



In re Felista Wambui Nyoike (Presumed Deceased) (Family Miscellaneous Application E058 of 2023) [2024] KEHC 14938 (KLR) (27 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY MISCELLANEOUS APPLICATION E058 OF 2023**

**JM NANG'EA, J
NOVEMBER 27, 2024**

**IN THE MATTER OF
ANN WAMBUI KARIUKI APPLICANT**

RULING

1. By Notice of Motion dated 9th October 2023 expressed to be brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Rules as well as Section 118A of the Evidence Act (sic), the applicant prays for these orders;
 - a. Spent
 - b. Spent
 - c. That the court be pleased to declare and presume one Felista Wambui Nyoike who has been missing since 1983, as dead.
2. The application is supported by the applicant's affidavit evidence to the effect that the missing person left home in 1983 and has not been seen since. The matter was reported to the police vide Occurrence Book No. 24/22/02/23 to no avail. The applicant, the missing person's daughter, further avers that their area chief has written a letter dated 7/9/2023 exhibited herein confirming the report. The chief mentions the subject's children as Philip Maina Nyoike, John Kariuki Nyoike, James Karanja Nyoike, Martha Wangari Nyoike, Nduta Nyoike and Wairimu Nyoike.
3. The applicant also made a statutory declaration under the Oaths and Statutory Declarations Act affirming the same facts.



4. Section 118A of the *Evidence Act* is in the following terms:-

“Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead.”

5. Section 119 of the Same Act enacts that:-

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the particular case.”

6. In the case of *Re ENK* [2017] eKLR, the court held that presumption of death is rebuttable and

“therefore before the presumption is made, sufficient evidence has to be adduced in court to prove presumption of death.”

It is further observed in that case that the applicant needs to show that the missing person has not communicated to those likely to hear from him/her during the seven years and that after independent search, there is no trace of the person within or without the jurisdiction of the court.

7. Section 386 of the Criminal Procedure Code provides in pertinent part that the officer in charge of a police station or any other authorized officer, on receiving information that a person is missing and believed to be dead, immediately give the information to the nearest magistrate empowered to hold inquests and carry out necessary investigations to unravel the circumstances of the death. Upon conducting the inquest the concerned magistrate is required inter alia to recommend to the Director of Public Prosecutor (DPP) as to whether or not the period regarding the presumption of death should be reduced and, if so, suggest the lesser period depending on the circumstances of each case so that the person’s relative don’t have to wait for an argonisingly long period.

8. In *Masoud Salim Hemen & Another vs DPP & 3 Others* it was restated that where *the Constitution* or statute prescribes a specific “procedure for redressing certain grievances, that special procedure should be strictly followed.”

9. In yet another decided case, *Re Matter of Pius Mukono Murage (presumed deceased)* [2019] eKLR, it was underscored that an applicant for such order must tender sufficient evidence supporting presumption of death and should not leave the matter to the court’s discretion or mere guess work. The court also reiterated that the prescribed legal procedure in seeking redress must be followed.

10. In the instant case, I note that the concerned chief in his letter alluded to hereinbefore does not mention the applicant as one of the children of the alleged missing person. None of the named children has testified in support of the applicant’s evidence or at all. It is not also shown what action, if any, the police took in line with the law upon receiving the information as to the missing person.

11. It is my conclusion in the circumstances that the applicant’s evidence is not sufficient to reach a finding that the missing person be presumed as dead. Other family members who were ordinarily expected to have heard from her should have also testified to corroborate the applicant’s evidence.

12. In the result, the application is dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF NOVEMBER, 2024.

J. M. NANG’EA , JUDGE.



In the presence of:

The Applicant, Present

Court Assistant, Lepikas

