



Republic v Attorney General & another; Cheluget (Exparte Applicant) (Judicial Review Application E051 of 2024) [2025] KEHC 1793 (KLR) (Judicial Review) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1793 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E051 OF 2024
JM CHIGITI, J
FEBRUARY 13, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

PRINCIPAL REGISTRAR OF BIRTHS & DEATHS 2ND RESPONDENT

AND

SAMWEL CHELUGET EXPARTE APPLICANT

JUDGMENT

1. The Ex-parte Applicant is the Biological Father and next of kin of Erick Kipyegon Mutai (deceased) who was presumed dead on 13th June 2014.
2. He sought an order of presumption of death through Kericho High Court Petition no 5 of 2014, dated 27th May 2014, of the said Erick Kipyegon Mutai and the court through its ruling dated 13th June 2014, issued Orders of Presumption of Death of the said Eric Kipyegon Mutai.
3. The Applicant then made a formal application to the Bomet Civil Registry to be issued with the death certificate and he was referred to the Principal Registrar of Births and Deaths.
4. It is his case that despite the formal application, the Principal Registrar of Births and Deaths has failed, ignored or refused to issue the said Certificate of Presumption of Death.
5. The Applicant contends that as a result of the foregoing, he has been unable to Petition for letters of Administration over the estate of the said Eric Kipyegon Mutai.



6. This has precipitated the filing of the Notice of Motion application dated 11th March, 2024 wherein he is seeking the following orders;
 1. That this court honourable High Court do grant Orders of Mandamus to compel the 2nd Respondent to issue the Ex-Parte Applicant with the Certificate of Presumption of Death for Erick Kipyegon Mutai (Deceased) as directed by the Orders of the Court on 13th June 2014 in Petition No. 5 of 2014.
 2. That cost of this application be provided for in the suit.
7. The Applicant filed a further affidavit dated 20th June, 2024 sworn by Samwel Cheulget.
8. The Applicant argues that a Presumption of Death Order is issuable under section 118A & 119 of the Evidence Act and Rule 10 of the Probate and Administration Rules of the Law of Succession Act.
9. The Applicant argues that the 2nd Respondent ought to be guided by Article 47 of the Constitution and the provisions of the Fair Administrative Act that imply a duty on a person holding an administrative position to act fairly and provide a remedy to an aggrieved person.
10. It is his case that the conduct of the Respondents is tantamount to contempt of court as they are challenging the efficacy of an active court order.
11. The Applicant vehemently denies the averment by the 1st Respondent that he was issued with a letter by the 2nd Respondent acknowledging the court order and states that even if he had been issued with the said letter he would have proceeded and petitioned for issuance of letters of administration of his late son.
12. The Application is opposed.

The 1st and 2nd Respondents Case;

13. In opposition to the Ex-parte Applicants' Application, it is the Respondent's case that the Births and Deaths Registration Act (Cap 149) in Sections 17, 18, 19, 20 and 21 (herein after referred to as the Act) provide for the requirements and process for registering a death and issuance of a permit for burial.
14. Section 2 (b) of the Act defines prescribed particulars in regards to the registration of a death as follows;
 - (b) to any death, the name, age, sex, residence, occupation and nationality of the deceased, and the date place and cause of death.
15. They argue that by dint of Section 26(2) & (4) of the Act a certificate of death is an extract of an already completed death registers or record of death which then means that without a duly completed register of death a death certificate cannot be issued.
16. They argue that in the case of presumed death, the registrar does not have in his /her custody a register of death from which to extract a certificate of death.
17. It is their case that it is thus practically impossible for some of the critical prescribed particulars namely date of death, place of death and cause of death to be provided or ascertained in the case of a presumed death.
18. It is their case that in the case of presumed deaths the conditions set out in sections 17 and 18 of the Act for informants do not apply and 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.



