In re Estate of Elijah Murkomen Kitum (Deceased) (Probate & Administration 112 of 2013) [2025] KEHC 2838 (KLR) (11 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2838 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION 112 OF 2013

RN NYAKUNDI, J

MARCH 11, 2025

IN THE MATTER OF THE ESTATE OF ELIJAH MURKOMEN KITUM (DECEASED) THROUGH

BETWEEN

GEORGINAH MBITHE MURKOMEN KITUM ..... 1ST PETITIONER

MICHAEL KIBET KITUM ..... 2ND PETITIONER

AND

NOVENA JEPKEMBOI LAGAT ..... 1ST OBJECTOR

LILY JERUTO KANJI ..... 2ND OBJECTOR

JUDGMENT

1. The deceased herein passed on 8th February, 2013. His wife together with the son petitioned for letters of administration dated 10th May, 2013 indicating that the deceased died intestate and left the following surviving him:
    a. Georginah Murkomen Kitum – widow (Adult)
    b. Beatrice Jerono Kitum – Daughter (30 years)
    c. Michael Kibet Kitum – Son (24 year)
    d. Stanley Kipyatich Kitum – Son (22 years)
    e. DJK – Daughter (16 years).
2. The petitioners gave the following as a full inventory of the assets and liabilities of the deceased:

    Assets

a. Eldoret Municipality/Block 9/1XX9 – (0.0294 Ha)

b. Eldoret Municipality/Block 9/2XX3 – (0.0441 Ha)

c. Eldoret Municipality/Block 11/3X6 – (0.0236 Ha)

d. Uasin Gishu/Kimumu Scheme/1XX0 – (0.10 Ha.)

e. Uasin Gishu/Kimumu/Scheme/1XX7 – (0.058 Ha)

f. Kiplombe/Kiplombe Block 9(Marakwet Dev.)/2X6 – (0.7084 Ha)

g. Outspan Trading Centre/1X – (0.338 Ha)

h. Nakuru/Kapsita/1XX1

i. HFC Bank A/C No. 20XXXXXX66

j. Standard Bank A/C No. 0150XXXXXXX00

k. KCB Bank A/C No. 11XXXXX04

l. KCB Bank A/C No. 11XXXXXX30

m. Barclays Bank A/c No. 0300XXXXXX37

n. Oriental Bank A/C No. 55XXXXXX07

o. Asili Fosa Bank A/C No. 4299XXXXXXXXX04

p. Blue Shield Insurance Co. Ltd Policy No. 89XXX9

q. Asili Cooperatives Shares

r. Asili Benevolent Shares

s. Cooperatives Insurance Co. of (K) Ltd Policy No. 2X1/00XX53

t. Save KPO A/C No. CS-001XXXXXX82

u. Shares at KCB

v. Shares at Kenya Airways A/C No. 56XXX00

w. Lorry Reg No. KAY 4X9F Isuzu Canter

x. Benefits and Death Gratuity from Kenya Forest Service

Liabilites – Nil

3. The Objectors objected to making of the grant on grounds that:

a. The petitioners herein did not disclose to this honourable court the fact that the objectors are also the widows and therefore entitled to the estate of the deceased.

b. The petitioners did not disclose to this Honourable court the fact that the deceased is also survived by the following children: -

i. Cynthia Jepkosgei Kitum – daughter – born 18/8/1998

ii. Linda Jepchumba Kitum – daughter – born on 15/3/2001

iii. Benjamin Kipyegon Kitum – son – born on 23/4/2005

iv. Winnie Cherotich Kitum – daughter – born on 18/8/1999

v. Christine Chepkoech Kitum – daughter – born on 15/5/2001

c. The Objectors were not involved when the cause was being filed.

d. The Objectors were and are entitled to apply for letters of administration to the estate of the said Elijah Murkomen Kitum (deceased) in equality with the 1st Petitioner and in priority to the 2nd Petitioner.

e. The consent to the making of a grant of administration (form 38) was not signed by the 1st and 2nd Objectors.

f. The deceased had the following benefits in addition to the ones listed by the petitioners, but the said petitioners did not list – the reasons for that are well known to them – the following benefits which form part and parcel of the deceased's estate: -

i. Benefits/Death gratuity from Kenya Forest Service

ii. As soon as the Objectors discover other properties, they will give the particulars to this Honourable Court.

g. The letter dated 25/3/2013, written by the Assistant Chief Kamukunji Sub-location is wanting for the deceased was not a resident of Kamukunji sub-location but of Kapsoya Sub-location, Kapsoya location within Uasin Gishu County.

h. The Petitioners are residents of Kapsoya Estate within Kapsoya Sub-Location, Kapsoya Location within Uasin Gishu County, hence it defeats logic for the petitioners to Obtain a letter indicating that the deceased's residence was at Kamunkunji.

i. If the distribution or disposition is made herein without taking into account, the interests of the objectors and those claiming under them then grave injustice will be suffered by the said objector and those claiming under them.

4. The objectors equally filed a petition by way of cross application for a grant and an answer to petition for a Grant essentially agitating that they were nit involved when the cause was being filed.

5. Moses Kitum Chemongwo also came in as a 3rd Objector in his capacity as the brother to the deceased representing all other family members. In his Objection to making of Grant dated 12th June, 2013 he fronted the following grounds for objecting to the making of Grant:

a. That Petitioners herein did not disclose to this Honourable court the fact that the objector is also one of the brothers and therefore interested in the estate of the deceased.

b. That the petitioners did not disclose to this Honourable Court the fact that the deceased is also survived by the following family members;

i. Kaino Kipkech – father

ii. Stephen Kitum – brother

iii. Elias Kibor Chemongwo – brother

iv. Mary Kitum – sister

v. Ismael Korir – brother

vi. David Suter Kitum – brother

vii. Moses Chemogwo – brother

viii. Samson Kimutai Chemongwo – brother

c. That the Objectors herein were not involved when the case was filed.

6. In response to the Objection by the 1st and 2nd Objectors, the 1st petitioner deposed that she is the legal wife of the deceased and that she followed the lawful proceedings and involved all the relevant beneficiaries and/or dependants and disclosed all relevant information.

7. On 20th March, 2023, the 1st Petitioner filed an application dated 16th March, 2023 seeking order that this honourable court be pleased to set aside the mediation agreement dated 11th March, 2022 and adopted on 11th May, 2022. The application was anchored on grounds that the petitioners and/or their advocates never fully participated in the mediation for reasons beyond their control. That during the mediation process the Petitioner made a complaint about how the process was being conducted but the same fell on deaf ears. That the petitioners were and are still in disagreement with the contents of the mediation agreement as is. That the final mediation report dated 27.1.2022 stated that parties were not in agreement.

8. The Objectors filed an affidavit in response and averred that there was a consensus that they would all submit themselves to the mediation process. That they attended the sessions as required of them and when it was about to come to an end, they all had three meetings at the deceased's step father's residence at a place called Kamendi, within Trans Nzoia County and after lengthy discussions by the family members together with all the parties, they agreed that no DNA was to be conducted.

9. Further that after they were through with the deliberations at home, all the parties appeared before the court mediator and informed him of what they had agreed on hence the settlement dated 11th March, 2022. The Objectors argued that the petitioners cannot turn around to rubbish what is the outcome of a negotiated settlement. DNA test is a forgone issue and there is need to move forward instead of backwards so that this matter can be brought to its logical conclusion.

10. Stephen Kimosop Kitum also protested to the confirmation of grant on grounds that they acquired two of the listed assets with the deceased being:

a. Eldoret Municipality Block 11/3X6

b. Trans-Nzoia/Milimani/168

The evidence adduced:

11. In this matter there was a trial within a trial in which viva voce evidence was adduced from the following witnesses

12. PW1 – Stephen Kimosop on oath gave evidence that he was a brother to the deceased in which he acknowledged that his brother upon his demise was survived by Georginah Murkomen and Novena Jepkemoi as legitimate spouses. It was Stephen's testimony that the deceased was also survived with biological children from the aforementioned spouses but he also had children with Lilly Jeruto, the 2nd Objector. According to his evidence, his objection to the administration of the estate is in respect of one property referenced as Eldoret Municipality Block 11/3X6 fully developed and the 2nd being Trans Nzoia Milimani 168. That the two properties were jointly owned with the deceased during his lifetime.

