



REPUBLIC OF KENYA

High Court at Kisii

Petition 78 of 2011

L.C.T PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The petition before this honourable court is based on the provisions of **section 22 (1) and (2)** of the **Matrimonial Causes Act Cap 152 Laws of Kenya** which states:

(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and have the marriage dissolved and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time shall be evidence that he or she is dead until the contrary is proved.

2. The petitioner herein is a wife to A.O.N. She averred in her petition that she married the said A.O.N in the year 1985 by performing and observing Abagusii marriage customs and rites and the marriage was blessed with 4 issues. That on 4th September 2004 her husband went missing from home and his place of work never to be seen again to date; that a missing report was made to the Chief of (particulars withheld) Location who wrote a letter to the OCS Ogembo police station on 30th January 2006; the missing report was entered in the official police occurrence book as No.**/**/**/** dated 30th January 2006 at Ogembo police station; all efforts have been made to trace A.O.N everywhere in the Republic of Kenya to no avail and that this matter has subjected the petitioner to anxiety and suspense thus requiring the intervention of this honourable court since seven (7) years have already lapsed. She therefore prays that:-

a) *A declaration that the victim A.O.N is presumed dead and that the marriage be dissolved.*

b) *The honourable court be pleased to issue such orders and/or writs as it may deem fit.*

c) *Costs of this petition be in cause.*

3. On the 1st October 2012 the petitioner adduced viva voce evidence before Hon. Korir J. after the court was satisfied that the respondents had been duly served but chosen not to attend court. She told the court that her husband left home on 9th November 2004, (though the petition refers to 4th November 2004); that she got married to her husband in a traditional marriage ceremony in 1984, they got 4 children

together namely J.O born in 1986, G.K and G.M born in 1988 and J.M born in 1992. She further stated that the deceased was a school teacher at N.p school and since leaving home for school on the fateful day, he has never returned. That she reported to the chief on 30th January 2006 and reported to police on 9th December 2006 (she produced a copy of police abstract No.PC/*/*/**). The police then instructed her to bring them his photograph, the last time she checked with the police was in July 2012 and there was still no trace of him. In conclusion, she asked the court to grant her the order presuming her husband dead so that she can process his benefits.

4. PW2 was J.M.O, the retired chief of B location, Gucha District. He corroborated the Petitioner's testimony that on 30th January 2006 the petitioner reported to him that her husband had been missing for some time, he in turn reported the matter to Ogembo police station for further investigation and to date, he has not heard from the petitioner's husband. He further testified that he knew the petitioner's husband as a primary school teacher and the efforts the petitioner's family have made to find him.

5. On 18th April 2013 the petitioner appeared before me and reiterated her evidence above but added the fact that she not only wanted an order to declare her husband to be presumed dead but that the marriage be dissolved.

6. Upon careful perusal of the evidence supporting the petitioner's testimony I have seen a letter from the Office of the President addressed to the OCS Ogembo police station seeking assistance for the petitioner from PW2, a police abstract dated 30th January 2006 and a copy of the petitioner's husband's national identification card.

7. **Section 118A of the Evidence Act Cap 80 Laws of Kenya** states that:-

“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.”

8. In such a case the petitioner has no burden to prove the death of her husband but to raise a rebuttable presumption. There is no one who is asserting anything to the contrary. It is more than seven years since the petitioner's husband disappeared from home. All diligent efforts to trace him have borne no fruit. In the circumstances, I allow the petition filed by the petitioner herein on 4th November 2011 and declare as follows:-

1) *That the victim A.O.N be and is hereby presumed dead and that the marriage between the said A.O.N and the petitioner be dissolved.*

2) *That a decree of presumption of death and dissolution of marriage do issue.*

3) *Costs in the cause.*

Dated and delivered at Kisii this 23rd day of May, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Present in person for Petitioner

N/A for Respondent

Mr. Bibu - Court Clerk