THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO 261 OF 2007

IN THE MATTER OF THE ESTATE OF MORRIS KILONZO MUSYIMI (DECEASED)

PRISCILLA MUMBUA KILONZO.....APPLICANT/1ST ADMINISTRATOR

VERSUS

PHOEBE MBENEKA KILONZO.....RESPONDENT/2ND ADMINISTRATOR

AND

DANIEL KILONZO AND FRANCIS KILONZO.....PROTESTORS

AND

SHADRACK MUSYOKI.....OBJECTOR

AND

BENARD MUTETI MUNG'ATA.....INTERESTED PARTY

RULING

Introduction

1. By Summons for Confirmation of Grant dated 11th October, 2007, the 1st Administrator/applicant herein, **Priscilla Mumbua Kilonzo**, seeks the following orders:

> **(1). That the proceedings of 24th October, 2012 appointing Phoebe Mbeneka Kilonzo as the 2nd administrator be reviewed and or set aside to remove her name from the grant leaving Priscilla Mumbua Kilonzo as the sole administrator of the estate herein.**
>
> **(2). That upon the grant of prayer (1) above, the grant of letters of administration intestate made to the said Priscilla Mumbua Kilonzo in this matter on 26th February, 2009 be confirmed in terms of the annexed Schedule of distribution.**
>
> **(3). That the costs of this application be in the cause.**

The Applicant/1st Administrator's Case

2. According to the applicant/1st administrator, the grant of letters of administration of the said estate was made to her on 26th February, 2009 and on 24th October, 2012 it was rectified to include, the Respondent herein, **Phoebe Mbeneka Kilonzo** as the 2nd administrator. The applicant deposed that she got married to the deceased on 12th August, 1944 through a monogamous statutory marriage. It was the applicant's case that the deceased did not have capacity to marry any other wife during the subsistence of the said marriage and based on legal advice averred that the appointment of **Phoebe Mbeneka Kilonzo** as an administrator was an error of law and fact which contravenes the law and is also contrary to public interest.

3. It was the applicant's case that the said **Phoebe Mbeneka Kilonzo** is a stranger to the Estate and should thus be disregarded and her name removed from the grant as she is taking advantage of the applicant due to the fat that the applicant is not blessed with a child.

4. The applicant asserted that the deceased left her as his surviving dependant thus all the properties should be registered in her name as no application for provision for dependants is pending. According to the applicant, the deceased owned the following properties:

a) Machakos/Kiandani/2783

b) Machakos/Kaliluni/1754

c) Machakos/Kiandani/2601

d) Machakos/Kiandani/2784

e) Machakos/Kiandani/2601

f) Nzaui/Kikumini/17

g) Nzaui/Kikumini/692

h) Plot at Kativani

i) Plot at Masimba

5. The applicant disclosed that the deceased left the following as his creditors who had bought the plots from him:

i. Elizabeth Kanini Mulumbi – Machakos/Kiandani/2784

ii. Shadrack Musyoki - Machakos/Kiandani/2601

6. It was the applicant's view that the estate should be distributed as per the schedule annexed for distribution as it was more than six months since the grant was made and rectified and there was no estate duty payable in respect of the deceased.

7. The applicant disclosed that she had sold Machakos/Kiandani/2783 after she got a certificate of confirmed grant which was issued to her on 26th February, 2009.

8. It was submitted on behalf of the Applicant/1st Administrator that by the time of the revocation of the earlier grant, the Applicant had already dealt with the estate of the deceased on the strengthen of the confirmed grant.

9. It was her submission that the deceased and the applicant having been married under the ***Marriage Act***, Cap 150 Laws of Kenya, the marriage was monogamous in nature and the deceased had no capacity to contract another marriage during the subsistence of their marriage based on section 37 of the said Act. It was accordingly submitted that any other alleged marriage would and was void for all purposes and the sanctions for doing so are provided under section 50 of the Act.

10. According to the applicant, there is no evidence that the Respondent was married to the deceased under customary law or any other law. Similarly there is no evidence that any ceremonies were performed to customarily validate the alleged marriage and in the absence of that the Court cannot ascertain or presume a marriage existed. In this respect the Applicant relied on **Irene Njeri Macharia vs. Margaret Wairimu Njomo & Another [1966] eKLR**.