He also told the court that parcel No. 168 Trans Nzoia Milimani was sold and transferred to one Joseph Mangera in the year 2000. In addition, the witness explained to the court that he co-owned property which he has rent receivables and at one time between 2013 to 2021 the rent was being collected by Georginah Murkomen, one of the spouses to the deceased but 50% of the rent is collected by himself as the co-owner of the property. In essence, the property is shared with his brother at a ratio of 50-50

13. Next was the evidence of Georginah Murkomen who in her testimony urged the court to set aside the mediation agreement for reasons that due to compelling reasons she was not able to attend all the sessions therefore the final settlement purported to be adopted by the court should be considered as fatally defective for lack of her comprehensive contribution. According to Georginah, the objectors together with the children are strangers to this intestate estate and it was therefore necessary to conduct a DNA to establish their lineage with their deceased. The witness asserted firmly in his evidence that she had been married to the deceased under customary law thereafter the marriage was celebrated in the civil registry on 15th December, 2001. It was her testimony that at no time did the deceased bring to her attention about the existence of the objectors as her co-wives nor were the children ever introduced to her during the lifetime of the deceased. As far she is concerned, she is the only legitimate wife of the deceased during his lifetime until his demise. She urged the court to take cognizance of the existence of the marriage certificate as conclusive evidence on the legitimacy and authenticity of her marriage. Given that background she strongly invited the court not to take cognizance of any terms of the mediation agreement.

14. As a rejoinder to the evidence by PW1 and PW2, the Objectors on taking the witness box testified as follows:

15. OW1 – Novena Jepkemoi Lagat who told the court on oath that she works with Kenya Postal Corporation and in her evidence in chief she adopted the contents of her affidavit dated 15th May, 2023 and in addition her witness statement recorded on 18th December, 2014 and subsequent ones filed on 9th May, 2015. During her testimony she invited the court to interrogate the inventory of assets, the birth certificates of her children sired with the deceased namely Cynthia Kitum – Born on 18th August, 1998, Linda Jepchumba Kitum – born on 15th March, 2001 whereas the last born is Benjamin Kitum – born on 23rd April 2005. It was in her evidence that the birth certificates in question are genuine, properly procured in support of the children being sired by the deceased during his lifetime. In so far as the mediation agreement is concerned, she admitted to be fully part of the discussions which positively identified her children being part of the deceased family born out of their union whit the deceased. In her subsequent evidence she denied that there was coercion, duress or misrepresentation of facts as alleged by Georgina, her co-wife petitioner to these proceedings. In her recollection, the deceased made provision in support of their maintenance and survival rights. To the best of his ability without any discrimination in the period under review when he took her in as a legal wife. In support of this issue of dependency and support from the deceased, she submitted a bundle of receipts to demonstrate the financial provisions made to the children in terms of school fees and other collateral expense. She further demonstrated that her relationship with the deceased was not that of a concubine or an ad-hoc kind of engagement but in all intents and purposes, she was a wife to the deceased as known in law. That it was in that level of engagement that even the personal effects of the deceased happened to bestowed in a custody which the deceased will use quite often whenever she spends time with the family and the children at their Bungoma. However, she acknowledged that the deceased during his career like any other civil servant experienced transfers from one station to another but retaining Bungoma. She went further to give a chronology of what in her recollection constituting free assets of the deceased.

16. Next in line was the testimony of Lily Jeruto Kanji who testified as the 2nd objector narrating to this court that she fully relies on her witness statement dated 18th December, 2014, 18th April, 2023 and 15th

May, 2023. According to her, she was a wife married to the deceased and during that union, they were blessed with two issues namely: Jerotich Kitum and Christine Jepkoech Kitum whose date of birth is 21st February, 2013. The witness invited the court to find the birth certificate as probative evidence in support of the children being direct beneficiaries and herself to inherit the shares of the intestate estate of the deceased. In addition, the witness went further to state that the deceased provided for them including purchase of movable assets like radios and other basic assets which were necessary for the upkeep and maintenance. It was her assertion that their marriage union lasted for 15 years before the demise of the deceased.

17. The parties filed their written submissions as briefly highlighted hereunder:

Petitioners' submissions

18. Learned Counsel Mr. Osewe started by submitting that on 23/5/2013, the Objectors (Novena Jepkemoi Lagat and Lily Jeruto Kanji) filed an objection to the grant, alleging that they were also widows of the deceased and thus claiming to be dependants/beneficiaries of the estate. He further stated that the Petitioners responded with a Replying Affidavit on 6/12/2013, wherein the 1st Petitioner maintained she was the only wife to the deceased and provided their marriage certificate as evidence.

19. Learned counsel submitted that the 1st Petitioner was legally married to the deceased on a specified date and had children with him, including the 2nd Petitioner. He maintained that the Objectors' claims were unsubstantiated and appeared to be motivated solely by interest in the deceased's property rather than genuine family relationships.

20. Learned Counsel identified three issues for determination couched as follows

    a. Whether the mediation report as adopted by court should be set aside

    b. Whether the objectors qualify to be the beneficiaries of the estate as per section 29 of the *Law of Succession Act*.

    c. How should the distribution of the estate be done?

21. On the first issue, learned counsel submitted that the 1st Petitioner through her supporting affidavit filed in court on 20th March, 2023 informed this court that she never fully participated in the mediation process owing to her ill health and further that she was unhappy with how the process was being carried out which prompted her to even file a formal complaint stating her dissatisfaction with the mediation process as was being conducted.

22. The 1st Petitioner through counsel submitted that the mediator misinterpreted issues presented to him from clan meetings held at home, and employed high-handedness to coerce the first petitioner into signing the first settlement to pave way for a "NO DNA" process being conducted so as to avoid exhuming the body of the deceased. It is further submitted for the 1st Petitioner that the mediator insisted that for exhumation not to happen, it was necessary for the petitioners to sign in acceptance of the children of the objectors as the kin of the deceased to avoid a DNA order for exhumation being issued.

23. Counsel submitted that the sequence of developments from the family/clan meetings that took place back home in Trans Nzoia as was narrated by the Petitioners in their joint witness statement as follows:

    a. The clan members inquired on whether the two objectors were wives to the late deceased relative by asking the objectors to present any form of documentation/evidence proving that

indeed they were married customarily or through civil marriage. The Objectors never proved their allegation of being 'widows" and they were told that they are not entitled to any property therein.

b. The clan also probed the authenticity of the objectors' objection by asking why they were never recognized during the entire sending off processes of the deceased and why they never came forth as the case normaly is before burial, only until the petitioners filed for administration. The Objectors claimed that they had been warned by the deceased while alive, to never come forth and embarrass him or cause anguish to the family.

c. The Objectors were then asked to demonstrate or evidence how they contributed to any of the assets under the name of the deceased as purported widows, to avoid a falsehood 'rubber stamping' of their recognition. They were asked for example, how they would identify a herd of sheep or cattle belonging to the deceased if they were brought with others before them. The Objectors were not able to respond.

d. The objectors were countlessly demanded by the clan elders (Asis) over three different meetings held on Saturdays between January and March 2022, to bring forth the purported children of the deceased for the meetings to get to be known and seen to which they were never able to demonstrate. The constant excuse was that the children were in school sessions.

e. The Objectors were also probed on what assets they worked for and owned with the deceased. They were asked why (if any) they did not list such in court so that the same could also be shared among all others. The questions were not answered.

f. In wisdom exercised by the Asis clan elders, the elders noted that they did not have with them any capacity to conduct a DNA test of the purported children unbeknownst to them. However, they also categorically and unanimously discouraged the matter in court to lead to the exhumation of the deceased on grounds that it is unethical, not cultural, and unheard of in the entire existence of the clan and tribe at large.

g. The Asis elders however directed that, owing to the probe on the lifestyles of the objectors who seemed to also be well off, the clan noted that the matters would best be suited by this Honourable court to allow for the closure and healing of the deceased's family and clan; it recognized the 1st petitioner as the legal wife of the deceased who was buried at their matrimonial home. The elders also pointed that for her, as the one entitled to overseeing the estate of the deceased, both culturally and according to law, she be compelled to see anything (asset) within her heart and will for disposal to the families of the two objectors to settle the matter conclusively and pave way for the much-needed closure of the case.

h. It is during the caucus and deliberations between the Asis clan members and the nuclear family of the deceased that the 1st petitioner offered two parcels of land for disposal. These parcels include: a two-acre piece of land situated in Nakuru county in Molo, and shares of a plot ELD/MUN/BLK 11/3X6 measuring 0.0236H situated in Eldoret town, Mwanzo that is co-shared between the deceased and his brother Stephen kimosop Kitum.

