



**In re Evans Kusienya (Miscellaneous Application 98 of 2019)  
[2022] KEHC 15865 (KLR) (Civ) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15865 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS APPLICATION 98 OF 2019**

**MA ODERO, J**

**NOVEMBER 25, 2022**

**IN THE MATTER OF AN APPLICATION FOR DECLARATION  
OF PRESUMPTION OF DEATH FOR XXXX SENIOR PRIVATE EK**

**JUDGMENT**

1. Before this court is the Ex Parte Notice of Motion dated 14<sup>th</sup> June 2019 by which the Applicant Sylvia Isiaho Mutondo seeks the following orders:-
  1. That this Honourable court be pleased to issue an order for presumption of death in respect of xxxx Senior Private EK.
  2. That the costs of this application be in the cause.”
2. The application was supported by Affidavits dated 14<sup>th</sup> June 2019 sworn by –Sylvia Isiaho MutondoChristopher Kusienya MutoroMajor Anthony Manyara Mwiti (19807)
3. The application was canvassed by way of viva voce evidence on the virtual platform.
4. The Applicant Sylvia Mutoro told the court that she was the wife of Senior Private EK (the Subject herein). That they had one (1) child together. She states that the Subject was a service member of the Kenya Armed Forces and was stationed at Kahawa Barracks. The wife states that she has not seen her husband for the past twelve (12) years. The Applicant told the court that she last saw the subject on 23<sup>rd</sup> June 2011. That enquires at his place of work have yielded no answers. The Applicant now requests that the Subject be presumed dead and that a declaration to that effect be issued by the court.
5. PW2 Christopher Kusienya Muterolis the father of the Subject. He told the court that he Subject is the fifth out of his thirteen (13) children. PW2 confirms that the Subject was a service member with the Kenya Defence Forces and was based at Kahawa Barracks. PW2 also told the court that he has not seen his son in the past twelve (12) years and states that several enquires made to the Subjects employer have yielded no answers. He prays that the Subject be presumed dead.



6. Section 118A of the Evidence Act Cap 80 Laws of Kenya provides as follows:-

“Where it is proved that a person has not been heard for seven (7) years by those who might he expected to have heard of him he were alive, there shall be a rebuttal to presumption that he is dead.”

7. The Subject herein was a married man who had a wife and a child. He was also a member of a large family of thirteen (13) children and his father is still alive.
8. The wife, Father and siblings of the Subject are persons who would have in the ordinary course of things have been expected to have been in regular constant and/or communication with the Subject. They all stated that they have not seen nor heard from the Subject in the last twelve (12) years. The Subjects wife stated that she last saw her husband in June 2011.
9. The Subject was a member of the Kenya Defence Forces and was attached to the Kahawa Barracks. Even though his wife and family did not hear from him, it would be expected that the Subjects employer would be in a position to shed light regarding his whereabouts. The family told the court that numerous enquiries to the KDF yielded no answers.
19. On record is a letter dated 11<sup>th</sup> September 2011 signed by a Brigadier I.K. Tumbo of the KDF. The letter states that the Subject in the company of other service men had been assigned to escort supplies from Wajir to Liboi during Operation Linda Nchi. It is stated that the driver mistakenly took the route to Diff in Somali. The men strayed into the territory of Somalia through Liboi on 24<sup>th</sup> July 2011 at around 4.00 pm. That the company upon being stopped by friendly forces in Somalia jumped out of their vehicle and disappeared. To date none of the men have been traced. This information is also contained in the Affidavit dated 14<sup>th</sup> June 2019 sworn by Major Anthony Manyara Mwiti a staff officer based at the Kenya Army Headquarters. To date no information has been received by the employer as to where the missing men are.
20. There is evidence that the family of the Subject have made all efforts to establish his whereabouts. In a supplementary Affidavit dated 14<sup>th</sup> December 2021 Corporal Aggrey Kusienya Mutoro a brother to the Subject has detailed how acting on orders issued by Hon Justice Onyiego he placed a missing person advert in the Nation Newspaper of 25<sup>th</sup> October 2021. A copy of the said Advert is annexed to the Supplementary Affidavit (Annexure AKM ‘2’). Despite this Advert, no information was received regarding the whereabouts of the Subject.
21. It is clear that the Subject herein went missing following the unintended foray into Somalia. Even the employer is unable to tell what happened to him. The Subject has been missing and incommunicado for a period of twelve (12) years. If he was still alive I have no doubt that he would have contacted his family. It is therefore unlikely that the Subject is still alive.
22. Based on the foregoing, I find that the threshold set in Section 118A of the Evidence Act has been met. There exists a strong presumption that the Subject is no longer alive. Accordingly, I do allow this application and make the following orders:-
  1. That xxxx Senior Private EK and is hereby presumed to be dead.
  2. The Registrar to issue a Death Certificate in respect of the said Senior Private EK.
  3. No orders on costs.

**DATED IN NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**



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**MAUREEN A. ODERO**

**JUDGE**

