



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLN. NO. 691 OF 2019

DIANA AMENYA OPINGO

[In The Matter of an Application for Presumption of

Death of Herbert Taitus Andalo] APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 28th October 2019 filed in court on 31st October 2019 seeking that *Herbert Taitus Andalo* be presumed dead and a death certificate be issued to that effect by the Principal Registrar of Births and Deaths.

2. The application is anchored on *Section 118A of the Evidence Act, Section 3A of the Civil Procedure Act and Order 50 Rule (1) of the Civil Procedure Rules* and all other enabling provisions of the law. It is supported by a supporting and further affidavit sworn by the applicant *Ms Diana Amenia Opingo* on 28th October 2019 and 19th May 2019 respectively.

3. The application was canvassed by way of affidavit evidence since when it was scheduled for hearing on 24th April 2020, the COVID-19 pandemic had already struck our country and the Hon. Chief Justice issued practice directions down scaling court operations to mitigate its spread.

4. I have considered the depositions made by the applicant in the affidavits on record as well as the information contained in the annexures thereto.

5. The applicant contends that she is the wife of *Mr. Herbert Taitus Andalo* (the subject) and that they solemnized their marriage on 11th August, 2001; that their union is blessed with five children. The applicant further deponed that before his disappearance, the subject was working with Serena Hotel Nairobi in its Rooms Division. On 8th August 2006, she received information from one of their neighbours who was her husband's colleague that her husband had not reported on duty and his services were going to be terminated.

6. She reported the matter to their area chief and to Kilimani Police Station and that since then, she has extensively searched for her husband and contacted all their friends and relatives both in Nairobi and in their rural home in Kakamega County without any success. She asserts that nobody has seen or heard from him since August 2006 and his services with Serena Hotel were terminated on 28th August 2006 when he failed to report on duty without permission; that numerous inquiries made to the Officer Commanding Police Division (OCPD) Kilimani regarding the status of the missing person report she made at the station concerning the subject's disappearance have gone unanswered. She urged the court to allow the application to facilitate payment of a Group Life Insurance claim lodged with Serena Hotel to assist her with the upkeep of her family.

7. I have considered the application, the two affidavits on record and all the annexures thereto. The law governing the circumstances in which a person may be presumed dead is set out in *Section 118A of the Evidence Act* which states as follows:

“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.”

8. In this case, the applicant who is the subject's wife and three of their adult children namely *Mercyline Moyi Andalo, Faith Matendecheere Andalo* and *Joy Amenia Opingo* who are people who are expected to see or hear from the subject almost on a daily basis or every so often have confirmed that they have not heard or seen the subject since 4th August, 2006. I have confirmed from annexures to the affidavits filed by the applicant that she also reported his disappearance to the chief of the area in which they resided in Kibera and the chief in charge of their rural home in Shirombe Location, Khwisero Sub-county. I have also confirmed that the subject's disappearance was reported to Kilimani Police Station vide OB No. 42/2619/2006.

9. In view of the foregoing, I am satisfied that the applicant has demonstrated by credible and reliable evidence that the subject disappeared

on or about 4th August 2006 and has todate not been in touch with his close family members. This means that the subject has been missing for the last about 14 years and all efforts to trace his whereabouts have been unsuccessful. If the subject was alive, it is expected that he would have attempted to contact at least members of his nuclear family which he has not done todate.

10. Flowing from the above, it is my finding that the applicant has met the threshold set in *Section 118A* of the *Evidence Act* by providing evidence which raises a presumption that the subject is dead.

11. For the foregoing reasons, I find that it would be in the interest of justice to grant the applicant the orders sought given the circumstances necessitating filing of the motion. I therefore invoke the inherent powers of this court under *Section 3A* of the *Civil Procedure Act* and allow the application in terms of prayers 1 and 2.

12. As this was an *ex parte* application, I make no orders as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 30th day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kamunye for the applicant

Ms. Mwinzi: Court Assistant