



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2016

IN THE MATTER OF PRESUMPTION OF DEATH OF ALAUDIN FAZAL DIN

NAHEED NIAZ DIN.....1ST APPLICANT

TAHIRA JABIN DIN.....2ND APPLICANT

RULING

Before the court for determination is a Chamber Summons dated 15th April 2015, filed by the Applicants under the provisions of section 1A, 1B & 3A of the Civil Procedure Act, Order 50 of the Civil Procedure Rules and section 118A of the Evidence Act. The Applicants are seeking an order presuming Alaudin Fazal Din dead, and any other order the Court deems fit to grant.

The Applicants are the sisters of Alaudin Fazal Din whose whereabouts have been unknown since 3rd December 2004. They swore an affidavit on 15th April 2016 stating that their father and mother died on 5th December 1991 and 13th July 2015 respectively, and their property is being administered by the Public Trustee. Further, that they were named as beneficiaries together with their brother, and now wish to distribute the property. They attached a police abstract of the report made at Pangani Police Station that their brother Alaudin was missing, and a notice published in the *Daily Nation* Newspaper of 17th December 2004 also reporting him missing.

Other family members namely Aasmah Said, Malik Said, Mujaheed Naeem Khan and Shenaz Suraj Din swore an affidavit on 19th September 2016 confirming that Alaudin disappeared on 3rd December 2004 and of the reports made to the police station and advertisement in the newspaper about his disappearance. They also stated that they had searched for him in various mortuaries and police stations without success.

The Issue and Determination

I have read and carefully considered the pleadings filed. The issue to be determined is whether there is sufficient proof for the presumption of death of Alaudin Fazal Din to arise. Before I address the substantive issue, I will make a preliminary observation on the form of the Applicants' application.

I note that the Applicants have filed this suit by way of a Chamber Summons, which is in its nature an application. The Petitioner ought to have filed Originating Summons brought under Order 37 Rule 1 of the Civil Procedure Rules, as they were filing a substantive suit as heirs and beneficiaries of an estate. However, this is a technicality that may be overlooked by this Court in the spirit of Article 159 of the Constitution. The Court will therefore proceed on the basis that the application before it is by way of Originating Summons.

On the substantive issue for determination, 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.”

In **Halsbury’s Laws of England, 4th Edition Vol 17(1)** at paragraph 580-581 it is stated that he who asserts that a person was dead on a given date must prove the fact by evidence, and the issue will be decided on all the evidence available at the date of the hearing.

What is required to be proved is that there are persons who are likely to have heard of the person sought to be presumed dead over that period, and that those persons have not heard of him, and all due inquiries have been made appropriate to the circumstances. Where the presumption of death after seven years’ absence applies, the person will be presumed to have died by the end of that period, where the presumption does not apply or is displaced by evidence, the issue will be decided on the facts of the particular case.

In the present application the Applicants assert that they have not seen their brother Alaudin Fazal Din since 3rd December 2004 which is about 12 years ago. The evidence they attached in this regard are a police abstract and newspaper advertisement made in December 2004 on his disappearance. In addition, evidence was brought to support the Applicants averments by other relatives who averred to the disappearance of Alaudin Fazal Din, and to having searched for him.

In the circumstances I find that there is sufficient evidence on record to sustain a presumption of death of Alaudin Fazal Din, and the prayers in the Chamber Summons dated 15th April 2015 are allowed. Alaudin Fazal Din is hereby presumed dead, and a certificate of his death shall issue.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 22nd day of November, 2016.

P. NYAMWEYA

JUDGE