



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**S0 UCCESSION CAUSE NO. 327 OF 1994**

**IN THE MATTER OF THE ESTATE OF HUDSON GITHAIGA GITHINJI – DECEASED**

**JUDGMENT**

The deceased, Hudson Githaiga Githinji, died on 30th January 1993. Representation to his estate was sought on 24th February 1994 by Jemimah Wambui Githaiga and Anne Wambui, who described themselves as wife and daughter, respectively, of the deceased.

The petitioners swore an affidavit on 15th February 1994, to support their petition where they listed the survivors of the deceased as:-

1. Jemimah Wairimu Githaiga – widow
2. Anne Wambui – daughter
3. Maina Githaiga – son
4. Keziah Njeri – daughter
5. Ruth Nyacomba – mother
6. Stephen Maina – grandson
7. Moses Wanjohi – grandson
8. Hudson Ndiritu – grandson
9. Willy Kinyua – grandson

There is also a handwritten document on the record headed consent letter. It bears the names of the following persons:-

1. Maina Githaiga (son)
2. Keziah Njeri (daughter)
3. Ruth Nyacomba (mother)
4. Stephen Maina ( grandson)
5. Moses Wanjohi (grandson)
6. Hudson Ndiritu (grandson)
7. Willy Kinyua (grandson)

There are signatures against the first three names – those of Maina Githaiga, Keziah Njeri and Ruth Nyacomba. At the foot of the document is embossed the stamp mark of Lucy Njiru, advocate, of Box No. 75219, Nairobi. There is also a signature next to the mark of the stamp, and I presume it to be of the said Lucy Njiru, advocate. I presume that this document is a consent signed in an effort to conform with Rule 7(7) (a) of the Probate and Administration Rules. Representation was made on 13th July 1994 to the petitioners, Jemimah Wambui Githaiga and Anne Wambui, taking the form of a grant of letters of administration intestate.

The said administrators then moved the court on 8th December 1997, vide an application dated 18th

September 1997, for confirmation of the grant. The affidavit supporting the application was sworn on 8th December 1997 by Jemimah Wairimu Githaiga. It was said that the deceased was survived by:-

1. Jemimah Wairimu Githaiga – widow
2. Anne Wambui – daughter
3. Hudson Ndiritu Githaiga - grandson

- (4) Stephen Maina - grandson
- (5) Moses Wanjohi - grandson
- (6) Willy Kinyua Githaiga -grandson

The grant was confirmed on 4th March 1998. The property was to be registered in the name of an unnamed person to hold in trust in equal shares for her children.

There are two remarkable things about the confirmation. One of the persons in whose name the grant was confirmed was not named in the grant made on 13th July 1994 as administratrix. The confirmation was in favour of Jemima Wairimu Githaiga, while the grant made on 13th July 1994 was to Jemima Wambui Githaiga. There was no rectification of the grant before the confirmation. The certificate of confirmation directs the estate ***“to be registered in her name and to hold the same in trust in equal share for her children.”*** This is grossly vague – for it is not clear who is being referred to as ***“her.”***

It is this distribution that provoked the summons for revocation dated 4th July 2002 by Stephen Maina Githaiga. The application seeks revocation of the grant issued on 4th August 1998. The record is clear, no grant was made on 4th August 1998. The only grant on record was made on 13th July 1995. It was confirmed on 4th March 1998 and a certificate of confirmation of grant was issued on the same day. Nothing happened in this matter on 4th August 1998.

Be that as it may, the applicant says, in his affidavit in support of the application, that he was a son of the deceased. He complains that he and his sister, being children of the second wife of the deceased, had been omitted from distribution as the estate had been distributed only among members of the first house of the deceased.

The application was served. The respondents filed affidavits in reply. Jemimah Wairimu Githaiga swore her affidavit on 4th February 2003 and filed it in court on 7th February 2003. Anne Wambui Githaiga swore her affidavit on 10th February 2003. In both affidavits, the respondents deny Stephen Maina as a son of the deceased. They aver that the deceased never married the mother of Stephen Maina that the said Stephen Maina was not a biological child of the deceased.

