



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 79 OF 2015 (O.S)

**IN THE MATTER OF AN APPLICATION FOR A DECLARATION/ORDER 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 AND SECTION**

**3A OF THE CIVIL PROCEDURE ACT AND ORDER 37 RULE 14 OF THE CIVIL
PROCEDURE RULES.**

AND

**IN THE MATTER OF ROLANDO MALPELI, RESIDENT OF TAKAUNGU WITHIN KILIFI
COUNTY HOLDER OF REPUBLICAN**

**ITALIANA PASSPORT NO. AA0067028 WHO DISAPPEARED AT SEA ON 18TH JUNE 2008
(PRESUMED DEAD).**

RULING

The applicant, MONICA MALPELI has approached the court via an originating summons dated 6th October, 2015 under Section 118 of the Evidence Act, Section 3A of the Civil Procedure Act and Order 37 Rule 14 of the Civil Procedure Rules. The application is premised upon the affidavit of the applicant. She seeks the following orders:

- i. The matter to proceed ex-parte.
- ii. A declaration that one Rolando Malpeli be presumed dead and a death certificate be issued..
- iii. The costs of the application to be provided out of the estate of the said Rolando Malpeli.

The applicant avers that she is the daughter of the said Rolando Malpeli of passport No. AA0067028A. He was a restaurateur at Takaungu. On the fateful day of 18th June, 2008 Rolando Malpeli went out for a swim at the ocean, got captured by the strong current and never got back home. He was thought to have

drowned and lost at sea, only his swim trunks were ever recovered. The annexed documents in the affidavit in support of the application include an affidavit of one Germaine Marie-Rose Venzac. She averred that she witnessed him being carried off by the sea as he swam and in her bid to rescue him, she too was carried off but luckily rescued by fishermen. He never came home after that swim since then. The matter was reported at Kilifi police station and Germaine recorded a statement also annexed to the application.

Section 118A of the Evidence Act provides 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.”

The applicant states that since that eventful day she has never heard from her father. She makes claim that as her father frequently communicated with her, he would have already done so or made some efforts to do so. As he has never communicated as expected since that unfortunate date and as the Italian Consulate at Malindi have never gotten any communication from him since that day, he probably was lost for good. A letter from the Consulate dated 13th July, 2015 confirming that he has never communicated with them is in addition attached to the affidavit.

There are important factual lacunae that have not been filled 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 communications.

I have read the affidavit of Germaine Marie-Rose Venzac. It was sworn in relation to **Mombasa Succession Cause No. 79 of 2008**. The affidavit was sworn on 3rd July, 2008. It also refers to a matter involving the presumption of death of Rolando Malpeli. If this matter was filed in 2008 and the alleged deceased drowned on 18th June, 2008, seven (7) years had not elapsed by then. My cross reference with the Mombasa Court revealed that its Succession Cause No. 79 of 2008 relates to the estate of Nashon Mangua Nyamu where an application for a full grant was made while the Mombasa High Court's Miscellaneous Application succession Cause No. 79 of 2008 is in reference to the estate of Sammy Njuguna Sondu where an application for a limited grant was made.

From the above scenario, it is clear to me that Germaine Marie-Rose Venzac did not swear the affidavit on 3rd July, 2008. The affidavit was sworn in Mombasa. If that affidavit was meant for this cause, it would be prudent to obtain a certified copy of Germaine Marie-Rose's passport for the court to confirm that she was indeed in Kenya on the date she swore the affidavit.

It is also not clear to me as to why the applicant would like Rolando Malpeli to be declared dead. Does she wish to file a succession cause. It is alleged that Rolando used to run a restaurant at the beach front of his property. That would mean that he owned land in Watamu. No official search or copy of title deed has been annexed. Such documents are necessary to enable the court note the importance of the application. There is also need for the entire passport of Mr. Rolando to be certified so that the court can note when he entered Kenya. Did he have resident permit? How was he living in Kenya? Where are the licenses for the restaurants? If he was running a restaurant, why none of his employees have sworn an affidavit to confirm that their boss drowned. Apart from Germaine Marie-Rose, none of the locals

recorded a statement with the police. There is also need to obtain the original hand written investigation diary from Kilifi police station. It is unusual for a statement and a further statement to be on the same page. The initial occurrence book reference seems to be giving the date of drowning as 18th June, 2008. That could be a typing error. However, several occurrence book numbers are given in relation to the same incident. There is O.B 52/7/2008, O.B 59/18/6/2008, O.B 26/15/7/2008 and O.B 38/15/7/2008.

Given the application herein, I am satisfied that the same does not meet the threshold for declaring someone as dead. It is even surprising that the deceased had no neighbours who can support the obvious fact that Rolando used to live with them in Takaungu. No report was made to the area chief or sub-chief. It is equally unusual for a foreigner to drown in Kenya without the matter being reported in the local newspapers. The applicant needs to provide more information if she wants the court to declare Rolando as dead. She needs to also annex her passport for the court to verify her date of birth. Who is her mother and when did her father decide to live in Kenya. Why can't she come physically to Kenya and be sworn or examined by the court on these issues.

In the end, I do hereby strike out the application dated 6th October, 2015. The applicant is at liberty to file a fresh application.

Dated and delivered in Malindi this 21st day of April, 2016.

S. CHITEMBWE

JUDGE