



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 768 OF 2008

IN THE MATTER OF THE ESTATE OF GEOFFREY MUCHIRI KAMAU (DECEASED)

JUDGMENT

1. There are two applications to be determined simultaneously, the first is dated 31st July 2008 and the other 7th July 2011. The two were consolidated by an order made on 15th November 2011 by Njagi J. Directions had been given on 23rd September 2008 that the application dated 31st July 2008 be disposed of orally, but no directions were ever given on the disposal of the application dated 7th July 2011. However, the general understanding as between the parties would appear to be that the same would be disposed of by *viva voce* evidence.
2. The application dated 31st July 2008 is premised on section 26 of the Law of Succession Act, Cap 160, Laws of Kenya, and it seeks in the main that reasonable provision be made for the applicant and her daughter as dependants of the deceased from his net estate. There are also secondary prayers for regular payments of sums of money to cater for the upkeep and school fees of the applicant's daughter, appointment of a manager for the deceased's businesses, and the furnishing of accounts with respect to the deceased's bank accounts.
3. The affidavit in support of the application was sworn by Ann Njeri on 31st July 2008, on her own behalf and on behalf of her child, Eunice Wanjiru. She avers that no representation has been granted in respect of the intestate estate of the deceased, although the same had been sought by Margaret Njoki Muchiri.
4. Her case is that the deceased was her spouse, they had had a child together and they had developed certain properties together in the period running from 1987 and 2000. She alleges that she subsequently became a housewife thereafter. She avers that she lived lovingly with the deceased as his wife with their daughter, but she did not attend his funeral as she was bedridden. Her daughter too did not attend the funeral as she was of tender age and she could not possibly attend the same on her own.
5. She claims that she and her daughter were dependent on the deceased up to the time of his death in the following respects, which represents her needs and those of her child, which ought to be met from the estate: -
 - a. house rent for their matrimonial home at Komarock Estate - Kshs. 30, 000.00;
 - b. general expenses covering house shopping and electricity bills - Kshs. 35, 000.00;
 - c. transport and related expenses - Kshs. 15, 000.00;
 - d. school fees - Kshs. 30, 000.00;
 - e. personal expenses for the child - Kshs. 5, 000.00;
 - f. school uniform for the child - Kshs. 10, 000, 00;
 - g. personal items (such as cream and hair care) - Kshs. 15, 000.00; and

h. leisure and holidays - Kshs. 40, 000.00.

6. The Applicant has identified the other dependants of the deceased as including Margaret Njoki, who is said to be a housewife; Muchiri, Susan Wanjiku Kamau, who is said to be married and living in the United States of America; Charity Wanjiru Kamau, who is said to be living with her mother; and James Robert Muchiri, who is said to be generally doing poorly health wise and is under medication.
7. The deceased is said to have been a wealthy person with substantial interests in the hospitality industry, realty, transport and farming. The assets listed as making up the estate include real property in Nairobi and elsewhere, motor vehicles money in several banks and shares in limited liability companies. The total value of the estate was estimated at the time of filing to be Kshs. 900, 000, 000.00.
8. She avers that she does not have any capital assets of her own, but, during the deceased's lifetime, there was a lorry, being registration mark and number KVM 246, which had been made available to her, unfortunately the same was taken away after the deceased's death. She pleads that she does not anticipate any future capital assets on account of ill health, pointing out that she was only making Kshs. 10, 000.00 from running a kiosk in Kayole, Nairobi.
9. She has attached to her affidavit several documents. There is copy of a birth certificate, serial number 55609, of 20th December 2005, in respect of her daughter, Eunice Wanjiru. The same depicts the said child to have been born on 15th February 1991 to the deceased and Anne Njeri Mbugua. There are copies of handwritten notes dated 17th August 1988, 16th April 1989, 17 April 1989, 31st May 1989, 2nd July 1989 and 1st April 1990. They all state that the author had visited but did not find whoever the notes were addressed to. There are also medical notes relating to Ann Njeri dated 5th July 2007 and 6th May 2008.
10. The reply to the application is by Margaret Njoki Muchiri, through an affidavit sworn on 19th September 2008. She asserts that no material has been presented sufficient to prove that the deceased was the husband of the applicant and the father of her child. She challenges the authenticity of the birth certificate presented by the applicant. She avers that the name of the deceased was not featured in the child's birth notification, yet the said notification is usually the foundation for the birth certificate.
11. She further argues that it was not possible for the said child to have joined school without a birth certificate, yet the one displayed was obtained in 2005 long after she had been to school, suggesting that she was probably entered into school using another birth certificate. She asserts further that the deceased's name was not featured in the child's school records from Kigumo Girls Secondary School.
12. She explains that the applicant was the deceased's employee in 1991 and was sacked in 1999. She never was taken in as a housewife, for if that were so then the deceased would have given her one of his many houses, or even constructed one for her in keeping with Kikuyu customary law. She asserts that the deceased had not moved into any of her rented single rooms at Soweto at any time. She further asserts that the deceased never provided for the applicant and her daughter at all. She discounts the handwritten notes attached to the applicant's supporting affidavit, saying that the hand writing on them was not that of the deceased. She dismisses the writings as forgeries based on a report she had procured from a handwriting expert
13. On the assertion by the applicant that she did not attend the deceased's burial because she was unwell and there was hostility from the respondent, she states there was no opportunity for her and her family to display hostility to the applicant for the latter never attended any of the funeral committee meetings, neither did her relatives send condolence messages or even attend the funeral. She argues that if there was indeed a marital relationship between the applicant and the

