



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY COURT
SUCCESSION CAUSE No. 2338 OF 2009
IN THE MATTER OF THE ESTATE OF WALLACE NDERU KAMAU
JUDGMENT

PLEADINGS

The deceased herein Wallace Nderu Kamau died on 9th September 2009.

Margaret Wangui Nderu and Charles Kamau Nderu; wife and son of the deceased respectively petitioned the Court for grant of letters of administration intestate on 15th October 2009. The petition was supported by an affidavit, Chief's letter and consents of James Kaigai Nderu and Joseph Kamaru Nderu; sons of the deceased. According to the affidavit in support of the petition, the deceased died intestate and was survived by the following:

I. MARGARET WANGUI NDERU – widow

II. CHARLES KAMAU NDERU – son

III. JAMES KAIGAI NDERU - son

IV. JOSEPH KAMARU NDERU – son

The Assets that were said to have been left by the Deceased are:

I. DAGORETTI/KINOO/4629

II. M/V KAP 653D

III. M/V KAH 287G

IV. M/V KAB 865Z

V. BANK ACCOUNT – BARCLAYS BANK – ONGATA RONGAI

The Petition was gazetted on 12th March 2010. Alice Waceke Nderu objected to the petition for making of grant by filing an Answer to Petition and a petition by way of Cross Application for a grant on 17th March 2010. She argued that she is also a widow of the deceased by virtue of the fact that she was his second wife as evidenced by a copy of an affidavit sworn by the deceased under the Oaths and Statutory

Declaration Act and thus a dependant of the Deceased. She submitted that the persons surviving the deceased were:

I. MARGARET WANGUI NDERU – 1st wife

II. CHARLES KAMAU NDERU – son

III. JAMES KAGAI NDER U – son

IV. JOSEPH KAMAU NDERU – son

V. ALICE WACEKE NDERU – 2ND WIFE

VI. ANTHONY NJUGUNA NGANGA – son

VII. EDWARD NDARAU NGANGA – son

VIII. DANIEL KARUGA NGANGA – son

IX. ANNE WAMBUI NGANGA – daughter

The District officer, Ngong division and Chief of Rongai location wrote letters that were produced before court. The full inventory of assets left by the deceased according to the objector's application included:

I. L.R No. NGONG/NGONG 5677

II. L.R No. NGONG/NGONG 5847

III. DAGORETTI/KINOO/1056

IV. BARCLAYS BANK FIXED DEPOSIT ACCOUNT No. [particulars withheld] (ONGATA RONGAI BRANCH)

V. BARCLAYS BANK SAVINGS ACCOUNT No. [particulars withheld]

(MOI AVENUE NAIROBI BRANCH)

VI. 375 SHARES WITH AFYA CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED

VII. STANDARD CHARTERED ACCOUNT No. [particulars withheld]

(KIAMBU BRANCH)

The first petitioner Margaret Wangui Nderu replied to the cross petition by an affidavit dated 10th December 2010 and a supplementary affidavit filed on 15th September 2016. She submitted that she is the only legal wife to the deceased and their union was solemnized in 14th September 1985 under the **African Christian Marriage and Divorce Act, Cap 151 (now repealed)** as evidenced by a copy of the marriage certificate of serial no. 382856 and that they had three Issues of their marriage as mentioned in her Petition. She deposed that in 1993 the deceased and herself jointly purchased plot No. **Ngong/Ngong/5677** and the same was registered in the name of the deceased. Later in 1986, she applied for a house building loan from Barclays Bank of Kenya Ltd where she was employed as a banker. She secured the loan on condition that plot No. **Ngong/Ngong/5677** be registered jointly between herself and the deceased as evidenced by a copy of a charge and she fully serviced the loan. Further, she deposed that they bought other properties which were registered under the name of the deceased. She further submitted

that she left for U.S.A in 2000 with the consent of the deceased. When she came back home in 2007, she found the Objector herein who lived in and refused to leave the matrimonial home. After the deceased's death, the Objector claimed to be the 2nd wife to the deceased and thus a beneficiary of the deceased's estate. The Petitioner filed suit in **HCCC No. 624 of 2009**, a valid eviction order was issued against the Objector to vacate the matrimonial home and she declined to vacate the home.

