



In re Estate of Stephen Muthima Mathenge (Deceased) (Succession Cause 73 of 2017) [2024] KEHC 16157 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 73 OF 2017
CM KARIUKI, J
DECEMBER 19, 2024**

IN THE MATTER OF THE ESTATE OF STEPHEN MUTHIMA MATHENGE (DECEASED)

BETWEEN

DAMARIS WANGECHI MUTHIMA PETITIONER

AND

NANCY WAMBUI MUTHIMA 1ST OBJECTOR

NJOKI NDEGWA NJIHIA 2ND OBJECTOR

JUDGMENT

1. Stephen Muthima Mathenge the Deceased to whom these proceedings relate died on 11.10.2013. Upon his death and burial, the Petitioner was issued with a certificate of death in her capacity as the wife upon production of the burial permit and the deceased national identification card.
2. On 21.11.2013 and 21.1.2014 the 1st Objector and 2nd Objector filed citation proceedings against the Petitioner and her three children Ndirangu Wahome Muthima, Karimi Mathenge Muthima and Eliab Karugu Muthima to accept or refuse letters of administration intestate vide Nakuru High Court Succession Citation Cause No.818 of 2013 and Nakuru High Court Succession Citation Cause No.39 of 2014 respectively.
3. On 19.12.2013 and 25.3.2014 the Petitioner and her three children Ndirangu Wahome Muthima, Karimi Mathenge Muthima and Eliab Karugu Muthima entered appearance in the citation causes respectively. The citation causes were mentioned on 3.4.2014 and by consent of all parties, the court directed the Petitioner to apply for letters of administration within 30 days and to serve the Objectors with the petition duly filed within 7 days from the date of publication of the notice in the Kenya Gazette.



4. In complying with the court order, on 13.5.2014 the Petitioner petitioned for a grant letters of administration intestate vide Nakuru High Court Succession Cause No.350 of 2014 (Now Nyahururu Succession Cause No.73 of 2017).
5. In her petition, the Petitioner has named herself. Ndirangu Wahome Muthima, Karimi Mathenge Muthima and Eliab Karugu Muthima as the beneficiaries of the estate of the deceased in their capacity as the wife and sons respectively. The petition was published in the Kenya Gazette on 13.6.2014 through Notice No 4017 and same was served upon the Objectors on 19.6.2014 through their respective Advocates but they failed to file any objection as a result of which a grant was issued to the Petitioner on 17.7.2014.
6. On 30.7.2014 and 4.2.2014, the 1st and 2nd Objectors filed summons for revocation of the grant respectively. The applications were consolidated and disposed by way of written submissions and the court rendered its ruling on 1.7.2021 through which it revoked the grant of letters of administration issued to the Petitioner on 17.7.2014 and the Objectors were ordered to file their replies to petition and cross petition within 14 days.
7. The 1st Objector, Nancy Wambui Mwirigi filed her answer to petition and cross petition for a grant on 19.8.2021. Under paragraph 5(c) of her answer, she avers that she got married to the deceased in the year 2001 under Kikuyu Customary law and they lived together in Nakuru and were blessed with two children namely; Peris Nyawira and Janice Nyathira born on 12.2.2002 and 3.5.2010 respectively.
8. The 1st Objector prays that she and her children be recognized as beneficiaries of the estate of the deceased and that she be granted letters of administration with the Petitioner as a co-administrator.
9. The 2nd Objector, Njoki Ndegwa Njihia filed her answer to petition and a cross petition for a grant on 17.1.2023. Under paragraph 4 (c) of her answer, she avers that she got married to the deceased in 2007 under kikuyu customary law while under paragraph 2 of her cross petition she avers that she got married to the deceased in the year 2010 and they were blessed with one child namely Lloyd Ndegwa Muthima born on 12.11.2011. She prays to court that she and her child be recognized as beneficiaries of the estate of the deceased and that she also be granted letters of administration with the Petitioner as a co-administrator.
10. The Petitioner responded to the 1st Objector's answer to petition and cross petition through her replying affidavit sworn on 15.11.2021 filed in court on 16.11.2021 and to the 2nd Objector's answer to petition and cross petition through her replying affidavit sworn on 11.7.2023 filed in court on the same day. In her replying affidavits the Petitioner avers that the Objectors were not wives of the deceased because the deceased married her in church and that the Objectors never lived together with the deceased as husband and wives and their children were not children of the deceased.
11. The case was heard by way of viva voce evidence. The 1st Objector testified and called one witness while the 2nd Objector failed to give testimony in support of her answer and cross petition while the Petitioner gave testimony in support of her petition.
12. In her evidence the 1st Objector adopted her answer, cross petition and supporting affidavit sworn on 20.8.2021. She said that she got married to the deceased under customary law and they were blessed with two children named Peris Nyawira born on 12.2.2002 and Janice Nyathira born on 3.5.2010. She produced the immunization card marked N.W.M-I(b) to prove that Peris Nyawira was a child of the deceased and acknowledgment of birth notification and DNA report marked NWM-I(a) and N.W.M-IV to prove that the Janice Nyathira was a child of the deceased.



