

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
SUCCESSION CAUSE NO. 281 OF 2014
IN THE MATTER OF THE ESTATE OF OUNDA OKENDO alias
OUNGA AKENDO (DECEASED)

BERNARD OCHIENG OTAYE.....
APPLICANT

RULING

[1] This ruling is in respect of the Notice of Motion dated 24th June 2025. The application was filed by **Benard Ochieng Otaye** pursuant to **Rules 63, 67 and 73** of the Probate & Administration Rules as read with **Order 45 Rules 1(1) and (2)** of the Civil Procedure Rules, and all other enabling provisions of the law, for the following orders:

[a] That the Court be pleased to review its ruling dated 31st July 2023 and expressly issue Grant of Letters of Administration Intestate to the applicant;

[b] That upon Prayer 1 being granted, the Court be pleased to fix a date for confirmation of the said Grant.

[2] The application was premised on the grounds that there is an error and/or oversight on the face of the ruling dated 31st July 2023 making it impossible to conclude this Succession Cause. The applicant averred that, although the Court revoked the Grant that was confirmed on 23rd November 2015 in the name of **Joseph Ouma Ounda** and ordered the estate to revert to the name of the deceased for distribution, it did not expressly make an order for the issuance of

a fresh Grant. Consequently, distribution of the estate has become impossible for all practical purposes.

[3] The applicant averred that the instant application has been made with the consent of all the surviving beneficiaries and therefore no prejudice will be occasioned if the orders sought are granted. He therefore prayed that the application be allowed and orders granted as prayed.

[4] The application was supported by the affidavit of the applicant, sworn on 24th June 2025, to which he annexed copies of the ruling dated 31st July 2023 the letter from the area Chief dated 4th June 2025 as well as the consent forms duly filled by the two surviving beneficiaries of the deceased who rank in *pari passu* with the applicant. The applicant also annexed a Certificate of Death to demonstrate that the initial petitioner, **Joseph Ouma Ounda**, has since passed away.

[5] Order 45 Rule 1 of the Civil Procedure Rules, one of the enabling provisions relied on by the applicant, states:

(1) any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

[6] In the instant application, the applicant contended that there is an error apparent on the face of the record; in that the Court revoked the Grant issued herein to **Joseph Ouma Ounda** but failed to re-issue a fresh Grant to ensure the continued administration of the deceased's estate. As was observed in **Muyodi v Industrial and Commercial Development Corporation & another** [2006] 1 EA 243:

"There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us...an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

[7] It is manifest from the ruling dated 31st July 2023 that the Summons for Revocation of Grant was allowed and an order made for land parcel number Kanyada/Kanyango/Kalanya/1143 to revert to the name of the deceased, **Ounda Okendo alias Ounga Okendo**, for purposes of distribution to the rightful beneficiaries. It is also apparent on the face of the record that the Court did not appoint an alternative administrator; and therefore the estate has been without an administrator ever since.

[8] In the circumstances, I am satisfied that the applicant has given justification for review for purposes of **Rules 63, 67 and 73** of the Probate & Administration Rules as read with **Order 45 Rule**

1(1) and (2) of the Civil Procedure Rules. Therefore, the application dated 24th June 2025 is hereby allowed and orders granted as hereunder:

[a] That the ruling dated 31st July 2023 be and is hereby reviewed so as to expressly state that a fresh Grant of Letters of Administration Intestate be and is hereby issued to the applicant, **Benard Ochieng Otaye;**

[b] That upon being issued with Grant as ordered, the applicant to forthwith file an application for confirmation of the said Grant.

[c] That costs of the application to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY
THIS 9TH DAY OF MARCH 2026**

.....
OLGA SEWE

JUDGE