The application was cleared for disposal by affidavit and oral evidence. Both sides testified and called witnesses. The gist of the applicant's story as narrated by him and his witnesses was the applicant was a son of the deceased as his mother was at one time married to the deceased and the applicant was the issue of the said marriage. The respondent's counter story was that the applicant's mother was never married to the deceased, but was either a maid of a woman - to - woman wife of the deceased's sister, Keziah Njeri.

I do not need to analyse and evaluate the oral evidence adduced at the hearing of the revocation application. The answer lies not in those proceedings, but in the papers lodged in court on 24th February 1994 at the initiation of this cause. There is an affidavit sworn on 15th February 1994 by Jemima Wairimu Githaiga to support the petition for grant of letters. It lists Maina Githaiga, the applicant, and his sister, Keziah Njeri, as survivors of the deceased, being his son and daughter, respectively. There is also a consent letter, which is undated, but forms part of the court record and which is signed by Lucy Njiru, advocate for the respondents, which purports to be executed by the said Maina Githaiga and Keziah Njeri, as son and daughter, respectively, of the deceased. They are purported to have signed the said consents in those capacities to indicate that they had no objection to the grant being made to Jemima Wairimu Githaiga and Anne Wambui. It is inconceivable that the said Jemimah Wairimu Githaiga could later

swear another affidavit on 4th February 2002 to say that Maina Githaiga and Keziah Njeri were not children of deceased. The averments in the two affidavits cannot stand together as they are totally contrary to each other. What this no doubt means is that one of them is false. No effort has been made to explain the about-turn from the position in the first affidavit. The deponent of these two affidavits has no doubt perjured herself. She has told untruths on oath. I would have recommended her for prosecution for perjury were it for the fact that she has since died.

From the material on record, I am satisfied that Stephen Maina Githaiga and Keziah Njeri were children of the deceased and ought to have been provided for in the distribution of the estate of the deceased.

I have noted from the record that the children of Anne Wambui are listed as survivors of the deceased and have been allotted shares in the estate. The justification given for this is that they were dependent on the deceased. The law on intestate succession is very clear on the position of grand-children. They are not entitled to a share in the estate of their deceased grandfather or grandmother so long as their own parent is alive and taking a share. Grandchildren are only entitled where their own parent is dead. Under **Section 41** of the Law of Succession Act they take the share that would have gone to their dead parent. Anne Wambui is alive – there is no legal basis at all for Stephen Maina, Moses Wanjohi, Hudson Ndiritu and Willy Kinyua taking a share in the estate of their deceased grandfather.

Were the grandchildren dependent on their deceased grandfather? Whether or not a person was dependent on another is a matter for determination under **Section 26** of the Law of Succession Act in an application properly brought under that provision. No such application was brought in that behalf and there is no declaration by the court that the said grandchildren were dependent on the deceased.

The application dated 4th July 2002 seeks revocation of grant. It however does not target the events of 1994 when the grant was made, but the events of 1998 when the grant was confirmed. At the time grant was obtained the applicant and his sister were disclosed as children of the deceased. It is at confirmation that their names were suppressed. The applicant is apparently complaining about the confirmation process, but not the grant making process. **Section 76** of the Law of Succession Act, on which the application is premised, allows revocation of grant in connection with two circumstances – a process of obtaining grant that is defective

and fraudulent, and difficulties in the process of administration. Challenges faced at confirmation are not good ground for revocation of grant. Where confirmation of grant is obtained in a flawed process, the grant ought not be revoked, instead the confirmation orders ought to be set aside.

The orders that I am disposed to make are:-

1. That Anne Wambui is confirmed as the surviving administrator.
2. That Stephen Maina Githaiga is appointed as a co-administrator of the deceased and a grant of letters of administration intestate shall be issued to Stephen Maina Githaiga and Anne Wambui Githaiga.
3. That the confirmation proceedings of 4th March 1998 are set aside and the certificate of confirmation dated 4th March 1998 is hereby cancelled.
4. That the estate of Hudson Githaiga Githinji, deceased, shall be shared equally between his three surviving children Anne Wambui, Stephen Maina Githaiga and Keziah Njeri.
5. That a certificate to confirmation of grant shall issue accordingly.
6. That each party shall bear their own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 8th DAY OF November, 2013.**

**W. M. MUSYOKA**

**JUDGE**