The 1st petitioner submitted that the objector was married to one John Nganga Njuguna on 1st February 1969 and that she filed **Divorce Cause No. 94 of 2003**. The decree nisi was issued on 5th June 2007 and decree absolute on 14th July 2008 which meant that the objector did not have capacity to contract another marriage until after 14th July 2008. The Petitioner deposed that the Objector's children (all adults at the time of filing the cross petition) are from the previous marriage and not from the objector's alleged marriage to the deceased. During the burial of the deceased the objector and the children did not participate in the funeral arrangement nor did they attend the said burial.

The objector filed a further replying affidavit on 2nd September 2016 and a Supplementary Affidavit on 4th November 2016 in response to those filed by the Petitioner. She admitted that the petitioner was indeed married to the deceased and together, they had 3 children. She denied the averments of the alleged purchase and in the alternative stated that the deceased solely purchased land parcel No. **Ngong/Ngong/5677** on 10th October 1982 as evidenced by a copy of a sale agreement. The Petitioner used the said property as security to secure the loan. She further deposed that the Petitioner deserted the deceased and went abroad and that she began living with the deceased sometime in 1990 by which time her former husband had already left her. She further stated that by the time the petitioner returned to Kenya, she and the deceased had been living together on **Ngong/Ngong/ 5677**. She also averred that she had never been issued with an eviction order as **HCCC No. 624 of 2009** instead the suit was dismissed with costs. With regard to the marriage, she stated that the deceased married her under Kikuyu customary law and acquired parental responsibility for her children and that she was the sole care giver to the deceased before his demise.

HEARING

The hearing commenced on 7th September 2016, this Court was informed that Hon J Njagi had admitted the Petitioner's affidavit filed on 10th December 2010 as part of the evidence on the Court record.

PW2 Mary Wambui Kaigai; sister to Petitioner, lived with the deceased's family from 1985 as she pursued College. She learnt that the petitioner and deceased were building their home in Ongata Rongai. The Petitioner obtained staff loan from the bank. In 1987 the deceased, children and herself moved to the home in Ongata Rongai. In 2000, the Petitioner left for United States of America and left her to look after the children. The deceased; a psychiatrist was on night shifts at the hospital. In 2003 the petitioner visited and went back with their 1st born child Charles Kamau. In 2005, she visited and took the 2nd born James Kaigai and last born Joseph Kamaru back with her to USA. PW2 left the deceased's home thereafter and she visited the homestead occasionally. In 2007, she visited the home and found the Objector herein, and she claimed she was cleaning the deceased's home and washing clothes. PW2 alerted the Petitioner who travelled to Kenya.

The Petitioner, Margaret Wangui Nderu, in reliance to the earlier accepted affidavit was recalled for cross examination. The Affidavit was filed pursuant to an application filed on 14th February 2011 and granted by Hon Justice L.Njagi on 3rd October 2012 that since she resided out of the country, her affidavit would suffice as evidence in Court. However, she presented herself for cross examination. She admitted that after she retired as employee of the bank, she agreed with the deceased that she would seek employment in USA and later the family would join her there. She came to Kenya on one of the visits in 2007 and found the Objector in their matrimonial home. She claimed to be the deceased's 2nd wife. She filed **HCCC 624 of 2009** as per annexure **MWN6** and obtained an order for the Objector's eviction and she refused to vacate to date. The Objector filed **SRMCC No 41 of 2010 in Kajiado Law Courts**. Therein she claimed that the deceased married her on 30th August 1990 as shown by annexure marked **MWN8**. The suit was dismissed for lack of jurisdiction. The Plot **Ngong/Ngong 5677** is joint property. The

Petitioner and deceased contributed to the purchase equally; Ksh 150,000/- each. She obtained a loan from Barclays bank where she worked from 1972-1996 when she left under early retirement program. The property was registered in deceased's name only as they agreed as per Agreement for Loan. The loan was given to her by the bank, but her husband the deceased was the guarantor. The copy of Green Card shows registration of the suit property in both names as per the annexure marked **MWN3** and the Charge of Ksh 400,000/- as per annexure **MWN 4**.

