



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Thomas Mwangi Toto (Miscellaneous Application E194 of 2022)  
[2023] KEHC 20250 (KLR) (Family) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20250 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E194 OF 2022  
PM NYAUNDI, J  
JUNE 15, 2023**

**IN THE MATTER OF  
JENNIFFER WANGUI GITIRI ..... APPLICANT**

**RULING**

1. Before this Court is the summons for declaration of presumption of death of Thomas Mwangi Toto dated July 18, 2022 by which the Applicant seeks orders as follows: -
  - i. That Thomas Mwangi Toto be presumed dead.
  - ii. That the Applicant herein Jeniffer Wangui Gitiri be granted leave to petition for grant of letters of administration of the estate of Thomas Mwangi Toto without producing a Certificate of Death.
  - iii. That there be no order for costs.
2. The Application is presented under Section 118A of the Evidence Act Cap 80 Laws of Kenya and Rule 10 of *Probate and Administration Rules* was supported by the annexed Affidavit sworn by the Applicant.
3. The Applicant Jeniffer Wangui Gitiri stated that Thomas Mwangi Toto has not been heard of or from since September 17, 2008 by family, friends and or those who might be expected to have heard of or from him if he was alive. She further stated that efforts from family and friends to trace him have been fruitless. His whereabouts are unknown to date.
4. The Applicant stated that her family is made up of three siblings; That is, the subject, Kennedy Macharia Gitiri and herself. They are the surviving relatives of Thomas Mwangi Toto. She further averred that their mother Teresia Gitiri Toto died on November 18, 1998 as per the copy of death certificate annexed.



5. She averred that the matter was reported at Kayole Police Station on September 23, 2008 vide OB No 27/23/08.
6. It is her contention that on 23<sup>rd</sup> and September 24, 2008 an announcement for a lost person was made on Inooro radio and efforts to trace their brother have not borne any fruit to date. She further contended that it has now been more than 14 years since his disappearance.
7. Her brother Kennedy Macharia Gitiri has given his consent to this Application.
8. The Petitioner seeks the orders as the subject matter Thomas Mwangi Toto has been allocated property in the estate of their late mother Teresa Gitiri Toto which property needs administration.
9. Subsequently, it is her prayer that grant of the orders be issued to assist her brother and herself to ensure that the property allocated to their lost brother from their late mother's estate does not go to waste.

### **Issues for Determination**

10. Upon reading the application and supporting affidavit of Jeniffer Wangui Gitiri, this court has outlined two issues for determination which are as follows;
  - (i) Whether the Applicant has made out a case to be granted the order of declaration of presumption of death of Thomas Mwangi Toto and the consequential orders arising therefrom

### **Issue one Whether the Applicant has made out a case to be granted the order of declaration of presumption of death of Thomas Mwangi Toto and the Consequential orders arising therefrom**

11. The Applicant deponed that she was a sister of the subject and filed the application on behalf of his other sibling Kennedy Macharia Gitiri, her claim is that the subject had gone missing in 2008 and his mysterious disappearance had been reported to the police and the OB extract was annexed to the application;
12. On the presumption of death, the applicable law is found at Section 118A of the Evidence Act which provides 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.'
13. Before this presumption can be applicable the person has to have been unheard of for a period seven years.
14. This court notes that the subject disappeared from home in September 17, 2008 and in the same year the applicant made a report to Kayole Police Station and it was entered in the Occurrence Book as OB No 27/23/3/2008; a copy of the OB extract is annexed and marked JWG-3 made on September 23, 2008.
15. There is also an annexure dated 23<sup>rd</sup> and September 24, 2008 for a lost person made on Inooro Radio a copy marked JWG-4 dated the 2/02/
16. Consequently, the subject has been missing for more than the statutory period of seven (7) years and the applicant has tendered sufficient material that is in compliance with the provisions of Section 118A of the Evidence Act to enable this court to make a determination on the presumption of the death of the subject.



17. It is confirmed that Letters of Administration and Confirmation of grant of the estate of Teresia Gitiri Toto were granted by the Honourable Court and Thomas Mwangi Toto had been allocated KCB shares, National Bank of Kenya Shares as well as Plot No D1-258 Kayole.
18. According to the *Law of Succession Act*, Cap 160 Rule 10 and Section 51 stipulates requirements and application for grant of letters of administration and a copy of death certificate is mandatory.'
- ' Application for order presuming death of a person of whose death there is no sufficient written evidence and to 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.'
19. In the circumstances I find that there is sufficient evidence tendered by the Applicant in her Summons and supporting affidavit dated July 18, 2022 and order as follows:
- a. The subject herein Thomas Mwangi Toto is presumed dead;
  - b. The Registrar of Births and Deaths to issue a certificate of Death in respect of Thomas Mwangi Toto
  - c. There shall be no order as to costs.

It is so ordered

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 15TH DAY OF JUNE, 2023.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

**Ruling**

