

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**FAMILY DIVISION**  
**MISCELLANEOUS APPLICATION NO. E280 OF 2024**

***IN THE MATTER OF ARTICLE 2(5), 46(1), 48 AND 159 OF  
THE CONSTITUTION***

**AND**

***IN THE MATTER SECTION 118A OF THE EVIDENCE ACT***

**AND**

***IN THE MATTER OF SECTION 1A, 1B AND 3A OF THE  
CIVIL PROCEDURE ACT***

**AND**

***IN THE MATTER OF AN APPLICATION FOR THE DECLARATION OF  
DEATH OF JAMES KIMATHI M'ATHIRU***

<b>SUSAN NYOROKA KIMATHI</b>	.....	<b>1<sup>ST</sup> APPLICANT</b>
<b>LUCY KENDI JAMES</b>	.....	<b>2<sup>ND</sup> APPLICANT</b>
	<b>AND</b>	
<b>JAMES KIMATHI M'ATHIRU</b>	.....	<b>SUBJECT</b>

**RULING**

1. Before the Court is Notice of Motion Application dated 19 November 2024, in which the Applicants seek the equitable and statutory intervention of this Court regarding the unexplained, complete, and prolonged disappearance of James Kimathi M'Athiru, the Subject.

2. The primary prayers solicited in the Application are twofold in their nature. First, the Applicants seek a declaratory order that James Kimathi M'Athiru be legally presumed dead. Second, the Applicants beseech the Court to issue mandatory consequential orders directing the Registrar of Births and Deaths to formally issue a Certificate of Death in respect of the Subject. The Application is fundamentally supported by the sworn Affidavits of the Applicants, alongside a comprehensive compendium of documentary exhibits detailing the chronology of the Subject's disappearance, the subsequent administrative investigations by the National Police Service, and the parallel criminal judicial proceedings that took place in the subordinate courts.
3. The matter proceeded to a full hearing on 18 November 2025, during which the First Applicant took the stand to offer sworn oral testimony to supplement and contextualize the affidavit evidence. The evidentiary record firmly indicates that the Applicants meticulously fulfilled the procedural requirements for substituted service and public notification by publishing a Missing Person and Public Notice in *The Standard* newspaper on 20 May 2025, calling upon any member of the public with information regarding the Subject to come forward.
4. The 1<sup>st</sup> Applicant and the Subject contracted a valid customary marriage under Ameru customary law in May 1984. The union was blessed with five children, firmly establishing a long-standing and legally recognizable family unit. The 2<sup>nd</sup> Applicant, Lucy Kendi James, is the firstborn child of the marriage, currently aged 38 years, while the youngest child of the union is currently 25 years old. The family's primary matrimonial residence was situated in Athwana, Meru County, constructed on ancestral land belonging to the Subject's parents. The record demonstrates unequivocally that the Subject's parents are still alive, reside in the exact same compound as the 1<sup>st</sup> Applicant, and maintain a close familial nexus with the Applicants.

5. The Subject was a career law enforcement officer with the National Police Service. At the time of his disappearance, he held the rank of Police Constable (Force Number 52091) and was attached to the Directorate of Criminal Investigations (DCI) Headquarters, serving specifically in the Radio Room in Nairobi County. Due to the logistical demands of his deployment, he resided in police living quarters in Kilimani, Nairobi, while his family remained at their primary residence in Meru. The Subject had served in the police force for an extensive period of 28 years and 4 months, having formally enlisted on 26 July 1986.
6. The timeline of his disappearance is established through a convergence of the 1<sup>st</sup> Applicant's oral testimony and the official internal police records annexed to the Affidavits. The 1<sup>st</sup> Applicant last physically saw the Subject at his Kilimani residence in Nairobi on 11 May 2014. During this visit, he left for his morning shift at 8:00 AM, and she subsequently travelled back to Meru.
7. The Subject was last seen in person by a male colleague at the Kiambu CID Headquarters on 22 September 2014 while on active duty.
8. The Subject last communicated via mobile phone with his colleague, Corporal Njuguna M. Karari, on 27 September 2014, regarding the completion of standard staff appraisal forms scheduled for submission on 29 September 2014.
9. The Subject failed to report for his scheduled duty shift to relieve Corporal Njuguna in the Radio Room on 14 October 2014, marking the official commencement of his unexplained absence from his professional station.
10. On 15 October 2014, an Internal Memo was issued by the Staff Officer Operations, Francis Njiru, formally notifying the Director of Criminal

Investigations that the Subject had absented himself without leave, that his mobile phone was switched off, and that physical searches at his Kilimani residence had yielded absolutely no results.

