



**Muriuki v Muriuki & another (Civil Appeal 38 of 2019)  
[2023] KEHC 3596 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3596 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 38 OF 2019**

**FR OLEL, J  
APRIL 25, 2023**

**BETWEEN**

**PURITY WANJIKU MURIUKI ..... APPELLANT**

**AND**

**SUSAN MUTHONI MURIUKI ..... 1<sup>ST</sup> RESPONDENT**

**FAITH FIDES KARUANA KAREITHI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment/decree of HON E.O Wambo (SRM)  
issued and dated 9/5/2019 in Kerugoya chief magistrate court succession  
cause no 245 of 2018- estate of Francis Muriuki Muchira- deceased)*

**JUDGMENT**

**Introduction**

1. The appellant filed summons for revocation of grant dated 30<sup>th</sup> May 2016 on grounds that the 1<sup>st</sup> Respondent obtained the same fraudulently and by making a false statement and/or by concealment of material facts. In particular. She alleged that the 1<sup>st</sup> Respondent did not reveal and/or disclose to court that she had a co-wife and other beneficiaries and thus sought to have the confirmed grant of letters of administration intestate issued on 8<sup>th</sup> March 2016 be annulled.
2. The 1<sup>st</sup> Respondent opposed the said application by stating that she was the legal wife of the late Francis Muriuki Muchira and the legal administrator of his estate. The appellant was a stranger to her family and was not entitled to any property of the estate, she further deponed that she had sold plot No. 104 Kutus, to Faith Fides Karuana and therefore the orders sought had been overtaken by events and the said application was unmerited. The 2<sup>nd</sup> Respondent too did oppose the said application by stating that she was a stranger to the estate of Francis Muriuki Muchira –deceased and having procedurally



and legally acquired the said plot 104 Kutus. The only option available to the appellant was to move to the Environment and land court and file a suit challenging the sale.

3. The parties gave viva voce evidence and vide his judgment dated 9/5/2019 the trial court did find that the appellant had not proved that there was a valid Kikuyu customary marriage between the appellant and the deceased and there was no way the Court can presume existence of a marriage. The said objection was dismissed with costs, giving rise to this appeal, where the appellant raised twelve (12) grounds of appeal namely;
  - a. The Learned Magistrate erred in law and fact by failing to revoke grant of letters of administration intestate issued on 8/3/2016 in favour of the 1<sup>st</sup> Respondent/Administrator whereas there was sufficient evidence adduced by the appellant to warrant the granting of the orders sought in the application dated 30/5/2016.
  - b. The Learned Magistrate erred in law and fact by not finding that there was sufficient evidence to prove that the appellant and her son Stephen Mithamo Muriuki were lawful beneficiaries of the estate of the deceased to whose estate the proceedings relate and they were unlawfully and fraudulently locked out on the entire proceedings and hence unlawfully disinherited.
  - c. The Learned Magistrate erred in law and facts by not finding that the deceased estate was polygamous with surviving spouses in the person of the appellant and the 1<sup>st</sup> Respondent and with children yet there was sufficient evidence to prove the same.
  - d. The Learned Magistrate erred in law and fact by holding that, the appellant was not a wife of the deceased entitled to the estate and proceeded to make a wrong finding on matters of Kikuyu Customary Law yet there was sufficient evidence on records to make a finding to the contrary.
  - e. The Learned Magistrate erred in law and fact by not appreciating the customary and legal principles that establishes the presence of a marriage under our laws and constitution of Kenya 2010 and hence delivered a judgment that discriminatory against the appellant and a breach to her constitutional rights of inheritance.
  - f. The Learned Magistrate erred in law and facts by not properly considering that the evidence by Appellant witnesses fully established a marriage between the appellant and the deceased which marriage relationship has never been rebutted.
  - g. The Learned Magistrate erred in law and fact by not holding that, the appellant was fully settled by the deceased on portion of estate comprised of plot No.104 Kutus Township of Kirinyaga County as her matrimonial home and failed to hold that the same was not available for distribution to the 1<sup>st</sup> Respondent but should have been granted to the Appellant solely.
  - h. The Learned Magistrate erred in law and fact by failing to revoke the grant and order a fresh distribution as per provision of section 40 of the laws of succession Act Cap 160 Laws of Kenya.
  - i. The Learned Magistrate erred in law and fact by not finding that the appellant had proved the ingredients stipulated in Section 76 of the *Law of Succession Act* Cap 160 Laws of Kenya to warrant granting of the Revocation and/or annulment of grant in accordance with the law and decided case law.
  - j. The Learned Magistrate erred in law and facts by sustaining the claim by the 2<sup>nd</sup> Respondent that, she is an innocent purchaser for value from the administrator whereas the 2<sup>nd</sup> Respondent had failed to acquire a clean title to the estate the same having been acquired fraudulently by the 1<sup>st</sup> Respondent who lacked a clean title to pass to the 2<sup>nd</sup> Respondent.