11. While the Applicant appreciated the provisions of section 3(5) of the Law of Succession Act, it was submitted that there is no evidence whether the Respondent and the deceased ever went through any ceremony of marriage or even that the concept of a presumed marriage can be applied to their circumstances. In any case, it was submitted that the Respondent's case is that she was married way back in 1962 which was before the ***Law of Succession Act*** case into force in 1981. According to the Applicant, ***the Law of Succession Act*** does not provide for its retrospective application to any succession matter which arose before it came into force. In this respect the Applicant relied on section 2 of the said Act. It was the Applicant's case based on the decision in **Irene Njeri Macharia vs. Margaret Wairimu Njomo & Another** (supra) which referred with approval **Re Ruenji's Estate [1977] KLR** 21 and **Re Ogola's Estate [1978] KR 18**.

12. As regards the consent which was recorded on 24th October, 2012, it was submitted that the said consent contravenes the law and is contrary to public interest. It was submitted that the said consent was recorded contrary to the applicable law, which was section 3(5) of the ***Marriage Act***, Cap 150 Laws of Kenya as the ***Law of Succession Act*** was not applicable to this case.

13. According to the Applicant the contention that the elders purported to distribute the estate of the deceased is legally untenable as only the Succession Court can adjudicate over the property of a deceased person.

Protestors' Case

14. There were affidavits of protest sworn by **Daniel Kilonzo** and **Francis Kilonzo** who deposed that they were the sons of the deceased herein.

15. According to the protestors the Respondent was their biological mother and the 2nd wife to the deceased. It was deposed that the Respondent was married to the deceased in 1962 under the Kamba Customary Law and they were blessed with 5 sons and 6 daughters whose names were disclosed. According to the Protestors, the Applicant, who was his step mother, was the 1st wife of the deceased but was not blessed with any child. Therefore the Respondent being the widow to the deceased had the same degree of priority with the Applicant, her co-wife and all the surviving beneficiaries.

16. According to them, the Applicant as their mother took care of all the children of the Respondent when their father the deceased and his biological mother, the Respondent, were residing in Nairobi and according to them the Applicant did this in recognition of the fact that they were the deceased's children. It was the Protestors' case that the Applicant cannot claim at this point in time that the Respondent is a stranger to the deceased's estate and that they were illegitimate children. To the Protestors the current application is a move calculated to selfishly divest and/or deprive the heirs and/or beneficiaries to the estate from receiving their rightful shares and/or legal entitlement from the deceased's estate.

17. Based on legal advice, the Protestors averred that a marriage that is monogamous in a potentially polygamous society, does not bar a polygamous marriage being successfully and validly celebrated. They further averred that the law allows a potentially polygamous marriage to be successfully celebrated before or after a monogamous marriage. It was therefore their position that potentially polygamous marriage is a valid marriage and the wife and children of the said marriage are "wife" and "children" within the meaning of the word in the Law of Succession and that such wife and children will accordingly have equal rights with the wife and the children of a monogamous marriage.

18. According to the Protestors, the properties in Nzaui, being Nzaui/Kikumini/17 and 692 were acquired by the deceased and allocated to the Respondent and at the time of the said acquisition and allocation the children of the deceased and their step-mother, the Applicant, used to live in Machakos Iveti. They deposed that it was at this point in time that the deceased built a family house for his 2nd family and the Respondent moved in which is todate her place of aboard.

19. It was disclosed that before his demise, the deceased had subdivided all his estate to the two houses (1st wife's and 2nd wife's) and neither of them complained until the time when he passed on in 1994, when the Applicant raised issues on the distribution of the estate herein. The Protestors averred that they had to call for a Council of Elders who took an inventory and measurements of all the properties under the deceased's name. On 7th April. 1998, after hearing both side, the Council issued a resolution dividing the estate as previously done by the deceased. According to them, they were all in agreement with the said resolution which he urged the Court to adopt in drawing the Schedule of Distribution of the deceased's estate. During the said proceedings, it was averred that the Applicant was present and actively participated therein and was it total agreement with the resolution.

