



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO. 20 OF 2018

[FORMERLY NAIROBI SUCC. CAUSE NO. 2506 OF 2008 & NYERI SUCC. CAUSE 1334 OF 2011]

IN THE MATTER OF THE ESTATE OF GEORGE MURIITHI GITAHU (DECEASED)

ELIZABETH WAIRIMU BARU OBJECTOR/APPLICANT

-VERSUS-

REGINA WAIRIMU GITAHU ADMINISTRATIX/RESPONDENT

JUDGEMENT

Introduction

The deceased GEORGE MURIITHI GITAHU died intestate on the 25th August 2006. The Respondent, Regina Wairimu Gitahi applied for Letters of Administration intestate through Nairobi High Court Succession Cause No. 2506 of 2008. A Grant of Letters of Administration (intestate) was subsequently issued to the Respondent herein on 24th March, 2009 and subsequently confirmed on 22nd January, 2010. Meanwhile, Elizabeth Wairimu Baru, the purported wife of the deceased and the Objector herein filed a parallel Succession Cause in Nyeri High Court Succession Cause NO. 1334 of 2011. Eventually, the two matters were consolidated pursuant to an Application dated 7th July 2014 and filed on the 15th September 2014 which sought inter alia for Orders that:

1. THAT the grant of letters of administration (intestate) issued to REGINA WAIRIMU GITAHU, the Respondent herein, on 24th March, 2009 and subsequently confirmed on 22nd January, 2010 be revoked and/or annulled.
2. THAT such further or other orders be and are hereby issued to safeguard the Estate of the Deceased herein.
3. THAT the costs of this Application be provided for.

The Objector's application was supported by the affidavit of Elizabeth Wairimu Baru sworn and filed on even dates. In response to the Objector's Application, the Respondent herein swore an affidavit on the 7th July 2018 and filed it on 11th July 2018. Consequently, the Objector filed a further affidavit sworn by her on the 23rd of July 2018. The Respondent filed a Statement of Accounts listing the assets of the deceased and a further affidavit sworn on the 27th July 2018 on the 30th July 2018. Yet another affidavit dated 15th November and filed on the 20th of November 2018 was filed together with a Certificate of Accounts by the Respondent. A final affidavit dated 7th December 2018 was filed by the Respondent on 13th December 2018. The parties filed written submissions with the Objector filing on the same day submissions dated 5th December 2018 and the Respondent filing theirs dated 7th December 2018 on 13th December 2018.

The Objector/Applicant's Case

By and large, the Objector's Application sought for the revocation of the Grant of Letters of Administration (intestate) issued to the Respondent herein on 24th March, 2009 and subsequently confirmed on 22nd January, 2010. It was the Objector's case that she married the late George Murithi Gitahi under Kikuyu Customary Law which marriage bore five issues. That on 25th August 2006 the deceased passed on and she subsequently applied for Letters of Administration vide Nyeri Succession Cause Number 1334 of 2011. That unbeknownst to her, the deceased's sister and Respondent herein had also applied for Letters of Administration vide Nairobi Succession Cause Number 2506 of 2008 despite the fact that she was not a dependant, executor or beneficiary. According to the Objector, the Respondent failed to indicate to the court in Succession Cause Number 2506 of 2008 that the deceased was married to the Objector and had left behind children. Instead the Respondent had only included the deceased's mother and brothers as the only surviving dependants. That in the application for Confirmation of Grant the Respondent had allegedly obtained consent letters from the deceased siblings and mother a fact that they had all denied.

It was further averred that the Respondent was not a dependant of the deceased at the time of his death and that the Letters of Administration were confirmed to her through material misrepresentation and fraud and ought to be revoked. The Objector further denied knowing that the Respondent had applied for Letters of Administration and that was the reason she had not objected to the same before they were confirmed.

The Objector averred that the Respondent had no right to apply for grant of letters of administration since the requirements of **Section 39 of The Law of Succession Act** were not met. That while the Respondent is the younger sister to the deceased she did not obtain the necessary consents required before making an application for grant of letters of administration intestate.

