

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
FAMILY DIVISION
MISC APPLICATION NO. E 263 OF 2024

***IN THE MATTER OF AN APPLICATION BY MARY GATHONI MACHARIA
(THE APPLICANT) FOR THE PRESUMPTION OF THE DEATH OF
JOSEPH MACHARIA KARANJA UNDER SECTION 118A OF THE
EVIDENCE ACT***

MARY GATHONI MACHARIA **APPLICANT**

RULING

1. The Notice of Motion dated 11 November 2024 seeks:
 - (i) That JOSEPH MACHARIA KARANJA – ID 4421885 – who was last seen on 15 January 2008 be presumed dead;
 - (ii) That a Death Certificate be issued for JOSEPH MACHARIA KARANJA – ID 4421885 by the Principal Registrar of Births and Deaths;

2. The Applicant and the Subject celebrated their marriage on 7 January 1989. the union was solemnized at Kiereini CPK Church under the African Christian Marriage and Divorce Act (repealed). Attached to the Supporting Affidavit is a copy of the Certificate of Marriage. The union was blessed with two issues born in 1988 and 1992. At the time of the disappearance, the family resided at Buru Buru Farmers, within Ruai, Nairobi County. The Subject was the breadwinner, employed as a Secretary at a company where he maintained a

routine schedule, reporting to his office primarily on Wednesdays and Saturdays.

3. According to the testimony of the Applicant, the Applicant was home with the subject on 15 January 2008, which was a workday. The Applicant averred that she last saw the Subject that morning when he left their home to go get a vehicle from one of his friends. This statement, seemingly mundane, marks the final confirmed physical sighting of the Subject by his primary dependent. The purpose of his departure—to check on a car hire or procure a vehicle—suggests an intention to return. There was no indication of a journey of long duration, no packing of bags, and no farewells indicative of permanent departure.
4. The behaviour of the Subject in the immediate aftermath of his departure creates a complex evidentiary picture. He did not return that evening. This absence extended for two days. On the third day, the Applicant, displaying the diligence expected of a spouse, initiated inquiries. She visited the Subject's place of work, informing the Chairman and Directors that her husband had gone to Umoja and failed to return.
5. The Subject made contact on the third day. The Applicant testified that the Subject called 3 days after she had reported his absence. He informed the Applicant that he was coming back home and wanted to speak to his daughter. The Subject called using a private number. While this confirms the Subject was alive at that moment, it also suggests an element of concealment or, at the very least, an inability to be traced via standard caller identification. This was the last known voice contact. The Subject expressed an intent to return and a paternal desire to speak to his child, yet he never materialized.

6. The legal requirement for presumption of death is not merely the passage of time; it is the passage of time despite reasonable efforts to locate the individual. The Applicant's efforts were multi-faceted.
7. A report was made to the Ruai Police Station. The Applicant also engaged the Criminal Investigation Department (CID) at Kayole. Her siblings assisted in this process. The feedback from the CID at the time was nebulous and distressing: *"When the CID Kayole called me for information, they told me that my husband was moving around"*. However, despite this intelligence, the police were unable to apprehend him, locate his physical address, or establish a line of communication. His phone would not go through.
8. The Applicant visited hospitals and mortuaries, the grim itinerary of the searching spouse, to rule out accidents or admission as an unknown patient.
9. The Subject has a large extended family, comprising four brothers and four sisters. The Applicant testified that she informed them of the disappearance on the third day.
10. Further, the matter was reported to the local administration, specifically the Chief of Mihang'o Location, ensuring the disappearance was noted in the administrative records of the state.
11. Following those initial frantic days in January 2008, a curtain of silence descended. For over 16 years, the Subject has not returned to his matrimonial home. He has not contacted his wife or his now-adult children. He has not claimed or managed his three properties. The "moving around" alluded to by the CID in 2008 appears to have ceased or moved entirely beyond the radar of his kin.

Analysis & Determination

12. The Court has meticulously examined the documentary evidence tendered in support of this application. The Applicant has provided a copy of her national ID card to establish her identity and citizenship. The Certificate of Marriage proves the *locus standi* of the Applicant and confirms the marriage date. The letter from the Chief date 17 September 2024 confirms the residence and disappearance of the Subject. The letter from Ruai Police Station dated 24 October 2024 confirms the missing person report. The Applicant has also provided copies of the national ID cards for the two issues of the marriage. There is a copy of newspaper advertisement in the Saturday Nation dated 24 May 2025 as proof of public notice and procedural compliance.
13. I do note, however, a glaring inconsistency in the letter authored by CI Peter Nyaga, OCS Ruai Police Station dated 24 October 2024, which states:

"Mrs. Mary Gathoni Macharia... alleges that her husband namely JOSEPH MACHARIA KARANJ went missing in the year 2007 on 1st December... She made a report at Ruai Police Station in December 2007."
14. This letter stands in stark contradiction to the Applicant's sworn oral testimony and affidavit evidence that the Subject was last seen on 15 January 2008. This begs the question: Does this contradiction fatally undermine the credibility of the Applicant? The answer is in the negative. The Police letter itself contains the explanatory note that the records of that year cannot be traced.
15. It is the finding of this Court that the date in the Police Letter is likely a reconstruction error or a clerical slip by the drafting officer in 2024, attempting to recall or summarize an event from 17 years prior without the benefit of the original Occurrence Book (OB) entry. The Applicant's testimony, corroborated

by the Chief and her children, and delivered under oath, is consistent and credible.

