

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

BETWEEN

IN THE MATTER OF THE ESTATE OF:

DAUDI MOSI NGOTO DECEASED

AND

JOSIAH KICHE MOSI APPLICANT

VERSUS

DAVID NGOTO MOSI RESPONDENT

RULING

1. When **DAUDI MOSI NGOTO** (the deceased) died intestate on 20th June, 1986, his son **JOSIAH KICHE MOSI** filed a summons for issuance of letters of administration and distribution of the deceased's estate. The application was however opposed by another son named **DAVID NGOTO MOSI**. **JOSIAH** wanted to inherit both **C/KARACHUONYO/KONYANGO/1088** and **1090** as the last born son citing such rights derived from Luo Customs.

2. The court in its ruling dated 12th February 2016 held that the deceased intended his last born son to inherit parcel No.1088k measuring 1.4 hectares where his homestead stood. Further that parcel No.1090 was not intended exclusively for **JOSIAH KICHE**, and it therefore formed part of the deceased's free property. However the judge noted that the deceased's other sons had built their homesteads on No.1088.

3. The judge therefore directed that the County surveyor, with the assistance of the Assistant County Commander of North Rachuonyo Sub County, to visit the said parcels, identify and subdivide the same to each beneficiary except for the deceased's homestead and land cultivated by the deceased which were to accrue exclusively to **JOSIAH KICHE MOSI**. The sub division was required to be done within 90 days, and thereafter a report was to be filed in court. The costs of the sub division was to be shared by the beneficiaries equally.

4. However when the matter next came up on 30th June 2016, it was apparent that the surveyor could not complete the subdivision with regard to parcel No.1088 sub division.

5. On 14th July 2016 Mr. Ochieng who held brief for Mr. Onyango for the Respondent asked the court to review the ruling by Majanja J. dated 12th February 2016 on the basis of a report by the District Surveyor dated 4th May 2016 but this was opposed.

6. The problem in No.1088 is that each brother has fenced a portion of it and is not willing to cede any area. The surveyor once again attempted a survey in the presence of all the affected parties, but **DAVID NGOTO** walked away – probably still unhappy with what the surveyor had embarked on. Infact this time round, partial survey was done on No.1088, but trouble arose when the surveyor got to the portion occupied by David Ngoto Mosi – instead of even awaiting the outcome of the survey, he called his

witnesses and advocate and walked away – surely the most logical and reasonable thing was to await the outcome of the survey and make known his displeasure once the report is filed. He cannot frustrate the court's efforts at trying to resolve the stalemates and expect to come and obtain a stay – just so that matters move in the manner he desires. Court orders must be obeyed, and it will be setting a very dangerous precedent to allow the respondent to dictate to the court how matters should be conducted – surely if he does not agree with the interpretation of the surveyors how will the court know what the survey has found without completion of the exercise and a report being filed?

7. I now direct that the Assistant County Commission of North Rachuonyo Sub County to give comprehensive security to the District Surveyor to conduct the survey and in the absence of the Respondent and/or his servants, agents or proxy. There shall be appropriated police presence during the entire exercise and the surveyor do file his report within 21 days. Copy of the order be served on Sub County Commission North Rachuonyo Sub County.

Delivered and dated this **15th** day of **September, 2016** at Homa Bay.

H.A. OMONDI

JUDGE.