



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Misc. 74 of 2008

IN THE MATTER OF GEORGE OKELLO NOBALLA

AND

IN THE MATTER OF AN APPLCIATION BY AGATHA NOBALLA

AND

**IN THE MATTER OF APPLICATION FOR EXECUTION AND PROTECTION OF
PROPERTY OF GEORGE OKELLO NOBALADECEASED**

Coram

J. W. Mwera J.

Mwamu for Applicant

N/a for Respondent

Court Clerk Raymond interpreter/English/Swahili/Luo

RULING

The applicant seeks orders under Order 36 rule 1 Civil Procedure Rules to the effect that this court do declare one George Okello Noballa dead notwithstanding that 7 years have not elapsed since he went missing in Iraq. The originating summons also sought orders that the applicant Agatha Nahulo Osidiana be declared executor/administrator of the estate of Noballa so that she can protect it from interference or wastage by any 3rd party. There was an affidavit in support.

Mr. Mwamu, acknowledging the provision of law requiring presumption of one's death only after seven years and on facts presented that the deceased has not been in touch with all relatives and persons he/she ought to have contacted and they themselves had fared no better in contacting the subject, nonetheless desired this court to issue the orders on the basis that since 2006 the subject (Noballa) was reported as having been kidnapped in Iraq. Iraq is known to be in a state of war with kidnappings, killings etc. As per her affidavit the applicant has received correspondence from the subject's former employer and information from a body called the Supreme Council of Kenya Muslims – all not shedding light on Noballa's whereabouts. That lastly the subject's employer, M/S Orascom of Egypt, sent an e-mail to the applicant expressing its giving up on the search of Noballa. They even shipped his property to the applicant at the same time paying Nobolla's dues. That although the applicant cannot obtain a certificate of (presumption of) death in the circumstances, this court should issue protective orders so that the bank where the subject held an account, does not burden the account with levies, and those trying to

take over the subject's property be stopped.

In this court's view, this is a unique case in very unusual circumstances and time. Our Law of Succession Act never envisaged such situations and has no procedure to appoint executors/administrators as prayed by the applicant. And that is no wonder because the 20th and 21st centuries have brought along exceptional circumstances and events like kidnappings in which victims can disappear forever, while their relatives etc are left in positions of grave uncertainty. Our law and quite probably other nations have not formulated laws and procedures to be applied. It is time to think on this lines and cater for such circumstances in our laws.

For now section 113 A of the Evidence Act says

“118A. Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard from him if he were alive, there shall be a reputable presumption that he is dead.”

The law in this country allows presumption of death on facts proven after seven years. It is a question of fact for the court to decide, Halsbury's Laws of England 3rd Edition Volume 15 says:

“623. Presumption of life and death:

There is no presumption of law by which the fact that a particular person was alive on a given date can be established, it being in every case a question of fact for the jury or judge sitting alone. The tribunal though, may act on presumption of fact as to continuance of life. Where no statute lays down an applicable rule, the issue whether a person is dead generally speaking is one of fact and not subject to presumption of law. To this there is one exception, namely, that, if there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more then, if it can be proved that there are persons who would be likely to have heard of him, and (it seems) that all due inquiries have been made appropriate to the circumstances, there arises a legal presumption that he is dead.”

This treatise is of 1956 publication. What we are faced with today like in the present matter was nowhere on the horizon. And still reference is to a period of seven years without hearing from the subject. Then as now, we have no law or procedure to presume death of a person in two years as this court is being asked to do and thus appoint the applicant executor/administrator of Noballa's estate. The circumstances may be that such an order is warranted but with what legal backing and what will be the format of the order of the court? Order 36 Rule 1 says:

“1. The executors or administrators of a deceased persons, or any of them.....”,

may by originating summons seek certain reliefs from a judge sitting in chambers. Mr. Mwamu invoked the provisions above in this application but they appear inappropriate in the circumstances. The applicant is not an executor or an administrator because the subject is yet to be presumed dead. The case of In the Goods of SCHULHOF, In the Goods of Scolf, {December 20, 1947} All England Law Reports Vol.2-841 did not help much. The subjects there were presumed dead according to Czechoslovakian law.

In sum the orders sought cannot issue.

Delivered on 6th June 2008.

J. W. MWERA

JUDGE

JWM/mk.