



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1196 OF 2008

IN THE MATTER OF THE ESTATE OF ABDULGUNI MOHAMED ALI (DECEASED)

FATUMO FARAH ALI

ABDISALAM MOHAMMED..... PETITIONERS

V E R S U S

AMIN MOHAMED ALI

ADAN MOHAMED ALI..... OBJECTORS

AND

COMINCO KENYA LIMITED.....1ST PROTESTOR

IBRAHIM RASHID MOHAMMED.....2ND PROTESTOR

RULING

1. Proceedings in relation to this file commenced sometime in the year 2008. Being a matter that is hotly contested by way of a protest opposing distribution of the estate, hearing by viva voce evidence was conducted sometime in the year 2018 with each side calling witnesses. Several documents were admitted as exhibits and parties advised to file their written submissions. A date was subsequently set to confirm compliance and fix judgment date. The court then ordered for typing of proceedings.

2. On 3rd December 2018 when the file was due for mention to confirm compliance, the original file could not be availed. I was informed that the file had disappeared while in the custody of the Secretary who was typing the proceedings.

3. The court then directed the Deputy Registrar and the in-charge registry to look for the file. The file was mentioned for several days without success. According to the court record, on 28th September 2019 the Deputy Registrar indicated that they had looked for the file without success. The Hon. Deputy Registrar directed parties to file all documents in their possession in the skeleton file which she had opened. The file was then fixed for mention before the trial Judge on 18th November 2019.

4. On 18th November 2019 the file was still missing. The court was informed of a complaint letter which had been written to the Hon. The Chief Justice for intervention.

5. Meanwhile, my secretary who had custody of the file was interdicted over the loss of that file. She is still on interdiction pending disciplinary proceedings. On 10th March 2020 parties appeared before the Deputy Registrar Hon. Munyolo. Mr. Wetaba holding brief for Abubakar for the 2nd protestor requested the court to fix the matter for hearing. Counsel promised to avail all documentations in their possession to enable proceedings proceed.

6. Consequently, the Deputy Registrar directed parties again to avail pleadings and documents in their custody to enable the court reconstruct the file. The skeleton file was placed before me on 19th May 2020. In attendance was Mrs. Wambugu who urged the court to reconstruct the court file using documents in the possession of the parties.

7. Observing that there was no possibility of tracing the original file despite every effort and intervention of the top judiciary administration, the court directed parties to submit all documents and pleadings in their custody to facilitate reconstruction of the court file so that witnesses shall be recalled to testify. Parties were given 21 days to comply.

8. On 23rd June 2020 the file was mentioned to confirm reconstruction of the file. On that day, parties' respective counsel were in attendance. Mrs. Wambugu for petitioners informed the court that they had submitted their documents to the court as directed. Mr. J. M. Mwangi for the 1st protestor sought for 30 days to comply.

9. On his part, Mr. Abubakar informed the court that they had filed an application opposing the orders of the court made on 19th May 2020 directing reconstruction of the file. The court once again directed parties to submit their documents to the Deputy Registrar to fast track reconstruction of the file. Mention was fixed for 27th July 2020 before the Deputy Registrar to confirm compliance.

10. Before 27th July 2020, the court was confronted with a Chamber Summons application dated 21st June 2020 filed under Rules 49 and 73 of the Probate and Administration Rules seeking for orders as hereunder;

(i) That the application be certified as urgent and be heard exparte in the first instance.

(ii) That the Honourable Court be pleased to stay reconstruction or any other action incidental thereto for this file pending the hearing of this application.

(iii) That the Honourable Court be pleased to vacate the orders made on 19th May, 2020.

(iv) That the Honourable Court be pleased to order for an investigation as to the loss of the original file.

(v) That a report be filed by the Deputy Registrar Family Court or any other authorized person explaining the loss and disappearance of the file and the likely culprit.

(vi) That the cost of this application be in the cause.

11. The application was premised on the grounds stated on the face of it and an affidavit sworn on 22nd June 2020 by Ibrahim Rashid Mohamed in which he averred that there was need to file a report explaining circumstances under which the file got lost, who is culpable and what action has been taken including prosecution of the culprit. He further averred that the orders of 19th May 2020 were made in his absence and without notice hence should be vacated.

12. In reply, the first petitioner swore a replying affidavit on 9th July 2020 in which she stated that upon disappearance of the court file, she wrote complaint letters to the Deputy Registrar dated 20th December 2018 (FM-1(a), Principal Judge dated 7th February 2019 (FM.1 B) and to the hon. the Chief Justice dated 22nd March 2019 (FM.2).

13. She further stated that given the age of the file, there was need to reconstruct the file so that the matter can proceed with hearing to conclusion. She blamed the protestors for delaying the matter as the orders issued on 19th May 2020 directing reconstruction of the file was in the best interest of justice.

14. She contended that the application is intended to curtail the ends of justice by delaying the matter further.

15. During the hearing, Mr. Abubakar for the applicant stated that, his client was not against reconstruction of the file perse. His only concern is that there must be an investigation report in the file showing what steps had been taken to unearth the person behind the disappearance of the file and possibly be prosecuted. He also submitted that under the Fair Administrative Action Act, his client was entitled to any investigation report that may be there.

16. In response, Mrs. Wambugu for the petitioners expressed shock and dismay at the prayers sought which she termed as absurd. Counsel wondered what the protestors will achieve by opposing reconstruction of the court file. That the disappearance of the file cannot stop the continuation of proceedings and conclusion of the matter through file reconstruction.

17. I have considered the application herein, responses thereto and oral submissions by counsel. I have already given a history over the disappearance of the original file. I must from the onset express my disappointment over the loss of the original file in this case. There is no doubt this is an old case. Proceedings and hearing of witnesses had closed. It was pending filing submissions and then Judgment.

18. It is not in doubt and admittedly so that both parties have made every available effort to trace the file. The Hon. The Chief Justice has himself intervened leading to the interdiction of the secretary concerned. This was an administrative process to which the applicant does not need to be given administrative correspondences between various actors in the organization.

19. It is not every disciplinary issue against a staff that must end up to prosecution. Disciplinary process against the officer in whose custody the file was before disappearing is ongoing. I cannot order for the disciplinary proceedings to be supplied to Mr. Abubakar and his client. I do not have powers to order for prosecution of staff connected to disappearance of a file. The officer under interdiction has her story as well hence cannot be condemned unheard until disciplinary proceedings are over.

20. Mr. Abubakar stated that they are not opposed to reconstruction of the file. There is no indication as to when the original file will resurface. The only sane alternative to any reasonable human being is to reconstruct the file as directed by the Deputy Registrar and the court on 19th May 2020 so as to proceed and re-hear the matter afresh.

21. I do not see any prejudice to be suffered by the applicants in complying with the orders of this court made on 19th May 2020. The orders were made in good faith for the ends of justice to be met. What will the protestors gain by delaying this matter further? I must agree with Mrs. Wambugu that the application is not warranted and the same is just but a waste of time.

22. Since parties are in agreement for the reconstruction of the file as the only way forward, I have no reason not to dismiss the application herein which I find to be unmeritorious.

23. Accordingly, application dated 22nd June 2020 is hereby dismissed. Parties to submit necessary pleadings and documents in their possession to enable the DR have the file reconstructed. Parties to appear before the DR. on 27th July 2020 as earlier directed to confirm compliance.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JULY, 2020.

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J. N. ONYIEGO

JUDGE