- deceased nothing would have prevented her or her relatives from attending the funeral, emphasizing that funerals are not secret affairs for their arrangements are made publicly, complete with newspaper announcements.
14. She asserts that the applicant did not develop any properties with the deceased for she was a mere employee. She submits that the deceased was a man of means, who would have built a home for the applicant or to let her stay in one of his many houses. He would not have allowed his wife to continue living in a rented house in a slum in Kayole.
 15. She explains that after 2002, the deceased began ailing and she nursed him every now and then at the Nairobi Hospital, and during that entire period she never saw the applicant visiting him either at the hospital or at his Karen home. She asserts that the deceased never paid dowry for the applicant; neither did his relatives ever attend any marriage ceremony at the applicant's parents' home. She asserts that if there had been a secret marriage, the deceased's driver would have known about it, for due to his ill-health the deceased had to be chauffeured around. In any event, she concludes, the applicant's national identity card does not bear the deceased's name. She states that the deceased's mother's name was Wanjiku, and if the applicant's child were named after the deceased's mother, then her name should be Wanjiku and not Wanjiru.
 16. She has attached to her affidavit copies of various documents. There is the birth notification reference number 333/91 of 20th July 2005, indicating birth of a child on 15th February 1991, which does not indicate the name of the child nor of the father. There is copy of the notice of objection filed in the cause, together with the affidavit drawn to support it. In it the applicant calls herself Ann Njeri. There is the birth certificate serial number 55609 of 20th December 2005, where the applicant is depicted as Anne Njeri Mbugua. The child's school leaving certificate indicates that she joined Chalaw Academy in 1998. The letter offering the child admission to the Kigumo Girls Secondary School, which is undated, but concerns school fees for year 2007, refers to her as Eunice, with another unclear name starting with letter W. However, the letter offering her a place at St. Michael's Girls High School, Kenol, refers to her as Eunice Muchiri.
 17. Several other affidavits were lodged in the cause on 22nd September 2008, together with that of the respondent. These were sworn by Joseph Karanja on an unknown date, James Muigai on an unknown date, Francis Mahia on an unknown date, and Charles Kirina Rukara on 19th September 2008.
 18. In his affidavit, Charles Kirina Rukara, stated that the respondent, Margaret Njoki Muchiri, the wife of the deceased, was a sister of his own wife. He played a role in the funeral arrangements following the death of the deceased, acting as the secretary to the funeral committee. He avers that he knew the respondent as the only wife of the deceased. He states that he did not know the applicant, she had never been introduced to him by the deceased and she did not participate in the funeral arrangements nor even attend the funeral itself. His relatives too did not participate in the funeral arrangements or in the funeral itself.
 19. Joseph Kinyanjui, a building contractor, on his part avers that he knew the deceased from 1974 up to the date of his death, as they interacted during the construction of the former's houses. He knew Anne as an employee of the deceased when she was hired as a cleaner in 1990, but was sacked after only eight months in employment. He was to meet her later in 2007 at Kayole, when she approached him seeking a job to supply building materials and made a request to be given a rental shop at the premises he was constructing. He asserts that the lorry that was allegedly providing her with funds for maintenance was actually used by him to supply building materials and was grounded in 2005 at the Chief's camp and remained there until it was towed away in 2005 on instructions of the respondent.
 20. Francis Mahia worked for the deceased as a driver starting in 2005 until the latter's death. He states that only the respondent was introduced to him as a wife, he did not know the applicant. He says that the deceased was sickly over the period and he recalls only driving him to work, home

and Nairobi Hospital. James Muigai worked for the deceased, with the applicant, at Eastleigh. He recalls that the applicant was a cleaner, who was sacked in 1991 after being in employment for eight months. He identified the respondent as the only wife of the deceased that he knew, adding that the applicant related with the deceased as her employer.

