



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 931 OF 2013**

**(CONSOLIDATED WITH HIGH COURT SUCCESSION CAUSE NO. 566 OF 2013)**

**IN THE MATTER OF THE ESTATE OF NJUGUNA DANIEL NGANGA (DECEASED)**

MARGARET MUMBI NJUGUNA.....1<sup>ST</sup> PETITIONER

GEORGE WAINAINA NJUGUNA..... 2<sup>ND</sup> PETITIONER

DANIEL NG'ANG'A NJUGUNA.....3<sup>RD</sup> PETITIONER

NELLIE NYAKIO NJUGUNA.....4<sup>TH</sup> PETITIONER

VERSUS

MARGARET WAMBUI NJUGUNA.....1<sup>ST</sup> OBJECTOR

MARY WANJIKU GITAU.....2<sup>ND</sup> OBJECTOR

**RULING**

**Background**

1. The deceased herein Daniel Njuguna Nganga whose estate these proceedings relate died intestate on 14<sup>th</sup> January 2013. Consequently, Margaret Wambui Njuguna (1<sup>st</sup> Objector) moved to this court vide Succession Cause No. 566 of 2013 after filing a citation dated 12<sup>th</sup> March 2013 against Margaret Mumbi Njuguna (1<sup>st</sup> wife), Jane Wambui Thuku (daughter), Hellen Mugure Kamau (daughter), Nancy Wairimu Mwangi (daughter), George Wainaina Njuguna (son), Daniel Nganga Njuguna (son) and Nelly Nyakio Njuguna (daughter) Seeking the citees to accept or refuse letters of administration of the deceased's estate and show cause why they could not be granted to the citor.

2. Subsequently, the citees entered appearance on 11<sup>th</sup> July 2013. On 1<sup>st</sup> August 2013, the citees lodged a caveat against any dealings in respect of any assets (property) of the estate. Consequently, Margaret Mumbi Njuguna, George Wambui Njuguna, Daniel Nganga Njuguna and Nellie Nyakio Njuguna all of them citees (hereinafter referred to as the petitioners), petitioned for a full grant vide Succession Cause No. 931 of 2013.

3. In support of their petition, the petitioners annexed a letter from the Chief Gitaru Location listing the following as survivors and beneficiaries to the deceased's estate:

**1<sup>st</sup> house:**

- (1) Margaret Mumbi Njuguna (widow)
- (2) Jane Mugure Thuku (Daughter)
- (3) Hellen Mugure Kamau (Daughter)
- (4) Damaris Wanjiku Kamau (Daughter)
- (5) Nancy Wairimu Mwangi (Daughter)

- (6) Ann Nduta Njuguna (Daughter)
- (7) George Waweru Njuguna (Son)
- (8) Daniel Nganga Njuguna (Son)
- (9) Nelly Nyakio Njuguna (Son)
- (10) Everlyne Njeri Njuguna (Deceased)
- (11) Wambugu Wanyeki (Son to Everlyne Njeri)
- (12) Wachinga Wambugu (Daughter to Everlyne Njeri)

**2<sup>nd</sup> house:**

- (13) Margaret Wambui Njuguna (widow)
- (14) Jamba construction Ltd.

4. According to Form P/A 5, the petitioners only named Margaret Mumbi Njuguna as the only widow to the deceased and her children as the survivors and beneficiaries to the deceased thus leaving out Margaret Wambui. Contemporaneously filed with the petition is a summons of even date seeking to injunct Margaret Wambui Njuguna from dealing with, interfering, intermeddling, transferring or alienating the assets of the deceased person.

5. On 29<sup>th</sup> May 2014, Margaret Wambui filed a notice of objection objecting to the making of a grant of representation to the estate of the deceased to the petitioners. Subsequently, on 24<sup>th</sup> June 2014, Mary Wanjiku Gitau claiming to be a widow also filed summons dated 23<sup>rd</sup> June 2014 seeking leave to file an objection to the making of the grant of letters of administration, cross-petition and an answer to the petition out of time as well as an injunction to stop the petitioners from intermeddling with the estate.

6. Having been granted leave, on 17<sup>th</sup> July, 2014, Mary Wanjiku Gitau filed an objection to the making of a grant. On 28<sup>th</sup> April 2015, she also filed an answer to the petition and cross petition for grant claiming to be the lawful widow to the deceased thereby seeking to be issued with a grant of letters of administration. She claimed to have been married in 1983 and that she cohabited with the deceased as husband and wife until his death. She claimed to have settled and cohabited at Maai Mahiu and that they were blessed with a son one George Ndungu Njuguna. She further stated that, by the time she got married to the deceased, the petitioner (Margaret Mumbi) had long divorced with the deceased.

