

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
MISC. CIVIL APPL. 45 OF 2022

IN THE MATTER OF AN APPLICATION OF PRESUMPTION OF DEATH OF
OMARY HASSAN
DOTTO OMARY HASSAN APPLICANT**

RULING

20th July & 26th August 2022

ITEMBA, J

Dotto Omari Hassan has filed this application under section 2(1) (3) of the The Judicature and Application of Laws Act and section 95 of the Civil Procedure Code, seeking the court to make the following orders.

- (i) A declaration for the presumptive death of Omary Hassan who has not been seen by his family since the year 1981.*
- (ii) Upon such declaration the applicant who is the eldest daughter of the said Omary Hassan, be allowed to institute probate proceedings for the purpose of protection the estate of her father.*

The applicant has filed her own affidavit in support of the application and she avers that she was born on 17th July 1966 in Kirumba within

Ilemela District in Mwanza city. She attached her birth certificate to that effect. She states that since birth she has been living with his father at Kirumba area but in the year 1981 he disappeared and he has never been seen up to the time she is making this application. She explained that his father left their home stating that he was going to the market where he used to work as a businessman and he never came back. They searched for few days in vain and his uncle, one Selemani Hamis Mbaruku decided to report the matter to police, however, they no longer have a copy of the report book number also known as 'RB', because it has been a long time and the same is lost.

The applicant states further that having not heard from their father for a long time despite all the efforts, they decided to hold a clan meeting on 10th of February 2021 and it was agreed that it is reasonable to presume that Omary Hassan is dead. Following that agreement, the applicant was recommended to be an administratrix of his estate. The minutes of the said meeting of the family of Mzee Omari Hassan is also attached with this application.

It is further averred that Omary Hassan had left a wife and three children, the said wife had already passed away. He has also left three houses; two in Mwanza located at **Plot No.97 Block 'A'** Kirumba and house **No. 011/111** at Bugando Mission Street and the third house is in Tabora. He also left a market stall which he used for his business. That, it has been forty (40) years since his disappearance and his estate is left unadministered.

At the hearing the applicant was present in person and he was also represented by Mr. Paul Kipeja learned advocate who prayed for the affidavit of the applicant to form part of this application.

The learned advocate stated that there is no provisions which could support this kind of application thus they resorted to general provisions of the Judicature and Application of Laws Act and Civil Procedure Code which basically refers to court's jurisdiction. He reiterated what is in the applicant's affidavit and stated that, as there is no objection, the application should be granted and Omari Hassan should be declared presumed dead and the applicant be allowed to file a probate petition thereof. He also moved the Court to be persuaded by the High Court

decision **in the matter of Estate of Chrispine Kajuna and Lucia Msua**

@ Lucia Kajuna Misc. Civil Application no. 71 of 2021.

Upon further inquiry from the Court, it was stated that Omar Hassan was originally from Masagara area within Uyui in Tabora region and further a search was done in Tabora but he could not be found.

Having gone through the pleading and evidence herein the issue is one whether the application has merit.

The evidence shows that Omari Hassan has disappeared from his family home since 1980. That he was going to his business in the market as he would always do, but he never came back. He left his wife who is now the deceased, his three children and landed properties. Upon further inquiry, it was explained that a thorough search was done physically and using loud speakers and even announcing in the mosque. Further, it was stated that the two relatives, the brother of Omari Hassan and one Selemani Mbaruk, who are both deceased, went to Tabora to conduct a search but all the efforts proved futile.

In determining this application, I will be guided by section 117 and 122 of the Evidence Act which provides that:

'117. 'When the question is whether a man is alive or dead and it is proved that he has not been heard of within the preceding five years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who asserts it'.

Further to that, section 22 of the same Act is to the effect that:

'122. 'A court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case'.

It means therefore, for a court to be able to presume that someone is dead due to his disappearance, there must be evidence proving that a person alleged to be dead has not been heard within 5 years by those who would have naturally heard him, say his family, relatives and colleagues, if he had been alive. It goes therefore, even in the absence of the burial permit or death certificate, anyone may move the court to presume death and must adduce evidence from which the court can safely draw a conclusion that the person alleged to be dead might actually be dead.

When the presumption of death is proved, the burden shifts to the person who denies death to prove that the person alleged to be dead is alive. So far, there are no allegations to the contrary.

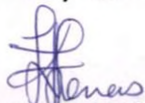
This application is further aiming at further processing the administration of estate of Omari Hassan. There is no objections raised so far. I find it reasonable to grant the application for the family to proceed with such applications through the applicant Dotto Omari Hassan.

Based on this background, evidence presented before the court and the legal provisions cited, I have no doubts that the disappearance of Omari Hassan for 40 years is long enough for him to be presumed dead. I therefore, grant the application and that Omari Hassan is hereby declared presumed dead.

If the applicant may wish to petition for letters of administration of the estate of Omari Hassan, her powers shall be limited to the administration of properties mentioned in this application which are two houses located in Mwanza in Plot No.97 Block 'A' Kirumba and Plot. No. 011/111 at Bugando Mission Street, one house in Tabora and a market stall.

DATED at **MWANZA** this 26th day of August 2022.




L.J. ITEMBA
JUDGE