REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2261 OF 2011

IN THE MATTER OF THE ESTATE OF ANTHONY NAHASHON NGUNJIRI (DECEASED)

CATHERINE NJERI NGUNJIRI.....1ST PETITIONER

CAROLINE WAMBUI NGUNJIRI.....2ND PETITIONER

HARIT A. SHETH.....3RD PETITIONER

VERSUS

IRENE WANGUI NGUNJIRI.....OBJECTOR

RULING

1. The petitioner Catherine Njeri Ngunjiri, Caroline Wambui Ngunjiri and Harit A. Sheth filed summons dated 26th March 2018 seeking the following orders:

> (a) the court be pleased to set aside the orders issued on 21st February 2018 by this court and reinstate the summons dated 3rd November 2016 by the objector Irene Wangui Ngunjiri for hearing; and
>
> (b) upon reinstatement of the summons dated 3rd January 2016, the court be pleased to enlarge time for the petitioners to file a response to the summons.

The application has become necessary because the objector's summons came for hearing on 31st October 2017. The petitioners and their counsel were absent. No response had been filed to oppose the summons. The matter was heard and a ruling reserved. The ruling was delivered on 21st February 2018. An order was made that apartment A6 on LR No 209/5821/6 along Forest Road in Nairobi be made vacant for the accommodation of Alfred Nahashon Ngunjiri while studying at the University of Nairobi, and, if the apartment has a tenant, all lawful means be used to terminate the tenancy to enable the availability of the same for the said use.

2. The application dated 3rd November 2016 had been brought under **section 47** of the **(Law of Succession Act Cap 160) rules 49** and **73** of the **Probate and Administration Rules**. In it was claimed that Alfred Nahashon Ngunjiri was the son of the objector with the deceased Anthony Nahashon Ngunjiri whose estate is the subject of these proceedings. Alfred had been offered admission in the School of Engineering at the University of Nairobi under the University of Nairobi Module II Programmes, commencing 5th September 2016. He was expected to make own arrangements for accommodation, catering, travel and subsistence. The objector was willing to provide for the subsistence and catering costs for the boy but sought that the estate of the deceased provides for accommodation and travel. She stated that the deceased owned apartments A6, B1 and B3 situate on LR No. 209/5821/6 along Forest Road within Nairobi. The boy was staying with the objector at Thome Estate in Nairobi. She considered Thome to be inconvenient and sought that he be accommodated in one of these apartments.

3. The application was served on the petitioners' advocates on 8th November 2016. When it came up for hearing before Judge Ougo on 3rd October 2017 no response had been filed. The court recused itself because Mr. Chacha Odera who was acting for the petitioners was personally known to the Judge. The judge directed that the matter be heard on 31st November 2017 before any other judge in the Division. In the meantime, the petitioners were given 14 days to file a response. On 31st October 2017 the application came before me for hearing. The petitioners and their counsel were absent without word. No response had been filed. Counsel for the objector prosecuted the application

which led to the ruling on 21st February 2018.

4. I have read the affidavit of Sandra Kavagi, an advocate in the firm of Ms. Oraro & Co. Advocates which has the conduct of the case for the petitioners. She stated that Mr. Chacha Odera from their firm was the one handling the case. On 13th October 2017 he instructed her to attend court on the same day to request for time to file a response to the objector's application dated 3rd November 2016. The application was coming for hearing on that day. She attended court. The judge recused herself. She was indulged and the petitioners given 14 days to file a response. The hearing was adjourned to 31st October 2017 before another judge. She went back to the office, prepared an internal memo and, together with the file, placed them on the desk of Mr. Chacha Odera. It was not until 13th March 2018 when the order (issued on 21st February 2018) was served on the firm that she came to learn from Mr. Chacha Odera that their filing clerk had filed the instructions note in the file and taken the file from the desk of Mr. Chacha Odera before he had seen it. The file had been filed away before any action had been taken on it. There was no client letter that was done on the file to appraise the client of the orders of the court. Mr. Chacha Odera called for a meeting with the petitioners and informed them of what had transpired. They indicated that they were aggrieved by the orders and instructed that instead they had been given an opportunity to be heard on the objector's application. Otherwise, it was stated, the petitioners had been regularly attending the court. It was deponed that:-

> **"11. I honestly believe that the failure to comply with the orders of the court of 3rd October 2017 or inform the petitioners of the same was an honest mistake on the part of counsel for the petitioners which is regrettable. However, it is also my honest belief that the mistake of the counsel ought not be visited on the petitioners who are innocent parties."**

5. The objector filed a replying affidavit sworn on 9th November 2018 to oppose the application. Her case was that the application was in bad faith and only intended to deprive her son of the accommodation. She swore that the petitioners and their counsel had not been vigilant in dealing with the matter. They had not explained why, upon service of the application on 8th November 2016, they had not filed a response. To her, the petitioners, who control the deceased's estate, were not keen to have the matter heard expeditiously. She stated that, prior to the application, she had on 29th August 2016 written to the advocates for the petitioners seeking accommodation for the son. On 17th October 2016 the petitioners had written back but without reference to the issue of accommodation. The advocates only said they were seeking instructions from their clients on the request. There was no further word from them. This is what led to the application.

