



In re Application for Presumption of Death of WMW (Miscellaneous Civil Application E008 of 2024) [2024] KEHC 5537 (KLR) (20 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E008 OF 2024
RN NYAKUNDI, J
MAY 20, 2024**

IN THE MATTER OF

SKM APPLICANT

RULING

1. The applicant approached this court vide an application dated 19th march 2024 seeking the following orders;
 - a. That there be a presumption of death made in respect of Wilfred Matala Wafula.
 - b. That a death certificate be issued to the effect of (1) above by the principal registrar of births and deaths.
2. The application is premised on the grounds set out in the supporting affidavit sworn by the applicant.
3. The applicant avers that she is the wife of one WMW following a marriage ceremony held on 13/10/2012. On 14/09/2016 he went missing and the same was reported at Eldoret police station vide OB No. XXXX/2017 on 10th January 2017 and a police abstract was obtained. She further made a missing persons advertisement in a local daily paper with nationwide distribution being the Daily Nation of 12/01/2017. Despite frantic efforts by the applicant and the police to find her husband they have not been able to do the same. She urged the court to allow the application as seven years have lapsed since he disappeared.
4. The court directed that all relevant documentary evidence and disclosures forming the cause of action be annexed to the witness statement by the applicant on 11/04/2024.
5. The applicants' sister in law swore a further affidavit dated 23/04/2024 where she deponed that on 15/12/2016 she received a call from her family members concerning the whereabouts of her brother as they had been unable to reach him from the previous day. On 19/12/2016 she went to file a missing person's report accompanied by her sister in law, the applicant and they were issued with an OB No. XXXX/2016. They were issued with a police abstract on 10/01/2017. Despite their efforts they have



been unable to trace him and they published the story in the daily nation and in two media houses being NTV and Citizen TV. It is now seven years since his disappearance and neither her or his family have heard from him. She urged the court to allow the application in order for the family to be assisted further.

6. The only issue for determination that arises is;
 - i. Whether there should be a presumption of death made in respect of Wilfred Matala Wafula

Whether there should be a presumption of death made in respect of Wilfred Matala Wafula

7. I have considered the application, the supporting affidavit and further affidavit on record, and all the annexures thereto. The law governing the circumstances in which a person may be presumed dead is set out in Section 118A of the *Evidence Act* which states 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.”

8. In the case of In *re ENK [2017]* eKLR, Njuguna, J held that:-

“The presumption of death is a rebuttable presumption which can be reversed if sufficient evidence is adduced to the contrary. Therefore, before this presumption is made, sufficient evidence has to be adduced in court to prove presumption of death.”

9. The disappearance of a person leaving no trace behind as the evidence giving rise to this application is curious and baffling in various branches of the law. It is clear that with abundance of caution that the mere fact that a person has not been heard of is not sufficient if news of him/her would have been obtained by exercise of reasonable diligence. Just as the person like the applicant in this case who seeks to set up the presumption of death is not bound to listen to idle gossip so also he/she must not shut his/her eyes to possible sources of reliable information. It is trite that there are two ways of establishing the presumption:

- a. By evidence that the person did not communicate with those who would have been likely to here from him/her during the seven years; or
- b. By evidence that after seven years an independent search revealed no trace of him/ her within or without the jurisdiction of the court in which the application has been filed for determination.

10. Generally, the fact to which the law attributes significance is the lack of news during the whole of the period of disappearance.

11. In our jurisdiction, there is an elaborate procedure for an applicant to bring his/her case on presumption of death within the ambit of Section 118A of the *Evidence Act*. The applicable statute is Section 386 of the *Criminal Procedure Code* CAP 75 of the Laws of Kenya which provides:

Section 386 of the Criminal Procedure Code Cap 75 Laws of Kenya provides:

“The officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person –

- (a) has committed suicide; or
- (b) has been killed by another or by an accident; or



- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or
 - (d) is missing and believed to be dead; shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister, shall proceed to the place where the body of the deceased person is, and shall there make an investigation and draw up a report on the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), the marks appear to have been inflicted; and the report shall in the case of paragraph (a), (b) or (c); be forwarded forthwith to the nearest magistrate empowered to hold inquests; and in the case of paragraph (d) shall immediately send to the Director of Public Prosecutions through the Commissioner of Police as full a report as possible together with details of all supporting evidence relating to the circumstances surrounding the disappearance and the grounds upon which the death of that person is presumed to have taken place.
- (2) When, except in the case of a missing person believed to be dead there is any doubt regarding the cause of death, or when for any other reason the police officer considers it expedient to do so, he shall, subject to any rule made by the Minister, forward the body, with a view to its being examined, to the nearest medical officer or other person appointed by the Minister in that behalf, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render the examination useless.
 - (3) When the body of a person is found or a person has committed suicide or has been killed by another or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, a person finding the body or becoming aware of the death shall immediately give information thereof to the nearest administrative officer or police officer.”
12. The elaborate textual procedure is as stated in Section 387(6) of the [Criminal Procedure Code](#) as read with Section 388 of the same code.

