

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL CAUSE NO. 5 OF 2023

In the matter of presumption of death of

FRANK WIRTH ----- PRESUMED DEAD

AND

MALISHA MKENZU (*Administrator of the Estates of*

***the Late AMINA MALANGO WIRTH*-----APPLICANT**

RULING

July 24th & 31st, 2023

Morris, J

This is one of those instances where this Court receives a delicate invitation to declare someone as **presumed dead**. This time, such order is sought in respect of one **Frank Wirth**. A chamber application is preferred and supported by affidavits of Malisha Mkenzu. The applicant is recorded as Wirth's cousin brother.

Extraction from the affidavits are depositions about the fate of Frank Wirth. I will summarize it. Frank was born on 19th August 1987. Joseph Wirth and Amina Malango Wirth (the applicant's in-law and aunt respectively)

legally adopted him about three years later; on 29th October 1990. Joseph Wirth, a Germany national, died in 1992 and Amina Malango, the widow, followed a decade later (2002). Consequently, the applicant was appointed to administer Amina Malango's estates.

In 2005, Frank disappeared from Usa River Academy School in Arusha. The disappearance was reported to and investigation was mounted by the police. Nevertheless, he has remained missing ever since. In order to finalize administration of the estates of late Amina Malango, this application was found to be necessary as it needs one to apply for administration of the estates of Frank Wirth.

Before hearing I ordered the applicant to publish a 30-day Notice of citation to the public in any English Newspaper with wide circulation. The order was complied with. The publication was made through Daily News of 22nd June 2023. No person has filed or appeared in Court to object the orders sought herein. During hearing the applicant was represented by Mr. Buberwa Prudence, learned Advocate. He submitted briefly that the application is made under ***the Judicature and Application of Laws Act***,



Cap 358 R.E. 2019 and section 95 of ***the Civil Procedure Code***, Cap 33 R.E. 2019.

He stated further that Frank Wirth disappeared and has been missing for about 18 years. Citing section 117 of ***the Evidence Act***, Cap 6 R.E. 2019 he argued that a person is presumed dead upon expiry of 5 years of his whereabouts being unknown. The Court was further referred to the cases of ***Re Dotto Omary Hassan***, Misc. Civil Application No. 45 of 2022 and ***Re Crispine Kajuna and Lucia Msua Kajuna***, Misc. Civil Application No. 71 of 2021 (both unreported). He prayed for the application to be granted.

I have considered the submissions for the applicant in line with the related record. I should perhaps start by stating that the application was brought under inherent jurisdiction of this Court. Unlike in other countries such as the United Kingdom where there is specific law concerning presumption of death (***the Presumption of Death Act***, 2013); in Tanzania no explicit law in that respect. Nonetheless, I am not reinventing the wheel in this regard. This Court has determined the like applications under its inherent powers. I have in mind cases such as ***Re Dotto Omary Hassan***;



Re. Lucia Msua @ Lucia Kajuna (*supra*); and **Re Fatuma Kitwana Ally**, Misc. Civil Application no 36 of 2022 (unreported).

Under section 1 (a) of the United Kingdom **Presumption of Death Act**, 2013, a person is presumed dead if he has not been known to be alive for 7 years period. My brother Mugeta J. in **Re Lucia Msua @ Lucia Kajuna** and **Re Fatuma Kitwana Ally** cases (*supra*) relied also on 5 years' absence provided by section 161 (1) of **the Law of Marriage Act**, Cap 29 R.E. 2019 to declare death of respective persons.

In this matter, Frank Wirth is alleged to have been missing for 18 years. I have seen a police letter dated 23rd June 2015 which states that the unsuccessful investigation of his death led the law enforcers to close the respective folder on No Further (Police) Action (NFA) basis. Further, by the order of this Court, citation was made for 30 days but still no one objected this application.

In **Re Mohamed Salehe Kaombwe (presumed dead) and Hamisi Mohamed Salehe** (*applicant*); HC Misc. Civ. Application 59/2022; this Court interpreted section 117 of **the Evidence Act** (*supra*) to imply that "when those who would have naturally heard from a person had he been alive have



not heard from him in the preceding five years, then the burden of proving that the said person is alive is on the person who says he or she is alive.”

In this matter neither Frank nor anyone else has come forward alleging that the former is alive. As the matter stands now, it is seemingly untenable to rebut the presumption sought in the current application.

For the above reasons, I find this application to be merited. Pursuant to the prayer in the application, I declare Frank Wirth as **presumed dead**. It is so ordered.



C.K.K. Morris

Judge

July 31st, 2023

The ruling is delivered this 31st day of July 2023 in the presence of the Mr. Malisha Mkenzu, the applicant; and his advocate, Mr. Buberwa Prudence, learned Advocate.



C.K.K. Morris

Judge

July 31st, 2023

