In re Estate of Joseph Mwaura Nderi (Deceased) (Succession Cause 578 of 2015) [2022] KEHC 598 (KLR) (Family) (25 April 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 578 OF 2015

WM MUSYOKA, J

APRIL 25, 2022

IN THE MATTER OF THE ESTATE OF JOSEPH MWAURA NDERI (DECEASED)

JUDGMENT

1. This cause relates to the estate of Joseph Mwaura Nderi, who died on 31st December 2013, according to certificate of death, serial number 0105526, dated 22nd January 2014. From the letter from the Deputy County Commissioner, Nairobi, dated 20th March 2014, the deceased was survived by a widow, Margaret Njoki Mwaura; and had had five sons, being Nelson Ndung'u Mwaura, the late David Muturi Mwaura, Peter Matama Mwaura, Godfrey Njihia Mwaura and Francis Karoki Mwaura; and six daughters, being Lucy Wangui Mwaura, Mary Gathoni, Josephine Mukuhi Mwaura, Ruth Ngina Mwaura, Elizabeth Wanjiku Mwaura and Martha Nyokabi Mwaura. Representation to his estate was sought by one of his sons, Nelson Ndung'u Mwaura, on 10th March 2015. In the affidavit in support, the deceased was said to have been survived by the persons indicated in the Chief's letter mentioned above. And to have died possessed of Nyandarua/Passenga/143, Nyandarua/Matindiri/175, LR 36/166/ Eastleigh and Stall 58B Quarry Road. Letters of administration intestate were made to Nelson Ndung'u Mwaura on 5th August 2015, and a grant was duly issued to him on even date, and I shall hereafter refer to him as the administrator.

2. On 22nd June 2016, Lucy Wanja Mwaura filed a summons for revocation of grant, of even date. I shall refer to her hereafter as the applicant. She would like the grant made on 5th August 2015 to the administrator to be revoked, and a fresh grant to be made jointly to her and the administrator. She avers that she was a widow of the deceased, having married him sometime in 1981 under customary law, through cohabitation, and they had cohabited as such right up to the death of the deceased. The cohabitation gave rise to two children, that she identifies as Daniel Njihia Mwaura and Irene Wangui Mwaura. She avers that she and the deceased lived at Nairobi, where they operated a business within the Eastleigh area; while the first wife, Margaret Njoki Mwaura, lived upcountry, at Nyandarua, with her children. She avers that the first family knew about her, and her marriage to the deceased, as various

members of the family would visit her and the deceased in Nairobi. She states that the first family was intent on disinheriting her, for they did not involve her in burial arrangements, they did not mention her name and that of her children in the funeral programme. She submits that representation to the estate was obtained through a defective and fraudulent process, as her existence and that of her children were concealed from the court.

3. She has attached to her affidavit a number of documents to support her case. She has attached copies of national identity cards for herself, Lucy Wanja Mwaura, issued on 1st April 2003; her son, Daniel Njihia Mwaura, issued on 13th August 2014; and her daughter, Irene Wangui Mwaura, issued on 5th December 2007. There are nine copies of photographs where the applicant appears with the deceased, and other persons. Finally, there is the funeral programme for the burial of the deceased.

4. The administrator responded to the application, through an affidavit sworn on 31st August 2016. He asserts that the applicant was never married to the deceased, either under kikuyu customary law or any other system of law. He avers that she was instead an employee of the deceased, in the bar that the deceased was operating at Eastleigh, known as Blue Shade, adding that whenever he visited the bar he would see the applicant serving customers like any other employee. He attaches a document, titled "Trustworthy Agreement," allegedly entered into between the deceased and the applicant, where it was spelt out that the applicant was a the senior most employee and the management had agreed to pay her house rent if she continued with her good work, and that the management would assist in the education of her two children. He asserts that one of the children of the applicant was named after the mother of the deceased without the consent of the deceased, at a time when the deceased was in hospital. He states that the deceased and the applicant entered into another agreement, where it was specified that the applicant was an employee of the deceased. He further states that the applicant threatened to kill the deceased, and the matter was reported at the Pangani Police Station, vide OB/9/10/2008, in response to which the applicant conceded that she was a long time employee of the deceased. He asserts that the deceased had married his mother in church, and he could not possibly enter into any other marriage under tradition. He further asserts that he was a trusted confidant of the deceased, and if he had anything with the applicant, he would have known. He states that the deceased had given him a power of attorney in 2005, and in it he did not instruct him to provide anything for the applicant or her children, when dealing with his properties. On the identity cards of the applicant and her children of the applicant, he avers that although the applicant claims to have had been married by the deceased in 1981, she card was issued in 2003 when the deceased was ailing; the identity card for Daniel Njihia Mwaura was obtained in 2014, some eight months after his death; Daniel Njihia should have been named after the father of the deceased if indeed he was a son of the deceased; and the applicant was never introduced to the family by the deceased as a member of his family, nor was dowry ever paid for her. He avers that the applicant was not involved in the burial arrangements as she was not a member of the family of the deceased, and if she was a real wife she ought to have raised that issue during the funeral preparations. He also avers that he could not have involved him in the filing of the succession cause for the same reason.

5. 1 will now recite the documents attached to the affidavit of the administrator. There is the document referred to as the trust worthy agreement, between the deceased and the applicant, the date is not clear, but it is the 26th of August of sometime in the 1900s, spelling out that the applicant was a mere employee of the deceased, she was the senior most employee at Blue Shade in charge of management and supervision of the other employees, in charge of sales and purchases, should not quarrel with other employees, the her rent would be paid by the management, management would assist with education of her children and one of the children was named after the mother of the deceased without his consent, the applicant had obtained her national identity card using the name of the deceased as her surname without his consent, and he was not allowed by the law of his religion to marry another wife. The other

agreement, in Gikuyu, is dated 26th September 1990. The same was purported to have been entered into to avoid future problems in the household of the deceased and that of the applicant. it spelt out that the applicant was an employee that the deceased had penetrated with his business, together with his daughter Lucy Wangui; she had obtained a national identity card with his name as her surname without his consent; she had named her child after the mother of the deceased without the consent of the deceased, when the deceased was in hospital, allegedly on advice of her mother; and that he could not take a second wife as the church did not allow him to. The next is a letter dated 9th October 2008, from the Pangani Police Station, under the heading Lucy Wanja and death threats. It asked the applicant to visit the Pangani Police Station to record a statement. The reportee was said to be the employer of the applicant, who was also her personal friend at various levels. It urged her to reconcile with the deceased subject to the concerns and conditions of the deceased. The next is a letter, in Kiswahili, dated 14th October 2008, from the applicant, and addressed to the Pangani Police Station, in response to the letter of 9th October 2008. She said she was an employee of the deceased; they had reconciled; she had uttered the threats when drunk; the deceased had helped her in many ways, like assisting her get land, join groups such as Jamii Bora and to buy a house; and she had been running his business. The last two documents are the certificate of the marriage deceased celebrated on 24th December 1991 between the and the mother of the administrator and the power of attorney dated 28th February 2005.

