



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 60 OF 1985
IN THE MATTER OF THE ESTATE OF
MUSA KADUYU AGOI (DECEASED)

BETWEEN

HESBON AGOI.....APPLICANT/PROTESTOR

AND

JANE KADUYU AGOI.....1ST PETITIONER/RESPONDENT

FLORENCE KADUYU AGOI.....2ND PETITIONER/RESPONDENT

RULING NO. 2

1. The late **Moses Kaduyu Agoi** died intestate on 2nd April 1984 and a grant of letters of administration was issued to his wife Jane Kaduyu Agoi and his daughter Florence Kaduyu Agoi. On 10th August 2009, the two administrators applied for confirmation of grant. In their draft Certificate of confirmation, the deceased's only property namely **S/MARAGOLI/LUGOVO/890 (plot 890)** measuring 7.4Ha was to be subdivided into 7 portions for Clive Moses Kaduyu, Everlyne Kaduyu, Gladys Kaduyu Agoi, Caroline Kaduyu, Wycliff Agoi, Hesbon Agoi and Jane Kaduyu Agoi wherein each beneficiary was to get 1 Ha. except Jane who was to get a bigger share of 1.3 Ha.

2. Hesbon Agoi who is the son of the deceased's late brother, Hislop Wangu Aluda (Hislop) opposed the application for confirmation. His claim was that Plot 890 rightfully belonged to his grandfather the late Senior Chief, Paul Nyadida Adoi and as such the deceased and his late father Hislop were entitled to equal shares of the land them being sons of the late senior Chief. Consequently, Hesbon claimed half share of Plot 890 which he intended to subdivide with his siblings and the homestead of late Senior Chief Agoi because Hislop was entitled to the homestead by the Maragoli custom.

3. I ordered that the matter proceed by way of *viva voce* evidence during which it emerged that the deceased bought several plots of land which were consolidated with senior chief Agoi's parcel of land comprised in Plot 590 to form Plot 890 which was registered in the deceased's name in 1970. The two then invited Hislop to live on the land. Consequently, and in a ruling dated 30th September 2016 ("Ruling No. 1"), I rejected Hesbon's claim that he was entitled to half share of plot 890 but there was still the question of what share was to be allocated to Hesbon and his siblings as none of the witnesses had testified on defined boundaries and measurements. As a result, I directed as follows:

a) *The area occupied and cultivated by the family of Hislop including the homestead of the late*

Paul Nyadida Agoi shall be determined by the District Commissioner and County Surveyor and a report prepared and filed before this court within sixty (60) days .

b) Parties are at liberty to apply for further and other orders.

4. The County Surveyor filed his report on 7th December 2016 and parties filed written submissions on the same. This court is now called upon to determine what share of Plot 890 is to be allocated to Hesbon. From the county surveyor's report; the area covering the homestead of the late Paul Nyadida Agoi is 0.65Ha; the area occupied and cultivated by the family of the late Hislop is 0.80Ha whereas the remaining land is occupied by the family of Jane Kaduyu Agoi.

5. The protestor has put forward two arguments. One is that the surveyors report is incomplete as it does not contain proceedings and evidence by the parties pertaining to the boundaries as such it should not be relied on and the court should order that the survey be redone. In the alternative, the protestor has suggested that the court do make a reasonable provision as it thinks fit. On the other hand, the petitioners agree with the surveyor's report. They argue that according to the report the protestor is only entitled to 0.80Ha and they were overly generous in allocating him 2Ha.

6. To begin with the argument by the protestor that the surveyor's report is inconclusive is neither here nor there. This is because the surveyor's duty was simple and straight forward, he was to go on the ground and ascertain the measurements of the part occupied by the two parties. He was not supposed to go there and conduct a hearing as this was not a case of land boundary dispute. Having stated that, the surveyor ascertained that the parcel occupied by Hislop is 0.80Ha and his father's compound is 0.65Ha. The petitioners were willing to give Hesbon 1 ha and his brother Wycliff Agoi 1 Ha. It is also agreed that Hislop was entitled to Senior Chief Agoi's homestead as per Maragoli customary law. That would make a total of 1.45Ha. To me that is a reasonable provision bearing in mind that the decision I already reached in Ruling No. 1.

7. I therefore direct that the family of Hislop Wangu Aluda shall be entitled to 2.0Ha which shall include the homestead of the late Paul Nyadida Agoi and the same shall be hive off the large parcel so as to form a continuous parcel with the homestead.

8. I make no order as to costs.

DATED and DELIVERED at KISUMU this 30th day of March 2017.

D.S. MAJANJA

JUDGE

Mr Olel instructed by Odhiambo Olel and Company Advocates for the Protestor.

Mr Kisia instructed Kwanga Mboya and Company Advocate

for the Administrators/Respondents.