24. Learned Counsel further submitted that when the 2nd Objector was cross examined, she confirmed that she is aware that parties did not get into an agreement during the mediation process. That the 1st Objector also confirmed in her cross examination that the petitioner did not attend all the mediation sessions. It is on this ground that counsel argued that the mediation process was not conducted fairly. In support of his arguments, counsel relied on the case in Masai v Masai & 2 others (2024) KEELC 3318 (KLR) which cited the case of SMN v. ZMS & 3 others (2017) eKLR.

25. Moving to the second issue on whether the objectors qualify to be beneficiaries of the estate as per section 29 of the *Law of Succession Act*. Counsel submitted that it is indeed the duty of the objectors to prove that they were married to the deceased. He submitted that the 1st Objector in her statement stated that she knew the deceased in 1996 and after knowing each other she started cohabiting with the deceased. Equally the 2nd Objector, Lily Jeruto Kanji, stated in her statement that she knew the deceased sometime in 1998 in Eldoret town when she had gone to visit a friend and a former schoolmate (which friend was never mentioned by name and or called upon to testify in court). That after two months they bumped into each other and that is when they began their relationship and after few days she went to visit the deceased at his work station and they started cohabiting and their relationship blossomed.

26. Counsel pointed out that the objectors did not testify and/or adduce evidence pointing to any customary, civil, Christian, muslim or Hindu marriage which are the types of marriages recognized in Kenya. No documentary or oral evidence was adduced to that effect and in essence both the 1st and the 2nd Objectors are telling this court that they were cohabitees with the deceased herein and each claim that they lived with the deceased as husband and wife and should thus be considered by this honourable court as wives to the deceased herein and be ranked equally with the 1st Petitioner.

27. Mr. Osewe maintained that cohabitation is not provided for as a form of marriage under the *Marriage Act* and it has never been a form of marriage even before. On this counsel relied on the supreme court's decision in MNK v POM; Initiative for strategic litigation in Africa (ISLA) (Amicus Curiae) (2023) KESC 2 (KLR). He also pointed out the fact that the names of the objectors did not appear in the Eulogy and in the insurance form and the fact that they were not present or even taken part in the burial program of the deceased.

28. Learned Counsel submitted that apart from the two objectors simply alleging long term cohabitation with the deceased herein, there is no evidence that has been tabled meeting the parameters set out by the Supreme Court for a claim of presumption of marriage. He cited the decision in Re Estate of Alloys Obunga Aboge (deceased) (2023) KEHC 18520 (KLR). He maintained that the relationship that existed between the deceased and the objectors, if any relationship did exist, then it is that which the Supreme Court referred to as adult interdependent relationship outside marriage which does not amount to any form of marriage or even presumptive marriage. That parties thereto do not even have rights similar to those of married couples and the objectors thus cannot claim any share of the deceased's estate on such.

29. Counsel argued that the evidence before this court points to the fact that the deceased was married to the 1st Petitioner under statute and his marriage to the petitioner was monogamous in nature and that marriage was never dissolved until the death of the deceased. As such the deceased did not have the legal capacity under the 2nd parameter set by the Supreme Court to contract any other form of marriage whether under statute, customary or presumptive.

30. Counsel relied on the cases in Re Joseph Abok Kibuye Wadawi (deceased) (2024) KEHC 10378 (KLR), M.W.G v. E.W.K (2010) KECA 322 (KLR), Re Estate of the Late Melchisedec Kingi Gideon (deceased) and Re Estate of Amos Muhuri Koria (deceased) (2024) KEHC 9662 (KLR).

31. It is submitted for the Petitioners that the objectors made an attempt of producing birth certificates purporting to show that the deceased was the father of their children. However, the said birth certificates were highly contested and the petitioners subsequently verified these documents with the Registrar of Births and same filed in court. Moreover, the timing of the issuance of the said birth certificates raises significant doubts regarding their authenticity and motive all together.

32. That as may be seen from the birth certificates produced by the 2nd Objector, the said birth certificates were registered/acquired after the death of the deceased and precisely two days before the deceased's burial. That not even a notification of birth was produced in court to ascertain that indeed the children belonged to the deceased as is now being put forth only after his death.

33. Counsel submitted that the unexplained delays in registering vital records such as birth certificates could imply a lack of veracity in claims of paternity and dependency. Given the lack of contemporaneous records and the suspicious timing, the birth certificates produced by the objectors should be disregarded and/or treated with caution. Further that birth certificates are not conclusive proof of paternity. Moreover, no witness appeared to prove that the children were indeed sired by the deceased. Not even the alleged children were brought to court.

34. Learned Counsel argued that the children of the objectors would have been entitled to reasonable dependency provision under section 29(b) of the *Law of Succession Act* had it been proved that indeed the said children (who apparently are now adults) were indeed children of the deceased or that they were being maintained by the deceased immediately prior to his death. That there is no proof that was tabled before this court showing that the children belonged to the deceased or even that they were being maintained by the deceased immediately prior to his death or even that the deceased took them into his family as his own children.

35. Counsel concluded on this issue by submitting that the objection is unsupported by credible evidence and fail to satisfy the requisite standard of proof under Kenyan Law. He urged the court to dismiss the objections in their entirety, affirm the petitioner's legal entitlement to the estate, and proceed with the administration of the estate.

36. On distribution, counsel started by pointing that since the objectors have not attained the required standard of establishing that they were wives of the deceased, section 40 of the Law of Succession cannot apply. He submitted that the court should take note of the fact that mostly, in African set ups, when a lady is married, most of the properties that they acquire together with the husband will always be registered in the husband's name and this is exactly what happened in this case. That the wife's contributions should never be taken in vain. That the company name Gemuk which is an acronym derived from the 1st petitioner's and the deceased's names, Georgina and Murkomen Kitum, will got to explain how the 1st petitioner and the deceased had invested in acquisition of properties together.

37. On the matrix of distribution, the 1st petitioner submitted that out of the listed assets, 3 of the parcels are her matrimonial homes and should be registered in her name when the estate is being distributed. The said parcels of land are Eldoret Municipality/Block 9/1XX9 where she lived with her husband since the year 1994, Kiplombe/Kiplombe Block 9 (Marakwet Dev)/2X6 where the 1st petitioner submits that she lived there from the year 2000 and is presently living there and utilizing the same and Trans Nzoia/Milimani/54XXX96 where they also live and the late husband (deceased herein) was buried. She submitted that the said properties should be transferred to her name.

38. As regards the PSC benefits, such as the benefits and death gratuity from Kenya Forest Services, benefits from Asili Fosa Bank A/C 4299XXXXXXXXX04, Asili Cooperatives Shares and Saye KPO A/C No. CS-001XXXXXX82, the deceased herein had already nominated the Petitioner and her children to collect and they should not form part of the estate available for distribution as that is the law. As such no party, other than whoever was appointed/nominated by the deceased, should lay claim on them as the Objectors had purported that the petitioners did not states them. On this he cited the decision in Re Estate of Carolyne Achieng' Wagah (deceased) (2014) eKLR.

