

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

MISC. APPLIC. NO.51 OF 2017

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

AND

IN THE MATTER OF THE ESTATE OF NYATOTA OJWANG (PRESUMED DEAD)

PAMELA ADHIAMBO.....APPLICANT

RULING

PAMELA ADHIAMBO (the applicant) has sought orders to issue that **NYATOTA OJWANG** be presumed dead and a certificate of death be issued to her. The application is premised on grounds that the said **NYATOTA OJWANG** disappeared from his home sometimes in early 1970's and has never been seen or heard from to date, particularly by his brother and parents.

The applicant got married to **NYATOTA**'s brother (one **NYAMITA OJWANG** who is now deceased) sometime in the early 1990's and she has never met nor seen him. It has been over 40 years since the said **NYATOTA OJWANG** disappeared from his home, and hopes of ever finding him have significantly dimmed. It is thus fair that for the sake of the administration of his estate, he be presumed dead.

The application is supported by the affidavit sworn by the applicant in which she deposes that her late husband **NYAMITA OJWANG** and his brother **NYATOTA OJWANG** were the only children and beneficiaries of the estate of **OJWANG MADANGA** who is now deceased.

By the time the applicant got married with the **OJWANG** home, **NYATOTA** had mysteriously disappeared from the home and as confirmed by a copy of the chief's letter dated 16/10/2017 signed by **JOSEPH MBOGA** (Chief of Kodera South Location). In the past 40 years, he has never been seen nor heard from.

The applicant's father-in-law **OJWANG MADANGA** (deceased) was and is still the registered owner of **LAND PARCEL NO. WEST KASIPUL/KODERA KARABACH/ 246** measuring 2.8 hectares as shown in the copy of official search marked **PA4**.

The applicant commenced succession proceedings vide **OYUGIS SUCCESSION CAUSE NO.174 OF 2016** but the cause cannot be confirmed until this application is heard and determined. No objection proceedings have been filed in respect of the said cause.

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.”

The chief's letter confirms the applicant's averments regarding the said **NYATOTA**. The death certificate confirms that his only known brother **NYAMITA** is now deceased. More than 7 years have elapsed almost 6 times over, without any contact from the said **NYATOTA**. In my view it is reasonable to presume that he is dead and chances of finding him alive have dimmed.

The application has merit and I declare that **NYATOTA OJWANG** shall be presumed dead and a certificate of death shall issue to the applicant.

Delivered and dated this 5th day of April, 2018 at Homa Bay

H.A. OMONDI

JUDGE

Mr. Nyakwamba holding brief for Mr. Moronge for Applicant