



**Mbira v Makau (Miscellaneous Application 28 of 2023)
[2024] KEELC 5413 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION 28 OF 2023**

LL NAIKUNI, J

JULY 9, 2024

BETWEEN

HENRY ODERO MBIRA APPLICANT

AND

PETER NGOVE MAKAU RESPONDENT

RULING

I. Introduction

1. The Ruling of this Honourable Court regards the Notice of Motion application dated 17th March, 2023. It was brought by Henry Odero Mbira, the Applicant herein under the provision of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap. 21.
2. Upon effecting service of the Notice of Motion application dated 17th March, 2023, the Respondent opposed the application through filing of a Replying Affidavit dated 23rd October, 2023.

II. The Applicant's case

3. The Applicant sought for the following orders:-
 - a. This court be pleased to order that a skeleton file for Mombasa Environment & Land Court Case No. 185 of 2018 (OS): Peter Ngove Makau v Henry Odero Mbira be opened.
 - b. This court be pleased to grant leave to the applicants to reconstruct the Court file Makau v Henry Odero Mbira and upon the reconstruction the reconstructed file be merged with the skeleton file.
 - c. Costs be provided for.



4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 7th Paragraphed Supporting Affidavit of William O.Wameyo, the Advocate for the Applicant herein with three (3) annextures marked as “WOW - 1 to 3” sworn and dated 17th March, 2023 averred that:
- a. A decree in respect of “Environment & Land Court (Mombasa) Case No. 185 of 2018 (OS):Peter Ngove Makau – Versus - Henry Odero Mbira was issued on 17th June 2020. Annexed in the affidavit a copy of the Decree and mark as ‘WOW-1’.
 - b. Having received instructions to make an application to have the said decree set aside certificate of urgency all dated 2nd December 2022. Annexed in the affidavit a copy of the Notice of Appointment of Advocates together with a Notice of Motion application under certificate of urgency and mark as ‘WOW - 2’.
 - c. They had painstakingly made enquiries on the whereabouts of the court file but the court file has not been traced at the court registry since February 2022. Annexed a copy of a letter to the Deputy Registrar dated 22nd February 2022 and mark as ‘WOW - 3’.
 - d. Consequently, the Applicant's application to have the decree set aside has never been heard and determined despite the same having been filed under certificate of urgency on 2nd December 2022.
 - e. It is in the interest of justice that the orders sought herein be granted.

III. The response by the Respondent

5. In a 14th Paragraphed of the Replying Affidavit sworn by Peter Ngove Makau dated 23rd October, 2023 and with an annexure marked as “PNM - 1” annexed thereto. The Deponent while opposing the Application averred that:-
- a. The Affidavit was in opposition of the said Application stating that it contained falsehood and urge this court to dismiss the same with costs.
 - b. On 27th August, 2018, he instructed his advocate on record to file an Originating summons which she filed an Application dated 15th August, 2018 at the civil case of “the Environment and Land Court at Malindi being ELC 185 OF 2018 at MOMBASA the same filed under the Limitation of Actions Act, Cap. 22 seeking orders to be issued with a title deed.
 - c. On 4th December, 2018 the said application came up for hearing before Lady Justice A. Omollo in an open court whereby the court issued an order for the Applicant to serve the Respondent with originating summons, pleadings and all subsequent documents in the suit by way of an advertisement either in the Nation/Standard Newspaper.
 - d. On 24th December, 2018 his Advocate on record proceeded to Standard Group Limited Offices Mombasa where she produced the said order to the said office to be advertised.
 - e. On 25th December, 2018 the same matter was placed on public notice under one of the local dailies “the Daily Nation” Newspaper on page 40. Annexed herein and marked as “PNM - 1” was a copy of newspaper.
 - f. He filed a request for judgment on 4th March, 2019 and the same was endorsed, and the suit was set for formal proof hearing on 22nd October, 2019 before Justice Munyao.



- g. He testified in an open court and his Advocate took a further hearing date for 27th January, 2020 for the Land Registrar Mr. Wanjohi to testify in court and thereafter closed the case and the matter was slated for mention to confirm filing of submissions on 13th February, 2020.
- h. His Advocate filed her written submissions on 10th February, 2020 and when the April, 2020 when judgment was delivered on his favour.
- i. His advocate proceeded and extracted a decree which was signed on 17th June, 2020
- j. The property in question had already exchanged hands and a Provisional title deed issued.
- k. His Advocate on record followed the due procedure as required by law.

IV. Submissions

- 6. On 31st October, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 17th March, 2023 be disposed of by way of written submissions. Unfortunately, by the time the Honourable Court was penning down this Ruling, none of the parties herein had complied. Pursuant to that, on 21st February, 2024 a ruling date was reserved on 8th May, 2024 by Honourable Court on its own merit accordingly.