Elizabeth denied deserting the matrimonial home or being separated from the deceased and averred that even if that were the case, it could not have been a basis for the Respondent to apply for letters of administration as the law of succession recognizes a separated wife as a wife for purposes of succession. That while she and the deceased were living separately, it was because he was working at Kerugoya while she in Nairobi but they would alternate in visiting each other over the weekends. Further, she averred that the deceased took an early retirement from his employment with Barclays Bank of Kenya Limited and was not suffering from any form of depression.

It was deponed that the Respondent could not possibly have obtained the certificate of death of the deceased genuinely since the Objector was in possession of the notification of death and the burial permit. Similarly, if the Respondent obtained any letter from a chief then the same was obtained through fraud and material non-disclosure.

According to the Objector, the deceased was never kicked out of the rental home and in any event the deceased had property he would have disposed to raise money in case he needed some for medical expenses or utilized his pension. It was the Objectors firm belief that no other member of the Respondent's family participated in her fraudulent process of obtaining the grant of letters of administration intestate. That the Respondent has not disposed all the assets of the deceased specifically land parcel number KAJIADO/KITENGELA/6573 whose resultant subdivisions have been encumbered by way of a restriction and that the Respondent ought to account and return what she may have misused to the estate of the deceased.

The Objector contended that while the Respondent did pay some of the school fees for Felix Gitahi, it was the court that ought to have made provisions for the dependants of the deceased and the Respondent clearly violated the clear provisions as set out in the Law of Succession Act which were cast in stone and the issue of being vigilant or indolent cannot be used to perpetuate and justify an illegality. Further that the matter cannot be deemed to be overtaken by events before the Respondent renders an account of how the estate of the deceased was distributed.

The Administratrix/Respondent's Case

Reginah Wairimu Gitahi on her part averred that she was the Administratrix of the Estate of the deceased by virtue of a grant of letters of Administration intestate issued by the High Court in Nairobi in Succession Cause No. 2506 of 2008 on 29th August 2009 and confirmed on 22nd January 2010. She further averred that she was the deceased's younger sister and admitted that the Objector was the deceased's former wife adding that the two had separated sometime in the year 2000 owing to a troubled marriage.

It was further averred that the Applicant and the deceased previously had their home at some rental apartments in Ngong town where they lived with their two children, Felix Gitahi and Diana Muriithi. That owing to the deceased's aforesaid troubles, the Applicant deserted their matrimonial home sometime in the year 2000 never to return. Consequently, it was averred that the deceased was chased out of his rental home and the Respondent took him in, feed him and later catered for his medical expenses. Eventually, the deceased was taken to his parents' home in Marunduini, Nyeri County where the Respondent continued to cater for his upkeep and medication until his death.

According to the Respondent, it was a family decision that she take out the Letters of Administration which she did and thereafter disposed the assets and shared the proceeds thereof between herself, their parents and siblings. Further, that some of the proceeds thereof were also utilized to cater for school fees for the deceased's children Felix Gitahi and Diana Muriithi.

The Respondent's position was that she followed the law and procedure including being issued with a letter from the area chief to having the Matter gazetted inviting would be objectors to apply for objection before the grant was issued and therefore it could not be said that the Grant was fraudulently acquired. It was averred that in compliance with this Honourable Court's Orders, the Respondent prepared a true and accurate account of the estate.

If the Respondent is to be believed, the Objector had previously intimated to the family of the deceased that she did not wish to be involved with anything to do with the deceased and that is why the Respondent took out Letters of Administration to prevent the deceased's estate from wasting. She maintained that she obtained all the necessary consents, the letter from the chief in Ngong as well as the deceased's death certificate lawfully.

The Respondent went on to depone that KAJIADO/KITENGELA/6573 was sub-divided into four plots which were subsequently sold to third parties. According to her, the deceased had taken a loan facility with his employer Barclays Bank with KAJIADO/KITENGELA/6573 as security. At his demise, there was an outstanding amount of Kshs 330,000/- that was unpaid which the Respondent averred to have paid to avoid the bank selling off the property in exercise of its statutory power of sale. It was further averred that the Respondent reimbursed a Mr. Mwangi 450,000/- which had been payment for KAJIADO/KITENGELA/6573 which the deceased had allegedly sold at a throwaway price.

