



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**MISCELLANEOUS CIVIL APPLICATION NO. 9 OF 2019**

**THE MATTER OF AN APPLICATION FOR PRESUMPTION OF DEATH OF DANIEL AENGWO**

**BY**

**VOLFRIDA WANJALA MWANDAWA.....1<sup>ST</sup> APPLICANT**

**WALTER AENGWO.....2<sup>ND</sup> APPLICANT**

**JUDGMENT**

[1] By Notice of Motion dated 18<sup>th</sup> October 2019, expressed to be brought “under Order 51 Rule 1 of the Civil Procedure Rules, section 3A and 63 E of the Civil Procedure Act and section 118A of the Evidence Act and all enabling provisions of the law” the applicants seek the following Orders:

- “1. **THAT** Daniel Aengwo be and is hereby presumed death.
2. **THAT** the Registrar of Deaths do issue a Certificate of Death in respect of the said Daniel Aengwo.
3. **THAT** the cost of this application be in the cause.”

[2] The application is based on the grounds set out in Notice of Motion as follows:

- “1. **THAT** Daniel Aengwo has not been seen or heard of since 12<sup>th</sup> June 2012 and whereabouts is unknown.
2. **THAT** all effort to trace him and/or his whereabouts has been to no avail.
3. **THAT** it is now more than seven (7) years since his disappearance.
4. **THAT** the disappearance had been reported at Kisumu Police Station vide OB NO. 61/3/10/2012 and the print media vide the Standard Newspaper of 29<sup>th</sup> July 2013.
5. **THAT** he was the husband and brother of the applicants.

**DATED at NAIROBI this 18<sup>th</sup> day of October 2019”**

[3] The facts of the case are set out in the supporting affidavit of the Applicant as follows:

**“SUPPORTING AFFIDAVIT**

**I, VOLFRIDA WANJALA MWANDAWA of Post Office Box Number 36-30401 Kabartonjo in the Republic of Kenya make oath and state as follows:**

1. **THAT** I am one of the Applicants herein conversant with the facts giving rise to this application and duly authorized by my co-applicant to swear this affidavit on his behalf and on my behalf. Annexed hereto and marked “VWM 1” is a copy of the authority.
2. **THAT** I am the wife of Daniel Aengwo with whom we have nine children namely:

Melan Aengwo.....26 years

Felisty Aengwo.....24 years

Calvin Aengwo.....19 years

SA.....17 years

FA.....16 years

LA.....14 years

AA.....12 years

CA.....10 years

FA.....8 years

3. **THAT** sometime in 1991, I met Daniel Aengwo an Administration Police Officer at AP Post at Taita Taveta and we became friends and later got married to each other under Tugen Customary Law and Practice.

4. **THAT** we moved to our present matrimonial home at Kapchemungot village, Tiriondonin Sub location, Ossen location, Baringo location, Baringo North Sub County where we continued to cohabit until his disappearance on 12<sup>th</sup> June 2012.

5. **THAT** between 1991 and 2012, my husband served in several AP Posts and his last posting was at the Kisumu District Commissioner's Office where he disappeared on 12<sup>th</sup> June, 2019 at Shauri Moyo AP Camp never to be seen.

6. **THAT** I last spoke with him on 12<sup>th</sup> June 2012, when he had called and informed me that he had taken a loan and sent me Ksh.30,000/= for school fees.

7. **THAT** three (3) days later I received a call from his cousin Job Barkachai also a police officer working at Kisumu Airport that my husband had not reported for duty and could not be traced.

8. **THAT** I immediately called on his mobile phone, but the phone was off and/or could not be reached and we made arrangements with his brother Walter Aengwo to travel to Kisumu and trace his whereabouts.

9. **THAT** when we reached Kisumu we went to his house and found that he had not locked it. We also found his Identity Card and ATM Annexed hereto and marked "VWM2" are copies of the Identity Card and ATM Card.

