



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL CAUSE NO. 5 OF 2015

IN THE MATTER OF PRESUMPTION OF DEATH OF NGOMO WASUA – DECEASED

MUTULA WASUAPETITIONER

RULING

Before the court for determination is a Chamber Summons dated 20th January 2014, filed by the Petitioner under the provisions of Rule 10 of the Probate and Administration Rules and section 17 of the Births and Deaths Registration Act, and all other enabling provisions of the law. The Petitioner is seeking the following substantive orders:

1. That, an order be issued by this court presuming Ngomo Wasua dead.
2. That a certificate of death be issued to the Petitioner.

The Applicant's application is premised on the grounds that Ngomo Wasua was last seen alive on or about the year 1960 and since then no one has heard from him. Further, that the efforts to trace him have borne no fruits to date, and that the Petitioner is the only surviving legal representative of the deceased.

The Petitioner stated in a supporting affidavit he swore on 20th January 2014 that the deceased Ngomo Wasua is his brother, and that he is the only surviving legal representative of the deceased. He annexed a copy of letter from a chief as evidence in this regard.

Further, that the deceased was last seen alive at his place of residence in Mombasa in the year 1960, and that the Petitioner had made efforts to trace his brother since the year 1960 but all in vain, including from relatives. He stated that he visited relatives in Nairobi and Mombasa, mortuaries in Nairobi, and officially made a report to Makandara Police station on or about the year 1964. The Petitioner averred that his brother had not contacted him to date and that 49 years have passed since Ngomo Wasua disappeared. He also stated that he is seeking an order for presumption of death since he owned a parcel of land jointly with his brother and he is unable to transact on the same.

The application by the Petitioner was served on the Respondent who did not file any response. The Petitioner was directed to file written submissions on the application, and his Advocates, B.M. Mungata & Company Advocates filed submissions dated 26th October 2015. It was submitted that the Petitioner's application is brought under rule 10 of the Probate and Administration Rules and section 17 of the Births and Deaths Registration Act. The facts of the application were reiterated, and it was stated that Petitioner last saw his brother Ngomo Wasua at his place of residence in Mombasa sometimes in the year 1960, and efforts to trace him ever since have borne no fruits. Further, that Ngomo Wasua has never made efforts to communicate with the Petitioner, who is his only surviving legal representative and it is the Petitioner's assumption that Ngomo Wasua is dead.

Reliance was placed on section 118A of the Evidence Act and the decision in **Gladys Mbuche and 3 Others vs Principal Registrar of Birth and Death, (2011) eKLR**, that the presumption of death can only arise once the basis has been laid by providing sufficient proof that the person has not been heard of for at least 7 years.

The Issue and Determination

I have read and carefully considered the pleadings and submissions filed. The issue to be determined is whether there is sufficient proof for the presumption of death of Ngomo Wasua to arise. Before I address the substantive issue I will make a preliminary observation on the form of the Petitioner's application.

I note that the Petitioner has filed this suit by way of a Chamber Summons, which is in its nature an application. He relied on Rule 10 of the Probate and Administration Rules which provides as follows:

“An application for an order presuming the death of a person of whose death there is no sufficient written evidence and to whose estate a grant is sought shall be made by summons to the court and shall be supported by an affidavit setting out the grounds of the application.”

This Rule requires an Applicant to file Summons, and the Petitioner ought to have filed Originating Summons as he was filing a substantive suit. However, this is a technicality that may be overlooked by this Court in the spirit of Article 159 of the Constitution. The Court will therefore proceed on the basis that the application before it is by way of Originating Summons.

On the substantive issue for determination, Section 118A of the Evidence Act, Chapter 80 of the Laws of Kenya 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 was alive, there shall be a rebuttable presumption that he is dead.”

In **Halsbury's Laws of England, 4th Edition Vol 17(1)** at paragraph 580-581 it is stated that he who asserts that a person was dead on a given date must prove the fact by evidence, and the issue will be decided on all the evidence available at the date of the hearing.

What is required to be proved is that there are persons who are likely to have heard of the person sought to be presumed dead over that period, and that those persons have not heard of him, and all due inquiries have been made appropriate to the circumstances. Where the presumption of death after seven years' absence applies, the person will be presumed to have died by the end of that period, where the presumption does not apply or is displaced by evidence, the issue will be decided on the facts of the particular case.

In the present application the Petitioner asserts that he has not seen his brother Ngomo Wasua since 1960. The evidence he attached in this regard was a letter from the Chief of Wamunyu Location dated 6th May 2013. I have perused the contents of the said letter, and note that it does not in any way relate to, or give any information as to the whereabouts of Ngomo Wasua, but only confirms that the Petitioner and Ngome Wasua owned a parcel of land and that the Petitioner is the administrator of the said parcel of land.

The Petitioner also stated that he made a report to Makandara Police Station about the disappearance of Ngomo Wasua in 1964, however he did not produce any police abstract on the said disappearance. In addition, no evidence was brought to support the Petitioner's averments that he is the only legal representative of Ngomo Wasua, nor were the other relatives referred to in the Petitioner's supporting affidavit brought to give evidence of their knowledge of Ngomo Wasua.

In the circumstances I find that there is insufficient evidence on record to sustain a presumption of death of Ngomo Wasua, and the prayers in the Chamber Summons dated 20th January 2014 are denied. The

Petitioner is however at liberty to present another suit for the same prayers with the required evidence.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 3rd day of December, 2015.

P. NYAMWEYA

JUDGE