39. The Petitioners submitted that as regards the other remaining assets, that is Eldoret Municipality/ Block 9/2XX3, Eldoret Municipality/Block 11/3X6, Uasin Gishu/Kimumu Scheme/1XX0, Outspan Trading Centre/1X, Nakuru/Kapsita/1XX1, HFC Bank A/C No. 20XXXXXX66, Standard Bank A/C No. 0150XXXXXXX00, KCB Bank A/C No. 11XXXXX04 and 11XXXXXX30 Barclays Bank A/C No. 0300XXXXXX37, Oriental Bank A/C No. 55XXXXXX07, Blue Shield Insurance Co. Ltd Policy No. 8909609, Asili Benevolent Shares Cooperative Insurance Co. of Kena Ltd Policy No. 2X1/00XX53, Shares at KCB, Shares at Kenya Airways A/C No. 56XXX00 should be registered under their family company name Gemuk Enterprises for the benefit of herself and the children or alternatively the same may be distributed equally amongst the 1st petitioner and her four children being Beatrice Jerono Kitum, Michael Kibet Kitum, Stanley Kipyatich Kitum and DJK.

40. The petitioner further submitted that as regards Uasin Gishu/Kimumu Scheme/1XX7 the parcel of land still has an ongoing case as such the same may only be distributed once the case has been heard and determined. Even though the parcel of land is registered in the name of the deceased as confirmed by the Certificate of Official search which was filed in court on 14th May, 2013. Whereas the motor vehicle registration number KAY 4X9F which was bought by the deceased herein is still in the name of the deceased brother Stephen whom the deceased had used to register the said motor vehicle.

41. On a without prejudice basis, the petitioner submitted that shold this court find that the children herein were of the deceased, then only a reasonable share should be given to them. The petitioners proposed that land parcel NAKURU/KAPSITA/1XX1, the parcel of land at Mwanza (Block 311) and monies in the various listed bank accounts shall be reasonable provision in the circumstances.

The Objectors' submissions.

42. Learned Counsel Mr. Wafula, representing the 1st and 2nd Objectors, submitted that the cause relates to the estate of Elijah Murkomen Kitum who died intestate on 8.2.2013. Counsel argued that when initiating this cause, the petitioners deliberately and conveniently excluded the objectors and other children of the deceased from the matter, which precipitated the dispute before the Honourable Court.

43. Counsel submitted that at the instance of the parties, the matter was referred to court-annexed mediation where the mediator discharged his duties as required. It is the objectors' position that the parties, including other beneficiaries, participated in the mediation process and mutually developed a settlement agreement, which was duly signed by the petitioners, objectors, other beneficiaries, and some clan members.

44. Learned Counsel emphasized that this mediation settlement agreement was forwarded to the Honourable Court for adoption and was formally adopted on 11.05.2022 as a court order. Mr. Wafula pointed out that after an elapse of over 10 months, on 20.3.2023, the petitioners filed an application dated 16.3.2023 seeking to set aside the mediation agreement dated 11.3.2022 and adopted on 11.5.2022, which the objectors consider to be an afterthought.

45. Counsel for the objectors identified two cardinal issues framed by the petitioners' advocate: whether the mediation agreement adopted by the Court should be set aside in its entirety, and whether the objectors and their children should be beneficiaries of the estate, and if so, what is the proper mode of distribution.

46. On the first issue, Mr. Wafula strenuously argued that the objectors filed an affidavit in response to and opposition of the Notice of Motion application dated 16.3.2023, which was filed in Court on 20.3.2023. Counsel submitted that this affidavit was sworn on 15.5.2023 and urged the Court to consider the evidence contained therein regarding the application.

47. Learned Counsel submitted that in paragraph 2 of their affidavit, the objectors stated that the application is frivolous, vexatious, bad in law, and amounts to an abuse of Court process, deserving dismissal. Counsel maintained that the objectors' position remains unchanged.

48. Mr. Wafula vehemently argued that the application is fatally defective and amounts to an abuse of court process because the petitioners filed it without first seeking the leave of the Honourable Court, thereby contravening rule 39(1) of the Civil Procedure (Court-Annexed Mediation) Rules.

49. It is submitted for the objectors that this provision is expressed in mandatory terms, which the petitioners failed to comply with. Counsel contended that due to this non-compliance, the petitioners' application was "dead on arrival." The objectors' position is that the mediation agreement as adopted by the Court ought not to be set aside in any way whatsoever, as it remains binding on the parties and other beneficiaries.

50. Furthermore, Mr. Wafula advanced a hypothetical argument that even if the petitioners had sought leave of the Court before filing their application, there would have been no basis for setting aside the order arising from the settlement agreement. Counsel maintained this position because the petitioners failed to lead evidence proving misconduct, fraud, or fundamental mistake on the part of the mediator, or fraud, collusion, or misrepresentation by any party to the mediation, as required by rule 39(3) (a), (b), and (c). On these grounds, Counsel submitted, there would be no legal basis for setting aside the adopted mediation settlement agreement.

51. On the second issue concerning whether the objectors and their children should be beneficiaries of the estate, Counsel submitted that according to the mediation settlement agreement, it was agreed that the deceased was survived by 10 children, and there was no need for DNA testing. Counsel noted that the names of these 10 children were provided and captured in the Court order issued on 11.5.2022. Mr. Wafula argued that paternity of the children the deceased sired with the objectors is a non-issue and characterized the petitioners' attempt to go back on what parties had already agreed upon as completely bad faith.

52. In support of this position, Counsel relied on section 120 of the *Evidence Act* regarding estoppel, which states: "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

53. Counsel submitted that the parties did agree that the 10 children are indeed children of the deceased, which was also confirmed by clan members. Mr. Wafula referenced the testimony of Stephen Kimosop Kitum, who appeared before the Court and confirmed that the 1st and 2nd objectors were married by the deceased. Counsel noted that before 15.12.2001, the petitioner had not celebrated her marriage with the deceased, and therefore the objectors would not be wrong to assert they were wives of the deceased through long cohabitation.

54. Learned Counsel argued that from 15.11.2001 onwards, the objectors continued to be the deceased's dependants and former wives. Mr. Wafula highlighted Stephen's confirmation that the 10 children mentioned in the mediation settlement agreement are the deceased's children entitled to inherit the estate, just like their mothers. Stephen further testified that the parties and clan members mutually agreed there was no need for DNA tests as they all acknowledged the 10 children as the deceased's children.

55. Counsel also cited the testimony of the 1st objector, who stated she began living and cohabiting with the deceased in 1996, continuing until his demise in 2013, resulting in 3 children. To substantiate

her claims, she produced M-pesa statements showing financial support from the deceased and a diary demonstrating the relationship between the objectors and the deceased.

56. Mr. Wafula emphasized that before 15.12.2001, the deceased was a polygamist, with the 1st petitioner, 1st objector, and 2nd objector as his wives. When the deceased married the 1st petitioner on 15.12.2001, the objectors became former wives. As former wives and dependants, Counsel argued, their interests and those of their children are protected under Section 29(a) of the *Law of Succession Act*, Cap. 160 of the Laws of Kenya.

57. Counsel submitted that the deceased cared for the objectors and their children during his lifetime, with ample evidence supporting this. The objectors and their children, like the 1st petitioner and her children, are entitled to the deceased's estate. Mr. Wafula concluded that the objectors have ably proven they are beneficiaries of the estate.

58. Having demonstrated that the mediation agreement should not be set aside and that the objectors and their children should be beneficiaries, Counsel addressed the distribution of the estate. Mr. Wafula proposed that the estate should be distributed equally among the 13 beneficiaries (10 children and 3 mothers), taking into account the interests of Stephen Kimosop Kitum.

59. Learned Counsel concluded by submitting that justice would be served if the estate were distributed equally among these 13 beneficiaries. Mr. Wafula alleged that the petitioners have been "hogging the estate" to the disadvantage of other beneficiaries and argued it is time to end this by distributing the estate to all beneficiaries and requiring the petitioners to account for monies they have taken from the estate.

Analysis and determination

60. Having considered the evidence adduced by the parties, the submissions by learned counsel, and the applicable legal principles, I now turn to the determination of the issues raised in this matter. The principal question before this Court is whether the objectors qualify as beneficiaries of the deceased's estate pursuant to the *Law of Succession Act*. This necessitates a determination of whether the objectors were wives of the deceased or, in the alternative, whether they and their children qualify as dependants under Section 29 of the *Law of Succession Act*. Also requiring the Court's determination is whether the mediation agreement entered into by the parties should be set aside, and ultimately, how the deceased's estate ought to be distributed among the rightful beneficiaries.