6. That reply elicited a response from the applicant, vide an affidavit sworn on 28th October 2016. She avers that after their cohabitation which started in 1981, the deceased and the applicant were blessed with a child in 1986, being Daniel Njihia, after which the deceased visited the parents of the applicant and gave out some money towards fulfilling the customary rite of kuhanda ithigi. She avers that she did not meet the deceased for the first time at the Blue Shade Bar at Eastleigh, but that they were cohabiting there, for they had met earlier at Gikomba, where they operated a textiles business, before it was closed and relocated to Eastleigh. She asserts that she was at the bar was a family business, and she was not an employee there. She avers that whenever the administrator visited he might have seen her assist the workers, but that did not mean that she was also an employee. On the document titled trust worthy agreement, she dismisses it as a forgery for she never entered into any such agreement with the deceased, daring the administrator to avail the alleged witnesses for cross-examination. On naming the second child after the mother of the deceased, the applicant avers that it was the deceased who insisting on a second child, and there was no way he would have refused to have her named after his mother, and that it was he who gave her the name, after he visited her with his mother and sister. She further avers that all the other letters attached to the affidavit of the administrator were forgeries, and dares the administrator to have the same subjected to forensics. She further denies being summoned to the Pangani Police Station over death threats on the deceased, and dares the administrator to summons PC Kiplangat, who allegedly wrote the letter from the police, to come to court as a witness. She states that she got a second national identify card in 2003 as a replacement to an earlier one, adding that the name Mwaura was added to her national identity card in 1992, after she and the applicant presented affidavits to that effect. She says that when she had Daniel Njihia she was not sure whether the deceased was serious about the marriage hence he was named after her father, but by the time she got her daughter she was quite sure, and she named him after the deceased's mother. She states that most of the members of the family of the deceased knew her., and the deceased's brother was among those who were present at the kuhanda ithigi event. She has attached pictures that she alleges depict her and the deceased with some of the relatives, such as the sister of the applicant, the deceased at the applicant's house when he was sick and the deceased with his friends at the house of the applicant. Before the deceased was taken ill for the final time, he had been staying at the house of the applicant, and was removed to St. Mary's Hospital, but died within days. She states that she hosted mourners at her one of the venues. She complains that despite all that, she and her children, were sidelined, and were not mentioned at the funeral programme, but she chose peace by not raising issues at the time.

She has attached to that affidavit, two affidavits sworn on 21st August 1992, by her and the deceased, stating that they had married each other in 1991 under customary law, they were staying as husband and wife, and wanted the name of the deceased reflected in the national identity card of the applicant. There are school records from Gacharage Primary School, Gacharage Secondary School and the Kenya National Examinations Council, relating to Daniel Njihia, where his surname is depicted as Mwaura. The others annexures are the pictures, allegedly taken at the residence of the applicant, placing the deceased's daughter, the deceased himself and his friends at the said residence. There is also a copy of a permit from the Chief of Airbase Sub-Location permitting the applicant to hold a funeral gathering at Blue Shade between 2nd January 2014 and 8th January 2014.

7. The administrator responded to the affidavit of 28th October 2016, by his affidavit of 9th November 2016. He avers that the applicant was their employee, and they would pay her for the services she had rendered, and allow her to use a house No. 2 as part of her package. He complains that she was not honest in that she was collecting rents, but remitting a lesser figure, after deducting some fictitious payments, a matter which they reported at the Pangani Primary School. He avers that his mother and siblings did not live at Nyandarua, but at Nairobi, where most of them schooled. On the alleged customary law marriage, he asserts that there was no such marriage, and that although in her revocation application she stated that she married the deceased in 1981, the affidavits f marriage for change of her name talk of 1991. He further points out that the same affidavit mentions that the deceased hailed from Kandara, Murang'a, which was not true. He mentions an event on 10th September 2016, when the applicant conducted a ceremony at her parents' home, which was only conducted by unmarried women. He points at the birth certificate of Daniel Njihia, to argue that the slot for father was blank, and says that he obtained an identity card with the name of the deceased using the forged affidavits of 1992. He alleged that he knew the daughter of the applicant to have been sired by a Maasai man, who was a boyfriend of the applicant, and asserted that the said children be subjected to a deoxyribonucleic acid (DNA) test to determine paternity. He asserts that the deceased was a prominent person, who could not have, in 1981, married an eighteen-year-old girl, and had married his mother in a church ceremony, and, therefore, lacked capacity to marry another woman. He has attached a bundle of documents to reflect a statement of accounts of the rent due from the property on which stands the Blue Shade Bar. There are also copies of documents which show where his siblings attended school in Nairobi. The other documents are the power of attorney, a deed of indemnity over the Eastleigh property, national identity card for the deceased, certificate of birth for Daniel Njihia Mwaura.

8. Filed simultaneously with that affidavit is that of Margaret Njoki Mwaura, the mother of the administrator. She avers to be the widow of the deceased, having married him in 1954, under customary law, before she went through a church ceremony in 1991, at St. Peters Clavers Church. She gives details of the property that the deceased bought over the years, and the businesses that he set up. She describes how she and the deceased raised money from a bank to buy the Eastleigh on which the Blue Shade Bar stood, where they also resided until 2003, when they relocated to Ruai. She states that the deceased never introduced her to any other woman, as her co-wife. She describes the applicant as a worker, who was employed in 1988 as a bar attendant. She said that the deceased died on 31st December 2013, after spending the Christmas period with her and their children. He fell ill and was rushed to the Mama Lucy Kibaki Hospital where he died.

9. The other affidavit is by Mary Njeri Ndungu, sworn on 9th November 2016. She is a sister of the deceased. She avers to have been very close to the deceased, who could not hold any ceremonies without involving her. She used to visit him at his bar at Eastleigh, and he never introduced the applicant to her as his wife, and her children as his children. She said she knew the deceased to have had only one wife, Margaret Njoki Mwaura. She refutes the allegation that the applicant was a second wife of the deceased, and that she had visited her when she had a baby girl.

10. The last affidavit is by Agnes Wangui Meto, sworn on 9th November 2016. She is a resident of Eastleigh, who was known to the applicant since 2009, when she rented a house within the Eastleigh property. She said that she knew her as a worker at Blue Shade Bar, before it was converted into a residential house. She said that she did not know the deceased and the applicant as husband and wife, as the deceased was not living with her, but with his wife. She avers that the applicant invited her and her other friends to visit her parents on 10th September 2016, to a ceremony where she paid dowry for herself as an unmarried woman, who had given birth while unmarried. She said none of the attendees were from the family of the deceased. She has attached a number of pictures of the said ceremony.

11. The applicant swore a further affidavit on 13th December 2016, to respond to the affidavits of 9th November 2016. She reiterates what she had averred in her previous affidavits, and raises a number of other issues. She avers that the deceased had made a gift inter vivos of a house, just as he had done for the mother of the administrator with respect to the Ruai assets. She asserts that that the first family never resided in the Eastleigh property. She further asserts that the deceased signed an affidavit before a commissioner for oaths to enable her have his name included in her national identity card. She explains that the event at her parents' home on 10th September 2016, was to pay the dowry that the deceased had not paid, and it was meant to pave way for her to receive dowry for her own daughter who was getting married, as she could receive dowry for her daughter so long as dowry for her had not been paid. She asserts that she did not pay dowry for herself as an unmarried woman, for she had long been married by the deceased. On the fact that the birth certificate for Daniel Njihia did not include the name of the deceased, she asserted that that was a non-issue, for the said child was the biological son of the deceased, and the deceased himself was comfortable with him. She denies that her daughter was sired by a Maasai. She says that she is open to the children, including those of Margaret Njoki, going through a paternity test to determine their conception with the deceased. She asserts that the deceased was her husband, whether under customary law or under cohabitation, with whom he cohabited and had two children with. She avers that the deceased might have spent Christmas with Margaret and her children, but asserts that he was with her at her home between 27th and 30th December 2013, before he left for Ruai, where he died on 31st December 2013. She states that after the deceased died, three sons of the deceased, Ndungu Matama and Mwaniki, came to her house and asked for the deceased's documents, which she gave to them. She asserts that the bank loan was repaid from the Blue Shade Bar business, which she managed, saying that the other wife was not in any meaningful business, from which she could raise money for repaying a loan. She further avers that the Ruai house, where Margaret Njoki lived, was constructed with money from the business ran at Blue Shade Bar, and that she even contributed iron sheets. She avers that the fact that the deceased spent time at her house and part of his time at the house of Margaret Njoki meant that they were co-wives. She also points to the fact that she kept his documents that his sons came for after his death, and the fact that the sons also came for her to go and view the body of the deceased shortly after he died, were all good pointers to that fact. She avers that the sister of the deceased knew her as a second wife of the deceased, and it was on that basis that she and the deceased attended the burial of step-grandmother at Murang'a. She further mentions that when the mother of the deceased was hospitalized at Nakuru, the sister of the deceased was with her, and the applicant and the deceased used to visit her there. Regarding Agnes Wangui Mote, she avers that she is a bought witness, as she was witness to the applicant and the deceased living together at Eastleigh as husband and wife.