7. In reply to the 2<sup>nd</sup> objector's answer and cross-petition above stated, the petitioners filed a replying affidavit jointly sworn on 15<sup>th</sup> July 2015 and filed on 21<sup>st</sup> July 2015 denying that Mary Wanjiku (2<sup>nd</sup> objector) was ever married to the deceased. They expressed their shock at the area Chief's letter's inclusion of the name of Margaret Wambui (1<sup>st</sup> objector) as a widow to the deceased. They stated that the area chief must have been misled by the 1<sup>st</sup> objector. They further denied having knowledge of any marriage relationship between the deceased and the 2<sup>nd</sup> objector one Mary Wanjiku.

8. It was further alleged that the deceased did not have any child or children with any of the objectors nor did he take parental responsibility over any of their children. Consequently, directions were given for the hearing to be canvassed by way of viva voce evidence.

**1<sup>st</sup> Objector's case**

9. During the hearing, Margaret Wambui Njuguna (pw1) the first objector herein adopted the averments contained in her affidavit sworn on 31<sup>st</sup> July 2015 in which she stated that: she was the second wife to the deceased; that dowry to the tune of Kshs 94,000 was paid to her brothers and uncle sometime 2009 after having courted since 2006 as friends and, that the deceased had divorced Margaret Mumbi the year 1984 hence he had no wife by the time she got married to him.

10. She claimed that when she started staying with the deceased as husband and wife, she had two children from her previous relationship namely; Miriam Mumbi and Burton Kamau whom she moved in with and the deceased accepted them as his children.

11. She further claimed that they had established their matrimonial home at Plot No. Kiambu/Kikuyu/52. That after paying dowry on 20<sup>th</sup> November 2010, she was formally handed over by her uncle to the deceased as a wife.

12. She claimed that since the year 2012 when the deceased started ailing, she was staying with him until he died in her hands in their matrimonial home. That despite every effort to involve his children and the 1<sup>st</sup> wife (1<sup>st</sup> petitioner) of the deceased's ailment and eventual death, none of them bothered to assist. She claimed to have involved the deceased's nephews Mr. Daniel Thuku, Njenga and Daniel Nganga.

13. In her testimony, she produced an identity card (P-Ex.1) bearing her name and that of the deceased as proof that she was his wife. She also produced minutes of the meeting held by elders at her home at Njoro when her husband visited them for dowry payment (see P-Ex. 2A and 2B being minutes of 16<sup>th</sup> October 2010 and 20<sup>th</sup> November 2010 respectively).

14. She also produced photographs reflecting persons who attended their marriage ceremony. She further produced a radio burial announcement which was prepared by the 4<sup>th</sup> petitioner a daughter to the 1<sup>st</sup> petitioner indicating the 1<sup>st</sup> objector and the 1<sup>st</sup> petitioner as widows to the deceased (P-Ex. 5).

15. On cross-examination by Judy Thongori for the petitioners, she admitted that her identity card bearing the deceased's name was issued on 21<sup>st</sup> January 2013 seven days after the deceased had died. She claimed that, she had applied for the ID card earlier before the deceased had died hence dismissed the allegation of forgery. She further dismissed the claim that she was a tenant to the deceased. On further cross examination, she admitted that the minutes of 16<sup>th</sup> October 2010 and 20<sup>th</sup> November 2010 taken during dowry payment did not have signatures of the attendees. She also admitted that she has been collecting rent from the premises in which she is staying and that she was not paying rent to anybody.

16. On cross-examination by Gitonga for the 2<sup>nd</sup> objector, she stated that Mary Wanjiku used to supply them with cattle fodder. That she never sired any baby with the deceased.

17. PW2 Joshua Njuguna Gacece informed the court that sometime the year 2015, he was a tenant to the deceased in his premises within Mai Mahiu. That the year 2009, Margaret Wambui (1<sup>st</sup> objector) who was originally a tenant to the deceased got married to the deceased. He further confirmed that he was one of the people who took Njuguna to his in-laws to pay dowry for Margaret Wambui. That they paid Kshs 44,000 as part of the dowry. He also identified photographs taken during the marriage ceremony which was allegedly attended by among others Kamau, a son to Wambui, Musyoka and Daniel. He claimed that, as tenant to Njuguna, he used to pay rent through Margaret Wambui who is residing at the same premises up to now.

