



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ORIGINATING SUMMONS NO 1 OF 2018

IN THE MATTER OF THE EVIDENCE ACT CAP 80 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP 21 OF THE LAWS OF KENYA

AND

IN THE MATTER OF NYABICHA NYANGUTE.....THE MISSING PERSON

RULING

1. By an Originating Summons dated the 11<sup>th</sup> of January 2018 brought under Order 37 Rule 7 of the Civil Procedure Rules 2010 and Sections 118 A of the Evidence Act Cap 80 of the Laws of Kenya the Applicant Janes Nyanduko Obwanga hereinafter referred to as the Applicant, seeks for orders that;

- i. The Court be pleased to make an order that **Nyabicha Nyangute** be presumed dead.
- ii. That the costs of the application be provided for.

2. The application is supported by the affidavit of the applicant together with the affidavits of **Nason Mairura Kegoro** and **Japheth Ambrose Maiko**. The applicant is the widow of a nephew of the missing person Nyabicha Nyangute. Her late husband was David Obwanga Omwame who was the only child of his parents who are also deceased. The applicant's late father in law was Omwame Nyangute who was the registered owner of land parcel No. South Mugirango/ Bogetenga/852. Nyabicha Nyangute was a brother to her father in law and he was the registered owner of the adjoining piece of land registered as South Mugirango/ Bogetenga/851. The applicant avers that she married her late husband in the year 1970 and they lived together in parcel no. 852. Her husband died on the 15<sup>th</sup> of November 1998. They lived in parcel no. 852 and have been in exclusive possession of the adjoining parcel 851. That Nyabicha Nyangute left for Tanzania in the late 1960's as a young man and single and has never been seen heard of and or come back home. The applicant depones that has since 1970 when she married in the family she has not seen the said Nyabichah Nyangute. That it has been over 50 years. She depones further that she has been advised by her advocate that she cannot commence any proceedings on **L.R. South / Mugirango/ Bogetenga/ 851** against 3<sup>rd</sup> parties unless she applies to the court to have Nyabicha Nyangute presumed dead so that she can take out a letters of administration over his estate.

3. **Nason Mairura Kegoro** deposed that the applicant is his sister in law and he is now 73 years old. That Nyabicha Nyangute was his uncle, Nyabicha left home in 1960 for Tanzania and has never returned home and his whereabouts are not known nor has he been seen since the said date. **Japheth Ambrose Maiko** depones that the applicant is his sister in law, her late husband was his cousin. He is 59 years old. That he came to know Nyabicha Nyangute who is missing as his cousin because parcel no. South/ Mugirango/ Bogetenga/ 851 which was set aside for him and registered in his name is still intact on the ground and the same is in the user and occupation of the applicant as the successor of her late husband David Obwanga Omwame. He confirms that Nyabicha has not returned home since 1960 nor has he been seen by any family members.

4. From the facts as deposed in the 3 affidavits in support of the application Nyabicha Nyangute has been missing from the time he left his home in 1960. **Section 118A** of the **Evidence Act Cap 80 Laws of Kenya** states 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. It is 50 years since Nyabicha Nyangute left his home. The applicant and her in laws who are persons who are expected to have heard from Nyabicha have not heard from him. There is no one who is asserting anything to the contrary that Nyabicha is still alive. 50 years is a long

time for one not to return home. On can safely presume that Nyabicha is dead, as he has never returned home. I allow the application dated the 11<sup>th</sup> of January 2018 and declare as follows:-

**i. That Nyabicha Nyangute and is hereby presumed dead.**

**ii. Costs in the cause. It is so ordered.**

**Dated signed and delivered this 6<sup>th</sup> Day of July 2018**

**R.E.OUGO**

**JUDGE**

**In the presence of:**

**.....For the Applicant**

**Rael**

**Court Clerk**