



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**Civil Suit 106 of 2008**

**IN THE MATTER OF APPLICATION FOR PRESERVATION AND PROTECTION OF  
PROPERTY OF GEORGE OKELLO NOBALLA – DECEASED**

**APPLICATION AND BY AGATHA NAHULO OSIDIANA**

**RULING:**

The present application dated 4<sup>th</sup> November 2008, is supported by the facts contained in the applicant's affidavit of the same date.

The application is brought ex-parte under the provisions of Order 36 rule 1 of the Civil Procedure Rules and seeks the following substantive orders:-

- (i) That pending the expiry of seven (7) years the applicant be given authority to protect the property of George Okello Osidiana.**
- (ii) That the Court pleased to order that the applicant be at liberty to use all her rights and powers to protect the property of George Okello Noballa from waste, alienation and neglect from third party.**
- (iii) That the Court be pleased to make appropriate directions in this matter.**

The grounds for the application are:-

- (a) That the late George Okello Noballa disappeared in Iraq during the US/Iraq conflict.**
- (b) That the seven years allowed by the law has not expired.**
- (c) That the property of George Okello Nobolla is being destroyed and wasted by strangers.**
- (d) That the applicant requires money to take care of herself and the child left behind by George Okello Noballa.**
- (e) That the Court has powers to make the orders sought.**

The argument by the applicant as may be deciphered from her supporting affidavit is that the subject person George Okello Noballa is her husband and that they got married on or about the 30<sup>th</sup> August, 1992. He is an engineer by profession and in the year 2005 proceeded to work in Iraq with a company

known as Orascom Telkom Holdings. While there, he was reportedly kidnapped by unknown people and all efforts to trace him were fruitless. Eventually his employer gave up the search and declared that he had permanently gone missing. The employer then shipped all his personal effects to the applicant whom he left behind in Kenya together with their one child called Michelle. The applicant contends that she is unable to obtain a death certificate respecting her husband since the period of seven years provided by the law has not expired and yet his properties including parcels of land are getting wasted by third parties and people keen on exploiting his absence. She also contends that she cannot access his bank accounts which are attracting maintenance expenses on a daily basis and that one of the subject's property has already been taken over by a company. She therefore prays that the court authorizes her to act as a "*cestui qui trust*" to protect the property of her husband and that she be authorized to file cases and access all his accounts in Kenya and overseas.

Mr. Mwamu, appearing for the applicant, contended that she be declared a "*cestui que trust*" for the purpose of taking care of the property of the person who has disappeared. He argued that the applicant be given the authority to be in-charge of her husband's property and to make returns to the court for purposes of protecting the property.

In essence, the applicant invites this court to declare a trust over the entire property of her husband to enable her deal with the same for her own benefit and that of her child. It is obvious that she may not be appointed an administrator of the property without first and foremost establishing the fact of her husband's death. Indeed, since the reported disappearance of her husband in Iraq in the year 2005 the seven years period provided by law for a presumption of death have not elapsed.

In the circumstances the applicant may be required to hold on for a few more years prior to presuming that her husband has since died thereby giving her the leeway to apply for the grant of the letters of administration of his estate including the property and bank accounts mentioned herein. A presumption of death may arise only if it is shown that a person has not been heard of for seven years by those most likely to hear from him as long as there are no circumstances explaining the absence of communication from him.

Herein, there are circumstances explaining the absence of communication from the applicant's husband in that he was reportedly kidnapped in Iraq. There is however nothing showing that he was kidnapped by unknown people and killed.

Apart from the allegation of kidnap, there is no cogent evidence establishing the actual fact despite an international press release by the Supreme Council of Kenya Muslims pleading for the release of the applicant's husband by his "captors" and a message by the applicant and another to the "kidnappers" to release their husbands.

The applicant's husband would best be classified as a missing person and it is not unusual for such to re-surface even after seven years or remain kidnapped for as much period. The world has witnessed incidences of kidnapped hostages being released after more than seven years. The present application may therefore be premature if not misconceived considering that there is no law existing in this country to provide for the protection or administration of a missing or kidnapped persons property by those dependant on him.

Order 36 Rule 1 of the Civil Procedure Rules, under which the application is made presupposes a situation where there is already existence a trust or any other instrument. It would not apply in the instant circumstances.

It does not escape the mind of the Court that the application is in fact a challenge to the court to offer an equitable remedy in circumstances such as the present one hence the plea by the applicant to be declared a beneficiary on "*cestui que trust*" to protect her missing husband's property. A declaration of a trust over the missing persons property may achieve the applicant's desired result. However, equity follows the law which must confer necessary jurisdiction for declaration of a trust over a missing person's property. There is simply no such law. The declaration of a trust is not a matter to be given casual consideration. It

entails enormous legal obligations since a trust is defined as follows:-

“A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or “*cestui qui trust*”), for whom he may himself be one and any one of whom may enforce the obligation.”

(see Underhills’ Law of Trust and Trustee).

In the text “Lewis on trust 16<sup>th</sup> Edition,” it is stated that a trustee commonly does not have any beneficial interest in the trust property. Thus, the beneficial enjoyment of the property which is in the beneficiaries is entirely separated from its management which is vested in the trustee. A trustee may hold the trust property on trust for himself and others, but he cannot hold upon trust for himself alone because once the trust property and the whole beneficial interest meet in the same person the equitable obligation is swallowed up in the ownership.

Considering all the foregoing it would be imprudent for this court to offer an equitable remedy to the applicant by declaring a trust over her missing husband’s property. There is no legal basis as of now for such remedy. The applicant will have to contend with waiting for the expiry of seven years in order that the presumption of death applies to her husband she may nonetheless consider taking available legal steps to protect her husband’s property pending the expiration of seven years.

Otherwise the present application is devoid of merit and is dismissed accordingly.

Read and Signed this 23<sup>rd</sup> day of January 2009.

**J. R. KARANJA**

**JUDGE**

ORDER:

Have to appeal as stated as