REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 24 OF 2016

IN THE MATTER OF THE ESTATE OF JOSEPH IRUNGU GICHIRI (DECEASED)

1. RACHAEL WANJIRU IRUNGU

2. ANGELINE MUENI MUKOLA

3. PENINAH WAITHIRA NDUNGU....OBJECTORS

VERSUS

1. CATHERINE WAIRIMU IRUNGU

2. FRANCIS GICHIRI IRUNGU

3. MARY WANJIRU IRUNGU.....PETITIONERS

JUDGMENT

1. The deceased herein, Joseph Irungu Gichiri hailed from Gatanga. At the time of his death, he was a businessman residing in Thika. He died intestate on 3rd June 2016. Subsequently, three persons, namely, **Rachael Wanjiru Irungu**, **Angeline Mueni Mukola** and **Penina Waithira Ndungu** filed **Succession Cause No.24 of 2016** being a Citation to Accept or Refuse Letters of Administration directed at **Catherine Wairimu Irungu**. The Citors claimed to be widows of the deceased. But before the matter could be mentioned for directions, the Citee **Catherine Wairimu Irungu** filed a Petition for grant of letters of administration in respect of the estate of the deceased. The said Petition for grant being **Succession Cause No. 67 of 2016** was filed on 12.10.2016 by the Citee jointly with Francis Gichiri and Mary Wanjiru Irungu who asserted to be the widow and two children of the deceased, respectively. Thus on 16/2/2017 when the matters were listed for mention before the Judge, the court directed that Succession Causes Nos. 24/16 and 67/16 be consolidated under the former registration. The parties agreed that the issue for determination at the hearing was the question who among the claimants was /were the lawful spouse (s) of the deceased and the Court directed them to file their responses and witness statements. Hearing was set for 11th May 2017.

2. What happened next is that on 20th March 2017 the Citors filed an Objection to the making of a grant of representation *"as sought in the Petition of CATHERINE WAIRIMU IRUNGU, FRANCIS GICHIRI IRUNGU AND MARY WANJIRU IRUNGU."* On grounds *inter alia* that the Objectors, hitherto citors , and their children were beneficiaries of the estate and had not granted consent to the filing of the Petition and that the Petitioners above had deliberately concealed these facts from the court and therefore were not fit for appointment as administrators. Also filed contemporaneously was an Answer to Petition and Cross Petition dated 20th March 2017, and supported by the joint affidavit sworn by the Objectors on 20th March 2017, which which contained 18 annexures and ended with the deposition at paragraph 17 to the effect that;

> **"THAT based on the Petitioners actions, respectively the 1st Petitioner, it is clear that they are not fit and proper persons to be granted the letter of administration for the estate of the deceased and we pray that the same be granted to us as we have always been upfront and forthright in disclosing all the beneficiaries and all the assets of the deceased of which we are aware…."** (sic)

3. Filed together with the Cross petition were Forms P & A 57 being Guarantee by Personal Sureties executed by **John Maina Gichohi** and **Joseph Mwaura Kiarie**, and dated 8th August 2016; and Form P & A 11 of the same date being the affidavit of justification of sureties in the sum of KShs.3000,000/- sworn by John Mwaura Gichohi and Joseph Mwaura Kiarie; consent to making of grant executed by Judy Nyambura Irungu and Alice Wambui Irungu (described as daughters); Patrick Mukola Irungu and Joseph Mutuku Irungu (described as sons)

, as well as the Affidavit of Justification of Proposed Administrators executed by the three Citors on 8th August 2016. In the same bundle of documents were witness statements by the three Citors, Simon Mwangi Kamau, Chief Biashaara Location Thika, James Muraguri Kamau and John Maina Gichohi. For her part, the Citee had prior to the court's directions filed a Replying affidavit to the Citation on 10th February 2017 and another Replying affidavit on 9th May 2017, together with witness statements by Mary Wanjiru Mwangi and Zakayo Ndungu Kagunya.

4. Although the issue for determination had been identified in the directions given on 16/2/2017, on the actual hearing date (11th May 2017), there is no record of the fact of the filing of the Objection , Answer to Petition and Cross petition being brought to the court's notice for purposes of further directions . However, it appears that the parties actively canvassed the matters raised in the Objection and allied pleadings during the trial. Given the history of the proceedings and by dint of the provisions of Rule 22(4) of the Probate and Administration Rules the Citation to Accept or Refuse to take a grant directed at Catherine Wairimu Irungu was spent upon the filing , firstly ,of the Petition by the said Citee and subsequently, the Objection, Answer and Cross Petition by the Citors.

5. It is therefore the court's considered view that the proceedings conducted since 11th may 2017 could not be in respect of the spent Citation but the Objection, Answer to the Citee's Petition and Cross Petition by the Citors in terms of Rule 17(6) of the Probate and Administration Rules. It matters not that directions thereon had not been given as the core issues in the Citation and the Objections remained the same. The Citors' advocate appears to acknowledge this position at paragraphs 1 – 10 of the written submissions.

6. In the circumstances, while the court will consider the material filed in respect of the Citation and subsequent pleadings this decision relates to the Objection ; Answer to Petition and Cross petition filed by the Citors who will therefore henceforth be referred to as Objectors and the Citee as the 1st Petitioner respectively.

7. By their affidavit in support of their Cross Petition and presumably the Objection , the Objectors depose that they are also widows and dependants of the deceased; that the Objectors had married the deceased under customary law and though they did not have biological children with him, the deceased accepted their four children as his own; that the Petitioner had surreptitiously petitioned for a grant without involving them or seeking their consent. The complain that as beneficiaries, the had been excluded by the Petitioners who applied for the grant on the basis of an introduction letter from the Chief, Gatanga whereas the deceased resided at Biashara Location Thika. They relied on the introduction letter of the Chief in the latter location in proving their relationship with the deceased. They also deposed that the Petitioners have failed to disclose all the assets of the deceased and were guilty of intermeddling with the deceased's estate by disposing of some assets. They listed the deceased's dependants and assets at the date of death

8. At the hearing the disputants testified and adduced evidence through witnesses. For the Objectors, the first witness was SIMON MWANGI KAMAU **(PW1).** He testified that he is the Chief of Biashara Location , Thika and that he knew the deceased and his family. He stated that the deceased was polygamous and had four wives namely Catherine Wairimu, Rachael Wanjiru, Angeline Mueni and Peninah Waithira; that on 30/6/2016 all the deceased's wives together with their mother-in-law visited his office concerning the issue of the bona fide wives of the deceased and that the matter was resolved and he wrote a letter to the Deputy Registrar of this Court introducing the deceased's family members.