13. She said that the deceased, herself and the children lived in a rental house in Nakuru and the deceased was maintaining her and the children by paying rent school fees for Peris Nyawira and also providing her with money. To prove this, she produced the receipts issued to Peris Nyawira in 2005 by St Monica Nursery School and to the deceased in the year 2013 and her M-pesa statement for the year 2013 marked NWM-V. The admissibility of the receipts was objected to since they were not stamped with revenue stamps and court ordered that the issue of the admissibility of the receipts be canvassed through submissions.
14. In cross examination she said that the M-pesa transactions between her and the deceased was for only one year and they did not show the purpose for which the money was sent to her. She also confirmed that the receipts from St Monica Nursery School were not issued to the deceased but to Peris Nyawira
15. She further testified that the deceased initiated the process of DNA test to determine the paternity of Janice Nyathira. She said she that blood samples of Janice, herself and the deceased were taken at Nakuru County Referral Hospital facility with the assistance of a police officer one Margaret from Subukia Police Station who was a friend of the deceased. She said that police officer took the samples to Government Chemist and the results were collected by the deceased. Unfortunately, the said police officer was not called to give evidence in support of the role that she played in the process.
16. She said in cross examination that Aga Khan Hospital, Nakuru declined to take their blood samples because they were required to provide legal grounds for providing the samples. She confirmed that the deceased did not sign a consent to have the DNA profiling done and there was no complaint made and booked at Subukia Police Station or a court order to trigger the DNA exercise. She confirmed that the DNA test was only done on Janice Nyathira and not Peris Nyawira since she was in school and that the children did not have birth certificates.
17. In cross examination, the 1st Objector said that by the time she got married to the deceased under customary law in 2001, he was already married to the Petitioner but dowry was paid and although there was a ceremony involving the deceased's friends, the process was never completed by the time he died and that she never visited the deceased when he was hospitalized at the Nairobi Hospital.
18. Henry Sang, a document analyst with Government Chemist who testified as the 1st Objector's witness 2 said that on 9.6.2010 their facility received blood sample of alleged father marked S (Stephen Muthima), blood sample of the mother marked N (Nancy Wambui) and blood sample of the child marked J (Janice Nyathira) from a police officer by the name Margaret from Subukia Police Station with a request that they determine the paternity of Janice Nyathira. He said that a DNA profile was generated which showed that Stephen Muthima was 99.9% the biological father of Janice Nyathira. He produced the DNA report marked "N.W.M-
19. In cross examination the witness said he did not know how the samples were obtained, the chain of their custody and circumstances that lead to the samples being taken. He also confirmed that the parties involved in the DNA test did not appear before him and there were no documents supporting the samples other than the labels.
20. The Petitioner testified and adopted her replying affidavits sworn by herself on 15.11.2021 in answer to the 1st Objector's answer and cross petition and replying affidavit sworn by herself on 11.7.2023 in reply to the answer and cross petition filed by the 2nd Objector.
21. In her testimony the Petitioner said that she got married to the deceased at the Church of The Torch on 3.5.80 and they were issued with a certificate of marriage which she produced as "DMM-1". She said that she lived with the deceased at Mairo Inya Nyandarua County until his death in 2013 and that the deceased was not married to someone else. She also produced the certificate of death as "DMM-2". The



Petitioner said that she and the deceased were blessed with three children namely Ndirangu Wahome Muthima, Karimi Mathenge Muthima and Eliab Karugu Muthima all who were adults.

