



**JN Murage & K Juma t/a Murage Juma & Co Advocates v Tumaz & Tumaz Enterprises Limited  
(Miscellaneous Application 139 of 2018) [2023] KEHC 4140 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS APPLICATION 139 OF 2018**

**SC CHIRCHIR, J**

**MAY 8, 2023**

**BETWEEN**

**JN MURAGE & K JUMA T/A MURAGE JUMA & CO.  
ADVOCATES ..... APPLICANT**

**AND**

**TUMAZ & TUMAZ ENTERPRIZES LIMITED ..... RESPONDENT**

**RULING**

1. The notice of motion dated May 12, 2022 seeks for reconstruction of the court file in respect of this suit. It further prays that the case file be placed under lock and key and only be accessed by the parties and advocates in the case. In the alternative, the applicant prays that the documents filed alongside the application be deemed as documents constituting the entire case file and that on the basis of the said documents the court proceeds to hear and determine the Bill of costs dated September 5, 2018.
2. The application is supported by the grounds appearing on the face of the application as well as the affidavit of Joseph Murage Advocate, sworn on May 12, 2022.
3. The Applicant depones that the file went missing at the stage when the parties had filed written submissions in respect to the bill of costs, that the applicant has made several visits to court Registry in an attempt to locate the file and the last of such visits was on April 14, 2022. It is further stated that several letters have been written to the Deputy Registrar requesting her to avail the file but there has been no response received.
4. That the applicant has availed a bundle of documents of what he says make up the entire case file.
5. The application is opposed through the affidavit of Julius Mwale who describes himself as the plaintiff in the suit. (I should point out that the Respondent in this suit is Tumaz & Tumaz Enterprises limited, an artificial person, and not Julius Mwale.)



6. Nevertheless, he asserts that the case file is not missing, that indeed the bill of costs has been considered and struck out on the basis of a preliminary objection and that the file has been closed and archived. He points out that there is no letter from the court informing the parties that the file is missing and neither are there any letters exhibited showing that the Applicant has requested for the file. It is finally submitted that no certificate has been issued by the Deputy Registrar to the effect that the file is indeed missing.

### **Applicant's Submission**

7. The submissions by the applicant reiterate the averments in the Affidavit. The applicant further submits that section 3A of the *Civil Procedure Act*, grants inherent powers to the court in order to ensure that ends of justice are met.
8. The Applicant further relies on the case of *Wachira Karani v Bildad Wachira* in this regard. On the procedures to be followed on tracing a missing file, the Applicant submits that procedures are internal to the court and do not prevent an Applicant from seeking reconstruction. Reliance was placed on the case of *Celestine Wangui v Wagichugu Mburu* Misc Succession Cause No 32/2013 and *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* Misc Application No 17 of 2019.

### **Respondent's Submissions**

9. The Respondent reiterates the averments in the replying affidavit and states that the Application is premature as the procedures prerequisite to an application for reconstruction have not been followed and sets out paragraph 33 to 34 of the 2<sup>nd</sup> edition of the High Court registry operation manual to buttress his Submissions.
10. It is further submitted that there is no evidence that any requests for the file has been made to the court Registry. The Respondent has relied on the decisions of *Abdul Karim Omar v Stephen Ngumbau Kitbuka* (2017) eKLR and *Peter Wambugu & 16 others v Kenya Agricultural Research Institute* (*supra*) to buttress their submissions

### **Determination**

11. I have considered the application, the affidavit in support, the replying affidavits and the respective submissions plus Authorities relied on.
12. From the various averments, it emerges that the applicant filed a client- Advocate bill of costs. The court directed that the bill be canvassed by way of written submissions. At this point, some divergence on what transpired begins. Whereas the applicant in paragraph 17 of the affidavit suggests that the submissions was in respect of the bill of costs, the respondent on the other hand, asserts that the submissions were in respect of a preliminary objection.
13. The 2<sup>nd</sup> divergence is where the applicant asserts that the bill is pending determination, while the respondent's position is that the bill has been disposed of.
14. Ordinarily an application to reconstruct a file should not bring much contention, as there are procedures in place that would lead to the filing of such an application. The contention in my view, arise from the fact the applicant has failed to demonstrate that the said preliminaries were complied with. It is true that the procedures are internal to the courts and failure by a court to do its part should not be visited on the litigants.



15. However, in this case, the Applicant has failed to comply with the basics, namely, to exhibit any document(s) showing that a request for the alleged missing file has been made to the court Registry. The correspondences that the Applicant has attached to the application is not about a missing file. The letters dated 14.5.2019 and 8.11.2018 and marked JNM4 speak for themselves. One is seeking for a date while the other one is seeking for certain directions from the Registrar. It is rather misleading of the applicant, to try and relate the documents to a subject that is not related to, at all.
16. There is also no letter from the Registrar confirming that the file is indeed missing. However, as earlier stated, 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.
17. 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.
18. 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 Bill was struck off and file has since been closed. This assertion has however been made without any documentary evidence to support it. There is no ruling or order to that effect, that has been exhibited. The applicant disputes this, and states that the bill is alive, and only awaits determination. What then would constitute the correct bundle that would make up the constructed file if I allow this application? If indeed there is a ruling somewhere striking off the bill, would the bundle that has been supplied by the applicant be said to be complete for purposes of reconstruction?
20. 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. Equally if a ruling or order striking off the Bill of costs was made as alleged, it should be readily available.
21. In conclusion however, I agree with the respondent, the application is premature. The applicant needs to go back to the drawing board.
22. The application is disallowed. Each party to meet their own costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY, THIS 8<sup>TH</sup> DAY OF MAY 2023**

**S CHIRCHIR**

**JUDGE**

In the presence of :-

Court Assistant- Eric

Mr. Muluma holding brief for Mulenya for the Respondent

No appearance by the Applicant