- k. The Learned Magistrate erred in law and fact by delivering a judgment which was based on extraneous matters not pleaded or addressed by respective parties hence entered a wrong finding of facts and law.
  - l. The Learned Magistrate erred in law and fact by delivery and judgment against the weight of evidence.
4. The appellant therefore prayed that the judgment of Hon.E.O Wambo (SRM) dated 9/5/2019 be set aside and the appellant application for revocation and/or annulment of grant dated 30/5/2016 be allowed.

## **Background**

5. The appellant filed the summon for revocation of grant dated 30/5/2016 seeking to have the confirmed grant of letters of administration intestate issued on 8<sup>th</sup> March 2016 be revoked on grounds that the 1<sup>st</sup> Respondent did conceal the fact that she had a co-wife (being the appellant) the said application was supported by the supporting affidavit of the appellant and she later did file a supplementary affidavit dated 12/8/2016. The 1<sup>st</sup> Respondent opposed this application by filing her Replying Affidavit dated 9/6/2016 and supplementary affidavit dated 11/10/2016. The 2<sup>nd</sup> Respondent filed witness statement dated 9/10/2018 and relied on the same. The parties took directions and agreed to proceed by way of viva voce evidence.
6. PW1 Purity Wanjiku Muriuki adopted her affidavit in support of the protest dated 30/5/2016 and supplementary affidavit dated 12/8/2016. She stated that she was married to the late Francis Muchira, but had no marriage certificate. They stayed in Kutus and the deceased had paid dowry six month after they started cohabiting in accordance with Kikuyu customary tradition. The late Francis Muchira was accompanied by his brothers. She was later introduced to the family and attended several children ceremonies including Lucy and Susan's functions and a burial in Meru for the son.
7. PW1 stated that when she met the deceased he was living in Kutus, while she was a businesswoman selling banana's and initially stayed in a rental house. She started cohabiting with the deceased on plot 104 Kutus and they built it together. She also confirmed that the 1<sup>st</sup> Respondent participated in constructing the houses therein. She confirmed that the deceased did not build for her a house within the said plot 104 Kutus, but allowed her to cultivate 1½ acres where she planted maize and beans. As regards her national identity card she confirmed that it was issued on 4/4/2014 several months after her husband had died, but stated that on his advice she had applied for it several months before his death.
8. The Appellant also confirmed that she had a child called Stephen Mithamo who was born in 1987 and by the time she met the deceased in 1998, her child had already been born, though she did not have any document to show that the deceased had acquired parental responsibility. She reiterated that she was not a girlfriend to Luka Wambuga( the deceased brother) but was a legal wife of the deceased Francis Muiruki.
9. On cross examination by the interested party she testified that she entered plot No.104 Kutus in 1994 and knew the deceased Francis Muiruki in 1998. The courted for 6 months after which he took her to the village. Her son was named after her father according to Kikuyu customary law. She could not remember what her dowry price was, but the deceased brother Lucas wambuga attended the ceremony from his family. Further she testified that initially when she started staying on plot 104 kutus she found 5 houses already constructed, but 10 were added while she stayed thereon. And contributed in the development of the same.



10. The Appellant on further cross examination stated that the deceased allowed her to collect rent, and she did so for two years from 2014. In re Examination she stated that the 2<sup>nd</sup> letter by the chief was issued in the presence of both parties (her and 1<sup>st</sup> Respondent) and as per Kikuyu customs, the bride does not participate in dowry negotiations and thus she did not know how much was paid as the bride price, but her brothers received the bride price from her late husband and his brother.
11. PW2 Lucas Wambuga also adapted his affidavit dated 12/8/2016 as his evidence. In cross examination he stated that he accompanied his brother during the dowry discussion at the Appellants home. Such dowry negotiations were not family events and it could be done by a few negotiators. He confirmed that they did not go with elders for the dowry negotiations nor did he have any minutes of the negotiations. It was his evidence that the first dowry negotiations meeting was held on 19/6/1998, where they discussed issues regarding the child and the family of the appellant asked for a he goat to enable the deceased take the appellant and her child.
12. After the deceased died, the Eulogy was prepared by the family/funeral committee. He further confirmed that he stayed in Kutus and that the appellant was not a tenant as they had taken he goat to her home. The witness further testified that during the marriage ceremony they did not take photographs of himself, Francis and Purity and was not aware if customarily his brother needed to obtain consent from the 1<sup>st</sup> respondent before marriage a2<sup>nd</sup> wife. As regards plot 104 Kutus, the witness stated that the appellant was given 2 ½ acres to use by the deceased, though it was developed from coffee proceeds which the 1<sup>st</sup> respondent planted.
13. In cross examination he confirmed that he did not mention the date when dowry was paid in his affidavit nor did he mention the dowry price. He further stated that his evidence was restricted to the town plot 104 Kutus and that no home was built for the appellant within the said plot, though she stayed thereon. He finalized by reiterating that there was no custom restricting or prohibiting him from attending his brothers traditional marriage ceremony and that he did not have an affair with the appellant.
14. The 1<sup>st</sup> Respondent testified that she know the appellant as a tenant in the plot at Kutus, where there were other tenants. The deceased- Francis Muriuki had 7 children in total but never told her about another marriage nor did he seek her consent, which was a mandatory requirement under Kikuyu customs before he could re-marry. Further if such ceremony was to occur, she would have accompanied him to go pay the bride price. She further testified that the disputed plot 104 kutus was her parcel of land, which she had developed from farming kahawa and other farm produce.
15. In cross examination the 1<sup>st</sup> Respondent admitted that the Appellant occupied one of the houses amongst the 5 houses. Further by the time the appellant came, building of other residential houses was in progress. The deceased died in kutus and later she was issued with a burial permit which her brother-in-law Lucas Wambugu took possession of. The appellant Purity was named in the eulogy and she did not raise any objection she acknowledged that they even took a photograph at the funeral. She also did not know why the area chief mentioned the appellant as co-wife in his letter.
16. Finally she stated that she was not aware of the citation taken out as against her to take up letters of administration of her husband's estate and that is why she petitioned alone and nobody objected. When her husband died in Kutus, he had gone to collect rent where the appellant was a tenant. She admitted that she had sold plot 104 Kutus to the 2<sup>nd</sup> respondent and nobody asked about the issue of any pending matter in Court. In reexamination the Respondent asserted that in the photograph there were many women, who were not wives of the deceased and that she was not aware of the application