12. The other affidavit is by Rosemary Mulwa, sworn on 13th December 2013, she was a tenant in the Eastleigh house. She avers that the applicant and the deceased lived together in one of the houses, and she knew her as husband and wife. She mentions that the applicant used to rush the deceased to hospital whenever he fell ill, and to massage him at home, at times with her help. When the deceased died, they held meetings at Eastleigh, attended by the applicant and her children. She was also party to the

ceremony at the home of the parents of the applicant, when dowry was paid to them. According to her, the idea was to pay the dowry that the deceased had died before paying.

13. The other affidavit is by Lucy Wamaitha Kiarie, sworn on 13th December 2016. She avers to have had rented out a house to the deceased in 1992, and he lived there with the applicant and her children. She states that the deceased introduced her as his wife. In 2003, the deceased and the applicant left to occupy the premises where the Blue Shade Bar stood, but left their children at the house, and the deceased continued to pay rent for the house. The two children stayed on until 2009, when they moved out, a person moved in, who they described as their cousin. She asserts that the deceased used to spend nights ta that house, with the applicant. She states that they were close neighbours, and often the deceased would take his children and those of the neighbours on tours. She avers to have been party to the trip to Murang'a for the applicant to pay the dowry that the deceased should have paid. She asserts that she was not paying rent as an unmarried woman, but that which the deceased should have paid during his lifetime, so that, under Kikuyu customary law, she could receive the dowry for her daughter. She states that no mburi ya mururu was slaughtered, and that the one slaughtered in the preceding month was not for her but for her sister, who had given birth before she was married, and in her case, the applicant did not have to slaughter one as she gave birth to her first child when she was living with the deceased. She avers that the allegations by Agnes Wangu Meto were not true. She was not party to the negotiations, she did not enter the house where the ceremony happened and she did not even take the photographs that she took.

14. Daniel Njihia Mwaura and Irene Wangui Mwaura swore a joint affidavit on 13th December 2016. They assert to be the biological children of the deceased of the applicant and the deceased, and that the deceased had brought them up, by providing for them everything that a parent provides for his children, food, clothing, accommodation, school fees, medical expenses and other needs, right up to the point of his death. They aver that they lived in the same house with the two parents as a family and their school documents bear the name of the deceased. They further aver that the deceased loved them as his children, and he used to take them out to the lunar park and other placeless of entertainment. They state that the school records relating to Daniel Njihia had been attached to the applicant's affidavit, and they have attached to their own the documents relating to Irene Wangui Mwaura. The documents attached relate to her schooling at St. Teresa's Girls Primary School, Nembu Girls High School and the Kenya National Examinations Council.

15. The other affidavit is by Elizabeth Wachuka Njehia, sworn on 13th December 2016. She is the mother of the applicant. She avers that the applicant stayed at various addresses in Nairobi with her father, while looking for employment, and it was during that period that the deceased employed her as at his business at Gikomba. During the course of that employment, the applicant got pregnant with Daniel Njihia, and when they enquired she informed them that the deceased was responsible. When they asked the deceased about it, he conceded to the pregnancy, and said he was married, but committed himself to assist her and her child. When she gave birth, they named the boy after the applicant's father, given that she was not yet married to the deceased, but the two continued to work together and to have a relationship, during which they visited her upcountry home at Murang'a several times. She avers that in 1989, the deceased sent an elder to them, to inform them that the deceased was to start the process of getting formally married to the applicant. the deceased and the applicant then came home after one or two weeks, where the deceased expressed interest to marry the applicant, and paid Kshs. 20, 000.00, being part of dowry, known traditionally as kuhanda ithigi, an expression of commitment. They promised to come back. She avers that she used to visit the deceased and the applicant at the place where they used to reside in Eastleigh. She avers further that when the deceased got her second child, she was cohabiting with the deceased, and for that reason the child was named after the mother of the deceased. She avers that thereafter the deceased used to visit them and refer to them as his in-laws, and

remained in contact with them right up to the time of his death. When the applicant's daughter was to be married, the applicant enquired from the deponent what they were to do now that the deceased had died before he completed paying dowry, whereupon she advised her to follow custom, pay the unfinished dowry, to enable her receive dowry for her daughter. The applicant arranged the function, and came with her friends in September 2016, and paid dowry that the deceased had left unpaid. She asserts that the ceremony that the applicant performed was as per custom, from where she came from, and adds that it was not performed by an unmarried daughter who wanted to get dowry for her own daughter. She avers that her daughter was married to the deceased under customary law in 1981, or there was a marriage between them, that could be presumed from prolonged cohabitation.

16. The last affidavit is by Samuel Mwangi Macharia, sworn on 27th January 2017. He was a regular customer at the Blue Shade bar, Eastleigh. He avers that he knew the deceased and the applicant as husband and wife. He avers that he was aware of an incident when the deceased took his son Matama to Pangani Police Station after he mistreated the applicant. He avers that he had also visited the home of the deceased at Eastleigh, where he lived with the applicant and their two children. He avers that the deceased and the applicant used to refer to each other as husband and wife, to the people who knew her.

17. A summons for reasonable provision was filed on 29th September 2016, dated 28th September 2016, under section 26 of the *Law of Succession Act*, Cap 160, Laws of Kenya. It was at the instance of Lucy Wanja Mwaura. I shall refer to her as the applicant. She claimed to be a widow of the deceased, with whom he had worked for a while before they got married. They allegedly ran a business as Gikomba, selling textiles, and from the profits they bought property at Eastleigh where they ran a bar business, called Blue Shade Bar. The premises were subsequently converted into rental houses, from which the deceased and the applicant collected rent. She veered that the first widow of the deceased knew her and her children, as she used to visit her and the deceased at Eastleigh. Some children of the first wife were also acquainted with her as they worked for a while with her at the Eastleigh business. After the deceased died, the applicant continued to collect rent from the Eastleigh premises, but the first house began to slowly and quietly sideline her. It started with the initiation of the instant cause, when she and her children were excluded.

18. Interim orders were made on 31st October 2016, that the applicant should not be evicted from the house where she was staying. Directions were given on 14th December 2016, for the matter to be hear viva voce, based on the affidavits. An attempt to have the matter referred to mediation floundered on account of lack of agreement on the matter between the parties.

