

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC CIVIL APP 72 OF 2016

IN THE MATTER OF PRESUMPTION OF DEATH

IN THE MATTER OF NYAGA KAMWANA

JACINTA WANGIRI NYAGA.....APPLICANT

RULING

1. This application was brought under certificate of urgency through a notice of motion dated 11th May 2016. It is an *ex-parte* application seeking that one Nyaga Kamwana be presumed to have died by virtue of not having been seen since 1991.
2. The application is grounded on the applicant's supporting affidavit of 11th May 2016. The applicant has deponed that she is the biological daughter of Nyaga Kamwana, who disappeared in 1991 and has not been seen to-date. She has further deponed that her father was the registered owner of land parcel No. Ngandori/kirigi/T-149, where she lives with other family members. She has also deponed that they have been looking for their father without any success and they fear that somebody may take advantage of the prevailing position.
3. It is also her affidavit evidence that her mother reported the disappearance of Nyaga Kamwana to the administrative chief but she died while doing so. Furthermore, she has also deponed that there was a civil case being Embu Resident Magistrate's Court civil suit No. 17 of 76 between Michael Njagi Ndwiga and Nyaga Kamwana, in which land parcel No. Ngandori/Kirigi/T-149 was restricted on the application of Michael Njagi Ndwiga, who was the decree holder. She has also deponed that her father discharged the debt owed to the judgement decree. As a result, the decree holder wrote a letter dated 10th October 1981 in which he indicated that his debt of Kshs 2,000/- had been discharged, by the said Nyaga Kamwana which letter is annexed to the supporting affidavit as annex "J.W.M.4".
4. Finally, she seeks an order of the court that the Land Registrar be ordered to register the land in the name of the applicant.
5. I find that the application is by its very nature is unopposed. I believe that Nyaga Kamwana has not been seen since 1991, which is over 25 years up to date.
6. The provisions that govern the presumption of death are found in ***section 118A of the Evidence Act (Cap 80) Laws of Kenya***. That section provides as follows "***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. In the light of the evidence which I find credible that Nyaga Kamwana has not been seen for the last over 25 years and the fact that the law presumes that somebody who has not been seen for the last seven years should be presumed dead, I hereby grant the applicant's prayer that Nyaga Kamwana is dead in terms of section 118A of the Evidence Act.
8. However, I am not able to grant the prayer that the applicant be registered as the owner of her father's land. If this is desired to be done, it has to undergo the process of succession in terms of the Law of Succession Act (Cap 160) Laws of Kenya. The Law of Succession caters for those who intend to inherit the estate of those who are dead. It provides for an orderly transmission of property to the rightful beneficiaries. It also provides a forum for creditors to satisfy what they are owed.

9. I therefore only allow the applicant's prayer that Nyaga Kamwana be presumed dead. I dismiss the applicant's prayer that she be registered as the owner of the land which is registered in the name of Nyaga Kamwana.

10. There will be no orders to costs as this is an *ex-parte* applicant.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **6th** day of **JULY 2016**

In the presence of the applicant

Court clerk Njue

J.M. BWONWONGA

JUDGE

06.07.16