as evidenced by the court stamp endorsed on their faces. In the letter dated 6th June 2018, the Deputy Registrar on 21st June 2018 permitted the appellant to make a formal application for reconstruction of the original file meaning that she was satisfied that the original file was missing from the court registry. Given the foregoing, I am convinced that the applicant has sufficiently demonstrated that the said file cannot be traced.

12. Having found that the original file is missing from the court registry, the next question that I must answer is whether there is need for its reconstruction. A look at the pleadings and documents annexed to the applicant's supporting affidavit reveals that the Court of Appeal in its judgment dated 17th November 2004 ordered a retrial in this matter. In the circumstances, the respondent's argument that this court is *functus officio* and lacks jurisdiction to entertain the instant application is not only flawed but is also misconceived.

13. Even where a court has rendered judgment in a civil suit, it can only be *functus officio* with respect to matters that have a bearing on the issues determined in the suit. If the original file is lost or cannot be traced after judgment is delivered, nothing would stop a court from exercising its discretion to order reconstruction of the file to enable parties pursue post judgment proceedings for instance, execution proceedings.

14. Since the appeal is supposed to be re-heard by this court as per the judgment of the Court of Appeal, my take is that it is absolutely necessary to have the original file reconstructed. The respondent argued that it would be discriminatory and against the spirit of the constitution to allow reconstruction of the original file when all documents are not available. The respondent has however not disputed the appellant's claim that the only documents which are missing from the record annexed to the supporting affidavit are the documents which are in his custody which he was directed by the court to release to the appellant.

15. This is confirmed by the court order exhibited at page 77 of the aforesaid record. The record also shows that there is an application seeking to cite the respondent for contempt of court for failure to comply with the court order which is an indication that the respondent did not release the said documents to the appellant as directed by the court.

16. It is therefore safe to assume that the respondent still has custody of those documents and he cannot thus be heard to complain that it would be unfair to have the file reconstructed without the documents which are in his custody. As the old adage goes, he cannot have his cake and eat it at the same time.

17. In the circumstances of this case and given the material placed before me, I find nothing that would be discriminatory or against the spirit of the constitution if this court were to order reconstruction of the original file. If anything, such an order would go a long way towards achieving the overriding objective of the *Civil Procedure Act* and the constitutional principles enshrined in *Article 159* of the *Constitution* which enjoins courts to dispense substantive justice to parties before it in a just, proportionate, cost effective and expeditious manner. In any event, if this application is allowed, the respondent is not likely to suffer any prejudice.

18. In the result, I find merit in the Notice of Motion dated 19th October 2018 and it is hereby allowed with no orders as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of December 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kimani for the 2nd Applicant

No appearance for the respondent

Ms Mwinzi: Court Assistant