



REPUBLIC OF KENYA



**In re Estate of Henry Mbogo Kuria (Deceased) (Succession Cause
E004 of 2022) [2025] KEHC 10818 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
SUCCESSION CAUSE E004 OF 2022
AK NDUNG’U, J
JULY 17, 2025**

IN THE MATTER OF THE ESTATE OF HENRY MBOGO KURIA (DECEASED)

BETWEEN

TERESIA WANJIRU MBOGO 1ST PETITIONER

PATRICIA WANGARI MBOGO 2ND PETITIONER

AND

LUCY WAIRIMU NDERITU 1ST OBJECTOR

PATRICK GITONGA NGURE 2ND OBJECTOR

JUDGMENT

1. The 1st Objector, moved this court vide a citation dated 15/06/2022 directed to the Petitioners and the 2nd Objector. Consequently, the Petitioners herein filed petition for grant of letters of administration intestate dated 21/06/2022. In the said Petition, it was averred that the deceased was survived by the following persons;

- i. Teresia Wanjiru Mbogo wife
- ii. Patricia Wangari Mbogo daughter
- iii. Joseph Ngure Mbogo son
- iv. JDN son (Minor)
- v. SNM Son (Minor)

2. It was further averred that the deceased’s estate comprised of the following properties;

Land reference no. 2787/XII/37 (I.R 7265)



Land reference no. 4762/2 (I.R. 178771)

Land reference no. 4762/3 (I.R. 178772)

Stanbic Bank A/C No. 0100XXXXXX708

Stanbic Bank A/C No. 0100XXXXXX593

Welding and machinery equipment

3. The 1st Objector filed an objection dated 07/10/2022 in her capacity as deceased's wife objecting to the grant being made to the Petitioners' herein on account that she was not named in the petition and as a spouse, she has priority to petition for the grant, that her children interest cannot be safeguarded by the Petitioners acting alone and that the Petitioners live and work overseas hence they cannot effectively administer the Estate among other reasons. She also filed answer to petition dated 12/10/2022, a further affidavit dated 12/01/2023 and a cross petition for grant dated 12/10/2022. In response, the Petitioners filed a replying affidavit dated 22/11/2022.
4. The court ordered that the matter do proceed by way of *viva voce* evidence. The matter proceeded for hearing with the Objector calling four witnesses and the Petitioners' case proceeded with two witnesses.

Objectors' Case

5. Lucy Wairimu Nderitu, the 1st Objector testified that the deceased was her husband. She met him in 2006 when she was working for his mother and they started living together in the same year. In 2008, they were blessed with their first born son JDN Mbogo and in 2010, their second child, SNM was born. In 2010, the deceased informed her that he intended to go to her parents' home and on 20/11/2010, he paid her dowry. He went with his family that is his mother, his two brothers and a friend. That the deceased mentioned that he had another wife but they separated and she never saw the other wife. She produced a photograph dating back 2009 of the burial of her brother and said that the deceased was on the said photo which meant that he had attended the burial of her brother and another photo at a family gathering which she stated the deceased was in the said photo and another photo of him holding their 2 children.
6. She testified that Patricia, the 2nd Petitioner filed Succ E022 of 2022 before the magistrate court where she had concealed that the deceased had another wife and children and she was joined as an administrator and the court ordered all needs of her children be met by the estate. She prayed to be recognised as a wife and a beneficiary and to be an administrator.
7. On cross examination, she testified that people in the village knew her as a wife and that the 1st chief's letter did not mention her since Patricia told the chief that she was not the wife. That the deceased visited her home in 2010 for the first time and did not visit again. They started living together in 2008 when she got pregnant and they continued living together up to 2013. That the deceased requested they go back to his family home to live there but she felt it was not appropriate since she had worked there. Further, the deceased was violent and was drinking hard. She testified that the deceased went back home and she rented a house but he would visit. That when he got sick, they were not living together, she did not attend his burial, never participated in helping the deceased during his sickness and during the funeral as she was not in a good position to do so. That she was not aware that customary marriages are registrable.
8. She testified on re-examination that the first letter from the chief which was procured by Patricia did not recognise her as a wife but the chief corrected and issued a second letter that included her. That the deceased's mother was fine with their relationship and the reason why she did not attend the burial was



that she heard that Patricia had said she did not wish to see her. That she did not wish to cause drama at the burial. Her children attended the burial. That she went to see the deceased at Mathari hospital and that the photo at page 6 was written ‘mum and family members.

