



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**SUCCESSION CAUSE NO 69 OF 2014**

**(Formerly Homa Bay Succession Cause No 151 of 2011)**

**IN THE MATTER OF THE ESTATE OF**

**WERE NYAKUMBA OSELU alias PETERLIS WERE NYAKUMBA (DECEASED)**

**BETWEEN**

**GEORGE OKOTH WERE..... APPLICANT**

**AND**

**FESTUS OCHIENG NYAKUMBA.....RESPONDENT**

**RULING**

1. By an amended chamber summons dated 27<sup>th</sup> June 2016 made pursuant to Rule 45 of the Civil Procedure Rules (2010), Rules 49, 63 and 73 of the Probate and Administration Rules, this court is urged to review the entire ruling and orders delivered by Majanja J. on 12<sup>th</sup> February 2016. The applicant also seeks that further evidence be considered on grounds that it is new and compelling, and thereafter render it's decision based on that new evidence.

2. The basis for seeking the orders is that there has been discovery of new and important matters which after the exercise of due diligence, could not be produced by the applicant at the time the order was passed. This new evidence is in the form of the applicant's relatives whom he says have now agreed to testify on his behalf and have sworn affidavits in support of his case. It is also stated that great harm will be visited upon the applicant if the order is allowed to stand, and it is in the interest of justice and fairness that the application be allowed.

3. In his supporting affidavit dated 14<sup>th</sup> May 2106, the applicant deposes that the Summons for Revocation of the grant issued to the respondent was brusquely dismissed by the contested ruling dated 12<sup>th</sup> February 2016 yet he is a true biological son and heir of the deceased **WERE NYAKUMBA OSELU ALIAS PETERLIS WERE NYAKUMBA** and among the first in the hierarchical order to inherit his property.

The applicant contends that there was a union between the deceased and his mother **MARCELINA APIYO** which resulted in:

**CHARLES OCHIEN'G WERE**

**MARY ATIENO WERE**

**ELIZABET AKINYI WERE**

**NICHOLAS ODHIAMBO WERE**

**GEORGE OKOTH WERE**

**ERICK OTIENO WERE.**

5. In opposing the application the respondent deposes in the replying affidavit that the summons for revocation was exhaustively heard for a period of almost two years where the applicant availed all the witnesses and at no time did he intimate to the court that he wished to call additional witnesses. The respondent contends that the application is an after-thought brought in bad faith and is merely intended to frustrate him.

6. The summons for revocation was dismissed by the ruling dated 12<sup>th</sup> February 2016 on grounds that the applicant had not proved on a balance of probabilities that he was the son of the deceased and that his mother was a wife to the deceased. The judge stated that his case raised more questions than answers. Further that addressing the matter concerning jurisdiction of the lower court which had issued the grant would serve no purpose in light of the findings the court had made.

7. Under Order 45 rule 1 an order or a decree can be reviewed where

- there is an error apparent on the face of the record
- there is discovery of new evidence which could not have been discovered despite due diligence

8. In arguing the application, MR WARA reiterated the contents of the applicant's supporting affidavit urging the court to heed to the provisions of Order 45 Rule 1. The Respondent submitted in court that there is nothing new in what the applicant is attempting to introduce as the issues in the supporting affidavits were raised before Majanja J and the persons named as witnesses had infact been mentioned

9. I think the yardstick in such an application is not whether there are additional large numbers of persons to testify who did not testify earlier on, but whether the content of what they wish to present to the court is any different from what had earlier on been presented, and whether it would not have been possible to access such evidence earlier on despite exercising due diligence.

10. The applicant has not disclosed both in his initial affidavit and the supplementary affidavit what difficulties he had in getting these additional eleven witnesses whom he describes as his relatives. What due diligence did the applicant exercise in trying to get the witnesses to come to court? In fact on 12/11/2015 the applicant's counsel informed the court that he wished to close the applicant's case and there was no hint whatsoever that the applicant had desired to call additional evidence but had encountered an assortment of inhibitions. Of greater significance is that the content of their affidavit is no different from what was earlier presented before the court, and the mere fact that ten or eleven people say that an individual was the son of a deceased person does not convert it into a fact. I get the distinct impression that having read the court's findings, the applicant now wishes to patch up the loopholes pointed out by the court-which is not the spirit of the provisions of order 45.

11. Consequently the application lacks merit and is dismissed with costs to the respondent.

**Delivered and dated this 14<sup>th</sup> day of February 2017 at Homa Bay**

**H. A. OMONDI**

**JUDGE**