



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 145 OF 2012

IN THE MATTER OF THE ESTATE OF FRANCIS MBURU (DECEASED)

JUDGMENT

1. The deceased herein died on 23rd October 2011.
2. Representation was sought in the cause by Salome Nungari Ngigi and Peter Ngige Mburu, in their alleged capacities as widow and son, respectively, in a petition lodged on 27th January 2012. The deceased was expressed to have been survived by the widow, Salome Nungari Ngigi, and five (5) children, namely Peter Ngige Mburu, Ishmael Ngaruyia, Hanna Wambui, Damaris Wairimu and Lucy Wanjiku. He allegedly died possessed of two (2) assets – Kabete/L. Kabete/2808 and Motor Vehicle registration mark and number KAS 956X.
3. A notice of the initiation of the cause was published in the *Kenya Gazette* of 30th March 2012. A grant of letters of administration was duly issued on 16th May 2012 in the names of the petitioners.
4. On 17th September 2012 a summons for revocation of the said grant, dated 14th September 2012, was lodged in the cause by one Mary Wanjiku Kamau. She alleges to have been married to the deceased, and complains that the administrators had not disclosed that fact to the court when they sought representation to the estate. She avers that she had married the deceased in 1975, they had had a child together who was named after the deceased's mother. She then separated from the deceased after a quarrel, and lived apart from him till he died. After the deceased passed on, she was called by the deceased's brothers, who allegedly stated that they recognized her as being one of the deceased's widows. She and her alleged co-wife widow were supposed to obtain a letter from the local Chief to facilitate filing of the cause, but when the first administrator dilly-dallied, she opted to obtain a letter from the Chief without involving her. She then obtained the letter from the Chief of Kabete Location annexed to her affidavit, dated 28th February 2012, which identifies her and her daughter as survivors of the deceased.
5. There is another affidavit on record filed simultaneously with the application. It was sworn by one Peter Gathungu Maina on 14th September 2012. He alleges to be the elder brother of the deceased, and states that the deceased had two wives, the applicant and the first administrator. He says that both women had separated from the deceased, alleging that the administrator had collected her belongings from the matrimonial home with the intervention of the local Chief. At the time of the deceased's death, it is alleged that he was living with none of the two. When he died, the deponent and others informed alleged widows of the fact, and the first administrator attended the burial. He states that both were recognized as widows in the funeral programme. Thereafter, the family met and agreed that the estate be shared between the two families, but it would appear that the first administrator chose to go it alone.
6. The first administrator, upon being served, filed an affidavit in reply, sworn on 10th October 2012. She states that she married the deceased in 1995, whereupon they stayed together until he died, having two

children in the process. During the time, he allegedly never informed her that he had married previously. After his death, his family is said to have organized for the interment of his remains. During which process no one mentioned about another wife. She asserts that the funeral programme identified her as the only widow. She states that there was a meeting thereafter where succession was discussed, and it was agreed that the first administrator and her children were the only survivors of the deceased. She has attached a copy of the alleged funeral programme, which is in the Kikuyu language, and no translation has been provided, but it mentions the first administrator as having been his wife and names her five (5) children as the children that they had together.

7. Several other affidavits were lodged on the cause at the same time with that of the first administrator. These were sworn on 10th October 2012 by Daniel Mwangi Njoroge, Joseph Karugi Maina, Moses Wanjiru Maina and Julius Mbugua Mwaniki. The principal affidavit is that by Joseph Karugi Maina. He avers to be a brother of the deceased. He states that the deceased lived in the same compound with him. He asserts that the applicant never married the deceased. He says that she was a friend of the deceased but never his wife. He denies that she had been married by the deceased in 1975. He further denies that their mother was called Milka Nyambura, saying that her name was in fact Damaris Wairimu. When the deceased died the applicant was not involved in the funeral arrangements at all. The issue of the deceased's other wife only came up after the burial at the meeting that was to disband the funeral committee. A dispute arose when the first administrator declined to allow one of the brothers of the deceased inherit his car, whereupon the said brother threatened that the first administrator would not inherit anything from their brother's estate.

8. The deponents of the other affidavits associate with the averments made in the affidavit of Joseph Karugi Maina. Their said affidavits are in fact copy cats, where they all allege to have been members of the committee that planned the deceased's funeral, and stating that they had heard the threat by two of the deceased's brothers bringing someone to claim a stake in the estate of the deceased.

