



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 177 OF 2015

IN THE MATTER OF SECTION 118A OF THE EVIDENCE ACT

AND

IN THE MATTER OF AN APPLICATION BY WILSON NDILANGO MAINGI

AND

IN THE MATTER OF MAINGI NDILANGO (PRESUMED DECEASED)

RULING

1. By Originating Summons dated 25th August 2015, the applicant has sued for the declaration by the court - as a precursor to seeking an order for administration of property known as 168 Mung'ala of which he is said to be the bona fide owner - that the person subject of the proceedings is deceased by determination of the following specific questions:

1. ***Whether a rebuttable presumption that the said Maingi Ndilango who has not been seen and/or heard from by the applicant herein Wilson Ndilango Maingi who is his bona fide son and/or anybody else known to the applicant for more than seven (7) years is deceased.***
2. ***Whether upon determination that the said Mainig Ndilango is deceased a death certificate can accordingly issue to the applicant forthwith.***
3. ***Whether the costs of this application may be in the cause.***

2. In support of the application, the applicant swore an affidavit of 25th August 2015 whose primary averments at paragraphs 3-6 thereof are as follows:

3. *"That on/or about March 1973 the above said Maingi Ndilango who was a mason retained by one Philip Mutiso to construct a house for him at Kambu in Makueni, he was never seen and/heard from by any member of his immediate family since the said time.*
4. *That subsequently on a date that I cannot immediately recall I received news from the said employer that Maingi Ndilango had not returned to his residence after visiting the construction site and indeed he could not be traced anywhere.*
5. *That the said employer refused to take me to the place Maingi Ndilango worked hence I looked for someone else to take me to the aforestated parcel of land but we could only find one person whose name is Munyao Musau and he told me that Maingi Ndilango may have been eaten by unknown wild animals.*

6. *That [consistent] and concerted efforts by myself were unsuccessful and currently all the family members and government officials seem lethargic to engage in the process of finding, tracing, or even establishing the whereabouts of Maingi Ndilango after such a long period.” (sic)*
4. The letter from the area chief Mumbuni Location, Machakos indicates that the applicant has four (4) sisters aged between 72 and 56. None has sworn an affidavit as a person with whom the deceased may have communicated to indicate that they have not heard from or of the deceased for at least seven (7) years as prescribed.

The Law

5. Section 118A of the Evidence Act which is cited by the applicant is in terms as follows:

“118A. *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.”*

3. Although the Summons herein is expressed to be brought under Order 37 of the Civil Procedure Rules, the appropriate provision is Rule 10 of the Probate and Administration Rules under the Law of Succession Act, which provides as follows:

“10. Application for order presuming death

An application for an order presuming the death of a person of whose death there is no sufficient written evidence and to whose estate a grant is sought shall be made by summons to the court and shall be supported by an affidavit setting out the grounds of the application”

Conclusion

6. It may be that the person the subject of these proceedings for declaration of death being the father of the applicant himself aged 79 years maybe dead, but there is a chance that he could be living. Before a declaration may be made the court must be satisfied that the person has not been heard of (and from) by persons who would ordinarily be expected to hear of him.
7. In this case, I consider that affidavits on the matter from the person’s employer Philip Mutiso; Munyao Musau, the person who ventured that the person ‘may have been eaten by unknown wild animals’ and the applicant’s siblings named in the letter by the area Chief dated 14th July 2014, are necessary for the court reaching a decision in this matter.
8. That as stated by the applicant *“the family members and government officials seem lethargic to engage in the process of finding, tracing, or even establishing the whereabouts of Maingi Ndilango after such a long period”*, without more, cannot justify the making of declaration of death.

Orders

9. Accordingly, the application by Originating Summons (O.S.) dated 25th August 2015 is adjourned to a date to be fixed at the Registry after the applicant has secured the affidavits of the persons named in paragraph (7) above. Costs in the cause.

DATED AND DELIVERED THIS 23RD DAY OF DECEMBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kibunja for Mr. Musyoka Kimeu for the Applicant

Mr. Ndola - Court Assistant.



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