



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. APPLICATION NO. 7 OF 2015 (OS)

(In the matter of an application for a declaration presuming the death of one ROLANDO MALPELI under the provisions of section 118A of the Evidence Act, Cap. 80 Laws of Kenya)

AND

In the matter of an application by MONICA MALPELI under the above provisions & Rule 10 and 73 of the probate and Administration Rules

AND

In the matter of ROLANDO MALPELI, Resident of Takaungu WHO DISAPPEARED AT SEA ON 18TH June 2008 (To be presumed dead)

MONICA MALPELI.....APPLICANT

RULING

The application dated 19th August 2016 seeks the following order;-

THAT a declaration do and is hereby issued formerly declaring one ROLANDO MALPELI as presumed dead and a Death Certificate do issue accordingly.

The application is supported by the affidavit of MONICA MALPELI sworn on 19th October 2016. It is averred in the affidavit that the said RONALDO MALPELI was born in Italy on 1st May 1945. He relocated to Kenya in 1993. MONICA MALPELI is the daughter of ROLANDO MALPELI. She states that her father used to live in Takaungu in Kilifi County and was operating a restaurant. On the 18th of June 2008 her father went out swimming in the sea and it appears that due to the turbulent waves he drowned. His body has never been recovered.

This is the second time an application has been made to declare ROLAND MALPELI as deceased. Initially there was ***Misc. Civil application NO.79 of 2015 (OS)***. In my ruling dated 21st April 2016 I declined to declare ROLANDO MALPELI as dead. I observed as follows in my said ruling;-

“There are important factual lacunae that have not been filed and chiefly, the existence or otherwise of the said ROLANDO. The copy of passport annexed is not verified to be a copy of the original by Italian authorities. This court cannot presume in this ex-parte application that the copy belonged to the alleged Rolando. Yes there is a letter dated 13th July 2015 from the Italian Consulate at Malindi referring to one Rolando Malpeli but it does not refer to his passport number. Is he one and the same person as the person referred to in this application” it is impossible to tell.

There is also no indication of where the applicant's mother was or whether or not the said ROLANDO was married or in such a similar relationship at the time of his alleged disappearance. There is even no mention of his business associates. The court should take judicial notice that a restaurant business interacts frequently with other businesses. The importance of all these relationships cannot be understated seeing that it gives a wider audience of his expected communication”

In an application of this nature the court has to be convinced firstly that indeed the person to be declared as dead was living and secondly that those who are supposed to be his close relatives or to have known him have never heard from him for a period of seven years. I have gone through the supporting affidavit and this time round crucial documents have been annexed to prove that indeed there was somebody by the name ROLANDO MALPELI. I have seen the passport which is duly certified by the Italian consulate in Mombasa. The passport was issued on 14th of November 2006 and was to expire on 13th November 2016. There is also a Kenya Revenue Authority letter dated 24th January 2007 which gives the PIN number for ROLANDO MALPELI this being number [particulars withheld]. There is also the bank account No.

[particulars withheld] that belonged to ROLANDO MALPELI and was being held at the Kilifi branch of Kenya Commercial Bank Limited. Apart from that I have seen statement of account from Celtel Kenya Limited for telephone number [particulars withheld] which was MR. ROLANDO'S line.

There are also several court cases involving Mr. ROLANDO MALPELI. These include **Mombasa RMCC 725 of 1997 DOCTOR YUSUF SAEED -VS- ROLANDO MALPELI, KIKAMBALA DIVISION LAND TRIBUNAL CASE NO. 1 OF 2006 SWALEH SALIM SWALEH -VS- ROLANDO MALPELI**. There is also **KIKAMBALA DIVISION LAND TRIBUNAL CASE NO.12 OF 2005 KHAMISI ATHMAN NYALE -VS- ROLANDO MALPELI**. There is also **MOMBASA CRIMINAL APPEAL NO.209 OF 2005 ROLANDO MALPELI -VS- THE REPUBLIC**. The appeal arose out of **KILIFI CRIMINAL CASE NO. 191 OF 2005 REPUBLIC -VS- ROLANDO MALPELI**. There is also **MOMBASA HCC 201 OF 2006 – AWADH MOHAMEND AWADH AND ANOTHER -VS- ROLANDO MALPELI AND THE A.G.** I have also seen **KILIFI RMCC NO.95 OF 2008 ROLANDO MALPELI -VS- JATINDER DHANJAL SINGH T/A DOODLEBUG ENTERPRISES**.

It is alleged that ROLANDO MALPELI used to operate a restaurant beside the ocean at Takaungu on plot no. [particulars withheld]. I have seen the liquor licence for bar and restaurant from the Kilifi District Commissioner who is the chairman of the liquor licencing board. The licences range from 2001 to 2007. There is also a single business permit issued by the Kilifi Town Council for the years 2006 and 2008 in favour of the said ROLANDO MALPELI. I am therefore satisfied that indeed there was one ROLANDO MALPELI who used to operate a restaurant at Takaungu.

The next issue is whether the said ROLANDO MALPELI has never been seen since 18th of June 2008. I have seen an advertisement in the standard newspaper of 19th May 2016 by the firm of S.W. MUHUNI & CO. ADVOCATES. The advertisement indicates that since 18th June 2008 the deceased has not been seen. There is also communication between MONICA MALPELI and AYUB MACHARIA whereby a body of a drowned man was recovered and it was thought to be that of the deceased. MONICA organized for DNA test to be conducted but the body was found to be that of a male African. MONICA MALPELI in her affidavit states that she used to frequently communicate with her father who used to update her on his life in Kenya and his restaurant business. I have seen the photographs of the restaurant building which is now delapidated.

From all the above, I do conclude that the said ROLANDO MALPELI has never been seen or heard from 18th June 2008 to date. It is now a period of over seven (7) years. **Section 118A** of the Evidence Act states as follows;

“Where it is proved that a person has not been heard of for seven (7) 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”.

I am satisfied that the application is merited and it has been proved that ROLAND MALEPLI could be dead. The application is hereby granted. The Kilifi registrar of Births and Deaths is hereby ordered to issue a death certificate for the said ROLANDO MALPELI.

SAID CHITEMBWE

JUDGE

Dated, signed and delivered at Malindi this 17th day of October, 2017

WILDON KORIR

JUDGE