9. Directions were taken on 10th April 2013 for the disposal of the application dated 14th September 2012. It was directed that the same would be by way of oral evidence.

10. Hearing commenced on 9th February 2015, and concluded on 23rd September 2015. The applicant called four witnesses, while the administrators also called four.

11. The applicant testified first. She alleged that she and the deceased cohabited for twelve (12) years, a process which began after the applicant had had a child with him. It was alleged that after the delivery of the child, Milka Nyambura, the deceased took the applicant in and began to live with her. The two allegedly met at Limuru when the deceased was living and working with his uncle. The child was allegedly born in 1976, and the pair separated when the said child was in Standard Eight (8). At separation, the applicant allegedly went to live with her parents. She testified that upon the deceased's death she was not notified, and that she only came to be aware of the death after the burial. It was also after the death of the deceased that she discovered that the deceased had married another woman. It is the deceased's siblings who alerted her to that fact, and told her that she was entitled to inherit his estate. The matter was escalated to the Chief's office where, it was alleged, an agreement was reached that the two women would pursue representation to the estate jointly. However, both sides ended up with separate causes. The applicant complains that she was not informed before the administrators moved the court in this cause, nor did she sign any documents. She asserted that she was married to the deceased, and his brother knew about her and her daughter. She stated that she would have preferred that the estate was shared equally between her and the first administrator.

12. On cross-examination, the applicant stated that she was not sure of the date or year when the deceased married her. She stated that they got their child while living apart, but that they started staying together when the child was about four (4) years old. She put the year of their marriage to have been sometime in 1980 or towards 1980. She stated the year of separation to have been 1992. She stated that she and the deceased cohabited at Kiawaruingu, Kabete, for twelve (12) years, and that the deceased's mother, Damaris Wairimu, stayed with them. She asserted that her daughter, Milka Nyambura, was named after the deceased's mother, but was named Nyambura as the applicant had her while still at her parents'

home.. She stated that she was informed of the death of the deceased by his siblings. It was his sister, Salome Waceke, who called her and told her that he had died and was buried. She then added that his brothers called her before the burial and informed him of the death. She chose not to attend the burial as she was too shocked by the news.

13. On re-examination, she stated that she had her daughter while living her parents, and that explained why she named her after her own mother. She claimed that it was the deceased's mother who took her from her parents' home.

14. The applicant's first witness was Peter Gathungu Maina. He testifies to be the eldest brother of the deceased. He stated that the deceased had married the applicant and they got one child, the two disagreed, and the applicant left. Thereafter, he was said to have married the first administrator, they got children together, disagreed and she also left. By the time he died, he was not living with either woman, adding that the women only came back to get the estate. He asserted that the applicant had lived with the deceased for twelve (12) years, and that she had been recognized as his wife.

15. On cross-examination, he stated that he did not call any of the wives of the deceased to inform them about the deceased's demise. He testified that he could not recall when the deceased married the applicant. He said that the deceased's child with the applicant was born when the two were living together at Kiawaruingu, Kabete, although he could not recall the date of her birth. He said he could not recall the deceased brother living and working with their uncle at Limuru, adding that he probably only used to visit his uncle there. He said that the issue of the deceased's property was not discussed at the funeral committee meetings, adding that he could not recall the date of the last meeting of the committee. He asserted that he did not attend the last meeting when the committee was disbanded. He said the issue of the property was discussed only at a meeting at the office of the Chief of Lower Kabete Location. He conceded that a brother of the deceased called Njenga used to drive the deceased's car after the former died.

16. The next witness for the applicant was Newton Njenga Maina. He testified to be a younger brother of the deceased. He stated that the deceased at one time lived with their uncle at Kinyogori. He alleged that he got to know the applicant when the deceased was living at Limuru. The deceased allegedly went and informed their mother that he had a lover at Kinyogori. The applicant got pregnant while living with her parents, and their mother and aunt then went and took her and brought her home, where she lived for some twelve (12) years. He recalled that at one time she got very ill and they struggled a lot to get her treated. She fell out with his brother and went back to her parents. After that the deceased married the first administrator. She was said to have been taken away from her husband's home, and came along with her three (3) children. She then two (2) more with the deceased. After her former husband died, she was called by his brothers, who gave her a piece of land as her inheritance, which she later sold. After she married the deceased, they began to have disputes, which would be arbitrated by the Chief. Eventually her father said she should separate from the deceased, adding that she ought not to have married him in the first place given that they were related. Her belongings were brought to the Chief's office and distributed, after which she left to live with her parents. He alleged that the deceased thereafter lived alone until his demise. He stated that he took charge of the deceased's vehicle as he was the person who was familiar with motor vehicles. The first administrator attended the funeral meetings, as a mourner, according to the witness; and the applicant was not party to the proceedings as the witness and his siblings had failed to get hold of her on phone. He asserted that he and his brothers did not claim anything from the estate, saying that the motor vehicle in his possession was eventually taken away from him by the police. The first administrator eventually returned to the deceased's home and was facilitated to have access to the deceased's documents and assets. He stated that their efforts to bring the applicant on board bore no fruits. At the meeting held to wind up the affairs of the deceased's funeral did not end well for it was frustrated by the first administrator and the same allegedly ended up as a dispute before the Chief.

