FEO v ACO (Sued as Co-Administratrix of the Estate of the Late BPO) (Matrimonial Cause E006 of 2023) [2024] KEHC 14889 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14889 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

MATRIMONIAL CAUSE E006 OF 2023

WM MUSYOKA, J

NOVEMBER 28, 2024

BETWEEN

FEO ..... APPLICANT

AND

ACO ..... RESPONDENT

SUED AS CO-ADMINISTRATRIX OF THE ESTATE OF THE LATE BPO

JUDGMENT

1. These proceedings were initiated, by way of an Originating Summons, dated 18th December 2023, at the instance of the applicant, FEO :

    a. for a declaration that the assets, listed in Schedule A, in the Originating Summons, acquired during the subsistence of the marriage between the applicant and the deceased, BPO , between 4th August 1963 and 2002, registered in the name of the deceased, were held beneficially or in trust for her;

    b. for a declaration that the applicant was entitled to the said assets 100%, based on her contribution, both directly and indirectly, to their acquisition, and having been acquired during the subsistence of the marriage between her and the deceased;

    c. for a declaration that the assets, listed in Schedule B, in the Originating Summons, acquired during the subsistence of the marriage between her and the deceased, between 4th August 1962 and April 2019, registered in the name of the deceased, were held by him to her beneficial interest or in trust for her, at 50% or higher, based on her contribution, or on account of their marriage; and

    d. among other declarations and prayers.

2. The background given, by the applicant, is that she and the deceased had contracted a customary law marriage in 1963, which was subsequently solemnized in church in 1973. The deceased died in 2019. There were 7 issues of the marriage, 4 of whom passed on. She avers that some 41 assets were acquired jointly, in the course of the marriage, and the same ought to not be subjected to succession, as they were not free property. She avers that the deceased married a second wife in 2002, and that some assets were acquired after that, and that she, the applicant, had contributed to acquisition of those assets too. The applicant has detailed how she assisted the deceased manage his businesses, and how she also dabbled in the businesses of handcrafts, footwear and beauty styling, from which she made money, part of which was channelled to acquisition of the assets ,the subject of the suit.

3. The respondent, in her response, states that she was a spouse of the deceased, and a co-administratrix of his estate, in Busia HCSC No. E008 of 2021. She argues that this cause, for distribution of matrimonial property, is misconceived, as it was founded on a false premise. She further argues that a dispute on division of matrimonial property should be between a man and a woman, on the basis of a marriage between them, where the marriage has been dissolved formally by divorce, and the assets had been acquired during the currency of the marriage. She asserts that she was not a spouse of the applicant, and a suit for division of matrimonial property could not be maintained against her. She also argues that she and the applicant are joint administratrices of the estate of the deceased, and neither of them can sue the other, with respect to division of the assets allegedly acquired by the deceased, with a view to dividing them as matrimonial property. She asserts that the assets in question were acquired by the deceased, and remain registered under his name. She further argues that none of the assets were in their names, as widows of the deceased. She argues that all the said assets ought to be subjected to succession, contrary to the position taken by the applicant. She states that the suit is incompetent, and ought to be dismissed.

4. The matter was canvassed viva voce. The hearing happened on 26th June 2024. Both parties testified, with the applicant calling witnesses.

5. The applicant breathed life into her filings. She stated that she had sued the respondent as a co-administratrix of the estate of the deceased. She testified that after the deceased married both the respondent and her, none of them separated from, nor divorced, the deceased. She stated that the court did not divide matrimonial property between her and the deceased, as they remained in good terms throughout, explaining that they could only divide matrimonial property upon separation or divorce. She said that all the assets were in the name of the deceased, but asserted that she contributed to their acquisition. She further asserted that the property had already been acquired by the time the respondent married the deceased. She testified that the deceased had bought property for the respondent, at Busia and Nairobi, but she, the applicant, was not claiming any of it. She wondered why the respondent was claiming what was meant for her and her children. She stated that there were assets that were acquired after the respondent married the deceased.

6. MOS testified next. He was a nephew of the deceased. He lived with the deceased, during his school days, in the 1960s and 1970s, and visited the deceased at Nairobi during school holidays. In the 1980s, he worked with the deceased in Nairobi, at his businesses. He testified that the applicant was not a full-time housewife, for she used to run businesses. He said that he knew both the applicant and the respondent, and that the 2 never separated from, nor divorced, the deceased. He mentioned that he knew the houses from where the applicant was collecting rent. He stated that those houses belonged to the deceased. He mentioned that the applicant did not share the rent with the respondent, as the applicant was the custodian of those assets.

7. Opuku Nading followed. He was an employee of the deceased. He worked as a guard at some of the businesses, and later as a cook at an eatery operated by the deceased. He said that the deceased had 2 wives. He only interacted with the applicant, and only heard of the respondent.

8. The respondent testified last. She stated that neither she nor the applicant had divorced the deceased. She asserted that she was not a spouse of the applicant. She said that all the assets listed in the cause were in the name of the deceased, and were assets in the estate of the deceased. She testified that some assets were acquired after she married the deceased. She clarified that she was not claiming any of them exclusively, and the same ought to be subjected to succession. She said that she contributed to the acquisition of some of those assets, although she had no evidence of such contribution. She said that she was aware that the law allows division of property amongst the divorced. She said that death did not end marriage, and explained that that was why there was succession. She conceded that some assets were acquired before she married the deceased. She asserted that the applicant did not contribute to the acquisition of the assets, and, if there was proof of her contribution, then she, the applicant, should be entitled to that contribution. She submitted that it was wrong for the applicant to sue claiming division of matrimonial property, as the deceased died, and what should have happened thereafter should be succession to his estate. She said that she had not seen any evidence of contribution by the applicant.

9. At the conclusion of the oral hearings, the parties were to file written submissions. I have only come across written submissions by the respondent. I have read them, and noted the arguments made.

10. The respondent has cited Rules 5 and 7 of the Matrimonial Property Rules, 2022; the preamble to the *Matrimonial Property Act*, Cap 152, Laws of Kenya; sections 2, 16 and 17 of the *Marriage Act*, Cap 150, Laws of Kenya; the preamble to and sections 2(1), 79 and 80(2) of the *Law of Succession Act*, Cap 160, Laws of Kenya; section 61(1) of the *Land Registration Act*, Cap 300, Laws of Kenya; Article 45(2) of *the Constitution*; Salomon vs. Salomon [1897] AC 78 (Lord McNaughten); Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors [1969] eKLR EA 696 (Sir Charles Newbold, P, Duffus VP & Law JA); Karanja vs. Karanja [1976-80] 1 KLR [1983] eKLR (Kneller & Hancox, JJA & Chesoni, Ag JA); Njoroge vs. Ngari [1985] KLR 480 [1985] eKLR (Butler-Sloss, J); Nderitu vs. Nderitu [1998] eKLR (Pall, JA); Echaria vs. Echaria [2007] EA 139 [2007] eKLR (Tunoi, O'Kubasu, Githinji, Waki & Deverell, JJA); Victor Mabachi & another vs. Nurton Bates Ltd [2013] eKLR (Kihara Kariuki PCA, Mwilu & Gatembu, JJA); Joseph Kobia Nguthari vs. Kiegoi Tea Factory Company Limited & 2 others [2016] eKLR (Gikonyo, J) and In re Estate of Makokha Idris Khasabuli (Deceased) [2019] eKLR (Musyoka, J).

11. There is only 1 issue for determination, that is declaration of the rights of the applicant to the property acquired by the deceased during their matrimony, and division of the said property as between them. However, whether I will get to make that determination, may depend on the issue flagged by the respondent, about the competence of the cause.

12. The competence of this cause is challenged. The argument is that the concept of division of matrimonial property presupposes a dispute between spouses, that is a husband and a wife, going by the provisions of the *Matrimonial Property Act* and the Matrimonial Property Rules. The remedy, of determination of matrimonial rights and division of matrimonial property, is unlocked upon dissolution of the marriage between them. A close reading of these 2 statutes, would reveal that a party, who wishes to get the court to pronounce on their rights to property, acquired by either spouse during the currency of their marriage, should do so following dissolution of the marriage upon divorce. The respondent asserts that that remedy would not be available here, given that there has been no dissolution of the marriage between the deceased and the applicant, by divorce decree, as the deceased is dead, and, therefore, there would be no legal basis for bringing the cause.

13. The counter-argument, by the applicant, is that death also brings a marriage to an end, and suggests that that would amount to a dissolution, which would avail the remedy to a party, who would like the court to pronounce on their rights, to the property acquired, by their otherwise dead spouse, during the currency of the marriage.