22. The Petitioner also said that the 1st Objector was employed at their Highway School in 2000 up to 2001 and she was married but her husband died in 2001. She denied that the 1st Objector was married to the deceased under Kikuyu customary law because she and the deceased were married in church. She said that the 1st Objector never attended any family gathering for over 10 years, never visited the deceased in hospital and she learnt of the 1st Objector when she was served with letter written to her after the death of the deceased produced as "MWM-4" She also said that no ceremonies under kikuyu customary law were ever performed between her deceased husband and the 1st Objector.
23. The Petitioner said that Peris Nyawira and Janice Nyathira were not children of the deceased since the father of Peris Nyawira according to the immunization card "N.W.M-I(b)" was Stephen Mathenge who is not her deceased husband while the birth acknowledgement notification for Janice Nyathira "M.W.M-1 (a)" indicate the father as Mathenge who is not her husband. She also denied that a paternity test was done on her husband and Janice Nyathira which showed that the deceased was her father.

Petitioner's Written Submissions

25. Issues for Determination

Whether the receipts produced as N.W.M- VI are admissible as evidence?

Whether the Objectors are wives of the deceased married under Kikuyu customary law and therefore dependants of the deceased?

Whether the Objectors' children are dependants of the deceased entitled to share in his estate?

Who is entitled to the grant of letters of administration intestate?

Who shall bear the costs?

a. Whether the receipts produced by the Objector are admissible as evidence?

26. It was submitted that the 1st Objector produced receipts marked N.W.M-VI alleged to have been issued to the deceased by St Monica Nursery School on payment of school fees for Peris Nyawira and JC Holdings on payment of house rent. The admissibility of the receipts as evidence was objected to by counsel for the Petitioner. That Section 19 (1) of *Stamp duty Act* Cap 480, places a mandatory requirement that any receipts produced in evidence must have revenue stamps for them to be admissible. Further reliance was placed on the case of *Wycliffe Lubanga Kefa vs. Dennis Ochola & Another* [2020] eKLR
27. The Petitioner asserted that upon raising objection, it was expected that the 1st Objector would make an application to court to be allowed to stamp the receipts. Such an application was not made and they urged the court to find that the receipts are not admissible in evidence.

b) Whether the Objectors are wives of the deceased married under Kikuyu Customary Law and therefore dependants of the deceased?

28. It was contended that the Objector's have alleged that they were both married to the deceased under Kikuyu Customary Law an allegation they are required to prove. The standard and burden of proof required under Section 107 of the *Evidence Act* must be discharged by the person alleging. Reliance was placed on *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* [2014]eKLR relied upon in



the case of FWK (Guardian ad litem for TK and SN Minors) VS MWM & Another (Succession Cause E012 of 2021) [2022]KEHC 16610 (KLR)

29. It was argued that it is incumbent upon the Objectors to prove that they were married by the deceased under kikuyu customary law. The Petitioner said that she got married to the deceased in the Church of The Torch in Kiambu on 3.5.1980 and the marriage was never dissolved in support of this fact the Petitioner produced a certificate of marriage marked "DWM-1",
30. It was stated that it is clear from the certificate of marriage that the Petitioner and the deceased contracted a statutory marriage under the African Christian Marriage and Divorce Act (Now repealed) meaning that the deceased lacked capacity to enter into other union(s) unless the marriage to the Petitioner was dissolved. It was contended that the Objectors have therefore not been able to prove that they were legally married to the deceased during his life time and they are not therefore wives of the deceased. Reliance was placed on Section 9 of the Marriage Act 2014 which is a replica of Section 9 of the African Christian Marriage and Divorce Act, re Estate of Lihasi Bidali (Deceased) [2019]eKLR, Section 3 (5) of the Law of Succession Act
31. It was stated that though the 1st Objector alleges that she was married by the deceased under Kikuyu customary law in the year 2001, she did not lead any evidence to prove that a customary marriage took place between her and the deceased. Reliance was placed on Section 43 of the Marriage Act, 2014, In Re Estate of Geoffrey Muchiri Kamau [2016] eKLR
32. It was pleaded that in her testimony the 1st Objector said that dowry was paid but she did not say how when and who were involved in the ceremony and how much or in what form same was paid. She also did not lead any evidence to show that the ngurario ceremony was performed and she did not call any witness to confirm these facts. If indeed she got married under customary marriage and dowry was paid, it would not have been difficult for her to call those who were involved in the negotiations to testify on her behalf. In fact she said in cross examination that there was a ceremony involving the friends of the deceased but she did not call any of those friends to explain to court the nature of the ceremony they were involved in.
33. Further, it was asserted that the 2nd Objector claimed through her answer and cross petition that she was married by the deceased under kikuyu customary but she did not give evidence to support the allegations.
34. On her part, the Petitioner said that the deceased or his family never visited the Objectors homes and no ceremonies were ever performed regarding their alleged marriages.
35. It was stated that since customary marriages contracts are between families of the persons getting married, if indeed the Objectors were married to the deceased under kikuyu customary law, their families and that of the deceased would have been involved and she would have known about it.
36. The Petitioners argued that the Objectors have failed to prove that they were married under Kikuyu customary marriage and we therefore urge the court to find that the Objectors were not married by the deceased under kikuyu customary law and cannot be considered as wives under Section 3(5) of the Law of Succession Act.
37. It was averred that in order for the court to presume marriage, the Objectors are required to demonstrate by way of evidence that they cohabited with the deceased for a long period and that there exists acts of general repute that show they were a husband and wife. Reliance was placed on Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another [2009] eKLR adopted with approval in the case of Eva Naima Kaaka & Another vs Tabitha Waithera Mararro [2018] eKLR