for revocation of grant which was pending as at the time she sold nor was there any restriction on the said parcel of land.

17. DW2 Daniel Mwaniki testified that the deceased Francis Muriuki was his elder brother. It was his evidence that his brother never married the appellant, nor was there any relationship between the appellant and his other brother Lucas Wambugu. They had not gone to the appellant home and did not know about any child. He confirmed that the deceased died in Kutus and it was the appellant who brought the news of his death at around 7.30a.m. The burial arrangements were done at the 1<sup>st</sup> Respondent house. The deceased- Francis Muiruki during his life time had also confirmed to him that he had given the appellant a shop to carry out her banana business.
18. The last witness was Faith Fides Karuana( the 2<sup>nd</sup> Respodent) who stated that she bought plot 104 Kutus for Kenya Shillings Two Million( Ksh 2,000,000/=)after the succession case had been successfully completed and transferred it to herself. As at the time of purchase there was no restriction or caution. After purchasing the property she wrote a demand letter to the appellant demanding she stops collecting rent and that is when she knew that the Appellant was claiming to be a wife of the deceased. In Court she did not have any documents to prove that indeed she had paid Kenya Shillings Two Million (Kshs.2, 000,000/=). She also denied colluding with the 1<sup>st</sup> Respondent in having the property sold to her.

### **Appellant Submission**

19. The appellant did file her submission on 5<sup>th</sup> April 2022 where she submitted that the trial Magistrate erred in his interpretation of what constitutes a marriage and had a narrow approach on this issue hence arrived at a wrong conclusion not supported by evidence on record. She proceeded to point out the same.
20. As regards cohabitation as husband and wife, it was the appellant contention that her evidence was uncontroverted that she lived with the deceased from 1998 until 2014, when he died. She participated in the funeral as a wife of the deceased together with other family members without any objection. They both signed the burial permit, were named as wives of the deceased in the eulogy and their photographs were taken together as wives of the deceased. Even at the time of his death, the deceased was in the Appellant house in Kutus and she is the one who informed his family about his death. If she was a stranger the 1<sup>st</sup> Respondent would have opposed the citation which she filed and stated that she was stranger to the estate but did not do so. Instead the 1<sup>st</sup> respondent went and filed for grant without involving the Appellant and this point to her guilt and concealment of material facts. The appellant relied on Migori HCCA No. 82 of 2017. *K.O & Anor v J.O* (2018)eKLR , where court of Appeal case *Beth Nyandwa Kimani v Joyce Nyakinywa was Kimani & others* (206) eKLR was cited with approval.
21. The appellant submitted that due to the long cohabitation between the deceased and the appellant there was a presumption of marriage. No strong and weighty evidence was tendered to rebut the same. See *Re Estate of Jacinta Njoki Okoth (deceased)* 2020 eKLR and *Re Estate of Salim Islam Saudan (deceased)* 2016 eKLR.

### **1<sup>st</sup> Respondent Submissions**

22. The 1<sup>st</sup> Respondent submitted that the appellant did not prove that indeed she was a wife of the deceased- Francis Muiriku, nor did she prove that there was Kikuyu customary marriage conducted either by paying dowry or performing the ruracio ceremony and slaughtering a ram. Her thus allegation merely remained as an assertion with no probative value. The 1<sup>st</sup> Respondent relied on Dr. Engene contran book “Restatement of African Law, Kenya Value I. The law on marriage and divorce.



