



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION 57 OF 2016

IN THE MATTER OF SECTION 118 OF THE EVIDENCE ACT, CAP 80 OF THE EVIDENCE ACT LAWS OF KENYA

IN THE MATTER OF ORDER 37 RULE 2 OF THE CIVIL PROCEDURE RULES, 2010

IN THE MATTER OF THE PRESUMPTION OF DEATH OF LUISA MARIA GODINHO

RUTH AGNETA NYAIRO.....APPLICANT

RULING

1. The applicant has filed an Originating Summons dated 26th April 2016 seeking an order of presumption of death of **Maria Godinho** to facilitate the petition for grant of letters of administration in respect of her property Mombasa/MS/Block II/36.

2. The same is based on grounds that; Godinho lived and carried out business of selling children clothes in Eldoret town until 1978. She was of Goan descent, in her 50's and had no children or known relatives in Kenya That sometime in 1978 she moved to settle in England and has not been heard from for over 37 years. That prior to her departure she sold her property **L.R. Mombasa /MS/Block 11/36** to the applicant and executed all relevant conveyance however, she left the title documents and executed conveyance to her advocates **Nyairo, Tunoi & Co. Advocates** who have since misplaced and or lost the said documents and transfer was not possible. That over the years the applicant has hoped to hear from her to no avail. That over the years the applicant has paid the land rates and rent over the said property. That the orders sought are to enable the applicant take out letters of administration to complete the transfer of the said property.

3. The applicant seeks to have **Maria Godinho** presumed dead since she has not been heard from for over 37 years and also so as to enable the applicant take out letters of administration to complete transfer of L.R. Mombasa /MS/Block 11/36 since the original title document and signed conveyance and all other executed documents held by the vendor's advocates had been misplaced by the said firm. In support of the said application there two affidavits by Justice Philip Kiptoo Tunoi dated the 27th of October 2010 when he was a partner of the firm of Nyairo, Tunoi and Co. Advocates who avers that he drew the conveyance between Luisa Maria Godinho and Ruth Agneta Nyairo on 30th May 1978 and the same was executed by Maria on the same date but the said conveyance was never registered. Alfred King'oina Nyairo working the law firm of Nyairo, Tunoi and Company Advocates avers in his affidavit dated the 27th of October 2010 that he had in his possession the title conveyance and certificate of ownership of L.R. No. 36 section 11 in his office together with other documents but he was unable to trace it. That this prompted him to report the same to Eldoret police as evidence by police abstract 13/29/10/10.

4. In support of this application the applicant has annexed a copy of title document. The same bears a

conveyance that shows that Luisa Maria Godinho had sold to Ruth Agneta Nyairo parcel of land for a consideration of Kshs. 12,000/- and the same appears to have been signed by both vendor and purchaser. However over time the title changed to a different regime with the conversion of the initial LTA to Registered Land Act all still in the names of the vendor. The same requires another transfer document to be executed.

5. The applicant claims there is no known relative of Maria Godinho and no one appears to have heard anything for over 37 years since the time she relocated to England.

6. I have read and carefully considered the pleadings and filed affidavits filed by the applicant. The issue to be determined is whether there is sufficient proof for the presumption of death of Maria Godinho.

Rule 10 of the Probate and Administration Rules provides as follows: ***“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. Further, **Section 118A of the Evidence Act, Chapter 80** of the Laws of Kenya 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 was alive, there shall be a rebuttable presumption that he is dead.”***

8. The applicant states that Maria Godinho did not have any known family and that she has not heard from her since she relocated to England. For the said presumption to stand the applicant seeking that Maria Godinho be presumed dead must adduced evidence that persons who are likely to have heard of the person sought to be presumed dead over that period have not heard of him, and all inquiries made appropriate have not adduced any fruits. In support of her application she seeks to rely on affidavits by advocates that had handled the sale and said transfer of Maria Godinho property to the applicant and subsequent loss of the said original title documents held by the advocates. It is important to note that the content captured therein is more so in support of the said sale than of the disappearance of Maria Godinho.

9. The applicant avers that there is no known relative of Maria Godinho but adduces no evidence to support this. The circumstances of this matter are in some way unique. In my view the applicant needs to have a publication that Maria Godindo has been missing seeking information on her whereabouts in one of the widely read dailies in this nation, maybe a relative or a person known to her might come forward. In the circumstances, I find that there is insufficient evidence on record to sustain a presumption of death of Maria Godinho. I decline to grant the prayers by the applicant with no orders as to costs.

Orders accordingly.

Dated, signed and delivered this **19th** day of **August** 2016.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Applicant**

MS. Charity

Court Clerk