REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS SUCCESSION CAUSE NO. 6 OF 2013

IN THE MATTER OF ESTATE OF ROSELINE GAKII NTOGAITI, (PRESUMED DEAD)

AND

ZIPPORAH MWARI ..... APPLICANT/PETITIONER

JUDGMENT

1. Zipporah Mwari ("the Applicant") is the widow of the late Humphrey Stephen Ntogaiti alias Mieru M'Muguna M'Twerandu. The two were blessed with children one of whom was Roseline Gakii Ntogaiti. According to the letter of the Chief of Ntakira Location dated 10th May, 2013, Roseline Gakii Ntogaiti was aged 47 years as at the time of writing that letter.

2. By a Summons taken out under Rule 10 of the Probate and Administration Rules and Section 118A of the Evidence Act, Cap 80 Laws of Kenya, the Applicant sought a declaration that the said Roseline Gakii Ntogaiti be presumed dead. The grounds set out both in the Summons and the Supporting Affidavit were that the said Roseline had not been seen or heard from for the last 20 years by any of her family members. The Applicant swore that Roseline left her home in 1993 to a destination the Applicant did not know. That she has to-date not returned.

3. The Applicant appeared before me on 8th March, 2017 and testified. She reiterated the contents of her aforesaid Supporting Affidavit and stated that Roseline had left behind a child who has since finished his studies and moved to Nairobi. She urged that the application be allowed.

4. Section 118A of the Evidence Act, Cap 80 Laws of Kenya 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. The Applicant swore that Roseline is her daughter. It is expected that she as the parent is the most likely person to have heard from Roseline during the period of the latter's absence. She further swore that none of her children had heard from Roseline. Under Section 119 of the Evidence Act, it is more likely than not that were Roseline alive, the Applicant or any of her children would have heard from her. Since she was living with the Applicant and her children at the time she went missing, it is presumed that it is that home she would have visited or returned to after finishing whatever business she had gone to undertake at the time of her disappearance. That Section provides:-

> ***"119. The court my presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

6. In this regard, I am satisfied that the Applicant has proved that if Roseline was alive, she would have been heard of by either the Applicant or her other children. I am also satisfied that Roseline has not been heard of for a period of 20 years by those likely to hear of her. In the circumstances, I allow the application as prayed.

DATED and **DELIVERED** at **MERU** this **9th** day of **MARCH, 2017.**

A. MABEYA

JUDGE