23. The 1<sup>st</sup> Respondent also submitted that the appellant did not prove that her child called Stephen Mithumo was also a dependant/beneficiary of the estate of the deceased Francis Muriuki. The appellant in her evidence admitted that she gave birth to her son in 1987, and met the deceased a whole 11 years later after her son had been born. The said Stephen Mithumo was almost 32 years old and had not brought any case for revocation of grant or claiming to be a beneficiary and as such it was not an issue for determination in this appeal.
24. As regards the issue of presumption of Marriage, the 1<sup>st</sup> Respondent submitted that the appellant did not show that she and the deceased lived together as husband and wife or that they were regarded as such by the community. The 1<sup>st</sup> Respondents stated that her evidence was more credible as compared to the Appellant's evidence. The appellant relied on *In Re:Estate of Mbiyu Koinange (deceased)* [2015] eKLR and *Phylis Njoki Karanja and 2 others v Rosemary Mueni Karanja and Another* Nairobi Civil Appeal No.313 of 2001 [2009]eKLR.

## 2<sup>nd</sup> Respondent Submission

25. The 2<sup>nd</sup> Respondent submitted that she was an innocent Purchaser for value from the administrator of the estate and had acquired a good title to the suit parcel, Plot 104 Kutus. The appellant had failed to prove that indeed she was a widow of the deceased nor did she have any valid interest in his estate. Her allegations that the deceased performed marriage rites under Kikuyu customary law too was not proved. The appellant was just a concubine living with the deceased in his Kutus plot and as such was not entitled to the prayer sought in her summons for revocation of grant dated 30/5/2016

## Analysis and determination

26. I have considered the pleading filed , oral evidence presents and written submissions filed by all the parties before the trial court and this court and this being the first appeal, the court is foremost enjoined to subject to whole proceedings to fresh scrutiny and make my own conclusions.

27. As held in *Selle & Ano v Associated Motor Boat Co.Ltd & Others* [1968] EA 123

“I accept counsel for the Respondent’s preposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluation it itself and draw its own conclusions through it should always bear in mind that it neither saw or heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s finding of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case Generally (Also see *Abdul Hammed Saif v Mohammed Sholan* [1955 22 EACA 270]

28. In *Cogblan v Cumberland* [1898] 1ch 704 the Court of Appeal of England stated as follows;

“ Even where, as in this case, the appeal turns on a question of fact, the Court of appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the material before the judge with such other material as it may have decided to admit. The Court must then make up its won mind, not disregarding the judgment appealed from, but carefully weighing and considering its and not shrinking from overruling it if on full consideration



the Court comes to the conclusions that the judgment is wrong.....when the question arises which witness is to be believed rather than the other end that question turns on manner and demeanor the Court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances quite apart from manner and demeanour which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

29. Therefore, this Court has a solemn duty to delve at some length into factual details, and revisit the evidence presented in the trial court, analyze the same, evaluate it and arrive at its own Independent conclusion, but always remembering and giving allowance for it, that the trial court have the advantage of hearing the parties.
30. The appellant had filed for summons for revocation of grant under section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. The appellant basic grouse was that she was a wife of the deceased and the 1<sup>st</sup> Respondent concealed this material fact from court nor did she involve and/or inform the appellant of the succession cause filed and thus sought to have the same to be annulled. Further the 2<sup>nd</sup> Respondent was enjoined as she had purchased plot No.104 Kutus from the 1<sup>st</sup> Respondent and was claiming ownership thereof.
31. The appellant did file his memorandum of appeal on 7<sup>th</sup> June 2018 and raised twelve grounds of appeal. As the appellant rightly pointed out, there are only two main issue for this Court's determination; mainly that;
  - a) Whether the trial Court was right in making a determination that there was no marriage between the appellant and the deceased Francis Muiruki and thus was not entitled to get a share of his estate. Tied to this question
  - b) Is whether based on the evidence presented the court could presume the appellant had demonstrated that "presumption of marriage could be assumed "as between the said parties.
  - c) Was the 1<sup>st</sup> Respondent right in selling plot 104 kutus to the 2<sup>nd</sup> Respondent and did she pass a good title to the said 2<sup>nd</sup> Respondent.

**A. The Learned magistrate erred in law and in fact in holding that there was no valid marriage between the deceased and the Appellant.**

32. Section 76 of the Law of Succession Act Cap 160 provides that
  - (76) Revocation or annulment of grant

A grant of representation whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or if its own motion; that

    - a) The proceedings to obtain the grant were defective in substance.
    - b) That the grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the case.
    - c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that allegation was made in ignorance or inadvertently.
    - d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either;



