



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCC MISC APPL. NO. E006 OF 2020

IN THE MATTER OF SECTION 118A

OF THE EVIDENCE ACT (CAP 80)

AND

IN THE MATTER OF RULE 10 OF THE

PROBATE AND ADMINISTRATION RULES

AND

IN THE MATTER OF SECTION 17 OF THE

BIRTHS AND DEATHS REGISTRATION ACT

AND

IN THE MATTER OF AN APPLICTION FOR PRESUMPTION OF DEATH OF NICHOLAS MUEMA MUNYWOKI

BETWEEN

JOSEPHAT KIOKO MUNYWOKI.....APPLICANT

RULING

1. Before me is an application by way of Originating Summons dated 24th November 2020 brought by Josephat Kioko Munywoki under Section 118A of the Evidence Act (Cap 80), Rule 10 of the Probate and Administration Rules and Section 17 of the Births and Deaths Registration Act seeking the following two (2) Orders:-

1. An order do issue by this court presuming Nicholas Muema Munywoki dead.
2. The Registrar of deaths do issue a certificate of death in respect of one Nicholas Muema Munywoki.

2. In support of the application the Applicant filed an affidavit sworn by himself on 24th September 2020, in which it was deponed that Nicholas Muema Munywoki (the subject) was his son, who worked at Nakumatt Downtown Branch Nairobi employed by Booles First Ltd, that the said Nakumatt building was involved in a fire tragedy on 28th January 2009 and he was burnt beyond recognition and could not be identified by scientific DNA identification, that after the fire incident the applicant make a report at Nairobi Central Police Station and was issued with a police abstract, that since 2009 his son had never been seen nor had he contacted anybody, that his son was unmarried, and that the insurers had asked for a death certificate in order to process the insurance claim. Annexed to the affidavit is a copy of a report from the Chief Government Pathologist, stating that the subject Nicholas Munyoki's remains could not be identified, the police abstract report, letter from Kenindia Assurance Company Ltd, a chief's letter from Kitela location, and identity card of the Applicant and the subject.

3. On the hearing date, Mr. Kithuka counsel for the Applicant explained the background and circumstances surrounding the application. The Applicant Joseph Kioko Munywoki also testified on oath in support of the application and adopted all the documents filed.

4. I have considered the application and perused all the documents filed, as well as the sworn evidence of the Applicant. From I have no doubt that the subject disappeared in the fire, Nakumatt fire tragedy as explained in the documents filed and the evidence of the applicant, and that the subject has not been heard of since 2009, which is more than 10 years now.

5. Under rule 10 of the Probate and Administration Rules under the Law of Succession Act (Cap 160) such an application is to be brought by way of Summons, supported by affidavit. I note that the present application was brought by way of Originating Summons supported by an affidavit. It is thus a proper and competent application.

6. Section 118A of the Evidence Act (Cap 80) provides that there is presumption of death where it is proved that a person has not been heard of for a period of seven (7) years. The section provides as follows-

118A 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.

7. In my view, with the evidence placed before the court in this application there cannot be any other conclusion than that the subject be presumed by the court to be dead as he has not been heard of for more than 10 years now. I will thus declare that the subject herein be and is presumed dead. With regard to the prayer directed to the Registrar of death.

8. With regard to the prayer directed to the Registrar of death section 17 of the Birth and Deaths Registration Act under which the application was brought provides as follows:-

17. "Upon the death of any person the registration of whose death is compulsory, it shall be the duty of the nearest relatives of the deceased present at the death or in attendance during the last illness of the deceased, and, in default of such relatives, of every other relative of the deceased dwelling or being in the same registration area as the deceased, and, in default of such other relatives, of each person present at the death and of the occupie of the house in which to his knowledge the death took place, and, in default of the persons herein before in this section mentioned, of each inmate of such home, or of any person finding or taking charge of the body of such person or causing the body of such person to be buried or otherwise disposed of, to give notice within such time as may be prescribed to the registrar of the registration area in which the death took place."

9. In my view, the declaration of presumption of death of the subject herein by this court means that the subject is dead by operation of law, and that the said death has to be registered by the Registrar as required by law. I will thus order the Registrar to register the death of the subject herein.

10. Consequently, I allow the application and order as follows:-

i) An order be and is hereby issued by this court presuming that Nicholas Muema Munywoki is dead.

ii) The Registrar of deaths is hereby ordered to issue a certificate of death in respect of the said Nicholas Muema Munywoki.

Delivered, Signed & dated this 15th day of February, 2021 in open court at Makueni.

GEORGE DULU

JUDGE