



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 201 OF 2011**

**IN THE MATTER OF THE ESTATE OF D**

**A A.....DECEASED**

**AND**

**A K M**

**E E M M.....PETITIONERS**

**VERSUS**

**A K A.....OBJECTOR**

**RULING**

**INTRODUCTION**

1. This ruling is on an Objection to Making of a Grant.
2. D A A died on 06/01/2011 at Nairobi Hospital while undergoing treatment. At the time of his death, he was working at [*particulars withheld*] in Nairobi and equally staying in Nairobi. He was laid to rest on 15/01/2011 in Kakamega County. I will refer to him as “**the deceased**” herein.
3. On 16/03/2011, A K M and E M M petitioned for a Grant of Letters of Administration Intestate in respect to the deceased’s estate. They so did in their respective capacities as “**Widow & Father-In-Law of the deceased.**”
4. In the Affidavit in support of the Petition aforesaid (Form P & A 5) they disclosed the following as the survivors of the deceased: -
  - a. **A K M- 35 YRS OLD (WIDOW)**
  - b. **L A L - 17 YRS OLD (DAUGHTER)**
  - c. **B L A 10 YRS OLD (DAUGHTER)**
  - d. **C T M 9 YRS OLD ( DAUGHTER)**
  - e. **A A A 5 MONTHS OLD ( SON)**
5. Whereas the application revealed that the deceased had no known liabilities as at the time of filing, it however described the deceased’s assets to include land in [*particulars withheld*], Pension (around Kshs. 2,000,000/=) and Terminal Benefits from United National Organization).

6. Barely one week after the filing of the Petition for Grant aforesaid, one A K B filed an objection to making of Grant and raised the following grounds thereto:-

**1. That I am the 1<sup>st</sup> widow to the deceased having married him under Luhya customary law in 1993 and were blessed with three (3) children namely:-**

**a. L A A- 16 YEARS**

**b. V A - (DECEASED)**

**c. B L A - 10 YEARS**

**2. That the 1<sup>st</sup> Administrator began cohabiting with my husband barely two (2) years ago and is not intending to disinherit me as a widow and deny my mother- in law any kind of financial benefit thereto.**

**3. That at the time of the deceased's death, my mother in law M A A now aged eighty (80) years and residing at Maringo Estate in Nairobi, was solely dependent on the deceased for rent, maintenance, medical and general upkeep and it was also the deceased's desired wish that his mother, the said M A A be buried on his land known as title number [particulars withheld] and this may not be possible if she is left out as threatened by the Administrator.**

**4. That the Co-administrator in the petition is the father to the 1<sup>st</sup> administrator herein and is therefore not a beneficiary of the estate of the deceased.**

**5. That the administrators have failed to issue or abide by the mandatory requirements of the requisite procedures relating to the taking out of Grant of Letters of Administration Intestate.**

7. Further, the said A K B filed a Petition by way of Cross-Application of a Grant on 09/05/2011 where she petitioned for the Grant to be made to herself instead. She listed the beneficiaries of the deceased as follows:-

	<u>NAME</u>	<u>RELATIONSHIP</u>	<u>STATUS</u>	<u>AGE</u>
a.	A K B-	WIFE	WIDOW	ADULT
b.	L A L	-DAUGHTER	SINGLE	16 YRS
c.	B L A	-DAUGHTER	SINGLE	10YRS

h. Directions on the hearing of the said objection were thereafter taken that the hearing be by oral evidence and thereafter the hearing began. The Objector was deemed as the Plaintiff and the Petitioner deemed as Defendants. The Objector testified and called 5 more witnesses whereas the Petitioners testified without calling any other witness. For purposes of clarity and ease of flow in his ruling, I shall refer A K B to as "**the Objector**", A K M as "**the 1<sup>st</sup> Petitioner**" and E E M M as "**the 2<sup>nd</sup> Petitioner**" respectively.

### **THE HEARING**

#### **a) The Objector's case:**

9. The Objector relied on the Objection dated 23/08/2011 and filed in Court on 25/09/2011 and the Replying Affidavit sworn on 29/09/2011 and filed in Court on 06/10/2011 as her pleadings and which formed the basis of the oral testimony.

The Objector (PW1) testified that she was an Administrative Assistant with Trans-Business Merchants in Nairobi and was married to the deceased under the Luhya customary laws sometimes

in 1993. Dowry was paid in 1994. During the currency of their marriage they were blessed with three children namely L A L A, V A (now deceased) and B L A. The Objector latter left their matrimonial home and returned to and continued to live with her mother due to some disagreements with the deceased. That was in April 2003. In the intervening period before the deceased passed on, the Objector would occasionally meet the deceased to discuss their issues and the last time they met was in December 2010 in a Café in Nairobi. The deceased died on 06/01/2011.