11. On 16 October 2014, a dedicated search party comprising Sergeant John Karonei, Corporal Franklin Guantai, Corporal Boniface Eng'olan, and the 1<sup>st</sup> Applicant visited the City Mortuary to inspect the admission registers for both known and unknown bodies. The search proved futile, establishing the beginning of the family's search efforts.
12. Following the Subject's failure to report to duty, the National Police Service initiated both internal disciplinary procedures and formal criminal mechanisms. On 2 December 2014, an official police signal (Reference: CID/SEC/OPS/1/2/8/3/94) was dispatched to all police stations nationwide, officially declaring the Subject a deserter from the National Police Service with retroactive effect from 6 November 2014. This administrative action was subsequently followed by the publication of a formal Wanted Persons Notice (Notice No. W/PJ/33/015) in the Kenya Police Gazette Vol. 86, No. 3, printed on 2 February 2015.
13. The State subsequently instituted criminal proceedings against the Subject. Criminal Case No. 736 of 2019 was filed at the Chief Magistrate's Court in Kiambu, charging the Subject with the criminal offence of Desertion from the National Police Service contrary to section 94(1)(3) of the National Police Service Act (No. 11A of 2011).
14. The certified court record from the Kiambu Chief Magistrate's Court reveals that the matter was mentioned repeatedly between May 2019 and July 2020. Warrants of arrest were issued and extended multiple times because the investigating officers simply could not trace the Subject despite their statutory mandate and resources. Ultimately, on 6 July 2020, the prosecution applied

to withdraw the charges under section 87(a) of the Criminal Procedure Code, expressly noting on the record that "one year has passed and warrant of arrest not executed. We cannot continue mentioning the matter anymore". The Chief Magistrate acceded to this reality, granted the application, and formally withdrew the case.

### **Analysis & Determination**

15. The threshold issue in any judicial proceeding is whether the court possesses the jurisdiction to entertain the matter and whether the parties before it have the legal standing to seek the prayers articulated in their pleadings. The High Court is established under Article 165 of the Constitution, which confers upon it unlimited original jurisdiction in criminal and civil matters. This broad constitutional mandate inherently encompasses the adjudication of declaratory suits and applications seeking the invocation of statutory presumptions, such as those embedded within the Evidence Act.
16. Regarding *locus standi*, the Applicants have approached this Court in their capacities as the lawful wife and first-born daughter of the Subject. The necessity for a formal legal declaration of death is not a mere academic exercise; it is a fundamental prerequisite for the activation of succession laws and the administration of an estate. A formal legal declaration is required to trigger succession laws and prevent an estate from going to waste. The Applicants, being the primary dependents and prospective beneficiaries of the Subject's estate, undeniably possess a direct, tangible, and legally recognizable interest in securing a declaration of his presumed death. The Court, therefore, finds that it is fully vested with jurisdiction and that the Applicants have established impeccable *locus standi*.

### **The Temporal Threshold and Expected Contacts**

17. The primary statutory provision governing this application is section 118A of the Evidence Act which stipulates the following legal maxim:

*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.*

18. This specific provision operates in tandem with section 119 of the Evidence Act, which broadly empowers the Court to presume the existence of any fact which it thinks likely to have happened, having regard to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.
19. The burden of proof in an application for the presumption of death lies squarely with the applicant, as dictated by section 109 of the Evidence Act, which states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. The standard of proof required to discharge this burden is not the stringent criminal standard of beyond reasonable doubt, but rather the civil standard of proof on a balance of probabilities. The concept of preponderance of probabilities requires the Court to assess whether the evidence presented makes it more likely than not that the fact in issue exists.
20. Courts have systematically refined the parameters required to activate section 118A. To succeed, an applicant must satisfy three indispensable elements:
  - (i) There must exist people who would be likely to have heard from the subject within the preceding seven years.
  - (ii) Those specific persons must not have heard from the subject during that period.