38. It was stated that the 1st Objector said that she lived with the deceased in Nakuru on a rented house and that he used to pay rent and also used to send her money. she produced receipts purportedly issued to the deceased in the year 2013 and her mpesa statement for the year 2013. It was contended that no other receipts and payments were produced to show that the deceased paid rent or sent her money on previous years despite her claiming that they lived together for 12 years. That mpesa transactions made by the deceased in 2013 do not in any way prove dependency.
39. The Petitioner pointed out that the 1st Objector produced photographs of herself, the deceased and her children but and not produce photographs showing the deceased, herself and members of the two families. The photograph showing the Objector with the deceased's son Ndirangu Wahome and other teachers was according to the evidence of the Petitioner taken in 2001 when the Objector was employed at the Petitioner's school.
40. It was argued that the court should note that the 1st Objector did not call any of her neighbor in the estate or any other witness to confirm that indeed she and the deceased were lived together in Nakuru. On the other hand, Petitioner said that the deceased lived with her at their matrimonial home in Mairo Inya where they operated a private school until his death.
41. It was submitted that The 1st Objector did not lead any evidence to show that she attended any gatherings involving the deceased family and that she had been accepted by the deceased family members, relatives and friends that the two were a husband and wife. She never visited the deceased in hospital and never attended the deceased funeral.
42. It was asserted that there is no sufficient evidence to prove that the 1st Objector and the deceased cohabited together for long and that they shared activities typical of married couples since the evidence she led, demonstrates how she perceived herself in relation to the deceased and not how the general public perceived her in relation to the deceased. That the court cannot therefore on the basis of the evidence before it invoke the doctrine of presumption of marriage in favour of the of both Objectors and the Objectors are therefore not dependants within the meaning of Section 29 (a) of the [Law of Succession Act](#) and cannot be included as beneficiaries of the estate of the deceased.
43. The Petitioner urged the court to make a similar finding as its ruling delivered by this court on 1.7.2021 produced as N.W.M-V the court at paragraph 25 at page 12 where the court found the application was starved of evidence. The Objector has not attached any evidence to proof her case of being a beneficiary of the estate of the deceased thus she has failed to discharge her burden under Section 107 of the [Evidence Act](#).

d) Whether the Objectors' children are beneficiaries and or dependants to the estate of the deceased?

44. The 1st Objector alleged that she and the deceased were blessed with two children namely, Peris Nyawira born on 12.2.2002 and Janice Nyathira born on 3.5.2010. She produced the immunization card and acknowledgment of birth notification marked N.W.M-I(b) and (a) which show the father of Peris as Stephen Mathenge and the father of Janice as Mathenge. Although the deceased's name is Stephen Muthima according to the certificates of death and marriage, the Objector did not call the registrar of births to produce the birth registers and notification forms of birth of the children which are the foundation documents on registration of birth to shed light on the particulars of the name of the father of the children provided by the parents at birth.
45. It was stated that the court cannot assume that Stephen Mathenge is the same person as Stephen Muthima or Mathenge because a name is the one that identifies a person. Reliance was placed on *Re Snook 2 Hill [NY]566 and LNW v Attorney General & 3 Others[2016] eKLR*