10. The Objector however did not manage to attend the deceased's burial as she had been hospitalized at Matter Hospital in Nairobi from 14/01/2011 to 18/01/2011 but managed to travel to the burial site in Kakamega immediately upon being discharged from the Hospital. That was around 4 days after the burial only to find that the home where the deceased was buried was deserted. She expected anyone in the name of the deceased's widow to stay thereat for at least 7 days in accordance with the customs. The Objector was categoric that despite the fact that she had issues with the deceased that was not a unique occurrence to her marriage as it is the normal wear and tear of everyday's marriage life. She contended that she never divorced the deceased neither was their marriage dissolved.
11. In the Replying Affidavit sworn on 29/09/2011, the Objector deponed in details how she was married to the deceased upto the payment of dowry including those who were present at the said function at her mother's home in Kariobangi South in Nairobi. She further deponed that even despite the misunderstanding they had in their marriage, she used to attend the deceased's funeral arrangements meetings which were held both in Maringo and at Antonio's Restaurant and that even during her hospitalization she was duly represented by her family members both at the meetings and during the burial including her father, mother, brother and sister. She further took issue with the manner in which the 1<sup>st</sup> Petitioner was dealing with her children even after the Children's Court having granted her legal custody but for the 1<sup>st</sup> Petitioner who continuously poisoned her children's mind and restrained them from her so as to use them to irregularly encroach into the deceased's estate. On that score the Objector denies that the 1<sup>st</sup> Petitioner ever used her money on the deceased's illness and burial since having worked at the United National for 8 years the Objector remained aware that all medical bills and burial expenses are fully paid by the employer according to the Rules and Regulations thereto.
12. It is also deponed by the Objector that the 1<sup>st</sup> Petitioner was instead married to one L U M M with whom they were blessed with a child. The said L hailed from [*particulars withheld*] in Kakamega District and was now living overseas. This marriage, she deponed, was cemented when the said L paid 2 cows as part of the dowry to the 1<sup>st</sup> Petitioner's family. To the deponent, that marriage subsisted and has not been dissolved hence the 1<sup>st</sup> Petitioner lacked the capacity to allege to contract a second marriage.
13. It is on this *inter alia* background that the 1<sup>st</sup> Petitioner is not suited to administer the deceased's estate and further given that the Objector had not renounced her right to do so neither had she consented thereto nor been accordingly cited by the 1<sup>st</sup> Petitioner. She is apprehensive that her daughters, her mother-in-law and herself are likely to be disinherited in the event the administration of the estate is left in the hands of the Petitioners moreso given that the 2<sup>nd</sup> Petitioner is the father of the 1<sup>st</sup> Petitioner and an alleged father-in-law. The Objector further points out that the deceased's mother who was wholly dependent on the deceased was left out and likewise the deceased's family was not involved in the succession at all. The Objector prays that her objection be upheld and that she be given the right to administer the deceased's estate instead.
14. **PW2** was **J K B**, the Objector's mother. She described how the Objector was married to the deceased under the Luhya customs and dowry accordingly paid when the deceased was in the company of his uncle, mother, sisters and brothers. To her the Objector and the deceased had been living together as married couple until just recently when disagreements stepped into their marriage. Despite her daughter, the Objector, having returned to her, she insisted that there was no divorce between the two.

On cross examination, J K B (hereinafter referred to as “**the Objector’s Mother**”) stated that she was optimistic that the two would have eventually reconciled as the deceased used to talk to her along those lines. She expected the two to continue living together and never knew that the deceased had married another wife. She further used to visit the deceased when he was admitted in hospital except on his last admission. She also attended the burial at Kakamega and that is when she saw another girl who was said to be the deceased’s wife. The Objector’s mother only saw one house standing on the land where the deceased was buried and noted that the alleged wife used to operate therefrom. To her, it was not possible that the girl was a wife to the deceased since under the Luhya customs a second wife is not allowed to enter the house of the first wife and perform burial rites therefrom. She however clarified that the other family members of the deceased and her children can enter the house and land but not the second wife.

15. **M A AI**, (herein referred to as “**M**”) testified as PW3. She was an elder sister to the deceased and the fourth born while the deceased was the eleventh born in their family. She had an opportunity of staying together with the deceased and the Objector from the time they got married until when their first daughter joined form one. She had volunteered to look after their children since they had no domestic helper. M confirmed that the deceased and the Objector were customarily married and lived together until when some disagreements started coming into their relationship. She however counseled them at times and managed to re-unite them. M testified that even when the Objector had left matrimonial home due to the disagreement aforesaid she used to come to see the children as the deceased was the one staying with the children and educating them accordingly. To her the deceased and the Objector never divorced but parted ways due to a disagreement but still the Objector even had her belongings still in their matrimonial home.

16. In respect to the 1<sup>st</sup> Petitioner, M testified that sometimes in 2009 the deceased told her that he had a girlfriend whom he wanted to marry. M recalls that one day her deceased brother’s “family” paid a visit to the 1<sup>st</sup> Petitioner’s family at Ngong. To her it was an occasion for the two immediate families to meet each other where they even learnt that the 1<sup>st</sup> Petitioner had a child. By the time of the deceased’s death, no dowry had been paid by their family in respect of the 1<sup>st</sup> Petitioner though the deceased and the 1<sup>st</sup> Petitioner lived together in Karen and even got a child. M’s recollection was that the 1<sup>st</sup> Petitioner had never been to their home in Kakamega and equally her family at Kakamega had never been to the 1<sup>st</sup> Petitioner’s family to meet them. As at the time the deceased died the 1<sup>st</sup> Petitioner was unknown to their family. The first time the 1<sup>st</sup> Petitioner visited the deceased’s farm in Kakamega and not the deceased’s home was after the deceased’s death and further recalls that it was during the burial when Kshs. 10,000/= was paid by her mother to the 1<sup>st</sup> Petitioner’s family before the deceased could be buried. M denied ever swearing any Affidavit in respect to any matter between the Objector and the deceased and upon being shown such an Affidavit she readily stated that the signature thereon alleged hers was indeed a forgery.

