



REPUBLIC OF KENYA



**Gichamba v CFC Stanbic Bank Limited (Civil Case 150 of 2011)
[2023] KEHC 19042 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 150 OF 2011
DKN MAGARE, J
JUNE 19, 2023**

BETWEEN

PETER MATHIGU GICHAMBA PLAINTIFF

AND

CFC STANBIC BANK LIMITED DEFENDANT

RULING

1. This matter came before me for directions on the hearing. The defendant raised issues that the suit had been dismissed during the service week of 8/7/2013. The matter was listed for Notice to show Cause before Justice R.N. Nyakundi on 8/7/2015.
2. The parties were not in agreement on what transpired. The plaintiff was of the view that the matter was alive and was never dismissed. On the other hand the Defendant was of the view that the matter was dismissed on 8/7/2020 by Justice R.N. Nyakundi.
3. The Respondent filed a report on Justice at last. Cold case clearance case initiative at the High Court Mombasa, 6th 24th July 2015.
4. On the relevant date 8/7/2015. It is clear that the cases listed for dismissal were dismissed on 8/7/2015. To pick another day, the returns for that week show that Justice R.N. Nyakundi dealt met 304 matters which had been listed. 3 files were missing 34 were given further dates and 256 were dismissal. A total of 11 files had already been dealt with. He dealt with a total of 301. Therefore, only 3 files were missing.
5. This case is listed for dismissal at No. 47 on the list for Justice R.N. Nyakundi for 8/7/2015. There is no evidence that the file was one of the zero missing files. *[In the case re Estate of Luke Owuor Ochido](#)*



(Deceased) (Probate & Administration E015 of 2021) [2022] KEHC 15544 (KLR) (21 November 2022) (Ruling),

“Needless to say that this is a court of law and is deemed to know the law. It is also a court of record and its decisions bind the subordinate courts. It must therefore not be afraid of making legal pronouncements which are obvious under the law.”

22. In the case of *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR, the court of appeal stated as doth: -

“The trial Judge went on to find that the appellant and his counsel “had not exercised due diligence” and had they done so, they would have produced the two authorities which were in existence then.” This reasoning on the basis of which Lesiit J, reached her decision was a misdirection. Failure by counsel to know or to cite relevant authorities that would have impacted on the Court decision had no relevance under rule 1 of order 44. The Court was deemed to know the law and ought to have been aware of the Treaty. Its lack of awareness of the Statute or case-law, however obscure, was not a mistake or error apparent on the face of the record nor was it a new and important matter or evidence which was discovered. The three limbs of rule 1 in order 44 (now Order 45) relate to issues of fact. The issues raised by the appellant related to law. Where the Court is not well served, an error of law in a decision predicated on correct facts cannot be blamed on a litigant or his counsel. But it can be challenged on appeal.”

6. Instead of showing cause, the plaintiff caused another folder to be opened on 23/11/2015 and restarted this matter and given the same number without an order to do so. This edifice has bene subsisting to date.
7. Before a matter is declared lost, the deputy registrar, must establish, on behalf of the court, that the file is truly lost. This file was not lost. It was dealt with by justice Nyakundi. It is only after that that the file disappeared.
8. The application dated 12/11/2015 was filed in the file. The application was seeking for orders that: -
 - a. That the matter be certified as urgent.
 - b. That this Honourable Court be pleased to make an Order for construction of a skeleton file.
 - c. That appropriate directions be given so that this matter be finalized without any further delay.
 - d. The cost of this Application be provided for.
9. In the week of 8/7/2015, the following was the statistics.
 - a. Listed files 218
 - b. Missing file 0.
 - c. Files given further dated 57
 - d. Dismissed 153.