21. The respondent swore a further affidavit on 21st October 2008, in response to one sworn by Mary Nyambura Kimenyi, which is not in the record before me. She asserts that the deponent had not disclosed the personal life of the deceased apart from what she was allegedly told by the applicant. She wonders why the deponent did not attend the deceased's funerals if she was a family as she claims. She asserts that the applicant never had an office at the Al-Jadalal Hotel, the deceased never owned a house at Umoja, and never lived at both Umoja and Komarock. She further asserts that if the deponent did know the deceased that well she ought to have known that his mother was called Wanjiku and not Wanjiru.
22. To the issues raised in the foregoing affidavits, the applicant swore an affidavit on 6th November 2008. She asserts that the deceased lived with her for over twenty (20) years and between the two of them they had a child. She argues that notifications of birth do not carry on them names as they accompany other hospital records which are sent to the registrar of births. She states that her daughter was ready to be subjected to a deoxyribonucleic acid (DNA) test along with the other children of the deceased. She further argues that there are no school regulations that require that a birth certificate be produced as evidence of birth, other records such as clinical records or baptismal cards could be used for the purpose. She says that she lived in a rented house at Umoja, where the rent was paid by the deceased. She explains that she could not have named her daughter after the deceased's mother Wanjiku as she had an older child bearing that same name, named after her own mother who was also called Wanjiku. She named her Wanjiru allegedly on instructions of the deceased, to mean from the Munjiru clan of his father and also to honour the woman who raised him after his mother abandoned them. She asserts that her daughter was taken to good schools such as Chalaw Academy and Kagumo High School. She adds that the Kikuyu rites of marriage, that is to say *kuhanda ithigi*, *riracio* and *ngurario*, were conducted.
23. There is a bunch of affidavits on record sworn by persons who supported the applicant's case. All these were sworn on 6th November 2008.
24. Evans Amber Ombongi is an elder working with the Chief of Kayole Location. He states that he knew both the applicant and the deceased, with the deceased having introduced the applicant as his wife. He alleged that the two owned plots at Kayole, where the applicant put up stalls and let them out to several persons. When issues arose with respect to the plots, the applicant would sort them out allegedly as the wife of the deceased. Later flats were put up on the plots. The applicant parked a lorry KVM 246 at the Chief's camp, and the same remained parked there till after the deceased's demise.
25. Charfano Guyo Morku was at one time a member of parliament for Isiolo North. He states that he stayed at Eastleigh and he got to know both the deceased and his wife, the applicant herein. It was the deceased who introduced the applicant as his wife sometime in 1990. The applicant was said to have been in charge of the Al- Jalalah Hotel where visiting constituents from the deponent's constituency would reside. He asserts that she worked there for over ten (10) years, taking care of the business as the deceased's wife.
26. Felista Nyambura says that she knew the family of the applicant and the deceased. She used to visit them at their offices at Eastleigh. When the applicant delivered, she visited the office and the deceased told her that his wife was recuperating at home. He took her to the Umoja home, where she prepared food for the applicant.
27. There is also on record an affidavit sworn by Francis Mwithukia on 17th November 2008, responding to the applicant's affidavit of 6th November 2008. He is a cousin of the deceased, who

claims to have been very close to the latter. He asserts that the deceased never lived with the applicant for more than twenty (20) years or for that matter for any length of time for he only lived with the respondent as his wife since the date of their marriage till he died. He was said to have suffered a stroke and was always in and out of hospital where he was being taken by the respondent, who also settled all the bills. He asserts that no customary law marriage rites ever took place to mark the deceased's marriage to the applicant, and none were attended by any member of the family or clan of the deceased. He states that the applicant did not attend the deceased's funeral, and neither did her relatives. He says that he met her for the first time shortly after the deceased's death, after she approached him seeking to have him persuade the respondent give her some money for she was the deceased's widow. A copy of a confidential medical report, dated 26th August 2008, is attached which shows that respondent was the person known by the doctors, attending to the deceased during his final illness, as his wife.

28. The Motion dated 7th July 2011, was also at the instance of Anne Njeri Muchiri. She sought a variety of orders. She sought that the respondent be restrained from withdrawing money from named bank accounts alleged to be in the name of the deceased, and from selling shares and receiving dividends with respect to named limited liability companies. She also sought to be paid a monthly sum of Kshs. 170, 000.00 from income generated from certain assets named in the application.

29. In the affidavit, she swore on 7th July 2011 in support of the application, she avers to have been married to the deceased under customary law. She asserts that her daughter was accustomed to a good standard of living by the deceased, which included her education in named high cost schools. She lived a fairly high standard rented accommodation at Umoja and Komarock, close to developments that the deceased was carrying out in premises at Kayole. She states that she was in charge of various houses collecting rent. Although she was not on salary she was allegedly well taken care of as a wife. She would like the respondent compelled to submit all documents relating to the assets of the deceased. She lists the immovable property owned by the deceased, and estimates it to be valued in the region of Kshs. 100,000,000.00. She estimates the other assets to be valued in the region of Kshs. 1,500,000,000.00. She has detailed her current needs and expenses, and given a breakdown of the money that was last given to her by the deceased on 30th November 2007 of Kshs. 12, 000.00 left with a landlord at Kayole.

30. Several affidavits were lodged in the cause in 2012 in respect of the said Motion.

31. The alleged deceased's daughter, Eunice Wanjiru Muchiri, swore an affidavit on 27th January 2012, where she gives a physical description of the deceased, and how he related to her. She talks of the type of car he used to drive, how he would take her shopping and visit her in high school. He allegedly used to talk to her through her mother's phone, and she would visit him at a construction site at Kayole. He would leave money for her tuition with a cobbler and her mother would collect it later. She was allegedly introduced by the deceased to a foreman called Kinyanjui. She tells of how her mother fell ill in 2006, and how she knew in 2007 that the deceased was ill, although her mother had not told her about it probably thinking that she would worry about it. She discovered that he died on 30th December 2008, and she decided to visit his grave at Murengeti, Limuru, where she was taken by her mother.

32. Mary Wanjiku Mbugua is the mother of the applicant. She swore an affidavit 30th January 2012. She talks of first seeing the applicant for the first time with the deceased in 1989 when he was introduced as a boyfriend. The pair is said to have been visiting a property at Muthaita. She gives a physical description of the deceased and the type of car that they came in with. They returned in June 1990 to perform Kikuyu rites of marriage. Money was produced by the deceased and given to her husband, now deceased, in the presence of two named elders, now also deceased. Her son and his wife and children were also said to be present, and so was her friends, Elishiba Nduta, also deceased. The deceased was accompanied by a friend of his called Kimani.