17. The deceased’s mother **M A A** (hereinafter referred to as the “**the deceased’s mother**”) testified as PW4. She was aware that the dispute in Court was in respect to the land which the deceased had bought while he was alive. As at the time she testified in Court she used to live at Maringo in Nairobi and was aware that her son, the deceased, had married the Objector and they had children. She recalls that the deceased never told her that he had divorced the Objector, though she was aware of the disagreement they had leading to the Objector going back to her home. She confirmed that the Objector was at Nairobi Hospital when the deceased passed on but did not attend the burial at Kakamega. To her surprise another wife of the deceased attended the burial who had not even been brought to her attention neither had she visited her homestead. The deceased’s mother further testified that she did not even visit the 1<sup>st</sup> Petitioner’s family at Ngong to give an envelope to the 2<sup>nd</sup> Petitioner. To her, the 1<sup>st</sup> Petitioner was only a friend to the deceased and was not aware of any child arising out of that friendship as none had been taken to her.

18. **PW5** was **IBRAHIM KOMBO MARAMBA** who was a Village elder. He confirmed that the

deceased was buried in his land at Ikonyero which he had bought.

19. **SHAABAN MMANI RAMADHAN** as **PW6** described himself as the Caretaker of the deceased's land where he was buried having worked there for 3 years under the employment of the Objector. He testified that for all the time he had been there as such a worker he used to live in one of the rooms in the main only house until recently when the 1<sup>st</sup> Petitioner had chased him away and locked the house.

And, with this testimony, the Objector closed her case.

**(b) The Petitioners' case:**

20. The Petitioners relied on the Petition for Grant and the Replying Affidavit sworn by the 1<sup>st</sup> Petitioner on 04/07/2011 and filed in Court on 09/07/2011 as their joint pleadings.

The 1<sup>st</sup> Petitioner testified as DW1 and stated that she lives at Ngong and used to work at Nairobi Hospital. She was married to the deceased on 02/06/2009 under the Luhya customs and their union had one boy called A A A. She recalls that when she met the deceased, he was living with his children as his then wife had abandoned them about 5 years ago. The deceased contended that the Objector had thereafter been married to a Mr. M and that they had a son in 2008 long before she was married. That is why she gave into marrying the deceased whom she lived with until death. She produced an Affidavit by the deceased verifying the customary marriage and further testified that the deceased had sworn an Affidavit of Separation at this work place and later on informed his employer in writing that he was divorced and went ahead to change the medical cover to her name. She produced several documents to that effect.

21. It was her further testimony that upon the death of the deceased, the Objector never took any part in the burial arrangements which were elaborately made by a Committee and did not even attend the burial in Kakamega. She produced various exhibits in support thereof including the Burial announcement in the press, the Eulogy and photographs and stated that her family actually participated in the burial arrangements and even gave speeches. She called for the dismissal of the objection since she remained the suitable person to administer the deceased's estate since she had with the deceased's children for about one year before they went back to the Objector following a Court case and that they even visit her regularly. The 1<sup>st</sup> Petitioner further testified that she has all along been in very good terms with her-in-laws and the deceased's mother was present when she gave birth to her son and even attended the boy's baptism. She produced her photographs with the baby boy taken in August 2010.

22. On cross examination, the 1<sup>st</sup> Petitioner reiterated that she was married to the deceased on 02/06/2009 at Ngong which ceremony was attended by her parents, the deceased's mother and her other in-laws who knew that they had gone there for a marriage. She however confirmed that on that day, there was no money which was given but one of the deceased's uncle whom she could not remember his name came later on and gave her parents Kshs. 10,000/=. On being asked if she knew that the deceased was previously married, she said she was aware that the deceased had a wife but was convinced that the marriage was no more. She however admitted that she was not shown any Decree for divorce or Certificate of Separation but an Affidavit.

23. She further recalled that sometimes in 2002 she was in College where she had a boyfriend one L whom she got a girl-child with. They were not married though and no dowry was paid to her parents, she so said. L later on went to the UK. She was aware that the deceased came from Khisa in Kakamega but she had never been there on account of the deceased's health hence could not travel. She however admitted that if one missed from the list in the eulogy or the burial announcement that is not to say that, that person is not related to the deceased and could even be a wife. She returned to Nairobi 3 days after the burial though she was aware that the mourning period was 40 days because the in-laws had abandoned them after the burial and she did not have

many days from her work. She further decided to immediately apply for succession since she had no money to take care of the deceased's family and used her father instead of the in-laws, as a Co-administrator, given that the in-laws had abandoned her and did not know them. She was also not so advised by her Counsel.

