



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Karanja Kagwangi (Deceased) (Civil Case  
E018 of 2021) [2022] KEHC 10493 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10493 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL CASE E018 OF 2021  
MM KASANGO, J  
JULY 27, 2022  
IN THE MATTER OF THE ESTATE OF KARANJA KAGWANGI (DECEASED)  
AND  
IN THE MATTER OF PRESUMPTION OF DEATH**

**JUDGMENT**

1. The originating summons dated 30<sup>th</sup> July, 2021 is for the following orders:- That Karanja Kagwangi be presumed dead. That the Registrar of Death do issue a certificate of death in respect of the said Karanja Kagwangi.

**The Law**

2. The foundational law of the orders sought in this matter is Section 118A of the *Evidence Act*. That Section is in 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.”

3. Rule 10 of the *Probate and Administrative Rules* states:-

“An application for an order presuming the death of a person whose death there is no sufficient written evidence and to whose estate a grant is sought shall be made by summons to the court and shall be supported by an affidavit setting out the grounds of the application.”



4. An application seeking the presumption of death of another ought to also comply with the provisions of the Criminal Procedure Code (CPC) Cap. 75. Section 386 of the CPC provides that:-

“The officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person –

- (a) ...
- (b) ...
- (c) ...
- (d) is missing and believed to be dead; shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister, .. and in the case of paragraph (d) shall immediately send to the Director of Public Prosecutions through the Commissioner of Police as full a report as possible together with details of all supporting evidence relating to the circumstances surrounding the disappearance and the grounds upon which the death of that person is presumed to have taken place.

5. Further, Section 387(6) of the CPC provides that:-

“In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Director of Public Prosecutions and shall make recommendations as to whether or not the period regarding the presumption of death provided for by section 118A of the Evidence Act should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.”

6. Finally, the provision of Section 388(1) of the CPC is as follows:-

“The Director of Public Prosecutions may at any time direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provisions of that section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.

### **The Application**

7. As stated before, the originating summons filed by Charles Njuguna Kimemia (the applicant) seeks the order for the presumption of death of Karanja Kagwangi, here after the subject. The originating summons is supported by affidavit evidence.

8. The applicant by his affidavit dated 30<sup>TH</sup> July, 2021 deponed that on 2<sup>nd</sup> December, 1989 he purchased parcel of land known as Kiambaa/Thimbigua/763 the property from John Gikiru Waihenya (deceased)(hereafter the vendor). The vendor previously purchased the property from the subject. The date of the agreement of sale of the property between the vendor and the subject is 20<sup>th</sup> November, 1961. The applicant further deponed:-

“That on 14/4/2021 I obtained a certificate of official search of the said land which shows that the title deed for the said land is still in the name of Karanja Kagwangi.



That in 1961 Karanja Kagwangi then left for Right Valley and he has never been heard of his whereabouts (sic).

That all attempts both at Eldoret and Kiambu for over the years to trace the whereabouts of Karanja Kagwangi have all been in vain.

That to date, Karanja Kagwangi has not been heard of by anyone ...

That the presumption (sic) is necessary to facilitate the transmission of Kiambaa/thimbigua/763 from Karanja Kagwangi to me as the purchaser and owner.”

9. The application is supported by affidavits sworn by James Gatoru, Francis Njenga and John Gikuru Waihenya. All of these deponents swore the affidavits as witnesses of the agreement of sale of the property that is the sale by the subject to the vendor. Those three deponents swore each their own affidavits. Those affidavits are a replica of each other. They therein deposed:-

“That I recall on 20<sup>th</sup> November, 1961 I witnessed Mr. Karanja Kagwangi execute an Agreement for Sale of his property known as Kiambaa/thimbigua/763 to Stephen Waihenya.

That after the execution of the Sale Agreement, Mr. Karanja Kagwangi handed over the title deed for the said property to buyer in my presence and that of James Gatoru.

THAT since then, I have never met Mr. Karanja Kagwangi nor heard about his whereabouts.”

### Analysis

10. The applicant did not, as required under Section 386 CPC, report to the police of the alleged missing of the subject. In other words, the alleged disappearance of the subject has not undergone the rigors of the legal requirements before presumption of death can be made. In my humble view, the provisions cited above of CPC must be met before a court can make presumption of death as provided under Section 118A of the Evidence Act.
11. My consideration of the originating summons has led me to find that the main and sole purpose of presenting this matter before court is to sanitize a sale of the property. The originating summons is worrisome because the applicant simply states that because the subject is alleged to have gone to the Rift Valley, he should be presumed dead. That was not the intention of the legislation related to presumption of death.
12. It is also worrisome that the applicant does not state who are the relatives of the subject. He himself does not seem to have any family relationship to the subject. That indeed is perturbing. If indeed the subject has family/relatives what then is their view? Is the subject’s kin aware he is missing?
13. The standard of proof the applicant was required to meet is on a balance of probability. That means the applicant was required to provide facts which would prove to this Court that it is more likely to be true than not that the subject is missing. That standard of proof was not even met by the letter dated 11<sup>th</sup> December, 2020 written by the Chief Kiambaa location. In that letter, the Chief stated in part:-
- “We have information that he (the subject) migrated to Rift Valley in 1961 and his whereabouts is not known and has never been heard.”
14. That letter of the Chief of Kiambaa location does not meet the standard of the independent source to prove to this Court that the subject is missing and should therefore be presumed dead. This is because



the Chief, as can be seen from the above reproduced letter, relied on information whose source he did not disclose. Further, the Chief could not have been a Chief in 1961 when the subject allegedly disappeared. Therefore, the more reason why the said chief should have clearly set out the source of his information.

### **Disposition**

15. The applicant has failed to prove that the subject is indeed missing. The applicant has equally failed to comply with the procedure set out in Criminal Procedure Code. The judgment of the court is that the originating summons is without merit and is dismissed.

16. This file shall henceforth be closed.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 27<sup>TH</sup> JULY, 2022.**

**MARY KASANGO**

**JUDGE**

In the presence of:-

Coram:

Court Assistant:- Mourice

For Appellant:- Gaita for plaintiff.

Court

Judgment delivered virtually,

**MARY KASANGO**

**JUDGE**