14. Does death lead to a dissolution of a marriage? The *Marriage Act* does carry a provision on the effect of the death of a spouse on a marriage. That is at section 16, which is on duration of marriage, and it states that marriage subsists until it is determined by the death of a spouse, a declaration of the presumption of death of a spouse, annulment of the marriage, and a decree of divorce. Section 3(1) of the *Marriage Act* states that marriage is a voluntary union between a man and a woman. That can only refer to a living man and a living woman, not one who is dead. Section 15 of the *Marriage Act* goes on to declare the rights of widows and widowers. They are freed to re-marry. That liberty would not be available were it that death did not terminate marriage.

15. The Matrimonial Property Rules, under Rules 4 and 5, envisage the mounting of a suit for determination of rights, over property acquired by either spouse during the currency of their marriage, for the purpose of division, upon dissolution of a marriage by a decree of divorce. Such proceedings could be by or against a spouse in a subsisting marriage or a former spouse. Section 7 of the *Matrimonial Property Act* envisages division of matrimonial property upon divorce or dissolution of the marriage. There is no mention, in these provisions, of declaration of rights over or division of matrimonial property being sought upon the death of a spouse. In the absence of that, there would be no basis for inviting the court to determine matrimonial property rights where there is no decree of divorce, or upon the demise of a spouse.

16. Death terminates a marriage. However, the remedy, of determination of matrimonial property rights, for the purposes of division, is only unlocked through divorce or dissolution of the marriage. That presupposes termination of a marriage during the lifetime of the parties. It is about dissolving a subsisting marriage, between parties who are alive. Death naturally ends a marriage, and, after that, the issue of terminating marriage, by divorce or other means, would not arise.

17. Perhaps, there may be need to define the term "dissolve," given that the same is used together with "divorce," in section 7 of the *Matrimonial Property Act*, for matrimonial property is "divided between the spouses if they divorce or their marriage is otherwise dissolved." The words "dissolve" and "dissolution" are also used in sections 8 and 11 of the *Matrimonial Property Act*. Section 8 talks of "If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved ..."; while section 11 talks of "... the customary law relating to divorce or dissolution of marriage."

18. According to Concise Oxford English Dictionary, Oxford University Press, Oxford, 2011, 415, "dissolution" refers to the formal ending of something, and it meant death in archaic English. The verb drawn from it, or from which it is derived, is "dissolve," which is defined to mean, with reference to marriage, to close down or annul. Black's Law Dictionary, Thomson Reuters, St. Paul, 2014, 574, "dissolve" is not defined, but "dissolution" is, to mean the act of bringing to an end, or termination, or cancellation, or annulment and restoration to original status. "Dissolution of marriage" is defined as divorce, or divorce-like remedies in archaic English.

19. The statutory law of marriages may, perhaps, be more illuminating. Section 16 of the *Marriage Act* provides for duration of marriage. The words or terms "dissolve" and "dissolution" are not used in this provision, which, instead, talks of determination of marriage, by either death, divorce or annulment. Part X of the *Marriage Act* is on matrimonial disputes and proceedings, and it is here that the word "dissolution" is used, in connection with divorce. This Part provides for "dissolution" of Christian, civil, customary, Hindu and Islamic marriages. The grounds for "dissolution" or "divorce" are detailed,

for the marriages under each of the 5 categories. Section 65 for the Christian marriage, section 66 for civil marriages, section 69 for customary marriages, section 70 for Hindu marriages, and sections 71 and 72 for Islamic marriages. Remarkably, "dissolution of marriage" is used only in Part X of the *Marriage Act*, and it is limited to the portion of Part X dealing with divorce. "Dissolution" and "divorce" are used interchangeably, and it would suggest that, under the *Marriage Act*, the 2 are synonymous.

20. Annulment of marriages is also dealt with under Part X. However, the words "dissolve" and "dissolution" are not used in the portion on annulment of marriage. The effect of an annulment decree, under section 75 of the *Marriage Act*, is to deem that the parties never married. In short, that there never was a marriage.

21. The Marriage (Matrimonial Proceedings) Rules, No. 122 of 2020, are also useful, as they carry provisions which use the terms "dissolved" and "dissolution." Rule 4 provides for application for "dissolution" of a civil marriage. Rule 5 is on commencement of proceedings for "dissolution of a marriage," separation of parties, annulment of a marriage and presumption of death of a spouse. Rule 6 is on the form of a petition, and, at sub-rule (1)(f), it refers to petitions for presumption of death and "dissolution of marriage." Rule 20 is on the decree for "dissolution of marriage," and, at sub-rule (3)(a)(b), it refers to a marriage being "dissolved." Rule 21 is on "dissolution of marriages under Islamic law."

22. So, what do I make of all this? The definitions of "dissolve" and "dissolution," in Concise Oxford English Dictionary and Black's Law Dictionary, point to termination of a marriage, other than by death, either through divorce or annulment. The *Marriage Act* is more specific. According to it, dissolution of marriage means divorce. The *Matrimonial Property Act* does not define marriage, and it does not make reference to the *Marriage Act*. However, the *Marriage Act* is the only statutory law defining and governing marriage in Kenya. The *Matrimonial Property Act* governs rights on property acquired within the period when parties are in a marriage relationship, and, in determining whether there was a marriage, in the first place, for the purposes of the *Matrimonial Property Act*, recourse must be had to the *Marriage Act*.

23. So, when section 7 of the *Matrimonial Property Act* refers to "if they divorce or their marriage is otherwise dissolved," must be read to mean if the marriage is ended by way of divorce, in accordance with Part X of the *Marriage Act*. "... their marriage is otherwise dissolved" should be taken to mean the other forms of disintegration of marriage mentioned in Part X, being annulment and separation, being the "divorce-like" remedies in archaic English that Black's Law Dictionary talks about. Going by Rule 5 of the *Matrimonial Property Act*, the reference, in section 7 of the *Matrimonial Property Act*, to "their marriage is otherwise dissolved," should mean dissolved by court decree, in proceedings conducted under Part X of the *Marriage Act*. Sections 7, 8, 11 and 17 of the *Matrimonial Property Act*, which make reference to "dissolved" and "dissolution," should be read together with Part X of the *Marriage Act*, and the Marriage (Matrimonial Proceedings) Rules, for the purpose of giving meaning to those terms.

24. Under Rule 5 of the Matrimonial Property Rules, the proceedings for division of matrimonial property may be brought "at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the *Marriage Act*," or "as part of the relief sought in a matrimonial cause under section 17 of the *Marriage Act*, where the applicant is seeking a declaration of rights to any property that is contested between the applicant and the applicant's spouse or former spouse." "Spouse" and "former spouse," in the context of these provisions, and these proceedings, can only be read to mean a person who is alive, and not one who is dead. If it was intended that the remedy would be available to and against a spouse who is dead, the law, meaning the *Matrimonial Property Act* and the Rules, would have expressly provided so.

25. The other strand, to that competence issue, is whether a cause, for determining matrimonial property rights, can be maintained after death. Whether such a cause is maintainable would be dependent on whether death leads to dissolution of a marriage, and whether dissolution of marriage and termination of a marriage mean the same thing. If dissolution and termination of marriage are one and the same thing, it would mean that a cause for determining matrimonial property rights, for division purposes, would be maintainable. If they do not, then it would mean that such a cause would not be maintainable.

26. My view is that the remedy is available to the parties in the marriage, during their lifetime, and once one of the parties dies, the remedy would be unavailable to the survivor, and any issues, relating to his or her claims to the property, can only be pursued in probate or administration proceedings, for reasons that should become apparent in the receding paragraphs of this judgment. The right to sue for determination of matrimonial property rights, in the instant cause, died with the deceased, and it robbed the applicant of any remedy under the *Matrimonial Property Act*, and the Rules made under it. She can only pursue her claims over such property through succession proceedings, if at all, through the route that has been opened by the courts, in such cases as Esther Wanjiru Kiarie vs. Mary Wanjiru Githatu [2016] eKLR (Kimondo, J), In re Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR (M. Ngugi, J), In re Estate of Kipkemboi Chepkwony Meto alias Kipkemoi arap Kimeto (Deceased) [2017] eKLR (M. Ngugi, J), In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of M'Barutua Kithia Kingili (Deceased) [2019] eKLR (Gikonyo, J), Elizabeth Wanjiru Njonjo Rubia vs. Brian Mwaituria [2019] eKLR (Ouko, Nambuye & Warsame, JJA), Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA), In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR (Nyakundi, J) and In re Estate of MM (Deceased) [2020] eKLR (Gikonyo, J).