24. It was her further evidence in cross-examination that she had obtained a Birth Certificate for the child she had with the deceased but did not bring it to Court. On dowry, she said that a little payment had to be made for her before the burial as the Objector had not lived there before. She bought flour and chicken for her in-laws prior to the burial. The 1<sup>st</sup> Petitioner conceded that she had not taken her son to the deceased's family since a sister-in-law had asked her for the deceased's Death Certificate and an Identity Card which she refused.

On re-examination, the 1<sup>st</sup> Petitioner confirmed that the rites were performed on her since the Objector was not present during the burial.

25. The 2<sup>nd</sup> Petitioner testified as **DW2**. He is a retired Civil Servant from Kakamega County; the father of the 1<sup>st</sup> Petitioner. He resides in Kakamega but has a house in Ngong in Nairobi. He testified that sometimes in June 2009, he received a call from her daughter the 1<sup>st</sup> Petitioner that she had found a man from Kisa in Kakamega County who wanted to marry her. He told them to organize and go home in Kakamega but the man (the deceased) was on medical advice not to travel long distances. He therefore instead went to his home in Ngong and took his 5 family members along. He testified that the deceased attended with his mother and 5 sisters and a brother.

In accordance with the Luhya traditions, the deceased produced an envelope which he handed over to him. It contained Kshs. 5,000/- and the 2<sup>nd</sup> Petitioner passed it over to his wife. According to him that was an introduction and a grant of permission to the deceased to stay together with the 1<sup>st</sup> Petitioner. In the meeting upon being asked if the other woman would still come back to him, the deceased indicated that being a lawyer he was intent on filing for divorce and assured the members that the other woman would not come back. The 2<sup>nd</sup> Petitioner's family thereafter visited the deceased when he was admitted in Nairobi Hospital until he passed on.

26 When the deceased died, the 2<sup>nd</sup> Petitioner called the deceased's mother for preparations towards the burial in Kakamega but there was no response at all. He had to use the Village elder (PW5) to clear the plot where the deceased was buried by hiring people. As the house thereat required some repair works the 2<sup>nd</sup> Petitioner had to get his clan to undertake the same since there was no assistance from the deceased's family. He then attended the burial where he presented flour and chicken for the Kisa people so as to have her daughter be accepted in the deceased's family. He clearly stated that the issue of dowry had not been discussed. According to him, the Kisa people met that night and he was given 10,000/=. He recollects that the Objector did not attend the burial. After the burial he was asked by the 1<sup>st</sup> Petitioner and agreed so as to assist in these proceedings but not as a beneficiary.

27. On cross-examination the 2<sup>nd</sup> Petitioner confirmed that the issue of dowry had not been discussed as his daughter was expectant. He also confirmed that he did not go with his clan members to the meeting in Ngong and that he expected the deceased and his family to make a visit to him to deal with the matter further. He however learnt from one Peter (the deceased's maternal uncle) that the Kisa people were not going to visit him and truly they so did not. The 2<sup>nd</sup> Petitioner knows who L was. To him he was the 1<sup>st</sup> Petitioner's boyfriend and that they had a child. He testified that L came home once with his Uncle before he went to the UK. L gave him Kshs. 2,000/= as an introduction just as the deceased gave him Kshs. 5,000/=.

The Petitioners' case was thereafter closed with DW2's testimony.

#### **THE OBJECTOR'S SUBMISSIONS:**

28. The Objector filed her submissions on 21/10/2014. She expounded on her position that she remained the only suitable person to administer the deceased's estate and referred to the cases of **Atemo vs. Imujaro (2003) KLR 435, In the matter of the Estate of Gerishom John Mbogholi Nairobi HCCC No. 989 & 1110 of 1999 (unreported)** and **Eugene Cotran's Restatement of African Customary Law, Law of Succession II** in support of her said position.

#### **THE PETITIONERS' SUBMISSIONS:**

28. Their submissions were filed on 02/12/2014. They propounded their positions and argument that the Objector had divorced the deceased and went to live elsewhere with one M and had a son thereat and that the 1<sup>st</sup> Petitioner was rightfully married by the deceased and was the one who took care of the deceased and his family until the deceased's death. They argued that the issue of citation does not arise in this matter as the Objector was not known to the 1<sup>st</sup> Petitioner. The Objector was not willing to introduce herself to her as the first wife neither was the deceased willing to introduce the Objector to her as the first wife. The Petitioners remained of the view that the objection be dismissed accordingly.

#### **ANALYSIS AND DETERMINATIONS:**

29. Having appraised myself of the background of the matter, the evidence on record and the parties' submissions, it now remains to this Court to determine whether either of the parties are entitled to the Grant of representation or otherwise. In reaching that finding, this Court will address its mind to the following issues: -

- a. ***Whether the 1<sup>st</sup> Petitioner was married to the deceased.***
- b. ***Whether the Objector was married to the deceased and if in the affirmative whether that marriage subsisted until the deceased's death.***

I will deal with each of them independently.

