Mwangi v Maina (Probate & Administration Appeal 4 of 2020)
[2022] KEHC 14303 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PROBATE & ADMINISTRATION APPEAL 4 OF 2020

JN NJAGI, J

OCTOBER 26, 2022

BETWEEN

MARGARET WAGIKONDI MWANGI ..... APPELLANT

AND

ROSE WAMBUI MAINA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. W. Kagendo, CM, in Nyeri CMC Succession Cause No.505 of 2018 delivered on 29/6/2020)

JUDGMENT

1. The appellant has filed this appeal challenging the decision of the trial magistrate where the magistrate made a finding that the respondent herein was a wife to the deceased and that she and her son were entitled to inherit the estate of the deceased. The grounds of appeal are that:

    1. The learned trial magistrate erred in fact and in law in failing to appreciate the effect of introductory letter from the chief in constraining proceedings in the nature of succession causes.

    2. The learned trial magistrate erred in fact and in law in entertaining evidence in the nature of hearsay in arriving into conclusions in this matter.

    3. The learned trial magistrate erred in misdirecting herself on the evidence of subsisting circumstances and thereby arrived at a wrong conclusion on matters of fact and law.

    4. The learned trial magistrate erred in misdirecting herself on the applicable law in regard to prove of marriage.

    5. The learned trial magistrate erred in finding the protestor`s son as a beneficiary in the estate whereas he was not even a party to the proceedings herein.

6. The learned trial magistrate erred in fact and in law in making a finding that was against the weight of the evidence and the law.

2. The brief facts of the case are that appellant is the wife to the late JMN who died on the April 24, 2018 leaving behind an estate comprised of three parcels of land, namely-

   Aguthi/Gatitu/XXXX (jointly owned with Washington Githinji Ndegwa)

   Aguthi/Gatitu/3XXXX

   Laikipia/Ndindika/XXXX

   Two bank accounts with Equity Bank and shares with Kenya Commercial Bank.

3. Before the deceased died he was cohabiting with the respondent. The respondent contended that she was a second wife to the deceased having cohabited with him for a period of 16 years. The appellant on the other hand contended that the respondent had only a casual affair with the deceased that did not amount to marriage.

4. The appellant had 7 children with the deceased. Upon the death of the deceased the appellant filed a succession cause at Nyeri chief magistrate`s court with a view to distributing the estate among the beneficiaries. Accompanying the petition was a chief`s letter naming the appellant as the 1st wife of the deceased and her 7 children as the beneficiaries of the estate. The letter also named the respondent as the 2nd wife of the deceased and her son, Jackson Ndegwa Mwangi, as a son to the deceased.

5. In her petition the appellant named all the persons stated in the chief`s letter as beneficiaries of the estate. Subsequently a grant of letters of administration intestate was issued to her. Later, she filed summons for confirmation of grant dated September 4, 2020 in which she named herself and her children as the only beneficiaries of the estate and excluded the respondent and her son as beneficiaries of the estate. She prayed that the entire estate be bequeathed to her. Her children gave consent to that proposal. The respondent filed a protest on the ground that the petitioner had failed to disclose that she was the second wife to the deceased and that she and her son were beneficiaries to the estate. She prayed that the estate be distributed equally between all the 10 beneficiaries, i.e the petitioner and her 7 children and herself and her son.

6. The protest proceeded by way of viva voce evidence. The respondent testified as the plaintiff in the case and called two witnesses - a cousin to the deceased PW2, and her son PW3. The respondent`s case was that she was a wife to the deceased and that she had lived with him for a period of about 16 years.

7. The appellant/petitioner testified as the defendant in the protest and called one witnesses, a brother to the deceased, DW2. The gist of their evidence was that the respondent was only a girlfriend to the deceased and not a wife.