19. The oral hearing commenced on 10th July 2017. The applicant was the first on the witness stand. She averred that the deceased was her husband. They had stayed together since 1981 when they met, and they had two children. Her evidence in chief largely mirrored the averments in her affidavits. During cross-examination, she stated that the deceased used to introduce her to members of his family as his wife, whenever they visited them at Eastleigh, although he was not introduced as such at the home of his wife. She explained that the deceased had explained to her that he came from Ambui Mbari ya Hungi, and lived Githiga, Kiambu. He sold land that he owned at Murang'a and bought another at Nyandurua, where he set up his home. She testified that he paid part of dowry for her in 1986. She also stated that her mother received the other part of the dowry to enable her receive dowry for her daughter. She said that she did not involve the family of the deceased in the second visit to ay dowry and when her in-laws brought dowry for her daughter because of the way they had treated her. She asserted that she did not attend the funeral of the deceased as a mere attendee, but as a wife. She stated that she changed her name in the national identity card in 1991 to adopt the name of the deceased. At the time Daniel Njihia was born, that two had not yet formally married, so he named him after her father. She stated that the child registered for national identity cards using the identity card of the deceased, their

father. She asserted that Daniel Njihia was not adopted, but a blood son of the deceased. She stated that her child could be subjected to DNA to determine paternity. She testified that the deceased bought the Eastleigh property in 1985, from proceeds of the business at Gikomba.

20. Daniel Njihia Mwaura followed on 4th September 2019, as the next witness for the applicant. He testified that she was a son of the applicant and the deceased. He stated that he grew up in a house where he lived with the applicant, the deceased had his sister Irene. He said that the deceased provided for him with everything that a child needs, he said that he used the name of the deceased in school, but when he initially obtained his national identity card, he only used two names, Daniel Njihia. He stated that he knew that the deceased had another family, and that when the deceased died his side of the family was informed, and involved in the funeral preparations. He was personally telephoned about it by the applicant and his stepbrother, Matama. He said that his side of the family was not put in the funeral programme, and it was at that point that they noted that something was wrong. Regarding the succession cause, he stated that it was the applicant who informed about it, and he did not know whether she had been involved right from its initiation. He said members of his side of the family were not listed in the petition as survivors of the deceased.

21. During cross-examination, the witness stated that he attended school at Gacharage, where he lived with his maternal grandmother. He stated that after schools closed he would move to Nairobi and stay with the applicant and the deceased. She denied rushing to obtain his identity card after the deceased died, saying that he had no ulterior motives. He said that at the burial they were not included in the eulogy, and they were not given a chance to speak. He said they did not object as they did not want to cause trouble. He spoke about the ceremony that was conducted her maternal grandparents home, when his sister was about to get married. He explained that the same was meat to complete the dowry that the deceased had not finished paying for. He described it as the final ceremony according to tradition, to pave way for the applicant to receive dowry for his sister. He stated that none of the relatives from the side of the family of the deceased attended. They did not involve them. His sister was eventually married, and at that ceremony, relatives from the family of the deceased did not attend, and they had not invited nor involved them. He stated that his maternal relatives were present. He explained that his sister was on bursary at some point, and that was after the premises where the applicant run the business in Eastleigh from was destroyed by a fire. He said that at one point before the deceased died, the family had held a meeting at the home of Njoki, but no such meeting happened thereafter.

22. Irene Wangui Mwaura testified next. She described herself as a daughter of the applicant and the deceased, and that they lived together as a family in Eastleigh. She said that the applicant operated a bar at Eastleigh, not as an employee, but as a family business. She asserted that the deceased used to visit where the applicant lived, and that he lived with them. She explained that they the deceased and the applicant had two places from where they operated from. A house near Pumwani and the bar in Eastleigh where there was also a room where they could sleep in case they got delayed at work. She said that the deceased used to provide for her with everything that a father could provide for their child. She said that the deceased had another wife, who resided at the Garage area of Eastleigh before moving to Ruai. She said that before the deceased died, the family was close, and used to interact. After he died, they held funeral committee arrangements at Ruai and Blue Shade Bar, and that she attended the meetings at both places. She attended the burial, but he sides of the family was not included in the funeral programme, and was to mentioned in the eulogy. They did not go to court because they wanted peace. She stated that she was omitted from the list of the survivors of the deceased in the petition filed herein, yet she was one, and wanted the court to have her included. She stated that her brother was named after her maternal grandfather. She added that he schooled at the maternal grandparents' home. She stated that a traditional marriage ceremony was held for her but her stepsiblings were not in attendance. She said that her father's clan was not involved in the ceremony, and that her dowry

was received by her maternal relatives. She also testified that they had visited her maternal parents' home to complete dowry for her mother, and said that her siblings, and the paternal relatives were generally not involved in the affair. She said she was not aware that her stepmother had been married in church. She said although during lifetime of the deceased, they would things together as a family, things changed after he died. She said that she and other children wore T-shirts as a tribute to the passing of the deceased.

23. Elizabeth Wachuka Njihia testified next. She was the mother of the applicant. She said that she got to know the deceased back in the 1980s, when he lived as a neighbour to her husband at Makadara in Nairobi. He employed the applicant at a business at Gikomba, to sell clothes. Later on he made the applicant pregnant, acknowledged the same and committed to assist her. When she delivered a baby boy, he was named after the applicant's father as the deceased had a family. They started living together thereafter, and opened a business at Eastleigh. According to her they began living together in 1986, when she said that was also the time he sent emissaries to come and report the matter to them, and to alert them that they would be visiting to talk about marriage. He did eventually visit, and pay a sum of Kshs. 20, 000.00, as a first step in the Kikuyu tradition relating to marriage, after that they all accepted that the applicant was married, and the two continued to live together. They thereafter got a baby girl who was named after the mother of the deceased. She also testified on the ceremony in 2016, when the applicant visited with friends to pay dowry, essentially to complete that which the deceased had left undone. She did so on their advice, that she could not receive dowry for her daughter before he own ceremonies had been completed. She explained that the deceased did not complete the ceremonies he began in 1986 as he fell sick thereafter. She explained that when her husband died, the deceased attended the burial as an in-law. She explained that after the deceased and the applicant got married, they never separated, and the applicant never married anyone else.

24. During cross-examination, she stated that she knew Njoki as the wife of the deceased, from the days that she and her husband lived at Makadara in Nairobi as neighbours of the deceased. She said that after the applicant delivered, Njoki visited. At the time the applicant lived with her father. The child was named after her husband as at the time the applicant was not yet married. The deceased accepted being responsible, and accepted the child educated and sheltered him. She stated that Daniel Njihia lived with her, and attended local schools at Gacharage. She stated that after the Kshs. 20, 000.00, the deceased did not go back to take mwati and harika. He never came back with relatives, and it was the applicant who did the ceremonies that the deceased should have done. She confirmed that no one came with her from the family of the deceased. She explained that Daniel Njihia stood in the place of her father. She said that the deceased and her husband were not close friends, but neigbours. The deceased attended the burial of her late husband, not as an employer of the applicant, but as an in-law, and he was allowed to speak at the event in that capacity.

25. Lucy Wamaitha Kiarie followed. She said that she knew both the applicant and the deceased. She was the one who rented a house to him at Eastleigh in 1992. He moved into the house with the applicant and her children. She regarded them as a family. She said that they were neighbours at Eastleigh. They stayed on till 2003, when they moved out. She said that it was the applicant and the deceased who moved out, leaving the children behind, who remained there till 2009 when they moved out as adults. She asserted that the applicant and the deceased lived as husband and wife, as the deceased told her that the woman was his wife and the children were his. She said that the children attended schools in Nairobi. She said that the deceased continued to pay rent for the house after he and the applicant moved out in 2003.

26. Samuel Mwangi Macharia testified next. He was a customer at the Eastleigh bar. He said that he knew both the deceased and the applicant. The deceased used to tell them that the applicant was his wife.