20. According to the Protestors, in the said resolution, the Council of Elders resolved that Title No. Machakos/Kiandani/2783 comprising 12 units of residential houses be allocated to the deceased's two widows in equal shares with each taking six (6) units. However contrary to the foregoing the Interested Party herein, **Bernard Mungata**, the lawyer who represented the Applicant in obtaining the first grant which was eventually rectified by the Court, took advantage of his position to illegally purchase the said property without a sale agreement and/or record showing how the said transfer was effected. According to the Protestors, the interested party, being an advocate of the High Court of Kenya knew very well that the Applicant had no capacity to sell that which was not hers hence the transaction was irregular, illegal and void.

21. It was the Protestors' case that the Plots at Kativani and Masimba do not form part of the deceased's estate as the same are registered in the names of the Respondent and as such ought not to be included amongst the deceased's properties.

Objector's Case

22. The Objector, **Shadrack Musyoki**, also filed his response.

23. According to the Objector, he and the deceased **Morris Kilonzo Musyimi** entered into an agreement for the sale of land known as **Machakos/Kiandani/2601** between 1992 and 1994 and the Objector herein complied with his obligations under the Sale Agreement including payment of the full purchase price to the deceased. Following the demise of **Morris Kilonzo Musyoka**, the Applicant herein applied for Grant of Letters of Administration of the estate of the deceased and in her application for grant, land known as **Machakos/Kiandani/2601** had not been included in the schedule of assets and liabilities by the Administrator herein. The Administrator herein by Summons for Rectification of Grant filed before this Honourable Court on 12th April 2016 sought to rectify the certificate of grant issued on 26th February 2009 and sought that Land known as **Machakos/Kiandani/2601** be included as part of the estate of the deceased.

24. According to the Objector, section 51(2)(h) of the ***Law of Succession Act*** provides that:

> ***Every application shall include information as to a full inventory of all the assets and liabilities of the deceased.***

25. The Objector relied on the case of **Johnson Muinde Ngunza & Another vs. Michael Gitau Kiarie & 12 Others (2017) eKLR**, where the Court stated that:

> ***"[T]he Law of Succession Act recognizes the purchaser's rights and in support of these submissions the said (sic) the Law of Succession defines a "Purchaser". Purchaser according to the Act means a purchaser for money or money worth."***

26. It was submitted that the Objector herein paid the purchase price in instalments as agreed between himself and the deceased for the sale of land known as **Machakos/Kiandani/2601** and he is therefore a purchaser within the meaning assigned under the **Law of Succession Act**. The Objector also relied on the case of **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, in which the learned judge observed that :

"This Court's view before distribution of the estate of the deceased under Section 71 of the *Law of Succession Act* Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution."

27. It was therefore submitted that that the Objector's interest as a creditor of the Estate of the deceased ought to be factored in the mode of distribution and that the Administrators of the Estate transfer **Machakos/Kiandani/2601** to the Objector.

The Respondent/2nd Administrator's Case

28. Apart from the protest by **Daniel Kilonzo** and **Francis Kilonzo**, there was also a protest by **Phebe Mbeneka Kilonzo**, the 2nd administrator and the Respondent herein.

29. According to the Respondent, following the death of the deceased on 4th May, 1994, the Applicant applied for and was issued with Grant of Letters of Administration Intestate which letters were subsequently confirmed on 25th February, 2009. However following an application seeking revocation of the said grant, when the matter came up for hearing on 24th October, 2012, a consent was recorded by which the Respondent was added as the 2nd administrator of the deceased's estate and the original grant rectified accordingly. It was then directed that the 1st and 2nd administrators agree on the new mode distribution of the estate to include all the beneficiaries. However her proposals forwarded to the Applicant were never responded to.

30. It was therefore the Respondent's case that this application is calculated to selfishly divest and/or deprive the heirs and/or beneficiaries to the estate from receiving their rightful shares and/or legal entitlement from the deceased's estate. According to her this is not the first time the Applicant is raising the issue relating to statutory marriage between her and the deceased since the same issue was raised during the hearing of the application for revocation of the grant issued to the Applicant but was determined by the recording of the aforesaid consent.