Judgment of the trial court –

8. The trial magistrate made a finding that the respondent had proved that she was a wife to the deceased on the reason that the respondent had lived with the deceased with the knowledge of the appellant for a period of 15 years. That the deceased`s brother DW2 admitted seeing the deceased with the respondent and even seeing the son to the respondent with the deceased. Further that the area chief wrote a letter stating that the respondent was a wife to the deceased which showed that even outsiders knew of this relationship and recognized the respondent as wife to the deceased.

9. The court further stated that the petitioner swore under oath in her initial application for grant of letters of administration that the respondent and her son were dependants of the deceased. That the

fact that the appellant cited the respondent shows that the respondent was a key person in that family unit and not just a tenant. That the respondent had moved to court to be joined in burial arrangements of the deceased and therefore that the protest was not an afterthought.

Submissions by the appellant –

10. The advocates for the appellant, Nderi & Kiingati Advocates submitted that the trial court misdirected itself on the role of the chief's introductory letter. That the court made conclusions from the contents of the chief's letter that there was evidence of general repute that the respondent was a wife to the deceased. That in doing so the court entertained hearsay evidence and elevated unsubstantiated allegations in the chief's letter to the place of cogent evidence.

11. It was submitted that the appellant had followed the right process in citing the respondent. That the trial court confused this process with giving credence to the respondent as a co-wife. That this finding had no basis and did not take away the duty of the court to consider who the appropriate beneficiaries of the estate were.

12. Counsels for the appellant submitted that the issue that was before the trial court was whether there existed a marriage between the deceased and the respondent and if so under what system. That the trial court considered whether there was customary marriage but did not establish whether the same was proved. That there was no evidence of any customary rites of marriage having been undertaken. That the duty to establish the existence of marriage was on the respondent. Counsels cited the case of *Njoki v Mathara and Others, Civil Appeal No 71 of 1989* Kneller JA held that:

    i. 'The onus of proving a customary marriage is on the party who claims it.

    ii. The standard of proof is the usual one for civil action, balance of probabilities.

    iii. Evidence as to the formalities required for a customary law marriage must be proved to the above standard.'

13. It was submitted that the court was invited to presume marriage between the respondent and the deceased. That the legal position is that the respondent needed to call evidence to show that she had a long cohabitation with the deceased and that they not only held each other out as man and wife but the society held them out as such. Counsels cited the case of *MWK vs AMW (2017)eKLR* where it was held that:

    Since then, our case law has been consistent in following the English common law in requiring that a presumption of marriage arises only when a person proves two factual predicates:

    a. Quantitative element – namely the length of time the two people have cohabited with each other; and

    b. Qualitative element – namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative elements include whether the parties had children together; whether the community considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account – and so forth.

14. That in the instant case the respondent did not call any member of the community in which they lived or even a family member to prove the cohabitation and general repute of a husband and wife.

15. Counsel further submitted that there is doubt whether with the passage of the *Marriage Act* courts can presume marriage. Counsels cited the case of *CWN V DK, HCCC No 17 0f 2017* where Ngaah J held stated that:

> And back home, though it does not out rightly outlaw it, the *Marriage Act*, 2014 does not recognise this kind of marriage. Section 2 of that act defines the word cohabit, in its technical term, as follows:
>
> > 'cohabit' means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.'
>
> Three things that stand out of this definition are, one, regardless of what the intentions of a cohabiting couple may be, they do not acquire any other status than that of being unmarried and, two, perhaps to drive the point home, the relationship of the cohabiting couple only 'resembles' a marriage; in other words, it is not a marriage. The third aspect of this definition is, regardless of how long the couple lives together, the status of its legal relationship will not change.
>
> When this section is read alongside sections 6 and 59 of the *Marriage Act*, it is reasonable to conclude that presumption of marriage by cohabitation no longer stands on a solid foundation in our marriage law infrastructure.

16. Counsel emphasized that marriage is a serious union with profound legal and social ramifications. That it should not be second guessed. That one is either married within any of the legally recognized systems of marriage or a marriage can be presumed within parameters known to law. That the respondent failed to prove that she was married to the deceased through any system of marriage recognized under the laws of Kenya and specifically failed to prove the existence of customary marriage between her and the deceased or even a marriage by presumption.

17. It was submitted that there was no basis for finding the respondent`s son as son to the deceased and granting him beneficial interest to the estate. That there was no time that the issue of adoption was broached. That the said son was emphatic that he had no interest in the estate of the deceased. That he did not file an affidavit of protest despite him being 28 years old. That his position was that he was in support of his mother`s case.

Submissions by the respondent –

18. The advocates for the respondent, Gitonga Muthee & Co Advocates, submitted that the appellant commenced the petition by citing the respondent. That this in itself is a clear indication that the appellant knew that the respondent was not a mistress but a legal beneficiary of the estate of the deceased. That this was amplified by the appellant`s evidence that the respondent was staying in the deceased`s rental house of which she was not paying rent and that the deceased used to visit her frequently.

19. The advocates submitted that the respondent had demonstrated that she was married to the deceased who had presented an ewe and a young she-goat to her parents.

20. Counsel for the respondent submitted that the appellant`s witness PW2 confirmed that the respondent was a wife to the deceased. That PW2 used to see the deceased visiting the respondent in her house.

21. It was submitted that the respondent had demonstrated that the deceased used to maintain her and her son and had done so for a period of close to 20 years before his demise. That he had given them

shelter. That he had taken up her son as his very own and used to pay his school fees and give him pocket money. That he had even given the said son his name. That all this proved that the respondent was a beneficiary to the estate of the deceased. That a relationship that spanned for almost 20 years in full and open knowledge of the appellant can only mean that the deceased regarded the respondent as his 2nd wife. The advocates urged the court to uphold the judgment of the trial court.

Analysis and determination –

22. This being a first appeal, the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusion. In this respect the Court of Appeal in *Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co Advocates (2013)eKLR* held that:

> This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212* wherein the Court of Appeal held inter alia that:-
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> > 'On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.'

23. I have considered the grounds of appeal, the pleadings and the submissions by the respective advocates for the parties. The issue for determination in the appeal is whether the respondent had proved that she was married to the deceased. The evidence that was adduced at the trial court touched on customary marriage and presumption of marriage.

24. The respondent stated in her evidence that the deceased had introduced himself to her parents. She also stated in cross-examination that the deceased had paid two animals to her parents as initial payment of dowry. The respondent was then asserting that she was married to the deceased under customary law. The trial court did not form a definite conclusion on the issue.

25. The onus of proving customary marriage is on the party who claims it -see Njoki v Mathara and Others (supra). In this case the burden of proof was on the respondent to prove that she was married to the deceased under Kikuyu customary law. Eugene Cotran in his book, *Casebook on Kenya Customary Law at page 30*, spells out the essentials of a Kikuyu customary marriage to be as follows:

    (1) Capacity; the parties must have capacity to marry and also capacity to marry each other.

    (2) Consent; the parties to the marriage and their respective families must consent to the union.

    (3) Ngurario; no marriage is valid under Kikuyu customary law unless the ngurario ram is slaughtered.

    (4) Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.

    (5) Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture

procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bridegroom's home'

26. In the instant case the respondent did not call her parents to support her evidence that the deceased paid them some animals as dowry. The brother of the deceased DW2 stated that he did not participate in any dowry negotiations for the respondent. It would be strange for the deceased to have engaged himself in marriage negotiations all by himself without participation of his family members. The fact that the issue of payment of animals to the respondent`s parents was not supported by any witness can only mean that it was a lie. There was thus no evidence that there was customary marriage between the respondent and the deceased. The assertion by the respondent that she was married to the deceased under Kikuyu customary marriage was not proved.

27. The alternative issue is whether a marriage could be presumed between the respondent and the deceased. The trial court found that there was general repute in the community that the deceased and the respondent lived that the two were married to each other. The basis of this was that the two had lived together since the year 2000. That the area chief recognized the respondent as wife to the deceased. That the appellant in her petition swore under oath that the respondent and her son were dependants to the deceased. That the appellant cited the petitioner before filing the petition for grant of letters of administration.

28. The principle of presumption of marriage was considered in the case of *Hortensiah Wanjiku Yawe v Public Trustee CA Civil Appeal No 13 of 1976 (UR)* where the Court of Appeal for East Africa held that a long period of cohabitation between a man and a woman may give rise to a presumption of marriage in favour of the party asserting it. Mustafa JA, held as follows:

> ' I find nothing in the restatement of African Law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising out of long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case, should not apply just because she was married according to Kikuyu customary law. It is a concept that is beneficial to the institution of marriage to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages, however celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage.'

29. In *Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR*, Bosire JA., summarized the position thus:

> The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on 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 statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

30. The respondent testified that she had lived with the deceased for a period of 16 years. That they were initially living at the deceased`s rented rooms on plot No 881 which was the same compound where the appellant has her own house. That later the deceased constructed another house on plot No 3777 and moved her there. That she is occupying 4 rooms on that plot. The other rooms are rented out.

31. The respondent`s witnesses PW2 testified that he was a cousin to the deceased and a close friend to him. That the deceased had on several occasions told him that he had married a second wife, the respondent herein. That the respondent was initially living at the deceased`s rented houses where the 1st wife had her house. That later on the deceased bought another plot and constructed some rooms. He moved the respondent to the second plot where she is occupying 3 rooms. It was his evidence that he has always known the respondent as a wife to the deceased though he did not know whether the deceased had paid dowry to the respondent`s parents.

32. The respondent`s son PW3 supported his mother`s evidence and stated that the deceased was staying with his mother as he grew up as a child. That the deceased was his father and had adopted him as his son. That he paid his school fees and used to give him pocket money. That the deceased gave him authority to adopt his name as his surname when he was registering for an identity card. That the deceased stayed with his mother for more than 15 years and would introduce her to relatives as his wife.

33. The appellant however stated that the respondent was only their tenant in their rental houses adjoining her matrimonial home. That in the year 2006 she learnt that her husband had an affair with the respondent. She noticed that the deceased would go out drinking with the respondent and started noticing him going in and out of her house. She realized from the rental receipts that she was not paying rent. That when they developed plot No 3777 in the year 2006 the respondent went to live there. She did not ask why she had moved there. She however said that there was nothing serious in the relationship between the deceased and the respondent.

34. It was further evidence of the appellant that after the deceased died the respondent sought to stop the burial arrangements as she tried to assert her place as a wife but later abandoned the course after the court failed to issue an order in her favour. However, that she was able to compromise the chief to be recognized as a beneficiary and she, the appellant, was denied a letter to commence the probate proceedings.

35. The witness for the appellant Washington Ndegwa DW2 who is the elder brother to the deceased testified that he came to know the respondent as a tenant for the deceased in the year 2000. That between the year 2002 and 2003 he realized that the respondent had become a girlfriend to the deceased as he used to see him sneaking into her house. That the deceased bought plot No 3777 and constructed some rooms. The respondent moved in there. That the friendship continued up to the time that the deceased died.

36. It is therefore not disputed that there was a long cohabitation between the deceased and the respondent lasting for a period of about 15 years. The question is whether it can be presumed to be one of a marriage. In *Mary Njoki v John Kinyanjui Mutheru (1985)eKLR*, Nyarangi JA considered the effect of prolonged cohabitation between couples and stated as follows:

> ' There has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong

evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage.. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.'

The court further held:

> ' Acts of general repute are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their very nature they are a determinant of whether a presumption of marriage can be found to exist.'

37. In *Joseis Wanjiru alias Joseis Wairimu vs Kabui Ndegwa Kabui & Another (2014) eKLR* the Court of Appeal (Visram, Koome and Odek, JJ A) held that the doctrine of presumption of marriage is based on section 119 of the *Evidence Act*, cap 80 which states as follows:

119. 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.

38. The learned judges held that a presumption of marriage is basically a presumption of fact and were emphatic that:

> ' The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded.'

39. The trial court made a finding that the chief's letter proved existence of a marriage between the respondent and the deceased. I do not agree with the trial court on that finding. The chief who wrote the letter did not testify in the case. In the premises, the letter was no more than hearsay and did not confer any rights to the respondent. In my consideration, the chief's letter acts only as an introduction of parties to the court when they are filing a succession cause. It does not mean that the contents of a chief's letter is gospel truth. Where the contents of such a letter are contested, a party who wishes to rely on the contents of the letter is bound to call the author as a witness in the case. As the chief in this case did not testify the trial court erred in relying on hearsay to make a finding that the letter proved the existence of a marriage between the respondent and the deceased.

40. I have deeply agonized on the issue whether a marriage could be presumed to have existed between the deceased and the respondent. I would have been hesitant to declare that there was marriage between the two if it were not for the fact that the appellant herself seemed to recognize the respondent as a second wife to the deceased. In the first place the appellant before filing the petition for grant of letters of administration intestate sent a citation to the respondent on whether to accept or refuse to take letters of administration. In paragraph 5 of the citation which was taken under oath, the appellant stated that the deceased was survived by, inter alia, Rose Wambui Maina (the respondent) and Edwin Maina Mwangi (respondent`s son). In my view, the fact that the appellant cited the respondent meant that she recognized her as a beneficiary to his estate. The appellant cannot have cited a stranger to the estate.

41. Secondly, when filing the affidavit in support for letters of administration intestate, form P & A 5, sworn on July 24, 2018, the appellant stated that the deceased was survived by, inter alia, the respondent as the 2nd wife and her son Edwin Maina Mwangi. The respondent and her son were also named in

the consent to the making of a grant of administration intestate to person of equal or lesser priority, form P&A 38 dated the same date, July 24, 2018. The effect of these assertions are, in my view, that the appellant recognized the 2nd respondent as the 2nd wife to the deceased. Why she thereafter excluded the respondent when she filed the affidavit in support of summons for confirmation of grant of administration intestate was not explained to the court. The advocate for the appellant in his submissions argued that they included the respondent in the initial documents as they were following what was stated in the chief's letter. However, this argument does not hold water as the chief did not force the appellant to include the respondent in the petition as the 2nd wife to the deceased if she was disputing that fact. She did so on her own volition. She had the advice of her counsel when she filed the petition. I do not buy the explanation that they were blindly following the chief's letter when they included the respondent as the 2nd wife in the petition.

42. It is apparent from the documents filed in the succession cause that the respondent and her son refused to give consent in form 38 dated July 24, 2018 for grant of letters of administration be issued to the appellant. It is clear that it is after their refusal that the appellant filed an affidavit in support of confirmation of grant of administration intestate dated September 5, 2018 in which she excluded the respondent and her son from the succession cause. She and her children filed another consent dated the same date in which they excluded the respondent and her son. That is when the respondent filed the protest in which the trial court ruled in her favour.

43. The citation and the petition for grant of letters of administration were supported by the sworn affidavits of the appellant in which she recognized the respondent as the 2nd wife to the deceased and she and her son as beneficiaries to the estate of the deceased. The appellant later on reneged on all that and stated on oath that the respondent is not a wife to the deceased and neither is she a beneficiary to his estate. The sum total of the evidence that was before the trial court was that the appellant had on one hand stated on oath that the respondent was a wife to the deceased and on the other hand also stated on oath that the respondent was not a wife to the deceased.

44. It is trite law that parties are bound by their pleadings unless there has been an amendment to the pleadings. In *Mumias Outgrowers Company Limited v Regina Achieng Okoth (Suing as legal representative of estate of Joseph Odhiambo Jalango (Deceased) (2016)eKLR* it was held that:

Since the pleadings define of the contest before the trial court, the parties are not permitted to depart from their pleadings unless an amendment is allowed or it appears from the course of the proceedings that the parties have left an unpleaded issue for determination by the court. In *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others NRB CA Civil appeal no 219 of 2013 (2014)* the court of appeal cited with approval the decision of the supreme court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLCSC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings;

(1) it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments in the pleadings goes to no issue and must be disregarded. In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

45. It is my considered view that what the appellant stated on oath when she filed the petition to the effect that the respondent was the second wife to the deceased cannot be amended by a subsequent statement also on oath that the respondent was not a wife to the deceased. A statement made on oath cannot

be amended. In a succession cause the affidavit in support of the petition takes the place of a plaint in a civil suit. In this matter the appellant pleaded in a sworn affidavit in support of the petition that the respondent was the 2nd wife to the deceased. The appellant did not apply that it be expunged from the record. It is therefore part and parcel of the petition. It was therefore untenable for the appellant to subsequently state on another oath that the respondent was not a wife to the deceased when her pleadings indicated so. In the case of *Swaleh Gheithan Saanun v Commissioner of Lands & 5 others (2002) eKLR* Onyancha J (as he then was) considered whether an affidavit can be amended and held as follows:

> Counsel for the defendants failed to point out to court any reliable authority supporting their stand that an affidavit cannot be amended. The basis for such a view would appear to be mere common sense and/or logic arising from the fact that an affidavit mainly contains of matters of fact sworn to be true upon knowledge, information or belief. Once such facts have been sworn on oath therefore, they cannot be negatived or controverted by the person who deponed them. It is my view what is sworn in the body of the affidavit will thereon be clearly defined. Once it is so stated, and becomes the substance of the oath, it would indeed be against common sense and logic to amend the substantive express contents in the said affidavit.

46. In the instant case the appellant was blowing both hot and cold that the respondent was a wife to the deceased and at the same time that she was not. It cannot be both. The fact that the appellant pleaded in a sworn affidavit that the respondent was a second wife to the deceased tends to support the evidence that there was general repute in the community within which the respondent lived that she was the 2nd wife to the deceased. A cousin to the deceased PW2 and the son to the respondent PW3 testified on this general repute. The respondent had lived with the deceased for a period of about 15 years. He had at first housed her next to the appellant`s matrimonial house. The appellant was aware of the relationship between the deceased and the respondent. She was aware that she was not paying rent like other tenants. The deceased thereafter moved the respondent to another plot where he gave her 3 or so rooms. Why would the deceased have given her so many rooms to occupy if she was just an acquintance? I do not believe that the respondent was just a mere acquaintance to the deceased. Considering the pleadings filed in the succession cause, the evidence of the deceased`s cousin PW2 and that of the respondent`s son PW3, I find that the relationship between the deceased and the respondent had crystalized into marriage. In the premises the trial court was correct in concluding that the respondent was a wife to the deceased by presumption. The respondent was thus a beneficiary to the estate of the deceased.

47. The respondent`s son was however categorical that he was not interested in the property of the deceased. He had not filed any papers claiming to be included as a beneficiary to the estate. The trial court was wrong in including him as a beneficiary when he had stated that he had no interest in the estate.

48. The upshot is that there is no merit in the appeal, safe that the son to the respondent is removed from sharing the estate of the deceased. The appeal is thus dismissed.

49. In view of the fact that the matter involves members of the same family, I order each party to bear its own costs to the appeal.

SIGNED THIS 14TH DAY OF SEPTEMBER 2022

JN NJAGI

JUDGE

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF OCTOBER, 2022.

By:

HON JUSTICE M MUYA

JUDGE

In the presence of:

Mr Nderi: for Appellant

Gitonga: for Respondent

Court Assistant: Kinyua

30 days R/A.