

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2056 OF 2013

**IN THE MATTER OF THE ESTATE OF MARY AWASI MALIT alias MARY AWASI OLELA
(DECEASED)**

RULING

1. The application dated 4th April 2016 is brought at the instance of Catherine Were Mboya, the administrator of the estate of the deceased. She would like the sole surviving child of the deceased, Jack Elvis Olela, to be presumed dead. She has sworn an affidavit on 4th April 2016. She alleges that the whereabouts of the sole surviving child of the deceased are unknown since 2003. She avers that her efforts to find or trace him have been unsuccessful. She pleads that due to that fact she has been unable to have the grant confirmed.
2. The applicant swore a further affidavit on 14th November 2016. She has attached two documents to support the contention she had made efforts to trace the deceased's only child. There is a letter from the Chief of Central Karachuonyo Location, which says that the said person has not been seen for over ten years. There is also an Occurrence Book (OB) number, 11/14/10/2016, from the Kendu Bay Police with respect to a report made there by a Edwin Okombo.
3. In applications of this nature, whether founded on section 188 of the Evidence Act, Cap 80, Laws of Kenya, or Rule 10 of the Probate and Administration Rules, the applicant ought to demonstrate that following the disappearance of the person sought to be presumed dead efforts were made to trace the whereabouts of the said person. That would involve visiting places where the deceased was known to frequent, and meeting with persons that he was known to associate or convort with. It would also involve making reports to the relevant state agencies of the disappearance.
4. I understand the applicant to be saying that the provincial administration, of the ancestral area of the deceased, was aware of the disappearance. It is also suggested that a report had been made to the police. However, the little slip of paper from the police does not indicate whether OB number 11/14/10/2016 had anything to do with the disappearance of Jack Elvis Olela. The complainant is not the applicant herein, Catherine Were Mboya, nor her brother, Crispus Ojiem Malit, the deponent of the affidavit sworn on 21st November 2016. It is by an Edwin Okombo. The applicant does not explain who that is with relation to the deceased or her son, Jack Elvis Olela.
5. According to sections 35 and of the Law of Succession Act, Cap 160, Laws of Kenya, a dead person who is not survived by a spouse, the next in the line of the inheritors of his estate ought to be his child or children. The husband of the deceased is himself deceased. The next in line is said to be Jack Elvis Olela. I am now being told that he has been lost for so long that I should declare him dead. I can only do so on concrete evidence of the disappearance. Such evidence usually comes from the police, to whom a report of the disappearance ought to have been made. There ought to be proof of the report, and confirmation from the police that a report was indeed made to them and that their efforts to trace the person bore no fruits.
6. Then there is the affidavit of Crispus Ojiem Malit, an alleged brother of the deceased and the applicant, sworn on 21st November 2016. He alleges that he last saw Jack Elvis Olela in 2005. The applicant, his alleged sister, says that Jack Elvis Olela was last heard of or seen in 2003. How can that possibly be, that an alleged brother and an alleged sister cannot agree as to the exact time when they, as a family, last saw or heard of their alleged nephew?

7. The material placed before is inadequate for the purpose of making the presumption that the applicant is asking me to make, for the reasons that I have given in paragraph 5 above. The application is for dismissal and I hereby dismiss the same. There shall, however, be liberty to reapply should the applicant gather material that is a little more persuasive. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE