



**In re JOO (Miscellaneous Application E136 of 2024)  
[2025] KEHC 1974 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E136 OF 2024**

**JK NG'ARNG'AR, J**

**FEBRUARY 20, 2025**

**IN THE MATTER OF AN APPLICATION FOR  
THE DECLARATION OF THE DEATH OF JOO**

**AND**

**IN THE MATTER OF ARTICLE 2(5), 46(1), 48, AND 159 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTION 118A OF THE EVIDENCE ACT**

**AND**

**IN THE MATTER OF SECTION 1A, 1B & 3A & ORDER  
51(1) OF THE CIVIL PROCEDURE ACT AND RULES**

**IN THE MATTER OF**

**AAA ..... APPLICANT**

**RULING**

1. The Applicant filed an Ex-parte Notice of Motion Application dated 6<sup>th</sup> June 2024 under Certificate of Urgency pursuant to Articles 2(5), 46(1), 48, and 159 of the Constitution, 1A, 1B & 3A of the Civil Procedure Act, Order 51(1) of the Civil Procedure Rules, Section 118A of the Evidence Act, and all other enabling provisions of the law.
2. The Applicant seeks for orders that this honourable court do issue a declaration that JOO of Passport No. A469XXX Republic of Kenya is presumed dead, that this honourable court does order the Registrar of Births and Deaths- to issue a death certificate in respect of the said JOO, and that costs of this application be in the cause.
3. The application is premised on grounds on its face and the supporting affidavit sworn by the Applicant on 6<sup>th</sup> June 2024 that JOO is her younger brother and an only sibling, and their parents are deceased.



- That her brother used to reside with their maternal uncle, GOO, at Mkomani, Mombasa County and worked as a mechanic in a ship owned by Brazilian nationals but the Applicant does not remember the name of the company nor the owners. That some time in the year 1998, her brother travelled to Brazil with the ship owners and left the Applicant with his personal belongings with the promise that he would keep in touch. That their mother passed away in 1999 but the Applicant and other family members were not able to reach her brother, and that they proceeded with the burial in his absence. That the Applicant has not seen nor heard from her brother neither have other relatives and the village mates. That in the circumstances, it can be safely presumed that he is long dead.
4. A Replying Affidavit was filed having been sworn on 26<sup>th</sup> June 2024 by Milkah Nyende, a Civil Registration Officer in Civil Registration Services, Ministry of Interior and Coordination of National Government. She averred that the *Births and Deaths Registration Act* under Section 17, 18, 19, 20 and 21 provide for requirements and process for registering death and issuance of a permit for burial. That Section 2(b) of the Act provides for mandatory particulars for registration of a death, which particulars should also be correct. That the said particulars include the name, age, sex, residence, occupation and nationality of the deceased, and the death, place and cause of death. That it is practically impossible for the prescribed particulars to be provided or ascertained in the case of a presumed death. That according Section 26(2) & (4) of the Act, a certificate of death is an extract of an already completed death register or record of death. That this therefore means that without a duly completed register of death, a death certificate cannot be issued.
  5. It was deposed that Section 17 and 18 of the Act provides for circumstances under which a person can give information in relation to registration of death which include that the person is present at the death of the deceased, that the person has attended the deceased during their last illness, lives in the same house or area where the death occurred, or of any person finding or taking charge of the body of such person or causing the body of such person to be buried or otherwise disposed of, and in case of a medical practitioner, he/she attended the deceased during their last illness or given a report where an inquest is held on the body of the deceased. That in the case of presumed deaths, the conditions set out in sections 17 and 18 of the Act for informants do not apply as such there is no person qualified in accordance with the act to complete and sign the death register as the informant, for purposes of registration of a presumed death that will allow for the eventual issuance of a certificate of death.
  6. It was stated that Section 388 (4) of the *Criminal Procedure Code* (CPC) provides for the issuance of an appropriate certificate of death in the case of a presumed death in accordance with the Act. That the registration of presumed deaths and issuance of certificates of death for presumed deaths is not provided for anywhere in the Act hence the lack of procedures, direction and guidelines on how to register the same and issue an appropriate certificate of death. That an appropriate certificate of death indicated in Section 388 (4) of the CPC refers to a certificate of death that is different from the usual certificate of death issued in respect of actual deaths and that an appropriate certificate of death is special and specific to presumed deaths.
  7. It was deposed that a court order on presumption of death is sufficient for purposes of meeting the requirements of the *Evidence Act* regarding presumed dead persons and that a certificate of death in the proper meaning given by the Act will be of no legal purpose. That the appropriate certificate of death for presumed deaths issued is in the form of letter acknowledging the court decision to declare the person presumed dead and stating that the court order will suffice for purposes of administration of the estate of the presumed dead person. That presumed deaths are rebuttable and that currently no process has been provided for rebutting presumed deaths and thereby revocation of a certificate of death if issued. That the department will face numerous legal and technical challenges including the format/form of certificate of death to be issued, where to extract particulars from of who the informant