33. The next visit allegedly followed in August 1990. The visitors, eight in number, are said to have come in two vehicles, a pick-up converted into a matatu and a small car. It was the deceased, Kimani and others, whose names the deponent could recall. They brought a *ndurume* goat. There were dowry negotiations, in which she did not participate for women are not allowed into such fora under custom. When the visitors were departing, they gave the women Kshs. 10,000.00 (in appreciation for their services) and lesos. The deceased also gave her Kshs. 5,000.00 for sugar. She later learnt from her husband that the deceased had left them with Kshs. 20,000.00. There was a symbolic pouring of the blood of slaughtered goat as acceptance that the family had agreed to give out the applicant as a wife to the deceased. She states that they agreed reluctantly given the age difference between them, and the fact that they had hoped she would pursue a career in the aviation industry.
34. She alleges that she later visited the couple at their home in Umoja. She later learnt that they had moved to Komarock and then to Kayole. In 1991, they had a daughter named Wanjiru, allegedly at the insistence of the deceased. She did not attend the funeral of the deceased as she was sick
35. Mary Nduta Kamau swore an affidavit on 14th February 2012. She is a sister of the deceased. She states that their mother was called Elizabeth Wanjiku Kamau, and not Eunice Wanjiru. She was separated from their father, and lived at Ngong. The deponent asserts that prior to their mother's death she did not see the applicant visit the old woman during her illness. She only got to see her after the deceased's death, when she visited her house to announce that she was the deceased's widow, and seeking help to convince other family members about that fact. It is said that she conceded that she had not attended the deceased's funeral, explaining that she had been unwell. She also conceded that none of her relatives participated in the funeral arrangements nor attended the funeral. Although, she alleged that her daughter was named after the deceased's mother, she was surprised to learn that their mother's name was Elizabeth Wanjiku, not Eunice Wanjiru. She says that the rites of marriage referred to in the affidavits of the applicant and her mother were unknown under Kikuyu customs, pointing out that coincidentally all those named in the affidavits as witnesses are all dead.
36. There is also the affidavit of Samuel Muithukia Kamau, a step-brother of the deceased, sworn on 14th February 2012. He gives details of the family of the deceased, particularly explaining that their father was a polygamist, but separated from the mother of the deceased. He says he was very close to his deceased step-brother. He expresses surprise to the claim that the applicant was married to the deceased. He says that public announcements were made of the death and the burial arrangements, but the applicant did not visit the family to offer condolences nor attend the burial itself. He expresses surprise that the deceased's alleged daughter only got to hear of the death after the deceased had been buried. He is equally surprised at the claim that the applicant took her to the burial site, yet she had not herself attended the funeral. He asserts that the marriage rites described by the applicant and her mother were alien to Kikuyu custom. He has attached to his affidavit, copies of the minutes of the funeral committee, an obituary and radio death announcements.
37. The oral hearing of the application commenced on 20th March 2013. The first to take the stand on the part of the applicant was George Mutua, an officer with the Department of Civil Immigration. He testified on the birth certificate of the applicant's daughter. He testified that the parents of the child were indicated as the applicant, Anne Njeri Mbugua, and the deceased, Geoffrey Muchiri Kamau. He stated that the particulars of parentage would have been obtained from the mother of the child by the midwife at the hospital where child was born, which would then be passed to the doctor, who would then forward the details to the registration of persons department. He emphasized that the information ought to come from both parents, and it need not necessarily come from the mother. He stated that his office only relied on information forwarded to it by the hospitals and it would be difficult for his office to know whether the information was correct or not.
38. The second on the stand on the part of the applicant was the applicant herself. Her testimony was largely along the lines of the affidavits that she had lodged in the cause. She described how she

