



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**MISC APPLICATION NO. 57 OF 2015**

**In the Matter of:-**

**The Estate of Julius Kathurima Kirera alias Kathurima S/O Kirera**

**AND**

**The Evidence Act Cap 80 Section 118A**

**STEPHEN KAIMENYI KIRERA.....1<sup>ST</sup> APPLICANT**

**DANIEL KIMATHI KIRERA.....2<sup>ND</sup> APPLICANT**

**JUDGMENT**

[1] This is an application for presumption of death. It has been commenced by way of a Notice of Motion Application dated 3<sup>rd</sup> March 2015 which is expressed to be brought under Sections 118A of the Evidence Act, 3 and 3A of the Civil Procedure Act. The specific orders sought in this Motion are:

1. That this honourable court be pleased to order and or presume Julius Kathurima alias Kathurima S/O Kirera as dead by virtue of not having been seen or heard to those who ordinary would have heard of him had he been alive.
2. That this honourable court be pleased to order the Land Registrar, Imenti North District to cancel the name of Kathurima S/O Kirera as the registered owner of land Registration Number Abothuguchi/Katheri/488 and in place thereof do register Stephen Kaimenyi Kirera as the proprietor.
3. That this honourable court be pleased to issue any order that may be expedient to grant in the circumstance.
4. That there be no orders as to costs.

[2] The said application is premised on the following grounds:

- a. That the applicant and his other siblings have not seen or heard from Kathurima S/O Kirera alias Julius Kathurima Kirera since 1983.
- b. That the applicants are brothers to the said Kathurima S/O Kirera alias Julius Kathurima Kirera.
- c. That the lost brother was the registered owner of land registration number Abothuguchi/Katheri/488.

## **Brief facts**

[3] Julius Kathurima Kirera alias Kathurima S/O Kirera was the older brother of the Applicants and was the registered owner of land registration number Abothuguchi/Katheri/488. None of his family members, friends or neighbours has ever heard from him since 1983. According to the Applicants, in 1975 the said Kathurima was sponsored by the Kenyan government to study medicine in Russia where he stayed up to 1983. He came back to Kenya in 1983 and visited home. He was again later sited in Mombasa. In the affidavit filed, it is deposed that when Kathurima came back home in 1983, he told the Applicants that he wanted to go to West Germany. But since then he had not been seen or heard from by any family member. They therefore believe that it has now been 32 years since he disappeared and consequently the court should presume him dead.

[4] On 4<sup>th</sup> May 2015, Makau J directed the matter be disposed of by way of oral evidence. Evidence was tendered in court. PW1 Stephen Kaimenyi testified that that his brother vanished in 1983 and that they had never heard from him ever since and that he had come back in Kenya in 1983 from Russia where he had gone for further studies in 1975. He further testified that his brother was the registered owner of Abothuguchi/Katheri/488 and was never married in his lifetime. He testified that both parents of Mr. Kathurima are deceased. Consequently, he urged the court to presume his brother dead and to allow him take over his land.

[5] PW2 Daniel Kimathi and a brother to PW1 associated himself with the evidence of his brother PW1. He, however, confirmed that PW1 should be allowed to take over the land belonging to his brother as he had been given another parcel of land by his deceased father.

[6] PW3 a Senior Chief at Katheri Central where the applicants live testified that, although he knew the applicants family, he did not know Julius in person. He said that he heard that Julius disappeared and that he had no children or spouse. He further testified that he had made enquiries from neighbours who confirmed to him that they had never seen him or heard from him. He testified that the family had agreed that the 1<sup>st</sup> applicant takes over the land belonging to Julius.

[7] PW4 M'Ringere M'Ibutu testified that he knew the applicants' family since he settled at Katheri. They are his neighbours. He told the court that he last saw Julius in 1983 and that he had never seen or heard from him since then and that he didn't know where he went to. He further testified that Julius had allowed the 1<sup>st</sup> applicant to live on his land and that their parents were deceased.

[8] This application has been brought under Section 118A of the Evidence Act CAP 80 of the Laws of Kenya which empowers the court to make an order for rebuttable presumption of death of, where it is proved that a person has not been seen or heard of for 7 years by those who might have been expected to have heard of him if he were alive. Although Section 118A of the Evidence Act CAP 80 of the Laws of Kenya does not use the words "*and that all due inquiries have been made appropriate to the circumstances*" but, as we shall see in a short while, those words are inextricable within the type of inquiry anticipated under the said section. The said section 118A 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 from him if he were alive, there shall be a rebuttable presumption that he is dead."***

Has the threshold of the law been met?

[9] The law is that presumption of death of a person is a question of fact for the court to decide. See ***Halsbury's Laws of England 3<sup>rd</sup> Edition Volume 15*** at para 623:

***"623. Presumption of life and death:***

***There is no presumption of law by which the fact that a particular person was alive on a given***

*date can be established, it being in every case a question of fact for the jury or judge sitting alone. The tribunal though, may act on presumption of fact as to continuance of life. Where no statute lays down an applicable rule, the issue whether a person is dead generally speaking is one of fact and not subject to presumption of law. To this there is one exception, namely, that, if there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more then, if it can be proved that there are persons who would be likely to have heard of him, and (it seems) that all due inquiries have been made appropriate to the circumstances, there arises legal presumption that he is dead.”*

[10] I have considered all the evidence tendered in court. All witnesses told the court that Julius Kathurima Kirera alias Kathurima S/O Kirera had not been seen or heard of for the last 32 years. He did not marry and he did not have a child or children. The witnesses herein were; the chief, a neighbour, and the applicants- the only surviving brothers of the said Julius Kathurima. These are people who would have been expected to have seen or heard of the said Julius Kathurima if he were alive. They have neither seen nor heard of him for 32 years now. This is a period of over seven (7) years. The applicants did not exactly demonstrate what steps they had undertaken to trace or find their kin, but their evidence was corroborated by both PW3 and PW4; the local chief and neighbor respectively. Therefore, in consideration of the application, the evidence on record and the submissions by the applicants, I am satisfied that Julius has not been seen or heard of for a continuous period of 32 years. Accordingly, it has been proved that Julius Kathurima Kirera alias Kathurima S/O Kirera has not been heard of for seven years by those who might be expected to have heard from him if he were alive. The upshot therefore is that I issue a rebuttable presumption that he is dead in accordance with section 118A of the Evidence Act. I allow the application dated 3<sup>rd</sup> March 2015 to the extent I have expressly granted above. No order as to costs. It is so ordered.

**Dated, signed and delivered in court at Meru this 15<sup>th</sup> day of February 2016**

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**F. GIKONYO**

**JUDGE**

**Mr.Kaimenyi advocate for the applicants**

**Applicants present**  
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**F. GIKONYO**

**JUDGE**