is and which registration jurisdiction to apply in the presumption of death. The Respondent therefore asked the court not to allow the application.

8. The application was canvassed by way of written submissions. The Applicant filed written submissions dated 10<sup>th</sup> November 2024 while the Respondent filed submissions dated 12<sup>th</sup> November 2024.
9. I have considered the application dated 6<sup>th</sup> July 2024, the Replying Affidavit sworn on 26<sup>th</sup> June 2024 and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
10. The Applicant stated that the subject, her younger and only sibling travelled to Brazil in the year 1998 and promised to keep in touch but no one has seen or heard from him since then. The Applicant therefore prays that this court do issue a declaration that JOO of Passport No. A469XXX is presumed dead and that the Registrar of Births and Deaths do issue a death certificate to that effect.
11. Section 118A of the Evidence Act provides for circumstances for presumption of death 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.
12. Further, the court in Re Application for Presumption of Death of WMW (Miscellaneous Civil Application E008 of 2024) [2024] KEHC 5537 (KLR) (20 May 2024) (Ruling) held as follows: -

“The accepted view is that there is presumption of death in the event that very person known to have been physically present within his homestead, place of work, neighbourhood, village, sub-location, location, ward, constituency, county, region or the Republic at large during his/her lifetime but suddenly goes missing and the fact of it remains so for a period of seven years it is taken to be a rule of law that is equivalent to death. That is, in the absence of evidence to the contrary, the presumption compels a finding of the fact of a person’s death once certain prescribed facts are established to the court’s satisfaction. It is also true to bear in mind where a man disappears and is unheard of for a long period of time, he may or he may not be dead. That fact must remain alive to the court exercising discretion and the presumption of death. In *Bowden v Henderson* [1854] 2 SM. The court held that for presumption to arise there must be persons likely to have heard of the propositus who had not in fact heard. The reason for this requirement was explained thus:

The principle on which the court presumes the death of a person from whom no tidings have been received for a long time is this that if he were living he would probably have communicated with some of his friends and relatives. It is a conclusion which the court draws from the probabilities of the case. It is quite clear that where no such probability exists, the presumption cannot arise.”
13. A letter from the chief dated 30<sup>th</sup> May 2024 has been annexed to the application confirming that the Applicant and the subject are residents of his area of service and that the subject, JOO, has not been seen since 1998.
14. In view of the foregoing, the Applicant has met the threshold under Section 118A of the Evidence Act which raises a rebuttable presumption of death.
15. In the upshot, I find that it is in the interest of justice that the application dated 6<sup>th</sup> July 2024 is allowed. This court therefore declares that JOO is presumed dead. The Registrar of Births and Deaths is hereby ordered to issue a certificate of death in respect of JOO. No orders as to costs.



**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

..... Advocate for the Applicant

..... State Counsel

Court Assistant – Shitemi