- met the deceased in 1987 as she was looking for employment, and he employed her as a receptionist. How he started taking her out, got her a rented residence in Umoja, and how the deceased spent a night there after the house was furnished. She told of his regular visits on Thursdays, Fridays and Saturdays when he would not find her, whereupon he would leave notes indicating that he had visited but did not find her. She was later moved to a residence at Komarock. She said that although the deceased had homes at Karen and Limuru, he did not give her any of them adding that that was a matter that was purely within his discretion.
39. She stated that sometime in 1989, a child of the deceased died and she was involved in the funeral arrangements, in terms of keeping a condolence book at the place of work at Eastleigh and receiving monetary collections at the same place towards the funeral. She took the money and the condolence book to the deceased's residence at Karen, and she attended the funeral. After the funeral, the deceased told her that he wanted to have a child with her, whereupon she told him that she had to take him to her parents first.
40. She told of how the deceased made three trips to her parents' home at Nakuru. The first visit was in 1989, it involved just the applicant and the deceased. They found her parents and her brothers. The deceased was accepted. The second visit allegedly followed in January 1990. The deceased was accompanied by the applicant and two elderly men, called Leonard and S K Kimani. They carried with them two goats and five crates of soda. They found her father with neighbours, but she could only recall Stephen Kiragu, Mambo, Kihuna Njoroge and Elishiba Nduta. There was a feast, one of the goats was slaughtered and her father was given Kshs. 10, 000.00. She described the event as *ruracio*, for payment of dowry. She said she did not understand the significance of the slaughtering of the goat. It is after this that she decided to bear the deceased a child. The third visit was in June 1990. They went again with Leonard and S K Kimani. She was told it was the *ngurario*, but she did not understand the difference between it and the *ruracio*. On cross-examination, she said the third visit took place in August 1990. She testified that on the third visit no goat was slaughtered.
41. The rest of the testimony dwelt on how she conceived, was admitted at the Park Road Nursing Home, delivered, was visited by the deceased, how they discussed what name to give the child before settling on Wanjiru, how he registered the birth at the hospital offices and how she eventually went home to Umoja to convalesce. The deceased was said to have brought Felista Nyambura one day to help with the cooking.
42. She also testified at length on the various businesses of the deceased where she worked in various capacities. She was a receptionist at the Jalala Hotel at Eastleigh, which changed names a number of times. She later worked at another hotel business of the deceased christened Atlanta Hotel, which also changed names several times. She was then moved to a shop called Brighty Hardware, where she sold all the stock in there, after which it changed names to Jeokan Wholesalers. They then began to sell spaghetti and macaroni. He then bought a property, which was operated as a hotel known as Sphagethini. They then moved into importing and selling motor tyres, soda and peanuts. He thereafter bought plots at Kayole, which the applicant used for a while as market stalls which she rented out. He thereafter began to develop the said plots. She asserted that she was not an employee of the deceased, and therefore she was not drawing a salary, she could therefore not be dismissed from employment.
43. She stated that although the deceased died on 30th December 2007, she only got to learn of it on 2nd January 2008. She said she was on sick bed, and did not attend any of the funeral meetings. She had been admitted at Kenyatta National Hospital from 5th July 2007 to 9th October 2007, she only recovered fully in May 2008. She was unable to attend the funeral. She was informed of the death by the deceased's step-brother called Paul Wangai. Her relatives had also been unable to attend the funeral as her father had also died at around the same time, and they were also mourning. After the deceased's burial, she approached another of his step-brothers called Francis

Mwithukia, for support, but she did not receive any, so she decided to come to court. After his death, she moved her residence to Kayole. She denied living at Soweto.

44. She thereafter gave a detailed list of all the assets that the deceased owned, which I need not recite here. She stated that she knew that the deceased had another wife, who he had married in Church. She testified that the deceased had told her that he had not obtained the consent of his first wife before he took dowry to her people. She stated that none of the deceased's relatives played a role in their marriage arrangements, and the deceased had told her that if he involved them they would have brought problems. She said that she knew his relatives, and proceeded to name them and indicate where some of them lived. She said that she never adopted the deceased's name even after she married him. She did not have any of the deceased's photographs, either alone with him or with their child. She did not also have any photographs taken together with the deceased at social functions.
45. The next witness on the applicant's side to testify was Felister Nyambura, who stated that she lived in Eastleigh and was in the grocery business. She had known the applicant since 1987, while they were choir members at St. Theresa's Catholic Church, Eastleigh. She said that she was not close to the applicant as such for they were not age mates. She was aware of the relationship between the applicant and the deceased, who she described as his boy or man friend. According to her, the applicant got pregnant and she was at some point taken to her house in Umoja by the deceased. She would visit the latter there, and witnessed the deceased visiting her. She said the child was delivered when the applicant lived at Kayole in an apartment, saying that the Umoja residence was not an apartment. She could not tell when the former delivered. She did not spend any nights at the applicant's residence at Kayole, but she noted that the deceased would come in and leave. She conceded that she did not know much about the applicant, and although she knew the deceased as her husband she could not tell whether he spent any night at the applicant's residence or not. She never went with the applicant to the latter's home when the marriage ceremonies were conducted, although she had been invited once but could not go on account of work routine.
46. The applicant's daughter, Eunice Wanjiru Muchiri, testified next. She said that she was born on 15th January 1991. She stated that the deceased was her father, and it was in 2005, when she was in Standard Six, that she got to know that fact. He would visit her at school, usually on Fridays, and he would do shopping for her, among other things. When unable to visit her at school, he would ask that she meets him at the site where he was constructing a house at Kayole, and give her money for shopping. When admitted to secondary school, he did shopping for her, and personally took her to the school situated at Kerugoya. He paid school fees for her for the entire year. He also came to see her at school on visiting day. He would take her out on weekends and bought her clothes, but she did not know his mobile phone number. She only got to know that the deceased had another family after he died. She evinced her readiness to be subjected to a DNA test to prove that he was her father. On cross-examination, she said that the deceased used to visit them on Saturdays, at times he would come and spend the whole weekend with them. She did not attend his funeral as she was away at her maternal grandparents' home. Her grandmother was with her harvesting, and so too were her maternal uncles. She had left for upcountry before her mother fell ill. She only learnt of the death after she came back to Nairobi.
47. The next to testify for the applicant was Evans Ambori Ombogi, who described himself as an elder at the Kayole Chief's office. He stated that he got to know the applicant and the deceased in 2003 when they came to the chief's office, saying that they had plots at Kayole, and wanted the chief's help to remove persons who had encroached on the plots. The applicant introduced the deceased as her brother and herself as the person to be in charge of the construction. He did not get to know where the pair lived, they had a child in the car, and there was a lorry that they used to park at the chief's camp. They visited the chief's camp several times thereafter. The plots were later developed and tenants moved in. He said that the time he saw the deceased alive was between 2003 and 2005. He did not know any other wife of the deceased. He did not attend any ceremony of marriage between the applicant and the deceased. On cross-examination, he stated

that it was the deceased who introduced the applicant as his wife.