#### **On whether ANNETTE KHAYIKA MBWABI (1<sup>st</sup> Petitioner) was married to the deceased:**

30. It is on record that when the 1<sup>st</sup> Petitioner called her Father (2<sup>nd</sup> Petitioner) to tell him of her plans to get married to the deceased, she had met the deceased barely two months earlier. The 2<sup>nd</sup> Petitioner readily asked the man to go to his home but due to health challenges and Doctor's advice the visit to the 2<sup>nd</sup> Petitioner's house in Kakamega did not take place but instead it was at the 2<sup>nd</sup> Petitioner's home in Ngong. The Petitioners' family then assembled thereat. The meeting truly took place and the deceased attended in the company of his Mother (as so alleged), 5 sisters and a brother. However their names and identities were not availed either in evidence before Court or in the 1<sup>st</sup> Petitioner's Replying Affidavit. This was on 02/06/2009, the day the 1<sup>st</sup> Petitioner alleges the marriage took place.

31. During the meeting, the deceased gave an envelope to the 2<sup>nd</sup> Petitioner who opened it to see Kshs. 5,000/= therein. He accepted the money and handed over the envelope to his wife. To the 2<sup>nd</sup> Petitioner, this was an introduction of the deceased to his family and a grant of permission to the deceased to stay with the 1<sup>st</sup> Petitioner. And, that was all about the meeting.

It appears that nothing happened again until the deceased passed on and that is when the 2<sup>nd</sup> Petitioner called the deceased's mother to prepare the burial place. The reception from the deceased's family however was not cordial and the 2<sup>nd</sup> Petitioner had to hire some young men to assist. He also had to call his clan to put the deceased's house in shape in view of the foregone. During the burial, it appears some traditional rites had to be conducted. One, the Petitioners' family provided flour and chicken to the Kisa people. It was said that was for the 1<sup>st</sup> Petitioner to

be accepted in the family, but it remained unclear what was meant by the 1<sup>st</sup> Petitioner “**be accepted in the family**”. The Court is still in doubt whether the acceptance of the 1<sup>st</sup> Petitioner in the family was for the purpose of conducting the burial given that the Objector was absent or it signified something else. Two, it is alleged that the deceased’s family met the night before burial and the 2<sup>nd</sup> Petitioner was given Kshs. 10,000/=. But, the 1<sup>st</sup> Petitioner had in her testimony said that the deceased and his uncle (whom she did not know his name) returned to his family after the meeting of 02/06/2009 and gave her father Kshs. 10,000/=. The twin versions of the Kshs. 10,000/= came from the Petitioners and one wonders how come. This Court is therefore not in a position to say with certainty if at all the sum of Kshs. 10,000/= was actually paid into the Petitioners’ family and if so what the essence and purpose of the same was. The same is hereby held in the negative.

32. When the issue of L came up, the 2<sup>nd</sup> Petitioner stated as follows:

***“L brought 2000/= and paid to me as introduction, as D did”.***

And that was it. The money paid by both L and the deceased was at the introductory stages towards marriage. To be precise it was for introduction in accordance with the Luhya customs. For there to be a marriage, this introductory step was to be followed by other steps towards formalizing any marriage under any regime. It is not denied that L had a child with the 1<sup>st</sup> Petitioner before he left to the UK, but we are not told when he left or if there were any formal arrangements with the 1<sup>st</sup> Petitioner with whom he was leaving his child with.

This Court’s mind is further drawn to the testimony of the 2<sup>nd</sup> Petitioner when he said: -

***“In Luhya tradition, D produced an envelope which was handed over to me. It was introduction. I opened the envelope and saw Kshs. 5,000/= I gave it to my wife. That was a grant of permission for D to stay together with my daughter.”***

Going by that testimony it is equally right to say that when L gave the Kshs. 2000/= to the 2<sup>nd</sup> Petitioner then it was a grant of permission for L to stay together with the 1<sup>st</sup> Petitioner and maybe out of such the child came forth. It appears that the Petitioners may not have been very comfortable bringing out the issue of L, but in the circumstances of this case it was quite imperative that cogent evidence be availed to clearly address this issue as it had all the bearing on the legality of the relationship between the 1<sup>st</sup> Petitioner and the deceased. Unfortunately it hangs in the balance with many questions than answers.

33. When the 1<sup>st</sup> Petitioner testified, she stated that she was married under Luhya customs. At the burial, the 2<sup>nd</sup> Petitioner had the following to say: -

***“I told mother to D that we had not discussed dowry...”***

The foregone therefore means that as at the time the deceased died no dowry had been paid to the Petitioners neither had any dowry negotiations been undertaken at all between the two families. **Eugene Cotran’s Restatement of African Customary Law Vol. 1 (The Law of Marriage and Divorce)** at Page 50 (Chapter 5 on the Luhya Marriages) has this to say: -

***“1. Definition of marriage considerations (Bukhwi):***

***Bukhwi is a payment or payments of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father (or other guardian) of the bride, which is necessary for the validity of the marriage and to establish the affiliation or legal control of the issue of the union, and which may be repayable in whole or in part on the dissolution of the marriage.***