61. The dispute traverses delicate family dynamics where competing claims to the estate of the late Elijah Murkomen Kitum must be resolved with sensitivity to both legal dictates and equitable considerations. This Court is tasked with the solemn duty of ensuring that the distribution of the deceased's estate upholds the letter and spirit of the *Law of Succession Act* while giving due regard to the legitimate expectations of all who depended on the deceased during his lifetime. The resolution of this matter requires a meticulous examination of the evidence to ascertain the true nature of the relationships that existed between the deceased and the objectors, and consequently, their entitlement, if any, to a share of his estate.

62. Section 107(1) of the *Evidence Act* (chapter 80 of the laws of Kenya), provides that;

> " 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."

63. The provisions were well augmented by the Court of Appeal in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR as follows:

> " We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that "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." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side."

64. I shall first address the validity of the mediation agreement dated 11th March, 2022 and adopted on 11th May, 2022, which the petitioners now seek to set aside. The determination of this preliminary issue is pivotal as it bears directly on the subsequent substantive questions regarding the beneficiaries' status and the ultimate distribution of the estate.

65. On the question of whether the mediation agreement should be set aside, I have carefully examined the petitioners' application dated 16th March, 2023, and the objections thereto. The petitioners contend that they never fully participated in the mediation process due to the ill health of the 1st petitioner and that the mediator misinterpreted issues presented to him from clan meetings. The petitioners further allege that there was an element of coercion to sign the agreement to avoid a DNA exhumation order.

66. The mediation agreement in question, dated 11th March, 2022, is captured as follows:

> " Upon reading the mediation settlement agreements dated 11th March, 2022 and duly signed by Richard E. Omanyala, mediator, and the parties herein: It is hereby recorded as follows:
>
> That the clan confirms that the (deceased)left behind Ten (10) children namely:
>
> a) Beatrice Jerono Kitum
>
> b) Michael Kibet Kitum
>
> c) Stanley Kipyetich Murkomen
>
> d) DJM
>
> e) Lilian Chepngetich
>
> f) Cynthia Jepkogei Kitum
>
> g) Winnie Cherotich Kitum
>
> h) Christine Chepkoech Kitum
>
> i) Linda Jepchumba Kitum
>
> j) Benjamin Kipyego Kitum.
>
> That following the above declaration and identity of the said children of the deceased. The clan confirms that there will be no at any time any claim of DNA for the said family of the deceased.

That in the progress matter of succession of the late Elijah Murkomen Kitum and as per his property Vehicle KAY 4X6F Lorry RAY 4X6F is registered in his name as per their mutual agreement when his brother was still alive but confirms that it belongs to his late brother and agrees to transfer the logbook to the family and to the person that shall be identified.

That in the progress matter of succession of the late Elijah Murkomen Kitum and as per his property Vehicle KAY 4X6F Lorry RAY 4X6F is registered in his name as per their mutual agreement when his brother was still alive but confirms that it belongs to his late brother and agrees to transfer the logbook to the family and to the person that shall be identified.

That in the progress matter of succession of the late Elijah Murkomen Kitum (deceased) and his brother Stephen Kimosop Kitum in the matter of joint ownership of land parcel No ELD/MUN/BLK 11/3X6 measuring 0.0236 HA, permanently developed with rental housing in use that was jointly developed by the two brothers with a joint A/C Barclays Bank No. OO34532737, that the said parcel of the land shall be jointly now owned by the late's widow Georgina Mbithe and brother in-law Stephen Kimosop Kitum. That henceforth Stephen Kimosop Kitum shall be in charge of rental collection and maintenance jointly undertake maintenance. That rent collected shall be divided equally and for the widow to be deposited to her A/C 11XXXXXX40 – KCB ELD Branch.

That the vehicle Registration KAS 1X9B Toyota pick-up be transferred to and remains in the company name of GEMUK Enterprises Ltd under the Directors names of:

a) Elijah Murkomen Kitum(deceased)

b) Georgina Mbithe Murkomen Kitum

c) Beatrice Jerono Kitum

As a matter of succession both parties agree that the vehicle is inherited by the remaining board members namely; Georgina Mbithe Kitum and Beatrice Jerono.

That we as family agree together that all financial cash that was left behind by the late Elijah Kitum as from the date of his death plus all interests earned thereby in the Banks or elsewhere shall be with permission from the H/Court withdrawn and all accounts closed and that with the supervision of the elders the Court itself to distribute all the earnings equally to the ten children (10) of the deceased."

67. The process of court annexed mediation is governed by the Judiciary of Kenya Practice Directions on Court Annexed Mediation issued by the Chief Justice under Article 159 of the *Constitution* and section 59B (1) (a), (b) and (c) of the *Civil Procedure Act*.

68. Mediation is an informal and non-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties. The mediator does not determine the dispute or impose a decision. Rather, the parties themselves propose settlement terms, and upon reaching agreement, the mediator guides them through signing a mediation agreement.

69. When the mediation agreement is signed, it becomes final and binding regarding the disputes that have been amicably resolved. Under Court Annexed Mediation, the Mediation Report is filed with the court and subsequently adopted as a court order. However, if the parties cannot reach agreement on issues referred to mediation, the Mediator submits a report to the court indicating which matters remain unresolved, allowing the court to proceed with the formal litigation process for those outstanding issues.

70. The guiding principles used by courts in setting aside consent judgments or orders are well established. In Flora N. Wasike v Destimo Wamboko [1988] eKLR Hancox, JA, as he then was, said: -

> " It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or certain conditions remained to be fulfilled which are not carried out"

71. This position is clearly articulated in the English Case of Purcel V. F. C. Trigell Ltd, (trading as Southern Window and General Cleaning Co. and Another), [1970] 3 ALL ER671, where Winn, LJ, opined:

> " It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."

72. In the present case, the 1st Petitioner seeks to impugn the mediation agreement on grounds that she never fully participated in the mediation process owing to ill health and that she was dissatisfied with how the process was being conducted. She further alleges that the mediator misinterpreted issues presented from clan meetings and employed high-handedness to coerce her into signing the agreement to avoid DNA testing through exhumation of the deceased's remains.

73. Having carefully scrutinized the evidence adduced, I find that the 1st Petitioner has not discharged the burden of proving these allegations to the requisite standard. While the 2nd Objector confirmed during cross-examination that parties did not reach full agreement during mediation, and the 1st Objector acknowledged that the Petitioner did not attend all sessions, this falls short of establishing grounds that would vitiate the mediation agreement in its entirety.

74. The mediation agreement dated 11th March, 2022 bears the signatures of all parties, including the Petitioners, and was formally adopted by this court on 11th May, 2022. Significantly, the Petitioners waited for over ten months before filing their application to set aside the agreement, suggesting an afterthought rather than a genuine complaint about procedural irregularities. The Petitioners have not demonstrated any misconduct, fraud, or fundamental mistake on the part of the mediator, or fraud, collusion, or misrepresentation by any party to the mediation as would be required under Rule 39(3).

75. It is worth noting that while the mediation agreement addressed critical issues including the identification of all ten children of the deceased and arrangements regarding specific assets such as the vehicle Registration KAY 4X6F, land parcel NO ELD/MUN/BLK 11/3X6, and vehicle Registration KAS 1X9B, it did not comprehensively dispose of all properties in the deceased's estate. Several properties listed in the inventory of assets, including multiple land parcels and bank accounts, were not specifically addressed in the agreement. This, however, does not invalidate the agreement with respect to the matters it did resolve. The court retains jurisdiction to determine the distribution of the remaining assets in accordance with the *Law of Succession Act*, while respecting the terms already agreed upon in the mediation process.

76. The mediation agreement established important parameters for resolving this succession dispute, particularly by identifying all beneficiaries and determining the approach to specific assets. Setting it aside at this juncture without compelling reasons would not only prolong litigation unnecessarily but

would also undermine the court-annexed mediation process which is designed to expedite resolution of disputes through amicable settlement.