27. I need to explain myself. The basis of my conclusion is in the *Matrimonial Property Act* itself. Its preamble is to the effect that the *Matrimonial Property Act* is about rights and responsibilities of spouses in relation to matrimonial property and connected purposes. "Spouses," in that context, can only refer to living beings, and a dead person cannot possibly be the spouse envisaged, for no rights can accrue to a dead person, neither can responsibilities be imposed on such a person. Section 4 of the Act refers to the equal status of spouses at the commencement of marriage during and after dissolution of the marriage. A dead person cannot be a spouse, and cannot be assigned any status in marriage. Section 6 is on matrimonial property, and talks about homes, household goods and other property jointly owned or acquired during the subsistence of marriage. The dead do not need homes, nor household goods. Section 7 talks of matrimonial property being divided upon divorce or dissolution of marriage. The dead cannot be in a marriage, and divorce or dissolution of the marriage cannot possibly arise with respect to them. The applicant has not alleged that she and the deceased divorced or dissolved their marriage, at any stage of their life together, before he died. Section 17 refers to declaration of rights to property between a person and a spouse or former spouse. This provision envisages a living spouse or former spouse, not one that has died.

28. Rule 4 of the Matrimonial Property Rules identifies the persons who may sue for determination of rights to the property of a spouse, but it does not define who may be sued. The *Matrimonial Property Act* and the Matrimonial Property Rules are, however, clear, that such causes are maintainable only against the other spouse or former spouse. There is no provision nor suggestion that such a cause can be maintained against a dead spouse or his estate, and my very firm position is that such a cause is not feasible. Rule 5 is about when causes for determination of rights over matrimonial property may be commenced, and it states that the same can only be after dissolution of a marriage, unless one is seeking declaration of rights over contested property between the spouse and the other or former spouse. Such

cause is to be filed within 12 months of the making of the decree of divorce absolute. There was no dissolution of the marriage herein, between the deceased and the applicant, and these Matrimonial Property Rules would be of no application.

29. The other issue would be, should it be the case that such a cause is maintainable, who would be the proper person to sue. Of course, such a cause could be maintained against the personal representative of the deceased, given that it is a claim against a person who is deceased. In the instant cause, both the applicant and the respondent are personal representatives of the deceased herein, by virtue of both being the administratrices of his estate. One of them has sued the estate, through the other. Would that be proper? The applicant has brought the instant cause in her personal capacity, to the extent that she has not asserted her position as the personal representative of the deceased, and has not purported to bring the claim on behalf of the estate of the deceased. In the heading, the party described, as administratrix of the estate, is the respondent. Whether the suit is competent, is another matter altogether, on other parameters.

30. The *Law of Succession Act* does not address matrimonial property rights, for the said law is silent on matrimonial property, and rights accruing from such property. Indeed, the concept of matrimonial property is alien to the law of succession, for neither the *Law of Succession Act*, nor the Common Law on succession and the African customary law of succession provide for it. Based on that, it is an issue that the probate court should not countenance. However, the courts are increasingly holding, in such cases as In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of M'Barutua Kithia Kingili (Deceased) [2019] eKLR (Gikonyo, J), Elizabeth Wanjiru Njonjo Rubia vs. Brian Mwaituria [2019] eKLR (Ouko, Nambuye & Warsame, JJA), Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA), In re Estate of Josphat Muturi Njoroge (Deceased) [2020] eKLR (Onyiego, J), In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR (Nyakundi, J) and In re Estate of MM (Deceased) [2020] eKLR (Gikonyo, J), that such rights can be reckoned in succession proceedings, and especially with regard to the estate of a polygamist, or an intestate in a similar situation.

31. I do not, with respect, agree with that position, and I expressed my views on it, in In re Estate of Tsimango Akafwale (Deceased) [2021] eKLR (Musyoka, J), where I stated that at succession, the issues are around inheritance rights and not matrimonial property rights, for the ideal situation should be that matrimonial property rights ought to be asserted during the lifetime of the other spouse, for the contest over matrimonial property ought to be between the 2 spouses. I expressed that it would be unfair, in my view, to require children to contend with the surviving spouse, over the entitlement of that spouse, to certain assets of the estate, as matrimonial property, at distribution in probate proceedings. I argued that the tension, between the matrimonial property rights of a surviving spouse and the inheritance rights of the children, over estate property, should be avoided, and the property treated strictly as property available for distribution in succession, without considering matrimonial property rights. For where such rights existed, ideally, they ought to have been asserted, and the matter determined, prior to the demise of the other spouse. I submitted that it disadvantages, or embarrasses, or is prejudicial to the children, where that issue has to be resolved in succession proceedings. The matter of matrimonial property rights is, in my estimation, overtaken by events, once the other spouse passes on before the matrimonial rights are asserted, ascertained and determined, and the succession cause is not the proper place or forum to raise and determine the issue.

32. The contest herein is between the 2 surviving spouses of the deceased, over the matrimonial property rights of 1 of them, with regard to assets acquired, in the name of the deceased, during the currency of his marriage to her. The children of the deceased, from the 2 marriages, and even outside of the marriages, if there are any, are not in the forefront on this. However, the ultimate effect, of reckoning

matrimonial property rights in succession proceedings, would be to diminish the inheritance rights of the children, particularly those of the surviving spouse who would lose out in that contest. In this case, that would be the respondent. The inheritance rights of the children ought not be hinged on the matrimonial property rights of their mother. Making their inheritance rights dependent on the matrimonial property rights of their mother would be discriminatory, in the sense of being treated differently from the other children of the deceased, yet they, as children, would have had no say on the marriage transaction or transactions between their parents.

33. There is a sense in which the concept of matrimonial property rights is being forced into the succession process, yet inheritance and division of matrimonial property ought to be distinct. Matrimonial property rights are not property rights in the strict sense, that is in the context of property or land law. Indeed, the *Land Act*, Cap 280, Laws of Kenya, and the *Land Registration Act* do not provide for them. If they were property rights in that context, they would be provided for in the statutes on property. Matrimonial property rights are a concept in family law, and they are relevant only in the contexts of marriage and allied relationships. They would be reckoned where the relationship is dissolved during the lifetime of the parties. The concept is about determination of the rights of 1 spouse over the property of the other, acquired during marriage, and the possible division and transfer of proprietary rights based on that. The rights, by 1 spouse over the property of the other, acquired during matrimony, or the lifetime of the spouses, accrue during the lifetime of both spouses, and determine upon the death of either of them. As the rights are founded on matrimony, they are extinguished upon determination of matrimony, through the death of either spouse. There is no matrimony in death, by virtue of section 16 of the *Marriage Act*. There are not matrimonial rights in succession, as a result, and what would be available are rights in inheritance or succession.

34. As a concept in the law of marriage and family, it defines the rights the parties to a marriage have, to assets available to them as a couple during marriage. Once marriage determines, that right also ceases, and a determination may be necessary as to whether any proprietary rights, acquired or accrued from the marriage, over the property, had arisen, to necessitate division or sharing of the subject property. The right accrues on the incidence or circumstance of the marriage, and upon the death of 1 spouse, the marriage ends, and the right would, as a circumstance of the death, be no longer tenable or exercisable, for it only lies against a living partner to the marriage. Once that partner dies, it cannot be enforced against any other person, for it is personal against the now dead partner. The surviving spouse cannot enforce a matrimonial right of a spouse over the property of a dead spouse, for once that other spouse dies, that right expires or is extinguished upon that death. The right to pursue matrimonial property rights is given to spouses, and it exists in personam. It is available only to or against them. It cannot be enforced by or against other individuals not party to the marriage, including personal representatives and children of the dead spouse.

35. Death does not dissolve the marital or matrimonial relationship, but it terminates or ends it, by the very fact that 1 partner is no more. The termination of the marriage relationship, on account of death, ought to extinguish the right or entitlement to the property of the dead spouse, based on the fact of marriage, for the law of marriage would cease to govern that relationship, and the law of succession would take over. From that perspective, it should follow that there should be no place for reckoning matrimonial property rights in succession proceedings. Upon the demise of 1 spouse, the surviving spouse would be entitled to the equivalent of the matrimonial rights over the property of the other spouse during the currency of the marriage, known as a life interest over the assets of the dead spouse. See Part V of the *Law of Succession Act*, sections 35, 36, 37 and 39. The entitlement to the assets of the other spouse, during matrimony, would cease, upon the death of the property owner, and that right would transform into an entitlement to a life interest over that property, for the lifetime of the surviving spouse. Upon the death of 1 spouse, the matrimonial right to the property of that dead spouse or

partner would terminate or expire, as the law of marriage would cease to apply to it, and the law of succession would take over, and that right would be transformed, and its existence would take the form of life interest, held by the surviving spouse or partner over the estate and property of the dead spouse or partner, for the benefit of the children. See Elishiba Njoki Njari & another vs. Purity Gathoni Njari & 3 others [2017] eKLR (Ngaah, J).

