



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO.2 OF 2007**

**IN THE MATTER OF THE ESTATE OF SOLOMON ONACHA NGOCHELA (DECEASED)**

**AND**

**IN THE MATTER OF**

**TAPHROZA MIDECHA OMBAYO .....1<sup>ST</sup> PETITIONER**

**HUDSON LUGARIA MUSERA .....2<sup>ND</sup> PETITIONER**

**R U L I N G**

1. By the Summons dated 21/07/2015, the Petitioners herein pray that the orders made on 07/07/2015 closing this Succession Cause be set aside and/or vacated and that this Succession cause be re-opened paving way for distribution of the deceased's estate. The Petitioners also pray that the Letters of Administration intestate issued by this Honourable Court on 19/11/2008 be amended and rectified by correcting the names of the 1<sup>st</sup> Petitioner to read TAPHROZA MIDECHA OMBAYO instead of TAPAROZA MIDECHA OMBAYO. The Petitioners also pray that costs of this application be provided for.
2. There are 4 grounds set out on the face of the application to the effect that the 1<sup>st</sup> Petitioner was never served with the dismissal/closure notice or at all and that the failure to fix the Succession Cause for Confirmation was occasioned by financial difficulties on the part of the 1<sup>st</sup> Petitioner. The 1<sup>st</sup> Petitioner has also sworn an affidavit dated 21/07/2016 reiterating the grounds in support on the face of the application. The application is brought under Rule 73 of the Probate and Administration Rules which provides as follows:-

“Nothing in these Rules shall limit or otherwise effect 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”

Compared to the Civil Procedure Act and the Rules made thereunder, Rule 73 of the P & A Rules can be described as the oxygen provision of the Law of Succession Act, Cap 160 Laws of Kenya as it gives this Court wide inherent powers to make orders necessary for the ends of Justice or to prevent abuse of Court Process.

3. It is noted that the Grant of Letters of Administration intestate herein as issued on 19/11/2008. The Petitioner should have proceeded to have the grant confirmed six months after 19/11/2008. She did not do so and during the **Courts Justice @ Last initiative** carried out in July 2015, the file was ordered closed. The applicant contends that she was never served with the Dismissal or file closure notice. I have perused the record and find no record of the notice or affidavit of

service of the same. It may therefore be true that the applicant was never served with the requisite notice to close the file. Prayers 1 and 2 of the Summons dated 21/07/2015 are therefore granted as prayed.

4. As regards the prayer for rectification the same is provided for under Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules, especially where errors sought to be corrected are not of a material nature such as those relating to names and descriptions or the setting and place of the deceased's death or the purpose in a limited grant. In the instant case, the applicant is seeking correction of her name which was typed wrongly in the grant. Such a correction is allowed under the Act. Accordingly, prayer 3 of the Summons is allowed by correcting the name of the 1<sup>st</sup> Petitioner to read TAPHROZA MIDECHA OMBAJO instead of TAPAROZA MIDECHA OMBAJO. In my considered view, the error was a typing error and does not go to the root of the pleadings.
5. In conclusion, the Summons dated 21/07/2015 is allowed as prayed in terms of prayers 1,2 and 3. So that the applicant does not go to sleep again once the rectified grant is issued, the applicant shall proceed to fix the Summons for Confirmation of Grant within sixty (60) days of the issuance of the rectified grant.
6. Costs shall be in the cause.
7. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 3<sup>rd</sup> day of March 2016.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mrs Muleshe for 1<sup>st</sup> Petitioner/applicant

Mr. Lagat - Court Assistant