31. The Respondent lamented that the Applicant has waited for 7 years to mischievously raise the issue.

32. While reiterating the depositions of the Protestors herein, the Respondent averred that she was the 2nd wife to the deceased having been married in the year 1962 under the Kamba Customary Law and that she stayed and cohabited with the deceased from the year 1962 as husband and wife till the deceased passed away on 4th May, 1994 during which time they were blessed with five sons and six daughters whose particulars she disclosed. It was therefore her case that she is a widow of the deceased and therefore has the same degree pf priority with the Applicant and all the surviving beneficiaries and further that her children are dependants and/or beneficiaries of the estate and are legally entitled to a share therefrom.

33. The Respondent averred that she still has in her possession the original Title Deed for Machakos/Kiandani/2783 which confirms that the Applicant must have used unfair means to effect any changes for transfer of the Title at the Department of Lands. She accordingly exhibited a certified copy of the said title.

34. While confirming that she was amenable to sitting down, deliberating and agreeing with the Applicant and all the beneficiaries on how Machakos/Kiandani/2783, being 12 units of residential houses, should be distributed, the Respondent maintained that the two Plots at Kativani and Masimba do not form part of the deceased's estate as the same are registered in her names and as such ought not to be included amongst the deceased's properties.

35. It was submitted on behalf of the Respondent that it is trite law that long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it. In this respect the Respondent relied on **Hortensiah Wanjiru Yawe vs. Public Trustee Civil Appeal No. 13 of 1976** as quoted with approval in the Court of Appeal decision in **VRM vs. MRM & Another Nairobi Civil Appeal No. 311 of 2002**, **Mary Njoki vs. John Kinyanjui Mutheru Civil Appeal No. 71 of 1984** and **M.W.G vs. E.W.K [2010] eKLR**.

36. It was submitted that the Respondent's evidence that she was married to the deceased under Kamba Customary Law, stayed and/or cohabited with the deceased from 1962 as husband and wife till he passed away on 4th May, 1994 during which period they were blessed with five sons and six daughters has not been disputed by the Applicant. It was further submitted that he Respondent's children have averred that they recognise the Applicant as their mother, since she took care of all of them when both their father and mother were residing in Nairobi hence the Applicant recognised the fact that they were the deceased's children from his marriage with the Respondent. It was therefore the Respondent's case that from the evidence advanced it is clear that there existed a long cohabitation between the Respondent and the deceased and circumstances which show that despite lack of formal marriage the parties intended to live and act together as husband and wife.

37. It was submitted that assuming that the Respondent got married to the deceased after formalising his marriage under the ***African Marriage and Divorce Act***, she could still find refuge in section 3(5) of the ***Law of Succession Act***, which recognises her status as a wife for purposes of the ***Law of Succession Act*** more particularly in sections 29 and 40 of the Act. It was submitted that whereas the ***Law of Succession Act*** sought to recognise the children of the deceased regardless of the status of the children's mother's relationship with their father, the Act did not recognise the mothers of such children whose marriage to the deceased otherwise resulted in bigamy. Therefore the Act specifically sought to address the plight of women who found themselves in the position of the customary law widows in the case of **Re Ruenji's Estate [1977] KLR** 21 and **Re Ogola's Estate [1978] KR 18.** This, it was submitted was appreciated in **Irene Njeri Macharia vs. Margaret Wairimu Njomo & Another** (supra). It was the Respondent's case that since the deceased died on 4th May, 1994, pursuant to section 2 of the ***Law of Succession Act***, the Act applies in matters concerning the distribution of the deceased's estate.

38. As to whether the consent made on 24th October, 2012 and the consequent orders ought to be set aside, based on **Brooke Bond Liebig**

(T) Limited vs. Mallya [1975] EA 266 and **Flora N. Wasike vs. Destimo Wamboko [1982-1988] KAR 625**, it was submitted that the circumstances that would justify the setting aside of a consent have not been proved as the parties who consented to the compromise knew all the facts and hence there was no possibility of mistake or misapprehension.