36. The life interest of a surviving spouse, and the right of a spouse to determination of rights to the property of the other spouse during the lifetime of both spouses, are related and connected. 1 of the 2 principles flows into the other. See Florence Kithiru & another vs. Jackim Ikunda M'Twerandu & another [2017] eKLR (Gikonyo, J) and In re Estate of M'Ikome M'Matiri (Deceased) [2019] eKLR (Gikonyo, J). During the currency of marriage, or coverture, a spouse would be entitled to access and use of property belonging to or registered in the name of the other spouse, either as a residence or matrimonial home, or for purposes of farming and animal husbandry, or for purposes of business or as business premises, or for carrying out a trade or practising a profession on. That right to access to and use of the property of the other spouse, during marriage, is what matrimonial property rights are about. In the event of the demise of the spouse who owns the property, accessed and used by the other, the surviving spouse would be entitled to continue to enjoy the right to access and use that property, just as he or she was utilising the same during the lifetime of the other or now dead spouse. There would be a sort of status quo, after the death of the other spouse, with respect to that right to access and utility of the property of the now dead spouse. That is what life interest is about.

37. Matrimonial property rights, to access and utilise the assets or property owned by either spouse, during marriage, is always enjoyed during happier times, and that enjoyment is often taken for granted. It only becomes contentious where headwinds hit the marital relationship, or where 1 of the partners in the marriage does not quite appreciate the nature and substance of those rights. Where a partner would be unsure of those rights, the remedy would be, during subsistence of marriage, to ask the court to declare those rights, over all or certain assets of the other spouse, without making an order on ownership or division. That would be in proceedings premised on section 17 of the *Matrimonial Property Act*. Determination of ownership rights to such property, under section 7 of the *Matrimonial Property Act*, should only arise upon the marriage falling apart, through divorce or dissolution. Whereupon, the former spouse, who had been enjoying the access and utility rights, may want to have, where there was contribution, either directly or indirectly, those rights concretised into a solid share, in the form of a percentage or ratio of ownership, after which the property may be transferred to his or her name, in the relevant ownership register of the property, maintained by the State. However, that concretisation is only available during the lifetime of the other spouse, and upon divorce or dissolution of the marriage.

38. Section 12 of the *Matrimonial Property Act* carries special provisions, designed to protect the rights and interests of a spouse, enjoying matrimonial property rights, in the property of the other spouse. Certain transactions or dealings with matrimonial property cannot be undertaken without the consent of the spouse enjoying access and utility rights over such property. Such spouses have a right to lodge encumbrances in the relevant registers, to prevent or bar transfers of the property without recourse to them. Regarding matrimonial homes, there are restrictions against evicting spouses in occupation, and the charging or mortgaging of the same without spousal consent. These provisions, however, do not connote ownership of, nor guarantee ownership rights over, the property by the spouse enjoying matrimonial property rights. All they do is to protect and preserve the matrimonial property rights to access and use of those assets of the other spouse, and to guard against those rights being adulterated, or diminished, or extinguished, through sale, or gifting, or leasing, or mortgaging.

39. The concept of "surviving spouse" in the *Law of Succession Act*, in the intestacy provisions in Part V, could be misleading. Misleading in the sense that it appears to introduce the concepts of the law of

marriage into the succession process, and thereby implying that the "surviving spouse," in succession, enjoys the same sort of clout, over the property of his or her now dead spouse, as he or she did, under the *Matrimonial Property Act*, during the lifetime of the deceased. There could be a sense, in the minds of some, on that account, that when it comes to succession, the "surviving spouse" should enjoy the same clout, in succession, as he or she did in marriage, given that the *Law of Succession Act* identifies him or her as a spouse of the deceased. That could suggest that the "surviving spouse" should expect entitlement to 50% of the estate, at most, as against the children, and other persons with beneficial interest in the estate, when the principles on division of matrimonial property, as espoused in Echaria vs. Echaria [2007] EA 139 [2007] eKLR (Tunoi, O'Kubasu, Githinji, Waki & Deverell, JJA), and other decisions, are applied. It would be, with that in mind, that it has been urged that "surviving spouses" should not, in intestate succession, be equated with the children, or placed at a level lower than that of the children, and that "surviving spouses" should be entitled to a share larger than that of the children. See In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR(Gikonyo, J) and In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR (Nyakundi, J). Equally, it is that thinking that explains the onslaught on the concept of life interest in intestate succession, which I shall discuss in the receding paragraphs of this judgment. See Florence Kithiru & another vs. Jackim Ikunda M'Twerandu & another [2017] eKLR (Gikonyo, J), on arguments against the concept of life interest.

40. I reiterate, that there is no matrimony in death, for upon death, by virtue of section 16 of the *Marriage Act*, the marriage determines, and the statuses of the spouses change to that of deceased persons, for the spouse who has died, on the one hand, and widows or widowers, for the spouse who has survived, on the other. There can only be a spouse in the context of marriage, and, therefore, a person can only be a spouse, during the lifetime of both partners. The individual who survives the other does not so survive as the spouse of that other, for there can be no spouse to a dead person. Logically, therefore, there are no spouses under the law of succession.

41. The term "surviving spouse" is used in the *Law of Succession Act* only at Part V. It is confined to intestate succession. It does not mean that the status of spouse continues after death, for the purposes of succession. The term is employed for 2 key reasons. The first is to make the distinction between the widow or widower of the deceased, on the one hand, and the former spouse of the deceased, on the other. A former spouse would be a person, whose marriage to the other had been dissolved, by divorce decree, by the time of the demise of the deceased. A former spouse is not entitled in intestacy to a share in the estate of his or her former wife or former husband, and can only access the estate, of the now deceased former wife or former husband, through section 26 of the *Law of Succession Act*. The person entitled, in intestacy, would be the widow or widower of the deceased. The widow or widower would mean the individual, who would have still been in valid matrimony with the deceased, as at the date of the death of the deceased, and this would be the person referred to as the "surviving spouse." It would mean the person who was the spouse of the deceased at the point of death. The term "surviving spouse" is, therefore, used in Part V, to bring clarity, as between these 2 categories of individuals.

42. The other reason is that the language of the *Law of Succession Act* is largely gender-neutral. The distinctions or categorisations into man and woman, male and female, son and daughter, husband and wife, widow and widower, father and mother, brother and sister, are, if at all, used in limited situations. Therefore, rather than widow and widower, which could be regarded as gender insensitive, the Act, particularly at Part V, has employed the neutral "surviving spouse." I would not venture to discuss whether that was a wise approach or not.

43. There is a tendency to assume that the law of succession is part of family law, and, based on that, the concepts of inheritance or succession rights and matrimonial property rights would be seen as bedfellows. Family law and the law of succession are distinct branches of law. Family law governs

family relationships, and deals with such issues as marriage and allied relationships, separation and termination of marriage, children of the marriage or the allied relationship, legitimacy, rights to property acquired by the parties during the currency of the marriage or relationship, among others. The law of succession, on the other hand, is about property, and not family. It regulates devolution of property upon death. It focuses on the property, and not the family. There is, of course, an interface between family law and the law of succession, to the extent of defining the persons upon whom the property of the dead should devolve. Under the law of succession, particularly on the incidence of intestacy, the persons entitled to inherit are largely members of the family of the dead owner of the property. That, however, should not be construed to mean that the law of succession is a branch of family law.

44. The concept of succession or inheritance is about transfer of property or wealth in accordance with the law of descent. See In re Estate of Ramaita Solitei (Deceased) [2019] eKLR (Nyakundi, J). It is about trans-generational transfer of wealth, that is from one generation, that of the parents, to the next, that of the children, and not vice versa. See In re Estate of Edward Omusinde Otong'o (Deceased) [2020] eKLR (Musyoka, J) and In re Estate of Tsimango Akafwale (Deceased) [2021] eKLR (Musyoka, J). The exception would be where the property owner does not have children, and the property has to pass to his or her spouse, if any, and where there be no spouse, to his or her parents, should they be alive. It explains why, in almost all systems of law, be they statutory, Common Law or customary law, upon intestacy, the surviving spouse is not entitled, absolutely, to the property of the departed spouse, but takes a life interest, over the assets of the departed spouse, for the ultimate destination of the property is to the children of the deceased spouse. See section 35(5) of the *Law of Succession Act*, In the Matter of the Estate of Gathima Chege (Deceased) Nairobi HCSC No. 1955 of 1996 (PJ Kamau, J) (unreported), In re Estate of Rosemary Mukwanjeru Kiria (Deceased) [2016] eKLR (Mativo, J), Mercy Kagige Kamunde vs. Eliphas Mugambi Kamunde & 3 others [2016] eKLR (Mabeya, J) and In re Estate of Kariuki Gachenga (Deceased) [2018] eKLR (Musyoka, J).