18. PW3 Peter Kinyanjui Chege a cousin to the deceased also stated that Margaret Wambui was a wife to the deceased and that he attended a dowry payment ceremony which was conducted in accordance with Kikuyu Customary Law.

19. On Cross-examination, he stated that he only attended the first ceremony where ruracio/dowry payment was made.

20. PW4 – Gabriel Mwaura Muthiora a brother to Margaret Wambui (1<sup>st</sup> objector) also corroborated the evidence of the rest of the witnesses. He stated that the deceased visited their home twice and paid kshs44000. He further claimed that before the deceased died, he had requested him to sign as a witness in respect of an ID card application form for Margaret to acquire an I/D with his (deceased's) name as the husband.

21. PW5 Joseph Chege Nguchu a retired Assistant Chief Maai Mahiu who was known to the deceased for over 20years also confirmed that he knew Margaret Wambui as a wife to the deceased. He also claimed to have attended their marriage ceremony.

22. PW6 Mary Wanjiku the second objector stated that she was married to the deceased after divorcing her former husband. She claimed that in 1987, the deceased sired with her a son known as George Ndungu. That he married her while already having five children from her former husband Philip Waweru namely; Rahab born 1973, Sarah Wambui born 1975, James Thuo born 1976, John Gitau born 1978 and Susan Wambui born 1982.

23. She claimed that on 25<sup>th</sup> December 2000 the deceased visited her home and introduced himself to her relatives as their future son-in-law. That a goat was slaughtered and parents blessed their marriage after exchange of gifts. To prove that the deceased was a father to George Ndungu, she produced his birth certificate bearing the deceased's name.

24. On cross-examination, she stated that she got married to the deceased in 1983. She claimed that the deceased visited her home twice during which period he paid 10,000/= on the first visit and 20,000 on the 2<sup>nd</sup> visit. That she only knew of the 1<sup>st</sup> wife one Margaret Mumbi but later, when she left for Germany to see her children, she overstayed and on returning back the country she found the deceased had married another wife in this case the 1<sup>st</sup> objector.

25. On cross-examination by Thongori, she stated that she divorced her former husband one Waweru in 1980 and the decree absolute came out in 1985. On further cross examination, she stated that she filed her divorce in 1989. The court was shown a copy of decree absolute dated 18<sup>th</sup> January 1998 in respect of divorce case No. 119/1994 Milimani Chief Magistrate's court.

26. She claimed that it was the deceased who brought up all her children and that she did not know that it was wrong to engage in another marriage before dissolving her statutory marriage. On further cross examination, she confirmed that the necessary Kikuyu rites and traditions among them payment of dowry/ruracio were not performed. She stated that they did not formalise their marriage in accordance with Kikuyu traditions.

27. Further, she stated that all her children are living in Germany including George Ndungu who left the country in 1994 while aged 7yrs old. In re-examination, she stated that it was her daughters who have been taking care of their younger brother one George Ndungu.

28. PW7 Josephat Muya Mugo, adopted his witness statement recorded on 1<sup>st</sup> March 2018. He claimed to have known Mary Wanjiku as a wife to the deceased and that he attended a ceremony where the marriage of Mary was formalized with the deceased paying Kshs10,000 as introduction fees known as "Kuhanda Ithigi". He claimed that the deceased had 3 wives.

29. PW8 Joseph Chege Ngechu also adopted his witness statement recorded on 1<sup>st</sup> November 2013. He also claimed to have attended a marriage ceremony at Mary Wanjiku's home in company of the deceased and other friends. PW9 Samwel Ndungu also corroborated PW7 and PW8 stating that Mary Wanjiku was a wife to the deceased and that she used to supervise his farm activities.

## Petitioner's case

30. On their part, the 2<sup>nd</sup> petitioner George Waweru Njuguna(Dw1) adopted averments in a joint affidavit sworn on 30<sup>th</sup> April 2013 by his co-petitioners in support of the petition for a grant of representation. He also relied on a replying affidavit filed on 21<sup>st</sup> July 2013 in response to objections herein. He further adopted the content in his witness statement in which he denied that the objectors were married to the deceased.

31. He stated that the Chief's letter he used to file this Succession Cause in which the 1<sup>st</sup> objector was listed as a wife to the deceased was misleading and not correct. On cross examination, he admitted that after the father died, burial arrangements were made and his sister Nelly Nyakio prepared a radio announcement with Margaret Mumbi and Margaret Wambui listed as wives.

