



**IN THE HIGH COURT AT HOMA BAY**

**SUCCESSION CAUSE NO. 18 OF 2015**

**Formerly Oyugis Succession Cause No. 128 of 2008**

**IN THE MATTER OF THE ESTATE OF**

**DAUDI MOSI NGOTO (DECEASED)**

**BETWEEN**

**JOSIAH KICHE MOSI .....APPLICANT**

**AND**

**DAVID NGOTO MOSI .....RESPONDENT**

**RULING**

1. The matter before the court is the summons for confirmation of grant issued to Josiah Kiche Mosi and David Ngoto Mosi on 28<sup>th</sup> May 2015 in respect of the estate of the late Daudi Mosi Ngoto who intestate died on 20<sup>th</sup> June 1986. The summons is filed by Josiah Kiche Mosi (“the applicant”) and is supported by his affidavit sworn on 4<sup>th</sup> May 2015 and a replying affidavit sworn on 8<sup>th</sup> October 2015. The application is opposed by David Ngoto Mosi (“the protestor”) whose affidavit of protest is sworn on 23<sup>rd</sup> June 2015 and a further affidavit sworn on 19<sup>th</sup> August 2015. Apart from filing affidavits, the parties gave *viva-voce* evidence and filed written submissions to support their respective cases.
2. It is not in dispute that the deceased had one wife and the following children; Andrew Awuor Mosi (deceased), Timothy Otina Mosi (deceased), David Ngoto Mosi, Samuel Oyoo Mosi (deceased), Josiah Kiche Mosi, and Nereah Auma Mosi. It is also not in dispute that the only free property of the deceased available for distribution to the beneficiaries are two parcels of land; C/KARACHUONYO/KONYANGO/1088 and C/KARACHUONYO/KONYANGO/1090.
3. The applicant states that according to Luo customs, as the last born son of the deceased, he was to inherit C/KARACHUONYO/KONYANGO/1088 and 1090 which remained in the name of the deceased who had distributed his land during his lifetime as follows;
  - C/KARACHUONYO/KONYANGO/108 (1.2Ha) and 1540 (0.14Ha) – Andrew Awuor Mosi
  - C/KARACHUONYO/KONYANGO/127 (1.2Ha) – Timothy Otina Mosi
  - C/KARACHUONYO/KONYANGO/125 (1.0Ha) and 1539(0.11Ha) – Samwel Oyoo Mosi
  - C/KARACHUONYO/KONYANGO/126 (0.9Ha) and 2345 – David Ngoto Mosi
4. The protestor contends that during his lifetime, the deceased subdivided and gifted his land to all his five sons and only two parcels No. 1088 and 1090 remained in the deceased’s name. He

- however contended that the applicant was given parcel No. 217. He further deponed that Parcel No. 1088 was registered after consolidating several parcels during the first registration. The said property comprised four units; the deceased's homestead and three other parcels which are cultivated. Further that the applicant was aware that the applicant built his home there in 2003 and the late Samuel Oyoo also his home on the said parcel hence his claim that he is entitled to the land under customary law does not hold. He further depones that applicant also resides on the property.
5. As regards Parcel No. 1090, the protestor depones that the applicant has built a residential estate known as Sunrise Estate and the balance is cultivated by him. He further depones that several attempts to resolve the matter have been unsuccessful.
  6. The protestor's proposes that Parcel No. 1090 should subdivided into four equal portions between the applicant, the protestor, Tabitha Mbuya Awuor (widow of the late Andrew Awuor Mosi) and Anne Adhiambo Oyoo (widow of the late Samuel Oyoo). He suggests that Parcel No. 1088 be subdivided into four equal portions in the names of the protestor covering the portion where his home is situated and the deceased's homestead, the protestor covering his own homestead, Tabitha Mbuya Awuor and Anne Adhiambo Oyoo.
  7. The issue in this case is whether the deceased distributed part of his property to the beneficiaries prior to his death and whether the applicant is entitled to parcels no. 1088 and 1090. The deceased died intestate and left surviving children hence under **section 38 of the Law of Succession Act (Chapter 160 of the Laws of Kenya)** the net estate of the deceased devolves equally among the surviving children. However, the court under **section 42 of the Act** may take into account property of given or settled to any of the beneficiaries by the deceased during his lifetime in determining the share of the estate finally accruing to each beneficiary.
  8. After considering the depositions and evidence, I am satisfied that the deceased during his lifetime made specific grants to his four sons; David Ngoto Mosi, Andrew Awuor Mosi, Timothy Otina Mosi and Samwel Oyoo Mosi. I reject the protestor's contention that the applicant was given Parcel no. 127. He did not attach the certificate of search for the property while the applicant attached to certificates of search of all properties subject of these proceedings. I also accept that it is more probable that deceased intended that his last son inherit his homestead on Parcel No. 1088 measuring 1.4Ha for in accordance with Luo custom. This size of the homestead is similar in size to the other properties the deceased had given the other sons.
  9. It also transpired that the protestors Parcel No. 2345 which was initially registered in the name of David Ngoto Mosi turned out to be a wetland hence the registration was cancelled as evidenced by the letter dated 18<sup>th</sup> September 2015 addressed by the Deputy County Commissioner, Rachuonyo North Sub-County. I note though that the protestor had been gifted Parcel No. 126 registered in his name.
  10. As regards Parcel No. 1090, it is agreed that the plot is not within the homestead but is situated in a commercial centre. If indeed the deceased had intended to gift it to his youngest son, nothing would have been easier than to transfer it to him during his lifetime when he gave his other sons their respective parcels. I therefore reject the contention that Parcel No. 1090 was intended exclusively for the applicant and hold that it is part of the deceased's free property.
  11. As the deceased other sons had built their homesteads on the Parcel No. 1088, this court is bound by the principles of equity, justice and fairness in distributing the estate **to come to an equitable solution (see Mary Rono v Jane Rono & William Rono ELD CA Civil Appeal No. 66 of 2002 [2005] eKLR)**. In coming to my decision, I have taken into account the fact that the applicant will have a smaller piece of land than his brothers yet have a more valuable property located in a commercial area. I therefore award Josiah Kiche Mosi the whole of Parcel No. 1090.
  12. As regards Parcel No. 1088, I direct the County Surveyor with the assistance of the Assistant

County Commissioner, North Rachuonyo Sub-County to visit the property, survey the land and subdivide the same to each beneficiary taking into account the area each beneficiary has constructed their homestead save that deceased homestead and land cultivated by the deceased shall accrue to Josiah Kiche Mosi.

13. In light of the foregoing, I make the following orders;

- a. **C/KARACHUONYO/KONYANGO/1090** shall be inherited by **JOSIAH KICHE MOSI** absolutely.
- b. The County Surveyor with the assistance of the Assistant County Commissioner, North Rachuonyo Sub-County shall visit **C/KARACHUONYO/KONYANGO/1088** shall identify and subdivide the same to each beneficiary taking into account the area each beneficiary has constructed their homestead save the deceased homestead and land cultivated by the deceased shall accrue exclusively to **JOSIAH KICHE MOSI**.
- c. The subdivision shall be done within the next **ninety (90) days** and the report filed in this court.
- d. Either party shall be at liberty to move the court for further orders.
- e. The cost of the subdivision shall be shared by the beneficiaries equally.

14. As this is a family matter, there shall be no order as to costs in regard to these proceedings.

**DATED and DELIVERED at HOMA BAY this 12<sup>th</sup> day of February 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Obach instructed by Orego & Odhiambo Advocates for the applicant.

Mr Onyango instructed by Ouma Onyango & Associates Advocates for the respondent.