It was contended that upon acquiring the certificate of confirmed grant, the Respondent sub-divided KAJIADO/KITENGELA/6573 into four plots which were later sold separately. That the first two plots were sold in 2009 at the price of Ksh 800,000/- each, the third plot was sold sometime in 2011 at the consideration price of Ksh 1,200,000/- and the last one in 2015 at the consideration price of Ksh 2,200,000/-. The Respondent averred that she sold the deceased's Kenya Commercial Bank Shares at Ksh 100,000/ but she was not able to follow up on the Kenbaco shares as she did not have the share certificate. Further, she contended that the Kenya Airways shares were in her name but she was yet to sell them. The Respondent averred that upon selling the properties in the deceased's estate, she bequeathed Ksh 500,000/- to her

parents and Kshs 500,000 to her brothers.

According to the Respondent, her late father James Gitahi Muriithi in a family meeting held back in 2010 or thereabouts arbitrated over this matter and he bequeathed the Applicant a parcel of land in Kieni-Nyeri and a further half acre at the family farm in Marunduini-Nyeri in exchange of which the Applicant would forfeit her claim to the deceased's estate.

The Respondent averred that it was unfair for the Applicant to have deserted the deceased in his hour of need and then rush to court to claim in his estate. In any event, it was averred, the estate that is the subject of the Application had already been disposed in full and by that fact alone the Application was moot. It was contended that, "equity aids the vigilant not the indolent" as such the Applicant ought to have made her Application earlier which at this point had been overtaken by time. In the circumstances the instant Application was dead on arrival and ought to be dismissed.

The Objector/Applicant's Submissions

According to Counsel for the Applicant, four issues arose for determination to wit:

- a. What is the place of the Respondent in the hierarchy under the Law of Succession Act?
- b. Were there exceptional circumstances necessitating the Respondent being issued with the letters of administration intestate for the estate of the deceased?
- c. Did the Respondent comply with the provisions of Sections 82 and 83 of the Law of Succession Act?
- d. What remedies are available to the Applicant?

Citing the provisions of Section 66 as well as the provisions of Part V of the Law of Succession Act, Counsel for the Applicant submitted that the order of priority in applying for the grant of letter of administration intestate is tied to the priority of those who are entitled to the estate of the deceased. Accordingly, in the instant matter the order of priority provided that the spouse of the deceased who is the Applicant herein came first followed by the children of the deceased, his father, mother and finally the brothers and sisters, and any child or children of deceased brothers and sisters. It was further submitted that no proper explanation had been given as to why the Respondent applied for grant of letters of administration intestate while there were people higher up in priority. If the Respondent wanted to apply for grant of representation, the least she could have done is to have consent of the applicant and her children and in any event she would have no right to a share of the estate of the deceased.

On whether there were exceptional circumstances necessitating the Respondent to apply for grant of letters of administration intestate, it was submitted that the Respondent failed to make material disclosure when making her application for grant of letters of administration. The affidavit in support of the Petition for grant of letters of administration intestate filed by the Respondent at the High Court of Kenya at Nairobi Succession Cause No. 2506 of 2008 in paragraph 4 listed the persons who survived the deceased as follows:

- a. Monicah Wangui Gitahi-Mother.
- b. Regina Wairimu Gitahi-Sister.
- c. Joseph Gikunju Gitahi-Brother.
- d. Charles Kariuki Gitahi-Brother.
- e. Samuel Kinyua Gitahi-Brother.

It was further submitted that **Section 51(2)(g) of the Law of Succession Act** required the Respondent to have set out the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children or of any child of his or hers then deceased. The Respondent failed to make such disclosure which is an offence under **Section 52 of the Law of Succession Act**.

Relying on the definition of a wife set out in Section 2 of the Law of Succession Act, it was submitted that even if the Applicant had been separated from the deceased, there would be no difference as far as the law of succession is concerned.

According to the Advocate for the Applicant, in the year 2008 when the Respondent filed for letters of administration, all the children of the deceased except one were adults and they were in a position to petition for letters of administration. Since the last child of the deceased was a minor there was a requirement for the administrators of the deceased's estate to have been at least two as provided for under section 58 of the Law of Succession Act. The deceased's spouse and his children having been alive were the only ones entitled to petition for grant of representation and to a share of the estate. That the Respondent chose to conceal material facts as to the existence of the deceased's spouse as well as his children could not be perceived as exceptional circumstances which would lead to letters of administration being issued to the Respondent.

Urging on whether the Respondent complied with the provisions of Sections 82 and 83 of the Law of Succession Act regarding the powers of the personal representative, it was submitted that the Respondent acquired the letters of administration for the estate of the deceased through fraud and therefore she was not entitled to exercise the powers under section 82 of the Act. According to Counsel, the Respondent abused the provisions of Section 82 of the Act to the extent that she vested the entire estate of the deceased to herself to the exclusion of everyone else.

At paragraph 14 of the affidavit sworn on 7th July, 2018 the Respondent stated that she disposed of the assets of the deceased and shared the proceeds with her parents and her siblings yet the certificate of confirmation of grant dated 22nd January, 2010 indicates that the Respondent was the sole beneficiary of the deceased's estate. The assertion that she shared proceeds of sale with any other person was false. The Respondent purported to give names against figures with no documentary evidence.

Counsel submitted that it is only the court that can approve the distribution of the estate of a deceased person and not what the Respondent purported to have done. The Respondent has failed to produce before the court a full and accurate account of the completed administration as provided for under Section 83(e) (g) & (h) of the Law of Succession Act despite directions by the court to that effect.

Reliance was placed on **Nairobi Succession Cause No. 2015 of 2012 In the matter of the Estate of Joshua Orwa Ojode (Deceased); Nyeri Succession Cause No. 549 of 2012 In the**

Matter of the Estate of the late Ngara Gathuri alias Ngaara Gathuri (Deceased) and Meru Succession Cause No. 599 of 2012 In the Matter of the Estate of Robert Mbogori Rutere (Deceased).

Based on the foregoing, Counsel urged the court to allow the Applicant's application dated 7th July, 2014 with costs to the Applicant. According to Counsel, the Grant issued to the Respondent cannot stand in light of the provisions of section 76 of the Law of Succession Act.

The Respondent's Submissions

Advocate for the Respondent crystallized the issues for determination as follows:

- a. The Applicants position in the hierarchy under section 66 of Cap 160.
- b. The exceptional existing circumstances that allowed the Respondent to take out letters of administration of the deceased's estate.
- c. Powers of a legal representative under section 82 & 83 of Cap 160
- d. The remedies available to the Applicant

Citing Section 66 and Section 29 of the Law of Succession Act, Counsel for the Respondent acquiesced that the Respondent came second in the order of priority while the Objector came first being a spouse of the deceased.

It was further submitted that the exceptional existing circumstances that allowed the Respondent to take out letters of administration of the deceased's estate as opposed to the Objector were that due to acute alcoholism, the deceased had outstanding debts among them a loan with his former employer and further that to support his alcoholism, the deceased had sold off his Kitengela parcel of land at a throw away price. The Respondent therefore had to act very quickly and obtain letters of administration of the deceased's estate to prevent the same from wasting. It further was submitted that the Respondent applied for letters of administration because the Objector had from the word go intimated that she did not want anything to do with the deceased's estate.

Regarding the powers and duties of a legal representative under section 82 & 83 of Cap 160, it was submitted that by calling back into the deceased's estate land title No. Kajiado/Kitengela/6573 and refunding the purchaser his monies as the Respondent had deponed under paragraph 13 of her Affidavit sworn on 27th July 2018, the respondent therefore acted as per the law. Thereafter the respondent sold off and disposed the disposable assets of the estate as seemed best to her as provided under section 82 (b) and later shared the proceeds of the sale of the assets with her parents and siblings.

Finally, on the remedies available to the Applicant, it was submitted that in the unlikely event that this Honourable Court found the Respondent's actions improper and the Respondent was liable for any loss, there remedies available to the Applicant were monetary compensation and revocation of the grant.

Citing Section 93 of the Law of Succession Act, it was submitted that the Respondent had openly admitted to having disposed and sold assets in the estate to third parties save for Kenya Airways and Kenbaco Shares. According to Counsel therefore, if the transfer of assets in the estate of the deceased had already been effected on the strength of the grant issued and confirmed to the Respondent, what purpose would the revocation of the grant serve? Accordingly, it was submitted that revocation at this point in time would not serve any good.

Analysis and Determinations

Having judiciously analysed the Pleadings, the evidence on the record and the submissions of the advocates of the respective parties' I find that the main issue that arises for determination is whether the Objector's application meets the requirements for revocation of a grant as set out in Section 76 of the Law of Succession Act. Before delving into whether the Objector / Applicant has demonstrated the grant should be revoked, I will first address the issue of who between the Objector and Respondent had the right to apply for letters of administration.

Section 66 of the Law of Succession Act, provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate and provides that the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the order of preference as set out in the aforesaid section. **Section 66(a)-(d)** provides: -

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors”

Part VII, dealing with making of grants under **Rule 26(1) and (2) of the Probate and Administration Rules** provides: -

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

In **Nairobi Succession Cause No. 2015 of 2012 In the matter of the Estate of Joshua Orwa Ojode (Deceased)** discussing the issue of who ought to benefit from the estate of a deceased, Musyoka J opined that:

“6. Going by the above provision, where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”

At paragraph 13 of the same judgement, Musyoka J went on to hold that:

“13. This duty to maintain a wife and children extends to protection of widows and orphans following the death of the person who is legally bound to maintain them. The law ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives, including parents, are relegated to a secondary position, and only access the property in the event that there is no widow or child, or if they convince the court in a proper application that they were dependent on their dead child or sibling or other relative and that the court should then make provision for them out of the estate of the dead child. These provisions are designed to obviate the possibility of widows and orphaned children being rendered destitute, as they would be if they are forced to share their inheritance with the parents and siblings of the deceased. Quite clearly therefore under succession law, parents are not in the same footing with widows and children.”

It is clear that under Part V referred under Section 66(b), the persons given priority over an intestate are the surviving spouse and children. Despite the earlier arguments that the Respondent applied for the letters of administration under **Section 39** of the Law of Succession Act, Counsel for the Respondent in his submissions acquiesced that in accordance with the law as cited above, the Objector held a higher priority than the Respondent. This is the correct position in law. Being a surviving spouse of the deceased, the Objector herein ought to have been considered before the Respondent. As established in the **Ojodeh case (supra)**, under succession law, parents are not in the same footing with widows and children. In extensor, the sister of the deceased in the instant matter is not on equal footing with the surviving spouse and children of the deceased. Further, as is evidenced by the annexed birth certificates of the deceased’s children, at the time of the deceased’s death, all but one of them was an adult and hence capable of taking out letters of administration before the duty could fall upon the Respondent.

The Respondent claimed to have obtained all the necessary consents in applying for the letters of administration intestate. She deponed that she had sought the consent from her parents and siblings. However, in light of Rule 26(1) of the Probate and Administration rules, it is clear that she ought to have sought the consent of the spouse of the deceased and the adult children. The explanation given that the Objector renounced her claim to the estate after being allocated the parcels of land in Kieni-Nyeri and Marunduini-Nyeri was not supported by way of evidence.

As a consequence of the foregoing I therefore find that by virtue of **Section 66 of the Law of Succession Act and Rule 26(1) and (2) of the Probation and Administration Rules**, the Objector had ranked in priority to the Respondent in seeking grant of letters of administration and the Respondent ought to have given notice to the Objector that she sought to take out the grant of letters of administration.