9. The gist of the evidence of JAMES KAMAU MURAGURI **(PW2)** was that he was the deceased's best friend for over fifteen years; that he knew the four wives of the deceased as the deceased had introduced them to him. During cross examination stated that he had attended the dowry ceremonies in respect of the four wives although he had no proof of the same.

10. JOHN MAINA GICHOHI **(PW3)** testified that growing up he knew the deceased as his father's friend and as Rachael Wanjiru's husband. He contended that he was briefly employed around 1994 by the said Rachael who was living with the deceased; that later the deceased developed a relationship with Angelina Mueni ; and subsequently with the fourth wife; and that it was a matter of public knowledge that the deceased had four wives.

11. The Objector RACHAEL WANJIRU IRUNGU **(PW4)** testified that having met the deceased in Garissa in 1978, she got married to him in 1988 under Kikuyu customary law and the two started living together. She produced affidavits sworn by the deceased and herself to the effect that she was married to the deceased. She indicated that the deceased paid dowry to her family and that the couple lived in Thika where they were known as husband and wife She admitted that the 1st Petitioner was the deceased's first wife and produced photographs she had taken with the said Petitioner. She testified that the deceased's obituary indicated that he had four wives as well as the eulogy. Admitting that she had no biological children with the deceased, she contended that the deceased had accepted her two daughters supporting them as his own by educating and providing for them and that the children adopted the deceased's last name as their surnames in their National Identity Cards (IDs)

12. ANGELINA MUENI MUKOLA **(PW5**) she testified that she met the deceased in 1987 or thereabouts and started to cohabit with him around 1997 ; that she got married under Kikuyu/Kamba customary law; and that the 1st Petitioner and her own co-Objectors were her co-wives. She produced a letters from Kenya Commercial Bank and from Shallom Community Hospital Athi River in support of her claims. She asserted that although she and the deceased did not sire any children the deceased accepted her sons as his children as evidenced by the use of his name in the sons' IDs. She produced an alleged agreement made by the co-wives met on 9/5/2016 acknowledging their mutual status as wives of the deceased as documented later in the deceased's obituary.

13. The third Objector and alleged fourth wife of the deceased PENINAH WAITHIRA NDUNGU **(PW6)** testified that the deceased was her customary law husband since 2014; that before her were the three wives of the deceased, namely, the 1st Petitioner and her co-Objectors ; that she conceived with the deceased one child born three months after his death; that the deceased had accepted her older child though not his biological child, as his own by providing for him a child . She testified that the deceased died at their home at Flame Tree Thika .

14. JOHN WAITHAKA **(PW7)** who had been summoned by the Court testified that he is the Assistant Chief of Gatanga Sub-Location and that he is the one who authored the introduction letter to used in the proceedings by the 1st Respondent as well as a second letter explaining

the circumstances of the first letter and particulars of the wives and children of the deceased.

15. On the part of the Petitioners, the first witness was the deceased's mother MARY WANJIRU MWANGI **(RW1).** The sum of her testimony was that the deceased had only one wife namely Catherine Wairimu Irungu, the 1st Petitioner and she had witnessed the payment of d dowry to the family of the said wife. She denied any knowledge of the other three Objectors as his son's wives saying they were never introduced to her by the deceased and that the deceased had never informed her that he had married any woman other than the 1st Petitioner.

16. CATHERINE WAIRIMU IRUNGU testified as **RW2.** She adopted her Replying affidavits as her evidence-in-chief. The key planks of her evidence were that she was the only wife of the deceased having married him under Kikuyu customary law in 1985; that the couple begot three children. She denied that the three Objectors were ever married to the deceased pointing out that that the Chiefs wrote contradictory letters regarding the deceased's widows. She asserted that she had refused the proposal by PW1 to resolve the issue of the deceased's bona fide wives because the said officer showed open bias and hostility towards and hence she had sought an introduction letter from the Chief at Gatanga. She stated that it's the three wives who prepared the eulogy and the newspaper advert hence their inclusion.

17. ZAKAYO NDUNGU KAGUNYA (RW3) testified that **RW2** is his niece and she was married to the deceased under Kikuyu customary law. He stated that he was not aware that the deceased had other wives.

18. The court directed the parties to file their written submissions. The Objectors through their counsel submitted that the 1st Petitioner having been married to the deceased under the Kikuyu Customary Law entered a potentially polygamous union. The court was urged to conclude that the deceased had four wives, based on the evidence on record. Reliance was placed on the case of **Gituanja vs Gituanja (1983) KLR 575** .It was submitted that the deceased performed certain Kikuyu Customary ceremonies in respect of the Objectors and that the community at large considered them wives of the deceased. Reliance was placed on the case of **Eliud Maina Mwangi vs Margaret Wanjiru Gachangi (2013) eKLR** for the proposition that customary law evolves with time and is not static. In the alternative, the Objectors anchored their claims on the common law doctrine of presumption of marriage, citing the Court of Appeal decision in **Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another (2009) eKLR** where the court held that a presumption of marriage could be drawn from long cohabitation and acts of general repute. Relying on the case of **Loise Selenka v Grace Naneu Andrew & another (2017) eKLR** the Objectors submitted that the deceased herein had prior to his death exercised voluntary parental responsibility over the Objectors' children and recognized them as his own. The Objectors attacked the evidence of RW1 as patently false citing her responses during cross-examination. In conclusion, the Objectors urged the Court to find that they had established that were the lawful wives of the deceased and therefore they and their children should be included as lawful and legal beneficiaries of the deceased's estate**.**

19. The Petitioners' written submissions were filed late but the Court accepted them as the judgment had not been written. The Petitioners assert that none of the Objectors had presented credible evidence in proof of their claims. Relying on the case of **Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR** on the essentials giving rise to the presumption of marriage , namely, long cohabitation and acts of general repute counsel submitted that the Objectors have not established any form of cohabitation with the deceased. And that if anything, the Objectors were merely mistresses who are not recognized by the law as beneficiaries to a deceased's estate. Lastly, counsel submitted that the 1st Petitioner has demonstrated that she is the only wife of the deceased as they contracted their a Kikuyu customary marriage ; that she and her children are the only beneficiaries of the deceased's estate.