The Objector, Alice Waceke stated in her testimony, that she lived with the deceased from 1990 in Loitoktok and then moved to Meru in 1996 and they lived and conducted business together. In 2005 she moved to the deceased's plot Ngong/Ngong/5677. The deceased told her he was married and his wife relocated to USA.

On her part she was married to John Nganga Njuguna under Kikuyu customary law in 1969 and they had 5 children. They divorced in 2007-8. At a certain undisclosed date, the deceased accompanied by a friend came to her home and found her family. He paid dowry of Ksh 41,000/. They lived together as man and wife from then on until he died.

The Objector claimed she was hindered by the Petitioner from attending the deceased's funeral. The suit property Ngong /Ngong/5677 was bought by the deceased and not with the Petitioner. They built their home together but the title documents are in the name of the Petitioner, which she alleged is illegal. She lived and stayed with him until his dying moment and prepared for the funeral.

The Objector told Court in cross examination that the suit property there are 2 portions each with a house and gate. She moved to her house and the other part is for the Petitioner. In re-examination, the Objector reiterated that she lived with deceased from 1990 in Loitoktok and Meru and in 2005 they lived on the suit property until the deceased died. She sold motor vehicle KAP 653 as it was her car. She sold motor vehicle KAH 287G as it was her son's car. She stated they bought the lorry Reg KAB 287 Z and sold it to pay medical bills while the deceased was sick. The Objector's prayer is that the suit property should be divided equally into 2 parts each party with a house and gate.

OBJECTOR'S SUBMISSIONS

The Objector filed her submissions on 20th January 2017 on the issue of whether she is a wife to the deceased and whether she and her children are bonafide beneficiaries of the estate. On the issue of whether the Objector is a wife, she relied on **Section 29(a) of the Law of Succession Act, Cap 160** which defines a dependent as a wife, former wife and children of the deceased whether or not maintained by the deceased immediately prior to his death. She relied on her pleadings and testimony as highlighted above to support her position that she was a wife to the deceased by virtue of the fact that they lived together from 1990-2005 and formalized their union after her previous marriage was dissolved. She relied on the case of ***Rosemary Aoko Munjai v Noel Namenya Munja [2015]eKLR*** where it was held that there existed a presumption of marriage under Kikuyu customary law where all the rights established a marriage were not performed. She submitted that there existed a presumption of marriage between the deceased and herself notwithstanding the absence of all rites of a Kikuyu customary marriage.

On the question of whether the Objector and her children are beneficiaries of the Deceased, the Objector relied on **Section 3 (5) of the Law of Succession Act** which provides:

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

She relied on ***Irene Macharia v Margaret Wairimu Njomo & Another [1996]eKLR*** and ***In the Matter of the Estate of Reuben Nzioka Mutua,P&A Case No. 843 of 1986 (unreported)*** to support the position that since she was married to the Deceased under the Kikuyu customary law she was a wife to the

deceased and her children are dependents for the purposes of succession since they were taken care of by the Deceased as his children. Accordingly, they prayed that the Court upholds the objection and allow the cross petition.

PETITIONER'S SUBMISSIONS

The petitioner also put in her submissions on 20th January 2017 which canvassed the issue of which of the parties is lawfully entitled to be granted letters of administration to the estate of the deceased primarily with regard to the relationship between the objector and the deceased as espoused. She relied in **Section 37 of the Marriage Act (now repealed)** in submitting that the deceased had no capacity to marry the Objector under Kikuyu customary law or any other law because their marriage with her former husband was never dissolved and thus she could not be lawfully considered to be a wife.