45. There has, recently, been quite some onslaught on the concept of life interest by the courts, where it has been decried that the surviving spouses are lumped together with children, and sometimes their rights are subordinated to those of the children, and it is urged that the interests or rights of surviving spouses ought to be more substantial, compared with those of the children. See In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR(Gikonyo, J), In re Estate of M'Barutua Kithia Kingili (Deceased) [2019] eKLR (Gikonyo, J) and In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR (Nyakundi, J).

46. In Florence Kithiru & another vs. Jackim Ikunda M'Twerandu & another [2017] eKLR (Gikonyo, J), for example, the court expressed reservations about the necessity of continuing to apply the principle of life interest, at this stage in the life of Kenya, on grounds that the same was oppressive to women. The court argued, with respect to life interest, that the right of a surviving spouse in the marriage property is a fundamental constitutional issue, which should be determined before the estate is distributed, and there was need to orientate that situation with an aim at bringing the law of succession into conformity with *the Constitution*. The court submitted that reducing the right of a surviving spouse, in matrimonial property, to mere life interest, offended *the Constitution*. See also Janet Njagi M'Nchebere vs. Julius Kioe Mwenda [2016] eKLR (Gikonyo, J), In re Estate of M'Ikome M'Matiri (Deceased) [2019] eKLR (Gikonyo, J) and In re Estate of MM (Deceased) [2020] eKLR (Gikonyo, J).

47. I beg, with profound respect, to differ. That onslaught, on the concept of life interest, is founded on a misconception, that a surviving spouse acquires an automatic right to all the assets or property, acquired by the other spouse during the currency of the marriage. I am not aware of any law, and none has been pointed out to me, which provides that whatever is acquired during marriage, by either

spouse, individually or separately, automatically becomes or amounts to matrimonial property, to which the other spouse would be automatically entitled to a share. There is also the misapprehension that surviving spouse refers exclusively to the widow of the deceased.

48. The Court of Appeal and the Supreme Court have pronounced, in such cases as Echaria vs. Echaria [2007] EA 139 [2007] eKLR (Tunoi, O'Kubasu, Githinji, Waki & Deverell, JJA) and JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), that the mere incidence or circumstance of marriage does not entitle 1 spouse to proprietary rights over the assets acquired by the other spouse, unless contribution is established. That then should mean that, upon the death of the spouse-owner of the property, that same standard should apply to the estate of the dead spouse, by way of being carried forward into the succession process, in the form of life interest, in the sense that the surviving spouse should not be entitled to the property of the dead spouse, absolutely, in succession, merely on account of marriage, and the only entitlement available would be access, use and utility of the property, during life interest, and not proprietary rights that should be conveyed to the surviving spouse, outside of the succession process. See Elishiba Njoki Njari & another vs. Purity Gathoni Njari & 3 others [2017] eKLR (Ngaah, J), In re Estate of William Nzioka Mutisya (Deceased) [2018] eKLR (Odunga, J) and In re Estate of the BKM (Deceased) [2021] eKLR (Odunga, J).

49. The position, taken by the Court of Appeal and the Supreme Court, on the rights of a spouse to the property of the other spouse, in the context of marriage, in Echaria vs. Echaria [2007] EA 139 [2007] eKLR (Tunoi, O'Kubasu, Githinji, Waki & Deverell, JJA) and JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), is in conflict with the Court of Appeal decision in Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA), with respect to the rights of surviving spouses to the property of a dead spouse.

50. In Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA), being an appeal which arose from Esther Wanjiru Kiarie vs. Mary Wanjiru Githatu [2016] eKLR (Kimondo, J), it was stated that, where the deceased had acquired assets with his first widow, the first widow would be entitled to a larger share of the estate, at distribution, in succession, on the basis that, although the property was registered in the name of the deceased, a resulting trust in her favour arose, as she had made a non-financial contribution to the acquisition of the property prior to the marriage of the second widow. In Esther Wanjiru Kiarie vs. Mary Wanjiru Githatu [2016] eKLR (Kimondo, J), In re Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR (M. Ngugi, J) and In re Estate of Kipkemboi Chepkwony Meto alias Kipkemoi arap Kimeto (Deceased) [2017] eKLR (M. Ngugi, J), the courts held that failure to consider, during distribution of an estate in intestate succession, the contribution of the widows, to acquisition of the property of the estate, led to unfairness. The courts proceeded to distribute the estates, after taking into account what each of the widows, in the polygamous unions, had allegedly contributed in the acquisition of the assets placed before them for distribution

51. With respect, these decisions are based on presumptions, that the widows contributed to the acquisition of the assets, for the deceased would not have been party to the succession proceedings, to lead evidence on how the assets were acquired, and the courts proceeded on an assumption that, as the assets were acquired during matrimony, it followed that the widows, married by then, must have contributed to the acquisition, contrary to the position in Echaria vs. Echaria [2007] EA 139 [2007] eKLR (Tunoi, O'Kubasu, Githinji, Waki & Deverell, JJA) and JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), that the mere incidence of marriage, at the time the

assets were acquired, does not entitle 1 spouse to proprietary rights over the assets acquired by the other spouse, unless contribution is established.

52. Fundamentally, these pronouncements were made in succession proceedings, and not in causes for determination of matrimonial property rights. It was asserted, in JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), that the guiding principle, in division of matrimonial property, is that the same could be done where parties proved that they were entitled to it by way of contribution. The dead spouse could not possibly be party to succession proceedings, to have his or her say on the matter relating to the issue of contribution, and, therefore, a determination on the matrimonial property rights of the surviving spouse would be considered after hearing only 1 side. In any case, the issue of determination of matrimonial rights over the property of 1 of the spouses is a matter for litigation in the lifetime of both spouses. The probate court is a forum for determination of inheritance rights, not matrimonial property rights, for the latter ought to be litigated over in the family court, during the lifetime of both spouses.

53. The principle of equality ought to apply in these cases, as stated in Articles 27 and 45(3) of *the Constitution*, and recited in section 3(1) of the *Marriage Act* and section 4 of the *Matrimonial Property Act*. The presumption ought to be that each spouse, or party to a marriage, has the same right and capacity to acquire their own property, during the currency of the marriage, without having to expect that the property acquired by the other spouse would be their property, or they would have a substantial stake in it, founded only on the incidence of marriage. Article 45(3) is about equality of the rights of parties to a marriage at the time of entering into the marriage, during the course of the marriage and after dissolution of the marriage. The position, in JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), on that, would be that each spouse has an equal right, compared with the other spouse, to acquire property, and that that other spouse would have a claim or interest on such property, on account of marriage, only on the basis of contribution.

54. It was asserted, in JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), that Article 45(3) does not entitle the courts to vary existing property rights of the parties, and to take away what belonged to 1 spouse, and award it to another spouse, that contributed nothing to its acquisition, merely because they were married to each other, for to do so would mean that the rights, guaranteed and protected under Article 40(1)(2) of *the Constitution*, that is the right to property, would have no meaning. Article 27 of *the Constitution* provides for equal rights of men and women, whether within or outside matrimony. The protections and privileges of both spouses, within marriage, according to these constitutional provisions, should be the same or equal, so that each has an equal right and opportunity to acquire property during marriage, which property does not necessarily automatically become matrimonial property.

55. The underlying principle, from the pronouncements in Echaria vs. Echaria [2007] EA 139 [2007] eKLR (Tunoi, O'Kubasu, Githinji, Waki & Deverell, JJA) and JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), should be that that there ought to be no "freeloaders" in marriage. There should be no space for "gold-digging," as it is popularly known. Marriage was not intended or designed to be an arrangement for acquisition of wealth or riches, through which the partner, who is in a weaker social position, becomes incredibly wealthy or rich, by merely contracting marriage with a wealthier or richer partner, on the assumption that such a marriage would entitle such a partner to half-share, or such other substantial entitlement, to the wealth or riches of the other partner,

by the mere fact of marriage. Marriage was not designed to be a ticket to wealth and riches for the spouses or parties to it. The expectation should be that each party, to a marriage, should create their own wealth, during the currency of the marriage, or should carry their own weight, so far as wealth-creation, in the context of marriage, is concerned.