32. He admitted on cross-examination that his father used to stay at Maai Mahiu while his mother (1<sup>st</sup> petitioner) used to stay at Muniu since 1976.

33. In attempt to prove the authenticity of the birth certificate produced by the 2<sup>nd</sup> objector in respect of George Ndungu Njuguna her son, DW2 Stephen Gichuki Principle Civil Registrar Kiambu County stated that the said birth certificate S/No. 395399 was a forgery. That data records in their registration office revealed that the said birth certificate did not emanate from their office. That all the particulars in respect of the said certificate were not registered in that office. He claimed that the registrar who purportedly issued and signed the certificate as Judith Abwaku was not in service at the material time the certificate was allegedly issued (27<sup>th</sup> March, 1989).

## Submissions

### 1<sup>st</sup> Objector's Submissions

34. Mr. Gitau for the 1<sup>st</sup> objector filed his submissions dated 30<sup>th</sup> March 2019 basically reiterating the averments contained in the 1<sup>st</sup> Objector's objection and oral testimony in court. Counsel submitted that from the Chief's letter used by the petitioners to file this Succession Cause, the Chief did confirm that the deceased had two wives among them the 1<sup>st</sup> objector. Counsel also relied on the evidence of PW1-PW5 who confirmed that the 1<sup>st</sup> objector was married under Kikuyu Customary Law with all rites performed. He also placed reliance on the funeral radio announcement content in which the 4<sup>th</sup> petitioner listed the 1<sup>st</sup> objector as one of her father's wives. Counsel also relied on the evidence of the 1<sup>st</sup> objector's ID card bearing the deceased's name.

35. In the alternative, Counsel submitted that the deceased and the 1<sup>st</sup> objector having stayed together from 2006 – 2013 presenting themselves to people as living together as husband and wife, their relationship could still be presumed to be a marriage under common law. To support this position, Counsel relied on the decision in the **Eldoret P/A 244/2002 in the matter of the estate of Ephantus Githatu Waitthaka (deceased)** where the court held that **“although there was no formal marriage between the objector and deceased, there was evidence that they were involved in a relationship which qualified as a marriage as they held themselves to all and sundry that they were staying together as husband and wife”**.

36. Mr. Gitau further submitted that besides being a wife, the first objector was a dependant to the deceased. That a dependant need not be a close family member to the deceased and that as long as the deceased took care of the person claiming to be a dependant prior to his death, then the person so claiming to be a dependant shall be entitled to a share of the deceased's estate. To support this proposition counsel made reference to the decision in **Malindi Succession Cause No. 78 of 2010 in the estate of Giovanni Gremmo (deceased)**.

### 2<sup>nd</sup> Objector's Submissions

37. M/s Githogori, appearing for the 2<sup>nd</sup> objector filed her submissions on 12<sup>th</sup> April 2019 literally restating the testimony of the 2<sup>nd</sup> objector. She submitted that the testimony of the 2<sup>nd</sup> objector was not challenged by the 1<sup>st</sup> petitioner who opted not to testify. Counsel submitted that there was prove by way of a birth certificate that the deceased sired a child known George Ndungu while cohabiting with the 2<sup>nd</sup> objector as husband and wife.

38. Regarding the 2<sup>nd</sup> Objector's previous marriage with one Philip Waweru, Counsel submitted that the 2<sup>nd</sup> objector had separated since 1983 and divorced in 1998 hence nothing would have stopped her from engaging in another marriage relationship.

39. Counsel submitted that there was proof that Kikuyu Customary marriage was conducted. That in the alternative, a presumption of marriage could suffice by virtue of long period of cohabitation. To support this position, he referred the court to the case of **Hortensiah Wanjiku Yawe v Public Trustee Civil Appeal No. 13 of 1976** where the court recognized a marriage out of long cohabitation.

40. The court was further referred to the decision in the case of **Nderitu Ndirangu v Patrick Mwago Wanjau (2011) eKLR** and **Phyllis Njoki Karanja v. Rosemary Mueni Karanja and Another (2009) eKLR** where the Court held that:

**“...before a presumption of marriage can arise a party needs to establish cohabitation and acts of general repute...”**

### Petitioner's submissions

41. M/s Judy Thongori appearing for the Petitioners filed her submissions on 30<sup>th</sup> September 2019 submitting on four issues as hereunder:

**(a) Whether the 1<sup>st</sup> objector was a wife of the deceased married through Kikuyu Customary Law and therefore a dependant of the deceased.**

