

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY

MISC. SUCCESSION NO. E002 OF 2024

IN THE MATTER OF SAMWEL NYAMWAYA AKEYO ONYANGO

BETWEEN

MILLICENT AKINYI AKEYO.....1ST APPLICANT

**HARRISON OWUOR AKEYO.....2ND
APPLICANT**

AND

**HON. ATTORNEY GENERAL.....
RESPONDENT**

RULING

[1] Before the Court for determination is the Amended Notice of Motion dated 30th January 2024. It was filed by the two applicants, **Millicent Akinyi Akeyo** and **Harrison Owuor Akeyo** pursuant to **Section 118A** of the Evidence Act, **Section 3A** of the Civil Procedure Act, and all enabling provisions of the Law for orders that:

[a] Service of this application be dispensed with (spent).

[b] This application be certified urgent and heard and disposed immediately. (spent)

[c] The subject herein, **Samwel Nyamwaya Akeyo**, be presumed dead.

[d] The Registrar of Deaths do issue a Certificate of Death in respect of the said **Samwel Nyamwaya Akeyo**.

[e] The Court do issue any other or further orders as the circumstances of the case may demand.

[2] The application was premised on the grounds that the subject, **Samwel Nyamwaya Akeyo**, left home in or about the year 1993, over 30 years ago, and has never been heard of since. The applicants further averred that, over that period of time, the subject has not been in communication with his immediate family members who ordinarily should have been in communication with him. The applicants further averred that the subject left behind a wife, the 1st applicant herein, and three children, namely: **Beryl Atieno Nyamwaya, Grace Achieng' Nyamwaya** and **Reagan Okoth Nyamwaya**, who are now adult members of the family.

[3] The applicants further deposed that the subject also left behind his siblings, including **Harrison Owuor Akeyo**, the second applicant herein, who is the subject's eldest brother. In addition, the subject left behind property, including a piece of land PARCEL NUMBER CENTRAL/ KARACHUONYO/KONYANGO/1147 which the family urgently needs to utilize in their day to day livelihood. The applicants averred that, in addition to reporting the subject's disappearance to the Police and the area chief, they searched in all prisons, hospitals and morgues around, but failed to trace him. The applicants therefore contended that, unless the Court intervenes

and grants the orders herein sought, the family has no other recourse.

[4] The application was supported by two affidavits sworn by the two applicants as well as affidavits of two of the children of the subject, namely, **Beryl Atieno Nyamwaya** and **Reagan Okoth Nyamwaya**. Their averments were essentially the same.

[5] In response to the application, the respondent filed Grounds of Opposition dated 13th June 2024, contending that:

[a] The applicants have not demonstrated by credible and reliable evidence that they have made efforts to trace the subject, for instance, by filing a police report or tracing him in his last known residence in Mombasa, and the searches have been unsuccessful.

[b] The applicants have not met the criteria set out in **Section 118A** of the Evidence Act.

[c] There is no evidence to show that the applicants are close relatives of the subject; or that the children mentioned are the children of the subject.

[6] With leave of the Court, the applicants filed an additional affidavit which they titled as a Replying Affidavit. The affidavit was sworn by the 1st applicant on 3rd March 2025. She deposed that she had the authority of the 2nd applicant to swear the affidavit on his behalf. A copy thereof was attached to the affidavit as Annexure MAO-1. The applicants deposed that the respondent's Grounds of

Opposition are misplaced, an afterthought and a waste of judicial time.

[7] The applicants reiterated that the 1st applicant is the wife of the subject; while the 2nd applicant is his eldest brother; and that the 1st applicant and the subject were indeed married and were blessed with three children. The applicants annexed copies of Certificates of Birth and affidavits sworn by two of their children to prove the fact. They further deposed that the application herein had long been allowed after the Attorney General failed to file a response thereto.

[8] The applicants also pointed out that, by the time counsel for the respondent came on record and asked for time to file a response, the Court had already granted them orders to gazette the disappearance of the said **Samwel Nyamwaya Akeyo**; which Gazette Notice was published on 16th day of November 2024. They exhibited a copy of the Notice as an attachment to the 1st applicant's affidavit as Annexure MAO - 3. They pointed out that at no time did the respondent raise any objection to that gazette. The applicants also annexed copies of documents, marked Annexure MAO-4, to confirm that the matter was reported to the Police as well as the area chief.