- (iii) All due and diligent inquiries must have been made as appropriate to the unique circumstances of the case.
21. The first limb of the statutory test requires irrefutable proof that the subject has been absent and unheard of for a minimum of seven years. The evidentiary record establishes that the Subject was last seen physically by his wife on 11 May 2014, and last communicated with his colleagues via mobile phone on 27 September 2014. From October 2014 to the filing of the Application in November 2024, a period of exactly ten years had elapsed. By the time of the oral hearing in November 2025, the period of continuous, unexplained absence exceeded 11 years. This timeline undeniably and overwhelmingly satisfies the temporal threshold of seven years stipulated in section 118A.
22. The second limb of the test requires that the lack of communication must be specifically in relation to those who might be expected to have heard of him. Judicial interpretation places significant, substantive weight on this plurality. In the instructive case of *In re Zakary Njeru Mbungu (Missing person) [2020] eKLR*, the Court dismissed an application because it was brought by a sole applicant who failed to adduce any evidence that the missing person's other siblings or close relatives had also not heard from him. The Court emphasized that section 118A deliberately uses the plural term "those," indicating that the absence of communication must span across the natural network of family and associates, rather than being limited to a single isolated individual.
23. In the present matter, the Applicants have successfully cured the evidentiary defect identified in *Zakary Njeru Mbungu*. The Application is jointly filed by the Subject's wife and his first-born daughter. Furthermore, during her oral testimony, the 1<sup>st</sup> Applicant explicitly addressed the status of the Subject's extended family. She testified that the Subject's parents are alive, that she

continues to reside in their compound in Meru, and that they too have not seen or heard from him. She further testified that the Subject was the first born among his siblings and maintained close ties with them, none of whom have reported any contact whatsoever over the past eleven years.

24. Professionally, the Subject's employer—the National Police Service—also falls squarely within the category of entities expected to hear from him. The police records, including the internal memos from the Staff Officer Operations and the recorded statements from Corporal Njuguna and Corporal Eng'olan, confirm that his colleagues and hierarchical superiors had absolutely no contact with him after September 2014.
25. The Court finds that the Applicants have conclusively demonstrated that a broad, exhaustive, and representative network of individuals—comprising his spouse, his children, his aging parents, his siblings, and his professional colleagues—who would naturally be expected to hear from the Subject, have had absolutely no contact with him for over eleven years. The threshold requirements of the first and second limbs of section 118A are, therefore, fully and satisfactorily met.

#### The Evidentiary Standard of Diligent Search

26. The third prerequisite for a judicial declaration of presumed death is that the applicants must have undertaken all due inquiries appropriate to the circumstances. The legal standard for due diligence holds that the presumption cannot be activated by mere passive waiting or the simple passage of time; active, reasonable, and demonstrable steps must be taken to locate the missing individual. The fact of not being found must relate to an active search proximate to the time the evidence is sought to be relied upon.
27. The record before this Court reveals an extensive, multi-layered search effort spanning several years, conducted concurrently by both the family and the

State apparatus. The 1<sup>st</sup> Applicant provided uncontroverted oral testimony that she physically traversed Nairobi to search Kenyatta National Hospital, Nazarene Hospital, and Mbagathi Hospital, inspecting both wards and their respective mortuaries. Similarly, the police investigation included physical checks at the City Mortuary on 16 October 2014, scanning both known and unknown admission registers.

28. The family promptly reported the disappearance to Muthaiga Police Station. While the 1<sup>st</sup> Applicant testified that she was not issued an Occurrence Book (OB) number—a procedural failure on the part of the desk officers—the broader institutional response by the National Police Service wholly compensates for this localized administrative lapse.
29. The DCI Headquarters Operations section attempted to trace the Subject's mobile phone signal without success. Internal law enforcement signals were broadcast to the Criminal Records Office (CRO) and all Station Commanders nationwide detailing the Subject's exact particulars, including his home location, area chief, and assistant chief, effectively turning his disappearance into a national police inquiry.
30. The Applicants fulfilled the public notification requirement by publishing a formal missing person notice in *The Standard* newspaper on 20 May 2025, which yielded no information or leads.
31. The depth of the search efforts in this matter far exceeds the standard typically presented in such applications. In ***In re Estate of Tom Obuon Obuon [2010] eKLR***, the Court granted a presumption of death based on police reports, hospital searches, and a public appeal after 14 years. The efforts made by the Applicants herein, compounded by the vast investigative resources utilized by the National Police Service to locate one of their own missing officers, satisfy the absolute highest threshold of a diligent search.