To them the applicant was the overseer of the bar. He stated that the two lived at California, near Pumwani, and he used to visit them at that house. He said that he knew them since 1985, and he left Nairobi in 2004. He said he was also from Gacharage. He said he knew about the other family of the deceased, but he never visited them. He was also among the party who accompanied the deceased when he visited the family to pay dowry.

27. Rosemary Mbatha followed. She was also a tenant at the Eastleigh house, who dealt closely with the deceased and the applicant. She met them in 2007, at the plot, and they lived together as husband and wife. She also knew their two children, even though they did not live at the plot. They would visit. She said that the applicant did not move out of the plot after the deceased died. She was also party to the ceremony at the maternal home of the applicant in 2016. She understood it to be a function where the applicant took the dowry that the deceased was supposed to pay but had failed to pay. She said that the children of the applicant lived in another plot, but she never visited that other residence. She said she was unaware that the deceased had another family, although he used to tell them that he had another wife, but he never showed them her children.

28. The case for the administrator opened on 10th September 2019, with the administrator on the stand. He stated that he was the first born child of the deceased and Njoki, who died in 2018. He said they were eleven children in total. He asserted that the applicant was an employee of the deceased, working at his bar in Eastleigh. He also worked at that bar at some point. His sister, Lucy Wangui, also worked there. He asserted that she was never married to the deceased. He also asserted that the applicant did not have two children with the deceased. He stated that the deceased never told them that he had married the applicant, and that they had had two children together, for never attended nay of the gatherings of the deceased. He asserted that the deceased was in his 50s in 1981, while the applicant was eighteen years old. He also stated that the applicant never worked in the clothes business of the deceased, and never worked with him at all at Gikomba, instead she was a house-girl for two women who were working at Gikomba with the deceased, he said he knew the father of the applicant as a neighbour of the deceased, and who also operated a matatu like the deceased. He said he did not know that the deceased had rented a house at Eastleigh for the applicant and her two children. He stated that the applicant lived in one of the rooms at Blue Shade, adding that her father could not have lived there at all. He also stated that the deceased did not carry out any customary law ceremony for the applicant, saying that he was an adult then, and he would have known. He said that the deceased was from Githunguri, Kiambu, and not Murang'a, even though he did buy land there. He detailed that the deceased bought land at Githunguri in 1960, in 1961/62 he bought land at Gikorori, land at Loc. 20 Muranga, land at Ndundori, land at Passenga Nyandarua and the Eastleigh property. He asserted that all the assets were bought before 1981, through the efforts of the deceased and the applicant. He stated that from 1984, the deceased did not buy any more land. He said he and his brother were party to settlement of the loan used to acquire the Eastleigh property. He explained that his mother was married under customary law in 1954, which marriage was later solemnized in a church wedding in 1991. She said the applicant provided service at the after party that was held at Blue Shade. He stated that problems began when he obtained the power of attorney in 2005. He said after the deceased died he found that the applicant had been collecting rent and he allowed her to continue, but he put her on a salary. She also had a house in Kisaju, Jamii Bora, he would give her money to pay off the debt. When he noted discrepancies with relation to payment of electricity and water bills, he sacked her, and she did not at the time allege that she was a spouse of the deceased. It was after that disagreement that she came to court. He said that he was not aware that the daughter of the applicant got married and that there were traditional ceremonies, for they were not involved.

29. During cross-examination, he said he knew the applicant from 1981, when she was a house-girl for some women, from what he had heard from the women, who worked at Gikomba. She never worked

at Gikomba at any time, according to him. He said that he did not know whether the applicant had a house at Pumwani. He asserted that the deceased never stayed at the Blue Shade. He said it was not true that the applicant left her children at Pumwani and went to stay at Blue Shade with the deceased. He stated that if the deceased was ever taken to hospital by the applicant, then she did so as his employee. He denied taking any documents from the applicant, saying that all his documents were with the deceased at their mother's house. He said that there was funeral committee meeting at Blue Shade, but added that one of his brothers sat at that meeting, while he was at the meetings at Ruai. He said that the permit for the blue Shade meetings was given to the applicant. He asserted that the deceased did not perfume the kuhanda ithigi ceremony for the applicant, for he never married her. He asserted too that Irene Wangui was not a biological child of the deceased, saying that she was sired by a James Masai, and that the child was named after the mother of the deceased despite protest by him. On the Kisaju property, he said he paid for it, believing it to be his house, but stopped after he was not provided with the relevant documents. He said that he there was a way of establishing paternity the same should be followed, as the two children of the applicant were not biological children of the deceased. He said that he had challenged the two children for a DNA test, but they did not take it up, and he was still challenging them. He said that the father of Irene was known, a joseph, who was a Maasai, who had a business at Blue Shade, and who was a friend of the applicant. He said that the deceased never introduced the applicant as his wife to the clan, and so the clan was not involved in his ceremonies.

30. Agnes Wangui Meto followed. She was among the persons who interacted with the deceased and the applicant at Eastleigh. She described herself as a friend of the applicant. She was in the team that accompanied the applicant to her parents' home after the deceased died to perform a ceremony. She said that the applicant had gone there to pay dowry for herself. She explained that traditionally the concept of paying dowry for oneself is intended to allow the unmarried woman to receive dowry from her daughter's suitors. The applicant slaughtered a goat of mururu, to cleanse herself for having children while still at her father's home. She said if the woman got married after having a child or children at her father's home, it is her husband who slaughters the goat. If the husband died before he could do so, then it would be up to his brothers to do so on his behalf. She said that she did not see the relatives of the deceased at that function. During cross-examination, she said that when she went to live at Blue Shade, she found the applicant there, living alone in one of the houses. She said that the deceased did not live there, he would come, collect rent and go away, but she should not tell whether he entered the house of the applicant or even slept there. She said the applicant was not married, and when she invited her to that ceremony in 2016, she told her it was so that she could marry herself. She said if she had been married then that ceremony would not have been necessary. She said she did not know about the naming of the children of the applicant.

31. Mary Njeri Ndung'u followed. She was a brother of the deceased. She described the applicant as an employee of the deceased, at a bar at Eastleigh. She said that the deceased never informed her that she was his wife, and that she had never heard about it. She also said that she had never visited the applicant. She said that the deceased held a solemnization ceremony for his marriage to his wife Njoki, and she was in attendance, but she did not see the applicant there, neither did she raise any protest. She denied ever meeting the applicant and the deceased at a house at Pumwani, nor at hospital at Nakuru when their mother was admitted there. She said that she also did not see Wanja at their mother's funeral. She also said that she had never visited Murang'a. She said she did not know about the daughter of the applicant. She explained that after kuhanda ithigi, if the man does not go back, then nothing happens, and there would be no uthoni, for it is the offering of the mwati and harika which signify start of a relationship. She said that she was not aware whether the deceased took mwati and harika to the family of the applicant.