20. The court has now considered the pleadings, affidavit and oral evidence and submissions of the respective parties. The undisputed background to this matter has already been set out. The key question identified for determination at the time of giving directions was the question of who is (are) the lawful spouse(s) of the deceased. This question has been enlarged through subsequent pleadings and evidence in the trial to become: who is/are the spouse(s), child or children of the deceased and therefore beneficiaries of his estate, and ultimately, who among the claimants are entitled to be appointed as administrators of the estate of the deceased. On the authority of the decision in **Odd Jobs V Mubea (1970)EA 476,** these are the issues the court considers to have been raised by the parties for determination.

21. Regarding the question of the lawful spouses and children all the claimants assert to have been married to the deceased under customary law and different times, or in the alternative that a presumption of marriage can be made in respect of them arising from long cohabitation and repute. Secondly that the children of the claimants are proper children of the deceased for the purposes of succession. There is no dispute however that the 1st Petitioner and her co-Petitioners who are her children were the spouse and children of the deceased, respectively. The Objectors do not dispute this fact, and variously refer to the 1st Petitioner as the first wife of the deceased.

22. There is no dispute that Rachael Wanjiru Irungu (hereafter the 1st Objector) who claims to be the deceased's second wife by customary law had no biological children with the deceased but she claims that her two children Judy Nyambura Irungu and Alice Wambui Irungu though not biological children of the deceased, were accepted by the deceased as his own hence the use of his surname in their IDs. As for Angelina Mueni Mukola (2nd Objector) she has two sons who are not biological children of the deceased but she asserts he accepted them as such after he married her under Kikuyu/Kamba customary law. Ditto for Peninah Waithira Ndungu (hereafter the 3rd Objector). She claims to have married the deceased in 2014 under Kikuyu customary law and that the deceased accepted her 11 year old son, P.K as his own and further that she sired one child with the deceased, that is **J.J.I** who was born some three months after the death of the deceased.

23. The 1st, 2nd and 3rd Objectors asserted that they started cohabitation with the deceased in 1988, 1997 and 2014 respectively. All testified that they contracted customary marriages with the deceased. For the 1st and 3rd Objector this was said to be Kikuyu customary law, and for the 2nd Objector, Kamba/Kikuyu customary law. In the case of **Gituanja v Gituanja)1983) KLR 575** the Court of Appeal held that:

> **"The existence of a customary marriage is a matter of fact to be proved with evidence."**

24. In the case of **Mary Njoki v John Kinyanjui Mutheru and 3 Others [1985] eKLR** the Court of Appeal, per **Kneller JA** referring to *inter alia* the decision of the Court in **Hortensia Wanjiru Yawe v Public Trustee Civil Appeal No 123 of 1976** and his own decision in

Anna Munini and Another v Margaret Nzambi [1984] e KLR stated:

> **"A reading of all the judgments in Yawe's appeal leads me to believe that it was held that:-**
>
> **i) The onus of proving customary marriage is generally on the party who claims it;**
>
> **ii) The standard of proof is the usual one for a civil action, namely, on the balance of probabilities;**
>
> **iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard (see Mwagiru v Mumbi (1967) EA 639, 642 (K; ….."**

25. The essentials of a Kikuyu customary marriage are described in **Eugene Cotran's "Case Book on Kenya Customary Law"** at page 30 to be:

> **"1) Capacity: The parties must have capacity to marry and also to marry each other.**
>
> **2) Consent: The parties to the marriage and their respective families must consent.**
>
> **3) Ngurario: No marriage is valid under Kikuyu customary law unless the Nguarario ram is slaughtered.**
>
> **4) Ruracio: There can be no valid marriage under Kikuyu customary law unless a part of the ruracio (dowry) has been paid.**
>
> **5) Commencement of cohabitation. The moment at which man and woman legally became husband and wife is when the man and woman commence cohabitation."**
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> See also **Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] e KLR, MNM v NMK & 13 Others (2017) e KLR and Eva Naima Kaaka & Another v Tabitha Waithera Mararo [2018] e KLR.**

26. It was the 1st Objector's evidence that she met the deceased in 1978 and contracted a marriage under Kikuyu Customary law; that the deceased visited her home (meaning home of origin) and paid dowry while the two lived as man and wife, first in Garrisa where jointly carried on business and later in Thika. She relied heavily on two affidavits sworn by the deceased and herself attesting to the alleged customary marriage. She stated that the deceased had visited her home and paid dowry in the company of the deceased's *guka* (grandfather) and that even the 1st Petitioner was in attendance.

27. Under cross-examination regarding the dowry ceremony, the 1st Objector stated that several persons including the *guka*, one Mbau and her aunt and uncle a Mwaura witnessed the ceremony but the deceased's mother did not attend. She stated that the customary ceremony happened in 1989. Surprisingly, she did not include **PW2** among the persons who took part. Yet the witness claimed to have been present during the ceremony which he said was in 2015. She did not give any further details of the event stating that a record of the event was made but she did not have it. She stated that she and the deceased moved from Garissa to Thika in 1990 but did not subsequently carry on any business with the deceased. That indeed he later started doing business with the 2nd Objector and upon asking the deceased he said he had married the said Objector.

28. She asserted that she initially occupied a house at Biafra estate that was owned by the deceased and later moved to a different house at Kimathi estate. She was put to task to tender evidence of cohabitation with the deceased in Garissa and to explain the fact that her two affidavits bear different dates of the alleged marriage – 1980 in **Exhibit 3** and 1988 in **Exhibit 1** but she maintained that she commenced cohabitation with the deceased in 1980. James Kamau Muragura **(PW2)** the avowed best friend of the deceased who should have been the Objectors' star witness merely stated in his evidence -in- chief that he knew the deceased to have married four wives and that he attended some of the Kikuyu customary ceremonies. He did not give the dates when these alleged wives started to cohabit with the deceased. And though he admitted during cross-examination that he resided in Juja, and the deceased in Garrisa and Thika that the deceased used to visit every wives' home, and that he too had known the family well. He did not give details of the visits or the location of the respective residences of the wives but asserted to have visited their homes.

