



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISC. SUCCESSION APPLICATION NO. 1 OF 2020**

**IN THE MATTER OF THE ESTATE OF JOSEPH KIBIU WACHIRA (THE SUBJECT)**

**SUMMONS FOR THE PRESUMPTION OF THE DEATH OF A PERSON**

**UNDER RULE 10 OF THE PROBATE AND ADMINISTRATION RULES**

**(LAW OF SUCCESSION ACT. CAP160)**

**RULING**

1. The application is brought under the provisions of Rule 10 the Probate and Administration Rules; the application is supported by a Supporting Affidavit made by **JOHN GIKUU WACHIRA** and is dated 20<sup>th</sup> of January, 2020; the deponent sought the following orders;

(a) **THAT JOSEPH KIBIU WACHIRA** who left his home in Githagara Village of Gakinduini Location in Mukuruweini Sub-County in 1988 and has not been seen or heard from since then, be presumed dead.

(b) **THAT** the Registrar of Births and deaths do issue a Certificate of Death in respect of the said **JOSEPH KIBIU WACHIRA**

(c) **THAT** costs be in the cause.

2. At the hearing hereof the applicant was represented by learned counsel Mr Wanjohi who made oral submissions; hereunder is a summary of the applicant's case;

**APPLICANT'S CASE**

3. The applicant is the younger brother of the subject **JOSEPH KIBIU WACHIRA (the subject)** and both are the sons of the late Richard Wachira Kibiu who died on 3/12/1971 and the late Jerusha Wangui Wachira who died on 18/11/1988;

4. The family is made up of nine (9) siblings inclusive of the subject; the siblings have consented to the application and the consent is annexed to the instant application and is dated the 20/01/2020;

5. That upon their mother's demise and after her burial the subject left home for an unknown destination and has never been seen or heard from by any relatives; the subject, Joseph had gone missing and his mysterious disappearance had been reported to Mukuruweini Police Station and was entered in the Occurrence Book as OB No.22/9/3/2020 and a copy of the OB extract is annexed to the Supplementary Affidavit made on 9/10/2020;

6. There is also a Further Affidavit dated 17/03/2021 in which the applicant depones that the police conducted investigations into the disappearance of his brother and issued the applicant with an Investigation Report dated the 2/02/2021 which confirms the subject disappeared from their home in 1988 and has never been seen or heard from to date; a copy of the Investigation Report is annexed to the Further Affidavit;

7. His prayer was that the application be allowed as prayed.

**ISSUES FOR DETERMINATION**

8. After hearing the submissions of the learned counsel and upon reading the affidavits this court has framed only one issue for determination; which is as follows;

(i) Whether the applicant has made out a case to be granted the orders sought.

## **ANALYSIS**

### **Whether the applicant has made out a case to be granted the orders sought.**

9. The applicant deponed that he was the younger brother of the subject and brought this instant application on behalf of his other siblings; his claim is that the subject had gone missing in 1988 and his mysterious disappearance had been reported to the police and the OB extract was annexed to the application;

10. 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.”***

11. Before this presumption can be applicable the person has to have been unheard of for a period seven years; the presumption of death is a rebuttable presumption which can be reversed if sufficient evidence is adduced to the contrary; therefore before this assumption is made sufficient evidence has to be adduced in court to prove this presumption of death; reference is made to the case of **Re.E N K [2017]eKLR**;

12. This court notes that the subject disappeared from home in 1988 and in the year 2020 the applicant made a report to Mukuruweini Police Station and it was entered in the Occurrence Book as OB No.22/9/3/2020; a copy of the OB extract is annexed to the Supplementary Affidavit made on 9/10/2020;

13. There is also a Further Affidavit dated 17/03/2021 in which the applicant has annexed an Investigation Report dated the 2/02/2021 prepared by the police on the diligent search and the investigations conducted into the disappearance of the subject; the Report confirms the subject disappeared from their home in 1988 and has never been seen or heard from to date; this means that the subject has been missing for more than the statutory period of seven (7) years;

14. The applicant has now 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;

## **FINDINGS & DETERMINATION**

15. In the light of the forgoing this court makes the following finding and determination;

(i) The application is found to have merit and it is hereby allowed;

(ii) **JOSEPH KIBIU WACHIRA** the subject herein be and is hereby presumed dead;

(iii) The Registrar of Births and Deaths do issue a Certificate of Death in respect of the said **JOSEPH KIBIU WACHIRA**

(iv) There shall be no order as to costs.

It is so ordered accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY DUE TO THE PANDEMIC AT NYERI THIS 17TH DAY OF JUNE, 2021.**

**HON. A. MSHILA**

**JUDGE**