***Bukhwi must be distinguished from other collateral payments and gifts made at the time of marriage.”***

At Page 52 thereof it is stated: -

***“7. Effect of non-payment of marriage consideration:***

***No valid marriage can arise in Luhya law if no Bukhwi is paid. However, a marriage will arise if Bukhwi is partly paid. The family of the wife may sue the husband for the payment of unpaid Bukhwi. The balance of unpaid Bukhwi at the death of a husband becomes the responsibility of the Omulindi”.***

34. The Court of Appeal in dealing with the issue of a party relying on customs expressed itself in the case of **Njoki -vs- Muteru (1985)KLR 874** in the following manner: -

***“The existence of a custom must be established by the party who intends to rely on it...”***

That is also the rationale behind **Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya** which states as follows: -

***“107.(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

It was therefore incumbent upon the Petitioners to clearly demonstrate marriage under the Luhya customs, but to say the least, there being no evidence of payment of dowry (bukwi) no marriage can arise under the Luhya customs. This Court therefore finds that there was no valid marriage between the deceased and the 1<sup>st</sup> Petitioner under the Luhya customs.

#### **Can this Court presume marriage under common law?**

35. This Court would not have fully exhausted the aspect of marriage if it does not look at the aspect of presumption of marriage since a party may fail to prove marriage under the customs but successfully prove such in common law.

The former Court Appeal for Eastern Africa, in the case of **HORTENSIAH WANJIKU YAWE - vs- THE PUBLIC TRUSTEE, Civil Appeal No. 13 of 1976** (unreported) had this to say on the presumption of marriage: -

***“The presumption does not depend on the law or a system of marriage. The presumption is simply an assumption based on very long cohabitation and repute that the parties are husband and wife”.***

This Court equally had an opportunity and discussed quite in detail the doctrine of presumption of marriage in **Kakamega HCCC No. 16 of 2014 EDWIN MAINA MANYASA -vs- PAMELA NANZALA KANUSU & 3 OTHERS (unreported)** which decision I will fully rely on in this analysis.

36. In the said case of **EDWIN MAINA MANYASA (supra)** this Court came up with some factors to be considered in presuming whether or not a marriage subsists. The same are however not exhaustive but include the following: -

- i. ***The nature and length of the cohabitation;***
- ii. ***The capacity of the parties;***

iii. ***Parties' consent and intention to marry.***

37. Briefly, **on the nature and length of cohabitation**, it is on record that the deceased went to meet the 1<sup>st</sup> Petitioner's parents on 02/06/2009 and after being allowed to stay together did so thereafter. The exact date when that happened is not clear though, but this Court will take it to be immediately thereafter. The deceased died on 06/01/2011. The period in between is 18 months. They stayed in Karen. It is on record that by the time the 1<sup>st</sup> Petitioner came into the life of the deceased, the deceased was already of ill-health and that is why he could not even manage to travel to Kakamega for the introduction to his 'in-laws'. The deceased definitely needed someone by his side. The 'in-laws' had to instead follow him though to their house in Ngong.

There is also the child known as A A A whom according to the 1<sup>st</sup> Petitioner is a product of the cohabitation. The Objector however is of the contrary view and at page 29 of the proceedings her Counsel states as follows: -

***"Mrs Musiafu - I will pursue issue of DNA test for the boy of the 1<sup>st</sup> Petitioner at a later date".***

But the 1<sup>st</sup> Petitioner did not produce the Child's Certificate of Birth in evidence. That would have been *prima-facie* evidence and has a lot of bearing in issues of presumption of marriages though this Court is aware that the presence of a child in a relationship is not conclusive evidence of marriage. This was echoed by the Court of Appeal in the case of **Mary Njoki -vs- John Kinyanjui Muthuru & 4 Others Civil Appeal No. 71 of 1984** (unreported) where Nyarangi, JA (as he then was) observed that the presence of children is only one of the factors to be considered in favour of presumption of marriage, but is not of itself sufficient to establish the existence of marriage or cohabitation. I add to say that in this day and age where medical science has advanced to the level of being able to facilitate conception of test-tube babies, the mere presence of children does not by itself necessarily establish that the biological father and mother have cohabited.

38. It is also of importance to have a look at the relationship between the 1<sup>st</sup> Petitioner and the deceased's family. **First**, she never visited the deceased's family and home or farm in Kakamega and her first appearance at the deceased's farm was for the burial. **Two**, she was not known to the deceased's family as the deceased's mother had this to say: -

***"A wife has to be brought to my homestead".***

She further stated on the re-examination that: -

***"Before D died, I saw the child of A. They did not bring me the child....."***

Mary, the deceased's sister had this to say: -

***"The farm of the deceased was entered by A after the deceased had died. A has never been to our family home in Kakamega. As a family we have never been to the home of A's parents."***

**Three**, there was no co-operation and recognition between the deceased's family and that of the Petitioner. This aspect came out so clearly on the death of the deceased when the 2<sup>nd</sup> Petitioner called the deceased's mother to prepare the burial place. It is recorded as follows: -