- e. Already concluded 8.
 - f. Total 218
10. This means for 8/7/2018 all the matters were dealt with. None were missing. Clearly the plaintiff did not attend court and as such could not have shown cause. The Defendant averred positively that the suit was dismissed. There has been no serious challenge on this. The Defendant has even produced a humongous record on record of proceedings of the court.
11. Though no outcome is listed on the report, for individual cases, the report is sufficient to show that the suit was dismissed. In this case, the court will ask itself a question, which had lingered in my mind for some time, who will benefit from the loss of file? This is crucial in view of the statement that the suit was already dismissed.
12. I am the conspired view that only the plaintiff will benefit from loss of a file ready for dismissal of even dismissed. When the same issues arose on loss of the record, the Court of Appeal had this to say in the case of *Justus Cheruiyot Chumba v Republic* [2016] eKLR, Mumbi Ngugi, stated as followed: -

“ 17. In Criminal Appeal No. 187 of 2002 *Francis Ndungu Wanjau v Republic*, the Court of Appeal was seized of an appeal emanating from the High Court in which it was alleged that the records of the lower court and the High Court were missing. The Court considered various decisions on the subject and noted as follows:

“ On all the available authorities, the court has consistently held that there would be no automatic acquittal merely because all the records for the case have disappeared. Such was the situation in the case of *Joseph Maina Kariuki v Republic*, Cr. App. No. 53 & 105 of 2004 (UR) where it had been established that “the record of the trial magistrate and that of the High Court on first appeal have simply vanished into thin air and cannot be traced. The police file has also vanished in the same way. Nor can any record be traced in the office of the Attorney General. The appellant’s own copies of the record of proceedings in both lower courts which had been supplied to him had also disappeared.”

13. *Cheruiyot Chumba v Republic* [2016] eKLR, the court states as follows: -

“ 18. In reaching the decision not to acquit the applicant as it had been urged to do, the Court observed as follows:

“ Faced with that kind of situation this Court remarked as follows in the case of *John Karanja Wainaina v Republic*, Criminal Appeal No. 61 of 1993 (unreported): -

“ In such a situation as this, the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files” Is the appellant responsible” Should he benefit from his own mischief and illegality if he is” In the final analysis, the paramount



consideration must be whether the order proposed to be made in the one which serves the best interest of justice. An acquittal should not follow as a matter of course where a file has disappeared. After all a person, like the appellant has lost the benefit of the presumption of innocence given to him by section 72 (2) (a) of the Constitution, he having been convicted by a competent court and on appeal the burden is on him to show that the court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered.”

14. In John Ooko Otieno v Republic, Cr. Appeal No. 137 of 2002 (UR) the entire records and files containing proceedings and judgment of the trial court could not be traced and the Court was urged in the circumstances to quash the convictions and set aside the sentences thus setting the appellant at liberty since his constitutional rights to a proper trial had been infringed. In declining to accept this invitation, the Court stated:

“Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e court files, judgment, police file and Attorney General’s file is a rare occurrence. It has however, occurred and this Court is not a stranger to such a situation. This Court has on more than one occasion in the past encountered such a situation. In the case of Pius Mukaba Mulewa and Another v Republic, Court of Appeal Criminal Appeal No. 103 of 2001, this Court, faced with that situation had the following to say: -

““What we can take from Zaver’s (Haiderali Lakho & Zaver v Rex (1952) 19 EACA 2464) case is that the court must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss occurred. Who stands to gain from the loss” Is it merely coincident that both the magistrate’s file and that of the police are lost” Does the available evidence point to anyone as being responsible for the loss” And if so, can such a party be allowed to benefit from a situation of his own making” In the final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interests of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a retrial, an acquittal must follow as a matter of course.”

15. The loss of file immediately after the same was subject of dismissal of the case, it is not that out of imagination that the someone knows what happened to the original file.
16. Further, the application to reconstitute the skeleton file has taken to prosecute a simple application to reconstitute the file. At some stage the plaintiff proceeded as if the file is already allowed.
17. Given the circumstances of the matter, I am unable to allow application dated 12/11/2015. I have already found, from the report of the court and the replies that the matter was already dismissed by justice R N Nyakundi on 8/7/2023. Consequently, the application dated 12/11/2015, lacks merit.



Determination

18. In the circumstances, I make the following orders: -

- a. The application dated 12/11/2015 lacks merit.
- b. The Application is dismissed with costs, so far incurred from 13/11/2015.
- c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF JUNE, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Gikandi for the Plaintiff

Mr. Khagram for the Defendant

Court Assistant - Brian