She relied on the case of In the Matter of the Estate of **Grenshon Jon Mbogo No. 989 and 1110 of 1999** where it was held that:

"...I therefore find that the objector's previous marriage which is a statutory marriage has not been dissolved and as such no other marriage under any form is legal. Section 37 of the Marriage Act , Cap 150 states that any person who is married under the said Act shall be incapable of during the continuance of such marriage of contracting a valid marriage under any native law or custom. For this reason, I hold that the objector did not have capacity to marry the deceased and dismiss the objection with costs to the petitioner."

Similarly, she relied on **MVS v Kenya Law Reports [G&F] 313** where the Court of Appeal held that an already married person under the **Marriage Act, Cap 150** (repealed) had no capacity to enter into a marriage or promise to marry before a decree nisi or divorce has been granted. Accordingly, it was her submission that neither the deceased nor the Objector had capacity to contract a marriage when they did and thus the Objector was not a dependent under **Section 29 of the Law of Succession Act**. She also deposed that the Objector's children were also not dependents because they were all adults at the time when the Objector was purportedly married to the deceased.

ISSUES

- 1. Was the Objector wife to the deceased?**
- 2. Were the children of the Objector children of the deceased under Section 3 of Law of Succession Act?**
- 3. Is the Objector and her children entitled to inherit from the deceased's estate if so in what capacity?**
- 4. Should the grant be issued to the Petitioners or Objector or to both parties?**

DETERMINATION

From the foregoing, the issue for determination before this Court is whether the Objector's Answer to Petition and Petition by way of Cross Application should succeed. **The Law of Succession Act, Cap 160** does not set out ground on which an objection may be premised. However, the law prescribes that the surviving spouses(s) of the deceased and children are beneficiaries of the estate. Secondly by virtue of **section 66 of Law of Succession Act** and **Part VII rule 26 of Probate and Administration Rules** the administrator(s) of the estate are appointed with consents of beneficiaries.

In the instant case the petitioner filed petition and listed beneficiaries as herself and her 3 children whilst the objector filed objection and cross petition and listed herself and 4 children as part of the deceased's family and beneficiaries too.

The Objector claims to be the deceased's 2nd wife because she was married to the deceased under the Kikuyu customary Law and thus a beneficiary of the estate. This raises the issue of whether she is a wife for the purposes of succession.

The Petitioner submitted that she contracted a statutory marriage with the Deceased under the **African Christian Marriage and Divorce Act, Cap 151** (now repealed). **Section 4 of the Act** provides:

“Except as otherwise provided in this Act, the provisions of the Marriage Act shall apply to all marriages celebrated under this Act.”

Section 37 of the Marriage Act, Cap 150 (now repealed) provides:

“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.

The operational law is **Section 3(5) of the Law of Succession Act** which provides:

“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.”

The Objector if married by the deceased under Kikuyu customary law, in spite of the deceased being married under statutory marriage to the Petitioner, for purposes of succession, the objector would be recognized as beneficiary of his estate.

In examination of the evidence adduced in court on whether the Objector contracted a customary marriage with the deceased; the evidence on record is as follows; the Objector's testimony was that on an undisclosed date, unknown disclosed place; the deceased was accompanied by one Wakamithi (deceased) and another man who went to her home and presumably met her family again not disclosed where and the deceased conducted 'ngurario' and also paid ksh 41,000/-in total as dowry.

The Objector by the further replying affidavit of 2nd September 2016, attached copies of minutes dated 8th December 2007 confirming the 'ngurario' ceremony. Also attached is a copy of the dowry breakdown that was paid and totalled Ksh 41,400/-.

