

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. APPLICATION 28 OF 2015

J O B APPELLANT

VERSUS

B B O..... PRESUMED DECEASED

RULING

1. The application before this court by way of an originating summons is based on the provisions of section 118A Evidence Act Cap 80 laws of Kenya which states “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”.
2. J O B swore an affidavit on 10/04/2015 in which she depones that her husband, B B O who was then aged 61 years or thereabouts went missing on 24/06/2006 and that since then she has neither heard of him nor seen him. She further depones that she made a report of a missing person to Dudi Police Station under OB number 30/6/2006. A copy of the Police OB report is annexed to her affidavit and marked “JBO1”.
3. The applicant also states that all diligent efforts made by herself, friends and relatives to trace the said, B B O who went missing on 24/06/2006 have been fruitless. The applicant gave her sworn testimony to confirm the averments in her affidavit. She also called one witness G O O who testified that he was born in 1972. That the applicant is his mother, while B B O is his father. He stated that the last time he saw his father was on Saturday 24/06/2006. According to PW2 at about 9.00a.m on the material date, his father left the home as if he was going to the shop to buy cigarettes. He never returned. When the father did not return, PW2, his mother, other relatives and friends started looking for him everywhere, including mortuaries, but they never found him and he has never contacted them. PW2 also corroborated PW1’s testimony that B B O had been in retirement for about 6 years by the time he disappeared from home, and that on the material day he was dressed only in slippers, grey trouser and white shirt and that he left everything else behind.
4. Both applicant and PW2 asked the Court to grant an order presuming B B O dead in accordance with the provisions of Section 118A of the Evidence Act, Cap 80 Laws of Kenya; since it is now more than 7 years since the said B B O disappeared.
5. After a careful analysis of the evidence given by PW1 and PW2, the only issue that arises for determination is whether it has been shown that B B O has not been heard of for seven years? The evidence is clear that B B O disappeared from home at about 9.00an on 24/06/2006, dressed only in slippers, a grey trouser and a white shirt. The family members who saw him leave the homestead on that morning thought he was going to the shop to buy some cigarettes but todate, they have neither seen him nor heard from him. It is more than seven years since efforts to trace B B O commenced. Even the Police to whom a report of missing person was made on 30/06/2006 have not found or traced him.
6. In the circumstances, I am satisfied that the applicant has satisfied the requirements of Section 118A of the Evidence Act and is therefore entitled to the order sought. It has been shown that B B O has not been seen nor heard from since 24/06/2006. PW1 and PW2 as wife and son of the said B B O are the persons who are expected to have heard of him if he were alive. The fact that these two persons have neither seen nor heard of B B O since 24/06/2006, there is now a rebuttable presumption that the said B B O is dead. No one has come up before this Court to make any assertion to the contrary.
7. In the premises, the Originating Summons dated 30/04/2015 be and is hereby allowed in terms of prayer (i) thereof costs shall be in the cause.
8. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 2nd day of November 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Oyagi h/b for Mr. Otinga (present) for Applicant

Mr. Lagat - Court Assistant