- i) To apply for confirmation of grant within one year from the date thereof; or such longer period as the court order or allow; or
  - ii) To proceed diligently with the administrator of the estate; or
  - iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular or
- e) That the grant has become useless and inoperative through subsequent circumstances.
33. Vide her summons for revocation of grant dated 30/5/2016 the appellant applied that the grant dated 8<sup>th</sup> march 2016 be revoked, as the 1<sup>st</sup> Respondent applied for the same secretly and without inform her, yet she was beneficiary and co-wife of the 1<sup>st</sup> Respondent. The same was thus procured by making a false statement and/or by concealment of material facts. The appellant had depone to the fact that she had cited the 1<sup>st</sup> Respondent in Kerugoya High Court Succession Cause No. 663 of 2014 to take or refuse to take up letter of administration for the Estate of Francs Muriuki. On 26/10/2015, the 1<sup>st</sup> Respondent advocates M/s Ann Thungu & Company Advocates intimated to Court that she had no instructions from her client and the Court allowed her to file for the same. The appellant proceeded to file for grant for the estate of Francis Muiruki and was issued with grant of letters of administration intestate dated 16<sup>th</sup> February 2016.
34. As she waited for confirmation her grant the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent started to aggressively press her to vacate plot 104 Kutus and that is when she discovered that the 1<sup>st</sup> Respondent had secretly filed Kerugoya High Court Succession Cause No. 498 of 2014 and proceeded to confirm the grant which she challenged.
35. The appellant affidavit evidence and oral evidence was that she was a wife of the deceased and they had contracted their marriage under Kikuyu customary law. The dowry was paid 6 months after they started cohabiting in 1998. Her evidence was that the deceased Francis Muiruki was accompanied by his brother Lucas Wamboga during the event but could not remember the exact date when the function was held, or the amount paid as bride price. This was due to the fact that under Kikuyu customs “ladies don’t participate in such events”.
36. The appellant was supported by her witness PW2 Lucas Wamboga who was the deceased brother. He too testified that he accompanied the deceased Francis Muriuki to the appellant home. They went to discuss dowry. He did not know other persons they went with in the delegation, but there were no elders and he did not have minutes of the said negotiations to prove the marriage and/or marriage negotiations. He further stated that the family of the appellant asked for He-goats to allow the deceased to marry the appellant and adopt her son. He also confirmed in cross examination that in his affidavit filed in court he did not mention the date when the dowry negotiation were held nor did he mention the dowry price in his affidavit.
37. On the other hand the 1<sup>st</sup> Respondent referred to the appellant as their tenant on Plot 104 kutus and if the deceased Francis Muiruki were to remarry he would have had to sought her consent under Kikuyu customary law. None was ever sought. Her witness Daniel Mwaniki also affirmed that the deceased was his brother and at no point did they go to the appellant parents home to conduct any marriage ceremony.
38. Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya place the incidence of burden of proof of any facts on the one who wishes the Court to believe in the existence of the fact. The court of appeal in dealing with the issue of a party relying on customs expressed itself in the case



of *Njoki v Mutaru* [1985] KLR 874 in the following manner. “The existence of a custom must be established by the party who intends to rely on it.....”

39. In Eugence contran’s “Case book on Kenya Customary Law” at page 30 set out the essentials of a Kikuyu customary marriage. It was stipulated that the essentials were
- i. Capacity: the parties must have capacity to marry and also capacity to marry each other
  - ii. Consent: the parties to the marriage and other respective families must consent to the union.
  - iii. Ngurario: no marriage is valid under Kikuyu customary law unless the Ngurano ram is slaughtered.
  - iv. Ruracio: there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.
  - v. Commencement of cohabitation: the moment at which a man and a women legally become husband and wife is when the man and the women commence cohabitation i.e under the captured procedure when the marriage is consummated after the “eight days” seclusion and nowadays when the bride comes to the bridegroom home”.
40. In his considered judgment, the trial magistrate did find as a fact that “it is clear that though the applicant testified that she was a wife of the deceased under – Kikuyu customary law, there is no evidence that fundamental Kikuyu customary marriage practices and rites were performed. There is no evidence that either Ruracio or Nguraro was performed. Perhaps the deceased and his brother attended or visited the applicant family but in the absence of the deceased it only remains the word of the brother and the applicant, it is the importance of why a marriage ceremony or practice must have several persons so that if issues likes this arise there are enough witnesses to testify that one took place. It is very odd that the deceased went to visit his in-laws only accompanied by his brother and no elder. Perhaps the applicant was staying with the deceased as man and wife with the knowledge of the family/ administrator and she then allowed her to participate in the funeral and be in the obituary but that does not make one a wife for purpose of succession”.
41. This court cannot fault the finding of the trial magistrate that indeed the evidence put forth by the appellant and her witness to support the issue that she the deceased married her under Kikuyu customary law was scanty and lacked probative value. The appellant testified that “we married in 1998, dowry was paid, and I cannot remember the date” in cross examination by the counsel for the 2<sup>nd</sup> Respondent she further stated that “I don’t know what my dowry price was”
42. PW 2 Lucas Wambuga did not fair any better. It was his evidence that under Kikuyu customs, the brother accompanied the groom to a ceremony where the groom gets to know the bride’s family. Then there is a dowry negotiations ceremony. The fast ceremony is for the groom, and his friends and not parents, while dowry negotiations are done by elders not children. With specific regard to his deceased brother ceremony PW2 Lucas Wambuga stated that “I am a younger brother but I went to discuss his his dowry. Dowry negotiations are not a family event. It can be done by a few negotiators ”.
43. The evidence of the appellant and her witness are at variance while it was her evidence that “Dowry was paid”, PW2 Lucas Wambuga was clear that what he went to discuss at the appellants home was “Dowry negotiations” he stated that “Dowry negotiations are not a family event it can be done by a few negotiators”.