The essentials of a Kikuyu customary marriage are codified in **Restatement of African Law on the Law of Marriages and Divorce by Eugene Cotran**. These essentials include; capacity to marry, consent of parties, ceremonies of 'ruracio' 'ngurario' and commencement of cohabitation. In the instant case; the Objector's evidence is scanty on the ceremonies conducted. The documents are not proof of the ceremony of customary marriage in the absence of a single witness to testify that the ceremony took place and the veracity of the evidence is tested through cross-examination.

This Court has taken into consideration the evidence of PW2 sister to the Petitioner, who testified that on visiting the deceased her brother in law, she found the Objector who was cleaning the house and washing clothes. She called the Petitioner from USA who came and found her in the house. When she tried to evict her from their matrimonial home, she refused. They went to the Chief and the deceased said that the Objector worked for him and was not married to him. This is confirmed by deceased's letter of 18th April 2005 written to the Chief Mr. Hassan Dahir marked **MWN5**. The deceased confirmed being married only to the Petitioner and admitted that the Objector came to clean the house and cook for him. After the Petitioner came back, the deceased promised Alice Waceke would move out. It is curious that from the deceased's own letter, he at the same time conducted a customary marriage with the Objector, he did not

call any of his family members, brother, uncle, cousin to accompany him to the Objector's home and he conducted both ceremonies in quick succession; paid dowry on 16th September 2007 and 2 months later on 8th December 2007 the 'ngurario' ceremony was held. Such hurry is only normal when it is between a young bride and groom so as to complete the traditional rites in time for the official wedding ceremony. This was not the case.

I find anomalies in these documents; the document depicting dowry is a list of items and there is no mention at all of anyone who was present at the ceremony. Surely, anyone can draw list of items sought to be presented or monies paid in lieu of the item in a customary marriage. The writer of the note was not called to testify in Court. Secondly, the 'ngurario' ceremony does not include preparing any documents; it's a traditional wedding ceremony that includes slaughtering a ram and celebration by both families. So naturally, there would be witnesses to testify on the ceremony that took place but not a written agreement. Surely if such ceremony took place in presence of both families it would not be difficult to locate and avail a witness to testify on the occasion.

I find these documents specially prepared to prove a function that never took place in the first place. In the absence of oral evidence by any family member on either side of the family, I find that the evidence does not disclose a customary marriage between the deceased and the Objector.

This is further illustrated in the following case, the essentials of a kikuyu customary law were completed especially by 'ruracio'; payment of dowry. In ***THE ESTATE OF JOSEPH GATHIGO (DECEASED) PRISCILLA WARUGURU GATHIGO vs VIRGINIA KANUGU GATHIGO*** (2004) eKLR Hon. Lady Justice H. Okwengu stated as follows;

“I find the evidence adduced by the protestor on proof of alleged marriage to the deceased fell short of proving the alleged marriage...there was no independent witness to customary formalities. There was no evidence that the elders from the deceased relatives who participated in the said marriage. There was no evidence that a 'ngurario' ram was slaughtered. The Court finds there was no marriage between the deceased and Respondent”

See Also; ***SUCCESSION CAUSE 989 & 1110 OF 1999 IN THE MATTER OF THE ESTATE OF GERIHON JOHN MBOGO***

This Court is of the view that the deceased and respondent were not married. The alleged Kikuyu customary ceremony did not conform to the various steps undertaken to culminate to such a ceremony as required by the law as stated above. From the evidence on record, if there was a ceremony at the Respondent's home by the deceased's family none of the elders from the deceased's family or home confirmed the same. Further, there is no evidence that dowry; 'ruracio' was paid and 'ngurario' ram was slaughtered.

The Objector filed Further Replying Affidavit on 2nd September 2016 and annexed an affidavit sworn by the deceased that he married her on 30th August 1990. The same affidavit was filed in a suit the Objector filed in ***SRMCC 41 of 2010*** in Kajiado Law Courts against the petitioner. This is an anomaly and casts doubt on the truthfulness of the Objector; if she was married under customary law why did she need the deceased to swear affidavit to the same effect; it all does not add up unless she wanted to conceal something untrue.