46. They urged the court to find that the name Mathenge on the immunization card and acknowledgement of birth notification do not refer to the deceased Stephen Mathima and that he is not the father of the two children. Moreover, courts have held in many cases that such documents including birth certificates are not final proof of paternity. Reliance was placed on Kamau Muigai (Deceased) relied upon in the case of re Estate of GOR (Deceased) (Succession Cause 257 of 2017) [2023] KEHC 25658 (KLR) (Family)
47. It was stated that the 1st Objector also led evidence that the deceased initiated the process of a DNA test to determine paternity of Janice by calling Henry Sanga a document analysisist based at government chemists as Objector witness 2 to produce a DNA profiling report N.W.M-IV. In his opinion the deceased was the biological father of Janice.
48. It was submitted that the witness confirmed that he did not collect the blood samples from the participants since 3 bottles with labels of the participants were delivered to their facility by a police officer called Margaret Wachiuri from Subukia Police Station. He said that there were no identification documents of the persons whose blood samples had been taken and they did not present themselves at the facility and no consent was duly signed by the deceased authorizing the DNA testing.
49. It is worth noting that the police officer who was said to have facilitated the collection of the samples and delivering the same to government chemists did not give evidence. Her evidence was indeed crucial as it was important to confirm how the samples were collected and handled and what triggered the process bearing in mind that no complaint had been lodged at Subukia Police Station and there was no case pending in court relating to the deceased, the Objector and the child
50. It was averred that the DNA test was conducted on 14.7.2010 while the deceased died on 11.10. 2013. The questions that one would ask are why would the deceased subject Janice for DNA test before his death and not also Peris yet both children do not have birth certificates showing that he is their father? By the time the objection was filed, Peris was 19 years having completed secondary school and yet had not acquired a birth certificate? It was stated that many questions than answers arise and we urge the court not to exercise its discretion by admitting the DNA report.
51. It was contended that from the evidence of Henry Sang, it is not clear how he arrived at an opinion that the deceased was the father of Janice when the basic requirements for the DNA testing were not complied with His evidence can only be evaluated against the available evidence and in particular that of the police officer which is not available. Reliance was placed on Christopher Ndaru Kagina vs Esther Mbandi Kagira [2016] eKLR drawing guidance from the case of *Abringer v Ashton* (1873)17 LR Eq 3558 on the analysis of expert evidence. It was submitted that the evidence of Henry Sang casts a lot of doubts on the authenticity of the results generated by the profiling and his opinion is to say the least worthless and is intended to mislead the court and it is our submission that there is a likely hood that the tests were done long after the deceased had died.
52. As regards, Lloyd Ndegwa Maina, the 2nd Objector did not attach his birth certificate to her answer and cross petition and she did not produce it since she and met testify in support of her case. She did not therefore discharge the burden of proof placed upon her by Section 107 of the *Evidence Act*.

d. Who is entitled to the Grant of letters of administration intestate?

53. It was submitted that under Section 66 of the *Law of Succession Act*, the court has final discretion as to the person or persons to whom a grant should be made, but the guiding principle is the order of reference provided in the said section and top on the list is the surviving spouse or spouses with or without association of other beneficiaries.



54. It was asserted that the Petitioner has proved that she is the only spouse and there is no reason for the court to depart from the general guide and we urge the court to find that she is the one entitled to be issued with the grant.
55. In conclusion, It was stated that in all the circumstances in this case the Objectors have not proven their cases on a balance of probability as is required in civil cases and we urge the court to dismiss the Objectors objections and cross-petitions with costs to the Petitioner.

Objectors Submissions

56. Not available in file at the time of drafting this opinion

Analysis and Determination

57. Having analyzed the Petitioner's petition and the evidence produced thereto, the 1st and 2nd Objector's answers to the petition and cross petitions and the evidence produced thereto, the parties affidavits and submissions, the issues that arise for determination herein are as follows:-

Whether the 1st and 2nd Objectors herein are wives of the deceased married under Kikuyu customary law and therefore dependants of the deceased?

Whether the Objectors' children are dependants of the deceased entitled to share in his estate?

Who is entitled to the grant of letters of administration intestate?

Who shall bear the costs?

58. Nancy Wambui Mwirigi, the 1st Objector herein, filed her answer to petition and cross petition for a grant on 19.8.2021. she averred that she got married to the deceased in the year 2001 under Kikuyu Customary law and they lived together in Nakuru and were blessed with two children namely; Peris Nyawira and Janice Nyathira born on 12.2.2002 and 3.5.2010 respectively. The 1st Objector prayed that she and her children be recognized as beneficiaries of the estate of the deceased and that she be granted letters of administration with the Petitioner as a co-administrator.