“

- “6) In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Director of Public Prosecutions and shall make recommendations as to whether or not the period regarding the presumption of death provided for by section 118A of the [Evidence Act](#) should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.”

Section 388(1) of Criminal Procedure Code provides: -

- (1) 1) The Director of Public Prosecutions may at any time direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provisions of that section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.
13. Further on the legislative framework, Rule II of the Probate and Administration Rules made under the [Law of Succession Act](#) serves as the procedural law and provides as follows:



- a. “An application for an order presuming the death of a person of whose death there is no sufficient written evidence and whose estate a grant is sought shall be made by summons to the court and shall be supported by an affidavit setting out the grounds of the Application.”
14. It is therefore evident that Section 118A of the *Evidence Act* has to be construed and interpreted in line with Section 386, 387 and 388 of the Criminal procedure Code. This is what the court had in mind when laying down the guiding principles in the case of Masoud Salim Hemed & Another v D.P.P. & 3 Others where the court stated: -
- “It has now been established as a matter of best practice jurisdictional point that where *the constitution* or statute makes provision for a specific procedure for redressing certain grievances, that special procedure should be strictly followed. See the long line of cases restating the position including The Speaker of the National Assembly v The Hon. James Njenga Karume, Civil Application No. 92 of 1992 (unreported); Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others, [2008] 3 KLR (EP 291:and Wanyoike v electoral Commission of Kenya (No. 2) [2008] 2 KLR (EP) 43. In the Karume case, the Court of Appeal stated that: -
- “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particulars grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”
15. In the matter of *Re Matter of Pius Mukono Murage (presumed deceased) [2019]* eKLR the court observed inter alia that “the applicant had failed to tender sufficient evidence to warrant the court to order that there is a rebuttable presumption that the missing person is dead. Holding unto those views, it is both needful and rational that, it must not be left to the exercise of court’s discretion or mere guess work by petitioners making an application in support of or in opposition to a particular case... .. There is an elaborate procedure to be followed under the *Criminal Procedure Code* for declaring a missing person dead. Where the statute had made provision for the procedure to be followed, that procedure must be strictly followed.”
16. The applicant is the wife to the subject and mother to his two children. Further, the deponent of the further affidavit is his sister, all being people who are expected to see or hear from the subject almost on a daily basis or every so often have confirmed that they have not heard or seen the subject since 14/12/2016. I have confirmed from annexures to the affidavits filed by the applicant that she also reported his disappearance to the police and the chief of the area in which they resided. I have also confirmed that the subject’s disappearance was reported to Eldoret police station vide OB No. XXXX/2017.
17. I also place reliance in the case of Re Osman Bachit [1997] 4 MLJ 445 where the learned judge held that, in cases where circumstantial evidence existed that may prove that the person is dead, the family or interested party cannot be forced to wait for seven agonizing years just for formality. That holding is acceptably rational and justifiable in nature although an action of that nature by the courts must be exercised with abundance of caution and in most exceptional circumstances. He who seeks to overcome the presumption of continuance of life must adduce evidence of sufficient weight to contradict it. Anything short of that operates as blatant denial of existence of infinite possibilities.
18. 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.”

19. It is my considered view that the applicant has met the threshold set in Section 118A of the *Evidence Act* by providing evidence which raises a presumption that the subject is dead.
20. With regard to the prayer directed to the Registrar of Births and Deaths, Section 17 of the *Births and Deaths Registration Act* provides as follows: -

“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.”

21. For the foregoing reasons, the application for presumption of death of W.M.W be and is hereby confirmed as one whose right to life under Art 26 of *the Constitution* is no longer tenable within the scope of the facts provided by the applicant to meet the criteria set out in Section 118A of the *Evidence Act*. That the Registrar of Births and Deaths of the Republic of Kenya is hereby ordered to issue a certificate of death in respect of the said W.M.W whose better particulars shall be provided by the applicant. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 20TH DAY OF MAY, 2024

R. NYAKUNDI

JUDGE