***"When D died, I had to ring mother of D for young men to come and assist in funeral. No one could do so.***

***I had to see Kombo the village elder. The place was bushy. Kombo helped and I hired***

***people to clear. House was in bad shape and I had to get my clan to put in into shape”***

The 1<sup>st</sup> Petitioner herself had this to say: -

***“I know the mourning period is 40days. I stayed for 3 days after burial before going to Nairobi.... The in-laws abandoned us after burial....”***

She further had this to say when asked why she did not involve the deceased’s family in this succession cause: -

***“I applied with my father because my in-laws left me.....I did not want to get a stranger...”***

**Four**, there is no evidence that the 1<sup>st</sup> Petitioner adopted the deceased’s name in her official documents like the Identity Card or Passport or in any other such documents including when she filed this cause as her names appear as **A K M**. However an attempt to adopt the deceased name was made when she testified in Court. That may have been late in the day. **Five**, there is no evidence to show that they used to at least attend social functions together where they would be easily recognized as a couple. This may have been as a result of the deceased’s health. As they lived in Karen in Nairobi, this Court is not lost to the kind of lifestyle thereat. For one, it may take some good effort to at least know who your neighbour is. That is town life which the deceased and the 1<sup>st</sup> Petitioner lived in.

39. On the other hand, it is not disputed that the deceased and the Objector’s children used to stay together and that it was the 1<sup>st</sup> Petitioner who took care of the deceased at home and of course in and out of hospital. The Petitioners’ family no doubt took a sizeable role in organising for the burial amid lack of co-operation from the deceased’s family until they finally laid him to rest in Kakamega. At his work place, the deceased tendered an Affidavit confirming customary marriage to the 1<sup>st</sup> Petitioner and went ahead to change the medical cover to her name and named her as the next-of-kin. But when she went to get the deceased’s dues at his workplace she was advised to obtain Letters of Administration first, a result whereof the proceedings herein ensued.

40. On the **issue of the capacity of the parties**, it is clear that the deceased having initially married under customary law, was at liberty to marry any other wife whether or not the first marriages still subsisted. On the part of the 1<sup>st</sup> Petitioner, the position is different. Under the customs and the law in Kenya today a married woman does not enjoy the liberty of re-marrying during the life of the earlier marriage. Indeed a married woman unless she is formally divorced does not have the capacity to re-marry.

The issue of the 1<sup>st</sup> Petitioner and Lawrence came up so strongly in evidence and the Affidavits. However as stated earlier on there is no sufficient evidence to enable this Court prove that there was a marriage between the two the child of their relationship notwithstanding. A party which alleges a fact must prove it and the Objector did not prove that the 1<sup>st</sup> Petitioner was in an earlier marriage in the circumstances. It is hence this Court’s finding that both the 1<sup>st</sup> Petitioner and the deceased had the requisite capacities to contract any intended marriage.

41. On the issue of the **consent and intention to marry**, there is no such evidence that the deceased and the 1<sup>st</sup> Petitioner cohabited under coercion, undue influence or in any way against the law. However it is on record that the parties came together when the deceased was ailing and under strict medical care. I therefore find that there was consent and the intention to marry can be established by the act of the deceased proceeding to the Petitioners’ home where he was allowed to live with the 1<sup>st</sup> Petitioner.

42. From the foregone analysis and by taking into account the period of alleged cohabitation

being 18 months, the deceased's then health status, the nature of the cohabitation, the capacity of the parties, the issue of the consent and being guided by various binding Court of Appeal decisions including but not limited to **HORTENSIAH WANJIKU YAWE -versus- THE PUBLIC TRUSTEE, Civil Appeal No. 13 of 1976**, **JOSEIS WANJIRU -vrs- KABUI NDEGWA & ANO. (2014) eKLR**, **JOSEPH GITAU GITHONGO -vs- VICTORIA MWIHAKI (2014)eKLR** and **V.R.M. -vs- M.R.M. & Another (2006) eKLR**, this Court on a balance of probability finds that despite the 1<sup>st</sup> Petitioner having lived with the deceased in his last difficult period when he was in and out of hospital, this cohabitation falls short of the parameters under which this Court can safely presume any marriage between the two of them.

In sum therefore this Court finds that the 1<sup>st</sup> Petitioner and the deceased were not married under the Luhya customs neither does the common law doctrine of presumption of marriage come to the 1<sup>st</sup> Petitioner's aid.

**On whether the Objector was married to the deceased and if in the affirmative whether that marriage subsisted until the deceased's death:**

43. The Objector testified that she was married to the deceased in 1993 and dowry was paid in 1994 under the Luhya customs. They thereafter lived together and had 3 children but one passed on.

This testimony was corroborated by the Objector's mother when she stated thus: -

***“My daughter the objector herein was married under customary law. Dowry was paid. The deceased was in the company of his uncle, mother and sisters and brothers when he paid the dowry...”***

M, the deceased's sister further vouched the foregoing, as well the deceased's mother in their respective testimonies. The foregoing therefore gives credence to the Affidavit of marriage sworn on 03/02/1994 confirming that the Objector and the deceased were truly married under the Luhya customary law. Going by the fact that the Petitioners' contention was that the Objector's marriage with the deceased had been terminated, this Court therefore has no difficulty in finding that there was a valid Luhya marriage between the Objector and the deceased contracted in 1993.