29. Concerning the 1st Objector **PW2** was to state during cross-examination that:

> **"For the second wife, I knew she was a wife because deceased invited me to her parent's home and I heard them discussing dowry payments ….. other members of the deceased family attended the dowry ceremony for Rachael. Mother to the deceased was not there. The mother never attended any of the four (ceremonies) I attended these ceremonies as an elder as well as a friend. Others who were there included Ngethu. Mwaura was also there. I was part of the elders who went in for negotiations. I also attended the ceremony for the 3rd wife** (2nd Objector). **We were with some elders. It was before Catherine Wairimu's (1st Petitioner). It (**1st Objector's ceremony**) was probably early 90s. For Wairimu it was around 2014 – 2015. For Mueni** (2nd Objector) **dowry also was around 2014 – 2015. For Waithera it was probably in the last two years. Dowry ceremonies are not formal affairs. So, there are no documents to prove you were there. Rachael's dowry was about 1995. I had earlier said I knew deceased for 15 – 20 years. In the ceremony for Rachael I cannot recall which of the deceased's relatives attended. I am not quite acquainted with his relatives. I can see one sister here but she did not attend any of the ceremonies."**

30. Angelina Mueni (2nd Objector) had stated in her written statement that she married the deceased under customary law in 1992 but in her

evidence in chief stated that her cohabitation started "in the 1990s – probably 1997 or 1998" and that the deceased went to her parent's home to "report" that he was taking her as a wife. She was unable when pressed under cross-examination to be precise on the year when cohabitation started, stating like the 1st Objector that having met the deceased some ten years earlier, she settled in with him "around 1997" and finally that she married him in 1997. She did not identify the nature of the ceremony involved in contracting her alleged customary marriage to the deceased, stating that:

> **"Deceased went to visit my home. He went with 3 of his friends. He was with Kamau Daktari (PW2), John and another. These were my husband's friends. They went in 1997. I cannot remember the exact year. Deceased was not accompanied by any relatives."**

31. However, during his evidence, **PW2** stated that the ceremony relating to the 2nd Objector took place between 2014-2015. Similarly, the 3rd Objector claimed to have married the deceased under Kikuyu customary law in 2014 and that this entailed a visit by the deceased accompanied by **PW2** among others to her parents to "report" that he had married the Objector. She, like the 2nd Objector did not refer to the event as a dowry ceremony or such other customary right. She stated in cross-examination that she got married to the deceased in 2014 and confirmed that the deceased did not give any dowry to her parents but only "reported" to her parents during the visit alluded to by **PW2**, that he had married her. That was in 2015 and none of the relatives of the deceased attended the ceremony or event.

32. As for the Objectors' witness, **John Maina Gichohi (PW3)** who as earlier indicated also acted as a surety in the Cross Petition by the Objectors, he claimed to have met the deceased while in the employment of the 1st Objector. After claiming that he had met the 1st Objector first and knew deceased after being employed by his alleged second wife, the witness changed course to assert that the deceased had been known to him as a friend of his father. This information is not in his brief written statement in which he claimed to have been a close friend of the deceased for more than 10 years. And while he appeared to indicate that he had met the 1st Objector in Thika while she lived in Biafra estate, he claimed that the said Objector and the deceased had previously lived in Garissa. He stated in his evidence- in- chief:

> **"I got to know the deceased and Rachael well. They used to live in Garissa. Rachael moved to Biafra. I was Rachael's neighbor. I worked briefly for Rachael and she was with deceased. After 3 years Mueni** (2nd Objector) **hooked up with the deceased. Mueni used to live near where my mum used to live. Then deceased came to live with Mueni as husband and wife. I knew there was a first wife but I only got to know her recently. Everyone in the mtaa (location) knew the deceased had four wives. It is a matter of general knowledge."**

33. This is a witness whose evidence- in- chief itself is full of inconsistencies, and who purported to know much about the deceased's alleged two wives – Rachael and Mueni but did not know his first wife despite asserting that it was well known that the deceased had four wives. Under cross-examination he admitted that he was born in Murang'a and was a student in Murang'a until 1991. It took cross-examination for him to state the dates of his alleged employment with Rachael – 1994 – 1995 – for less than a year. He was to state that he did not recall the period in which Rachael lived in Garissa. The truth appears to be that he had no firsthand knowledge of this fact because in the period during which Rachael asserts to have lived in Garissa, the witness must have been away in school as a student in Murang'a. Even so, he claimed to have known that Rachael had only lived one year before she bought a matatu. He claimed, despite his earlier evidence on how he met the deceased to have known the deceased before he went to live in Garissa "*a long time ago when I was young ….*" And that after returning to Thika the couple lived at Kimathi (not Biafra as the 1st Objector asserted), and where according to the witness he lived as the neighbor to the 1st Objector.

34. PW3 admitted that he did not know when the deceased married Mueni but that "*we all got to know about it*." He stated that after Mueni got married to the deceased they started a cereals business. He stated that he was a neighbor to that couple and therefore knew Mueni before he knew her as the wife of the deceased. For her part, Mueni said she and deceased commenced cohabitation at Jamhuri estate. The witness said he lived at Biafra (not Jamhuri estate) in his evidence- in- chief and hence the 1st Objector was his neighbor. Concerning the residence and how he got to know Mueni **PW3** stated vaguely in his evidence- in- chief that Mueni used to live close where his mother lived. Seemingly his father and him lived in Biafra where he claimed the deceased used to visit his father when the witness was in primary school. Taken in its totality the evidence of **John Maina Gichohi** sounded contrived and lacking in candour. PW3 appeared adept at making up stories as he went along. Moreover, his involvement as a surety in the Cross petition by the Objectors depicts him as an already biased witness.

35. Returning to the evidence by the three Objectors, none of them were able to demonstrate that the customary rights necessary to contracting a Kikuyu or Kikuyu/Kamba customary marriage were performed in their respect. It is not enough to state merely as **PW2** and 1st Objector asserted that dowry ceremonies were held, or as the 2nd and 3rd Objectors assert that the deceased visited their respective homes to "report" he had taken them as his wives. The 1st Petitioner strongly opposed these assertions and called the deceased's mother, **Mary Wanjiru Mwangi (PW1)** who admittedly never attended the alleged ceremonies as a witness, which is odd given the alleged customary nature of the alleged ceremonies/events.

36. It was the evidence of the 1st Petitioner that the Objectors were at different times employed by the deceased in his bar and restaurant and had started similar wines and spirit businesses in the same neighborhood after leaving his employment; that the Objectors only laid claim to the deceased as their husband after his death ; and because they threatened to stop the burial, the family reluctantly allowed their participation in the funeral. She pointed out that at the time the 1st Objector claims to have met the deceased in 1978, the deceased was 18 years old, having been born in 1960. Her position was that none of the Objectors sired children with the deceased. Under cross examination she dismissed the Objectors' material evidence consisting of affidavits and identity cards obtained by the children of the Objectors in the deceased's name, and the leases and photographs relied on by the Objectors. However, she admitted that the 1st Objector's photographs **Exhibit 6b** represented the deceased and a person "resembling" the 1st Objector; **Exhibit 6c** represented herself and the 1st Objector ; **Exhibit 6d** reflected the 1st Objector, herself and **RW1** at the funeral of the brother to the deceased while **Exhibit 20** represented the deceased and the 3rd Objector.