32. George Watari Karuru testified next. He said that he knew the deceased since the 1950s, and they were family friends. He talked of the marriage of the deceased to Njoki in the 195s, and the subsequent solemnization in 1991. He described the applicant as a barmaid at Blue Shade. He would visit the deceased at the bar, and he never told him that the applicant was his wife. He said that he was unaware that the deceased had children with the applicant. He said that kuhanda ithigi happens in the presence of the woman, and it if followed by mwati and harika, after which the suitor is advised to pay dowry. He explained that if mwati and harika are not taken, then there would be no marriage. He said that he never went with the deceased to the home of her parents to kuhanda ithigi. During cross-examination, he asserted that the deceased would not have done anything without involving him, and that he never told him that he had a relationship with the applicant. He asserted that if the deceased had a relationship with the applicant, he would have known. He said that the deceased had a business at Gikomba, which belonged to his wife, Njoki. He said all the assets of the deceased belonged to Njoki, including the Blue Shade bar, which ran under the name of the deceased. He said that he was not aware that nay child of the deceased was named after the mother of the deceased. He said he did not know about the personal affairs of the applicant. He said when a man decided to have a secret relationship he never discloses it to family and friends. He said that if the deceased had secret children with the applicant, he would not have told him. He said he knew the applicant all along as a barmaid, and not an overseer of the business at Eastleigh. He said he could not tell for how long she worked there, but she did not start with Blue Shade, she came later. He asserted that kuhanda ithigi could not be done secretly, it had to be done openly. He explained that kuhanda ithigi shows that one is a suitor, and that one will be coming back for the betrothed. He also explained that one could not take the dowry of a daughter before marrying her mother, by paying dowry, and traditionally a person who has not married the mother would have no right over her daughters. He further said that a man who cohabited with a woman without fulfilling tradition, then such a woman is not that man's wife, and if the man had children with her, then the children were not his, but those of the woman, and he has no responsibility over them. He asserted that such a relationship amounted to prostitution. He said that traditionally, a person could only marry after consulting the family, including the wife. He said that if the family did not consent, then the man could not marry the woman. He also stated that a woman could not pay dowry for herself on behalf of the man after the man has died. He stated that where a man died before he completed paying dowry, the woman could not complete the same. He said that he the deceased had secret female friends, he would not have told him.

33. At the close of the oral hearings, the parties filed written submissions. In her written submissions the applicant did not dwell much on the validity of the marriage between the deceased and the applicant traditionally, in terms of discussing the ceremonies that were allegedly performed, kuhanda ithigi. She appeared to rely more on the common law presumption of marriage, and relied on the decisions in In the matter of the Testate of Julius Masika Kimatu – Philes Nduku Kimatu vs. Ruth Kanini Masika Machakos HCSC No. 126 of 1996, In the Matter of the Estate of Patrick Kibunja Kamau Nakuru HCSC No. 82 of 1991, In the Matter of the Estate of Gerald Kiragu Gatheru Nairobi HCSC No. 573 of 2003 and Hortensiah Wanjiku Yawe EACA CA No. 13 of 1976 (unreported) (Wambuzi P, Mustafa and Musoke JJA). It is not clear to me whether the administrator filed written submissions, because I have not seen any in the record that is before me.

34. The *Law of Succession Act*, Cap 160, Laws of Kenya, provides for revocation of grants under section 76, which states as follows:

> " 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 of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a 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 the 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 the 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 administration 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 paragraphs (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."

35. Under section 76 of the *Law of Succession Act*, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law; or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset; or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator dies or loses the soundness of his mind or is adjudged bankrupt.

36. In the instant case, the applicant appears to ground her case on the first general ground, that there were issues with the manner the grant was obtained. My understanding of her case is that the process of obtaining the grant was defective, as the administrator used fraud, misrepresentation and

concealed matter from the court. Her principal argument appears to be that the administrator obtained administration on the basis of concealment of the fact that she and her children were also survivors of the deceased, and he did not disclose them to the court, nor involve them in the process.

37. The framework for applications for grants of representation is set out in section 51 of the *Law of Succession Act*. The most relevant portions, for the purpose of this application, are in subsection (2) (g), which state as follows:

> " Application for Grant
>
> 51.
>
> (1) ...
>
> (2) Every application shall include information as to—
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) ...
>
> (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
>
> (h) ..."

38. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The complaint herein is that the applicant and her children were not disclosed, and that they were also not involved at all in the process. They were not consulted or informed or their consents to the process obtained. Their names were not listed in the petition on record.

39. The law on who qualifies to apply for representation in intestacy is section 66 of the *Law of Succession Act*, which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the *Probate and Administration Rule*s requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or to get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

40. For avoidance of doubt, these provisions state as follows:

> " 66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors ...”

and

“ 7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

a. renounced his right generally to apply for grant; or

b. consented in writing to the making of the grant to the applicant; or

c. been issued with a citation calling upon him to renounce such right or to apply for a grant. “

41. Then there is Rule 26 of the Probate and Administration Rules, which states as follows:

“ 26

(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

42. Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons, with equal entitlement, with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to

all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

43. The administrator in the instant cause, being a surviving son of the deceased, would have had a lesser right to administration over the applicant, if she was his stepmother or the surviving widow of the deceased; and an equal right to administration with her children, if they were his halfsiblings or the surviving children of the deceased. The fact that he was the first child or son of the deceased did not confer upon him any seniority with respect to entitlement to administration. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean the administrator needed to comply with the requirements of Rules 7(7) and 26, since those provisions apply to persons who seek representation while they had an equal or lesser right to administration. He should, therefore, have obtained the consents of the surviving spouse and other children of the deceased, before applying for representation to the estate of his late father. Of course, his late mother and his siblings have no raised issues at all, in that respect, and in this judgment I shall only concern myself with the case by the applicant. The administrator argues that he was not obliged to involve the applicant and her children, nor to obtain their consents or renunciations, as the applicant and her children were not survivors of the deceased.

44. The only issue for me to determine, before I can decide one way or the other that the administrator obtained the grant through an improper process, is whether the applicant and her children were survivors of the deceased. If I find that they were, then the position would be that the applicant was a surviving spouse of the deceased and her children surviving children of the deceased. Such a finding will mean that the administrator ought to have involved them in the process of obtaining representation, and ought to have obtained their consents and renunciations in line with Rules 7(7) and 26 of the Probate and Administration Rules. So that if he had failed to, then the process of obtaining the grant would have been defective for failure to comply with those Rules and section 51 of the *Law of Succession Act*, and the grant would be liable for revocation in terms of section 76 of the *Law of Succession Act*. If I find that the applicant was not a spouse of the deceased and her children of the deceased, then there would have been no wrongdoing on the part of the administrator, and his grant will have to remain intact.

45. The applicant claims to be a second wife of the deceased. it is not disputed that the mother of the administrator was married by the deceased sometime in the 1950s, under customary law, and that there was a solemnization of the marriage in 1991, under the rites of the Roman Catholic Church. The applicant says that her marriage was contracted sometime in the 1980s. She appears to advance two cases. One, that the marriage was a one that complied with Kikuyu customary law, and, therefore, she was customary law wife of the deceased. Two, that if the evidence of the existence of a customary law marriage fell short, then the court should presume marriage, on the basis of a prolonged cohabitation and repute.

46. I will start by considering whether there was a valid Kikuyu customary law marriage between the deceased and the applicant. 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. In the instant case, the burden would be on the applicant to establish the custom upon which she anchors her case. See *Ernest Kinyanjui*

Kimani v Muiru Gikanga & another [1965] EA 735 (Newbold VP, Crabbe & Duffus JJA), *Gituanja v Gituanja* [1983] KLR 575 (Potter, Kneller JJA 7 Chesoni Ag JA) and *Atemo v Imujaro* [2003] KLR 435 (Omolo, Shah & Waki JJA).