That being settled, I must now address whether in the circumstances, the grant issued to and confirmed to the Respondent ought to be revoked. The law on revocation of grants is **Section 76 of the Law of Succession Act** which provides:

Section 76: A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;
or

(ii) to proceed diligently with the administration of the estate;

or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

An examination of the pleadings and submissions reveals that the Objector's bone of contention is that the grant obtained by the Respondent was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. Specifically, the Objector cited the exclusion of her and the deceased's children from participating in Nairobi Succession Cause 2506 of 2008 as proof of the material non-disclosure. The Objector further alleged that the Respondent had failed to obtain the relevant consents from the dependants of the deceased which draws the inference that the proceedings to obtain the grant were defective in substance.

Section 51 of the Law of Succession Act deals with the information that should go into an application for grant of representation. Under Section 51(2) (g) it is stated:-

"51(2). An application shall include information as to ____...

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased..."

For the purpose of the estate of the deceased in this cause, for one to comply with Section 51(2) (g) of the Act, the Respondent was bound to reveal the name of the surviving spouse of the deceased, Elizabeth Wairimu Baru and those of her children. Instead, in the affidavit in support of the Petition for grant of letters of administration intestate filed by the Respondent at the High Court of Kenya at Nairobi Succession Cause No. 2506 of 2008, the Respondent listed the persons who survived the deceased as follows:

- a. Monicah Wangui Gitahi-Mother.
- b. Regina Wairimu Gitahi-Sister.
- c. Joseph Gikunju Gitahi-Brother.
- d. Charles Kariuki Gitahi-Brother.
- e. Samuel Kinyua Gitahi-Brother.

There is no doubt that from the listing above, the Respondent deliberately failed to include the Objector and her children. As such, Section 51(2) (g) of the Act was not complied with. I draw inspiration from **Nairobi Succession Cause No. 1642 of 2010 In re Estate of Laurent Ntirampeba (Deceased) [2017] eKLR** where my colleague Achode J held as below:

*"24. On the question of revocation of the grant issued, it is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. A duty is owed to the court to bring out all the facts and refrain from suppressing any material facts. If one is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right, but the duty to deny relief to such person. This was the expression of the court in **R. v. Kensington Income Tax Commissioner [1979] I KB 486** by Viscount Reading, Chief Justice of the Divisional Court.*

25. Rule 26 of the Probate and Administration Rules relates to the requirements attached to Grants of letters of administration as regards notifications and consents; and states:

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

*26. The effect of failure to comply with Rule 26 of the Probate and Administration Rules was discussed in **Al-Amin Abdulrehman Hatimy v. Mohamed Abdulrehman Mohamed & another [2013] eKLR** where the court held that the Law of Succession by virtue of Rule 26 requires that any petition for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate. The duty of a litigant is to make a full and fair disclosure of the material facts.”*

In totality, the Respondent made an application to the court for Grant of Letters of Administration in Nairobi Succession Cause 2506 of 2008 wherein she indicated that she, her parents and her siblings were the beneficiaries to the estate of the deceased. She did not disclose to court that the deceased left a wife and children despite being well aware of their existence. The Respondent did not give the widow notice before filing her petition and neither did he obtain her consent. It follows therefore that the Respondent was guilty of non-disclosure of material facts. In the end, I find and hold that the requirements of Section 76 (a), (b) and (c) of the Law of Succession Act have been satisfied.

The upshot of the foregoing is that the court makes the following orders:

- a. The summons dated 7th July 2014 brought by Elizabeth Wairimu Baru for revocation of the Grant of Letters of Administration issued to Regina Wairimu Gitahi on the 24th March, 2009 and subsequently confirmed on 22nd January, 2010 is found to have merit and is granted.
- b. The Grant of Letters of Administration intestate issued on the 24th March, 2009 and subsequently confirmed on 22nd January, 2010 in Nairobi Succession Cause 2506 of 2008 is hereby revoked.

There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF FEBRUARY 2019 AT KAJIADO

.....

R. NYAKUNDI

JUDGE

Representation:

Mr. Kamwaro for the applicant

Mr Manderera for the respondent