V. Analysis & Determination.

- 7. I have carefully read and considered the pleadings herein by the Applicant, the Replying Affidavit by the Respondent, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
- 8. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Applicant has made out a case for leave to reconstruct the Court file Makau v Henry Odero Mbira and upon the reconstruction the reconstructed file be merged with the skeleton file for Mombasa Environment & Land Court Case No. 185 of 2018 (OS): Peter Ngove Makau v Henry Odero Mbira.
 - b. Whether the Notices of Motion application dated 2nd December, 2022 and 8th May, 2023 can be determined in this file?
 - c. Who will bear the Costs of Notice of Motion application dated 17th March, 2023.

ISSUE No. a). Whether the Applicant has made out a case for leave to reconstruct the Court file Makau v Henry Odero Mbira and upon the reconstruction the reconstructed file be merged with the skeleton file for Mombasa Environment & Land Court Case No. 185 of 2018 (OS): Peter Ngove Makau v Henry Odero Mbira

- 9. Before raising the issue of reconstruction of the Court file in the case of: “Makau – Versus - Henry Odero Mbira, this Honourable Court takes note that it is clear from all the documents filed by the Parties, none of the parties pin - pointed nor have cited the relevant provisions of the law nor the guiding provision of the law applicable with regard to applications for reconstruction of lost files and the opening of skeleton files.
- 10. All said and done, it is clear that an order for reconstruction of a missing court file is consistent with the provisions of Article 48 of *the Constitution* on the right to access justice. To decline a party from reconstructing a missing file amounts to denying a party the opportunity to ventilate his or her/its case which in my view is an affront to the aforementioned provision of *the Constitution* and more



particularly, where it has not been shown that the original file went missing as a result of a mistake on the part of the party making such request.

11. Nonetheless, the application at hand was expressed to have been brought under the provisions with regard to the court overriding objective and the oxygen principle and especially the provision of Section 3A of the *Civil Procedure Act*, Cap. 21 which provides as follows:-

“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.”

12. It is this provision of law that provides for the inherent powers of the courts upon which basis and in the absence of a specific law, that the courts can make necessary orders in the interest of justice so as to prevent abuse of the court process. However, in my view, the reconstruction of lost files is a purely internal and administrative affair to be dealt with strictly by the office of the Deputy Registrar and the official overseeing the custody of the court files. I also appreciate that in the absence of a specific law or practice directions on the issue of reconstruction of lost files, recourse has to be had on the guidelines laid in the High Court of Kenya, Registry Operation Manual. The Second Edition thereof at pages 33-34 the guidelines are set out as follows:-

“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.”



13. In instant case, the Applicant stated in his supporting affidavit that they had painstakingly made enquiries on the whereabouts of the court file but the court file has not been traced at the court registry since February 2022. Annexed a copy of a letter to the Deputy Registrar dated 22nd February 2022 and mark the same as 'WOW-3'.
14. In the grounds in support of the application, the Applicant has merely stated that its efforts to retrieve the file from the Registry as well as the archives, has been without any success hence it has been concluded that the court file has been closed and disposed of. In my view, that conclusion can only be arrived at upon a written communication by the Deputy Registrar through a certificate confirming the loss of the court file and a recommendation for reconstruction. It is only until then that the application for reconstruction may be necessary, taking into account that the guidelines on reconstruction as reproduced above have provided for the necessary timelines for completion of the process.
15. Be that as it may, the Respondent argued that on 27th August, 2018, he instructed his advocate on record to file an Originating summons which she filed an Application dated 15th August, 2018 at The Environment and Land Court at Malindi being ELC 185 OF 2018 at MOMBASA the same filed under the Limitation of Actions Act seeking orders to be issued with a title deed. On 4th December, 2018 the said application came up for hearing before Lady Justice A. Omollo in an open court whereby the court issued an order for the Applicant to serve the Respondent with originating summons, pleadings and all subsequent documents in the suit by way of an advertisement either in the Nation/Standard Newspaper.
16. On 24th December, 2018 his Advocate on record proceeded to Standard Group Limited Offices Mombasa where she produced the said order to the said office to be advertised. On 25th December, 2018 the same matter was placed on public notice under the Daily Nation Newspaper on page 40. Annexed herein and marked as "PNM-1" is a copy of Newspaper. He filed a request for judgment on 4th March, 2019 and the same was endorsed, and the suit was set for formal proof hearing on 22nd October, 2019 before Justice Munyao. He testified in an open court and his Advocate took a further hearing date for 27th January, 2020 for the Land Registrar Mr. Wanjohi to testify in court and thereafter closed the case and the matter was slated for mention to confirm filing of submissions on 13th February, 2020. His Advocate filed her written submissions on 10th February, 2020 and when the April, 2020 when judgment was delivered on his favour. His advocate proceeded and extracted a decree which was signed on 17th June, 2020. The property in question has already exchanged hands and a provisional title deed.
17. The Applicant sent a letter to the Deputy Registrar filled in his affidavit it as "WOW - 3", this is one of the procedural requirements, that is internal to the courts and it cannot be used against the applicant. But this is only if the applicant had complied with that which is required of them as aforesaid.
18. I am not satisfied that the Applicant has convinced the court that he is deserving of the orders sought. A party has to demonstrate, by way of correspondences, that he has written to the courts requesting for the file to be availed. He must also write to the courts requesting to be allowed to reconstruct the file. To allow an application for reconstruction without sufficient proof that the file may be lost is to open a door for every litigant to seek to reconstruct a file on the flimsiest of grounds, with the resultant effect of the opening of multiple files in respect of the same case. This must not be allowed.
19. I have another reason to disallow this application. There are divergent positions on what the last position on the case was. The respondent alleges that the said matter had been concluded through a judgment delivered in April 2020. His advocate proceeded and extracted a decree which was signed on 17th June, 2020. The property in question has already exchanged hands and a provisional title deed.



