



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. SUCC APPLICATION NO. 3 OF 2020

IN THE MATTER OF THE ESTATE OF JOHN MBOGO MWANGI- (Deceased)

MWANGI KARIUKI.....APPLICANT

RULING

1. The Applicant Mwangi Kariuki is the father of one John Mbogo Mwangi who disappeared from his home village Mwerua Inoi Location Kirinyaga West Sub County on the 28th October, 2003.
2. The disappearance was reported by the applicant to the village elders-Kanyokora Sub-location, the Chief Mwerua, Inoi Location and at the Kerugoya Police Station about the missing person vide OB/Ref. NO 30/23/04/09 (exhibits marked “**MK1, MK2 and MK3**”).
3. The applicant states that despite all efforts, his son has not been traced or found in the last Sixteen (16) years.
4. By an application dated 24/2/2020, grounded on provisions of Section 1A, 1B and 3A of the Civil Procedure Act and Section 118A of the Evidence Act, the Applicant seeks Orders that;

(1) That the Honourable court be pleased to presume that one John Mbogo Mwangi of Kanyokora Sub-location, Kirinyaga West Sub-County as dead.

(2) That the applicant be allowed to benefit from the estate of the said John Mbogo Mwangi.

(3) That there be no orders as to costs.

5. The applicant swore the supporting affidavit to which the police abstract and OB of a missing person, and Senior Chief’s report are annexed- exhibits “**MK1, MK2, and MK3.**”

I have considered the application and the annexures. The missing person was, at the time of his disappearance working at Mununga Tea Factory. He was a contributory to the National Social Security Fund (N.S.S.F). By the Chief’s letter dated 21/2/2020, the applicant was his only next of kin.

Section 118A of the Evidence Act, Cap 80 Laws of Kenya, provides:-

118A: 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.

These factual requirements must be demonstrated by the applicant.

6. The letter by the Area Chief dated 21/2/2020 is misleading because, the Assistant Chief states that “----- **I wish to state that he disappeared mysteriously in 2004 and was not traced but all in vain -----.** His parent namely Mwangi Kariuki is the only next of kin Identification No. 0756696.”

7. It is not sufficient to state that the applicant is the only next of kin. It has not been stated whether the subjects mother, brothers or sisters or close family are alive and if so, whether they gave authority to the applicant to bring this application.

8. The letter from the Kerugoya Police Station dated 13/1/2004 does state of a report of a missing person. The OB (Occurrence book) extract has not been annexed to the letter to support the contents of the letter. No communication from the Tea Factory where the subject was working has been annexed, nor an acknowledgement by the then employer having been a contributory to NSSF. These are necessary documents and without them, the court finds it difficult to grant the orders sought.

9. Section 386 of the Criminal Procedure Code provides for the procedure once a person has been reported missing. It is an exhaustive procedure. Upon an inquest being conducted by a Magistrate, if the Magistrate is persuaded that indeed the person (subject) has been missing for the period stated, then, a presumption is heard that he is dead, and proceed to allow the application. Sufficient evidence must be adduced as to the presumption of death. It is not enough just to state so.

10. In the case Eliud Mungai (2015) eKLR, the court allowed the application upon evidence and statements of relatives of the subject.

Section 118A of the Evidence Act envisages that the missing person has not been seen, not by one person, but by those who might be expected to have heard or seen him, being immediate, extended family and relatives.

11. In the present application, no other person other than the applicant has deponed to, by affidavit, or otherwise, of the disappearance of the subject. Where there is clear procedure under statute to be followed for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure ought to be strictly followed as stated in the case The Speaker of National Assembly –v- The Hon. James Njenga Karume, Civil App. No. 92/92 (unreported).

12. For the foregoing, I find no compliance with the procedural requirements under the Criminal Procedure Code by the applicant.

The application is dismissed.

Dated, Signed and Delivered at Kerugoya this 8th day of December 2020.

J. N. MULWA

JUDGE