Thirdly, it is not denied that the Objector was married to John Nganga Njuguna in 1969 and they had 5 children. They divorced on 5th September 2007 when decree absolute was issued. The Objector claimed she started living with the deceased in Loitokitok in 1990 where the deceased visited and later in 1996 they moved to Meru and 2005 she joined him in the suit property Ngong /Ngong /5677 and they lived as man and wife up to his death. There is no evidence of the allegation; the deceased lived with his wife, the Petitioner and their children as he worked as a Psychiatrist in Mathare hospital and later Kamiti hospital in Nairobi. He could not live in Loitokitok and Meru and work in Nairobi each day; at best he could only visit. The petitioner retired from employment and pursued greener pastures in USA in 2000.

The Objector had children older than those of the deceased and petitioner. She was married earlier and had children as follows as at 2010 were aged;

- 1. ALLAN NJUGUNA NGANGA-38 YEARS**
- 2. EDWARD NDARUU NGANGA-35 YEARS**
- 3. DANIEL KARUGA NGANGA- 32 YEARS**
- 4. ANNE WAMBUI NGANGA- 31 YEARS**

The petitioner's children were aged as follows as at 2010;

- 1. CHARLES KAMAU NDERU-30 YEARS**
- 2. JAMES KAIGAI NDERU-29 YEARS**
- 3. JOSEPH KAMAU NDERU- 24 YEARS**

Therefore the deceased did not exercise parental responsibility to the Objector's children as they were adults at the time the alleged customary ought to have taken place. There is no evidence on record to confirm that the deceased lived with Objector's children when and where or provided parental responsibility to them during his lifetime.

They cannot be beneficiaries of the deceased's estate, they are not his biological children and he had no parental responsibility over them.

The Objector claimed the deceased purchased the suit property Plot Ngong/Ngong/5677 by the Agreement for sale annexed as **AW1** and he purchased through a loan as evidenced a letter from the bank dated 20th May 2004. The Respondent/Objector claimed the deceased bought the said property by the loan he obtained from Barclays bank annexed to the affidavit signed on 30th August 2016 and filed on 2nd September 2016 marked **AW2** which states;

We remind you that a guarantee for liabilities of NDERU MARGARET WANGUI (EX STAFF) Ksh. 408000.00 dated 20.5.86 and signed and held by us as security. Kindly sign and return to us this letter as acknowledgement of this guarantee.

The above allegation that the deceased bought the suit property single handily and it was registered solely in his name until the Petitioner irregularly transferred it to her name is not borne out by the evidence on record. The petitioner's testimony is that she was an employee of Barclays bank from 1972- 1996. Whilst there, she obtained a loan to finance construction of their matrimonial home on the suit property after each of them contributed to purchase the land. The bank demanded the deceased is registered as guarantor to the facility and they were jointly registered as owners of the suit property. The petitioner attached the genuine Sale Agreement dated 1st August, 1983 **MWN10** ***“To whom it may concern Plot No. Ngong/Ngong 5677 I Mr. Peter Kibe of ID No. 348139, has today the 1st August, 1983 received full payment of the said Plot 5677 Ngong/Ngong from a Mr. Wallace Nderu Kamau of ID No. 4846201 and a Mrs. Margaret Wangui Nderu of ID No. 1910072. They both contributed equally but they agreed the title to be registered under Mr. Wallace Nderu Kamau. Signed by Mr. Peter Kibe Njuguna”*** to the affidavit filed on 15th September, 2016 and the which confirms as was written the seller of the property Peter Kibe Njuguna. A copy of the title of the land shows it was registered in the joint names of Wallace Nderu Kamau deceased and Margaret Wangui Nderu at Kajiado district land Registry on 23rd June 1986. The title deed is annexed to the Petitioner's affidavit filed on 15th September 2016 as annexure **MWN11**.

