REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2174 OF 2014

IN THE MATTER OF THE ESTATE OF LUCY NJOKI MWANGI- DECEASED

RULING

This Chamber Summons seeks to have the orders of this court (Ongeri, J) closing this file issued on 21st May 2019 set aside and the matter reinstated to enable the Petitioners to pursue an application for confirmation of the grant issued on 27th April 2015. It also seeks to have the Application for confirmation of the said grant dated 2nd December 2019 and filed on 28th July 2020 deemed as duly filed and the same be listed down for hearing. The grounds in support of the Chamber Summons are found on the face of the Application and on the Supporting Affidavit sworn by Karanja D. Mwangi, learned counsel for the Petitioners in this matter.

The grounds in support of the Chamber Summons are that a grant of letters of administration intestate was issued by this court on 27th April 2015; that the beneficiaries commenced discussions on how the estate should be distributed; that the firm of M/s G. N. Mugo & Co. Advocates received instructions to file an application for confirmation of the said grant; that the said firm was advised that the file in this matter had been closed on 21st May 2019 pursuant to a Notice to Show Cause dated 12th April 2019; that the said Notice had been served on M/s R. M. Mugo & Co. Advocates which firm of advocates had been acting for the Petitioners previously and that the said firm of advocates had inadvertently failed to notify the Petitioners; that the Petitioners were not aware of the existence of the Notice to Show Cause and that failure to adhere to the directions on the Notice dated 12th April 2019 was not deliberate but because the said Notice was not communicated to the Petitioners or beneficiaries by their former counsel; that the beneficiaries had been engaged in discussions on how the estate should be distributed and hence the delay in filing the application for confirmation of the grant and that closing the file will be prejudicial to the beneficiaries.

The application is brought under Rules 49 and 73 of Probate and Administration Rules. Rule 73 provides that "**Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".**

I have considered the application and the supporting affidavit. I have also considered the brief oral submissions in court during virtual proceedings conducted on 9th December 2020. The application seeks to have this court exercise its discretion in determining this application. The Court of Appeal in **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** stated as follows:

> **"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit…"**

My reading of the file confirms that a Grant of Letters of Administration Intestate in respect of the Estate of Lucy Njoki Mwangi, deceased was issued by this court to Dominic Mwangi and George Karanja Mwangi, being widower and son of the deceased respectively, on the 27th day of April 2015. Court papers show that the deceased held certain properties that forms her estate including parcels of land and shares. In my view the beneficiaries would stand to suffer injustice if this court were to fail to hear them and determine how the estate should be distributed to the rightful beneficiaries. In **Mbaki & Others v. Macharia & Another (2005) 2 EA 206 at Page 210**, the Court stated

> "**The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard**."

In my exercising the discretion in this matter I am mindful of the nature of the action before the court. The matter involves the estate of the deceased. It would be unfair to fail to have this property distributed to the rightful beneficiaries because a mistake was committed by counsel previously on record. It is common practice that a mistake committed by counsel should not be visited on the party. I am also mindful that the intention in exercising this discretion is to avoid any injustice or hardship resulting from an inadvertent mistake on the part of the former counsel for the Petitioners. (**See Njoroge v Prestige Air Services Ltd [1991] eKLR 6.).** This is a matter that involves the estate of the

deceased and in closing the file before the completion of the administration of the estate, the court has denied the beneficiaries a say on how the estate should be distributed amongst the beneficiaries. In my view this would result in untold injustice and hardship for the beneficiaries.

My view on the matter is that it is justifiable to have this application allowed. The ends of justice demand it because it would be a failure of justice to deny the beneficiaries what rightfully belongs to them because of mistakes of their former advocates. I therefore allow the Chamber Summons dated 3rd August 2020 in the following manner:

1. That this honourable court sets aside the orders issued on 21st May 2019.

2. This matter, being Succession Cause No. 2174 of 2014, in the Matter of the Estate of Lucy Njoki Mwangi, deceased, is hereby reinstated.

3. The Application dated 2nd December 2019 and filed on 28th July 2020 is hereby deemed as duly filed.

4. Parties are at liberty to list is down for confirmation of the grant.

5. I make no order as to costs of this Application.

Orders shall issue accordingly.

Dated, signed and delivered this 18th January 2021.

S. N. MUTUKU

JUDGE