Determination

39. I have considered the issues raised in this matter. The main issue for determination here is whether the Respondent was the wife of the deceased, **Morris Kilonzo Musyimi.** There is no doubt that at the time that the Respondent alleges that she got married to the deceased through the Kamba Customary Law, the deceased was already married to the Applicant herein on 12th August, 1944 through a monogamous statutory marriage. Section 37 of the ***Marriage Act*** provides that:

> ***Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.***

40. It is appreciated by the parties that it was pursuant to this provision that the decisions in **Re Ruenji's Estate [1977] KLR** 21 and **Re Ogola's Estate [1978] KR 18** were decided. However with the enactment of the ***Law of Succession Act*** which came into force in 1981, section 3(5) therefore provides that:

> ***Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.***

41. The Applicant however contended that since the ***Law of Succession Act*** commenced after the alleged marriage between the Respondent and the deceased, section 3(5) aforesaid is not applicable as the Act was not expressed to operate retrospectively. This position was based on section 2(1) and (2) of the Act which provides that:

> ***(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.***
>
> ***(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.***

42. It is therefore clear that the provisions of the ***Law of Succession Act*** are applicable to *all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.* The Act does not distinguish between the time when the marriage was entered into. In other words what determines the application of the provisions of the Act is the time of death of the deceased whose estate is to be administered and not the time of the marriage. It follows that as the deceased herein died in 1994, his estate is to be administered in accordance with the provisions of the ***Law of Succession Act*** including section 3(5) thereof which provisions have been the subject of extensive judicial pronouncement in this country. In **M N M vs. D N M K & 13 Others [2017] eKLR**, the Court of Appeal held that:

> **"The section was introduced in 1981 by the *Statute Law (Repeals & Miscellaneous Amendments) Act, No. 10 of 1981*. The purpose of the amendment was to mitigate the rigours of decisions such as *Re Ruenji's Estate (supra)* and *Re Ogola's Estate (supra)*, which did not recognise as beneficiaries widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage. To the extent that a marriage arising from a presumption of marriage is a marriage that is potentially polygamous, the prior monogamous marriage of the deceased to M would not preclude E from being recognised as a beneficiary of the deceased. (See *Irene Njeri Macharia v. M Wairimu Njomo & Another, CA No 139 of 1994, Miriam Njoki Muturi v. Bilha Wahito Muturi, CA No. 168 of 2009* and *Muigai v. Muigai & Another [1995-1998] 1 EA 206).***"

43. It follows that ***Re Ruenji's Estate (supra)*** **and** ***Re Ogola's Estate (supra),*** can nolonger be cited as authorities to bar a woman from being considered as a wife where there is a marriage between her and the deceased whether real or presumed.

44. In this case however, there was no satisfactory evidence that the deceased was married to the Respondent. In **M N M vs. D N M K & 13 Others** (supra) it was held 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.'"

45. Based on the scanty material placed before me, I am unable to find that there was a customary marriage formalised between the Respondent herein and the deceased. That however is not the end of the matter. As appreciated in **M N M vs. D N M K & 13 Others** (supra):

"This leads us to the question whether on the evidence before it, the court could have presumed a marriage between the deceased and E based on cohabitation and the parties holding themselves out to society as husband and wife. 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] 2 KLR 272).*"**

46. That the concept of presumption of marriage exists in our jurisdiction is nolonger in doubt. In fact that concept has a statutory underpinning and this was recognised by the Court of Appeal in **Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie Civil Appeal No. 20 of 2009 [2010] 1 KLR 159** where it was held 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."

47. In **M N M vs. D N M K & 13 Others** (supra) it was held that:

"The presumption of marriage has been recognised in our jurisdiction for a long time. (See for example *Hortensia Wanjiku Yawe v. Public Trustee, CA No. 13 of 1976*). In *MWG v. EWK [2010] eKLR*, this Court explained that 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.

48. That the said presumption is not dependent upon the existence of a marriage was affirmed in **M N M vs. D N M K & 13 Others** (supra) where the Court held that:

"As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the *Hortensia Wanjiku Yawe v. Public Trustee (supra), Wambuzi, P.* noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system."