56. A spouse would only be entitled to acquire proprietary rights in the property of the other spouse, through contribution, and nothing more. It is what the equality principle, in Articles 27 and 45(3) of *the Constitution*, is about. Rights are largely conceived as to be enjoyed individually. That individuality and individualism extends to the creation of wealth. Each party has the right and freedom to create their own wealth, and to enjoy the same, and would only cede part of that wealth, to any other person, including their spouse, except in cases of gifting, on the basis of the role played by that other spouse in its creation, which can only be established in court proceedings, based on evidence adduced to prove the same.

57. Both spouses get into the marriage on equal terms, and go through the marriage on equal terms, and end it on equal terms, according to Article 45(3) of *the Constitution*. On account of that equality, there is liberty to each spouse to acquire their own property, using their own resources and means, and to build their own property portfolio, independent and separate from that of the other spouse. In the event of the death of the spouse, that would form his or her own estate, which would be available for devolution to his or her children, and not to the other spouse, subject only to life interest on the part of the other spouse. If, in the spirit of Article 45(3), the other spouse contributes, one way or the other, in the acquisition of any asset, then the *Matrimonial Property Act* would apply, to sort out the interest of that spouse, during the lifetime of both of them. Once death happens, before the sorting out is done, the property would be dealt with as the separate estate of the dead spouse, to be handled in succession proceedings under the *Law of Succession Act*, not under the *Matrimonial Property Act*, where the ultimate beneficiaries should be the children of the dead spouse.

58. Where a surviving spouse had contributed to the acquisition of some property, with the dead spouse, during the currency of marriage, or a trust arose with respect to property acquired by the dead spouse, during the currency of the marriage, litigation, over the accrual rights of the surviving spouse, ought to be conducted during the lifetime of both spouses, after divorce, on the basis of the right to matrimonial property; or even during the currency of the marriage, for declaration of matrimonial property rights, without division of the property. When the issue arises after the death of 1 of the spouses, that is as to the rights of a surviving spouse over such property, the litigation should not be, if there should be any litigation at all, in my humble view, by way of a suit over matrimonial property, as envisaged under the *Matrimonial Property Act* and the Rules, but by ordinary suit, at the Environment and Land Court, as it would be a matter of title to the land, for the right to sue to assert rights to matrimonial property would have expired or been extinguished, following the death. However, my own view of it, that is the filing of a suit at the Environment and Land Court, is that such a suit would not be viable, for the assertion of such rights is only feasible during the lifetime of both spouses, founded on the *Matrimonial Property Act* and the Rules.

59. I reiterate what I have stated elsewhere, that the concept of matrimonial property is alien to succession, as the *Law of Succession Act*, the Common Law on succession and African customary law of succession do not provide for it, and, on the basis of that, the concept ought not be reckoned in probate proceedings. It is also alien to land law, and, for that reason, land legislation does not provide for it, for under that legislation, the mere incidence of marriage does not confer title to the property of the other spouse. It is not a registrable right under land legislation. It is, at best, a right which hoovers over the title of the registered proprietor of the property, and it attaches only upon determination by the court, in appropriate proceedings, that there was contribution. The interest of a spouse, over the property

of the other spouse, can only be protected, under section 12(2) of the *Matrimonial Property Act*, by way of registration of a caution or caveat or like device, in the register of the title of the property of the other spouse.

60. The effect of Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA) is that what is not possible during the lifetime of the deceased, based on the decisions of the Court of Appeal and the Supreme Court, in Echaria vs. Echaria [2007] EA 139 [2007] eKLR (Tunoi, O'Kubasu, Githinji, Waki & Deverell, JJA) and JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), through assertion of rights to assets registered in the name of 1 spouse, would become possible through succession, after the death of the spouse in whose name the assets are registered.

61. I reiterate what I have stated elsewhere, above, that reckoning matrimonial property rights, in succession proceedings, diminishes the rights of the children to the property of their dead parent at succession. It also discriminates against some of the children, and distorts the distribution matrix, for it would favour the children of wives who were married earlier, a distinction that has not been created by the law of succession, including the *Law of Succession Act*.

62. A case in point would be Alice Wairimu Macharia vs. Kirigo Philip Macharia [2019] eKLR (JG Kemei, J), which highlights the tension, between the inheritance rights of the children and the matrimonial property rights of the surviving spouse. In that case, the probate court had devolved property directly to the widow, and a daughter initiated a cause at the Environment and Land Court, for declaration of a trust, on the basis that, although the probate court had devolved the share for the widow's house absolutely to the widow, the widow held the same in trust for her own children, including the daughter who had filed the case at the Environment and Land Court. The Environment and Land Court took the position that it did not have jurisdiction, as the dispute turned around succession matters, but stated that it appeared that there was a trust in favour of the daughter, and the probate court ought to have devolved the property to the widow during her lifetime, thereby creating a continuous trust in favour of the children. That decision should draw attention to the folly of devolving assets wholly directly to the surviving spouses, instead of giving them a lifetime interest, being what they are entitled to under the law of succession, which would then create a continuing trust in favour of the children. See also In the Matter of the Estate of George arap Soy (Deceased) [2013] eKLR (Musyoka, J), In re Lenah Wanjiku Gathuri (Deceased) [2021] eKLR (Odero, J) and In re Estate of Manesse Otieno Eshitubi (Deceased) [2022] eKLR (Musyoka, J).

63. The argument that the surviving spouse has a bigger or larger stake in the estate of a dead spouse, compared with the children of the deceased, as was stated in In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR (Nyakundi, J), is, with respect, a misapprehension of the concept of succession. It is an importation and imposition of the principle relating to division of matrimonial property into succession. I reiterate, that succession is trans-generational or inter-generational, not intra-generational. Wealth is moved from 1 generation to the next. The concept of succession explains and facilitates that movement. It is designed to move the wealth or property from the generation of the parents to that of the children, and not from 1 parent to the other parent. That is why it is successive. Succession is not meant to be horizontal, but lateral. It is not ascendant, but descendent. The property or estate should move from an ancestor to a descendant. It descends from a parent to a child. Trans-generational or descendent succession is the norm, while intra-generational or horizontal succession is the exception. Succession is only horizontal or ascendant in exceptional circumstances. If 1 parent has to inherit from the other, then they would only hold the property in trust for the children, who are the ultimate inheritors or successors or survivors, in the succession scheme, hence the concept of

life interest. The presumption is that both spouses are of the same age or within the same age bracket, and where death occurs, at 80 years, for example, there would be little sense of devolving the estate absolutely to a spouse of the same or about the same age, with the deceased at death, instead of it passing directly to the children, who would largely be over 40 years of age, in most cases. See Elishiba Njoki Njari & another vs. Purity Gathoni Njari & 3 others [2017] eKLR (Ngaah, J), In re Estate of William Nzioka Mutisya (Deceased) [2018] eKLR (Odunga, J), Alice Wairimu Macharia vs. Kirigo Philip Macharia [2019] eKLR (JG Kemei, J) and In re Estate of the BKM (Deceased) [2021] eKLR (Odunga, J).

64. Intra-generational or horizontal succession, that is within the same generation, such as from 1 parent to the other parent, is permissible, but as an exception to the general rule, that is trans-generational or descendent succession. One exception is enabled by the application of the doctrine of freedom of testation, through testate succession, which facilitates a spouse to devolve property to the other spouse absolutely, by will, through section 5(1) of the *Law of Succession Act*, contrary to the spirit of succession being trans-generational. See In re Estate of Julius Mimano (Deceased) [2019] eKLR (Musyoka, J). The second instance is where the property-owner dies intestate, and is not survived by children, the property could then pass to the other spouse absolutely, subject to certain limitations; or to his or her parents, in the event that he or she is also single or divorced or widowed, in the schemes provided for in sections 36 and 39 of the *Law of Succession Act*. See Willingstone Muchigi Kimari vs. Rahab Wanjiru Mugo, Nairobi Court of Appeal Civil Appeal Number 168 of 1990 (Gachuhi, Muli & Akiwumi, JJA) (unreported), In the Matter of the Estate of Henry Ng'ang'a Wang'endo (Deceased), Nairobi High Court Succession Cause Number 528 of 2000 (Ang'awa, J)(unreported) and In Re: The Estate of Beatrice Amalemba [2004] eKLR (Koome, J).

