



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

MISC APPLICATION NO.17 OF 2019

PETER WAMBUGU KARIUKI & 16 OTHERSPETITIONERS/APPLICANTS

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE RESPONDENT

Main File - Nakuru ELRC Petition No.2 of 2013

And

formerly Nakuru High Court Petition No.30 of 2012

RULING

The applicants, who are also the petitioners in Nakuru ELRC Petition No.2 of 2013 filed application seeking for orders that;

1. This court be pleased to order a skeleton file for **Petition 2 of 2013 Peter Wambugu Kariuki & 16 others versus Kenya Agricultural Research Institute** *be opened subject to order number 3 being granted.*
2. This court be pleased to grant leave to the applicants to reconstruct the Court file in **Petition 2 of 2013 Peter Wambugu Kariuki & 16 others versus Kenya Agricultural Research Institute** and upon the reconstruction the reconstructed file be merged with the skeleton file and be stored in the strong room.
3. Costs be provided for.

The application is supported by the Affidavit of Peter Wambugu Kariuki and on the grounds that the petitioners and applicants herein filed the Petition No.2 of 2013 and judgement was delivered on 3rd May, 2013 and the court ordered the respondent to pay costs. Both parties filed appeal vide Civil Appeal No.271 and 315 of 2015 which have since been finalised.

On 10th September, 2019 the petitioner's advocate filed for the bill of costs and while seeking to file the same the main file could not be traced. Efforts to engage the registry to trace the same have not borne fruit hence this application for leave to reconstruct the file.

The respondent is opposed to the application and filed Replying Affidavit sworn by Dr Eliud Kireger the Director General and who avers that the Deputy Registrar has not issued the parties with a Certificate that ELRC **Petition 2 of 2013 Peter Wambugu Kariuki & 16 others versus Kenya Agricultural Research Institute** is lost and a recommendation that it be reconstructed. There is also no information received by the respondents that the file is misplaced and cannot be traced as alleged.

Dr Kireger also avers that the main purpose for the reconstruction of the files is for the applicants to file the bill of costs who would need to peruse and confirm the record in the original file which the applicants have deliberately in making this applicant failed to attach. The application thus made is premature and should be dismissed with costs.

Both parties made oral submissions in court.

The applicants submitted that efforts to trace the main file in **Petition 2 of 2013 Peter Wambugu Kariuki & 16 others versus Kenya Agricultural Research Institute** have not borne fruits despite great efforts at the registry to trace it to file the bill of costs after the appeals filed by both parties in Civil Appeal No.271 and 315 of 2015 concluded. The Deputy Registrar has communicated that the file cannot be traced at the registry.

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 versus 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.

The respondent also submitted that they are opposed to the process adopted by the applicants in making the instant application. The due process captured in the case of **Abdul Karim Omar versus Stephen Ngumbau Kithuka [2017 eKLR]** has not been followed as the court must certify that the file is lost and cannot be traced. Prior to the application in question the conduct of the applicants is that they had prepared a bill of costs which requires perusal of the court file. Before the reconstruction can be ordered a certificate that the file is lost must issue.

The respondent also submitted that without the original file, the taxing master has no record upon which to assess the bill of costs filed. The matters before the Court of Appeal have not concluded and the application herein is done to forestall the outcome therefrom.

As noted by both parties in the case of **Abdul Karim Omar versus Stephen Ngumbau Kithuka [2017 eKLR]**, the reconstruction of a missing court file is an internal matter to be addressed by the office of the Registrar, the official and legal custodian of all court files. For this court, section 11 of the Employment and Labour Relations Court Act, 2011 places the duty upon the Court Registrar and the appointed Deputy Registrars to keep the custody of all court files.

As above noted, the court gave an outline of the procedures which should follow 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** the court through the office of the Registrar or the Deputy Registrar together with the parties are therefore involved in the process of reconstructing a file which is missing or cannot be traced.

It is more crucial where the parties are at the stage where the file is up for the filing and assessment of the due costs as the original record of the court becomes a necessary record to interrogate in this regard.

In the above referenced case of **Abdul Karim Omar versus Stephen Ngumbau Kithuka [2017 eKLR]**, the parties were at the stage as herein where judgement has since been delivered, parties proceeded to the Court of Appeal and the last attendance before such court was scheduled for the 17th of December, 2019.

At this stage, the Court Registrar or the appointed Deputy Registrar for the court under the provisions of section 11 of the Employment and Labour Relations Court Act, 2011 being the official custodian of all court files must confirm that upon request by the parties to file documents under **Petition 2 of 2013 Peter Wambugu Kariuki & 16 others versus Kenya Agricultural Research Institute** this file cannot be traced and or has been misplaced as upon such written communication then the parties can rightly be justified in seeking for the reconstruction of such a missing and or misplaced file. Without such communication, there is a presumption that the office/officer legally mandated to keep the court records has the same in his/her custody.

The internal steps thus outline as above referenced, though internal are a good operational tool coupled with the written communication from the official custodian of court records, the Registrar or the appointed Deputy Registrar(s).

The applicants have attached letter dated 20th September, 2019 and 3rd October, 2019 appendices “PWK4” and “PWK3” to the Affidavit of Peter Wambugu Kariuki to the Deputy Registrar, ELRC Nakuru on the basis that *efforts to trace the court file so as to file out party and party bill of costs have been unfruitful*. Kindly confirm you are unable to trace the said file so that we can apply to have it reconstructed. ...

No reply is noted.

It shall be imperative for the officer responsible for the custody of the court file(s) to issue written Communication in this regard and on the request by the applicant. Reference shall be the steps outline above and noted in **Abdul Karim Omar versus Stephen Ngumbau Kithuka [2017 eKLR** read together with section 11 of the Employment and Labour Relations Court Act, 2011.

Upon confirmation by the responsible officer as above and the court Registrar or the Deputy Registrar(s), the parties herein shall be at liberty to move the court as appropriate. A timeline is envisaged under the internal process for tracing missing files. Such time is reasonable and upon lapse, the parties without being put into unnecessary expense are at liberty to move the court as appropriate.

At this instance, the application dated 9th October, 2019 seeking for the reconstruction of the court file in **Petition 2 of 2013 Peter Wambugu Kariuki & 16 others versus Kenya Agricultural Research Institute** is premature. **The Registrar, ELRC and the Deputy Registrar(s) Nakuru shall attend as above referenced steps within the next twenty one (21) days.**

No orders on costs.

Delivered at Nakuru this 23rd day of January, 2020.

M MBARU

JUDGE

In the presence of: