



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL MISCELLANEOUS APPLICATION NO. 10 OF 2020

NANCY KAGENDO NJERU.....APPLICANT

R U L I N G

1. Before this court is an ex-pate application dated 18/10/2019 wherein the applicant sought orders that Zakary Njeru Mbungu alia Karingi be and is hereby presumed as dead and further that the Registrar of Births and Deaths do issue a certificate of death in respect of the said Zakary Njeru Mbungu (hereinafter to be referred as “the missing person”).

2. The application was based on the grounds on the face of the application and further supported by the affidavit of Nancy Kagendo Njeru the applicant herein. She deposed that the missing person disappeared in the year 2008 and since then she had not seen or heard from him and that his whereabouts were unknown. Further that she reported the matter at Runyenjes police station and that efforts to trace him had been futile despite the disappearance having been announced in the radio stations and the story having been featured by the Standard newspaper on 8/07/2009. That it is more than seven (7) years since the said disappearance and hence the instant application.

3. I have considered the application herein, the supporting affidavit thereto and the annexures thereto and it is my view that the main issue for determination is whether the applicant has made a case for the grant of the orders sought.

4. The instant application was brought under the provisions of section 118A of the Evidence Act. The said section provides that: -

“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.”

5. A reading of this provision of law is to the effect that a presumption of death ought to be made where it is proved (by the applicant) that: -

i. The person has not been heard of for seven years

ii. The person must not have been heard of for the said period by those who might be expected to have heard of him if he were alive.

6. From the facts of the case, it is not in dispute that the missing person has not been heard of for more than seven (7) years. The applicant deposed to the effect that the missing person disappeared in the year 2008 and has never been heard of since then. A letter from the Chief-Runyenjes East Location and another from the Ward Police Commanding Officer- Runyenjes were attached in support of the applicant’s averments. In my considered view, the applicant has satisfied the court that the missing person has not been seen or heard of for a period of more than seven (7) years.

7. The applicant deposed in paragraph 8 of the supporting affidavit that the missing person was a widower and had five (5) children with their mother who is now deceased. The five children including the applicant are close relatives of the missing person. However, the applicant being the sole applicant did not attach any evidence to the effect that her siblings had not heard from the missing person ever since his disappearance. In my opinion, her siblings ought to have filed documents showing that indeed they had not heard of the missing person and that they were aware that applicant was making this application.

8. Presumption of death is a serious matter that could affect other people adversely if orders are given without the applicant having satisfied the court as to the legal requirements. The applicant ought to have done due diligence before filing this application and presented all relevant evidence to support his case.

9. In my opinion, Section 118A of the Evidence Act envisages that the missing person ought not to have been, not by one person but “**by ‘those’** who might be expected to have heard from him. As such, there being no document filed by the siblings of the applicant to the effect that they had not heard from him for seven (7) years, it was not proved that the missing person had not been heard by those who might be expected to have heard from him.

10. Further despite the applicant having deposed (in paragraph 5 of the supporting affidavit) to the effect that upon the disappearance of the missing person, she reported the matter at Runyenjes Police station in the year 2008 but upon enquiry at the said police station so as to get the OB Number she was told that the Occurrence Book of the said year could not be found, there was no supporting evidence to that effect. The letter from the Ward Police Commanding Officer- Runyenjes does not mention that the OB has gone missing or could not be traced. The Ward Police Commanding Officer ought to have sworn an affidavit to support the alleged loss of such an important public document. It is not for the applicant to tell the court that the OB could not be traced. No police abstract as to the missing person report was annexed to this application.

11. It is my considered opinion that in the circumstances of the above, the applicant did not satisfy the requirements for granting of orders for presumption of death as required by Section 118A of the Evidence Act and as such the instant application cannot be sustained.

12. I find no merit in this application and I hereby dismiss it with no order as to costs.

DELIVERED, DATED and SIGNED at EMBU this 8th day of October, 2020.

F. MUCHEMI

JUDGE

Ruling delivered through video link in the presence of Ms. Machanga