**(b) Whether the 2<sup>nd</sup> objector was a wife of the deceased married through Kikuyu Customary Law and therefore a dependant of the deceased.**

**(c) Who are the dependants of the deceased entitled to share in his estate.**

**(d) Who should be given letters of administration of the deceased's estate.**

42. With regard to the 1<sup>st</sup> objector's alleged marriage to the deceased, M/s Thongori submitted that there was no proof of performance of the necessary essentials of Kikuyu Customary Marriage as set out in **Eugene Cotran's treatise "Casebook on Kenya Customary Law"** where four ingredients were named as; capacity to marry; consent for parties to marry and that of their families; slaughter of a ram (Ngurario); payment of dowry otherwise known as Ruracio and, lastly commencement of cohabitation.

43. Learned counsel submitted that there was no proof that all the first four stages were followed hence there was no marriage. To buttress her argument Counsel made reference to the decision in the case of **In the matter of the Estate of Geoffrey Muchiri Kamau (Deceased) Succession Cause No. 768 of 2008** where the Court held that:

**"I have noted that members of the family of the deceased did not feature in the proceedings. Yet, the traditional marriage contract ought to have been between his family and that of the applicant. None of the persons that the applicant and her mother mentioned to have accompanied the deceased to their home were identified as his relatives. They were said to be his friends. Indeed, it would appear that the whole affair was conducted in secrecy, if at all there were such ceremonies. It does not have hallmarks of a traditional marriage in my view."**

44. The court was further referred to the decision in the cases of **Joseph Gitau Githongo vs Victoria Mwhaki Munya, Civil Appeal No. 227 of 2005** in which the court relied on the decision in the case of **Priscilla Waruguru Gathigia vs Virginia Kanugu Kathigo, HCSC No. 31 of 2001 (Nyeri)** where the court stated that a customary marriage where relatives do not attend and no proof of Ngurario (ram slaughtered) cannot meet the test of a customary Kikuyu marriage.

45. Turning unto the 2<sup>nd</sup> objector's marriage, M/s Thongori submitted equally that there was no proof of a Kikuyu marriage having been celebrated. Counsel submitted that the allegation that the deceased and his friends took part in a birth day ceremony on the 25<sup>th</sup> February 2000 in the morning and thereafter proceeded for a wedding ceremony in the afternoon where they were served with porridge is proof enough that there was no wedding ceremony. She further submitted that the 2<sup>nd</sup> objector was a liar who even went to the extent of forging a birth certificate for a son she claimed was sired by the deceased with her. She further submitted that there was no proof of cohabitation.

46. Touching on dependency, M/s Thongori submitted that the 1<sup>st</sup> Objector in her cross petition did not name any of her children as beneficiaries of the deceased's estate and instead she named herself, the 1<sup>st</sup> petitioner and her children. That the 1<sup>st</sup> objector did not provide any proof that the deceased ever took care of or supported her two children namely; Miriam Wambui and Burton Kimani. That in any event, the 1<sup>st</sup> objector had confirmed that the children were not sired by the deceased hence dependency is far-fetched.

47. As to the dependency of George Ndungu a son to the 2<sup>nd</sup> objector, she submitted that he was an adult who should have testified. That the birth certificate could not support paternity as the same was forged.

48. As to whether the Chief's letter including the 1<sup>st</sup> objector as wife to the deceased is not enough proof of the existence of a marriage, counsel opined that the same was obtained through misrepresentation of facts. That in any event, it was originally produced by the 1<sup>st</sup> objector when filing a citation. Referring to the funeral announcement, M/s Thongori, submitted that, since there was no proof of any customary marriage nor cohabitation for a long time, the same is a mere statement which cannot prove existence of any marriage.

49. Regarding the 1<sup>st</sup> Objector's identity card bearing the deceased's name, Counsel submitted that there was no proof of any consent by the deceased and that it was deliberately processed after the deceased had died to serve the purpose of filing a succession case.

#### **Analysis and determination**

50. I have considered the pleadings and supporting documents, testimonies by various witnesses and submissions by counsel.