77. In light of the foregoing, I find no justifiable basis for setting aside the mediation agreement dated 11th March, 2022 which was adopted as a court order on 11th May, 2022. The agreement shall therefore remain valid and binding on all parties and shall form the foundation for determining issues pertaining to the distribution of the deceased's estate.

78. Having determined that the mediation agreement remains valid and binding upon all parties, I now turn to address the central issue in this succession cause: whether the objectors qualify as beneficiaries of the deceased's estate pursuant to section 29 of the *Law of Succession Act*. This determination necessitates a careful examination of the evidence presented regarding the nature of the relationships between the deceased and the objectors, and whether these relationships created legally recognized rights of inheritance or dependency. The resolution of this issue is particularly significant given that the mediation agreement identified ten children as offspring of the deceased but did not conclusively resolve the status of the objectors themselves as potential beneficiaries.

79. The 1st and 2nd Objectors claim to have been married to the deceased according to customary law. The 1st Objector, Novena Jepkemoi Lagat, asserts that she began cohabiting with the deceased in 1996 and subsequently entered into a customary marriage with him. Similarly, the 2nd Objector, Lily Jeruto Kanji, claims to have met the deceased in 1998 and subsequently entered into a customary marriage relationship. The question before this court is whether these relationships constituted legally recognized marriages that would entitle the objectors to inherit as spouses under the *Law of Succession Act*.

80. The timing of these relationships raises an interesting issue: could the objectors have established valid customary marriages with the deceased prior to his civil marriage, and if so, what is the effect of the subsequent civil marriage on their status? Are they marriages by presumption?

81. Halsbury's Laws of England 3rd Edition Vol. 19 PAR 1323 says: -

> " Presumption from Cohabitation
>
> Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted only by strong and weighty evidence to the contrary".

82. The concept of marriage is almost universal.

In the natural historical sense, marriage means –

> " A more or less durable union between one or more husbands and one or more wives sanctioned by society and lasting until the birth and rearing of offspring"

In the legal sense –

Marriage is a contract between one or more males and one or more females for establishment of a family.

83. The institution of marriage is profoundly woven into our constitutional framework, with Article 45 of the *Constitution* of Kenya providing robust protection for the family as "the natural and fundamental unit of society and the necessary basis of social order." Our legal system recognizes and accords equal protection to various forms of marriages, whether civil, customary, Islamic, Hindu, or other

religious traditions, acknowledging the rich cultural tapestry that defines our nation. Each form of marriage, when properly established according to its respective requisites, enjoys full constitutional protection and legal recognition. This recognition extends beyond mere formalities to embrace the substantive relationships that constitute the foundation of family life. The court must therefore approach questions of marital status with both legal precision and cultural sensitivity, mindful that relationships between men and women often exist in a complex interplay of formal recognition and lived reality. While cohabitation alone may not suffice to establish a marriage, the court must nevertheless be attentive to the potentially legitimate expectations that arise from long-standing intimate relationships, particularly where children are involved, even as it maintains fidelity to the legal requirements that distinguish marriage from other forms of adult relationships.

84. In Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR Bosire JA held as follows:

> " The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by along cohabitation or other circumstances evinced an intention of living together as husband and wife."

85. In Ngaah J, in CWN v DK [2021] eKLR was of the view that;

> " as far as presumption of marriage is concerned, it is a status of relationship that turns much on evidence as much as it is a presumption of law."

86. In the instant case, the relationships the deceased had with the objectors herein resulted in the birth of multiple children acknowledged in the mediation agreement as the deceased's offspring. The deceased's pattern of behavior in fathering children with both objectors; three children with the 1st Objector and two with the 2nd Objector, strongly suggests intentions beyond casual relations or mere convenience. The court must grapple with the question of whether a man who fathers multiple children with the same women over the course of many years, providing financial support as evidenced by the pieces of evidence produced by the 1st Objector, can reasonably claim to have had no matrimonial intentions. The deceased's conduct in maintaining these relationships for approximately 17 and 15 years respectively, while simultaneously supporting the resulting children, creates a compelling factual matrix that may satisfy the requirements for presumptive marriage prior to his formal civil marriage to the 1st Petitioner in December 2001.

87. The parameters of a marriage by presumption were set out by the Supreme Court in the case of MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) as follows:

    a. The parties must have lived together for a long period of time.

    b. The parties must have the legal right or capacity to marry.

    c. The parties must have intended to marry.

    d. There must be consent by both parties.

    e. The parties must have held themselves out to the outside world as being a married couple.

    f. The onus of proving the presumption is on the party who alleges it.

g. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.

h. The standard of proof is on a balance of probabilities.

88. Applying these principles to the present case requires a nuanced examination of the evidence presented regarding the relationships between the deceased and the objectors. The 1st Objector, Novena Jepkemoi Lagat, testified to cohabiting with the deceased from 1996 until his death in 2013, producing documentary evidence including M-pesa statements demonstrating financial support and a personal diary chronicling various events of the deceased. The 2nd Objector, Lily Jeruto Kanji, similarly established a 15-year relationship with the deceased, resulting in two children whom the deceased supported throughout his lifetime. Both objectors presented birth certificates for their respective children, documenting the deceased's paternal recognition. Significantly, the testimony of Stephen Kimosop Kitum, the deceased's own brother, acknowledged the relationships between the deceased and the objectors, lending familial recognition to these unions. The objectors' detailed accounts of their domestic arrangements with the deceased, including specific residences they shared in Bungoma and elsewhere during his various work transfers, suggest relationships characterized by permanence and commitment rather than casual associations. Furthermore, the objectors' knowledge of the deceased's personal effects, daily routines, and financial affairs indicates intimate familiarity consistent with matrimonial relationships. The sustained nature of these relationships over approximately 17 and 15 years respectively, coupled with the birth and ongoing support of multiple children, creates a compelling evidentiary foundation supporting the recognition of these relationships as substantive family unions deserving of legal protection under our constitutional framework, which values the family unit irrespective of its formal documentation.

89. For some people, due to the existence of the Human right to associate or elect to form a love relationship with any person of his/her choice, it sometimes becomes unrealistic and illogical to lay down strict definitions on what constitutes the scope of a legal marriage. I am convinced that the so called marriage unions across the country have survived legality, authenticity and legitimacy without the set definitions in the *Marriage Act* 2014. The case at bar does not fall within the provisions of the *Marriage Act*, 2014. All the events occurred prior to the enactment of the 2014 Act. In the result, it is not in my view either by necessity or prudence to attempt in the abstract, a definition or test of the circumstances in which a given relationship between a man and a woman who meet the legal criteria to cohabit together and do all things that pertains to that union with full marital characteristics should be held not to be married couples. It is the duty of the court in my considered view to address this issue on a case by case basis taking into account of the various factors and features which bore the hallmarks of a marriage. It just suffices if by way of evidence it can be established that the two souls by coming together and setting the marriage relationship to all and sundry they intended and believed that what they have created is a marriage. I have a lot of difficulties myself that it is neither possible nor sensible for courts to seek to restrictively or by limitation of a right to set out a definitive test for determining whether a particular cohabitation resulted in a non-marriage or on the other hand a valid marriage. I say this that in certain instances obligation of payment of dowry or bride price is no longer a condition precedent to afforded legal customary marriage.

90. Regarding marriages under customary law, Section 43 of the *Marriage Act*, Cap 150 of the Laws of Kenya, provides the governing law for customary marriages as follows:

i. A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

ii. Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.

91. Proof of customary marriage was brought out clearly by the Court of appeal in the case of Kimani v Gikanga [1965] EA 735. It was observed that;

> " To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."

92. In the case of Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976 (Wambuzi, P Mustafa V-P and Musoke, JA), Justice Kneller laid down three principles regarding proof of customary marriages in Court. They are:

> " i. The onus of proving customary law marriage is generally on the party who claims it;
>
> ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;
>
> iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard."