44. The appellant did not lead any evidence that Ngurario ram was slaughtered nor was there any evidence lead that Ruracio (dowry ) was paid even the appellant herself did not know the amount paid as Ruracio (dowry) nor did she lead any evidence to show which other family members, elder were present from either family and who witnessed this ceremony. It is highly unlikely that dowry negotiations could be conducted by the younger brother of the deceased in absence of his peers, friends and/or elders.

45. In *Eva Naima Kaaka & Anor v Tabitha Waitbera Maroro* (2018) eKLR the citation of *Gituanja v Gituanja* (1983)KLR575 was quoted with approval, where it was held that;

“The existence of a marriage is a matter of fact which is proved by evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario”

46. I do find that given the totality of the evidence presented, the trial magistrate cannot be faulted for finding as fact that the appellant failed to prove on a balance of probability that Kikuyu customary married ceremony as between herself, the deceased Francis Muriuki occurred and evidence presented did not prove the same.

**(B) Based on the evidence presented could a presumption of marriage be assumed as between the appellant and the late Francis Muriuki –deceased.**

47. Even through marriage as between the appellant and the deceased – Francis Muriuki was not proved, this Court must still endeavor to consider whether the preemption of marriage” could still prevail under the circumstances of this case based on “common law doctrine of presumption of marriage”.

49. In his considered judgment the trial magistrate stated that “ to this court the applicant herein does not fall within this definition. The moment she failed to demonstrate the existence of a Kikuyu customary marriage, there is no way this court can presume existence of a marriage. There must be evidence of such”.

50. This finding by the magistrate is definitely an error in law as the trial magistrate failed in his judgment to evaluate and consider the evidence presented before coming to his considered conclusion. As stated in *Beth Nyawade Kimani v Joyce Nyakinywa Kimani & others* [2006] where the Court held that;

“For it matters not whether or not statutory or customary marriage requirements are strictly proved in marriage. The Court must go further and consider whether, on the facts and circumstances available on records, the principles of presumption of marriage was applicable in the appellant’s favour.

51. The doctrine of presumption of marriage has its genesis in Section 119 of the *Evidence Act*, Cap 80- of the Laws of Kenya which states,

“the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case”.

52. In *Hortenesiab Wanjiku Yaweh v Public Trustee*; Civil Appeal No. 13 of 1976. Mustafa J.A in his leading judgment stated that

“I agree with the trial judge that the way of proving that she was married to the deceased was on the appellant. But in assessing the evidence on the issue, the trial judge omitted to take



into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant only cogent evidence to the contrary can rebut such a presumption.

53. The court further stated that;

“The presumption does not depend on the law or a system of marriage. The presumption is simply is an assumption based on very long cohabitation and repute that the parties are husband and wife.”

54. Again in the Court of Appeal Al Nyeri *Joseis Wanjiru v Kabui Ndegwa and Ano* [2017]eKLR expressed itself thus;

“The existence of a marriage is a question of facts likewise whether a marriage can be presumed is a question of fact. It is not dependent o any system of law except where by reason of a written law it is excluded for instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under a statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the by long cohabitation or other circumstances evinced an intention of living together as husband and wife.”

55. Finally *Halbury law of England* 3<sup>rd</sup> Edition Vol 19 paragraph 1323 states; “Presumption of cohabitation” is where

“where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though they maybe no positive evidence of any marriage having taken place and the presumption can only be rebutted by strong and weight evidence to the contrary.

56. The key issue which the court has to consider if they come out of evidence tendered is whether the appellant established long cohabitation and act of general repute, which would be synonymous with the impression, or assessment of the couple as perceived by the General Public including relatives and friends.

57. The Appellant testified that she knew the deceased Francis Muriuki in 1998 and cohabited together from then [1998], until his ultimate demise on 2/1/2014. During this period she was introduced to his family and attended his children ceremony- presumably traditional wedding ceremony. It was her evidence that she attended Lucy and Susan function and went to the burial of one of his sons in Meru. Their cohabitation was at plot 104 kutus. Initially when they started cohabiting there were only five houses thereon which the 1<sup>st</sup> Respondent contributed in building but other 10 units were added while she was residing thereon. She was not a tenant as even during the last two years before the deceased Francis Muriuki passed on, she was collecting rent on plot 104 kutus, until evicted from the said parcel by the 1<sup>st</sup> Respondent after it was sold.

58. The appellant testified that even though her national identity card was issued on 4/4/2014 after the death of Francis Muriuki, she had sought for the same before his death and with his consent, though she did not have application form in Court.

59. The Appellant also pointed out to the facts that upon the ultimate demise of the Francis Muriuki they were both issued with a burial permit jointly. They jointly participated during the burial arrangement



and were even photographed together as a family of the deceased. On the funeral programme – eulogy both of them were recognized and wives of the deceased and therefore if indeed she was a complete stranger to the family and/or estate of the deceased the 1<sup>st</sup> respondent ought to have informed Court of the same when she was cited to accept or refuse to accept the letters of administrations intestate in Kerugoya Hcc Succession Cause No. 663 of 2014, but instead the 1<sup>st</sup> respondent, deliberately chose to mislead court that she was yet to file succession proceedings; even through it later emerged that she had already filed one and was bent on stealing a match on the applicant/appellant.