Issues for determination are:

**(a) Whether the objectors were married to the deceased under; (i) Kikuyu customary law or (ii) under the presumption of marriage.**

**(b) Whether the objectors and their children were dependants to the deceased.**

**(c) Who is entitled to the grant of letters of administration intestate.**

**(a) Whether the objectors were married to the deceased under (i) Kikuyu customary law or (ii) or under the presumption of**

**marriage.**

51. According to the first objector, she started cohabiting with the deceased sometime 2006 when she was staying at the deceased's premises within Mai Mahiu as a tenant then operating a nursery school in one of the rooms within the said premises. That in the year 2009, they formalized their marriage by visiting her home in company of Joshua Njuguna (PW2) who was then a tenant to the deceased, Peter Kinyanjui (PW3) a cousin to the deceased, Murera Muthiora (PW4) and Joseph Chege Ngichu (PW5) also a friend to the deceased.

52. However, on cross examination by M/s Thongori, the first objector stated that the deceased was not accompanied by any of his relatives during the time he visited her home. It is trite that in any customary marriage ceremony, it is common practice that relatives from both the groom's and bride's side are expected to witness such ceremony. Why was the marriage being conducted in a manner that did not recognize the ordinary norms of a customary marriage where relatives ordinarily take part in the entire ceremony process?

53. As stated in the Estate of Francis Mburu (Deceased) (supra), the legitimacy and credence of a customary law marriage is hinged on the participation of relatives from both sides. The absence of relatives in such crucial function will put into question its credibility. Further, the minutes allegedly taken on 16<sup>th</sup> October 2010 and 20<sup>th</sup> November 2010 when dowry was allegedly paid were not signed thus putting into question the authenticity of the said minutes and the list of the attendees.

54. Besides the above stated omission, there are well known minimum essential requirements which must be fulfilled before a Kikuyu customary law marriage can be declared valid. Among such requirements are; the introduction stage (Kuhanda Ithigi), payment of dowry (ruracio), slaughter of a ram (ngurario) and then cohabitation.

55. In the instant case, only the introduction part of the ceremony which was allegedly done and then payment of Kshs 94,000 in two instalments which is clouded with uncertainty. Although in this case cohabitation started before the other stages owing to change of modern lifestyle, the other necessary steps must be satisfied before a customary law marriage can be declared valid.

56. In the absence of the performance of the necessary traditional practices which is admitted by both parties, a kikuyu customary law marriage cannot be said to have been celebrated. See Hortensiah Wanjiku Yawe vs The Public Trustee (supra) and Priscillah Waruguru Gathigia vs Virginia Kanugu Kathigo (supra) where the court held that:

**“Having carefully considered the evidence, I find that the evidence adduced by the protestor in proof of her alleged marriage to the deceased fell short of proving the alleged marriage. Apart from her daughter and 2 brothers there were no other independent witnesses to the customary formalities. There was no evidence that there was any ngurario ram slaughtered nor was there any evidence that there were any elders from the deceased's relatives who participated in the alleged formalities.”**

57. In Eugene Contran book in “Reinstatement of customary law”, “No marriage is valid under Kikuyu customary law unless ngurario ram is slaughtered” and that “there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid”.

58. The fact that the court has cast doubt on the manner in which the alleged marriage ceremony was conducted in doubtful arrangements with no relatives on both sides attending, and further considering that full essentials of a Kikuyu Customary law marriage among them the slaughter of a ram (ngurario) was not done, it is my finding that the 1<sup>st</sup> objector has not duly discharged her burden of proof that she was married under Kikuyu customary law.

59. Turning on whether there was a marriage relationship by way of a presumption of marriage, Mr. Gitau submitted in the affirmative. According to PW1 (1<sup>st</sup> objector), she had cohabited with the deceased since 2006 until the date he died. She further claimed that they had established a matrimonial home at Mai Mahiu where she has been staying to date and even collecting rent from the premises. She also relied on the burial radio announcement whereby she was named as a wife to the deceased. Further, she relied on her national ID card bearing the husband's name and that the deceased died in her hands.

60. PW2, PW3, PW4 and PW5 all confirmed and corroborated each other that the deceased and the 1<sup>st</sup> objector were staying together as husband and wife till the day he died in her hands in their house. Can the aforesaid conduct and lifestyle constitute grounds to infer a presumption of marriage?