6. Counsel filed written submissions on the application which I have considered.

7. The deceased died on 21st September 2011. He was an advocate running the firm of A. N. Ngunjiri and Co. Advocates. He died testate leaving a Will dated 7th October 2008. The petitioners were the trustees in the Will. On 14th October 2011 the petitioners filed a petition for a limited grant of probate *ad colligenda bona*. On the same day the grant was issued. On 16th November 2011 the objector filed an affidavit of protest. Her case was that the deceased had died intestate. She had been married to the deceased since 1996 and they had two children, including the boy in question. She believed the purported Will was a forgery. On 18th November 2011 the objector filed an application seeking to set aside the limited grant issued to the petitioners, and challenged the validity of the Will. The application has not been heard and determined. It is quite clear that the parties have been quite unfair to the estate. It does appear that the cause is, after all these years, at a very preliminary stage. It is crying for hearing and disposal for the beneficiaries to benefit from the estate.

8. The petitioners are asking the court to exercise its judicial discretion to set aside the orders of 21st February 2018, to reinstate the application dated 3rd November 2016 that led to the orders and to allow them an opportunity to be heard on the matter before a decision is rendered. Judicial discretion is a discretion to be exercised for the purpose of doing substantive justice to the parties in a case. It is exercised to give effect to the law and the Constitution. The overriding objective is to enable the court to deal with the case justly, expeditiously and at a proportionate cost.

9. The application dated 3rd November 2016 was served on the petitioners advocates on 8th November 2016. Prior to that the objector had been writing to the petitioners advocates regarding the issue of accommodation of her son. The service did not elicit any response. No replying affidavit was filed. By 3rd October 2017, one year later, when the application came for hearing there was no response. I have read the supporting affidavit filed in the instant application. There was no reference at all to why the petitioners filed no response. Did their advocates inform them of the application? Did they give any instructions on the same? Did they, during that year, seek to find out from their advocates what the status of their case was? On 3rd October 2017 when the matter came for hearing they were given 14 days to file response. Did their advocates communicate? I note the explanation by their advocate regarding the internal happenings in the firm that led to the file being filed away without action. Can one say that what happened should be excused, and that the objector should be made to suffer the consequences?

10. I consider that the mistake of counsel should not be visited upon an innocent litigant. But were the petitioners innocent in the circumstances of this case? Can the firm of Oraro & Co. Advocates shield itself behind the actions of their clerk? In the case of **Tana and Athi Development Authority –v- Jeremiah Kimigho Mwakio & 3 Others [2015]eKLR,** the Court of Appeal stated as follows:-

> **"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (<u>See Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101</u>) and also <u>Re Jones (1870), 6 Ch. App 497</u> in which Lord Hatherley communicated the court's expectations this way:**
>
> **'….I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned……'**

11. The Court of Appeal went on to cite with approval what was said by Lord Griffith in **Ketteman & others v. Hansel Properties Ltd [1988] 1 All ER 38** as follows:-

> **"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."**

12. Lastly, the Court of Appeal in **Habo Agencies Ltd –v- Wilfred Odhiambo Misingo [2015]eKLR** was stated as follows:-

> **"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."**

13. In this case, the petitioners were served with the application dated 3rd November 2016 on 8th November 2016. They did not respond. There was no explanation, either from them or their advocates why no response was filed. On 3rd October 2017 they were afforded a second opportunity of 14 days to file response. None was filed. There is explanation offered for this non-action which is not plausible. The advocates have sworn that the petitioners have always attended court and have diligently wanted to push this cause. If they did not, for about one year, seek to find out from their advocates what was happening with their cause, that was not diligence. It was not enough for them to blame their advocates. The consequences of their negligence and lack of diligence will fall on their heads. I consequently dismiss their application with costs.

DATED and DELIVERED at NAIROBI this 4TH day of JUNE, 2019.

A.O. MUCHELULE

JUDGE