48. The last witness on the applicant's side was Mary Wanjiku Mbugua, her mother. She identified the deceased as her son-in-law, being the husband of her daughter, the applicant. She described the visits that the applicant and the deceased allegedly made at her home at Nakuru. During the first visit the deceased did not bring anything with him, he only came to introduce himself, but by then the two were already together from what they told her. The second visit was said to have happened in the month of August of a year that was not disclosed. It was said that the deceased came with eight persons from his side, whose names she could not recall, to pay dowry. Her husband called three elders, Kiragu, Gitumbi and Mambo. A goat was slaughtered, whose significance was acceptance that the deceased had become their in-law. Blood was poured. Money also changed hands, and lesos were given for the women. No beer was brought because the witness's husband was a church person. They brought money instead of beer. During cross examination, she said that there were three visits by the deceased and her daughter, and that it was during the third visit that a goat was slaughtered. She stated that none of the members of the deceased's family were present.
49. She testified that she did visit Nairobi after her granddaughter was born. She went to the Umoja house in 1991 to visit the child. She found her daughter at home, but the deceased was not at home. She spent the night there and left in the morning. She did not visit them thereafter, rather it was the child who used to visit her with her mother. The deceased also did visit her on three occasions during the times that he visited his farm at Miti Mingi. During cross-examination she stated that she did not sleep at her daughter's house at Umoja. The deceased came into the house at 7.00 pm, and she left to sleep at her son's house elsewhere within Umoja. She stated that her husband died on 17th July 2007. The family of the deceased was not involved in the funeral. She mentioned that the deceased died the same year. At the time her daughter was sick and did not attend both funerals.
50. The respondent on her part, opened her case on 14th October 2014. She testified that the deceased was her husband. They lived at Karen, but they had a country home at Limuru. The deceased was also said to have had houses elsewhere in Nairobi, six in number. She said she was the only wife of the deceased having been married in Church. She was not aware of any other wife, and she had not heard of the applicant and her child until the matter was brought up in court. She only met the pair in court. She stated that she did not see the applicant or her relatives at the deceased's funeral. They did not attend any of the pre-burial meetings for mourning or funeral arrangements. They did not send funeral condolences either. She had not met the applicant at any of the family gatherings, nor was she ever introduced to her by her husband as a wife. When she was nursing the deceased after he suffered strokes and was hospitalized for some time, the applicant never visited him at hospital. He was said to have been ailing for over six years. She asserted that the applicant was not her co-wife.
51. The respondent called only one witness, Samuel Mwithukia Kamau, her husband's half-brother. He testified that he had been close to his deceased step-brother, and that he was also the family spokesperson. He stated that the issue of the deceased's other wife arose after the deceased's demise. Before then, he had not heard the deceased inform him that he had another wife. He never built a house for her, nor gave her a place to farm. The family knew nothing about her, and she was not part of the family. She never attended family meetings, was never introduced as a wife by the deceased, and she did not attend the funeral meetings. He saw her for the first time in court. He stated that she could not have been married secretly under Kikuyu customs, for the ceremonies under custom are never performed by two persons, and the goat required for the ceremonies is slaughtered by the family. He asserted that there must be witnesses and a record is kept. He drew parallels between the traditional ceremony and a church wedding. On cross-examination, he stated that neither the applicant nor her daughter attended the funeral. He stated that had she attended any of the funeral committee meetings in her alleged capacity as a wife of the deceased, he would have taken time to investigate the matter.
52. At the conclusion of the proceedings on 27th April 2015, I directed the parties to file and exchange written submissions. In compliance thereto, the parties did file their respective written

submissions, complete with the authorities that they propose to rely on. The applicant's written submissions are dated 25th April 2015, and were filed herein on 27th April 2015. The respondent's submissions are dated 22nd June 2015, and were filed herein on 23rd June 2015. The applicant thereafter filed supplementary submissions on 3rd July 2015, dated 2nd July 2015.

53. The applications for determination are largely founded on section 26 of the Law of Succession Act, which empowers the court to make provision out of the estate for persons who have not been adequately provided for either in testacy or in intestacy.

54. The persons who qualify to move the court for provision, under section 26, are defined in section 29 of the Act. For avoidance of doubt, the said provision states as follows –

“For the purposes of this Part, ‘dependant’ means –

- a. *The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
- b. *Such of the deceased's parent's, stepparents, grandparents, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*
- c. *Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”*

55. The said provision puts the persons who may benefit from the discretion granted to the court by section 26 into two categories. The first, is of those who need not prove dependency. In this category are wives and children of the deceased. The rationale being that a man is bound to maintain his wives and children during his lifetime and even in death. Where any person who fits the definition of wife or child of the deceased moves the court under section 26, they need not prove that they were dependent on the deceased immediately before he died. Whether he maintained them or not is irrelevant as legally he was bound to maintain them anyway, and if he was not maintaining them, then he must have been guilty of dereliction of duty.

56. The second category is of the persons who must prove dependency for them to enjoy the discretion granted under section 26. The exercise of the discretion by the court is dependent on them establishing that they were in fact dependent on the deceased immediately before his death. In that case, proof of dependency is a condition precedent to the exercise of the discretion.