65. The design, in Part V of the *Law of Succession Act*, is that where the deceased is survived by children, the said children would take that property equally, by virtue of sections 35(5) and 38. See In the Matter of the Estate of Wilson Wamagata (Deceased), Nairobi High Court Succession Cause Number 261 of 1998 (Waweru, J)(unreported). Where the deceased is survived by both children and a spouse, then, under section 35(1), the net intestate estate passes to the surviving spouse, not absolutely, but to hold during life interest, which would terminate upon the death of the spouse, or the remarriage of the widow. See Tau Katungi vs. MargretheThorning Katungi and another [2014] eKLR (Musyoka, J), Mercy Kagige Kamunde vs. Eliphas Mugambi Kamunde & 3 others [2016] eKLR (Mabeya, J), Elishiba Njoki Njari & another vs. Purity Gathoni Njari & 3 others [2017] eKLR (Ngaah, J), Emphasis, in sections 35(5) and 38 of the *Law of Succession Act*, is on equal treatment of the children in distribution. See In the Matter of the Estate of Mary Wanjiru Thairu (Deceased), Nairobi High Court succession cause number 1403 of 2002 (Ang'awa, J)(unreported).

66. Bringing in the distinctions, that In re Estate of Kipkemboi Chepkwony Meto alias Kipkemoi arap Kimeto (Deceased) [2017] eKLR (M. Ngugi, J) and Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA) introduce into the succession matrix, would have the effect of defeating the equality objective in sections 35(5) and 38 of the *Law of Succession Act*, by elevating the purported matrimonial property rights or interests of the surviving spouse over the inheritance rights and interests of the children, with respect to the property of their dead parent, yet the succession statute does not recognise those alleged matrimonial property rights of surviving spouses, propagated in those decisions. Succession is about distribution of the property of the person who has died, amongst the children of that person, subject to the life interest of any surviving spouse. It is not about determining the matrimonial property rights of the surviving spouse. If any such rights existed, prior to the death of the property owner, they should have been agitated during the lifetime of the dead owner of the subject property, otherwise they became extinct upon the death, and unavailable for agitation and granting thereafter.

67. I have discussed, elsewhere, about how the perception, that widows and widowers should have a larger claim to or stake in the estate, than the children of the deceased, is, perhaps, caused by the use of the term "surviving spouse" in the *Law of Succession Act*. That term has, quite unfortunately, generated the presumption that such "surviving spouse" should benefit, in succession, from the rights and protections given to him or her under the *Matrimonial Property Act*. The courts, in pronouncements, in such cases as Echaria vs. Echaria [2007] EA 139 [2007] eKLR (Tunoi, O'Kubasu, Githinji, Waki & Deverell, JJA), have construed the concept of division of matrimonial property as entitling spouses a substantial stake in the property of the other, even up to 50% thereof. When that concept is superimposed into succession, the "surviving spouse," while asserting rights under the *Matrimonial Property Act*, as construed by the courts, would claim entitlement to up to 50% of the estate.

68. I reiterate that division of matrimonial property is a concept in the law of marriage, where the principal actors or players are the spouses in the marriage, hence any sharing of property, in marriage, can only be between the spouses. Their children would not feature at all in division of property in matrimony. The legislation governing marriage, that is the *Marriage Act* and the *Matrimonial Property Act*, has very little to do with the children, for that is law about the parties to a marriage, that is to say a husband and a wife. The law relating to succession is about devolution of property from the dead owner to his or her progeny. Succession is more about the children or offspring, and less about widows and widowers, for devolution is meant to be to descendants, and not to ascendants and spouses, except in the peculiar circumstances discussed above. It is meant to benefit children. The imposition of the concept of division of matrimonial property, in the succession process, is as a result of a misconception, and its effect is to distort the concept and process of succession, to deny children of what should be rightfully theirs, and to create an unnecessary conflict or tension between children and their ancestors.

69. I have made reference to sections 5(1), 35, 36, 38 and 39 of the *Law of Succession Act*. They provide as follows:

> "5(1). Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses."
>
> 35. Where intestate has left one surviving spouse and child or children
>
> (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to —
>
> (a) the personal and household effects of the deceased absolutely; and
>
> (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
>
> (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

"36(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—

(a) the personal and household effects of the deceased absolutely; and

(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and

(c) a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person"

"38 Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

"39 Where intestate has left no surviving spouse or children

(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; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund."

70. The other disturbing feature of these decisions, that is to say In re Estate of Kipkemboi Chepkwony Meto alias Kipkemoi arap Kimeto (Deceased) [2017] eKLR (M. Ngugi, J), Florence Kithiru & another vs. Jackim Ikunda M'Twerandu & another [2017] eKLR (Gikonyo, J), In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of M'Barutua Kithia Kingili (Deceased) [2019] eKLR (Gikonyo, J), Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA) and In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR (Nyakundi, J), among others, would be that reckoning matrimonial property rights in succession proceedings would amount to the courts overstepping their mandate as such. The primary role, function and mandate of the Judiciary, or the courts, is interpretation of statutes or the law, and not law-making. The reckoning by the courts, in the decisions above, of matrimonial property rights in succession proceedings, in the absence of express statutory provisions for it, would amount to law-making on the part of the courts, and it would breach the doctrine of separation of powers.

71. Determination of matrimonial property rights and division of matrimonial property is provided for in the *Matrimonial Property Act*. That statute does not carry any provisions on division of matrimonial property after the death of 1 of the spouses, or declaration of rights of a surviving spouse over the property of a dead spouse. There are only 2 provisions in the Matrimonial Property on enforcement of the right to matrimonial property, and division of matrimonial property, beings sections 7 and 17. Section 7 is on ownership of matrimonial property, and it states that "ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and

shall be divided between the spouses if they divorce or their marriage is otherwise dissolved." Section 17 is on the procedure, and it provides that a "person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person," based on such procedure as may be prescribed. Rule 5(2) of the Matrimonial Property Rules, is significant, for under it, a cause for division of matrimonial property should be filed within 12 months from the date the decree for divorce is made absolute. Other than that there is no other provision, and indeed there is none at all, which provides for what should happen should a surviving spouse wish to have his or her matrimonial rights over the property of a dead spouse reckoned. There would, therefore, be no statutory foundation, in the *Matrimonial Property Act*, for the court to reckon that right in succession proceedings, purportedly in enforcement of what is provided for under the *Matrimonial Property Act*.

72. I have noted that in Esther Wanjiru Kiarie vs. Mary Wanjiru Githatu [2016] eKLR (Kimondo, J), In re Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR (M. Ngugi, J), In re Estate of Kipkemboi Chepkwony Meto alias Kipkemoi arap Kimeto (Deceased) [2017] eKLR (M. Ngugi, J) and Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA), the courts were handling estates of polygamist intestates, and reckoned matrimonial property rights of the widows in those succession proceedings, so as to assess what each widow had contributed to the acquisition of the assets placed before them for distribution, based on when the assets were acquired, relative to when the widows got into the marriages with the deceased. The principles, that the courts used for the purposes of that evaluation, are those stated in section 8 of the *Matrimonial Property Act*. Yet, section 8 of the *Matrimonial Property Act* is limited to declarations on the matrimonial property rights, and division of matrimonial property, between the owner of the property and his wives or former wives, during his lifetime. Section 8 does not provide for declaration of matrimonial property rights and division of matrimonial property after the demise of the husband-owner of the property.

73. If Parliament had intended, when it enacted the *Matrimonial Property Act*, that matrimonial property rights be reckoned in succession proceedings, in the mould of Esther Wanjiru Kiarie vs. Mary Wanjiru Githatu [2016] eKLR (Kimondo, J), In re Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR (M. Ngugi, J), In re Estate of Kipkemboi Chepkwony Meto alias Kipkemoi arap Kimeto (Deceased) [2017] eKLR (M. Ngugi, J) and Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA), nothing would have stopped it from expressly legislating such a provision in the said Act. I have very scrupulously perused, read and re-read all the provisions of the *Matrimonial Property Act*, and the Rules of procedure made under it, and I have not come across any provision which can be interpreted to mean that Parliament had intended that rights over matrimonial property be determined as between a living spouse and a dead one, nor that such rights could be reckoned in succession proceedings to the estate of a dead spouse.

74. Succession to the estate of a dead person is governed by the *Law of Succession Act*. I have also taken the trouble to very closely peruse the *Law of Succession Act*, and the Probate and Administration Rules, and I have been unable to get any provision on reckoning of matrimonial property rights in succession proceedings. Indeed, the *Law of Succession Act* does not carry any provision on matrimonial property and matrimonial property rights, neither is the concept of matrimonial property mentioned anywhere in the statute. If Parliament had intended that the provisions of the *Law of Succession Act* ought to reckon matrimonial property rights in succession proceedings nothing would have been easier than for Parliament to legislate that intention in the provisions of the *Law of Succession Act*. I have equally scoured through the provisions of the *Law of Succession Act*, and I have not found any provision which could be interpreted to mean that Parliament intended such a situation, to warrant the court holding that such rights should be reckoned in succession proceedings, and to go on to reckon them.