47. The essentials of a Kikuyu customary law marriage were detailed in two writings aby Eugene Cotran on *customary law, the Restatement of African Law:* Volume I, The Law on Marriage and Divorce, Sweet & Maxwell, 1968 and the *Casebook on Kenyan Customary Law,* Nairobi University Press, 1995. They have also been discussed in a number of cases such as *Edith Wagithi Chiira vs. Rebecca Wangui Gichuhi* [1998] eKLR (Akiwumi, Shah & Lakha JJA), *Jane Mbere Komu & 3 others vs. Leah Ngendo Komu & another* [1999] eKLR (Githinji J), *In Re The Matter of the Estate of Samuel Kiarie Kirimire (Deceased)* [1999] eKLR (Githinji), *Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi* [2013] eKLR (Nambuye, Karanja and M'Inoti JJA), *In re Estate of Johnson Githaiga Joshua Ng'ang'a (Deceased)* [2019] eKLR (Kimondo J), *In re Estate of Kihara Thatu Gatu (Deceased)* [2019] eKLR (Ndung'u J), *In re Estate of Boniface Njenga Mweru (Deceased)* [2020] eKLR (Ougo J), among others. The requisite ceremonies include the offering of the njohi ya njurio by the man to the woman's parents, payment of mwati na harika on the day following the ceremony of njohi ya njurio. Mwati na harika symbolize the uthoni or the marriage relationship, and the couple may start cohabiting thereafter. Other ceremonies, such as ngurario, guthinja ngoima and ruracio are also in the mixture.

48. The courts have observed that customary law is dynamic, elastic and fluid, and not static, and much of the ceremonies referred to in the writings by Cotran and in the older court decisions do not necessarily happen in exactly the manner narrated in those materials, with some of the ceremonies and practices even becoming obsolete. They involved a lot of slaughter and offering of animals, but much of them have since been replaced by exchange of money. What is critical is that the essential steps and ceremonies under custom must be observed in some form or other. See *Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi* [2013] eKLR (Nambuye, Karanja and M'Inoti JJA).

49. So, what is the case by the applicant, with respect to customary law? She claims that sometime in the 1980s, 1986 to be specific, the deceased visited her parents in Murang'a, and performed a ceremony of marriage known as kuhanda ithigi. That was contested by the other side, who argued that such a thing never happened. Do I have before me evidence that that ceremony was performed? The burden was on the applicant to prove that it happened. She asserted that it did, and she called her mother, who testified that it did. Some of the individuals from the family of the deceased who were alleged to have been party to that function, like the sister of the deceased, renounced it. They said they were not party to it, and that they have never ever set found in Murang'a. So it is the word of the applicant against that o the administrator as to whether that event happened or not.

50. More importantly, is the question of the import of that event, if it happened at all. Does it signify a marriage? The overwhelming evidence appears to be that it did not. It was a preliminary step at the start of the journey towards a valid customary marriage. I understood it to mean that it is an expression of interest or intention to marry a woman, made to her parents or family, to be followed later by other steps, such as mwati and harika, ngurario and ruracio, which would concretize the marriage. It would appear that where the kuhanda ithigi is performed, but nothing else follows thereafter, there would be no marriage. It would be a mere expression of interest or intent to marry the woman traditionally which is not followed up. It would remain at that stage, just an expression of intent, without more. Therefore, if the kunanda ithigi is the only thing that the deceased did, which I am persuaded he did, then there was no valid customary law marriage between her and the applicant...

51. The applicant also led evidence on another ceremony, which was done after the demise of the deceased. It was common ground that the ceremony was performed to allow the applicant receive dowry from her daughter's suitors, which could not be done where the dowry for the applicant had not been paid. The

applicant's case with relation to this ceremony was that it was meant to complete the traditional rites of marriage that the deceased had failed to perform prior to his death, and she did the same on his behalf. The case by the administrator was that such a ceremony could not be done by the wife, but the relatives of the deceased, who, in any event, were not involved in the ceremony. The applicant explained that she could not involve them as they were not on good terms. The administrator countered by saying that ceremony, for it is acknowledged as having taken place, was not what the applicant wanted the court to believe, but rather it was one where the applicant was paying dowry for herself, by literally marrying herself traditionally, to atone for having gotten a child outside wedlock, to allow her then receive dowry for her daughter. One of her friends, who was present, and who was called by the administrator as his witness, Meto, testified that the applicant had told her so, and she had slaughtered what she called a goat of mururu for that purpose. Both sides did not lead evidence on the two ceremonies that they alluded to. One, that a widow can perform ceremonies relating to marriage to complete that which her late husband had left undone. Two, that an unmarried woman can perform a ceremony of marriage, akin to marrying herself, in order to have the locus to receive dowry from her daughter's suitors. Whereas the said ceremony did happen, I am not persuaded that the same could be a basis for the applicant to assert that she was married under customary law to the deceased. No evidence was led to establish that such a custom exists, which would permit her to complete ceremonies of her marriage to the deceased after the deceased has died. No clear evidence was led on what such a ceremony would entail, for me to assess whether the applicant met the requirements for it.

52. I am aware that there is a practice that is emerging, which is somewhat tied to the Kikuyu custom that a parent ought not receive dowry if none was paid for her. It is now practiced in a manner which suggests that unmarried daughters "marry themselves" by way of offering dowry to their own parents, through kwigura in a ceremony akin to the traditional mburi ya ihaki, in which the man produces a ceremonial dowry goat or ngoima. There is also the practice of kamweretho, mainly being used by unmarried single mothers, who feel a sense of incompleteness, as no dowry has ever been paid for them. See hhttps:/www.standardmedia.co.ke/entertainemnet/lifestyle/2001399510/the-genius-of kamweretho-how-central-Kenya-women-richly-marry-themselves. These practices appear to be emerging as a consequence of the decline of polygamy and the increase of households headed by unmarried single mothers. I have not come across any decision of a court where it has been determined that these practices have attained the status of custom, to give force of law. Kamweretho was fleetingly mentioned in *In re Estate of Boniface Njenga Mweru (Deceased)* [2020] eKLR (Ougo J), but nothing turned on it. The point that has to be made, of course, is that a woman who performs any of these alleged ceremonies has to be an unmarried woman, and any association with the said ceremonies would be proof that the woman was not married.

53. I find the question of unmarried women paying dowry or bride price in a sense of kwigura, is something of a misnomer. Payment of dowry has something to do with marriage. It is a consideration for marriage. In most African customs, it is paid by the man to the parents of the bride, or, in woman-to-woman marriage arrangements, by the woman-husband to the parents of the woman-wife. In Islamic culture, it is paid to the bride by the man; while in Hindu practice, it is the woman who pays the same to the man. Where there is no marriage, the issue of exchange of dowry should not arise. In my view, there is a ring of repugnancy about it, some form of abuse of women, for it suggests that a mature unmarried woman, who has children, is not complete unless or until dowry is paid to someone, never mind that there is no marriage. Completeness is being tied to marriage here, and without doing something or going through a ceremony that has something to do with marriage then the unmarried single mother is not complete, or her household is not wholesome.

54. I was told the said ceremony was a kwigura or kamweretho-like ceremony, where a mburi ya mururu is slaughtered. Mburi ya mururu was referred to in *In re Estate of Johnson Githaiga Joshua Ng'ang'a*

(Deceased) [2019] eKLR (Kimondo J) as a cleansing ram. Mburi ya mururu appears to be offered in cases of pregnancy compensation, where a man has made an unmarried woman pregnant. It is apparently slaughtered at the home of the woman to signify the cutting of all connections between the child born outside wedlock and the family of the man, and the adoption of the child by the clan into which the mother was born. If such a goat was offered by the applicant herein in such circumstances, the point the administrator was making, by presenting a witness to give that evidence, would make sense. It would suggest that it was something about the applicant breaking ties with the family of the deceased to enable her and her family receive dowry for her daughter. The challenge with saying that ceremony was for slaughtering a mburi ya mururu is that such the goat is offered by the man and not the woman. It is slaughtered as part of the pregnancy compensation, which would include ten goats or one cow, which are given to the father or relatives of the woman, but which are not slaughtered, and I was not told whether such livestock were given.