93. In the context of women's reproductive health and rights, a delicate balance must be struck between individual autonomy and the recognition of sustained family relationships. While international instruments including CEDAW Article 16 and the Beijing Platform for Action rightly protect women's reproductive choices as fundamental human rights, these principles must be harmonized with our constitutional commitment to protecting family units in their various manifestations. The evidence in this case presents not merely isolated instances of childbearing, but rather a pattern of sustained relationships spanning more than a decade, resulting in multiple children who were acknowledged and supported by the deceased throughout his lifetime. The court must consider whether relationships of such duration and character, particularly those that produced offspring whom the deceased recognized as his own, represent more than casual associations and instead constitute family units deserving protection. When a relationship demonstrates permanence through years of continuous association, financial support, and shared parental responsibilities, it transcends mere reproductive choice and embodies the essential characteristics of a family unit. The evidence indicates that the deceased actively participated in these family arrangements, providing material support and maintaining relationships with both the objectors and their children until his death. Rather than undermining reproductive autonomy, recognizing the substantive nature of these enduring relationships acknowledges the legitimate expectations created when individuals choose to form and maintain family units over significant periods, especially when children are involved.

94. The approach to women inheritance is a quadruple pronged approach within the Kenyan legal system combining cultural and customary law, the *Constitution*, international law as entrenched in Art. 2(5) & (6) of the *Constitution* and finally the applicable and enabling statute law. In this conceptual framework, equality and non-discrimination inheritance pronouncement, are clearly expressed at the international and African regional level linkages and other treaties, the *Constitution* itself and the primary statute *Law of Succession Act*. The comprehensive guide on this subject at the regional level is the Treaty referenced as the African Charter on Human and people's Rights on the rights of women in Africa fondly referred to as the Maputo Protocol. The specifics of it are traceable to Art. 20 and 21. These provisions should be read together with the provisions of non-discrimination as provided in the convention on Social and Cultural Rights, CEDAW, the Organization of African Union Convention on the elimination of all forms of harmful practices affecting the discrimination of women and girls. The United Nations Human Rights Committee has explicitly recognized equality in marriage over the management of property including land under CEDAW general recommendations 21 on equality in marriage and family relations. In Art. 14 of the African Charter on Human and People's rights it guarantees the enjoyment of this right to equality and non-discrimination, without distinction of any kind including sex and gender. Whereas in Art. 23 of the International Covenant on Civil and Political Rights, equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution, it specifies that women should have equal inheritance rights to those of men when the dissolution of the marriage is caused by death of one of the spouses.

95. It also goes without saying in so far as our Constitution is concerned under Art. 27, every person shall have the right to equality before the law and to equal protection of the law. No person shall be unfairly discriminated against, directly on one or more of the following grounds: in particular race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language. That right to equality before the las envisaged in the *Constitution* is concerned more particularly with the entitling at the very least to equal treatment by our courts of law. In my considered view of this provision, no one is above or beneath the law when it comes to the interpretation in according rights under the fundamental rights and freedoms.

96. The question of significance to the facts of this case is that you are a man who betrothed two women, held himself out as the husband, went further to undertake all assignments, obligations, duties, commitments of what is the definitional dimension of a husband and head of the family unit. The two women who are objectors in this case spent their prime years of their lifetime with the man who is now deceased in this intestate estate proceedings. The objectors in exercising their sexual and reproductive rights gave in and consented to bring forth a generation with the deceased as the generator of procreation. From the evidence of the objectors each one of them was blessed with three and two heirs to the throne of the deceased respectfully. There was no cogent evidence that they were concubines with a promise to be married on a future date. For avoidance of doubt, there only sin was that they trusted a man who had other intentions unknown to them that he had formalized a marriage with the petitioner who had joined belatedly in comparison with the period they had spent with the deceased. As if that was not sufficient, the deceased never stopped to meet his obligations as provided under the law more specifically in fulfilling the welfare and best interest of the children under the Children's Act. The Objectors also in their evidence never lacked provisions for maintenance including conjugal rights from their late husband.

97. Where does the differentiation and discrimination come from given the historical background of this matter? First and foremost, the mediation agreement recognized the objector's children and makes no mention as to any financial provision as to their biological mothers as to their matrimonial homes or survival rights on basic fundamental rights. Incidentally, from the record, the deceased made those

financial provisions, including paying rent to the houses occupied by the objectors during his lifetime. He was fully aware that besides registering a civil marriage with the petitioner, he never abdicated his responsibilities and obligations to the objectors as "spouses". This marital union with the objectors looked at from the lens of the marriage by dint of this registration of certificate of marriage with the Petitioner may be considered as voidable but for all intention and purposes, the deceased conducted himself as a polygamous husband until his demise. In my considered view objectively so, rendering the objectors refugees and widowed without any rights to inheritance or financial provision are attributes and characteristics which have the potential to impair the fundamental human dignity of persons in the category of objectors which will affect them adversely in a comparably serious manner to the petitioner. The Objectors here have established the unfairness occasioned by the deceased in his conduct of registering the marriage with the petitioner but continue to hold himself out as a spouse at all material times, situations and circumstances as developed over time in the relationship he had with the objectors. It was the duty of the deceased not to discriminate against any of his spouses with regard to any term or condition of marriage. The Succession Act in its letter and spirit is aimed at outlawing or removal of any form of discrimination on inheritance. As pointed out by the court in the Hugo case SA 430 BCLR, the more vulnerable the group adversely affected by discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interest of the individuals affected by the discrimination, the more likely it will be held to be unfair."

98. The presumed legacy of the deceased in this sphere of inheritance, was not to discriminate against the objectors or the petitioner. It is precise from the evidence there was no such a design to disadvantage the objectors as against the Petitioner. It is also noteworthy to mention that equality is one of the core values in Art. 10 of the *Constitution*.

99. In addition to the standard and burden of proof discussed elsewhere in this judgment, as a matter of emphasis certain aspects of succession disputes are subjected to the threshold of proof on a balance of probabilities. The objector's case is one such scenario which must substantially be tested within that scope. In the case of William Kabogo v. George Thuo & 2 others (2010) 1KLR, the court stated:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred." See also: Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR.

100. Consideration of such principles necessarily involves looking at the whole picture of the objectors' case including what gaps there are in the evidence, whether the individual factors relied upon to prove their union has been properly established and what cogent factors point to the fact that fit the circumstances in which they are entitled to some form of inheritance notwithstanding the application of the doctrine of voidable in the overall assessment of how the deceased conducted himself under the sphere of personal law of marriage.

101. The long and short of it is that the objectors have discharged the burden of proving that they maintained substantial, enduring relationships with the deceased that merit recognition in the distribution of his estate. The evidence of extended cohabitation spanning approximately 15-17 years, coupled with the birth and continuous support of multiple children, now acknowledged in the binding mediation agreement, establishes relationships characterized by permanence and commitment

rather than transient associations. While traditional customary formalities such as formal dowry payments and ceremonial requirements may not have been exhaustively documented, the totality of evidence including financial support through M-pesa transactions, school fees payment receipts and the documented transactions in the diary produced by the 1st Objector, and the testimony of the deceased's brother acknowledging these relationships, creates a compelling foundation for recognizing their substantive nature. The court notes that family structures evolve over time, and our constitutional framework places primacy on protecting the family unit in its various manifestations rather than rigid adherence to formalities. The long-term cohabitation, shared parental responsibilities, and financial interdependence demonstrated in this case reflect relationships that functioned as de facto marriages deserving protection under our legal system. Recognizing these relationships honors the legitimate expectations of parties who commit to family formation over significant periods and acknowledges the reality that families may be constituted through lived experience as well as formal ceremony.

102. The preliminary issues regarding the validity of the mediation agreement and the status of the objectors have been addressed in depth. I now turn to the substantive question of how the deceased's estate should be distributed among the rightful beneficiaries. This determination must harmonize the binding mediation agreement with the applicable provisions of the *Law of Succession Act* while ensuring that all legitimate interests in the estate are properly recognized and protected.

103. Under Part V, the persons who are entitled to the estate of an intestate are the survivors, that is to say the persons mentioned in sections 35, 36, 38 and 39 of the *Law of Succession Act*, meaning surviving spouses, children, parents and siblings of the deceased, and other relatives of the deceased up to the sixth degree.

104. In the instant cause, given that the Objectors are now allowed to be part of the distribution matrix, the provisions of Section 40(1) of the *Law of Succession Act* should apply. The section states as follows:

> " 40(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."