37. She dismissed the evidence of **PW1** stating that he was openly biased against her and showed partiality towards the Objectors. The deceased's mother **RW1** was categorical that his son neither introduced him to the Objectors nor invited him to the alleged visits to the Objectors' homes and that the Objectors and their children never visited her home until the deceased passed away. She maintained that the deceased had only the 1st Petitioner as his wife and that she participated in the traditional marriage ceremonies in regard. She asserted that she lived in Makongeni while she operated a grocery business and that the deceased and the 1st Petitioner lived at Kiboko and she regularly visited them. She was categorical that the deceased had never informed her that he had taken other wives after the 1st Petitioner.

38. Under cross-examination **RW1** maintained that she only met the three Objectors after her son died but when shown photographs **Exhibit 6a, 6b, 6c and 6d** only identified the 1st Objector in **Exhibit 6c**, **e** and also in photo **Exhibit 5**. Regarding the photograph **Exhibit 6e** she affirmed the event to have been the funeral of her deceased son Peter Maina and the presence of the 1st Objector therein.

39. In their submissions the Objectors pour cold water on the evidence of the 1st Petitioner, especially through **RW1** dismissing it as falsehoods. This is primarily based on the fact that the witness did not identify the Objectors save the 1st Objector in photographs shown to her, in particular regarding her presence at the funeral of her son **Peter Maina**. However, it is confirmed by the Objectors themselves in their evidence that the witness did not attend any of the alleged customary ceremonies to perfect their marriage to the deceased. The mere presence of a person at a funeral or at an occasion cannot of itself be the basis of a finding of a customary marriage.

40. Although it is not unusual for an adult son to keep his marital issues away from his mother, it is odd in my view that the deceased could have taken not one but three additional wives under customary law without once inviting his mother to the attendant traditional ceremonies, or even taking the women to his mother to introduce them as his wives. None of the Objectors have indicated that they ever visited the home of **RW1** or were introduced to her at any time during their alleged relationship with the deceased.

41. The Court of Appeal stated in **MNM V DNMK & 13 Others [2017] e KLR** that:

> **"To prove a valid Kikuyu customary marriage, E was obliged to adduce evidence showing on a balance of probabilities the essential rites and ceremonies, without which a Kikuyu customary marriage is not valid, were performed. On the essentials of a valid Kikuyu customary marriage, Dr. Eugen Cotran, in his seminal work *Restatement of African Law: Kenya Volume1 The Law on Marriage and Divorce (supra)* explains that no marriage is valid under Kikuyu law unless the *ngurario* ram is slaughtered and that there can be no valid marriage under Kikuyu law unless part of the *ruracio*has been paid. (See also *Zipporah Wairimu v. Paul Muchemi, HCSCNO 1880 of 1970).* These are the rites that E readily admitted were not performed on account of her father's Christian background, and yet she was insisting that she was married under Kikuyu customs. Although she later on changed track and insisted that dowry was paid and *ngurario* performed, there is no credible evidence on record to prove that. It is inconceivable that the *ngurario*ceremony could be performed by a few people in a hurry, as she testified, on a day when the family was also involved in a funeral, and also in the absence of the deceased, who with E would have been the stars of the ceremony and responsible for cutting the lamb's shoulder. It is also far fetched to claim, as she did, that a different person represented the deceased in such an important ceremony. As this Court observed in *Eliud Maina Mwangi v. M Wanjiru Gachangi:***
>
> **Even if we allow room for evolution and development of customary law, it does not appear to us that *ngurario* under Kikuyu customary law has today transformed into a casual ceremony performed by a delegation of just two people.'"**

42. Equally, in the case there is scanty evidence of the performance of the mandatory rites that are critical to the contracting of a Kikuyu customary marriage. The payment of ruracio (dowry) was not proved by the Objectors. Nor the performance of the ngurario rite without which there can be no customary marriage were proved. The 2nd Objector who founded her claim as a wife on Kikuyu/Kamba customary law did not even attempt to demonstrate any customary Kamba marriage rites or the performance thereof in regard to her by the deceased. In the case of Naima Kaaka & Another V Tabitha Waithera Mararo [2018]e KLR the Court of Appeal reiterated the essentials of a Kikuyu customary marriage as described by Eugene Cotran and Gituanja v Gituanja before concluding that the basic elements necessary for a Kikuyu customary marriage was not proved in that case.

43. Regarding the centrality of the *ngurario* rite in the contracting and sealing of a marriage under Kiukuyu customary law, the Court of Appeal in Eva Naima Kaaka's case stated that:

> **"When the particulars of the alleged ceremony** (in the case)**are compared with the "essentials of a Kikuyu customary marriage" as described by Eugene Contran, and Gituanja v Gituanja (supra) it is plain to see that certain basic elements necessary for a Kikuyu customary Marriage were absent. For instance, the Ngurario is an integral part of the ceremony that signifies the existence of a Kikuyu customary marriage. But our re-evaluation of the evidence does not point to a Ngurario having taken place. This is because a fundamental component of a Ngurario is the slaughtering of a ram or goat… without the presence of the central feature of the Ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the deceased. See also Case v Ruguru [1970] EA 56."**

44. Similarly, in this case, no *ngurario* or *ruracio* ceremony were proved by any of the Objectors. Thus, the depositions contained in the affidavits marked as annexures **"RAP 6", "RAP" 7"** and **"RAP 7A"** that the 1st Objector and the deceased got married in 1980 or 1988 under Kikuyu customary law are based on a legal fallacy, even if genuine, on the part of the deponents. The court therefore finds that the Objectors have failed to establish that they were married to the deceased under Kikuyu and/or Kamba customary law.

45. The Objectors have submitted in the alternative that there is evidence to support a presumption of marriage between the deceased and the Objectors. In the case of **MNM V DNMK & 13 Others** the court having found that no customary marriage had been established proceeded to consider whether the court could have presumed a marriage between the deceased and the party named **"E"** based on cohabitation and the parties holding themselves out to society as husband and wife", and stated:

"In Mbogoh v Muthoni & Another [2006]1 KLR 199, this Court stated that where the requirements of statutory or customary marriage have not been proved and the issue of presumption of marriage has been raised, the court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable. (see also Kimani V Kimani & 2 Others [2006]2KLR 272)".