59. In the case of *Hortensiah Wanjiku Yawe vs The Public Trustee, Civil Appeal No. 13 of 1976*, the court held:-

- a. "The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action namely "on the balance of probabilities." Evidence as to the formalities required for a customary law marriage must be proved to that standard. Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage".

60. Further, In the Matter of the Estate of Karanja Kigo [2015] eKLR the court lists five elements that must be present for the existence of a Kikuyu customary marriage, that is:-

Capacity which includes age, physical and mental conditions and marital status;

Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;

The ceremonial slaughtering of a ram in a rite called Ngurario;



Ruracio (bride price) partly paid;

Commencement of cohabitation.

61. Further, in *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* (Court of Appeal at Eldoret in Civil Appeal No. 20 of 2009) the court stated:-
- a. “It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the ‘come we stay’ marriages which are neither customary nor statutory”
62. To prove customary marriage, the 1st Objector asserted that she was married to the deceased as a 2nd wife under Kikuyu Customary Laws in 2001 and lived together as husband and wife in Nakuru until the deceased’s demise. She averred that the deceased was supporting her and their two daughters by paying school fees and rent. In her oral testimony, she stated that she met the deceased in Nyahururu at Nyahururu Highway in 1998 and that they started the process of paying dowry and that dowry was paid. She stated that there was a ceremony involving the deceased friends and that she was married from 2001 to 2013 when he died. She stated that the Petitioner was aware that she was married to the deceased and that he initiated the DNA exercise conducted on her daughter Janice Nyathira.
63. In *re Estate of Joseph Mwaura Nderi (Deceased)* [2022] KEHC 598 (KLR) the court stated that:-
- a. Customary law is unwritten, and because of that its existence must be established by way of evidence, by having it proved as a matter of fact. There is statutory and case law basis for this position. Proof can be either through testimonies of individuals who are conversant with or experts in the relevant customary law, or through reliance on judicial precedents, or through citation of relevant treatises by authors who are experts in or have conducted research on the applicable customs. Since the existence and application of an alleged custom is subject to proof, it is incumbent upon or the burden of proof is on the person alleging the existence of the custom and its application to the set of circumstances that he places before the court.
64. Consequently, customary law is unwritten, and because of that its existence must be established by way of evidence, by having it proved as a matter of fact. Evidently, the 1st Objector never called her relatives or the deceased’s friends to testify on the dowry ceremony that she alleged had taken place. In my considered opinion and guided by the aforementioned case laws, I do not have before me any material to suggest that the deceased ever married the 1st Objector under Kikuyu Customary Law, and my conclusion is that the 1st Objector was not a Kikuyu Customary Law wife of the deceased at all.
65. Additionally, the 1st Objector led that the court should presume marriage, on the basis of a prolonged cohabitation and repute and that they had children together and the deceased supported them. From her testimony, she stated that they initially settled in Racecourse then Bahati in Nakuru and that that the deceased was paying rent for their rented house. She produced receipts to that effect for the year 2013 and also mpesa documents showing that the deceased supported them for the year 2013.
66. Contrarily, the Petitioner pointed out that the 1st Objector produced photographs of herself, the deceased and her children but and not produce photographs showing the deceased, herself and members of the two families. The photograph showing the Objector with the deceased’s son Ndirangu Wahome and other teachers was according to the evidence of the Petitioner taken in 2001 when the Objector was employed at the Petitioner’s school.



