**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.1016 OF 1988**

**IN THE MATTER OF THE ESTATE OF GITHAIGA GICHUKI–(DECEASED)**

**RULING**

1. This matter relates to the estate of Githaiga Gichuki who died, testate on 9th October 1987, having executed a will on 14th August 1985. The said will had named Francis Gichuki Githaiga as executor.

2. The said executor sought representation on 28th October 1988 and a grant of probate of the written will was made to him on 6th February 1989. In the affidavit in support of the petition, sworn on 27th October 1988, the executor expressed the deceased to have been survived by the following dependants –

1. Jane Muthoni Githaiga
2. Peris Wanjiru Githaiga
3. Francis Gichuki Githaiga
4. John Alex Mwaniki Githaiga
5. Anthony Gichuki Githaiga
6. John Wachira Githaiga
7. James Peter Wambugu Githaiga
8. Jackson Gichuki Githaiga
9. Joseph Wambugu Githaiga
10. Mwangi Githaiga

3. According to the terms of the will, the various assets which make up the estate of the deceased were distributed to the following persons-

1. Gichuki Mukami
2. Gichuki Wamuyu
3. Gichuki Wanjiru
4. Mwaniki Mukami
5. Wambugu Mukami
6. Wachira Wamuyu
7. Wambugu Wamuyu
8. Mwangi Njoki
9. Mukami Githaiga
10. Wanjiru Githaiga
11. Unmarried daughters were to get specified portions from their respective mother's portions.

4. Confirmation of grant was sought on 30th November 1989 vide an application of even date. The

distribution proposed was as per the will of the deceased made on 9th October 1987. The grant was confirmed on 1st December 1989, and a certificate to that effect duly issued. There was a subsequent amendment of the certificate on 16th March 2005 to bring it fully into conformity with the will of the deceased.

5. The executor of the will of the deceased, that is Francis Gichuki Githaiga, died on 15th February 2008. On 23rd July 2008, John Alex Mwaniki Githaiga petitioned in the cause for a grant of letters of administration *de bonis non* with the will of annexed. The petition was allowed by Maraga J. on 15th March 2011 constituting the said John Alex Mwaniki Rweria alias John Alex Mwaniki Githaiga administrator of the estate. A grant to that effect was issued dated 15th March 2011.

6. On 4th July 2011 a Summons seeking revocation of the grant *de bonis non* was lodged in court by two sons of the deceased, Jackson Gichuki Githaiga and John Wachira Githaiga, and daughter in law, Mary Ngunyu Gichuki, wife of the late executor Francis Gichuki Githagia. Their principal complaint is that they were not consulted nor involved in the petition for grant *de bonis non*. It is also their case that although the petitioner had equal right of administration with them he did not obtain their consents before petitioning for the grant. They complain that the administrator did not even disclose their existence.

7. The administrator replied to the application through his affidavit sworn on 20th July 2011 and filed in court on 11th August 2011. The administrator does not respond in his affidavit to the specific allegations made by the applicants in their affidavit of 30th June 2011; that they were not disclosed in the petition, nor consulted and neither were their consents obtained.

8. It was directed on 23rd July 2013 that the said application, dated 30th June 2011, be disposed of by way of written submissions. The administrator submissions are dated 26th August 2013 and were filed in court on 28th August 2013, while those by the applicants are dated 20th September 2013 and filed on 24th September 2013. The applicants principally dwell on the fact of lack of consents and involvement in the petition for grant *de bonis non*. The administration pleads that he has done nothing wrong.

9. The issue that arises in this matter relates to the substitution of a sole executor following his death. The persons who are entitled to administrater the estate of a deceased testator in the absence of an executor are stated in *Sections 63, 64 and 66* of the Law of Succession Act. Such persons include, according to order of priority, a residuary legatee, a personal representative of a universal legatee, persons entitled in intestacy, the Public Trustee and creditors.

10. The will made on 14th August 1985 does not name a residuary beneficiary; therefore there was no residuary or universal beneficiary or their personal representative who could be appointed to administrater the estate after the death of the sole executor. The next in line therefore were the persons entitled in intestacy to the estate of the deceased. Such persons in this case of course refer to the persons named in the will – the surviving widow and children of the deceased. If there are surviving widows they would have priority over the children, but if there are none then the children would be next in the line and have equal right to administration.

11. It is a requirement under rule 26(1) of the Probate and Administration Rules that letters of administration, whether simple or with annexed, are not to be granted to any applicant unless notice had been given to every person entitled in the same degree as or in priority to the applicant. Rule 26 (2) of the said rules envisages the obtaining of consents from persons of equal or superior right if they do not desire to apply.

12. From the material before me it is plain that notices were not given to the applicants, who had equal right to the administrator to the administration of the estate, neither were their consents obtained. Quite clearly, rule 26(1) of the Probate and Administration Rules was not complied with.

13. The application dated 30th June 2011 is premised on ***Section 76*** of the Law of Succession Act under

which a grant may be revoked if the same was obtained through a process that was defective. The process to obtain the grant made on 25th March 2011 was defective, and the said grant is liable to revocation.

14. I hereby make the following orders:-

(1) That the grant of letters of administration with will annexed made on 25th March 2011 to John Alex Mwaniki Rweria alias John Alex Mwaniki Githaiga is hereby revoked;

(2) That John Alex Mwaniki Rweria alias John Alex Mwaniki Githaiga, John Wachira Githagia and Jackson Gichuki Githaiga are hereby appointed administrators of the estate of the deceased with the limited mandate to complete administration of the said estate;

(3) That a grant of letters of administration with the will annexed limited to assets left administered by the execution shall issue to them accordingly; and

(4) That there shall be no order as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 16th DAY OF May, 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Ochieng advocate for the applicant.**

**No advocate for the respondent.**