



**Kamau v Waiharu (Family Miscellaneous Application E034 of 2024)  
[2025] KEHC 14636 (KLR) (13 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14636 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
FAMILY MISCELLANEOUS APPLICATION E034 OF 2024**

**JM NANG'EA, J  
OCTOBER 13, 2025**

**BETWEEN**

**JOHN NJUGUNA KAMAU ..... APPLICANT**

**AND**

**SAMUEL KAMAU WAIHARU ..... SUBJECT**

**JUDGMENT**

1. By Notice of Motion dated 4<sup>th</sup> October 2024 expressed to be brought pursuant to the provisions of Sections 1a, 1b and 3a of the *akn ke act 1924 3 Civil Procedure Act* Cap 21 of the Laws of Kenya, Article 2(5), 46(1), 48 and 159 of *akn ke act 2010 constitution the Constitution of Kenya 2010* (sic), the Applicant prays for these orders;
  1. Spent.
  2. That Samson Kamau Waiharu be presumed dead.
  3. That this Honourable Court do order the Registrar of Births & Deaths to issue a Death Certificate of Samson Kamau Waiharu.(sic)
  4. That consequent to the grant of the prayers above, the Honourable Court be pleased to issue such further direction and orders as may be necessary to give effect to the foregoing orders and or favours.(sic)
2. The Applicant, the missing person's biological son, avers that the Subject was last seen alive on 10<sup>th</sup> November 1997. He is believed to be dead considering that he was born in the year 1918 and would have been 106 as at the time of bringing this application.
3. In the circumstances, the Applicant strongly believes that the Subject is no longer alive , hence this Application. In support of the Motion, copies of the Subject's National Identification Card No.



4274660 and a letter dated 4<sup>th</sup> May 2023 from the Applicant's area Chief corroborating the evidence of the Subject going missing are exhibited inter alia.

4. The Application was heard orally, with the Applicant, his brother (Paul Njogu Kamau), the area Chief (Jane Wangui Kariuki) and the Subject's former neighbor (Benard Muigai Githinji) testifying and corroborating the averments in the Applicant's affidavit.
5. The Applicant also filed brief written submissions through his advocates.
6. Section 118A of the *akn ke act 1963 46 Evidence Act* the Applicant cites in reliance is in the following terms:-

“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. Section 119 of the Same Act enacts that;-

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the particular case.”

8. In the case of *Re ENK [2017] eKLR*, the court held that presumption of death is rebuttable and  
  
“therefore before the presumption is made, sufficient evidence has to be adduced in court to prove presumption of death.”

It is further observed in that case that the applicant needs to show that the missing person has not communicated to those likely to hear from him/her during the seven years and that after independent search, there is no trace of the person within or without the jurisdiction of the court.

9. Section 386 of the Criminal Procedure Code provides in pertinent part that the officer in charge of a police station or any other authorized officer, on receiving information that a person is missing and believed to be dead, immediately give the information to the nearest magistrate empowered to hold inquests and carry out necessary investigations to unravel the circumstances of the death. Upon conducting the inquest the concerned magistrate is required inter alia to recommend to the Director of Public Prosecutor (DPP) as to whether or not the period regarding the presumption of death should be reduced and, if so, suggest the lesser period depending on the circumstances of each case so that the person's relative don't have to wait for an agonisingly long period.
10. In *Masoud Salim Hemen & Another vs DPP & 3 Others* it was restated that where *akn ke act 2010 constitution the Constitution* or statute prescribes a specific “procedure for redressing certain grievances, that special procedure should be strictly followed.”
11. In yet another decided case, *Re Matter of Pius Mukono Murage (presumed deceased) [2019] eKLR*, it was underscored that an applicant for such order must tender sufficient evidence supporting presumption of death and should not leave the matter to the court's discretion or mere guess work. The court also reiterated that the prescribed legal procedure in seeking redress must be followed.
12. In the instant case, I note that the Applicant does not seem to have lodged a missing person report with the Police. The concerned Chief has, however, supported the Applicant's evidence.



13. It is my conclusion in the circumstances that the applicant's evidence is sufficient to reach a finding that the missing person be presumed as dead. Other family members who were ordinarily expected to have heard from her should have testified to confirming his evidence.

14. In the result, the application is allowed as prayed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 13<sup>TH</sup> DAY OF OCTOBER, 2025.**

**J. M. NANG'EA , JUDGE.**

In the presence of:

The Applicant's Advocate, Mr Opar.

Applicant, Absent.

Court Assistant, Jeniffer.