57. In the matter before me, the applicant has brought the application for dependency on her own behalf and that of her daughter. She claims to be a widow of the deceased. Consequently, she appears to be seeking to bring herself within the meaning of dependant under section 29(a), and so is her daughter. That being the case they need not prove dependency. However, whether they are widow and child, respectively, of the deceased is disputed. They are obligated to establish first that they are indeed spouse and child of the deceased. I can only exercise the discretion under section 26 upon being satisfied that the applicant and her daughter were dependants of the deceased within the meaning of section 29 of the Act.

58. However, before I venture to do that, I need to consider whether the application before me, brought under section 26, is competent given that no representation has been granted in this cause.

59. The petition for grant of letters of administration intestate was lodged herein by the respondent on 16th April 2008. From the record before me it is not clear whether a notice of the filing of the petition was published in the Kenya Gazette. What is clear though is that a grant of the letters sought has not been made to date. The record before indicates that the applicant lodged an objection to the making of the grant on 14th July 2008, supported by her affidavit, sworn on 15th July 2008. It is not clear whether the provisions of sections 68 and 69 of the Act and Rule 17 of the Probate and Administration Rules were complied with, for I have not come across an answer

to the petition nor a petition by way of cross-application.

60. The application dated 31st July 2008 was lodged in court on the same date, 31st July 2008. The procedure guiding the filing and handling of such applications is set out in Rule 45 of the Probate and Administration Rules. Rule 45 envisages two scenarios. The first is where the application is lodged in a cause where a grant has been applied for or made, but not confirmed. In such case, the application should take the form of a summons in that cause. The second is where no petition has been lodged for grant of representation, in which case the application should be in the form of a petition. In the instant case, a cause had already been initiated for grant of representation, and the application was brought appropriately by way of a summons.
61. Was the applicant, Mary Njeri Mbugua a wife of the deceased, Geoffrey Muchiri Kamau? She asserts that she was. She argues that she was married to the deceased under Kikuyu customary law. It is submitted also, on her behalf by counsel, that should it transpire that there was no valid Kikuyu customary law between her and the deceased, marriage could be presumed from a prolonged cohabitation.
62. Evidence was placed before the court to support the contention that she was a customary law wife of the deceased. That evidence was presented by the applicant herself, who testified as PW1, and her mother, who testified as PW5. The applicant stated that the deceased visited her parents for introductions, and thereafter paid *ruracio* and performed the *ngurario*. That evidence was echoed by PW5 in material particulars, but with some inconsistencies.
63. What constitutes a valid Kikuyu customary law marriage? The essentials of a valid Kikuyu customary law were set out by Eugene Cotran in *Restatement of African Law – Kenya Vol. 1 Marriage and Divorce*, 1968. They have also been discussed in several cases such as *In Re Estate of Harun Kagechu Kahagi (Deceased)* (2009) eKLR, *Nderitu Ndirangu vs. Patrick Mwaga Wanjau* (2011) eKLR and *In the Matter of the Estate of Samuel Muchiru Githuka – deceased* Nairobi High Court Succession Cause No. 1903 of 1994.
64. The steps were identified in those materials as including the consent of the family of the bride, the performance of a series of betrothal ceremonies which commence with the taking of beer (known as *njohi ya njurio*), payment of the first installment of dowry (known as *ruracio*), and the concluding ceremony known as the *ngurario*. The actual marriage ceremony is said to be performed after the *ngurario*, and is called the *guthinja ngoima*, during which the two families come together, slaughter sheep, exchange gifts and generally make merry. The bride should be handed over at the *guthinja ngoima*.
65. From these materials it is clear that the traditional marriage is a communal affair. It is matter involving both families, that of the man and the woman. It is not a private matter for the man or even the woman. Both their families must be involved for the woman thereafter becomes a member of the man's extended family. This process is intended for the protection of the woman for it gives her status and recognition as a wife in that extended family.
66. The applicant adduced evidence that some of the ceremonies referred to in paragraph 65 above were performed. She stated that she was not clear of the significance of what was done, but mentioned the *ruracio* and the *ngurario*. Her mother also testified along similar lines, although there were significant inconsistencies in their testimonies, particularly on the number of ceremonies conducted and what exactly happened in each of them. She too mentioned the *ruracio* and the *ngurario*, adding that she was not particularly clear on their significance.
67. Did the applicant prove sufficiently that the ceremonies mentioned above were in fact performed? I do not think so. In the first place I have noted the inconsistencies in the testimonies of the applicant and her mother. I have also noted that members of the family of the deceased did not feature in the proceedings. Yet, the traditional marriage contract ought to have been between his family and that of the applicant. None of the persons that the applicant and her mother mentioned to have had accompanied the deceased to their home were identified as his relatives. They were

said to be his friends. Indeed, it would appear that the whole affair was conducted in secrecy, if at all there were such ceremonies. It does not have the hallmarks of a traditional marriage in my view.

