

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.18 OF 2015

FORMERLY OYUGIS SUCCESSION CAUSE NO 128 OF 2008

IN THE MATTER OF DAUDI MOSI NGOTO (DECEASED)

DAVID NGOTO MOSI..... APPELLANT

VERSUS

JOSIAH KICHE MOSI.....RESPONDENT/PETITIONER

RULING

1. By an application dated 5th October 2016 **DAVID NGOTO MO** seeks that there be orders for retrial of the matter and so the court pronounces itself with clarity taking into account relevant facts and the interest of the beneficiaries. In the alternative the court is urged to review the ruling made on 8th May 2016 and any other consequential orders issued.

2. The basis for these prayers is that on 8th May 2016, **MAJANJA (J)** ruled that the parcel of land known as **C/KARACHUONYO/KONYANGO /1090** was to vest to the Petitioner/Respondent. The County Surveyor with the assistance of the Assistant County Commissioner was directed to subdivide parcel No. **C/KARACHUONYO/KONYANGO/1088** to each beneficiary taking into account the area each beneficiary has constructed their homestead save the deceased.

3. On 12th February 2016, a survey mandated by the judge was undertaken by the District Surveyor Rachuonyo District in the presence of the beneficiaries and their legal representatives. Although the survey proceeded peacefully, it was not concluded because the applicant and his legal representative walked away. This led to a second survey ordered by the court and conducted on 9th September 2016 in the presence of the respondent and his legal representatives on one hand, and the applicant minus his legal representative.

4. The applicant explains that the sole purpose of this second survey was to reduce the portions which had been demarcated in the first survey as falling within the homesteads and currently under the occupation of the applicant and the family of **SAMUEL OYOO MOSI**.

5. The applicant complains that the respondent and his wife threatened to burn down the house belonging to **SAMUEL OYOO MOSI'S** widow if she did not accept the results of the second survey. The surveyor too is accused of exceeding his mandate and acting unreasonably to the extent that he purported to modify the sizes of the homesteads as currently under the occupation of the parties.

6. It is the applicant's contention that the two surveys did not achieve their purpose because the first one was incomplete while the second one was prejudicial. He explains that the homestead which was to be the main criteria for demarcation was not given prominence-instead factors such as land previously cultivated by the deceased was treated as an overriding criteria.

7. Once the second survey was completed the respondent is said to have fenced the property without waiting for the report to be presented and confirmed in court. It is the applicant's contention that prior to the filing of this Succession Cause, the titles for parcel **NO C/KARACHUONYO/KONYANGO/1090** had been fraudulently obtained by the respondent and the cause was filed to sanitize his mischief.

8. The contested ruling dated 8th May 2016 is criticized as having failed to consider all the relevant facts and ignored all the other dependants and widows. The effect is that the applicant and the family of **SAMUEL MOSI** will be dispossessed of land which they have occupied for over 5 years-this would be unconscionable and unjust.

9. As at the date of writing this ruling, the respondent's counsel had not yet filed any response to the application nor did he file any written submissions. I only received written submissions from the applicant's counsel. This in effect means that the application is uncontested. It however does not bar this court from considering whether the application is merited. My greatest dilemma is that this matter had been fully heard by **MAJANJA (J)** who upon conclusion of the hearing ordered for the survey to be conducted taking into account the area where each beneficiary had constructed their homesteads. The second survey was ordered by me because the first one suffered a miscarriage midstream.

10. In my view this is not an appeal and it would be totally out of place for this court whose jurisdiction is of concurrent status with the one which heard the matter to conclusion to now order for a retrial. I am also reluctant to set aside the orders because that then makes the decision incomplete. I note that neither party has proposed a third survey. Majanja J had been very specific in his orders regarding what ought to be taken into account during the survey and under the circumstances, I consider it prudent to refer this file to **MAJANJA, J** who is now based in Kisumu to deal with the prayer regarding setting aside of the order for survey. The parties shall appear before the Judge in The High Court of Kenya sitting at Kisumu on 24th February 2017 for directions.

Delivered and dated this 30th day of January 2017 at Homa Bay

H.A.OMONDI

JUDGE