60. Finally the appellant also state that though she did not have a house built for her on plot 104 kutus; she resided thereon, collected rent had been constantly ploughing 1½ acres therefore and is therefore entitled to be considered as a beneficiary and during distribution be given her rightful share of the estate.
61. The appellant witness Lucas Wambugu recognized the appellant as wife of the deceased. The eulogy was proposed by the funeral committee which he chaired and was prepared by Gladys Wambui and Samuel his nephew. The appellant was not a tenant on plot 104 Kutus. She was farming on a portion of the said plot and this fact was well known by the 1<sup>st</sup> Respondent.
62. The 1<sup>st</sup> Respondent on the other hand testified that she and the deceased were in monogamous marriage and the appellant was the tenant on plot 104 Kutus. She admitted that “the appellant occupied one of the 5 houses, which were complete and some were in progress by the time the Appellant came. Her husband was also staying at Murinduko. He died at Kutus but previously we were with him”. On the burial permit she stated that Lucas Wambuga was given the permit and she signed it when the appellant was not present.
63. As regards the obituary, she confirmed that the appellant was listed therein as a wife and she did not raise any objection she also admitted “ we did photo at the funeral” photograph was for people who were there”. I had requested her to assist since I was collapsing. She further stated that she did not know why the area chief listed them as co-wives.
64. The 1<sup>st</sup> Respondent witness Daniel Mwaniki simply testified that the appellant was not a wife of the deceased, nor did she have a relationship with the other brother Lucas Wambuga. He confirmed that his late brother had told him he had given the appellant a shop for banana business. The 2<sup>nd</sup> Respondent too testified and stated that after she bought the plot “I wrote a demand letter to Purity to stop collecting rent,” that is when I know Purity was claiming to be a wife of Francis.
65. From the evidence adduced it is clear from the appellant evidence that she cohabited with the deceased Francis Muriuki from 1998 upto 2014 when he died in her house. This has not be rebutted by both the respondents and their witness. The 1<sup>st</sup> respondent confirmed that the appellant stayed in one of the five houses initially built within Plot 104 Kutus. The 1<sup>st</sup> Respondent specifically in cross examination testified that “ the Plaintiff occupied one of the houses amongst the 5 houses. “ There were 5 houses completed and some were in progress by the time the Plaintiff came. My Husband was also staying at Murindikoko. PW2 Lucas Wambuga also confirmed that the appellant started staying in Kutus in 1998. She stayed with his brother for six months before they married and that Purity was not a tenant. Daniel Mwaniki also testified that “when we were building the deceased to me Purity had been given a shop for banana business.
66. The evidence adduced unerringly points to and proves that there was long cohabitation, which was known not only by the 1<sup>st</sup> Respondent, but by the deceased two brothers as well.
67. As regards general repute, the long cohabitation was not merely friendship but had crystallized in into a marriage; the appellant’s evidence that she attended her step daughter’s wedding and burial of a son



in Meru was not rebutted. While there is scanty evidence of their social life, the irrefutable evidence tendered in court was that the deceased family, full acceptance the appellant as a wife and allowed her unhindered participation as wife during the deceased interment/burial. If indeed the appellant was a stranger to the family there would have been a huge hue and cry from the 1<sup>st</sup> Respondent and her six adult in including the appellant in the funeral eulogy as a co-wife. They did not protest and both the appellant and the 1<sup>st</sup> respondent buried the deceased Francis Muriuki as co-wives. For good measure they even took photographs by the coffin before he was interred.

68. The 1<sup>st</sup> Respondent cannot be heard to cry wolf over the appellant's inclusion. During her cross examination, she stated that "In the obituary I was listed with Purity I did not raise any objection. I had many things during that time and didn't make any observation. We did photo at the funeral. Photos was for people who were there. I had requested her to assist, Since I was collapsing " I don't know why chief said we are co-wives.
69. Daniel Mwaniki also testified that has the deceased brother told him that "when we were building the deceased told me Purity had been given a shop for banana business" while this is open to different interpretation. It connotes that she was not a tenant. The 2<sup>nd</sup> Respondent also confirmed that the appellant was collecting rent and caused a demand letter be written to stop the appellant from collecting rent". All the above strongly established acts of general repute that indeed the cohabitation was not merely friendship and it had the trial magistrate applied his mind and considered all these facts he would have definitely reached a different conclusion.