67. It was asserted that there is no sufficient evidence to prove that the 1st Objector and the deceased cohabited together for long and that they shared activities typical of married couples since the evidence she led, demonstrates how she perceived herself in relation to the deceased and not how the general public perceived her in relation to the deceased. That the court cannot therefore on the basis of the evidence before it invoke the doctrine of presumption of marriage in favour of the of both Objectors and the Objectors are therefore not dependants within the meaning of Section 29 (a) of the Law of Succession Act and cannot be included as beneficiaries of the estate of the deceased.
68. The Supreme Court decision in the case of MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) stated that:-
- a. The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.
69. Accordingly, the court emphasized that with the progress in law, the presumption of marriage would be the exception other than the rule. It is my considered finding that the evidence on cohabitation is lacking and there is no other evidence to assess it against. If the deceased was cohabiting with the 1st Objector for about 12 years as she alleged; you would think she would have wealth of evidence to irrefutably confirm this position including the evidence of family, neighbours and friends who knew the as husband and same but the same was not availed before this court.
70. It is not in doubt that the deceased and the Petitioner knew each other and had a relationship of some sort because the 1st Objector was employed at the deceased's school as evidenced by the photos and the 1st Objector. She also stated that her and her children were recognized as the deceased's 2nd family during his funeral but no evidence was availed to prove the same except the letter to the Petitioner by her advocate. In my considered opinion, it appears that there might have been a relationship that went beyond employer/employee relationship looking at the receipts for payment of rent, power and water paid by the deceased for the year 2013 between the 1st Objector and the deceased but the evidence on cohabitation between the two is insufficient and starved as held in my ruling dated 1st July 2021.
71. Turning to the issue of her two children, the 1st Objector was adamant that they were the deceased's children. She alleged that they were the deceased's children and produced receipts to prove that the deceased was supporting them. She also stated that her two daughters were named after the deceased's mother and her mother respectively in line with Kikuyu Customary Law. Further, the 1st Objector asserted that the deceased suggested that they conduct a paternity test to confirm that he was the father of her children and the same. From the DNA report produced by Henry Sang, Government Chemist in court, it was concluded that the deceased is the biological father to Janice Nyathira.
72. The 1st Objector called Henry Sang, a Government Analyst to testify on the DNA process. He stated that they received the following items:-Blood sample of Stephen Muthima who was alleged to be fatherBlood sample in a bottle marked motherBlood sample of Janice said to be a child
73. He testified that he received the items from PC Margaret Waichuri of Subukia Police Station and was requested to determine the paternity of Janice Nyathira. They analyzed the same and generated DNA profiles indicating that there were 99.9+% chances that Stephen Muthima was the biological father of the Janice Nyathira who was Nancy Wambui's daughter. The report is dated 14th July 2010 and he signed same and produced it as evidence.



74. Upon cross examination, he asserted that he did not know how samples were obtained and the chain of custody before they were brought to him. He also stated that he did not know of the circumstances leading to obtaining the blood samples or whether there was a case in relation to the parties. He averred that KEMRI also do DNA tests and that people seek their services even without a case.
75. It was his assertion that he received samples of 3 different people parties were not there. Further, that when police officers bring samples they do not ask for documents to support sample. He also stated that he cannot remember about payment but they charge Kshs. 8500 p/p. He stated that he can confirm authenticity of the samples that he analyzed for the report and the he is not aware of any analysis ever been rejected by the court.
76. When cross examination by Advocate Muchangi, he stated that he was an expert on DNA for 15 years. That PC analysis is the most accurate in determine analysis the samples of good quality. He asserted that the do not have data base but profile and that they received samples from a police officer. He concluded on sample analysis result and stated that if error occurs while labelling you would get wrong results but that there was no error in the analysis. He asserted that there are measures to counter compromise and that the Lab Manager receive samples and issues them to the analysts who do the analysis and file results.
77. In reexamination, Henry Sanga averred that he was only required to receive samples as the work of police was to submit them and they do not do background checks. He put details and items received and their work was to do an objective analysis and determine paternity of the Janice Nyathira. He stated that it is a mandatory requirement for our section to obtain samples form parties. That in criminal cases the state pays but in civil parties pay.
78. He stated that there was no challenge of results over brought our analysis the qualities of samples were in good order thus they generated DNA of the samples and the DNA results confirm the paternity. It was submitted that there was no error in their report or process nether was there was a possibility for samples interference.
79. Given the evidence from the DNA report, it is evident that Janice Nyathira was found to be the deceased's daughter. The DNA process was initiated by the deceased himself as asserted by the 1st Objector but even if that were not the case there is nothing barring parties whether the deceased or the 1st Objector from initiating the DNA test. I have no reason to doubt the DNA exercise conducted and the analysis and the report thereto produced before this court. the DNA exercise was conducted in 2010, 3 years before the deceased died and there was no evidence presented that he disputed the results of the same. I must state that I believe that the money that was being sent to the deceased was for purposes of supporting his children. It is my considered finding that Janice Nyathira is the deceased's daughter and therefore a beneficiary to his estate.
80. Furthermore, it is my considered opinion that the fact that the deceased had the mind to call for a paternity test for the 2nd child and not the first who was named after his mother according to kikuyu customs leads the court to believe that the deceased had no doubts that he was Peris Nyawira's father. In sum, I am convinced that both Peris and Janice were the deceased's chidden and therefore are entitled to benefit from the estate.