16. Furthermore, in the grand calculus of Section 118A, the difference between December 2007 and January 2008 is immaterial. Both dates fall substantially outside the seven-year statutory window. Whether the Subject disappeared in late 2007 or early 2008, the requisite period for presumption has elapsed more than twice over. The Court, therefore, accepts 15 January 2008 as the operative date of disappearance.

17. Section 118A of the Evidence Act provides:

Where it is proved that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, there is a rebuttable presumption that he is dead.

18. This section is derived from the English common law principle established in ***Nepean v Doe d. Knight (1837)***, which sought to resolve the impasse created by indefinite absence. However, the Kenyan statute codifies this into a precise tripartite test. For an applicant to succeed, they must navigate and satisfy three distinct elements:

- (i) The Absence: Actual absence from the usual place of abode or resort for a continuous period of not less than seven years.
- (ii) The Silence: That the person has not been heard of by "those who would naturally have heard of him."
- (iii) The Inquiry: That due and reasonable inquiry has been made without success.

19. The burden of proving these three elements lies squarely on the Applicant. As per Section 107 of the Evidence Act, he who asserts must prove. Once

the Applicant establishes these facts on a balance of probabilities, the burden shifts. Section 119 provides that if the presumption is established, the burden of proving that the person is alive shifts to the person who affirms it. In this *ex-parte* application, with no objector, the Court serves as the guardian of the standard, ensuring the Applicant's evidence is sufficient to trigger the presumption.

20. On the first element, the statutory clock began ticking on 15 January 2008. The Subject has been absent for approximately 17 years. This is more than double the statutory requirement. The temporal threshold is satisfied beyond any doubt.
21. Regarding the second element, the silence, the law asks, "who would have heard of him?" The Applicant and the two children are the primary category. They lived with him. He was the breadwinner. The Applicant testified that the Subject has 8 siblings, whom she informed when he went missing. However, the siblings do not speak to the Applicant. This estrangement of the in-laws poses a theoretical challenge. Could the Subject be in contact with his siblings but not his wife? If so, the siblings would be persons who have heard of him. However, the siblings were aware of the disappearance, having been informed on the third day. They have not appeared in this suit to object. They have not responded to the newspaper advertisement. The Court must infer that their estrangement from the Applicant does not equate to knowledge of the Subject's whereabouts. If they knew he was alive, they would likely have contested the presumption of death to protect their potential interest in his estate or to spite the estranged wife. Their silence acts as acquiescence to the fact of his disappearance.
22. On the due inquiry test, the question is whether the Applicant looked hard enough. The answer is a resounding yes!

23. Next, this Court must address the jurisprudential difficulty of the date when the Subject is presumed to have died. The common law position, often cited in *Re Phene's Trusts (1870)*, is that the law presumes death at the end of the period or at the time of the application, but it does not presume the exact time of death within that period. However, for the practical purposes of the Registrar of Births and Deaths and the administration of the estate, a specific date is required. To set the date as 15 Jan 2008 would be to presume he died the day he left, which contradicts the phone call on the third day and the CID report of "moving around". To set it at the end of 7 years is arbitrary.
24. Until this Court speaks, the Subject is presumed alive. It is this Ruling that rebuts the presumption of life. Therefore, for the purposes of the Death Certificate, the date of death shall be deemed to be the date of this Ruling, or alternatively, the Registrar may exercise administrative discretion to record it as "Unknown" or "Presumed as of".
25. Accordingly, the Notice of Motion dated 11 November 2024 is allowed in the following terms:
- (i) IT IS HEREBY DECLARED that JOSEPH MACHARIA KARANJA, holder of Kenyan National Identity Card Number 4421885, who was last seen on the 15th day of January 2008, is presumed dead for all intents and purposes of the law, pursuant to Section 118A of the Evidence Act (Cap 80).
 - (ii) The Principal Registrar of Births and Deaths is hereby directed to issue a Certificate of Death in respect of the said JOSEPH MACHARIA KARANJA (ID No. 4421885).

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2025

HELENE R. NAMISI
JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Applicant: No appearance

Court Assistant: Libertine Achieng

Ruling