[9] In the affidavits of **Reagan Okoth Nyamwaya** and his sister, **Beryl Atieno Nyamwaya**, the deponents reiterated the assertions by the applicants and confirmed that it was within their own knowledge that their mother had traveled on several occasions to

Mombasa and to various hospitals looking for their father but her searches have not been successful. They added that given the number of years that have passed by without hearing from their father they honestly believe he could have probably passed on and must have been buried somewhere without their knowledge.

[10] Accordingly, the applicants prayed for an order declaring the subject dead to allow the 1st applicant to proceed with the administration of his estate and recover some of their properties taken by our uncles.

[11] The application was canvassed by way of written submissions, pursuant to the directions given herein on 6th February 2025. The applicants relied on their written submissions dated 31st March 2025. They proposed one issue for determination, namely, whether their application herein is merited. They quoted the provisions of **Section 118A** of the Evidence Act and submitted that, in the absence of evidence to the contrary, the presumption of death should be invoked in the circumstances of this case. They reiterated their posturing that they are the closest persons to the subject and hence would best know of his whereabouts. They submitted that the subject having disappeared for over 30 years without any form of contact with his family is proof enough that he must be dead.

[12] The applicants referred the Court to **Re J O O** (Miscellaneous Application E136 of 2024) [2025] KEHC 1974 (KLR) (20 February 2025) (Ruling) in which it was held that the chief's letter was

sufficient proof that the subject had been missing for over 7 years and therefore that the applicant had met the requirements of **Section 118A** of the Evidence Act. They also relied on **Re Muguna M'mwere** (Presumption of Death) [2021] eKLR where the evidence of the subject's sister and daughter was accepted as sufficient proof that the subject was dead to warrant the invocation of the presumption of death. On the basis thereof, the applicants urged the Court to allow their application and grant the orders sought.

[13] Counsel for the respondent relied on the written submissions dated 14th April 2025 in which they reiterated their stance that the applicants never acted on the disappearance of the subject until the 22nd May 2024 when they reported to the chief solely for purposes of filing the above suit. In the premises, the respondent proposed the following issues for determination:

[a] whether the subject should be presumed dead under **Section 118A** of the Evidence Act.

[b] Whether there is sufficient evidence to presume that the alleged missing subject is dead;

[c] Whether there is adequate evidence to prove that the applicants are close relatives to the missing subject.

[14]The respondent submitted that **Section 118A** of the Evidence Act gives the court discretion to give orders it deems necessary in the interest of justice; and that sufficient evidence must be placed before it to warrant the exercise of that discretion.

On the authority of **Re matter of Pius Mukono Murage** (Presumed DCD) [2019] KEHC 9557 (KLR) and **Re Oregon,' Musau Muasya** (Presumed Deceased) [2021] eKLR the respondent argued that there is an elaborate procedure set out in the Criminal Procedure Code which must be followed in such instances; and which the applicants are yet to comply with.

[15]It was further the submission of the respondent that the applicants have not demonstrated by credible and reliable evidence that they have made efforts to trace the subject in his last known residence in Mombasa, and the search has been unsuccessful. The respondent pointed out that no explanation was given why the extract from the OB, if indeed the matter was reported to the Police, was not filed in court. In the same vein they submitted that the applicants ought to have availed formal documents to prove that they had searched in all prisons, hospitals, morgues as alleged.

[16]I have given due consideration to the application together with its Supporting Affidavits. I have also paid attention to the response filed thereto as well as the written submissions filed herein by learned counsel. The application was filed pursuant to **Section 118A** of the Evidence Act which provides:

“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.”