46. The court proceeded to state that as held in **MWG V EWK [2010] eKLR "the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact."**

47. In the case of **Mary Wanjiru Githatu V Esther Wanjiru Kiarie [2010] 1KLR 159** the Court of Appeal stated that:

"There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the Evidence Act, Cap 80, Laws of Kenya which provides that 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."

48. What are the essentials giving rise to a presumption of marriage? In **Naima Kaaka's case,** the Court of Appeal observed that:

"This court in the case of Phylis Njoki Karanja and 2 Others vs Rosemary Mueni Karanja [2009] e KLR in holding that the presumption marriage could be drawn from two conjoined factors, namely, long cohabitation and acts of general repute. It stated that: "Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long CIVIL CASE NO 7 OF 2018 JUDGMENT Page 15 of 16 cohabitation is not mere friendship or that a woman is not a mere concubine but that the long cohabitation has crystalized into a marriage and it is safe to presume the existence of a marriage." (emphasis added).

49. And in **MNM V DNMK** the court held that once long cohabitation between the deceased and the person who asserts to be his wife, was established the burden shifted upon the person disputing this presumption: -

"The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (Mbogoh V Muthoni & Another, *supra*. Mustapha JA added in Hortensia Wanjiku Yawe v Public Trustee (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption. see also Kimani V Kimani & 2 Others (supra)."

50. Starting with the 3rd Objector, it was her evidence that she met the deceased in 2012 and started cohabitation with him in 2014 at Flame Tree Thika and that though she already had a child one P.K., she got a child with the deceased, born 3 months after the death of the deceased. She claimed to have related to the deceased's daughter Mary Wanjiru prior to the death of the deceased and with the mother (1st Petitioner) after the funeral; that she had carried on business with the deceased who also gave her a car and that at the time of his death, the deceased lived with her at Flame Tree. She relied on several exhibits including a lease agreement signed by the deceased but not the landlord in respect of an apartment at Flame Tree **[Exhibit 19);** photographs taken during the visit to her parents' home and at the burial of the deceased **(Exhibit 20)**; a birth certificate in respect of her last child **J.J.I (Exhibit 21),** school fees deposit slip in respect of her son **P.K**.; Whatsapp messages and MPESA transactions **(Exhibit 23 and 24)** and an agreement allegedly signed by all the widows mutually recognizing one another as the wives of deceased (Exhibit 17).

51. She concluded by stating that everyone in Thika knew her as the deceased's wife. Among these, presumably are the two witnesses **PW1** and **PW2** none of whom could tell when the 3rd Objector started to cohabit with the deceased. For **PW2** who claimed to have known the deceased for about 20 years, he did not state the residential addresses of any of the wives he claimed to have visited. Moreover, the Biashara location chief **PW2** stated that while he knew the three Objectors as the wives of the deceased, he did not know when they started to cohabit. In particular, concerning the 3rd Objector, her alleged residence, Flame Tree did not fall within Biashara location, nor Kiburini where the 2nd Objector lived. In addition, **PW1** boldly asserted that all the children of the Objectors were biological children of the deceased when the mothers of these children asserted otherwise.

52. Looking at the evidence by **PW1** and **PW2** specifically in respect of the 3rd Objector, this was evidence of repute at best. Is there cogent evidence of long cohabitation? Black's Law Dictionary 9th Edn, page 296 defines cohabitation as:

"The fact or state of living together, especially as partners in life usually with the suggestion of sexual relations."

Section 2 of the Marriage Act of 2014 defines the term "cohabit" to mean: -

"to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles marriage."

53. Cohabitation is therefore not a series of intermittent incidents of the coming together of a couple but a settled continuous living together that entails the mutual ordering of life and affairs by them. The lease agreement relied on by the 3rd Objector is not signed by the alleged landlord and in any event the lessee was the deceased. The lease does not mention the 3rd Objector. Neither neighbours at Flame Tree nor

relatives or business colleagues of the deceased testified that the deceased lived with the said Objector in a manner falling within the above definition in the material period. That the deceased may have deposited fees in respect of the 3rd Objector's son or that the birth certificate in respect of the 3rd Objector's child reflects the name of the deceased does not prove cohabitation. It is striking, looking at the 2-3 month window snippet of Whatsapp messages exchanged between the 3rd Objector and the deceased's daughter Mary Irungu so heavily relied on by the 3rd Objector, that not a single message emanated from the deceased to the 3rd Objector.

54. The MPESA statement itself contains only one payment of KShs 20,000/= by the deceased to the 3rd Objector on 14/5/2016. The MPESA statement does not indicate that the 3rd Objector paid Mary Irungu's rent. Rather from the Whatsapp messages it seems that the said child was trying to get the 3rd Objector to press her father to respond to her request for rent. As for the sum of KShs 1,030/= sent to Mary Irungu on 31/5/2016 it appears consistent with the entire Whatsapp conversation between the 3rd Objector and the deceased's daughter. The latter was seemingly unable to get her father to give her money for her upkeep and was using the 3rd Objector to push him. It is possible to conclude from this conversation that the 3rd Objector had a close relationship with the deceased even if working at his businesses. And perhaps that during this specific period was recuperating in a place where the 3rd Objector had access to him. The Court is not persuaded, without more, that this conversation can be read to imply that Mary Irungu recognized the 3rd Objector as the deceased's wife.

55. All in all, even if it is accepted that the deceased may have cohabited with the 3rd Objector at Flame Tree for 2 years from 2014, during which time she ran some of his businesses, this in no way can be considered to be prolonged cohabitation. At best, the 3rd Objector was a mistress or concubine but not a wife to the deceased. I so find. The birth certificate tendered in respect of the child **J.J.I** by itself does not prove that the child born after the death of the deceased was his child. However, the court is prepared in view of the circumstances of birth and the provisions of Section 119 of the Evidence Act to hold that the child **J.J.I.** was a child of the deceased. But the child **P.K** does not qualify as a child of the deceased for succession purposes.

56. This case presents a special difficulty in that the parties claiming to be the deceased's wives did not live together in one homestead but as often happens especially in polygamous marriages in rural settings in separate homes. Secondly, despite the fact that the deceased was a relatively successful business man with several real assets to his name, there is no evidence that he settled any of his alleged 2nd to 4th wives in any permanent residences or construct homes for them. The onus lay with the claimants in these circumstances to demonstrate that indeed they were in long cohabitation with the deceased as to justify the presumption of marriage.