10. **THAT** we inquired from his fellow officers and they informed us that they do not know how he left his house.

11. **THAT** we kept inquiring as to his whereabouts and received several leads which we followed to no avail. My said brother in law went to several places following such leads to no avail.

12. **THAT** later we dispatched him to make a formal report of a missing person at Kisumu Police Station. Annexed hereto and marked "VWM3" is a copy of the report.

13. **THAT** we reported to the Print Media and published his disappearance through the Standard Newspaper of 29<sup>th</sup> July 2013, complete with his photograph, requesting for information as to his whereabouts to no avail. Annexed hereto and marked "VWM4" is a copy of the Newspaper print.

14. **THAT** I have also engaged the local Administration and the Law enforcement officers to assist me in tracing my husband and their efforts have not bore any fruitful information. Annexed hereto and marked "VWM5" is a copy of the letter from the Chief Ossen Location confirming the disappearance of my husband and my relation to him.

15. **THAT** since his disappearance he has not withdrawn any money from his account and/or his co-operative shares at Harambee SACCO.

16. **THAT** I have not heard and/or seen my husband for the last seven (7) years and it is only fair and just that he be presumed death and a certificate of death be issued to that effect.

17. **THAT** what is stated herein is true to the best of my knowledge, information and belief.

**SWORN** at **NAIROBI** this 18<sup>th</sup> day of **October** 2019

## **The law**

[4] With respect, the rule of evidence in section 118A of the Evidence Act only provides for the presumption of death upon proof of circumstances set out in therein as follow:

*“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.”*

[5] Then procedure for application of an order presuming the death of a person is provided under the Law of Succession Act which introduced section 118A of the Evidence Act by amendment pursuant to section 100 thereof under the Ninth Schedule of the Law of Succession Act.

[6] The application for the court determination that a person is presumed dead is to be made under Rule 11 of the **Probate and Administration Rules 1980** made under the Law of Succession Act providing as follows:

*“11. Application for order presuming death*

*An application for an order presuming the death of a person of whose death there is no sufficient written evidence and to whose estate a grant is sought shall be made by Summons to the Court and shall be supported by an Affidavit setting out the grounds of the application.”*

[7] The reference to “**whose estate grant is sought**” suggests that the application for presumption of death may be made either within a **Petition for Grant** by **Summons** therein or as a separate application by **Summons** preceding a petition for grant because all applications for grant must be made by **Petition** supported by an affidavit (see Rule 7 of the Probate and Administration Rules).

[8] In this application before the court, although no petition is made for appointment of administrators it must be the next thing to be done by the applicant as a person cannot validly deal with the estate of a deceased person except as authorized by a grant of representation under section 45 of the Law of Succession Act.

## **On the merits**

[9] Having heard the applicant, who is the spouse of the Subject herein, and their adult children confirm that the Subject has not been heard of or seen by them for a period of over seven years as prescribed in section 118A of the Evidence Act and noting the efforts as set out in the supporting affidavit to the application the steps taken in tracing the subject without success by advertisement and newspapers reports and considering that monies taken out by the Subject as loans were overtime were returned unused over time, I consider that the applicant has on a preponderance of evidence demonstrated that the subject is probably dead and the court may therefore presume that to be the case, and proceed to issue the order for presumption of his death as prayed.

## **Orders**

[10] Accordingly, for the reasons set out above, the court makes an order for the Presumption of death of one **DANIEL AENGWO**, the subject of these proceedings.

[11] The Registrar of Deaths shall make an appropriate entry in the Register and issue a Certificate of Death based on the presumption of the death of the Subject made herein.

[12] The applicant may thereafter move the court for appointment of administrator to the deceased’s intestate estate in accordance with the Law of Succession Act, cap. 160, Laws of Kenya and Probate and Administration Rules, 1980.

[13] Costs in the cause.

*Order accordingly.*

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF NOVEMBER 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Chebii & Co. Advocates for the Applicants.