REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1074 OF 1998

IN THE ESTATE OF MARY WANJIKU NJAU – (DECEASED)

RULING

1.The application for determination is dated 26th March 2012. It seeks revocation of the grant made on 2nd November 2000 to Lilian Wairimu Ngotho and Elizabeth Murungari Njoroge. It is brought at the instance of Cecilia Nduruka Njau who complains that although the administrators now in place were appointed twelve (12) years ago they have failed to effectively administer the estate with a view to distributing the assets.

2. In her affidavit sworn on 26th March 2013, the applicant states that she swears the affidavit on her own behalf and on behalf of two other persons – James Njoroge Njau and Richard Gichini Njoroge. The deponent is a half-sister of the deceased, Wanjiku Njau, being both daughters of the same father by different mothers. The deceased was not married and did not have children of her own. The applicant's is that despite having been appointed twelve years ago, the administrators have failed to complete administration of the estate.

3. The reply to the application was sworn by Elizabeth Murungari Njoroge on 14th May 2013. She concedes that Wanjiku Njau did not have children of her own, and says that her closest relatives are her nieces, the administrators herein, who are the children of the deceased's sister, Wamaitha Njau. She avers that Cecilia Nduruka is a half – sister of the deceased, but her claims to the estate is inferior to that of the nieces. She asserts that one of the applicants, Richard Gichini Njoroge, cannot represent the estate of Njoroge Njau, a dead brother of Wanjiku Njau. She explains that confirmation has not been obtained as there is pending litigation touching on the assets the subject of this cause.

4. On 13th August 2013, Cecilia Nduruka Njau filed an affidavit sworn on 7th August 2012 to respond to the administrators affidavit sworn on 14th May 2013. The fresh matter raised in the said affidavit is that the administrators are children of a married sister of the deceased. Their mother, Wamaitha, who was the biological full sister of the deceased, is said to have been married to a Mr. Ngatho. The applicant argues that Kikuyu customary law is patrilineal and would not allow children to inherit from their mother's side of the family.

5. On 25th September 2013 it was directed that the application dated 26th March 2013 be disposed of by way of written submissions. Both sides have filed their respective submissions.The applicant's submissions were filed on 22nd October 2013, and are dated 18th October 2013. The respondent's submissions are dated 28th October 2013 and were filed in court on 29th October 2013.

6. The applicants base their case on two grounds: that the estate has not be administered diligently and that a large number of relatives were left out or were not disclosed at the point of petitioning for grant. The central plank of their case is that it has taken the administrators too long to wind up the administration.

7. The respondents argue that sufficient case has not been made for revocation of the grant. They say that the applicants have not demonstrated their interest in the estate, nor that the process of obtaining the grant was defective, nor proved fraud practiced by the respondents, nor that the grant was obtained by concealment of facts. They further argue that the applicants have not established that they have not exercised diligence in administration despite notice having been given to them.

8. I have perused the record herein. It emerges that the deceased, Wanjiku Njau, was not married and did not have children of her own. It emerges too that she was survived by nieces, who are the children of her full biological sister, Wamaitha Ngatho and also by half-brothers and half-sisters. It would also appear that she was not survived by her father or mother.

9. Where an intestate, for Wanjiku Njau was one, is not survived by a spouse or children, or parents – but by nieces and half-siblings, the law that governs distribution to such person's estate would be *Section 39(1)* and (d) of the Law of Succession Act. The said provision state as follows:-

> ***"39(1).Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –***

a. ***Father, or if dead***
b. ***Mother, or if dead***
c. ***Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares, or if none***
d. ***Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares…"***

11. From the scheme of distribution envisaged in *Section 39* (1) (c) (d) of the Law of Succession Act, the children of the full biological siblings of the deceased have a superior right to inherit their deceased aunt or uncle than the deceased person's half siblings. The nieces of the deceased are in the category in *Section 39(1)(c),* while the half-siblings are in the category in *Section 39(1)(d).* The nieces right to a share in the estate of the deceased is greater than that of the half-siblings of the deceased.

12. The respondents argue that Kikuyu customary law would frown upon nieces inheriting property from their maternal side of the family. The basis for this submission is that the Kikuyu customary law of succession envisages a patrilineal system. The deceased died on 9th April 1998. Her estate is subject to administration and distribution under the provisions of the Law of Succession Act which came into force on the 1st of July 1981. The effect of the coming into force of this law was to oust the Kikuyu Customary Law of succession. This is stated is ***Section 2(1)*** of the Law of Succession Act. The said provision states-

> ***"2(1). Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of these persons."***

13. The Kikuyu customary law of succession todate only applies to estates of persons who died before the Law of Succession Act commenced on 1st July 1981. This is the effect of Section 2(2) of the Law of Succession Act.

14. It is evident from the above provisions that the Kikuyu customary law of succession does not

apply to the estate of Wanjiku Njau for she died after the Law of Succession Act came into force. The provisions of *Section 39(1) (c)* of the Act are not subject to customary law and therefore patriarchy is of no effect to them. There is therefore nothing that would change the position that the nieces of the deceased in this cause have a prior right to inherit the estate of their deceased aunt and equally to administer the same over that of the applicants in this case. So long as there are surviving nieces of the deceased's full sister, the half-siblings of the deceased have no claim to her estate and they do not have a prior right to administration of the estate over the nieces.

15. The application is predicated on *Section 76* of the Law of Succession Act. Under that provision a grant may be revoked if the proceedings to obtain it were defective, or the same was obtained fraudulently or that it was obtained by means of an untrue allegation on a point of law, or that the administrators have failed to diligently administer the estate.

16. An application founded on *Section 76* of the Law of Succession Act may be moved by an interested party. An interested party in the context of *Section 76* of the Act is not defined. It refers to a person who has a stake in the estate. It would could be a survivor of the deceased, a heir, a beneficiary, a creditor or dependant. I have already found that the applicants have a lesser claim to the estate compared with the respondents, and that for as long as the applicants are alive, the respondents should have no claim whatsoever to the estate. In view of this the applicants cannot be considered as ***"interested parties."*** They do not therefore have sufficient status to move the court under ***Section 76*** of the Law of Succession Act to have the grant made to the respondents revoked**.**

17. The principal complaint by the applicants is that the administrators have not been diligent in the administration of the estate. The said administrators are said to have been appointed in 2000, some thirteen (13) or so years ago, suggesting that they have failed in their duty to administer the estate and to finally distribute the assets. The ground in *Section 76 (d) (ii)* of the Act applies only where there has been due notice and there is no reasonable cause for failing to proceed diligently. There is no evidence that any notice was given to the respondents requiring them to proceed diligently and that there was no reasonable cause. The respondents have listed several cases pending over estate property which they say have delayed competition of administration. This appears to me to be a good reason. It cannot therefore be said that they failed to act diligently without reasonable cause.

18. No defects in the process of obtaining the grant were in my view demonstrated. No false allegations or fraud nor mispresentations were proved. The material placed before the court was all what was needed by the court at the time the appoints were made for the purpose of making the grant. Furthermore, the respondents had a superior right to administration and in succession to the applicants. Non-disclosure of the applicants would have been a matter of no consequence.

19. Having taken into account all the facts and circumstances of this case, I have come to the conclusion that the application dated 26th March 2013 is without merit and I hereby discuss the same with costs to the respondents.

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

W. MUSYOKA

JUDGE

In the presence of Miss Ambuko advocate for the petitioner.