



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT CIVIL CAUSE NO. 2 OF 2020 (OS)

IN THE MATTER OF GREGORY MUSAU MUASYA (PRESUMED DECEASED)

AND

IN THE MATTER OF AN APPLICATION BY JACINTA NTHENYA MUSAU

AND

IN THE MATTER OF AN APPLICATION FOR PRESUMPTION OF DEATH

JUDGEMENT

1. By an Originating Summons dated 20th January, 2020 expressed to be brought under the section 118A of the **Evidence Act**, Cap 80 Laws of Kenya, Rule 10 of the **Probate and Administration Rules**, Section 17 of the **Births and Death Registration Act**, Cap 148 Laws of Kenya, Section 3A of the **Civil Procedure Act**, Cap 21 Laws of Kenya and all other enabling provisions of the law, the applicant herein seeks a declaration that **Gregory Musau Muasya** be presumed dead and that a certificate of death be issued to the applicant herein.

2. The said application is supported by an affidavit sworn by the applicant herein who deposed that the deceased is her husband having gotten married to him in 1980 under Kamba Customary Law. According to him, the subject was last seen alive on the 14th October, 2006 and since then she has neither seen him nor heard from him despite the efforts she has made to trace him.

3. The applicant disclosed that she has even informed the area chief who drew a letter dated 24th April, 2009 confirming that the subject disappeared mysteriously on 4th October, 2006 and has not been locate to date. It was deposed by the applicant that she reported to the Kenya Police in Machakos on the 17th day of December, 2019 and was issued with a police abstract indicating that her husband was yet to be found and that her efforts in tracing the subject have been futile, 14 years after the subject disappeared.

4. The applicant averred that she was seeking the orders in question in order to enable her access the subject's NSSF dues in order to assist the family in its upkeep.

5. I have considered the Summons as well as the affidavit and the submissions. Section 118A of the **Evidence Act** provides that:-

“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.”

6. The presumption of death being a rebuttable presumption, the person seeking an order that the missing person be presumed dead must adduce sufficient evidence. In **Halsbury's Laws of England**, 4th Edition Vol 17(1) at paragraph 580-581 it is stated that he who asserts that a person was dead on a given date must prove the fact by evidence, and the issue will be decided on all the evidence available at the date of the hearing.

7. A presumption of death is made where it is proved that a person has not been seen or heard of for seven years by close relatives who might have been expected to have heard of him. Due inquiry must therefore be made and a party must prove that the inquiry has been made.

8. In this case, the only evidence that the subject is missing is that he was last seen alive on the 14th October, 2006 and since then the applicant has neither seen him nor heard from him despite the efforts she has made to trace him. Those efforts are however not disclosed. The document authored by the Chief states that the subject mysteriously disappeared on 14th October, 2006 at Nairobi where he was working at Corrugated Sheets Company. The applicant also annexed an abstract from the police. However, that abstract does not confirm that the disappearance of the subject was reported but that the report was in respect of loss of NSSF Membership Card.

9. It is not indicated by the applicant what steps if any have been made to search for the subject amongst his relatives such as parents and siblings. In my, the applicant has not adduced evidence to warrant the court to issue the order sought. Section 118A of the **Evidence Act** envisages that the missing person has not been seen, not by one person but by those who might be expected to have heard from him. What is required to be proved is that there are persons who are likely to have heard of the person sought to be presumed dead over that period, and that those persons have not heard of him, and all due inquiries have been made appropriate to the circumstances.

10. A declaration that a person is presumed dead is a serious presumption that ought only to be made when the court is satisfied that based on the circumstances of the case, there is sufficient material that the person must be dead. It is not merely the lapse of time that the court considers but also the steps made by the applicant to trace the whereabouts of the subject. Such steps as inquiries made amongst the close relatives, reporting of missing person to the police, (possibly) newspaper advert are all steps which may go towards showing that the subject, in all probability, must be dead.

11. Having considered the material placed before me I am not satisfied that this is a proper case for declaring the subject presumed dead. The evidence falls short of the threshold required for such a declaration. Accordingly, the Summons fails and is disallowed.

12. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 27th day of January, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Makau for Mr Musya for the Plaintiff

CA Geoffrey