

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**MISC. CIVIL APPLICATION NO. E004 OF 2024**

**IN THE MATTER OF DECLARATION OF DEATH OF  
GODFREY MUKATHE MACIIKA**

**AND**

**IN THE MATTER OF ARTICLE 159 OF THE  
CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF SECTION 11, 1B, AND 3A OF  
CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 118A OF EVIDENCE  
ACT, CAP 80 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 51 RULE 1 OF CIVIL  
PROCEUDRE RULES**

**AND**

**IN THE MATTER OF JOHANA MALIIKA  
MUKIGO.....APPLICAN  
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**R U L I N G**

1. The Applicant filed a Notice of Motion dated 8<sup>th</sup> May 2024 seeking orders:-

- (i) That honourable court be pleased to issue an order presuming Godfrey Mukathe Maciika alias Hazard dead before the statutory period of seven (7) years.
- (ii) That the honourable court be pleased to order the Registrar of Births and Death Marimanti to issue a Death Certificate in respect to Godfrey Mukathe Maciika.
- (iii) That the costs of Application be in the cause

2. The Application was brought under Article 159 of the Constitution, Sections 1A, 1B and 3B of the Civil Procedure Act, Section 118 of the Evidence Act and order 51, Rule 1 of the Civil Procedure Rules.

3. The Applicant stated the grounds reproduced verbatim that:-

- (i) Godfrey Mukathe Maciika died on 26<sup>th</sup> July 2023 after being shot by bandits.
- (ii) That there is an OB reporting the disappearance of Godfrey Mukathe Maciika at Makutano Police Station.
- (iii) That there is an eye witness confirming the death of Godfrey Mukathe Maciika.
- (iv) That despite the report having been made, the police have made no attempts to have the case investigated.
- (v) That owing to the eye witness report that the said Godfrey Mukathe Maciika was shot by bandits, the family, relatives and clan elders performed the necessary community rituals in accordance to Kitharaka Customary Law to declare to Godfrey dead and there is no doubt whatsoever that he is dead.

- (vi) That there is no evidence to the contrary to suggest that Godfrey is alive.
- (vii) That this application is brought without any ill motive whatsoever and it is only for the purposes of helping the family proceed with succession of the deceased.

4. Johana Maciika Mukigo, the father of the subject filed a supporting affidavit in which he stated that his son Godfrey Mukathe Maciika left home on 26<sup>th</sup> July 2023 in the company of Julius Mucimi (subject's uncle) to hunt in Meru National Park and never returned home. That Julius Muciimi Mukigo returned and reported that Godfrey Mukathe Maciika had been shot dead by bandits. That he subsequently reported the matter to Makutano police station, the assistant Chief Kangoro location and assistant Chief Mauthini sub-location. That he had also written to the ODPP

requesting an inquest which request elicited no response.

5. Johana Maciika Mukigo further stated that the family had given up on finding the subject and held rituals as per Kitharaka customs to declare his son dead.

6. Jerica Kathu Kugeria, mother of the subject, filed an affidavit stating that they had tried to trace the son in vain and that she believed that he was dead.

7. Another affidavit was filed by Julius Muciimi Mukigo stating that he was with Godfrey Mukathe Maciika and others when they were attacked by bandits while fishing at River Rwuei within Meru National Park. That he believed Godfrey was shot dead and his body could not be recovered for post-mortem. That he visited DCI offices and wrote a statement to that effect.

8. The court upon reading the Application directed that both the Director of Public Prosecutions (DPP) and

the Attorney General be enjoined in the proceedings to shed light on the averments contained in the supporting affidavits.

9. The ODPP responded to the Application vide an affidavit sworn by Number 258666 PC Emmanuel Kibet, an Investigator with the Directorate of Criminal Investigation at Tharaka North Sub-County. He stated that Mr. Julius Muciimi Mukigo who alleged was with the subject had not reported the incident of a bandit attack inside the Meru National Park. That the said Julius Muciimi was unwilling to interact with police to give information about Godfrey Mukathe Maciika and that he only recorded a statement on 5<sup>th</sup> September 2023 upon police learning that he (Julius Muciimi Mukigo) had been remanded at Marimanti G.K. Prison.

## **Submissions**

10. Parties were directed to file submissions. In submissions dated 19<sup>th</sup> December 2024, the Applicant's Counsel stated that the Respondents did not respond to the Application within the time directed by the court and the Application therefore was unopposed. The Applicant identified one substantive issue for determination being whether the orders sought should be granted.

11. The Applicant submitted that they had shown that no investigation or inquest had been conducted by the authorities despite request by the family of the subject. He submitted that the affidavit of Julius Muciimi Mukigo, showed that the subject was killed by bandits, while that of the Applicant proved that the subject had not been heard of since 26<sup>th</sup> July 2023 and should be presumed dead. The Applicant relied on the case of **In Re Bernard Kinyua Kiguru** (presumed deceased) **Misc. Civil Application No.**

**28 of 2023 [2024] KEHC 2203 (KLR)** and In Re **WMN (Miscellaneous Civil Application E008 of 2024 [2024] KEHC 5537 (KLR))**. In both cases a similar application was allowed.

