



In re Bernard Kinyua Kiguru (Presumed Deceased) (Miscellaneous Civil Application 28 of 2023) [2024] KEHC 2203 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL APPLICATION 28 OF 2023
AK NDUNG’U, J
FEBRUARY 28, 2024
IN THE MATTER OF SECTION 118A OF THE EVIDENCE ACT
AND
IN THE MATTER OF BERNARD KINYUA KIGURU (PRESUMED DCD)
IN THE MATTER OF
MARGARET WAIRIMU KINYUA EXPARTE APPLICANT**

RULING

1. Margaret Wairimu Kinyua approached this court vide an ex-parte Notice of Motion dated 17th October, 2023 and premised on Section 1A & B & 3A Civil Procedure Act and Section 118A of the Evidence Act seeking the following orders;
 1. Spent
 2. That this Honourable Court be pleased to declare and presume dead one Bernard Kinyua Kiguru who disappeared and has not been heard of continuously for the last 8 years.
 3. That this Honourable court do issue an order to the Registrar of deaths to issue a death certificate for Bernard Kinyua Kiguru.
2. The application is based on 6 grounds as particularized on the face thereof.
3. It is further supported by the Applicant’s affidavit sworn on the 17th October, 2023. Further affidavits confirming the fact of the missing person have been sworn by Allan Waigwa Kiguru, a brother to the missing person and by James Kiguru, John Muritu Kinyua and Pauline Nyaruai Kinyua, children of the missing person.
4. In a nutshell, the gist of the affidavits and grounds in support of the application is that Bernard Kinyua Kiguru (hereinafter the missing person) left home in January, 2015 allegedly to search for work in



Tanzania after retirement from the Kenya Wildlife Service in June 2020 since then, he has not been heard of. A report was made at Ng'arua Police Station vide OB No.13/25/02/2019.

5. It is stated that it is now over 8 years since the missing person was seen or heard from by those who might be expected to have heard from him if he were alive.
6. Efforts to trace him with the assistance of the missing person's brother sometime in August, 2022 bore no fruit. Annexed to the affidavit in support are a letter from Chief Leah W. Gitau, missing person OB extract No. 13/25/02/2019, a letter by OCS Namanga Kenya to OCS Namanga Tanzania, the Applicant's medical documents, letter to the Director of Pensions and Birth Certificates of the children of the missing person.
7. I have considered the application as well as the affidavits and the annexures thereto. Section 118A of the *Evidence Act* provides that:- "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."
8. The presumption of death being a rebuttable presumption, the person seeking an order that the missing person be presumed dead must adduce sufficient evidence. (See *Halsbury's Laws of England*, 4th Edition Vol. 17(1) at paragraph 580-581).
9. A presumption of death is made where it is proved that a person has not been seen or heard of for seven years by close relatives who might have been expected to have heard of him. Due inquiry must therefore be made and a party must prove that the inquiry has been made.
10. In this case, there is evidence that the subject is missing since January, 2015 when he was last seen alive as he reportedly left for Tanzania to look for work. Since then, the Applicant and those who might be expected to have seen or heard from him have neither seen him nor heard from him despite the efforts made to trace him. Those efforts are well documented vide police reports and physical efforts and travel to trace the missing person.
11. Section 118A of the *Evidence Act* envisages that the missing person has not been seen, not by one person but by those who might be expected to have heard from him. What is required to be proved is that there are persons who are likely to have heard of the person sought to be presumed dead over that period, and that those persons have not heard of him, and all due inquiries have been made appropriate to the circumstances. On the material before court, the Applicant has demonstrated as much.
12. 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 the 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.
13. Am satisfied from the evidence on record that the Applicant has established the threshold for the grant of the order sought. I allow the application and make the following orders;
 - a. Bernard Kinyua Kiguru be and is hereby presumed dead.
 - b. The Registrar of deaths do issue a death certificate for Bernard Kinyua Kiguru.
 - c. Costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRUARY 2024



.....
A.K. NDUNG’U
JUDGE