**c) Was the 1<sup>st</sup> Respondent Right in selling plot 104 Kutus to the 2<sup>nd</sup> Respondent and did she pass a good title to the said 2<sup>nd</sup> Respondent.**

70. It was the 1<sup>st</sup> Respondent evidence that she had evidence that she had already sold the plot 104 Kutus to the 2<sup>nd</sup> Respondent for a consideration of Kshs.2,000,000/= on the said property had already been transferred to the said 2<sup>nd</sup> Respondent, who also confirmed that she saw the confirmed grant issued by Court and council documents showed that the land belonged to the 1<sup>st</sup> Respondent and thus there was no hindrance in proceeding with the said transaction. She further mentioned that there was no restriction or caution placed on the property stopping any transaction.
71. In the Replying Affidavit filed by the 2<sup>nd</sup> Respondent she did annex two documents. The sale agreement dated 20<sup>th</sup> September 2016 for parcel 104 Kutus between her and the 1<sup>st</sup> Respondent, wherein the said parcel is sold for a consideration of Kshs.2,000,000/= and the second document are minutes of lands, housing and urban development and planning committee dated 17<sup>th</sup> October 2016 where transfer of parcel 104 Kutus was approved. The transfer is from Susan Muthoni Muriuki to Faith Fides Karuana,
72. It was the appellant submission that the grant ought to be revoked so that the properties left behind by the deceased could be distributed a fresh. Further she stated that the interested party was not protected by virtue of section 93 (1) of the *Law of Succession Act* as the 1<sup>st</sup> Respondent did not pass a valid title. The 2<sup>nd</sup> respondent on the other had submit that the property was properly transmitted to the deceased wife legally and therefore she had all rights of dealing with the said plot as she wished. The sale and transfer of the property to her was proper and valid. She was an innocent purchaser for value therefore could not be faulted.
73. The Appellant filed her objection on the 30<sup>th</sup> May 2016. By the time the 1<sup>st</sup> Respondent was entering into sale agreement with the 2<sup>nd</sup> Respondent on 30<sup>th</sup> September 2016, She was already aware that the whole succession process was being challenged and had even filed her initial replying affidavit



dated 9/6/2016 opposing the said summons for revocation of grant. By 17<sup>th</sup> October 2016, when the transfer was approved she had already filed her supplementary affidavit dated 11<sup>th</sup> October 2016. The 1<sup>st</sup> Respondent therefore cannot be heard to allege that she was not aware of these proceedings.

74. It should be noted too, that initially when the appellant filed for citation in Kerugoya Succession cause No. 663 of 2014 the appellant deliberately, chose not to disclose that she had already filed this cause and proceeded with it to conclusion without informing the Objector. She then transferred the property plot 104 Kutus to the 2<sup>nd</sup> respondent and started demanding rent from tenants. She also instituted eviction proceedings as against the appellant. That cannot be said to conduct of a person acting in good faith and obviously concealed material facts from Court.

75. In *Adrian Nyamu Kiugur v Elizabeth Karimi Kiugu & Anor* [2014]

The court made the following observation

“ whereas the above section states that a transfer to persons to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after commencement of this Act, I am of the considered view that such transaction can only be relied upon where the legal representation is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently.

76. In *Re Estate of Christopher Jude Adela (deceased)* [2009] eKLR R.K.H Rawal J (as she was then ) stated that’

“ the correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in that manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law it is gives a carte balance of absolute immunity against challenges to transfer of immovable property of the estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected over while undertaking unethical or illegal action prejudicing the interests and rights or right of beneficiary to the estate.”

77. The 1<sup>st</sup> Respondent acted in bad faith to sell plot 104 Kutus, while fully aware that the objection proceedings were pending. The 2<sup>nd</sup> Respondent too ought to have conducted better due diligence on the said property in terms of knowing the owner, visiting the plot and inquiring from tenants thereof better particulars as to its use and possession. By her demand better dated 13/1/2017 it seems she knew that the appellant was collecting rent. The letter states that “ that our client’s issue is that you have continued to occupy the said plot and collects rent from the tenants therein without any colour of right”.

78. The 2<sup>nd</sup> Respondent too cannot be heard to feign ignorance as to the state of affairs as regards the plot which she bought. No good title could have passed as the 1<sup>st</sup> respondent was fully aware to the objection/protest filed but proceeded to sell the estate property. There action is soiled in Equity and cannot be sanctioned.

## Disposition

79. Having found as above on all the point raised in this appeal, I do find and hold that;



- a. This appeal has merit. The judgment of Honourable E.O Wambo (SRM) dated 9/5/2019 is wholly set aside and substituted with an order revoking the confirmed grant dated 8th March 2016. A fresh grant of letter of administration intestate shall be issued in the joint names of the 1st respondent and the appellant.
- b. The transfer of Plot 104 Kutus to Faith Fides Karuana Kareithi is hereby revoked and the registration of the said plot 104 kutus is to be reversed back to the name of the deceased Francis Muiruki Muchira.
- c. That this matter be returned back to Kerugoya chief Magistrate Court for fresh hearing as to mode of distribution of Plot 104 Kutus as between the Appellant and the 1st Respondent. The same is to be handled by a different trial Magistrate.
- d. While fresh hearing on distribution is being conducted all rents collected from Plot 104 Kutus will be deposited in a joint interest earning account held in the names of the advocate of the Appellant and the Respondents. The said account to be opened in a commercial bank and/or Sacco of good repute.
- e. This being a family matter each party will bear their own costs.
- f. Right of Appeal (if need be) granted and the same to be filed within 14 days.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL 2023.**

**RAYOLA FRANCIS**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 25TH DAY OF APRIL, 2023.**

In the presence of;

.....for the Applicant

.....for Respondent

.....Court Assistant