105. The Court in Re Estate of John Musambayi Katumanga – Deceased [2014] eKLR held as follows:

> " The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is 'equally' as opposed to 'equitably'. This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall ... be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children."

The Petitioners' proposal

106. The Petitioners, through their counsel Mr. Osewe, submitted that since the Objectors have not established that they were wives of the deceased, Section 40 of the *Law of Succession Act* concerning polygamous marriages cannot apply in this case. They emphasized that in African settings, properties acquired jointly by spouses are often registered solely in the husband's name, and the wife's contributions should not be disregarded.

Specifically, the Petitioners proposed the following distribution scheme:

107. Matrimonial Homes: Three parcels of land identified as matrimonial homes should be registered in the name of the 1st Petitioner. These are:

a. Eldoret Municipality/Block 9/1XX9 (where she lived with the deceased since 1994)

b. Kiplombe/Kiplombe Block 9 (Marakwet Dev)/2X6 (where she has lived since 2000)

c. Trans Nzoia/Milimani/54XXX96 (where they also lived and where the deceased was buried)

Nominated Benefits: The Petitioners submitted that benefits from Kenya Forest Services, Asili Fosa Bank A/C, Asili Cooperatives Shares, and Saye KPO A/C should not form part of the distributable estate as the deceased had already nominated the 1st Petitioner and her children as beneficiaries.

Remaining Assets: The Petitioners proposed that the remaining properties, including various land parcels and financial assets, should either be registered under their family company name Gemuk Enterprises for the benefit of the 1st Petitioner and her children, or alternatively be distributed equally among the 1st Petitioner and her four children.

Properties with Special Considerations:

d. Uasin Gishu/Kimumu Scheme/1XX7: Distribution should be deferred pending the resolution of ongoing litigation.

e. The vehicle registration number KAY 4X9F: This should be addressed according to the arrangement with the deceased's brother Stephen.

Without Prejudice Position: The Petitioners added that if the court were to find that the Objectors' children were indeed the deceased's offspring, then only a reasonable provision should be made for them. They suggested that the land parcel Nakuru/Kapsita/1XX1, the parcel at Mwanza (Block 311), and monies in various bank accounts would constitute a reasonable provision in the circumstances.

The Objectors' proposal

108. The Objectors, through their counsel Mr. Wafula, anchored their distribution proposal on the mediation agreement which they maintained should be upheld in its entirety. They emphasized that according to this agreement, the deceased was survived by 10 children, and there was no need for DNA testing to establish paternity.

The Objectors contended that:

1. The 10 children identified in the mediation agreement are the deceased's legitimate children entitled to inherit his estate, as confirmed by clan members and Stephen Kimosop Kitum during his testimony.

2. Before the 1st Petitioner's civil marriage to the deceased on 15th December, 2001, the deceased was a polygamist with the 1st Petitioner, 1st Objector, and 2nd Objector as his wives.

3. After the civil marriage, the Objectors became "former wives" and dependants whose interests, along with those of their children, are protected under Section 29(a) of the *Law of Succession Act*.

4. The estate should be distributed equally among 13 beneficiaries (10 children and 3 mothers), taking into account the interests of Stephen Kimosop Kitum regarding jointly owned property.

The Objectors' proposition is fundamentally based on equal distribution among all beneficiaries, including themselves as former wives or dependants of the deceased.

Distribution matrix

109. Having outlined the competing proposals for distribution, I now proceed to determine the appropriate distribution scheme that aligns with the *Law of Succession Act* while taking into account the court's findings regarding the status of the parties and the binding mediation agreement. Given the court's recognition of the objectors' relationships with the deceased as substantive family unions deserving of legal protection, Section 40 of the *Law of Succession Act* concerning polygamous marriages becomes applicable to this case.

110. For the purposes of distribution, the estate shall be divided into three houses:House 1: Georginah Murkomen Kitum (1st Petitioner) with four childrenHouse 2: Novena Jepkemoi Lagat (1st Objector) with three childrenHouse 3: Lily Jeruto Kanji (2nd Objector) with two children

111. With respect to the specific assets comprising the estate, I make the following determinations:

112. The property identified as Eldoret Municipality/Block 9/1XX9, where the deceased and the 1st Petitioner resided, shall be registered in the name of the 1st Petitioner, Georginah Murkomen Kitum.

113. The property identified as Kiplombe/Kiplombe Block 9(Marakwet Dev.)/2X6 shall be transferred to Novena Jepkemoi Lagat (1st Objector) as her matrimonial home.

114. The property identified as Trans Nzoia/Milimani/54XXX96 shall be transferred to Lily Jeruto Kanji (2nd Objector) as her matrimonial home.

115. Joint Property: Regarding land parcel No. ELD/MUN/BLK 11/3X6 measuring 0.0236 Ha, the mediation agreement specifically addressed this property and established that it shall be jointly owned by the 1st Petitioner, Georginah Mbithe, and the deceased's brother, Stephen Kimosop Kitum, with equal division of rental income. This arrangement shall be maintained as per the binding agreement.

116. Vehicle Registration KAS 1X9B: As stipulated in the mediation agreement, this Toyota pick-up shall remain in the company name of Gemuk Enterprises Ltd under the directors' names of Georgina Mbithe Murkomen Kitum and Beatrice Jerono Kitum.

117. Financial Assets: In accordance with the mediation agreement, all financial cash left behind by the deceased, including bank balances and accrued interest, shall be withdrawn and distributed equally among the ten children of the deceased.

118. The following properties which were not specifically addressed in the mediation agreement shall be distributed in accordance with Section 40 of the *Law of Succession Act*:House 1 (5 units): Shall receive 5/15 share of Eldoret Municipality/Block 9/2XX3, Uasin Gishu/Kimumu Scheme/1XX0, Outspan Trading Centre/1X, and Nakuru/Kapsita/1XX1.House 2 (4 units): Shall receive 4/15 share of the same properties.House 3 (3 units): Shall receive 3/15 share of the same properties. Within each house, the property rights shall vest in all members jointly, with the wife in each house holding a life interest in trust for the benefit of the children of that house.

119. Nominated Benefits: Benefits from the Kenya Forest Service, Asili Fosa Bank A/C 4299XXXXXXXXX04, Asili Cooperatives Shares, and Saye Kpo A/C No. CS-001XXXXXX82, where the deceased had made specific nominations, shall be distributed according to such nominations and do not form part of the distributable estate, in accordance with the principle established in Re Estate of Carolyne Achieng' Wagah (deceased) (2014) eKLR.

120. Insurance Policies and Shares: The Blue Shield Insurance Co. Ltd Policy No. 89XXX9, Cooperatives Insurance Co. of Kenya Ltd Policy No. 2X1/00XX53, Shares At KCB, and Shares at Kenya Airways A/C No. 56XXX00 shall be liquidated and the proceeds distributed among the three houses according to the ratio established under Section 40 of the *Law of Succession Act*.

121. Disputed Property: With respect to Uasin Gishu/Kimumu Scheme/1XX7, which is subject to ongoing litigation, the distribution of this property shall be deferred pending the resolution of the existing case. Once the matter is determined, the property or any interests therein awarded to the deceased's estate shall be distributed in accordance with the principles outlined in this judgment under Section 40 of the *Law of Succession Act*.

122. Vehicle KAY 4X9F: As acknowledged in the mediation agreement, this vehicle belongs to the deceased's brother, Stephen, and shall be transferred to the appropriate family member as identified in accordance with the agreement.

123. The administrators of the estate are directed to take all necessary steps to implement this distribution within six months from the date of this judgment, including the transfer of titles, liquidation of assets, and equitable division of proceeds as outlined above. The court further directs that in implementing this distribution, the administrators shall be mindful of the need to minimize fragmentation of assets where possible, and may, with the consent of all beneficiaries, employ practical mechanisms such as sale and division of proceeds, or compensation in lieu of physical division, to achieve an equitable outcome that preserves the economic value of the assets.

124. The costs shall be borne by the estate.

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF MARCH 2025.

In the Presence of

Mr. Wafula for R. M Advocate

Mr. Osewe Advocate

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R. NYAKUNDI

JUDGE