[17]For the purposes of the above provision, **Section 386** stipulates that:

“The officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person -

(a) has committed suicide; or

(b) has been killed by another or by an accident; or

(c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or

(d) is missing and believed to be dead; shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister, shall proceed to the place where the body of the deceased person is, and shall there make an investigation and draw up a report on the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), the marks appear to have been inflicted; and the report shall in the case of paragraph (a), (b) or (c); be forwarded forthwith to the nearest magistrate empowered to hold inquests; and in the case of paragraph (d) shall immediately send to the Director of Public Prosecutions through the Commissioner of Police as full a report as possible together with details of all supporting evidence relating to the circumstances surrounding the disappearance and the grounds upon which the death of that person is presumed to have taken place.

(2) When, except in the case of a missing person believed to be dead there is any doubt regarding the cause of death, or when for any other reason the police officer considers it expedient to do so, he shall, subject to any rule made by the Minister, forward the body, with a view to its being examined, to the nearest medical officer or other person appointed by the Minister in that behalf, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render the examination useless.

(3) When the body of a person is found or a person has committed suicide or has been killed by another or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, a person finding the body or becoming aware of the death shall immediately give information thereof to the nearest administrative officer or police officer.”

[18] It is therefore imperative that before the orders sought can be granted, it be demonstrated that the matter had been reported to the Police and if need be, investigations conducted by the Police and where necessary by a magistrate by way of an inquiry. This is

because **Section 387(6)** of the Criminal Procedure Code states that:

“6) In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Director of Public Prosecutions and shall make recommendations as to whether or not the period regarding the presumption of death provided for by section 118A of the Evidence Act should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.”

[19] Further to the foregoing, **Section 388(1)** of Criminal Procedure Code provides:

(1) The Director of Public Prosecutions may at any time direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provisions of that section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.

[20] In this instance, the applicants adduced evidence to show that they are close relatives of the subject. In particular, there is credible proof that the 1st applicant is the wife of the subject; and that the 2nd applicant is his eldest brother. There is also credible proof that the 1st applicant and the subject have three children, namely: **Beryl Atieno Nyamwaya, Grace Achieng Nyamwaya** and **Reagan Okoth Nyamwaya**. On the basis of the evidence presented herein, I entertain no doubt that the subject has been missing for over 7 years considering that his closest family members who ordinarily would have heard from him averred that they have not heard or seen him for over 30 years.

[21] It is manifest however that the applicants are yet to comply with the applicable law relating to missing persons. Although at paragraph 6 of her Affidavit sworn on 3rd March 2025 the 1st

applicant deposed that a report was made to the Police, there is no proof of any such report having been made. As pointed out by the respondent, it would be expected that an OB extract or some other documentary proof of that kind be availed to demonstrate that indeed a report was made to the Police with specific details as to the police station concerned. This is important because it is upon such report that the Police can activate their response in terms of the provisions of **Sections 386 and 387** of the Criminal Procedure Code to investigate the matter.

[22] Secondly, reference was made by the applicants to a letter dated 22nd May 2024 from the area chief. This tends to suggest that prior to the filing of the instant application on 15th February 2024 no report of any kind had been made in respect of the subject's disappearance. The assertion by the respondent that the letter was obtained afterwards for the specific purposes of the instant application is therefore no entirely unfounded.

[23] Lastly, the applicants relied on a missing person notice posted in some publication which the applicants referred to as the Gazette. That notice is illegible, the date is not discernible and the exact newspaper is not ascertainable from the face of it. In **Re matter of Pius Mukono Murage** (Presumed DCD) [2019] KEHC 9557 (KLR) it was held:

"There is an elaborate procedure to be followed under the Criminal Procedure Code for declaring a missing person as dead. Where the statute has made provision for the procedure to be followed, that procedure must be strictly followed"

[24] Similarly, in **Re Oregon Musau Muasya** (Presumed Deceased) [2021] eKLR it was held that:

"A declaration that a person is presumed dead is a serious presumption that ought only to be made when the court is satisfied that based on the circumstances of the case, there is sufficient material that the person must be dead. It is not merely the lapse of time that the court considers but also the steps made by the applicant to trace the whereabouts of the subject. Such steps as inquiries made amongst the close relatives, reporting of missing person to the police, (possibly) newspaper advert are all steps which may go towards showing that the subject, in all probability, must be dead. "

[25] In the result, it is my finding that the instant application is premature. The same is hereby struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY
OF APRIL 2026**

.....
OLGA SEWE
JUDGE