



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL MISC. CASE NO. 7 OF 2015

**IN THE MATTER OF AN APPLICATION FOR PRESUMPTION OF DEATH OF JULIUS
MUTUI KIMWELI**

BY

PETER KILONZI KIMWELI APPLICANT

RULING

Before me is an application brought by the applicant by way of Notice of Motion under Section 118A of the Evidence Act (Cap 80 Laws of Kenya), as well as Section 3A of the Civil Procedure Act (Cap 21), as well as Order 51 Rule 1 of the Civil Procedure Rules. The prayers are two as follows:-

1. ***Julius Mutui Kimweli be and is hereby presumed dead.***
2. ***The registrar of death do issue a certificate of death in respect of the said Julius Mutui Kimweli.***

The application has grounds on the face of Notice of Motion. The grounds, firstly, that Julius Mutui Kimweli has not been seen or heard of from 28th April 2005 and his whereabouts were unknown, secondly, that it was now more than 7 years since his disappearance, thirdly, that the disappearance had been reported at Migwani Police Station under OB No. 10/23/8/05, fourthly, that he was a son of John Kimweli Ututu and had not married at the time of disappearance, fifthly, that John Kimweli Ututu died on 30th 2008, and his family was desirous of commencing succession proceedings in respect of his estate but were prevented from doing so in the absence of Julius Mutui Kimweli.

The application was filed with a supporting affidavit sworn by the applicant on 5th August 2015. The affidavit annexed a number of documents which were PKK1 a true copy of the applicant's identity card, PKK2 a true copy of a letter from the Chief Nguutani location dated 7th May 2012, and PKK3 is a copy of the applicant's father's death certificate. Also annexed were PKK4 is a copy of a letter from the OCS Migwani police station dated 23rd August 2005 confirming the missing persons report, and, PKK5 (a) and (b) being copies of letters from the Chief Nguutani location and the OCS Migwani police station dated 17th March 2015 and 20th March 2015 respectively, confirming that Julius Mutui Kimweli was still missing.

It was deponed by the applicant that being the eldest surviving heir of John Kimweli Utuku, he was eager to distribute his estate to the dependent's but could not do so in the absence of his deceased brother, unless the court grants the orders sought.

Mr. Ngala who held brief for Mr. Muigai for the applicant urged the court to peruse the documents filed

and make a ruling. Counsel informed the court that the applicant was in Nairobi and did not intend to attend court.

This application was brought under section 118 A of the Evidence Act (cap 80). Section 118A of the Evidence Act 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.”

The factual requirements in support of an application for presumption of death were considered in ***Machakos High Court Misc Cause No. 5 of 2015 In The Matter of Presumption of Death of Ngomo Wasua and in the matter of Mutula Wasua the petitioner [2015] eKLR***. In that particular case the application for presumption of death was dismissed by the court, because the facts disclosed by the petitioner were not adequate to satisfy the provisions of Section 118A of the Evidence Act.

The question to be asked herein, is whether the applicant has demonstrated with the facts he has disclosed in court that the person has not been heard of for seven years by those who might be expected to have heard of him if he were alive.

The applicant has filed with the application a copy of a letter from Migwani Police station dated 23rd August 2005 (PKK4) indicating that a report of the missing person had been made to the police. He also filed a letter dated 7th May 2012 from the Chief Nguutani location (PKK2) listing the names of the survivors of the father of the applicant, who is also the father of the missing person. The applicant also filed copy of a letter from the Chief Nguutani dated 17th March 2015 (PKK5(a)) stating that the missing person has still not been found. He further filed a copy of a letter from Migwani Police Station dated 20/3/2015 (PKK5(b)) stating that the missing person had still not been found.

In my view, the information or facts disclosed by the applicant herein do not comply with the requirements of Section 118A of the Evidence Act.

The information disclosed is not adequate to enable this court make a considered decision on whether the missing person can be presumed dead.

Firstly, on the communication from the police, the letter dated 23rd August 2005 (PKK4) from Migwani Police Headquarters, refers to an OB 10/23/8/5. No extract of that OB was filed with this application and no explanation was given why the extract from the OB was not filed in court.

Secondly, the letter dated 20th March 2015 PKK5(b) from the Officer Commanding Migwani Police Station was written on plain paper and was hand written. The person who signed it neither disclosed his name nor the rank he held in the police force or his forces number. That was a major omission. In ordinary circumstances also, the official document which can be verified is the Police Abstract. No police abstract filed nor was an explanation given for the failure to do so. In my view these are serious defects to the application.

The other serious defect to the application was the presumption by the applicant that he is the only person required to confirm that the missing person has not been traced.

He said he was the eldest son, but that did not mean that he was the only relevant interested person as envisaged under Section 118A of the Evidence Act. The letter from the Chief dated 7th May 2012 (PKK4) gave a list of other survivors of John Kiweli Ututu who would also be interested in the death or disappearance of the deceased. There is Peter Kilonzi Kimweli the applicant, Julius Mutui Kimweli, Monica Wamutwa Kimweli, Esther Mweni Uthithi, Mercy Kamene Muli, and Joyce Mawia Kimweli. All these should also have filed documents showing that indeed they had not heard of the missing person. The failure of the applicant to file documents indicating that all these living relatives of the missing person have not heard of the missing person and were aware that the applicant was making this

application, was also a material defect in the application.

I also take note that applicant did not even attend court when the application came up for hearing, with counsel stating that he was in Nairobi and was not interested for coming for the hearing of the matter.

With the above defects in the application herein, I find that the application does not meet the requirements of section 118A of the Evidence Act. The application cannot thus be sustained.

I thus strike out the application and make no order as to costs. For the avoidance of doubt, I wish to state that the applicant is at liberty to file a proper application and comply with all the factual requirements envisaged under the provisions of section 118A of the Evidence Act.

Dated and delivered at Garissa this day of 24th February 2016.

GEORGE DULU

JUDGE