17. On cross-examination, he stated that he did not know when the applicant and the deceased got married, but he asserted that that happened while Mburu was living at Limuru. He could also not recall when their child was born, but stated that he was sure that she was born in Limuru. He testified that the meeting to wind up the committee intended to talk about the estate of the deceased, but it never got to do

so. He conceded that at the time he was the one using the deceased's car, the same having been given to him by his sister, Salome Waceke, and his brother, Gathungu. He denied threatening to bring another person to claim the estate if he was not given the vehicle. He said the first wife did not attend the first meeting of the funeral committee as he had not informed her of the death, but Salome Waceke informed him that she had talked to her and she had said she would attend the meetings. On the funeral programme, he testified that he did not know who prepared it and where it was typed, but he did know that the programme had been rejected by the committee. He pleaded ignorance as to the contents of the programme, saying that he was aware that there was a funeral programme but he never saw it. He stated that the committee did talk about the applicant, but it was not placed on record that the deceased had two wives. He conceded to taking the applicant to the deceased's farm to cut Napier grass, but the police orally stopped both the applicant and the first administrator from cutting the grass at the farm or even using the farm itself. He said he did not know where the applicant resided. He stated that the deceased used to live on the farm with the first administrator, the farm was subdivided after the first administrator left and during the period when the deceased lived alone, but after he died the first administrator came back and lived there with her children. He stated that he could not recall when their mother called for the applicant after she had heard that she had delivered a baby. He asserted that the first administrator had been married elsewhere and that she had inherited property from her ex-husband. It was his view that both women ought to inherit from the deceased's estate.

18. The applicant's last witness was Salome Waceke Maina. She testified to be a sister of the deceased, who she said had two wives, the applicant and the respondent. She could not recall the dates when he married both women. She also said that she knew all the children of the deceased with both wives. The deceased was allegedly living alone as at the date of his death. She testified that at the meeting where the postmortem of the funeral was to be done, the committee did not discuss about the estate as the first administrator objected.

19. On cross-examination, she stated that at the last meeting they were unable to arrive at a consensus as they wanted the applicant to be present at the meeting. The first administrator allegedly attended the meeting in the company of her relatives, and it was the presence of the non-family members that was objected to. She conceded that she was party to giving the deceased's car to one of her brothers, saying that it was given to him for safekeeping. She stated that the applicant was born in the 1970s, while she, the witness, was born in 1962. She said that her mother went for the applicant after she had been delivered of her daughter, and the child was named after the applicant's mother because the applicant got her while at her mother's home.

20. The first administrator on her part testified that she had applied for representation to the estate of the deceased and the applicant had applied to have the grant made to her revoked. She stated that she had married the deceased in 1996, by which time she had already gotten three (3) children. She got two (2) more children with the deceased. They disagreed in 2006 and separated, but then in 2008 he began to visit her at her parents' home. She stated that it was their son who informed her of his death on the day he died. She was among the family that sat the following day to form a funeral committee. She was given keys to the deceased's house after the meeting and she moved in. She alleged that during their separation she and their children would visit the deceased at his house. At one point he removed his children from a public school and enrolled them in a private one. She stated that she was unaware that he had another wife. It was not until the last meeting of the burial committee that the issue of the other wife came up, after some of the relatives raised the issue of the validity of the deceased's marriage to the witness. The issue was allegedly raised by Njenga, who wanted to take the deceased's car, but when the witness allegedly objected, he, Njenga, threatened to bring in another woman so that she could share the estate with the witness. Shortly thereafter, the applicant was allegedly brought to cut Napier grass at the deceased's farm. An attempt was also made to subdivide the land between her and the applicant. On the funeral programme, she testified that Njenga had a copy of the programme, and that everybody read it. She said that she saw the programme for the first time after the funeral party left the mortuary after collecting the body of the deceased. She asserted that her husband had not told her about another wife, and that was why she applied for the grant alone.