The Court determines that no further inquiries could reasonably be expected of the Applicants, and they have fully discharged their burden under this limb.

### The Statutory Intersection of Civil Presumptions and Criminal Inquests

32. Perhaps the most legally complex and highly contested issue in matters of this nature is the absence of a formal Magistrate's inquest.
33. Section 386(1)(d) of the Criminal Procedure Code (CPC) mandates that an officer in charge of a police station, upon receiving information that a person is missing and believed to be dead, shall immediately send a full report to the Director of Public Prosecutions (DPP) detailing the circumstances of the disappearance.
34. Subsequently, section 387(1) of the CPC states that a Magistrate empowered to hold inquests shall, in the case of a missing person believed to be dead, hold an inquiry into the cause of death. Furthermore, section 387(6) dictates that at the termination of an inquiry relating to a missing person believed dead, the magistrate shall report the findings to the DPP and make explicit recommendations on whether the standard seven-year period regarding the presumption of death under section 118A of the Evidence Act should be reduced. Finally, section 388(1) empowers the DPP to direct a magistrate to hold such an inquiry.
35. The strict, literal interpretation of these provisions suggests that a concluded administrative inquest is a mandatory condition precedent to a civil declaration of death. This rigid, formalistic approach was adopted in ***In re Estate of John Mbogo Mwangi (Deceased) [2020] eKLR***. In that case, the Court dismissed an application for the presumption of death specifically because the applicant failed to demonstrate compliance with the procedural

inquest requirements under section 386 and 387 of the CPC, noting that statutory procedures must be strictly followed and the absolute burden of proving such compliance lay with the applicant.

36. Conversely, a more purposive, constitutional, and equitable interpretation has been applied in numerous other decisions. In cases such as ***In re Estate of Njoroge Mwaniki Gichamba [2021] eKLR***, the Court granted the presumption of death under section 118A after 24 years of absence without demanding proof of a concluded CPC inquest, focusing entirely on the substantive civil evidence of absence and due diligence.
37. More recently, in ***In re Presumption of Death of Mzee Kuni Hele Halanka [2026] KEHC 91***, the Court directly addressed the rigid application of statutory timelines and administrative procedures in cases of disappearance. Invoking the equitable maxim *ubi jus ibi remedium* (where there is a right, there is a remedy), the Court noted that it would be unfair and unconscionable to subject a suffering family to unending administrative limbo when the circumstantial evidence overwhelmingly pointed to the subject's demise. The Court granted the presumption after only 3 years and 10 months, bypassing the inquest requirement. Furthermore, in an appellate context, a 2025 Tribunal ruling regarding a crocodile attack victim held that an inquest and a court-certified death certificate are not mandatory prerequisites to establish *locus standi* for next of kin, provided the section 118A criteria are met.
38. This Court must resolve this jurisprudential conflict by analyzing the hierarchy of laws and the constitutional imperatives governing judicial authority. The Constitution, under Article 159(2)(d), strictly commands courts to administer justice without undue regard to procedural technicalities.

