

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 114 OF 2009

1. GLADYS MBUCHE NDUNE
2. JOEL ELIJAH NDUNE
3. JOSEPH MALANGA NDUNE
4. RICHARD ELIJAH

NDUNE.....PLAINTIFFS

VERSUS

PRINCIPAL REGISTRAR OF BIRTH & DEATH.....

....DEFENDANT

R U L I N G

2. The Principal Registrar of Births and Death who was named as the defendant filed a defence through the Attorney-General. In the defence the defendant denied knowledge of the facts averred by the plaintiffs and put the plaintiffs to strict proof.

3. The plaintiffs have now moved the court under Order 2 Rule 15 (1) (a), of the Civil Procedure Rules 2010 and sections 1A, 1B and 3A of the Civil Procedure Act for the defence to be struck out for failure to disclose a reasonable defence, and judgment entered in terms of the prayer in the plaint. Under Order 2 Rule 15 (1) (a) of the Civil Procedure Rules 2010 pleadings can be struck out on the grounds that it discloses no reasonable cause of action or defence in law. However, Rule 15 (2) provides that no evidence is admissible on such an application.

4. In this case the plaintiffs are seeking the declaration of the death of Elijah Chiluwe Ndune due to his disappearance. Although the plaintiffs have not so stated, this is an application which falls squarely within section 118A of the Evidence Act which provides for presumption of death. That section 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.”

5. Thus the presumption of death can only arise once the basis has been laid by providing sufficient proof that the person has not been heard of for at least 7 years. That is to say that Order 2 Rule 15 (1) (a) of the Civil Procedure Rules 2010 cannot apply to the plaintiffs’ suit as evidence must of necessity be laid before the court to establish the disappearance of Elijah Chiluwe Ndune. Indeed the plaintiffs have purported to introduce such evidence through grounds which have been stated on the motion. However, the grounds envisaged in support of such a motion are grounds based on law, and not contentious facts which have been pleaded and denied.

6. The overriding objective of the Civil Procedure Act and Rules is to facilitate the just expeditious proportionate and affordable resolution of disputes. In line with that objective the plaintiffs’ suit should be disposed of expeditiously. That does not however mean non-compliance with the appropriate rules. The plaintiffs can only obtain summary judgment if their application is brought properly under the appropriate rules. In short the application dated 11th March, 2011 fails, and is dismissed. I make no

orders as to costs.

Dated and delivered this 26th day of July, 2011.

H. M. OKWENGU
JUDGE

In the presence of:-

..... for the plaintiff
..... for the defendant
..... Court Clerk