



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 323 of 2007 (OS)

IN THE MATTER OF: THE ESTATE OF HEINZ GERD MEYER
(DECEASED)

AND

IN THE MATTER OF: THE LAW OF SUCCESSION ACT CAP 160

LAWS OF KENYA

AND

IN THE MATTER OF: THE EVIDENCE ACT CAP 80 LAWS OF

KENYA

AND

ROSEMARY MAKOKHA APPLICANT

RULING

Rosemary Makokha, the applicant herein, took out an originating summons under XXXVI rules 1 and 7 of the Civil Procedure Rules and under Sections 118A and 119 of the Evidence Act and under Section 147 of the Law of Succession Act in which she prayed to be given an order of declaration that one Heinz Gerd Meyer a German National, has been dead since May 2000. The applicant swore an affidavit in support of the summons which is exparte in nature.

In her affidavit she swore on 14th December 2007, Rosemary Makokha avers that she and Heinz Gerd Meyer cohabited at Mombasa, in Kenya from 1998 until the 14th day of April when Heinz Gerd Meyer left Kenya for Germany. She claimed she had joint business ventures with Heinz Gerd Meyer and that they had plans to formalize their cohabitation into a marriage. The applicant depones that during their short cohabitation the two purchased a parcel of land known as plot No. 5258 Section II/MN and Treasury Bill issue No. 1286 in the sum of Kshs.3,000,000 in their joint names. The two even opened a fixed deposit account with Barclays Bank (K) Ltd. In their joint names to keep the proceeds of the fixed deposit upon maturity. The applicant further avers that since Heinz Gerd Meyer left Kenya on 14th May 2000, he never communicated to her until she received a funeral card from Martina Hutchinson and Gabriele Meyer, being Heinz Gerd Meyer's daughters, indicating that Heinz Gerd Meyer died on 20th May 2000. Upon receiving the information, the applicant said she wrote through her lawyers to the

German Embassy requesting to be given the death certificate. Heinz Langer, the trustee of the estate of Heinz Gerd Meyer refused to release the death certificate. For the above reasons the applicant has now come to this court seeking for an order to declare that Heinz Gerd Meyer to be dead in view of the fact that seven years have now passed since he left Kenya.

I have considered the oral submissions of Mr. Asige, learned advocate for the applicant. I have also considered the grounds set out on the face of the originating summons and the facts deponed in the supporting affidavit. There is no doubt that Rosemary Makokha cohabited with one Heinz Gerd Meyer in Kenya from 1998 until the year 2000 when Heinz Gerd Meyer left Kenya for Germany. Since then he has never come back to Kenya nor communicated to Rosemary Makokha. There are correspondences exchanged between the Germany Embassy, Heinz Gerd Meyer's daughters, Heinz Langer, advocates and Rosemary Makokha indicating that Heinz Gerd Meyer is dead. It is unfortunate that that there is reluctance to release the death certificate to applicant. It is obvious also that the applicant and Heinz Gerd Meyer are jointly registered as the proprietors of plot No. 5258/Section II/M.N. and Treasury Bill issue No. 1286.

The law under Section 118A of the Evidence Act provides as follows:

“S. 118A. Where it is proved that a person has not been heard 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.”

The applicant in her averments she made in the affidavit of support shows that Heinz Gerd Meyer left Kenya for Germany more than seven years ago. It is also clear that he has not gotten in touch with the applicant despite having cohabited and jointly owning property in Kenya. There are averments to the effect that Heinz Gerd Meyer's relatives have shown that he is dead but have refused to hand over the death certificate.

Applications of this nature are rarely made that is why there is a drought of precedents. I will refer to the Law and Practice England as a guide. In **Tristram and Coote's Probate Practice 23rd Edition at Page 557**, the conditions which must be fulfilled before making an order of presumption of death are stated **inter alia** as follows:

“(1) Where a person has disappeared where the evidence of death of the alleged deceased is presumptive in consequence of his sudden disappearance, or of his not having been heard of for several years, the applicant's affidavit should be corroborated on some material point by a member of the family, and, if possible, by a friend of the deceased or of his family who is not interested in the estate.

Affidavit

The affidavit of the applicant should state:

- 1) When the deceased was last heard of, and what was his age.**
- 2) The believe of the applicant that the deceased is now dead.**
- 3) Whether any advertisement for the deceased have been inserted – if so, with what success; if inserted, the newspapers should be filed.**
- 4) Whether any letters have been received from the deceased (if any exist, they should also be produced).**
- 5) Whether the life of the deceased was insured.**
- 6) Whether the deceased died intestate or testate – in the former case filing the will – and stating**

who the persons, if any are entitled to a share of his estate in the event of intestacy.

7) The value and particulars of the estate of the deceased, and whether his bank accounts if any, have been operated since his disappearance.”

Having set out in brief, the guidelines from the practice in England, that is as of 1970, let me now apply those guidelines to the application now before this court. Of course I have already stated that under the Evidence Act, an applicant must show that the person sought to be presumed dead disappeared and remained unheard for over seven years. In England the number of years is not indicated but has to be several years. This requirement is met by the applicant in the matter before this court. The affidavit filed in support of the originating summons contains the following averments:

- (i) Date when Heinz Meyer disappeared.**
- (ii) The property Heinz Meyer and the jointly owned.**
- (iii) Correspondences exchanged.**
- (iv) An averment that Heinz Meyer died in Germany.**
- (v) The value of the estate of Heinz Meyer in Kenya.**
- (vi) No death certificate has been surrendered.**

I am convinced that the applicant has fulfilled the minimum requirements needed to enable this court grant the order sought under Section 118A of the Evidence Act. I have carefully considered the provisions of the aforesaid section and it is clear that the law did not shut out the fact that the presumption of death at some point may be rebutted. It would appear it may be necessary to cause a notice of the filing of such an application to be advertised in a newspaper publications attracting both national and international readers. In this case I think it is necessary for the applicant to cause the notice to be published in at least one newspaper with national circulation in Kenya and another in Germany. This will protect the interest of the ‘deceased’ and the beneficiaries of the deceased’s estate if any. In this regard I will grant the order on the above conditions. Consequently I declare that Heinz Gerd Meyer is dead on condition that the order is published once in one of the daily newspapers of national circulation in Kenya and in Germany. The order to be published should invite those interested or affected to show cause why the order should not be confirmed within 60 days from the date of the publication. Ideally, the notice of intention to apply should have preceded the filing of the application.

In sum, I allow the originating summons as prayed and the order nisi is to be made absolute 60 days after the publication is proved by affidavit evidence filed in court.

Dated and delivered at Mombasa this 28th day of August 2008.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Buti h/b Mr. Asige for the Applicant.