



In re Presumption of Death of Maurice Omondi Omino (Miscellaneous Civil Application 86 of 2018) [2023] KEHC 2841 (KLR) (30 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 86 OF 2018**

**JN KAMAU, J
MARCH 30, 2023**

**IN THE MATTER OF
GORDON OMINO APPLICANT**

RULING

INTRODUCTION

1. In his Notice of Motion dated February 18, 2020 and filed on February 20, 2020, the Applicant herein sought for orders that the District Registrar of Deaths (Kisumu) (hereinafter referred to as the “Registrar”) be summoned to give an appropriate response as to why he had refused to adhere to the court order dated October 29, 2018. He also sought for an order that the Registrar do issue him with a Death Certificate in the name of Maurice Omondi Omino.
2. He swore an affidavit on February 18, 2020 in support of the said application. He averred that the deceased, Maurice Omondi Omino (hereinafter referred to as “the deceased”) was his brother. He stated that on or about May 7, 2018, he filed an application that the court do presume the deceased dead by virtue of having not been seen or heard by those who ordinarily would have heard from him had he been alive, which application was allowed on October 24, 2018 and whereupon on October 29, 2018, the court issued an order directing the Registrar to issue a Certificate of Death in respect of the deceased.
3. He asserted that despite visiting the Office of the District Registrar of Deaths, Kisumu and his advocates writing to the said office on March 21, 2019 and August 20, 2019 demanding to be issued with the said Certificate of Death, he had not been issued with any to date.
4. He contended that without the said Certificate of Death, the family of the deceased was not able to meet financial provisions such as food, shelter and education of the minor children. He thus urged this court to grant him the orders that he had sought.
5. In opposition to the said application, Mathew N Khayota, the Registrar of Births and Deaths in charge of Kisumu County swore an affidavit on October 6, 2020. The same was filed on October 7, 2020.



- He stated that he took over the office in December 2019 and his predecessor did not inform him of this matter.
6. He explained that for issuance of a death certificate to a presumed death under Sections 7,8,16,17 and 18 of the *Births and Deaths Registration Act* Cap 149 (Laws of Kenya), a death must occur, be reported to government local agents (Assistant Chief) or be attended by a medical practitioner at the time of death or on examining the body the same is notified to the Civil Registrar to make an entry. He was emphatic that it was after all the above is proven before he could issue a death certificate.
 7. He contended that when a death occurred, the only authorised person to inform him to create an entry in the civil registry was the Assistant Chief or Medical Officer. He added that presumption of death of a person would not be considered as death until the date of death, place of death, place of burial, cause of death, the informant who was present or witnessed when death took place and or the medical practitioner who examined the body before disposal and the burial permit were provided, which in this case had not been provided to facilitate the issuance of a death certificate. He was emphatic that issuance of a death certificate in the circumstances of this case would be against the law.
 8. The Applicant swore a Supplementary Affidavit on November 25, 2020 in response to the Registrar's averments. The same was filed on November 28, 2020. He averred that he had perused a sample copy of a death certificate normally issued by the Registrar and that the details the Registrar claimed to be difficult to record were not provided in the death certificate.
 9. He added that he had also received a letter from the same office wherein they noted that there was nothing preventing the registration and the main contention was that there was no express provision for registration of presumed deaths.
 10. It was his proposal that the Registrar could record the date of death as being the date he was presumed dead in court, the place of death being Kisumu having been presumed dead in Kisumu, the place of burial can be ignored as the same is not provided for in the death certificate, the cause of death to be recorded as presumed dead by dint of the court order and that he be indicated as the informant having applied for the said presumption of death. He pointed out that there was provision for burial permit on the death certificate.
 11. The Applicant's Written Submissions were dated and filed on December 15, 2020. The Registrar of Births and Deaths, Kisumu County did not file any Written Submissions. This Ruling is therefore based on the Applicant's Written Submissions.

Legal analysis

12. The Applicant submitted that the Registrar had not given sufficient reasons as to why the order could not be enforced. He asserted that in the letter dated September 10, 2019 the said office indicated that it was finding it difficult to register persons under such circumstances because the *Births and Deaths Registration Act* does not expressly provide for such.
13. It was his case that the Act does not prohibit the registration of death as a result of presumption of death in that Section 15 (2) of the *Births and Deaths Registration Act* provided for compulsory registration of deaths. He added that the long title of the *Births and Deaths Registration Act* provided for incidents such as where one is presumed dead as it states that:-

“An Act of Parliament to provide for the notification and registration of births and deaths and matters incidental thereto”.



14. He argued that it was foreseen that there could arise incidents such as the one facing this court that was why the term, “other matters incidental thereto” was included in the *Births and Deaths Registration Act* to cater for that incident. He contended that the courts were guided by the said long title which promoted the aim of the provisions of the *Births and Deaths Registration Act* and that it assists during the interpretation process as it brings to the fore the purpose of the *Births and Deaths Registration Act*.
15. He asserted that presumption of death is provided for under Section 118A of the *Evidence Act* and that parties should not be allowed to disobey court orders and directions issued by court. In this regard, he relied on the case of *Kenya Human Rights Commission vs Attorney General & Another* [2018] eKLR where it was held that the court has inherent powers to enforce its orders under Article 159 of the *Constitution*.
16. He was categorical that the conduct of the office of the Registrar of Births and Deaths denied him his constitutional right of being issued with a death certificate and that it resulted to dire consequences on the family of the deceased who had not been able to make necessary financial provisions such as food, shelter and education of the deceased’s minor children.
17. He further submitted that the only remedy he had was enforcement of the court order. He urged the court to allow the registration of death of the deceased and the issuance of the death certificate as prayed for.
18. A reading of the record showed that indeed the Applicant filed an application dated May 3, 2018 seeking presumption of death of the deceased, that he be allowed to access the deceased’s bank account to withdraw funds for his children’s school fees and that the registrar of death do issue him with a death certificate in respect of the deceased.
19. On October 24, 2018, Cherere J granted an order to presume the deceased dead and directed that the Registrar do issue the Applicant with a Certificate of Death. She further directed that the Applicant to file Succession Cause in respect of deceased’s estate before he could withdraw funds from deceased’s accounts.
20. Notably, court orders must be obeyed because any court in exercising its jurisdiction is minded to ensure the orderly functioning of society and the rule of law. The orders of Cherere J had not yet been varied through a successful appeal or any other means. The Registrar of Births and Deaths was therefore bound to issue the Applicant a Certificate of Death in respect of the deceased.
21. The Registrar of Births and Death’s averments that his predecessor did not inform him of the Applicant’s case when he took over office and that he had not been provided with particulars were therefore rendered moot.
22. Accordingly, taking into account the circumstances of this case and the material that was placed before it, this court was satisfied that the Applicant herein had demonstrated that the Registrar of Births and Registration ought to comply with the court orders to maintain the dignity and sanctity of the court.

DISPOSITION

23. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated February 18, 2020 and filed on February 20, 2020 was merited and the same be and is hereby allowed in terms of Prayer No (2) therein.
24. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MARCH 2023



J. KAMAU
JUDGE