49. This rationale, as **Madan, JA** (as he then was) articulated in **Njoki vs. Mutheru [2008] 1 KLR (G&F) 288:**

"…is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the 'husband', or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of 'wife' upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased 'husband'."

50. According to **Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie** (supra):

"The cases of *Machani* and *Njoki* above were based on the old thinking and it is noteworthy that Parliament realised that women who genuinely had been taken as wives were discriminated against merely because dowry had not been paid or that there had been no ceremony to solemnise the union and by Act No. 10 of 1981, Parliament added section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya to the effect that "notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of the Act."

51. Once it is proved that there was long cohabitation between the deceased and the person claiming to be the wife, it was further held in **M N M vs. D N M K & 13 Others** (supra) that:

> **"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)*."**

52. In this case, it was averred by the Respondent and not disputed by the Applicant that there was a long cohabitation between the Respondent and the deceased spanning over two decades and by the time of the death of the deceased, he had sired 8 children with the Respondent. It was deposed that the deceased in fact built a family house for his 2nd family and the Respondent moved in which is todate her place of abode. It was deposed that the said children considered the Applicant as their mother and the Applicant likewise treated them as her children being the children of the deceased. There is no evidence that the Applicant raised any issue with the said relationship during the deceased's lifetime.

53. In **Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie** (supra), the Court found that:

> **"Evidence was adduced in the court below that the petitioner and the deceased had three children and she was living with him at the time of his death. Evidence was adduced to the effect that the deceased was paying the rent for the house the petitioner was living in with her children. Besides, several witnesses testified that during the deceased's lifetime he was living with and treating the petitioner for all intents and purposes as a wife. It is no wonder, therefore, that the deceased specifically told the objector that the children he had with the petitioner were his children and needed to be given a share of his estate. It is not in the common and natural course of human conduct to accept children he has fathered with another woman but reject their mother unless for good reason and on the contrary the evidence that the deceased and his family had no problem with the petitioner."**

54. It is therefore my view and I hold that such a long cohabitation coupled with the resultant issues of the said cohabitation, the conduct of the deceased can only lead to the conclusion that the deceased and the Respondent intended that they be presumed to be husband and wife and this Court ought not to put their desires asunder.

55. Having so found section 3(5) of the ***Law of Succession Act*** must come into play and I declare the Respondent a wife for the purposes of the Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of the said Act.

56. According to section 3 of the Act "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated. In this case none of the parties has contested the fact that the deceased had, before his death transferred his interest in **Machakos/Kiandani/2601** to the Objector.

57. According to **Maraga, J** (as he then was) in **Benson Njoroge Gitau vs. Peter Mwangi Gitau Nakuru HCSC No. 330 of 2003:**

> **"Section 40(1) of the Law of Succession Act provides that where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance be divided among the houses according to the number of children in each house, and also adding any wife surviving him as an additional unit to the number of children…Taking all circumstances into consideration, it is important that when the subdivision is effected over the main property, the portions occupied by respective beneficiaries should revert to them. The developed portion of the plot should also be valued and shared equally among the beneficiaries, thus it may be easier to sell the plot and share the proceeds. But if the plot is divisible the beneficiaries can group themselves in a way that they can be registered as tenants in common…Under sections 42 of the Law of Succession Act, previous benefits should be brought into account during distribution."**

58. According to **Musinga, J** (as he then was) in **In the Matter of the Estate of Silvester Ouko Gichana Kisii HCSC No. 3 of 2004**:

> **"Section 40(1) of the Law of Succession Act states that where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children…A house is defined as a family unit comprising a wife, whether alive or dead at the death of the husband, and the children of that wife…In applying the provisions of section 40 of the Law of Succession Act, it was not intended that there must be equality between houses and neither was it the intention of Parliament that each child must receive the same or equal portion…**T**he court may have to consider for example, the interests of the young beneficiary who is still being maintained or in need of more resources because of peculiar or specific circumstances. That notwithstanding, the court must try to distribute the deceased's estate as equitably as possible. In this case the petitioner and the objectors have lived separately for over thirty years. The two parcels of land are more or less the same acreage. It appears that the intention of the deceased was that they stay where they are…In distributing the estate of a deceased person under the provisions of the Law of Succession Act, no distinction should be made between male and female children...In this case, all the children of the deceased, sons and daughters, whether married or not, are entitled to a share of the deceased's estate. If any of the married daughters decide to forego their lawful entitlement, it will be up to them to so choose."**