68. I am conscious of the fact that traditionally a man does not have to obtain the consent of his first wife before he takes a second wife. I am also conscious that he does not have to consult her, or even inform her that he plans to take a second wife, and even after taking a second wife that he has in fact taken one. That however does not absolve a party who alleges to have been married under customary as a second wife from adducing evidence to support the contention that she was so married.
69. That should be taken against the absence of sufficient evidence to support cohabitation between the deceased and the applicant after the alleged customary law marriage. She alleges that the deceased rented premises for her accommodation, yet insufficient evidence was led to support that. No receipts were produced as evidence that he paid rent in the alleged premises. No one was presented before court as an alleged landlord in respect of the alleged premises. None of the witnesses called categorically stated that they ever saw the deceased spend a night at the alleged premises. Indeed, the applicant's mother alleged visited the couple only once. She did not say that she saw the deceased spend the night with the applicant at the material night. The applicant's daughter, on her part, says that she did not meet the deceased, or, at any rate, he was not introduced to her until she was in Standard Six. If indeed, he was a husband to the applicant why would he not interact with the applicant's child until the latter reached Standard Six.
70. When the deceased died, neither the applicant, nor her daughter, nor her other relatives were in the picture. They did not appear to have been aware of the fact that he was ailing and had been hospitalized. They were not in the picture during the mourning period, nor at the funeral, yet there was no evidence that anybody had obstructed them from playing a role in the same. That is a matter that should arouse curiosity with respect to a woman who says that she had been validly married customarily.
71. From the foregoing, I find myself unable to hold that the applicant was a customary law wife of the deceased. She cannot therefore seek refuge in section 3(5) of the Law of Succession Act, which provides as follows:
- 'Notwithstanding the provisions of any other written law, a woman married under a system of law which allows polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless 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 Act.'*
72. Perhaps the applicant can argue that a marriage could be presumed from cohabitation. The principle of presumption of marriage from prolonged cohabitation was stated in *Hortensia Wanjiku Yawe vs. The Public Trustee Nairobi CACA No. 13 of 1976*. This is considered to be the local case *classicus* on the principle. It was said in that case that a marriage could be presumed from a prolonged cohabitation between a man and a woman. The said decision has been followed with approval in a number of cases.
73. The foundation of the principle is cohabitation. There must be proof that the man and woman lived together for a considerable period of time. That then is considered alongside other factors; such as the couple had a child or children together, the children were named following a traditional pattern which suggests marriage, property acquired jointly or together by the parties as would be the case in a marriage, among others.
74. I have carefully gone through the evidence presented before me. I have already concluded that there is no material upon which I can hold there was what can be described as cohabitation between the parties, long enough for the court to find that there was prolonged cohabitation. None

of the witnesses called by the applicant could categorically say that the two lived together. Most of the witnesses presented allegedly related to the applicant and the deceased at the work place and not at their residence. None of them could coherently describe how the two lived together. Then there is the child who did not know her father until she was in Standard Six, yet she was alleged to have been born within wedlock. The evidence about the deceased's hospitalization and subsequent death is also telling. The applicant was apparently unaware of all that. She never visited the deceased in hospital, nor even participated in the funeral arrangements after he died. It telling that she did not even attend the interment of his remains. Her relatives, including her own daughter, did not attend the burial. All these factors taken together do not, in my view, support a case that there had been a prolonged cohabitation from which I could presume marriage.

75. Having concluded that there was no evidence that there was a customary law marriage between the deceased and the applicant, and that the available evidence did not point to a prolonged cohabitation from which the court could presume marriage, I hold that a case has not been made out for the making of provision for the applicant out of the intestate estate of the deceased.

76. The application before me does not just seek provision for the applicant, but also for her daughter, on the grounds that she was a child of the deceased. The court has discretion under section 26 of the Act to make provision for such a child so long as there is proof that she was a child of the deceased. The wording of section 29 is such that the applicant need not prove that the child was dependent on the deceased immediately before his demise.

77. Was the daughter of the applicant a child of the deceased? The applicant asserts that she was and presented a birth certificate to support that contention. The applicant's case was that it was the deceased who provided details to the hospital of the child, yet the birth notification produced did not mention the deceased as the father of the child. If he was the father of the child, why would he not cause the child to be registered as his child. It was testified that a certificate of birth is generated from a birth notification, yet the details in the certificate of birth presented as that of the applicant's child did not confirm with the notification of birth. It was not explained how the name of the deceased found its way into the certificate, while it was missing in the notification of birth. In view of the above, I do not find basis upon which I can hold at this stage that the applicant's child was sired by the deceased.

78. The applicant stated that the child was available for a DNA test to confirm paternity. She, however, did not apply for the test to be done, probably with samples from the children of the deceased with the respondent. A DNA analysis is by far the most foolproof mode of establishing paternity. In the absence of the test I cannot make any finding as to whether the applicant's child was sired by the deceased or not.

79. In the end I make the following orders:

- a. **I dismiss the applications dated 31st July 2008 and 7th July 2011;**
- b. **I direct that representation be made forthwith to the respondent as per the petition on record if the same has already been gazetted, and if not, representation be made to the petitioner in the usual manner after gazettement of the petition;**
- c. **The administrator to be appointed under (b) above shall be at liberty to apply for confirmation of the grant made to her, but prior to that a DNA test shall be conducted, using samples from all the children of the deceased with the respondent, to determine the paternity of Eunice Wanjiru, the alleged daughter of the deceased with the applicant;**
- d. **Should the DNA test prove that Eunice Wanjiru is a child of the deceased she shall be provided for accordingly in terms of Part V of the Law of Succession Act; and**
- e. **Each party to bear their own costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 27th DAY OF May, 2016.

W MUSYOKA

JUDGE