57. The 2nd Objector stated categorically in her written statement that she married the deceased in 1992 and cohabited with him at Jacaranda Pastures. In her evidence in chief she described the relationship in broad strokes stating that she met the deceased "in the 1980s" or that it was "probably 1987 or 1988" and that:

We started living together in the 1990s – probably in 1998.We were living in Jamhuri Estate then we moved to Jacaranda".

58. Like her alleged co-wives the 1st and 3rd Objectors denied that she was an employee of the deceased but stated to have had her own business when she married him. She further asserted that the deceased paid her rent. The remainder of her evidence was taken up with a long account of the care she gave to the deceased after his involvement in an accident seemingly on 1.3.2016 by taking him to Gatundu hospital on that date and on 10th March 2016; and subsequently to Kijabe hospital and on 29.3.2016 to Shalom Community hospital Athi River and other roles played after he died. She stated that her children's identity cards bear the deceased's name.

59. Under cross-examination she could not recall the exact date when she married the deceased although she allegedly became "serious" with him in 1993, that cohabitation commenced "around 1997" but admitted and that her last children was born in 1998 and "1990 or 1991" ,respectively were not biological children of the deceased. Although she asserted that the deceased paid rent for their home at Jamhuri and Jacaranda, she could not produce any receipts. Besides, according to **PW1** the said Objector lived at Kiburini before relocating. Moreover, from the evidence of **PW2** and **PW4**, the 2nd Objector lived either in Biafra or Kiburini as they were alleged neighbours.

60. If the 2nd Objector is to be believed, by 2016 she had cohabited with the deceased for 19 years, having started a relationship with him some 3 years prior to cohabitation. That would make a total of 23 years of being lovers and spouses. I find it odd that the 2nd Objector could not tender a single photograph to demonstrate this relationship. Notably all her documentary exhibits relate to the year 2016. Despite asserting that her children were raised and educated by the deceased, the Objector could not produce a single photograph of events such as school visits or family occasions. Not even birth certificates or school certificates in respect of the children to support the identity cards procured by the said children after 2008. Thus, the 2nd Objector appeared to cling to a lease agreement dated 2016 which, apart from not being fully executed did not bear the date of execution or names of signatories. Neither did it bear her name.

61. Her letter **Exh. 11** written by the KCB after the death of the deceased was not addressed to this Objector. Nor did the treatment notes from Gatundu hospital and prescription from Shalom Hospital Athi River **[Exh 2 and 13 and 16]** indicate the Objector's alleged role. As for the handwritten endorsement on the face of the Objector's advocate's letter to Shalom Hospital (**Exh**. **14)** to the effect that the deceased had on 29.3.2016 declared the 2nd Objector to the Shalom Hospital as his next of kin, it is no more than hearsay evidence as the actual record allegedly completed by the deceased to show that the 2nd Objector was his next of kin was never tendered. The Court must observe that as drafted, the advocate's letter is inaccurate as it appears to misrepresent to the Shalom Hospital not only the actual hearing date of the matter but it also unfairly invokes the authority of this Court by suggesting that the Court desired to find out the identity of the deceased's next of kin. Besides, there is no evidence at all that the deceased was admitted or underwent any surgical procedure at the said hospital as claimed by the 2nd Objector. Not even a discharge summary. The 2nd Objector's sole document in this regard is a receipt **Exh. 16** which reflects payment of KShs.700/= for *"dressing and medicine."*

62. Similarly, the document **Exh. 18** merely showed the surrender of the deceased's identity card after his death. As for the alleged widows' agreement dated 9.6.2016, this was after the death of the deceased when evidently an issued had arisen, according to all witnesses, as to the lawful wives of the deceased throwing the burial arrangements in disarray. Indeed, the eulogy of the deceased contained in **Exh.8** upon

which the Objectors placed much reliance did not have them as wives of the deceased, or their children as such. The eulogy merely records that the deceased after he married the 1st Petitioner had "met" the Objectors and their respective children.

63. That the 2nd Objector, an alleged wife of the deceased for over 19 years should cling to such scanty and threadbare pieces of evidence and an MPESA transfer of some KShs1,500/= to the deceased's daughter on 11/5/16 **[Exh. 10]** to prove her status appears remarkable. More so that in respect of this MPESA statement not a single transaction involved the deceased. If, as it appears the deceased was shortly before his death living at the apartment at Flame Tree shared with the 3rd Objector it is quite likely that the documents **Exh. 9 – 16** dated prior to the deceased's death were in that house at the time of his death and therefore available to the three objectors through the 3rd Objector. The remaining documents were evidently procured after the death of the deceased as the Objectors sought to establish themselves as his wives.

64. It is opportune at this point to comment on the evidence of **PW1** the Biashara Location Chief. He stated that on 30/6/2016 he hosted the "wives" of the deceased concerning the dispute as to who was a wife. This was well after the funeral and the alleged agreement **Exh. 17** dated 9/6/16 between the alleged wives. Both **RW1** and **RW2** confirm this meeting took place but assert that **PW1** was hostile to the 1st Petitioner while **RW1** thought he had no jurisdiction to deal with the question at hand. In court **PW1** claimed that the four women had visited his office seeking a letter of introduction for succession purposes.

65. However his notes of the meeting (annexed as annexure **RAP 15A**) to the Objectors' affidavit but not produced state clearly that the meeting was called after **PW1** had received complaints from the 2nd and 3rd Objectors concerning the 1st Petitioner and her daughter taking over certain businesses "without consultation to other wives" (sic). Under cross-examination he denied that a dispute was presented to him on 30.6.16. He however pointed out that the 1st Petitioner had not agreed to attend a meeting with elders as recommended at that meeting. Nevertheless, on 11th July 2016 he did write the introduction letter annexure **"RAP 1"** to the Objector's affidavit and was careful to state therein as a postscript that:

> **"NOTE: The 1st family was no co-operative and could not provide copies of ID cards (i.e for children).**

66. This despite the fact that the 1st Petitioner's identity card number was indicated. While the witness may have considered it within his mandate to try and resolve any dispute within the deceased's family, in my view the issue of who was the *bona fide* wife of the deceased or question of the management of the estate was not part of it. Other actions that appear to shine a biased light on the witness. Including the fact that he took it upon himself to refer Objectors to the Chief Gatanga **(PW7)** who had issued a letter to the 1st Petitioner and spoke to him not only to "clarify" his initial letter but also went out of his way after summons were issued for John Waithaka Chief Gatanga **PW7** by the court to call and ask him to come to court. Little wonder the witness appeared utterly discredited and reduced to merely reiterating material and evidently derived from **PW1's** letter before eventually admitting during cross-examination that he did not know the family of the deceased.