21. On cross-examination, the first administrator conceded that she had been married previous to

marrying the deceased. She had had two children with her first husband, two with the deceased, and that she got another one child during the time when she was separated from the deceased. She also conceded that she had inherited property from her first husband. She conceded that she left for her parents' home after a disagreement with the deceased, and she lived at her parents' home until the deceased died. She said that the letter she presented to court for the purpose of representation was by the Chief of the Location where she lived with her parents. She said that by the time she came to court, she knew that there was another woman claiming to be a wife of the deceased. She did not inform her about her petition, neither did she talk to anyone else about the matter. She said she was given title documents to the deceased's property by Joseph Karugi. She conceded that she did not have leave of court to sell the vehicle of the deceased, but added that she had not sold the farm. She stated that the deceased was related to her, and had paid dowry for her. She asserted that when she asked the deceased why he did not have a wife before he married her, and he had said that he had gotten late, stating that he never told her that he had had another wife. She concluded by saying that if the deceased had had a child with someone else before he married her, then the said child was entitled to a share in the estate.

22. The first administrator's first witness was Joseph Karugi Maina. He testified to be one of the elder brothers of the deceased. He identified the first administrator as a widow of the deceased, but said that he did not know the applicant,. He asserted that during the mourning period, the family did not see the applicant, but when a dispute arose within the family one of them threatened to introduce a third person to claim the estate. The dispute allegedly arose at the last meeting of the committee, when a postmortem of the funeral was to be done before the committee was wound up. Some family members protested to the estate going to the first administrator as his widow, while others felt that she and her children were entitled to the estate according to the witness, the dispute had something to do with the deceased's vehicle, which one of his brothers was interested in. It was the persons claiming the vehicle who brought in the issue of the second wife, and it was that section of the family, that is to say Gathungu and Njenga, that decided to look for another wife for the deceased. Regarding the meeting to wind up the committee, the witness stated that family disagreements arose and no one raised the issue of the other wife. It was much later that the witness saw her at the deceased's farm pitting up beacons on the farm with the assistance of Gathungu and Njenga. The police intervened and put a stop to it. He stated that the applicant did not marry the deceased in 1975, nor name her child, Milka Nyambura, after the deceased's mother, as the latter was called Damaris Wairimu. He asserted that if the deceased had married a wife in 1975, he would have known. He insisted that the deceased's estate should devolve upon his legitimate wife. He stated that the funeral programme was drawn by Gathungu's son, and at that time no other woman, apart from the first administrator, came forward claiming to be the deceased's wife. Equally, when photographs were being taken at the funeral, no other woman came forward claiming at that stage to be the deceased's wife.

23. On cross-examination, the witness stated that in 1975 he was a farmer at home, and that his brother, the deceased, was also at home, and the witness would at times employ the latter as a labourer. He could not say for sure whether his brother also worked for their uncle at the time. Concerning the applicant, he testified that he did not know her, adding that he brother and sister lied when they said she was married to the deceased, saying all they wanted was his property. He asserted that the deceased had no relationship with the applicant. He stated that at the point of the deceased's death, he was staying with the first administrator. They had their differences as the deceased had a drinking problem, and would separate. He mentioned that the meeting at the Chief's office was about property, but the parties were unable to agree for one part of the family was of the position that the deceased had only one wife, the first administrator; while the other held that he had two wives. He stated that it was after the proceedings at the Chief's office that two of his brothers took the applicant to the deceased's land and placed beacons on it.

24. The first administrator's next witness was Moses Ng'ang'a Maina. He testified that the deceased was his younger brother. He identified the first administrator as the only wife of the deceased that he knew. He said he only came to know of the deceased other alleged wife when the latter was brought to the Chief's office. He mentioned that at the meeting held to wind up the funeral committee a section of the family wanted to divide his estate as if the deceased did not have a wife, while the other section insisted that he had a legitimate wife, who should inherit the estate. It was at that stage that the issue of another was broached. He said that Gathungu asked the first administrator to let go of the vehicle in exchange for

the land. She refused. Eventually the applicant was introduced as the other wife of the deceased.

25. On cross-examination, he stated that at the meeting to wind up the funeral committee, the first administrator was told another woman would be brought to share the estate with her. He insisted that he did not know of her existence. He said he was sure of the matter as her existence did not arise at all until the dispute cropped up over the vehicle and the land. It was not an issue at all when the funeral programme was being drawn.