55. Regarding the alleged ceremony by a woman, after the death of her husband, to complete the traditional rites that her late husband left undone, no material was placed before me to suggest that that a ceremony exists in Kikuyu customary law or existed in the past. No case law was brought to my attention, and I have not come across any from my personal searches. I have carefully perused through the two writings by Cotran on customary law, cited above, and I have not come across anything of that character, neither have I stumbled on case law on it.

56. Over all, I do not have before me any material to suggest that the deceased ever married the applicant under Kikuyu customary law, and my conclusion is that the applicant was not a Kikuyu customary law wife of the deceased at all.

57. The other case that the applicant has sought to build up is that she and the deceased had cohabited as man and wife, got children together, acquired property together and were reputed as such. Indeed, it would appear, from written submissions, that this is the case upon which the applicant is anchoring her claim. From her testimony, and that of her witnesses, the two came together sometime in the early 1980s, through employment. She alleges cohabitation at Pumwani and at Eastleigh. The administrator contests the alleged employment at the initial stages, which had brought them together, and the cohabitation at Eastleigh. His case is that the relationship between the two was that of an employer and an employee, asserting that it never graduated to that of husband and wife. Do I have concrete evidence of the cohabitation? I have the word of the applicant and that of the administrator, and their witnesses. The evidence on cohabitation is hazy, and I can only assess it as against other evidence.

58. What is not in doubt is that there was more than an employer/employee relationship between the deceased and the applicant. That can be gleaned from several bits of evidence that the parties have placed on record. The administrator filed documents which were allegedly authorized by the deceased in the 1990s, and also of an alleged report to the Police in 2008. The documents from the 1990s, one headed "Trust Worthy Agreement," have the deceased describe the applicant a mere senior employee at his business, but not a wife, saying that his religious faith did not allow him to marry a second wife. The 2008 documents relate to what are described as death threats from the applicant to the deceased, which were reported to the Police. The alleged letter from the Police points to a personal relationship between the two at various undisclosed levels. At the oral hearings, both sides did not dwell much on these documents. What emerges from them is that there was a sort of relationship between the two individuals, which went beyond mere employment relations, so much so that it became necessary for them to sit and try to get clarifications on what the relationship between them entailed. What is clear is that the applicant perceived it to be a marriage relationship, while the deceased was trying to push back, saying there was no marriage, and that he had no capacity to marry. My understanding is that there was indeed a relationship of sorts, which painted the picture of a marriage, and which had to

be dealt with through the writings that the administrator has placed on record. It cannot be that the applicant, as mere employee, could begin to make claims against her employer, that they were married, if they were not relating in a manner akin to marriage, which would have necessitated the employer penning down a document to clarify that the relationship was not one of marriage but employment. Clearly, there is more in that than meets the eye.

59. Related to that, of course, is the question why the deceased would find it necessary to reduce all these into writing, to clarify that the applicant was not his wife but an employee. An allegation of that nature from an employee is a very serious one, likely to undermine the foundation of the employer's marriage. What would be expected is that the employer would take the drastic step of relieving the employee of the employment, to safeguard his marriage. However, that did not happen here. The first writings are of the 1990s. No action appears to have been taken against the applicant, and in 2008 we see another set of documents, suggesting that those allegations persisted, and the issue remained unresolved. If she was a mere employee, why did the deceased not take a more drastic step? Why retain the applicant in employment despite those very serious allegations? There must have been an interaction between the two which must have been serious enough for the deceased to address it in the manner that he sought to, to avoid possible damage to his marriage. But it appears that he was so seriously committed to the relationship so much so that he took no step to terminate it.

60. The second aspect to it is the matter of the two children of the applicant. The applicant alleges that both were sired by the deceased, that is to say that they were his biological children. Both carry the name of the deceased, Mwaura, as their surname. The administrator has contested the allegation that they were biological children of the deceased. For the first child, Daniel Njihia, he argues that, if he was born at a time when the two were married, the name of the deceased should have been reflected in the birth certificate, and the child should have been named after the father of the deceased. It is also argued that he was raised his, Daniel, maternal grandparents, and attended schools near their home. According to the administrator, that was a pointer that the said child was not sired by the deceased, and the deceased did not take up responsibility over him. The applicant explained that the child was born at the very early stages of the relationship, and there was no option but to deal with the matter as if there was no marriage, as they waited to progress the relationship further. Regarding the second child, she was given the name of the mother of the deceased. The administrator has protested that and pointed at the documents that I have discussed above, where the deceased had said that the child was named as such without his consent. What is noteworthy is that the deceased, in those documents, did not renounce the child, but merely complained that she was named after his mother without his say so. The two children carried the Mwaura name in school, and eventually into their national identification cards. For all this to happen, it would mean there was a relationship, which pointed to something close to a marriage, in the minds of either or both of the parties involved in the matter. Of course, naming children as if the parties were married, or using certain names at school or even in the national identity cards, do not prove paternity. The surest way would be to do it the scientific or forensic way, by way of a DNA test. Both sides expressed themselves to be ready for the same.

61. Then there were the two affidavits of marriage that were placed on record, one sworn by the deceased and the other by the applicant, in similar wording, that the two had gotten married under customary law. It was on the basis of these two affidavits that the applicant had the particulars of her of her national identity card changed to adopt the name of the deceased as her surname. She appears to have had carried that name for a long time during the deceased's lifetime, and the deceased did not appear to have done anything decisive to change the situation. The administrator did not make any serious effort to impeach these affidavits, by either demonstrating that the signature purported to be that of the deceased was not his or that the Commissioner for Oaths before who the affidavits were commissioned did not exist.

62. The courts have stated that in certain circumstances, parties who lack capacity to marry, may be presumed to be married, if, the facts and the circumstances, show the parties, by a long cohabitation or other circumstances, to have h evinced an intention of living together as husband and wife. See *Hortensiah Wanjiku Yawe* EACA CA No. 13 of 1976 (unreported) (Wambuzi P, Mustafa and Musoke JJA). In *In re Estate of Kihara Thatu Gatu (Deceased)* [2019] eKLR (Ndung'u J), it was emphasized that cohabitation was a critical component in proof of existence of a presumed marriage, and more so where there is evidence that the two were reputed by the community to be man and wife. The applicant marshaled some evidence that pointed to some community members regarding her and the deceased as such, but the administrator also led evidence by other individuals indicating that they did not regard them as such. It is clearly a case of having to weigh the evidence of one against the other. I am persuaded that the cumulative evidence pointed to a relationship where the two related as husband and wife, arising from cohabitation, use of the name of the deceased by the applicant and her children, documents that the deceased had to generate to deny that the relationship was not a marriage but still retained the applicant in alleged employment that notwithstanding, among others. On a balance, I am persuaded that there was a relationship that formed basis for a presumption that the two were married.

63. However, before final orders are made, with respect to the relationship between the deceased and the applicant and on whether the grant was obtained on basis of concealed information or that some family members were left out, it may be prudent to have the two children of the applicant subjected to DNA testing, with samples taken from them and two or more of the known children of the deceased from the late Margaret Njoki Mwaura. The DNA testing shall be conducted within the next forty-five days of the date of this judgment. The modalities shall be worked by the Advocates for the parties, and, in the event of a stalemate, the parties are at liberty to apply. Each party shall bear their own costs and expenses. There is leave to appeal, to the Court of Appeal, in the next twenty-eight days, in the event any party is aggrieved. It is so ordered.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2022

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF APRIL 2022

A.O. MUCHELULE

JUDGE

Mr. Isoe, Court Assistant.

Mr. Kamata, instructed by Messrs. Kamata & Co. Advocates, for the applicant.

Mr. Mwangi, instructed by Messrs. Irungu Mwangi Ng'ang'a TT & Co, Advocates, for the administrator.