



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISCELLANEOUS APPLICATION 116 OF 2011
IN THE MATTER OF AN APPLICATION FOR AN ORDER OF PRESUMPTION OF
DEATHS OF GEORGE KARIUKI NJENGA, PETER NJENGA AND JOYCE NYAMBURA
SUSAN NJERI NJENGA APPLICANT

R U L I N G

This application is brought by way of summons dated 3rd November, 2011 and taken out under **Rule 10** of the **Probate and Administration Rules**. By the application, the Applicant seeks the following three orders –

- 1. That this Honourable Court be pleased to issue an order presuming the deaths of GEORGE KARIUKI NJENGA, PETER NJENGA and JOYCE NYAMBURA.***
- 2. That the Applicant herein be granted leave to petition for grant of Letters of Administration in respect of the estates of GEORGE KARIUKI NJENGA; PETER NJENGA and JOYCE NYAMBURA without requiring the Applicant to produce their Death Certificates.***
- 3. That costs of this application be in the Cause.***

The application is supported by the annexed affidavit of Susan Njeri Njenga, the Applicant herein, and is based on the grounds that –

- a) GEORGE KARIUKI NJENGA, PETER NJENGA and JOYCE NYAMBURA were abducted by unknown persons between 26th December, 2008 and January, 2009 and have not yet been found to date.***
- b) They left both personal and immovable property and several dependants on the said property.***
- c) The Applicant wishes to obtain Grants of Letters of Administration in respect of their estates so that the same may be distributed to beneficiaries entitled thereto.***

Appearing for the Applicant, Mr. Mwaura adopted the grounds

embodied on the face of the application which were that the subject persons were abducted by unknown persons on 26th December, 2008 and to-date they have not been found. The relationship between the

Applicant and those persons is that she is the widow to George Kariuki Njenga, the mother to Peter Njenga and mother-in-law to Joyce Nyambura. She has made all efforts to trace those persons without success, and their disappearance was widely circulated in the local media, and the matter was also discussed in Parliament. For these reasons, she wishes to obtain Grant of Letters of Administration in respect of their estates so that the same may be distributed to the respective beneficiaries.

I note that this application is brought under **Rule 10** of the **Probate**

and Administration Rules. That rule provides for applications for orders presuming death. It is in the following words –

“10. 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.”

This rule is procedural and merely provides the procedure for applications for orders presuming the death of a person. Since it is subsidiary legislation, it is subservient to Acts of Parliament and should there be any inconsistencies between subsidiary legislation and an Act of Parliament, the latter would prevail in terms of **Section 31 of Interpretation and General Provisions Act (Cap. 2, Laws of Kenya)**. On that note, **Section 118A of the Evidence Act** is relevant to this matter. It 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.”

In view of this 7 year-rule, the application before the Court is premature since the persons sought to be presumed dead disappeared about four years ago, and the requirement for disappearance for 7 years has not yet been met. In the circumstances, this application is premature and incompetent at this moment and it is hereby struck out with no order as to costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 28th day of March, 2012.

L. NJAGI
JUDGE