61. In the case of Phyllis Njoki Karanja and 2 others v Rosemary Mueni Karanja and Another (supra), the court had this to say;

**“Before a presumption of a marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.”**

62. As to what constitutes a general repute so as to give rise to a presumption of marriage, guidance can be drawn from the case of Eva Naima Kaaka and Another v Tabitha Waithera Mararo (2018) eKLR where the court held that:

**“...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 nature they are a determinant of whether a presumption of marriage can be found to exist ... No evidence was led to demonstrate that Waithera and the deceased shared activities typical of married couples, and supportive of long cohabitation and that would give rise to acts of general repute. No family photographs, gifts or other memorabilia were produced as evidence, and there was no witness evidence from persons who might have regularly come into contact with the deceased and Waithera during the alleged period of cohabitation.”**

63. In the circumstances of this case, there is evidence by PW2, PW3 a cousin to the deceased, PW4 a brother to the 1<sup>st</sup> objector and Pw5 a retired Assistant Chief that the deceased cohabited with the accused until he died in the first objector's hands in their house. That when he died, the 4<sup>th</sup> petitioner a daughter to the 1<sup>st</sup> petitioner prepared a radio funeral announcement naming the first objector as a wife to the deceased. The 1<sup>st</sup> petitioner and 4<sup>th</sup> petitioner did not testify. Nobody challenged this evidence.

64. Why would a daughter to the 1<sup>st</sup> petitioner together with the burial arrangements committee recognize the 1<sup>st</sup> objector as wife to the deceased? I do not agree with M/s Thongori that the radio announcement was a mere statement which cannot be relied on to proof a presumed marriage which was in any event a very short one. Cohabitation for a period of six years is not a short period to infer a presumed marriage. Besides, a radio announcement recognizing the 1<sup>st</sup> objector as a widow is just but one of the conducts and acts which when put together with other factors can establish a presumed marriage.

65. Further, when the petitioners filed this Succession Cause, they obtained a letter from the area chief listing the 1<sup>st</sup> objector as a wife to the deceased. Apart from the allegation by M/s Thongori that the 1<sup>st</sup> objector misled the chief which is evidence from the bar, the petitioners themselves obtained the same letter from the area chief listing the 1<sup>st</sup> objector as the second wife and beneficiary to the deceased's estate. I am not convinced that the area chief was influenced by the 1<sup>st</sup> objector.

66. The 1<sup>st</sup> objector stated that she struggled with the deceased's sickness since 2012 while the 1<sup>st</sup> petitioner who had long separated with him and left with her children never bothered. Nobody disputed the fact that the deceased died in the hands of the 1<sup>st</sup> objector while living in the same house. This is not the behaviour of a girlfriend and boyfriend relationship.

67. Besides, the 1<sup>st</sup> objector produced an ID card bearing the deceased's name suggesting that the deceased was her husband. Although mere introduction of the deceased's name in her ID does not necessarily mean that she was her wife, there was no proof that the 1<sup>st</sup> objector had forged the consent of her husband in processing the ID card. It is trite that he who alleges must proof. An ID is a government document and anybody claiming of forgery must proof. With this evidence coupled with the fact that she was recognized as a wife in the funeral arrangements of the deceased, I am satisfied that their relationship was for all purposes and intents that of a husband and wife hence entitled to a share of the deceased's estate being a beneficiary as well as a dependant.

68. Regarding the marriage relationship with the deceased, the 2<sup>nd</sup> objector claimed that she started cohabiting with the deceased in 1983 after separating with her husband Philip Waweru whom she had married under statute. She however admitted that she finally divorced Mr. Waweru in 1998. That together with the deceased, they had one child by the name of George Ndungu born 1987. She claimed that her marriage to the deceased was under kikuyu customary law despite the subsistence of her monogamous marriage. However, on cross-examination by M/s Thongori, she admitted that there were no formalities conducted in accordance with Kikuyu customary law. Although PW7 claimed to have attended a marriage ceremony at the 2<sup>nd</sup> objector's home and Kshs10,000 paid as 'Uji', he did not state whether that was part of the dowry.

69. It is my holding based on the 2<sup>nd</sup> objector's own admission that there was no proper or formal Kikuyu Customary Law marriage conducted between the two. In any event, she was still married statutorily with her former husband with whom they had not divorced till 1998.

70. As to whether there was a relationship of general repute to infer presumption of marriage, no cogent evidence was adduced. She did not even feature anywhere in his funeral. Not a single relative from either side ever testified to confirm that there was such a relationship save for the 1<sup>st</sup> objector who stated that the 2<sup>nd</sup> objector was a mere friend to her husband who used to supply them with cattle fodder. The allegation that she gave birth to George Ndungu with the deceased was disputed and the birth certificate produced as exhibit dismissed as a forgery by DW2 the civil registrar of persons. I do not find any evidence sufficient enough to connect the 2<sup>nd</sup> objector with the deceased as a wife. Accordingly, her claim is untenable.