44. Let us therefore turn to the issue of whether or not the marriage which was so contracted in 1993 was terminated or not. It is not in dispute that the deceased and the Objector had disagreements which led to the Objector leaving her matrimonial home and going back to her mother's house sometimes in April 2003.

45. As this was a customary law marriage, may we present what Eugene Cotran's Restatement of African Law (Supra) says about divorce. He so says at page 56 thereof thus: -

**“1. Machinery for divorce.**

***A divorce can be granted either by the family and clan elders under Luhya customary procedure or by a court.***

- a. ***DIVORCE BY ELDERS. If a man wishes to divorce his wife he sends her back to her father. If the wife wishes to divorce her husband, she runs away to her father and tells him of her wish. The family elders (abisuti) of both parties then discuss the matter and try to reconcile the parties. If they fail to do so, a bigger meeting of clan elders (abashiribwa) of both sides is then called. The elders again try to reconcile the parties and only if they fail do they then consider whether the grounds advanced by the party seeking dissolution are sufficient to justify a divorce. The elders may then agree or refuse the dissolution of the marriage. The return of the bukhwī and the custody of the children are also discussed and settled at this meeting.....***

- b. ***DIVORCE BY A COURT.*** As an alternative to (a) above, party seeking dissolution of marriage may sue for divorce in a court.

**2. Time at which divorce becomes effective:**

*The time at which a divorce becomes legally effective is as follows:-*

a. ***IN THE CASE OF A DIVORCE BY THE ELDERS***

- i. *if any bukhwi is returnable, when at least one head of cattle is returned; or*
- ii. *if no bukhwi is returnable, as soon as the elders have agreed to the divorce*

- b. ***IN THE CASE OF A DIVORCE BY A COURT, as soon as the decree of the court is pronounced (provided there is no appeal) An appeal can be lodged within one month.***”

46. There is no evidence that a divorce was granted by the Court despite the 2<sup>nd</sup> Petitioner indicating that the deceased had undertaken to do so. From the Objector’s testimony, it is herself who left the matrimonial home due to disagreements between herself and the deceased. She indicated that they later on began communicating and used to meet and their last meeting was at a Café in Nairobi in December 2010 just a short while before the deceased met his death.

According to the Objector’s mother the deceased used to talk to her and they were optimistic of reconciliation given that they had earlier differed, separated and reconciled. M, the deceased’s sister testified that even after the disagreement the Objector used to pass by and see the children who were staying with the deceased. On the part of the deceased’s mother, she had the following to say: -

***“D did not tell me that he had divorced A. They disagreed and she went to her home...”***

47. According to the Luhya customs, if the Objector wanted to divorce the deceased (given that she was the one who walked out of the matrimonial home) her family was to take the matter to their family elders to attempt reconciliation. If that fails, the family elders would call a meeting of the larger clan elders to attempt reconciliation. In both instances both sides must be in attendance. Upon the failure to reconcile the parties on the second occasion then a divorce would be pronounced. In this case none of the foregone took place. Apart from the Objector going back home and the attempts by her mother to reconcile with the deceased, the matter did not even go beyond that. Further, no dowry or part thereof was returned to the deceased’s family by the Objector’s family. This Court is therefore unable to find that the Objector and the deceased were divorced under the Luhya customary law and instead finds that the Objector and the deceased were still married by the time the deceased died.

48. Despite the ‘separation’ so to say, the **Section 3 of the Law of Succession Act, Chapter 160 of the Laws of Kenya** still considers the Objector as a wife. The said section states as follows: -

***“Wife” includes a wife who is separated from her husband....”***

**Who should then be granted the administration of the deceased estate?**

49. Section 66 of the Law of Succession Act is clear that in cases where one dies intestate, the surviving spouse(s) with or without the other beneficiaries have the first priority in taking out the grant of representation. This right can only be waived in the event such a person exercises any of the following options under Rule 7 of the Probate and Administration rules viz: -

- a. ***Renounces in writing to the making of the grant to the Applicant; or***
- b. ***Consents in writing to the making of the grant to the Applicant; or***
- c. ***Having been issued with a citation, renounces such right to apply for a grant.***

In this case, the Objector has clearly stated that she had not exercised any of the above options and remained ready to administer the estate of the deceased.

**CONCLUSION**

50. Based on the foregone analysis, this Court therefore makes the following orders: -

- a. *The Objection to making of a Grant dated 23/03/2011 be and is hereby upheld.*
- b. *A Grant of Letters of Administration Intestate to the deceased's estate shall be forthwith issued in the joint names of A K A and L A L A.*
- c. *The Administrators and/or any of them shall within 21 days of the issuance of the grant in (b) above take out Summons for Confirmation of the Grant and effect service upon the Petitioner's Advocates herein.*
- d. *A date for directions shall be set within 60 days of the date hereof.*
- e. *The Petitioners to bear the costs of the objection.*

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 13<sup>th</sup> DAY OF FEBRUARY 2015.**

**A. C. MRIMA**

**JUDGE**