26. The first administrator's last witness was Julius Mbugua Mwaniki. He was a member of the funeral committee. He alluded to the meetings where an offer was made to the first administrator to surrender the car in exchange for the land but she refused. It was at that stage that that Njenga said he would bring another wife to share the estate with her. He testified that at the funeral meetings no one mentioned that the deceased had another wife, and the name of the applicant never arose. No one talked about her. He said he had visited the deceased and the first administrator at their residence and he had found them together.

27. At the conclusion of the formal hearing, it was directed that the parties file written submissions. Both parties complied with the order. The applicant's submissions are dated 10th June 2015, and were filed in court on 15th July 2015. The first administrator's written submissions are dated 21st July 2015, and were filed in court on the same date. The applicant submitted that she had established by evidence that she had been married to the deceased, and that the estate of the deceased was available for distribution as between her and the deceased other wife, the first administrator. On the first administrator's part, it was asserted that she was the sole wife of the deceased.

28. The application before me is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The provision provides for revocation of grants of representation. A grant is liable to revocation where the proceedings to obtain it were defective in substance, or the grant was obtained by fraud resulting from the making of a false statement or concealment of matter from court, or the grant was obtained by means of an untrue allegation of fact to justify it notwithstanding that the same was made in ignorance or inadvertently, or there have been problems with administration relating to failure to apply for confirmation of the grant within the stipulated period or to proceed diligently with the administration of the estate or to render accounts when required to, or the grant has become useless and inoperative through subsequent circumstances.

29. The applicant has not sought to clarify the specific grounds that she relies on to advance her case for revocation of grant. However, she did allege that the first administrator did not disclose her and her child as being among the survivors of the deceased. Such allegation would bring the applicant's case squarely within the grounds set out in section 76(a)(b)and(c) of the Law of Succession Act.

30. Proceedings where certain survivors of the deceased are not disclosed would render the proceedings to obtain the grant defective. This is so as section 76(a) of the Act should be read together with section 51(2)(g) of the Act and Rule 7(1)(e) of the Probate and Administration Rules. Both provisions state what ought to be disclosed in a petition for a grant of representation. The requirement to disclose the information is in mandatory terms. Among the facts that must be disclosed in cases of intestacy, such as in the present case, is the marital status of the deceased. If he was married then all his surviving spouses ought to be disclosed. As the provision is in mandatory terms, it follows that non-disclosure would amount to a defect in substance that could be fatal to the case. The same applies to surviving children. If the deceased had any children surviving him, then such children ought to be disclosed.

31. Non-disclosure of such information would be fatal whether the same is made fraudulently or innocently. Fraud amounts to criminality, and anything founded on it is touched by it. The effect of fraud is to vitiate any act it touches. A grant touched by fraud should automatically be vitiated, by way of it being revoked. Misrepresentation is less serious. It is not criminal by definition, but it is tortious in character. It has the effect of vitiating whatever it touches, for the outcome of the tortious act is distorted by it. A grant of representation touched by misrepresentation, whether it is innocent or fraudulent, is

liable to revocation. Non-disclosure of important matter can be with fraudulent intent or even innocent; whatever the case, it has the effect of exposing a grant founded on it open to revocation.

32. In the instant case it is alleged that the administrators did not disclose that the applicant and her child had survived the deceased. If it is established that the applicant was indeed a spouse of the deceased, and that her child was a child of the deceased, that alone would suffice to establish fraud or concealment of matter or misrepresentation. Once that is established, it would automatically follow that the grant made to the administrators would be available for revocation.

33. The issue that I should then determine is whether the deceased had ever married the applicant. She swore an affidavit alleging that she was married in 1975. She does not however indicate the type of marriage she went through, or the system of marriage under which she married. She only mentioned fleetingly that dowry was paid, suggesting that she had been married under customary law, but led no evidence to prove it.

34. Although she swore an affidavit saying in no uncertain terms that she married the deceased in 1975, when she took the witness stand she was less certain. She flip-flopped. During examination in chief she stated that the marriage took place after her daughter was born in 1976, meaning therefore that the alleged marriage did not happen in 1975, but after 1976. During cross-examination she put the year of marriage closer to 1980 than 1975. She also appeared to say that it was not the deceased who was instrumental in the alleged marriage but his mother; who allegedly went for the applicant from her parents' home.