2nd Objector

81. The 2nd Objector filed her answer to petition and a cross petition for a grant on 17.1.2023. she asserted that she got married to the deceased in 2007 under Kikuyu Customary Law and that they were blessed with one child namely Lloyd Ndegwa Muthima born on 12.11.2011. she stated that they had been



- cohabiting together as husband and wife and had established a home at Nakuru County. She prayed that she and her child be recognized as beneficiaries of the estate of the deceased and that she also be granted letters of administration with the Petitioner as a co-administrator.
82. Just like the 1st Objector, the 2nd Objector's case is that she was married under Kikuyu Customary Law to the deceased. The onus of proving a customary marriage rests on the party claiming it. In the case of *Njoki v Mathara and Others* Civil Appeal No. 71 of 1989 (UR), Kneller J. A pronounced as follows: -
83. The onus of proving a customary marriage is on the party who claims it.
84. The standard of proof is the usual one for civil action, balance of probabilities.
85. Evidence as to the formalities required for a customary law marriage must be proved to the above standard.
86. In the Matter of the Estate of Karanja Kigo [2015] eKLR the court lists five elements that must be present for the existence of a Kikuyu customary marriage, that is:-
- Capacity which includes age, physical and mental conditions and marital status;
 - Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;
 - The ceremonial slaughtering of a ram in a rite called Ngurario;
 - Ruracio (bride price) partly paid;
 - Commencement of cohabitation.
87. Further, in *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* (Court of Appeal at Eldoret in Civil Appeal No. 20 of 2009) the court stated:-
- a. "It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the 'come we stay' marriages which are neither customary nor statutory"
88. The Court of Appeal in *Gituanja vs Gituanja* (1983) KLR 575 and in *Kimani vs Gikanga* [1965] EA 735 held that the existence of a customary marriage is a matter of fact, to be proved through evidence.
89. Section 107 of the *Evidence Act* provides that: -
- (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."
90. The cases of *In the Matter of the Estate of Karanja Kigo* [2015] eKLR and *Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo* [2004] eKLR mention at least five elements: Capacity which includes age, physical and mental conditions and marital status; Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife; The ceremonial slaughtering of a ram in a rite called Ngurario; Ruracio (bride price) partly paid; Commencement of cohabitation.
91. However, in the *Eliud Maina Mwangi* Case, the Court of Appeal opined that customary law evolves with time. The Court stated thus: "Customary law is certainly not static. Like all other human



inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.”

92. Accordingly, I have reviewed the available evidence and I find that the 2nd Objector has not proved to the required standard that there was a customary marriage between her and the deceased. Considering the facts and circumstances available on record, the 2nd Objector did not lead any evidence of any essential steps or ceremonies that were preformed to prove that there was the existence of a customary marriage between the her and the deceased from 2007.
93. Moreover, in considering whether this court should presume that there was a marriage between the 2nd Objector and the deceased, I am tasked with establishing whether the principle of presumption of marriage was applicable in the 2nd Objector’s favour. The 2nd Objector asserted that her and the deceased cohabited together as husband and wife and has established a home at Nakuru county. However, it is my considered finding that apart from her allegations, she did not adduce any cogent evidence to buttress her averments on the presumption of marriage between her and the deceased. I should state at this point, that siring a child with someone does not automatically elevate one to being their spouse. In sum, I find that the 2nd Objector was not a wife of the deceased and thus not a dependant and/or beneficiary of the deceased’s estate.
94. The above notwithstanding, I am convinced that Lloyd Ndegwa Muthima is indeed the deceased’s son given the birth certificate no. 380145 produced before this court indicating that the deceased was the father and therefore he is rightfully a beneficiary of the deceased’s estate. The Petitioner did not provide any evidence to controvert the 2nd Objector’s evidence.
95. For the forgoing reasons this court makes the following findings and determinations: -
- i. This court finds that the 1st and 2nd Objectors were not the deceased’s wives and therefore not dependants of the deceased
 - ii. This court finds that Peris Nyawira, Janice Nyathira and Lloyd Ndegwa Muthima are the deceased’s children and are therefore beneficiaries of the estate.
 - iii. This court issues the Petitioner the grant of letters of administration but she is ordered to include Peris Nyawira, Janice Nyathira and Lloyd Ndegwa Muthima as beneficiaries of the estate.
 - iv. This being a family matter each party to bear their own costs.

DATED AND DELIVERED IN NYANDARUA THIS 19TH DAY OF DECEMBER 2024

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CHARLES KARIUKI
JUDGE