The totality of the evidence on record confirms that the suit property Ngong /Ngong/5677 was jointly purchased by deceased and petitioner in 1986 as confirmed the Charge registered on 20th May 1986

marked **MWN4** annexed to the Petitioner's affidavit of 10th December 2010; drawn in the joint names of the deceased and the Petitioner "**MNW4**". The Title deed and Green Card are all in both names of the deceased and Petitioner way before the Objector came into the scene and that is 1990 as she alleged. The letter from Barclays bank actually confirms that the deceased guaranteed the loan obtained by "**MWN3**" the Petitioner who was an employee of the bank then. In the instant case, since the property was registered jointly by the deceased and the petitioner who remained married, after the deceased's death, the property automatically reverts to the surviving joint owner wholly by operation of law. It is not available for distribution as part of the deceased's estate. Therefore, although the Objector resides on the rented houses side of the plot and eventually moved out of the matrimonial home the petitioner and deceased built, all the land comprising of the suit property belongs to the Petitioner.

The Court notes that the Objector claimed that she lived with the deceased from 1990 - 2009 when the deceased passed on. The evidence did not confirm this fact as the deceased was gainfully employed in Nairobi and lived with his wife the Petitioner until 2000 and he could only visit Loitoktok and Meru. The Objector even if she lived with the deceased all this time, the presumption of marriage cannot be invoked as she was married but separated from her former husband whom they divorced in 2007. The Objector did not have a child with the deceased. There is no basis to infer the presumption of marriage without evidence of long cohabitation and general repute of being held out as man and wife. She only lived with the deceased legally for a very short time 2007 when she obtained decree absolute upto 2009 when the deceased died. This is not a case which from the evidence on record can be regarded as a presumed marriage in terms of **Hortensia Wanjiku Yaweh Vs Public Trustee, Civil Appeal No. 13 of 1976.**

In the decision of VRM V MRM & Another [2006]Eklr the Court of Appeal reiterated that the evidence of long cohabitation and general repute can form a basis for a presumption of marriage. Once such a presumption is made the onus is on the person alleging that there was no such marriage to prove otherwise."

It is useful to note that the Petitioner on learning from her sister Pw2 of the Objector residing in her home in 2005, she came from USA and pursued her eviction from the matrimonial home vide **High Court Civil Case 624 of 2004** where the Court granted ejection/eviction orders on 30th November 2009 against the Objector from Ngong /Ngong/5677. The Objector was to release to Petitioner 10 grade cows, 4 piglets, 3 pigs; and motor vehicles **Reg KAB 865 Z, KAP 653 J and KAH 287G.**

The order is annexed to Petitioner's affidavit of 10th December 2010 marked **MWN6**. The Objector did not comply with the Court order nor did she appeal or apply for review. She instead pleaded that the case was dismissed.

The Objector has attached receipts of building materials they bought with the deceased to construct permanent structures on the suit property. Unfortunately, the Objector unlawfully encroached on property she did not own. The evidence on record does not disclose a marriage to the deceased. The Objector cannot rely on **Section 3(5) and 29 of Law of Succession Act.**

DISPOSITION

- 1. The Court upholds the Petitioner's petition as administrator and beneficiary of the deceased's estate with the 3 children of the marriage to the deceased.**
- 2. The Cross Petition by the Objector is dismissed as she was not a wife to the deceased and her children were not the deceased's but from previous marriage. The children were adults at the time the Objector met the deceased and he could not exercise parental responsibility on the children as they were adults. They are not beneficiaries of the deceased's estate.**
- 3. The suit property Ngong/Ngong/5677 is property jointly purchased and registered in the deceased's and petitioner's names. By operation of law, upon demise of one joint owner the property reverts to the surviving joint owner; the petitioner. The suit property does not form part of the estate of the deceased available for distribution.**

4. The grant shall be processed in the normal process and be issued to the petitioner to exercise statutory mandate under Section 83 of the Law of Succession Act, 2001.

5. Each Party shall bear own costs.

DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 22ND SEPTEMBER 2017.

M. W. MUIGAI

JUDGE