59. The Respondent and the Protestors however urged this Court to distribute the deceased's estate in accordance with the views of the elders. At this stage I must point out that it would be unfair to dismiss the role of culture and customs offhand. Article 11 of the Constitution

recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and obliges the state to promote the same. As was appreciate in the South African Constitutional case of **Shilubana vs. Nwamitwa [2008] ZACC 9; 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC) at para 45:**

> **"It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated."**

60. The same Court in **Bhe v Khayelitsha Magistrate (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission vs. President of the Republic of South Africa [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC)** held that:

> **"[41] Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. . . . It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.**
>
> **[45]The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the Constitution."**

61. I agree with the same Court in **Sigcau and Another vs. Minister of Cooperative Governance and Traditional Affairs and Others (CCT167/17) [2018] ZACC 28** that:

> **"[76] If we are serious about giving customary law its rightful place under the Constitution, it would be prudent to allow it to develop in its own intrinsic way in accordance with the fundamental values and rights protected in the Constitution."**

62. Having said that, while I have no problem with the said elders mediating between the warring parties, to adopt the decision of the elders in the manner proposed would amount to this Court abdicating its judicial mandate and that the Court cannot do. See **M'kiara vs. M'ikiandi [1984] KLR 170.**

63. In **Nurani vs. Nurani [1981] KLR 87**, the Kenyan Court of Appeal was of the view that:

> **"The High Court has jurisdiction over all matrimonial causes and suits arising out of Mohamedan marriages. In the absence of express legislation to that effect, the High Court cannot be divested of jurisdiction in any matter because similar proceedings are pending before quasi-judicial or non-statutory tribunal howsoever constituted. It was, however, the position that proceedings for custody of children and maintenance were in fact concurrently before the court and the Ismailia Provincial Council. The Court has jurisdiction vested with under statute and the council because Ismailis voluntarily submit to its jurisdiction in respect of the subjects relating to their personal law as stated in their constitution…There are no statutory provisions which prohibit a sect within the general society from setting up their own tribunal for the settlement of matrimonial or other permitted disputes between its own members; a tribunal thus constituted has a duty to act fairly and justly and if it fails to do so there are ample safeguards, and remedial actions available, for example, it would be the easiest of matters to obtain an order for a prerogative writ under the Law Reform Act (Cap 26) to quash its decision or to compel it to act according to law. It is laudable if such non-statutory tribunal functions impartially and as an independent forum as the High Court in the exercise of its jurisdiction. There is nothing derogatory in that to the powers or prestige of the High Court. The council remains subject to the supervisory jurisdiction of the High Court and its jurisdiction does not impugn or curtail, nor could it do so in any way, the jurisdiction under the Guardianship of Infants Act. By definition in Section 2 of the said Act "Court" means the High Court and certain matters specifically stated in the provisions of the Act are brought under its jurisdiction. Section 17 states that where in any proceedings before any court the custody or upbringing of an infant, etc, is in question, the court shall decide the question as directed in that section…The Council is empowered under the constitution to entertain proceedings relating to custody of children. It is incorrect to argue that the council cannot apply the provisions of the Act. Under Article 311 of the constitution the council is expressly enjoined to decide questions of custody of children in accordance with the provisions of the Act and it may not deviate without acting in breach of the constitution and if it were to do so, the High Court could either rectify the situation itself, or order the Council to desist and act in compliance with the provisions of the Act…In an orderly society the High Court gives, as it ought to give, recognition to a tribunal which is set up by consent of members of a sect to administer their personal law. Such non-statutory tribunals are useful adjuncts to courts of law, which administer justice under their inherent jurisdictions. They useful reduce the burden of the courts of law in an ever-increasing complex society…The only unfettered right which the wife had was to have the existence or extent of any civil right or obligation determined independently and impartially by an independent court or other adjudicating authority prescribed by law for that purpose as stated in section 77(9) of the constitution of Kenya provided she chose to submit it for determination to such court or other adjudicating authority. A person is free to have, or not to have a legal representative in civil proceedings. He is free to choose. The wife did not have the fundamental right to be represented by a legal representative of her own choice like a person charged with a criminal offence under section 77(1)(d). Whether the**

