



In re Estate of Joseph Ngingi Mbote (Presumed Deceased) (Miscellaneous Application E091 of 2023) [2024] KEHC 15407 (KLR) (Family) (12 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15407 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E091 OF 2023
EKO OGOLA, J
NOVEMBER 12, 2024
IN THE MATTER OF JOSEPH NGINGI MBOTE (PRESUMED DECEASED)
IN THE MATTER OF
JAMES MBOTE KABERERE APPLICANT

RULING

1. The application before this court is dated 3rd April 2023. The applicant prays for the following orders:-
 - a. That this court be pleased to order and presume Joseph Ngingi Mbote as dead by virtue of not having been seen or heard by those who ordinarily would have heard from him, had he been alive.
 - b. That this honorable court be pleased to order the registrar of births and death to issue a certificate of death in respect of the said Joseph Ngigi Mbote.
 - c. That upon granting prayer number 2 above, the honorable court do give direction to the Administration Police Service to process the benefits due for the said Joseph Ngigi Mbote to the applicant who is the bonafide beneficiary.
 - d. That this honorable court be pleased to issue any orders that may expedite to grant in the circumstances.
 - e. That there be no orders as to costs.
2. The application was based on the grounds set out therein and the applicant's supporting affidavit. The applicant deposed that he is the father of Joseph Ngigi Mbote, whose whereabouts have been unknown since April 2015. He added that the Internal Affairs Unit and the Administration Police Service have confirmed that the said Joseph Ngigi Mbote has been missing, and proof of death is required to facilitate the processing of his benefits as an employee of the Police Service.



3. The applicant annexed to his affidavit a report from the Internal Affairs Unit of the National Police Service dated 15th June 2017 confirming that Joseph Ngigi Mbote has not reported to work since April 2015. According to the National Police Service, Joseph Ngigi Mbote is an ‘Officer on desertion’.
4. The Attorney General responded to the Application vide Grounds of Opposition. Ms. Zippora Komu, a State Council stated that there is no opposition to all the prayers save for prayer (c). She stated that this court lacks jurisdiction to adjudicate prayer (c) since Joseph Ngingi Mbote had nominated beneficiaries and alienated their respective shares of the benefits

Determination

5. Having considered the application, the issue for determination is whether an order should be issued to declare and to presume the missing person as dead.
6. Section 386 of the *Criminal Procedure Code* 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.”

7. The procedure to be followed to presume a missing person as deceased is for the police to conduct investigations and an inquest as provided under Section 387(6) of the Criminal Procedure Code which provides:-

“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.”

8. Section 388(1) of the Criminal Procedure Code further 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 a missing person believed to be dead give such directions as he deems fit.

9. These provisions lay down an elaborate procedure to be followed in the event of a missing person. Where a procedure is laid down in the statute that special procedure should be strictly followed.

10. From the findings of the court above, it must be considered that the subject of these habeas corpus proceedings is a ‘missing person believed dead’ within the meaning of Section 386 of the Criminal Procedure Code (CPC). The Criminal Procedure Code provides for an inquest into missing persons believed dead.

11. The above procedure, notwithstanding M/S Zippora Komu, the State Counsel conceded to the application save for prayer (c) which sought to have this court direct the administration police to process the benefits due to the applicant.

12. The state counsel submitted that the issue of succession should be left to the normal process of succession since the said presumed deceased had nominated beneficiaries and alienated their respective shares.

13. With prayer (c) left out, I have carefully considered the application and find it merited. The application dated 3rd April 2023 is allowed in the following terms:

a. That Joseph Ngingi Mbote is hereby presumed dead by virtue of not having been seen or heard from since 2015.

b. That the Registrar of Births and Deaths hereby issue a Certificate of Death for Joseph Ngingi Mbote.

c. There will be no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2024

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E.K. OGOLA



JUDGE

In the presence of:

Ms. Komu for the Attorney General

Applicant in person

Ms Gisiele M court Assistant