67. In his evidence, **PW1** appeared to assert certain facts even when it was clear they were outside his personal knowledge. For instance, whereas the Objectors had admitted not to have had any biological children with the deceased, he asserted otherwise. And while admitting that Kiburini and Flame Tree where the 2nd and 3rd Objector lived were not in his jurisdiction and he did not know when the deceased married his wives, but maintained that he knew him to have had four wives. His source of information being that the deceased had introduced him to the wives and he also confirmed from other sources. Thus, he claimed to also know the children of the four wives and even could hazard a guess that the 1st and 2nd wives were married to the deceased over 30 and 10 years, respectively.

68. This is remarkable for someone who occupied the office of a chief in a densely populated area and did not, on the face of it, relate with these families as a friend or frequent visitor to their houses. Given his stance, it is no surprise that the 1st Petitioner did not think he was impartial. As noted earlier, if any value were to be attached to the evidence of **PW1** and **PW2** it would be primarily on repute and not the period of cohabitation of the Objectors and the deceased. Reviewing the evidence tendered by the 2nd Objector, this court is not satisfied that it qualifies as prolonged cohabitation capable of giving rise to a presumption of marriage.

69. The 1st Petitioner testified that the Objectors were business colleagues and or previous employees of the deceased who ran a bar and restaurant known under the umbrella business name "Topstar". Indeed, the Objectors admitted having been businesspersons when they met the deceased. In particular, the 2nd and 3rd Objectors ran wines and spirits shops close to Topstar restaurant prior to their alleged marriage to the deceased and carried on the same business at the time of the hearing.

70. The evidence on record depicts the deceased as a man who engaged in several romantic liaisons concurrently despite retaining the 1st Petitioner as a wife. Being a successful businessman, it is no surprise that the deceased had a steady stream of paramours competing for his attention. These would include business associates and even employees in his liquor and restaurant business. In my considered view, the 2nd Objector fell within this category and at best was a concubine during a brief period of the deceased's life. Her two sons, notwithstanding the names in their IDs, are not the children of the deceased.

71. Concerning the 1st Objector however, there is consistent evidence, starting with the affidavits sworn by the deceased and herself between 1994 and 1996 (**Exh. 1 – 3)** that the said Objector indeed cohabited with the deceased since 1988. In addition, there is unrebutted photographic evidence particularly **Exh.5,6b, 6c and 6(e)** that support her claims. Though undated, **Exh. 6(c)** reflects a much younger deceased and the 1st Objector posing by a vehicle KAC 698Y. While **Exh. 6e** fortuitously bears the year 1999 on the cross of the coffin on the deceased's admitted late brother Peter Maina whose burial was captured in the photograph. Even **RW1** conceded that that the 1st Objector, the 1st Petitioner, and the deceased were in the said photograph. It is surprising that the 2nd Objector who claims to have commenced cohabitation with the deceased in 1997 having met him in 1993 is not depicted in this photograph taken at such an important family event.

72. The court earlier noted that there was no evidence of a customary marriage contracted between the deceased and the 1st Objector as deposed by them in the affidavits **Exh 1 – 3**. However, despite this and the discrepancy in dates found in the said affidavits, the declarations therein about their cohabitation *"as husband and wife"* appear to lend much weight to the evidence of the 1st Objector. Even assuming the cohabitation started in 1988 as asserted by the 1st Objector, by 1996 when the last affidavit was sworn, the couple would have lived together for a period of 8 years which would mean that by the time of the death of the deceased, the relationship was 28 years old. That is a long period indeed.

73. And although there appears to be a gap in her evidence concerning cohabitation after the deceased started *to "do business with"* the couple's neighbour, the 2nd Objector and the 1st Objector's relocation from the home owed by the deceased in Biafra estate , to Kimathi estate , it does seem, on a balance that the 1st Objector did cohabit with the deceased long enough to raise a presumption of marriage and that by their affidavits and other actions the two held themselves out as a married couple even though they did not sire biological children between them.

74. Concerning the 1st Objector, the 1st Petitioner during cross-examination was shown the photographs marked **Exh 6 a – e**. While she denied that the 2nd Objector's children therein were known to her, she conceded the presence of her own children in the said photographs. She also accepted that photograph **Exh.6b** represented her husband and *"a woman who resembles Rachael"* (1st Objector); that **Exh 6c** and **e** reflected herself and the 1st Objector while **Exh.6d** contained images of the 1st Objector, the 1st Petitioner, together with **RW1** and the deceased at the burial (in 1999) of the latter's brother. These are obviously old photographs though not electronically dated. **Exh. 6b, 6c, 6e** reflect a much younger 1st Objector and 1st Petitioner and even deceased. **Exh. 6e** was clearly taken in 1999 as per the date on the cross. The 1st Petitioner could not explain how she came to be in photographs **Exh. 6b** and **e** alongside the 1st Objector, and while dismissing the 1st Objectors "marriage" affidavits as false, did not call any evidence to controvert the contents therein. On all accounts, but unsurprisingly, the 1st Petitioner may never have accepted the 1st Objector as the deceased's 2nd wife, but that cannot take away the fact that the deceased indeed married a second wife. The court is persuaded that on a balance of probabilities, the 1st Objector has demonstrated long cohabitation and repute such as to give rise to a presumption of marriage between the 2nd Objector and the deceased. The Court therefore finds that the 2nd Objector was the 2nd wife to the deceased and her two daughters were stepchildren of the deceased.

75. In the circumstances, it is evident that the Petitioners were perfectly entitled by dint of the provisions of Section 66 of the Law of Succession Act to apply for a grant in this case and in light of the disputation arising concerning the status of the other claimants, the Petitioners cannot be entirely blamed for non-inclusion of the said claimants as beneficiaries. In the circumstances, this court will direct that a grant does issue in the names of Catherine Wairimu Irungu (Widow), Rachael Wanjiru Irungu (Widow), Francis Gichiri Irungu (son) and Mary Wanjiru Irungu (daughter). The court grants liberty to file an application to confirm the grant before the expiry of 6 months considering the age of the dispute. Parties will bear own costs.

SIGNED AND DELIVERED ELECTRONICALLY THIS 25TH DAY OF SEPTEMBER, 2020

C. MEOLI

JUDGE