proceedings are of civil or criminal nature the court will not protect an imaginary deprivation of a fundamental right or allow it to be capriciously pushed to absurd lengths like importing a legal representative from Peking or Pakistan. The basis of good reasoning is to disregard absurdities which are usually trite and unimportant and which obscure the point and purpose of life. The foundation for the stability and progress of the human society is the observance of rules of conduct, which are the subject laws. The society needs stability for its continuance…The wife freely submitted herself to the jurisdiction of the Council to hear the Petition and the choice was her own. She did not have a fundamental or unfettered right to split up her matrimonial disputes and inflict upon her husband the inconvenience and expense of pursuing and defending himself half in the High Court and half before the Council. The reservation made by her in regard to the issues of maintenance and custody of the children could not, and did not, oust the inherent jurisdiction of the High Court to exercise its overall supervisory powers to ensure smooth and orderly operation of institutions administering justice in the general interest of the society. This was the power of the High Court, which the learned Judge invoked to avoid both deviation and disruption...True, orders made by the court are effective, because once made, they are enforceable as they brook of less argument than a morally binding order though also effective. A court order is backed by the authority and administrative power of the state while a disciplinary action, ordered by a certain tribunal, carries behind it the certainty of obedience arising from the immense might of moral sanctions which may be imposed by the united society backed through its power to order ostracism, excommunication, economic boycott, etc. It is a power, which has been and is still practised effectively since the early days of human history. It is a truism, for it is the fact that morally binding orders are usually obeyed rarely disobeyed and that is something, which also happens to court orders… The husband and wife have ceased to think of the present jointly. The agony of divorce between a married couple must be the worst of all. What better than the Conciliators or the Council should succeed, in which event the Court's task will happily turn into one of academic interest. The Council should expedite its task. If occasion arises necessitating an injunction, or an order for the arrest of a party, or to enforce an order made by the council, the court could and would make an appropriate order. Always alert, justice never sleeps."

64. However as was stated by the East African Court of Appeal in **Mohamed vs. Yasmin [1973] EA 533**, whereas a High Court will, no doubt, give full consideration to any views or principles of any religious body connected with the matter in carrying out its duties, such a decision is not necessarily binding upon the Court. The practice of the Courts rubberstamping decision made by other bodies was deprecated in **Attorney General vs. Oriental Construction Co. Ltd. SCCA No. 9 of 1991** where the Uganda Supreme Court held that:

"The manner in which this suit was conducted creates an impression that the Chambers of the Appellant put in half-hearted defence so as to bless the expected result with the stamp of a decision of the court. It is surprising that the arguments put before the Supreme Court by counsel for the Appellant were not advanced in the court below. On the facts of this case as they appear on the record some issues raised before the Supreme Court arise naturally and require no particular legal process to discover. There is no objection to parties settling their disputes outside the courts. In fact parties should be encouraged to do so, but exception would be taken to the courts being used to stamp deals already worked out by the parties as decisions of the court."

65. Since the Respondent indicated that she was amenable to sitting down, deliberating and agreeing with the Applicant and all the beneficiaries on how Machakos/Kiandani/2783, being 12 units of residential houses, should be distributed, pursuant to the provisions of Article 159(2)(d) of the Constitution, I hereby direct the parties to attempt an amicable mode of distribution of the Deceased's estate, failure to which this Court will proceed to distribute the estate in accordance with the law.

66. There will be no order as to costs.

67. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th day of September, 2018.

G V ODUNGA

JUDGE

Mr Muumbi for Mr A. K Mutua fo the 1st Administrator

Mr Mukulla for Mr Moende for the Protestor

CA Geoffrey