#### **Whether the Objectors and their children are dependants**

71. A dependant is defined under Section 29 of the Law of Succession as follows:

**“For the purposes of this Part, "dependant" means—**

**(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

**(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

72. In the case of Sarah Kanini Thigunku v Elizabeth Njuki Thigunku (2016) eKLR the court had this to say regarding dependency:

**“For one to be a dependent however, under Section 29 aforesaid, it is clear that one must prove dependency. The use of the words “... as being maintained by the deceased immediately prior to his death...” in that Section, connotes that one must prove**

**that he was dependent on the deceased before his demise. From the record, there was no evidence to show that either the Appellant or any of her children were dependent on the late Mbungu Thigunku. A mere relationship does not automatically qualify one to be a dependant under Section 29 of the Act. Prove of dependency is imperative.”**

73. Having stated that the 2<sup>nd</sup> Objector was not a wife, I do not find any proof that she was dependent on the deceased prior to his death. As to the 1<sup>st</sup> objector, I have already found that they were husband and wife. Accordingly, there was a relationship of interdependency. It follows almost naturally that the deceased as a husband had an obligation to support the 1<sup>st</sup> objector as a wife.

74. As to whether the 1<sup>st</sup> objector's children Miriam Wambui and Burton Kimani were dependants to the deceased, there was no evidence of dependency tendered. These children were sired in some relationship between some man somewhere and the 1<sup>st</sup> objector. The deceased was not their biological father. There was no evidence of acceptance, recognition or any support given to them by the deceased. Unfortunately, they should be having a father somewhere who should be responsible of their support.

75. Besides, when the 1<sup>st</sup> objector filed her objection, answer to and cross petition, she did not list any of her children as beneficiaries or survivors to the deceased. To introduce their names after the court had given directions for hearing is an afterthought. Accordingly, it is my finding that they are not beneficiaries to the deceased.

76. As to George Ndungu, I have already stated that there was no proof that he was a son to the deceased. As to whether he was a dependent, nothing was adduced to show that he ever stayed with the deceased and that he used to be supported by him. In any event, the 2<sup>nd</sup> objector stated that, George left for Germany in 1994 when he was 7 years old to join his siblings. With that background in mind, there is no evidence or proof of dependency. Dependency must be real or actual and not imaginary or imported for the sake of inheritance.

77. As to the rest of the children sired by Mr. Philip Waweru, these are adults over 35 years old and who are now living their independent lives. None of them has claimed dependency to the deceased when he was alive. There was no proof that the deceased took them up, recognised and accepted them as his children **(See EMM vs IGM and Another (2014) eKLR.**

78. Accordingly the claim of dependency by the 2<sup>nd</sup> objector and her children is dismissed.

#### **Whether the objectors are entitled to grant of letters of administration**

79. The governing provision on the appointment of a legal representative is Section 66 of the Law of Succession which recognises that appointment of a legal representative is the discretion of the court 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**

**(See Re: Estate of Garmaliel Otieno Onyiego (Deceased) (2018) eKLR.**

80. Similar position was held in the case of **Teresa Wangari Ngara v Kiama Gathuri Ngara and Another (2016) eKLR** where the Court held that:

**“The order of preference is provided for under Section 66 cited above. Under Section 66, the court has a final discretion as to the person or persons to whom a grant in the best interest shall be made, but the guiding principle is the order of preference provided in the said section and top on the list is the surviving spouse or spouses with or without association of the other beneficiaries.”**

81. Pursuant to Section 66 of the Law of Succession Act, and unless there exist good reason/s as to why the court should deviate from the order of preference, it is prudent to follow the order for the sake of certainty and consistency. In the circumstances of this case, there two widows. In order of preference they have equal right to seek jointly and be issued with a joint grant of representation.

82. Having arrived at the above finding, I am inclined to make the following orders;

**(a) That the deceased's estate having been gazetted, a joint grant of letters of administration intestate shall within 30 days from the date of delivery of this ruling issue to the 1<sup>st</sup> petitioner Margaret Mumbi Njuguna and Margaret Wambui as joint administratrixes.**

**(b) That the answer to petition and cross petition filed by the 2<sup>nd</sup> objector be and is hereby dismissed.**

**(c) That the list of beneficiaries shall remain as per the Chief's letter or the original petition filed by the petitioners with**

Margaret Wambui Njuguna as the additional beneficiary.

(d) That the two joint administratrixes shall within 60 days after receipt of the grant of letters of administration intestate apply for confirmation of the grant.

(e) Regarding costs, each party shall bear own costs.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2020

J. N. ONYIEGO

JUDGE