12. In submissions dated 20<sup>th</sup> September 2025, the DPP identified the issue whether the Applicant should be granted orders presuming Godfrey Mukathe Maciika dead before the statutory period of seven years. They submitted that the subject had been missing for only two years, falling short of the 7 years prescribed by law.

13. The DPP submitted that the Applicant had not followed the procedure set under section 386, 387 and 388 of the Criminal Procedure Code. They urged that the Application was premature and should be dismissed in its entirety.

14. The Attorney General, with leave of the court, filed submissions dated 4<sup>th</sup> February 2025. Their

submissions centred on the applicable law and the steps taken by the public officers including, the chief and the police. They submitted that P.C Emmanuel Kibet of DCI had sworn an affidavit showing that there were ongoing investigations and urged the court to treat the subject as a missing person. The Attorney General further submitted that the Application was not merited and should be dismissed with costs.

### **Analysis**

15. The only issued for my determination is whether a presumption of death order should issue in respect of Godfrey Mukathe Maciika.
16. The law governing circumstances in which a person may be presumed dead is set out in section 118A of the Evidence Act Chapter 80 Laws of Kenyan 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. In this case, the Applicant contends that his son has not been seen since he left home on 26<sup>th</sup> July 2023, when he was allegedly shot by bandits. The period between then and the date of the Application was 1 year 2 months. The period between then and now is two and a half years. Clearly this is a period way below the 7 years provided by law.

18. When a person has been missing and unheard of for period less than seven years, an order for presumption of death may only be issued in accordance with section 387(6) and 388(4) of the Criminal Procedure Code Cap 75 Laws of Kenya. The procedure is set out as follows:-

- (i) The conduct of an inquiry by a magistrate in respect of a missing person believed to be dead
- (ii) The termination of the inquiry and recording of findings by the magistrate
- (iii) The submission of a report and recommendations to the Director of Public Prosecutions, including the recommendation whether or not the period regarding the presumption of death provided for by section 118A of the Evidence Act (Cap. 80) should be reduced and if so, what lesser period should, in the circumstances of the death, be substituted for the period of seven years.
- (iv) The direction by the Director of Public Prosecution, upon consideration of the magistrate's recommendations, requiring the magistrate to make an order specifying the

period after which death shall be presumed, upon the expiry of which the Registrar-General may issue a certificate of death in accordance with the law.

19. I have critically examined the supporting affidavit(s). The Applicant wholly relied on the information given by one Julius Muciimi that they were together with the subject when they were attacked by bandits. There was no other proof that he was shot dead. The affidavit sworn by Julius Muciimi merely stated that he suspected that the subject died while they escaped a bandit attack at the Meru National Park.

20. I have considered the replying affidavit of PC Emmanuel Kibet of DCI which confirmed that a missing person report was made at Makutano Police Station vide OB No. 05/01/08/2023 by Johana Maciika. He stated that the police dispatched a signal

to all Police Stations in the country in an effort to trace the missing person.

21. It appears from the above that the case was still under investigation. It also appears to this court that the effort was lackluster as no progress in the search has been demonstrated by the Respondents.

22. It is trite that an application of this nature can be entertained before the mandatory 7 years, but only in the clearest of cases and following the procedure already set out above. I am persuaded by the reasoning of Nyakundi J. in the case of **SKM [2024] KEHC 5537 KLR** where his Lordship stated thus:-

**17. “ I also place reliance in the case of Re Osman Bachit [1997] 4 MLJ 445 where the learned Judge held that, in cases where circumstantial evidence existed that may prove that the person is dead, family or interested party cannot be forced to wait**

**for seven agonizing years just for formality. That holding is acceptably rational and justifiable in nature although an action of that nature by the courts must be exercised with abundance of caution and in most exceptional circumstances. He who seeks to overcome the presumption of continuance of life must adduce evidence of sufficient weight to contradict it. Anything short of that operates as blatant denial of existence of infinite possibilities.**"

[Underline mine]

22. In this case, and as I have stated before, the supporting affidavits did not show that all effort and procedure had been exhausted to warrant the Application being brought before the lapse of the mandatory 7 years. It is my finding that this case

was suitable for the procedure provided for under section 387 and 388 of the Criminal Procedure Code.

23. In the end, I have come to the conclusion that the Application is premature. There is no demonstration that all lawful effort including search, or inquest have been exhausted. The evidence presented is not sufficient to presume the subject dead. The Application is disallowed.

24. On costs, I decline to award costs to the Respondents as their participation in the proceedings was required by the court in their capacity as public authorities concerned with the subject matter. Each party shall therefore bear their costs.

**Ruling delivered, dated and signed at Chuka this 27<sup>th</sup> day of April 2026.**

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**R. LAGAT-KORIR**

## **JUDGE**

**Ruling delivered in the absence of Applicant, and in the presence of Ms Rukunga for the Respondent. Muriuki (Court Assistant).**

ORIGINAL