39. While Sections 386 and 387 of the CPC impose mandatory duties on the Police and the Magistracy to initiate and conduct inquests, they do not explicitly oust or strip the High Court of its original civil jurisdiction to hear applications under Section 118A of the Evidence Act. The duties under the CPC belong to the State apparatus. It is a well-established principle of administrative and constitutional law that a private citizen should not be prejudiced, penalized, or denied equitable relief due to the dereliction of statutory duty by state organs.
40. In the present case, the National Police Service was intimately aware of the Subject's disappearance, given that he was a serving officer. The State initiated a criminal prosecution for desertion but failed to initiate the mandatory inquest for a missing person under section 387 of the CPC, despite the clear mandate to do so. To adopt the rigid stance seen in **John Mbogo Mwangi** would mean punishing the Applicants—who have suffered the severe emotional and financial trauma of a missing patriarch for over a decade—for the institutional failure of the police and the DPP to trigger the inquest mechanism.
41. This Court aligns itself firmly with the progressive, constitutionally sound jurisprudence seen in **Mzee Kuni Hele Halanka** and **Njoroge Mwaniki Gichamba**. The analysis determines that while an inquest under section 387 of the CPC is highly desirable and serves as excellent corroborative evidence in presumption of death cases, it is not an absolute, inflexible condition precedent that bars the Court from exercising its original civil jurisdiction under section 118A of the Evidence Act, provided the civil burden of proof on a balance of probabilities is independently met by the Applicants.

#### The Implications of the "Deserter" Classification

42. The penultimate issue pertains to the Subject's official status as a police deserter. The record shows that JKM was gazetted as a deserter and

criminally charged. The question arises: Does the fact that a person is actively evading law enforcement (or presumed by the State to be doing so) rebut the presumption of death?

43. In normal circumstances, if a person has a compelling reason to hide—such as evading a pending criminal trial or debt—their failure to communicate with family might be construed as an act of self-preservation rather than evidence of death. However, this argument completely collapses upon a close scrutiny of the timeline in this specific case. The Subject disappeared in September/October 2014. He was not declared a deserter until November 2014, and the criminal case was not instituted until 2019. He did not disappear because he was charged; rather, he was charged because he disappeared.
44. This exact factual and legal scenario was expertly navigated by the High Court in *In re Estate of Joseph Ngingi Mbote KEHC 15407*. In that case, the subject was an Administration Police officer who went missing in April 2015 and was officially classified by the National Police Service as an "Officer on desertion". The father subsequently applied for a presumption of death. The Court granted the application, recognizing that the bureaucratic classification of desertion by the police service does not override the biological and civil realities of a decade-long disappearance with absolute zero proof of life.
45. Furthermore, the very State organ that accused JKM of desertion eventually conceded defeat. On 6 July 2020, the prosecution withdrew the criminal charges under section 87(a) of the CPC because the investigative machinery of the State, armed with warrants of arrest, could not locate him for over a year. The inability of the Directorate of Criminal Investigations—the primary investigative body in the country, where the Subject himself worked—to trace its own officer strongly reinforces the presumption that the Subject is no

longer alive. The "deserter" classification is, therefore, an administrative artifact that holds no substantive evidentiary weight in rebutting the strong presumption of death established under section 118A.

#### Ancillary Orders and the Births and Deaths Registration Act

46. The Applicants seek an ancillary order directing the Registrar of Births and Deaths to issue a Certificate of Death. Section 17 of the Births and Deaths Registration Act (Cap 149) outlines the duty to notify deaths and the procedures for registration. While the Act primarily contemplates the registration of physical bodies following a medical certification of death, judicial precedent has firmly established the mechanism for registering presumed deaths.
47. The issuance of a death certificate is not merely a bureaucratic formality; it is an essential, foundational legal instrument required by the Applicants. It is necessary to secure psychological closure, process any outstanding employment benefits from the National Police Service, initiate succession proceedings for the lawful administration of the estate under the Law of Succession Act, and reorganize their legal and financial realities after an eleven-year stasis.
48. Based on the foregoing, the Notice of Motion Application dated 19 November 2024 is found to be merited. The Court hereby makes the following orders:
  - (i) A declaration is hereby issued that James Kimathi M'Athiru (formerly Police Constable No. 52091), is legally presumed dead pursuant to section 118A of the Evidence Act.
  - (ii) The Registrar of Births and Deaths is hereby ordered and directed to forthwith register the presumed death and issue a Certificate of Death in respect of James Kimathi M'Athiru to the Applicants.

- (iii) Given the nature of these family proceedings, there shall be no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 30 DAY OF MARCH 2026**

**HELENE R. NAMISI  
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Applicants:

Ms Nechesa

Court Assistant

Lucy Mwangi