19. The Respondents posit that Section 388(4) of *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 and that the registration of presumed deaths and issuance of certificates of death for presumed deaths is NOT provided for anywhere in the Act.
20. According to the Respondents, 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 no longer be of legal purpose.
21. They posit that there is need for formulation and development of rules or guidelines to ensure predictability and certainty of the process as well as operational requirements thereby providing uniform guidelines to the registrar before the department is ordered to issue certificates of death for presumed death cases.
22. They also submit that Section 16 of the Act requires a person notifying a death to the registrar to give the prescribed particulars to be entered in the register and the person shall sign the register to certify the correctness of the information.
23. They argue that Section 17 of the Act mandatorily requires a notification to be caused to the registrar in the case of a death whose registration is compulsory. It provides that;

“Upon the death of any person the registration of whose death is compulsory, it shall be the duty of the nearest relatives of the deceased present at the death or in attendance during the last illness of the deceased, and, in default of such relatives of every other relative of the deceased dwelling or being in the same registration area as the deceased, and, in default of such other relatives, of each person present at the death and of the occupier of the house in which to his knowledge the death took place, and, in default of the persons hereinbefore in this section mentioned, of each inmate of such house, 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, to give notice within such time as may be prescribed to the registrar of the registration area in which the death took place.
29. The Respondents aver that 2nd Respondent, in execution of his mandates, issued a letter acknowledging the court decision declaring the presumed deceased person, dead and stating that the court order is sufficient for purposes of administration of the estate of the presumed deceased person and urge the court not to grant the orders sought as the 2nd Respondent shall face numerous challenges in absence of proper legal framework and regulation to guide the procedure on issuance of the certificate of presumption of death.

Analysis and Determination;

30. The issue before this court is whether or not the registrar of births and deaths should issue the applicant with a certificate of presumption of death or not.
31. It is not in dispute that on November 2022, the court issued an order, presuming Erick Kipyegon Mutai to be dead. However, the registrar of deaths has since declined to issue the applicant with a presumption of death certificate arguing that the law does not make provision for such.
32. It is a well-established principle of law that orders of Court must be obeyed without compromise.
33. The legislative provisions for the issuance of an order of presumption of death is not in vain. It brings closure to the life of the person who was once alive.



34. Though this is a rebuttable presumption, there is a procedure that must be followed to reverse the process in the event that the person is later on found alive.
35. A death certificate is a critical statutory document in the social, political, economic front. The document replaces a birth certificate upon the demise of a human being in almost all the countries.
36. The death certificate is a critical document in the Probate and Administration front without which, the court cannot process nor issue Letters of Administration under the law of succession Cap 160 of the laws of Kenya.
37. In essence the administration of the Estate of a deceased person cannot take place without a death certificate.
38. Back to the case before the court ,where the court issued a certificate of presumption of death, then the person seeking such orders is not aware of where the deceased died and under what circumstances and the registrar of deaths should not demand such information.
39. In Exercise of the powers conferred by Section 29 of the *Births and Deaths Registration Act*, the Cabinet Secretary for Interior and National Administration made The Births And Deaths Registration (Amendment) Rules, 2024 through Legal Notice 153 of 1st October 2024.
40. Rule 15 (2) provides that;

where the death is registered under the presumption of death in accordance with section 388(4) of the *Criminal Procedure Code* a certificate of death issued by the Principal Registrar shall be in Form No. 15 and such a certificate shall be rebuttable upon production to the Principal Registrar of satisfactory proof that the person presumed to be dead is alive and upon determination by a court of competent jurisdiction that the person presumed to be dead is alive.
30. No doubt this gives this court the jurisdiction to grant the orders sought.

Order;

1. An order of Mandamus to compel the 2nd Respondent to issue the Ex-Parte Applicant with the Certificate of Presumption of Death for Erick Kipyegon Mutai (Deceased) as directed by the Orders of the Court on 13th June 2014 in Petition No. 5 of 2014 is hereby issued.
2. No order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

.....

J.M CHIGITI (SC)

JUDGE

