



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 118 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF PRESUMPTION OF  
DEATH OF E N K A.K.A L N K W**

**IN THE MATTER OF THE EVIDENCE ACT CAP 80. SECTION 118A**

**J N K**

**S N K**

**W S K A.K.A. W K.....APPLICANTS**

**RULING**

1. Before this Court is an application brought by way of Notice of Motion dated 13/3/2017 under section 118A of the Evidence Act (Cap 80 Laws of Kenya) and section 3,3A of the Civil Procedure Act, and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Application seeks the following prayers :-

(a) That this Honourable Court be pleased to order and or presume E N K ALIAS L N K W as dead by virtue of not having been seen or heard by those who ordinarily would have heard from her had she been alive;

(b) THAT this Honourable Court be pleased to order that E N K ALIAS L N K W'S name be removed from title L.R No. 9963 (I.R 16602) to enable the remaining proprietors **J N K**, **S N K** and **W S K A.K.A W K** deal with the same; and

(c) The costs of this Application be in the cause.

2. The applicants are siblings of E N K alias L N K W ("E") whose whereabouts have been unknown since 20.11.2002. The Application is supported by Supporting Affidavits of **W S K A.K.A. W K**, **J N K** and **S N K** all dated 13<sup>th</sup> March, 2017 and **V W M**, a paternal cousin to the Applicants, dated 22<sup>nd</sup> February, 2017.

3. In the Supporting Affidavits, evidence has been adduced to the effect that both parents of the applicants died on or around 1968 when they were little children and the only property which was registered in the joint names of the children including E is L.R No. [particulars withheld]. That applicants are unable to deal with the property due to the fact that E's name appears in the records as a co-proprietor. A copy of the title deed to this property is annexed indicating that E is a co-proprietor. Also stated in the affidavits is that E was mentally and physically handicapped from birth and that at the time of her disappearance, she did not have children.

4. The Supporting Affidavit of W K also attaches a police abstract from Kikuyu police station dated

4.12.2002 reporting a missing person and money order for payment of the same, a daily newspaper extracts advertising a missing person, a letter from chief, Kikuyu Location dated 1/2/2017 confirming the missing person.

5. The application is brought under section 118A of the Evidence Act (Cap 80) which provides that;

***“where it is proved that a [person has not been heard 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”***

6. The presumption of death is a rebuttable presumption which can be reversed if sufficient evidence is adduced to the contrary. Therefore, before this presumption is made, sufficient evidence has to be adduced in court to prove presumption of death. The applicant has demonstrated evidence to show that E has neither been seen nor heard of, since November 2002 which is more than 14 years ago. The evidence adduced include Affidavits sworn by all the siblings of E and an Affidavit sworn by a cousin to E all being persons who might be expected to have heard of her if she was alive. There is also a newspaper advertisement extract, police abstract and a letter from the area chief confirming his knowledge of her disappearance.

7. The Applicant also prays for an order that E N K ALIAS L N K W’S name be removed from title L.R No. 9963 (I.R 16602) to enable the remaining proprietors **J N K, S N K** and **W S K A.K.A W K** deal with the property. This Court is not in a position to grant such an order as that is a subsequent process that will follow after a death certificate is issued and to be undertaken by the Registrar of Lands. I am not privy to the records at the registry of lands to ascertain the current position of the property and whether or not the same has encumbrances. No official search was attached to the affidavits for perusal by this court.

8. In the circumstances, I find that there is sufficient evidence to sustain a presumption of death of E N K ALIAS L N K W and the orders of the court are that E N K ALIAS L N K W is hereby presumed dead and a certificate of her death shall issue. For now prayer 2 is denied. There shall be no order as to costs.

**Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of July, 2017**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... **for the Applicant**