35. What is more is that in her affidavit she avers that she had named her daughter after the deceased's mother. She repeated that claim both at examination in chief and cross-examination. Her daughter's name is Milka Nyambura. It transpired that her alleged mother in law was called Damaris Wairimu. When that was brought out, she flip-flopped again, changed her position. She began to say that she had given birth while still at her mother's home, hence she named her child after her own mother rather than the deceased's mother. What she said on oath in her papers therefore differs from what she told the court on oath at the oral hearing.

36. Kikuyu customary law on marriage is notorious. Before it can be said that there was a Kikuyu customary marriage, it has to be established that the *ruracio* (dowry) and *ngurario* ceremonies were performed. There are several treatises on Kikuyu customary law on this. See E. Cotran: *Restatement of African Law: 2 Kenya II The Law of Succession*, London, Sweet and Maxwell, 1969 and Jomo Kenyatta: *Facing Mount Kenya: The Tribal Life of the Gikuyu*, London, Mercury Books, 1961. See also the decision in *In the Matter of the Estate of Samuel Muchiru Githuka*, deceased, HCSC No. 1903 of 1994. It was stated in *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* (1965) EA 735, *Sakina Sote Kaitany and another vs. Mary Wamaita* CACA No. 108 of 1995 (unreported) and *Joyce Atemo Imujaro vs. Mary Ipali Imujaro* CACA No. 274 of 2001 that any person who wishes to rely on any African customary law as a basis of their claim must prove the existence of the alleged custom by evidence.

37. The applicant did not allude to any of the ceremonies mentioned above. Her witnesses did not allude to them either. It is noteworthy too that the family was split in the middle as to the legitimacy of her alleged marriage, lending credence to the allegation that she was brought in specifically to vex the first administrator. From what is on record, it is as clear as day that the applicant has not placed before the court any material upon which it can conclude that there was a customary law marriage between her and the deceased, or put differently, that she was the deceased's customary law wife.

38. It has not been argued that there was a marriage capable of being presumed from a possible prolonged cohabitation between the applicant and the deceased. Her advocates did not deal with it in their written submissions. The applicant and her witnesses, however, did talk rather loudly about her having lived with the deceased for twelve (12) years. The principles to be followed for the purposes of presuming marriage are notorious. A presumed marriage founded on prolonged cohabitation is a marriage by repute. See *Hortensia Wanjiku Yawe vs. Public Trustee* Court of Appeal East Africa civil appeal number 13 of 1976, *Njoki vs. Muthuru* [1985] KLR 871 and *Christopher Nderi Githambo vs. Samuel Muthui Munene* Nairobi HCCC 1372 of 2001.

39. In the applicant's case, I note that only a section of the deceased's family appears to allude to cohabitation between her and the deceased. The other section of the family is categorical that there was no such cohabitation. The manner of naming children, if it follows the culture and the tradition of the man, is another pointer. In the present case the child in question was not named after the deceased's parents, and therefore that cannot be of much use. There is scanty evidence of the alleged cohabitation.

40. In any event, if there was any cohabitation, the same allegedly terminated in 1996. Between 1996 and 2011 when the deceased died, the parties did not cohabit, and were not in each other's lives, with the applicant only materializing to claim a stake in the deceased's estate after the demise of the deceased. I have taken particular note of the very inconsistent evidence as to when the applicant got to learn of the deceased's death and of her reasons for not attending his burial. A presumed marriage is founded on cohabitation alone. It is a marriage by repute. Once the cohabitation ceases, it would be unreasonable, in my view, to say that a marriage could still be presumed where the parties had not cohabited for fifteen (15) or so years after separation. Parties who are apart from each other cannot be reputed to be married where the marriage is to be gauged from the fact of cohabitation.

41. I am not persuaded from what has been placed before me that the applicant was ever a wife of the deceased.

42. Was her daughter a child of the deceased? Drawing from the foregoing conclusion that the applicant never cohabited with the deceased, I would be slow to conclude that her daughter was a child of the deceased. I have noted that the applicant has not offered to have her subjected to a deoxyribonucleic acid (DNA) test to establish her paternity.

43. As I have concluded that the applicant was not a spouse of the deceased, it cannot as a consequence be concluded that there was defect in the proceedings, or that there was fraud or concealment of material information. A case has not been made out for the revocation of the grant made herein on 16th May 2012. The application dated 14th September 2012 is for dismissal, and I do hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH DAY OF AUGUST, 2016.

W. MUSYOKA

JUDGE