



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO.16 OF 2020

IN THE MATTER OF NYAMASEGE AMENYA ALIAS JOHN NYAMASEGE AMENYA

AND

IN THE MATTER OF SECTION 118 A OF THE EVIDENCE ACT CAP 80 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 1A, 1B, 3 AND 3A OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

CHARLES KIAGE AMENYA.....PETITIONER

JUDGMENT

1. Charles Kiage Amenya has brought this petition under Section 118A of the Evidence Act and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. He prays for a declaration that Nyamasege Amenya *alias* John Nyamasege Amenya be presumed dead and urges the court to direct the registrar of births and deaths to issue a certificate of death in respect of John Nyamasege Amenya.

2. He avers, in an affidavit sworn in support of his petition on 3rd November 2020 that he is the first born of his late father Amenya Moguche Obiero who died in 1980 and his mother Peris Nyambati Amenya who died in 2000. He deposes that he has six brothers and two sisters. Nyamasege Amenya *alias* John Nyamasege Amenya, was the sixth born in their family. In or about the year 1994 his brother left to an unknown destination and did not tell him or any of his family members where he was going.

3. Charles Amenya states that he reported the matter at Kisii police station the year that his brother went missing and thereafter went to all their relatives inquiring whether they had seen John Nyamasege Amenya. He claims that they searched for his brother in hospitals, mortuaries and made reports to Assistant Chiefs, Chiefs, District Officers and District Commissioners in Kisii and Nyamira but did not find him or hear of his whereabouts.

4. On 2nd October 2020, Charles Amenya went back to Kisii Police Station to look for the Occurrence Book extract he had been issued in the year 1994 but was advised to make a new report because the station destroyed its Occurrence Books every 10 years. He made a new report and acquired OB No. 37/02/10/2020. He was issued with an extract of the Occurrence Book, a copy of which he annexed to his affidavit. He also annexed a report of a missing person dated 23rd March 1994 which had been issued by the Assistant Chief Kionganyo sub- location and a more recent letter dated 8th October 2020 issued by the Chief of Kionganyo location confirming that John Nyamasege Amenya had never been traced.

5. Charles Amenya further averred that he had published a missing person notice in the Standard News Paper on 27th October 2020 and given his mobile phone number in the public notice but he was never contacted with information on the whereabouts of his brother. He thus urged the court to grant the application as soon as it could to facilitate the finalization of a succession cause in respect of his late father's estate.

6. The applicable provision in this matter is **Section 118 A of the Evidence Act (Cap 80)** which 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”

7. The petition to declare John Nyamasege Amenya *alias* Nyamasege Amenya dead has been brought by his elder brother Charles Amenya. Although the application for presumption of death has erroneously been taken as a constitutional petition, the irregularity is curable under

Article 159 of the Constitution of Kenya, 2010.

8. I find that the applicant has demonstrated through evidence that since early 1994, he has not heard, seen or heard of the whereabouts of his brother, John Nyamasege Amenity *alias* Nyamasege Amenity. He has shown that when his brother disappeared in the year 1994, he reported the matter to the area Assistant Chief and Kisii Police Station. Many years later, he reported the matter to the area Chief, Kisii Police Station and also published a notice in the Standard Newspaper on 27th October 2020 but did not receive any information of the whereabouts of his brother.

9. He has demonstrated to this court through evidence that his brother has been missing for more than 26 years now. No evidence to the contrary has been adduced to rebut the presumption of his death. In the circumstances, I find that there is sufficient evidence to sustain a presumption of death of John Nyamasege Amenity *alias* Nyamasege Amenity. I hereby declare that John Nyamasege Amenity *alias* Nyamasege Amenity is presumed dead and direct the Registrar of Births and Deaths to issue a Certificate of Death in respect of John Nyamasege Amenity. There shall be no orders as to costs.

Dated, signed and delivered at Kisii this 8th day of December 2020.

R.E.OUGO

JUDGE

In the presence of:

Mr. Momanyi For the Petitioner

Respondent Absent

Ms Rael Court Assistant