



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISC. CIVIL CASE NO. 78 OF 2019 (OS)

IN THE MATTER OF SECTION 118A OF THE EVIDENCE ACT CAP 80 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY IRENE NJERI WANGARI – APPLICANT

AND

IN THE MATTER OF JAMES MWANGI NDUNG’U (DECEASED)

JUDGMENT

1. By originating summons dated 09/09/2019, the Plaintiff Irene Njeri Wangari sought reliefs;

a. That a declaration be made that James Mwangi Ndung’u dead.

b. And that the Registrar of Births and Deaths be directed to enter the name of James Mwangi Ndung’u in register of deaths and issue death certificate thereof.

2. The same Originating Summons is supported by the grounds that the subject herein went missing on 12/08/2012 and to date his whereabouts are unknown.

3. He left behind the wife instant Plaintiff and 2 issues of the marriage borne out of Customary Law.

4. Thus the Plaintiff seeks presumption of his death by dint of his disappearance for a period exceeding 7 years.

5. This court is moved via the provisions of **Section 118A of Evidence Act Cap. 80 Evidence Act Laws of Kenya.**

6. The Originating summons is supported by the affidavit of the Plaintiff sworn on 09/09/2019 reiterating the said grounds on the face of the Originating Summons.

7. When matter came for hearing on 26/07/2021, the Plaintiff testified as PW3 and confirmed that on 12/08/2012, her husband subject herein received a call from people unknown to her and they told him they had arrived in a place called Tank and he left to meet them.

8. In the evening of the same day, his phone went off and he has never been seen to date nor heard of his whereabouts.

9. The Plaintiff reported his disappearance on 14/08/2012 at Nyahururu Police Station and as a proof of the said report, PW1 Deputy OCS Nyahururu Police Station produced an OB Abstract P-Exhibit 1 of the same date of report.

10. The Plaintiff also did pay for media announcement of the subject disappearance via Royal Media via Inooro and to date, no information has ever emerged of his whereabouts. The extract of report announced and the receipts of payments were produced as Exhibit 4 (a) and (b).

11. PW2 Senior Chief Nyahururu produced a letter she wrote to confirm the Plaintiff is the surviving wife of the said James Mwangi Ndung’u, and same was marked P-Exhibit 3.

12. An application of this nature is anchored under **section 118A of the Evidence Act** which provides as follows:

“Where it is proved that a person has not been heard of or seen for seven years by those who might be expected to have heard of

him if he was alive, there shall be a rebuttable presumption that he is dead.”

13. Thus Section **118A Evidence Act, Cap. 80 Laws of Kenya** effect is that the person sought to be presumed dead must have disappeared for 7 years and that his whereabouts is unknown for the same period of 7 years.

14. In the instant situation, it has been established on balance of probabilities via the testimonies of PW1 Deputy OCS Nyahururu Police Station, The Senior Chief Nyahururu Police Station and the Plaintiff, that the subject disappearance by date of this judgment 9 years and by 09/09/2019, when this matter was lodged in court, over 7 years had lapsed and the subject’s whereabouts was unknown since 12/08/2012.

15. Thus the court finds that the Plaintiff has proved her case on balance of probabilities and thus court makes the following orders;

i. A declaration be and is hereby made to the effect that James Mwangi Ndung’u is presumed dead.

ii. And that the Registrar of Births and Deaths be and is hereby directed to enter the name of James Mwangi Ndung’u in register of deaths and issue death certificate thereof.

iii. No orders as to costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 30TH DAY OF JULY, 2021.

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CHARLES KARIUKI

JUDGE