20. What then would constitute the correct bundle that would make up the constructed file if I allow this application? If there was a judgment and a decree, would the bundle that has been supplied by the applicant be said to be complete for purposes of reconstruction? Either one or both parties in the contest are not being candid on what transpired in this case. Allegations have been made without any documents to back up, which documents in my view would ordinarily be available. If correspondences were exchanged with the courts, these would be readily available.
21. Once the order for the reconstruction of the court file is issued, both parties shall supply the necessary records for the same. There shall be no prejudice visited against the respondent. In the case of “Abdul Karim Omar v Stephen Ngumbau Kithuka [2017] eKLR” the court held that if a file is missing the court has internal procedures to apply to trace the same but the applicants herein have no control over the same and can only move as herein done and seeking for the reconstruction of the file not traced.
22. In conclusion however, as much as I agree with the Respondent, it will be in the interest of justice for this Honourable Court to use its discretion to allow the prayer on the reconstruction of “Mombasa Environment & Land Court Case No. 185 of 2018 (OS): Peter Ngove Makau v Henry Odero Mbira” to enable the Court understand the dispute better.

ISSUE No. b). Whether the Notices of Motion application dated 2nd December, 2022 and 8th May, 2023 can be determined in this file.

23. The Applicant through Mr. Wameyo on 28th May, 2024 argued that the Court was meant to render a ruling on the Notice of Motion application dated 2nd December, 2024 and not the one dated 17th March, 2023 as the Court has prepared. According to him, the Applicant’s advocate, he undertook to furnish Court with the physical proceedings for case of reference.
24. The Honourable Court is then left with a question can it determine application filed in the mother filed ELC 185 of 2018 in this file? The background to the filing on this current Miscellaneous application is that the mother filed ELC 185 of 2018 allegedly went missing and the Applicant filed this application to be able to reconstruct the missing file. The Purpose of the Miscellaneous application No. E028 of 2023 was just for the reconstruction. If the Applicant intended to seek some prayers other than the ones for reconstruction, they should have brought out the same in the application dated 17th March, 2023. Therefore the oral prayers made on 24th May, 2024 are hereby declined. The Applicant can go ahead and construct the main suit then seek to have the applications determined expeditiously. A reconstruction application/suit cannot be used to determine the application in the mother file. This Honourable Court is flying blind already as it is; it cannot make orders which will be in vain.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 17th March, 2023.

25. It is now well established that the issue of Costs are at the discretion of the Court. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

26. In other words, Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 of the Civil Procedure Act, Cap. 21 grants



the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

27. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

28. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

29. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

30. In this case, as this Honourable Court has opined above, there shall be no orders as to costs.

VI. Conclusion & Disposition

31. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders stated herein below:-

- a. That the Notice of Motion application dated 17th March, 2023 be and is hereby found to have merit thus it is allowed entirely.
- b. That an order do and is hereby issued that a skeleton file for Mombasa Environment & Land Court Case No. 185 of 2018 (OS): Peter Ngove Makau v Henry Odero Mbira be forthwith opened.



- c. That leave be and is hereby granted to both the Applicant and Respondents to mutually agree and proceed to reconstruct the Court file “Peter Ngove Makau v Henry Odera Mbira” from the records available and found on their possession Within The Next21 days from the date of this Ruling.
- d. That upon the reconstruction the reconstructed file be merged with the skeleton file.
- e. That for expediency sake the matter be mentioned on 1st October, 2024 to ascertain the progress made thereof, conducting a Pre – Trial Conference in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010 and for further direction by Court.
- f. That there shall be no orders as to the costs of the Notice of Motion application dated 17th March, 2023.

It is so ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF JULY 2024.

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HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.**
- b. Mr. Wameyo Advocate for the Applicant.**

****c. M/s. Apiyo Advocate holding brief M/s. Omollo Advocate for the Respondent.**