75. Legislating or law-making is the preserved role of Parliament, in the Kenyan system of governance, and, although the superior courts are allowed a window to make law, that is to a very limited extent, in the process of interpreting the text of the law. Law-making, by the court, can only be by way of filling gaps in the law, with respect to minor gaps or ambiguous provisions, where the court is allowed leeway to establish the intention of Parliament or the purpose of the legislation. Where the gap is substantial, or the issue arising cannot be addressed by interpreting the statutory provision or text in such a way as to extend it to cover that which is not expressly covered, the court ought not to attempt to cover such gaps. The best that it would do, in the circumstances, while respecting the doctrine of separation of powers, would be to suggest law reform in that direction, or in the area which it identifies or perceives that there is a gap or inadequacy in the law, and expect that Parliament would amend the relevant legislation, if it be in agreement with the court on the issue.

76. Determining matrimonial property rights and division of matrimonial property after the death of a spouse, and in succession proceedings, is a considerably substantial matter of law, that the courts cannot introduce into the substantive and procedural law of succession, by way of interpretation of statute or judicial precedent, when the texts of both the *Law of Succession Act* and the *Matrimonial Property Act* carry no provisions, where such a legal position can be read into those provisions, or interpreted that that was what Parliament intended. It is a substantive matter of law that can only come into being, as law, by way of legislation, and not through statutory interpretation or judicial precedent. For a court to introduce such a substantive chunk of law into succession law and process, is to stretch the doctrine of judicial precedent beyond its limits, and to trespass into the field of full-fledged legislation, which is a preserve of Parliament.

77. As neither the *Law of Succession Act*, nor the *Matrimonial Property Act*, provides for declaration of matrimonial property rights after the death of a spouse, it would be my very humble view, that the court would have no jurisdiction, over that area, whether sitting as a family court or as a probate court, as no jurisdiction is granted by the 2 pieces of legislation, relevant to it, and a court, making any definitive pronouncement of rights in that area, would be overstepping bounds. A court only exercises such jurisdiction as is granted to it by *the Constitution*, and such statutes as are relevant to the area of litigation, and where jurisdiction has not been granted by the law, the court cannot extend it to itself by craft or consent of the parties. See In the Matter of Interim Independent Electoral Commission [2011] eKLR (Mutunga CJ, Baraza DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Ndung'u, SCJJ) and Kibos Distillers Limited vs. Benson Ambuti Adega & 3 others [2020] eKLR (Makhandia, Kiage & Odek, JJA). Where a statute does not cover some substantial area or matter or issue, the court cannot appropriate to itself jurisdiction over such an area or matter or issue. See Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ) and Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA).

78. I have mentioned above, that where there are gaps or ambiguities in legislation, the court may, while interpreting the relevant provision in the applicable statute, in the spirit of the purposive interpretation of the text, read into it what it perceives to have been left out or is ambiguous, in order to breathe life to the text, instead of rendering it meaningless. See Commissioner Of Income Tax vs. Westmont Power (K) Ltd [2006] KEHC 3474 (KLR)(Visram, J), Midland Finance & Securities Limited & Glovete Inc vs. Attorney General & Kenya Anti Corruption Commission [2007] KEHC 1965 (KLR) (Nyamu, J) and Stephen Wachira Karani & Wahome Ndegwa vs. Attorney General, Independent Electoral and Boundaries Commission (IEBC), Returning Officer Laikipia West Constituency, Jubilee Party & Patrick Mariru [2017] KEHC 2184 (KLR)(Mativo, J). The question, then, that I ought to ask is whether there was a gap, in either the *Law of Succession Act* or the *Matrimonial Property Act*, in

not providing for consideration of matrimonial property rights in succession proceedings. I am not persuaded that any such gap existed, or exists, for reasons that I have discussed above.

79. Matrimonial property rights are only available during the lifetime of the spouses. They become extinct upon the death of either spouse, and, therefore, unavailable to be litigated over, or enforced, whether in proceedings under the *Matrimonial Property Act* or the *Law of Succession Act*. Upon being extinguished in death, those rights resurrect as the right of the surviving spouse to life interest over the net intestate estate of the dead spouse in succession. So, there would be no gap, to require plugging, in the manner proposed in Esther Wanjiru Kiarie vs. Mary Wanjiru Githatu [2016] eKLR (Kimondo, J), In re Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR (M. Ngugi, J), In re Estate of Kipkemboi Chepkwony Meto alias Kipkemoi arap Kimeto (Deceased) [2017] eKLR (M. Ngugi, J) and Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA). Even if that were to be considered to be a gap in the law, which I state it is not, it would still not be open to the court to legislate that position into succession law and practice, as was done in those cases, and it should be left to Parliament, should it find it necessary, in its wisdom, to amend either the *Law of Succession Act* or the *Matrimonial Property Act*, to provide for it.

80. The last point on this is that the remedy, of declaration of rights over the property of a spouse, in favour of the other spouse, is a creation of the Married Women's Property Act, of England, of 1882, the precursor of the *Matrimonial Property Act*, of Kenya. It was a legislative intervention to grant rights over property to married women, for, at Common Law, married women had no right to own property, for it was the position that, upon marriage, they and their husbands became 1, and the property of the family, even when acquired by the wife, became the property of the husband. The Married Women's Property Act, 1882, legislated against that Common Law position, by creating a remedy for married women, to assert rights over matrimonial property, registered under the names of their husbands.

81. The legal regime, in Kenya, on declaration of matrimonial property rights, is, therefore, statutory, and not the Common Law. That would make the declaration of rights over matrimonial property a statutory, rather than a Common Law, remedy. The Common Law would allow a lot more latitude for the court to make law, through judicial precedent. The application of legislation limits that leeway, for the court is bound by and restricted to the 4 corners of the statute, and can make law only to a very limited extent, in the course of interpretation of statute. That being the position, there was very little wriggle-room for the courts, in the decisions that I have discussed above, to introduce such a profoundly substantive remedy into succession law and process, by way of judicial precedent, without basing themselves on, or purporting to be interpreting, any relevant statutory provisions, from the legislation governing the areas of law in question.

82. It may appear that I have digressed, from the question on declaration of rights to matrimonial property, and addressed issues around succession, which are not, seemingly, at the core of the matter. Not quite. The instant proceedings were provoked by events in succession proceedings, in the matter of the estate of the deceased herein, the late BPO , being Busia HCSC No. E008 of 2021, which had been initiated by the applicant herein, in her capacity as the sole surviving spouse of the deceased. Subsequently, the court recognised the respondent as a surviving spouse of the deceased too, and appointed her a co-administratrix of the estate, together with the applicant, a position which the applicant has stated she accepted, although she did not agree with it. Confirmation proceedings were mounted, and a trial was conducted and concluded, but determination of the confirmation application was subsequently held in abeyance, following the initiation of the instant proceedings, to allow the applicant argue her case before the family court, on whether some of the assets, presented for distribution in intestacy, were matrimonial property, in respect of which she was entitled to certain rights, which, according to her, ought to be taken account of, before the distribution at the probate court.

83. Of course, the Court of Appeal has spoken, in Elizabeth Wanjiru Njonjo Rubia vs. Brian Mwaituria [2019] eKLR (Ouko, Nambuye & Warsame, JJA) and Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA). Sitting at a court subordinate to the Court of Appeal, I am bound by the position stated by the Court of Appeal, even where I disagree with it, and I feel, strongly, that I should state herein that I do profoundly disagree with the position in Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA).

84. I shall not venture to address the substance of the Originating Summons, dated 18th December 2023, in view of what I have discussed above. The long and short of it is that the cause herein is misconceived. The issues, that the applicant raises in the instant cause, should have been litigated over between her and the deceased, after the deceased married the respondent, and before he died. They are now best raised in the succession cause, in Busia HCSC No. E008 of 2021, for adjudication along the lines in Esther Wanjiru Githatu vs. Mary Wanjiru Githatu [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA), if at all the court has to go along with the precedent set in that decision. The suit herein is accordingly dismissed. Each party shall bear its own costs. The file, in respect of this cause, shall be closed.

85. To move the matter, in Busia HCSC No. E008 of 2021, forward, I shall allow the parties 7 days, to file further submissions, if they are minded to do so, in view of the positions that I have stated in this judgment. The cause, in Busia HCSC No. E008 of 2021, shall be mentioned on 4th December 2024, for allocating a date for ruling, on the confirmation application. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 28TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Were, briefed by Mr. Gabriel Fwaya, Advocate for Anne Christine Odongo.

Mr. Kuchio and Mr. Shihemi, instructed by Kuchio Tindi & Company and Maloba & Company, Advocates for Fridah Eunice Odipo.