9. OW2 Justus Ndiritu Ndirangu, DW1’s father adopted his statement dated 06/05/2023 and testified that he knew the deceased and at one time, he attended his son’s burial. The deceased and his family also visited his home to ‘accuse themselves of being thieves’ since they had taken his daughter away and they gave him Kshs.20,000/- as ‘stealing money’. They gave him a ram and a he goat at Kshs.4,000/-. In total, they gave him Kshs.22,000/- and they said they would come another date. They calculated as to what they were to eventually pay which was Kshs.234,000/- which included goats and heifer but the deceased never returned to pay the dowry. That he did not attend his burial as he feared.
10. On cross examination, he testified that the family of the deceased visited him once, paid the fine and Kshs.6,000/- and they did not return. They kept the record and he identified the minutes recorded by an old man who is now deceased.
11. OW3, Patrick Gitonga Ngure, the 2nd Objector adopted his statement dated 17/05/2023 and testified that the deceased was his younger brother and his interest in the matter was because of OW1, Lucy. He testified that after the deceased’s death, there was fighting and the first wife filed a case in the lower court. The daughter from the first marriage brought dispute and that he had no interest in the estate.
12. On cross examination, he testified that Teresia and his brother were separated and she moved to the USA which opened way for the second marriage. That there was hostility from the 1st family who said that they did not recognise the 2nd family.
13. On re-examination, he testified that the last time he saw Teresia was 20 years ago as she moved to the USA around 1999.
14. OW4, Hellen Wanja Ngure, adopted her statement dated 04/12/2023 and testified that the deceased was her brother. That before his death, Patricia was asked to go and see her father but she stated that she was unable to due to work. Two days after his death, she talked to Patricia and made burial arrangements and they also spoke about the other family of which she was aware of. That she denied anyone else as family and stated that she did not want to see Lucy at the burial. That she sat at the burial organising committee and Patricia was aggressive when the eulogy was being made but all the children were included but they omitted the wives. That Lucy did not attend the funeral but handed over her children to her because of hostility from Patricia. That she last saw the deceased’s wife in 1997. That the first wife also denied that Lucy was a wife.
15. On cross examination, she testified that she was not contesting that Teresia was a wife. Lucy and the deceased had separated but he continued to support his wife and children.

Petitioners’ case

16. PW1, Patricia Wangari Mbogo testified that she was the deceased’s first daughter living in Dubai. That prior to his father’s death, she had contacted him and he informed her that he was unwell and she advised him to go for an x-ray. When she was informed that he had passed away, she travelled to Nanyuki and she testified that the OCS had been contacted by his uncle and had said funeral arrangements would only go on when next of kin arrived. She went to police station and identified herself and the burial permit that Hellen Ngure had obtained was cancelled. That Hellen mentioned Wairimu whom she did not know and later on the said Wairimu wanted her two children to be recognised as deceased’s children. That the elder siblings were not agreeing with Hellen and Ngure and they were unable to



- hold prayers at family home. That her prayer was to be the administrator and she would ensure equal distribution of the estate including to the two minors.
17. On cross examination, she testified that she sent the money to Hellen to refund those who had contributed as his father had been moved to two hospitals by his family in Kenya. That her mother was not mentioned in the eulogy and that she was in the USA and was unable to travel since she had travel documents issues. That she has lived in Dubai for 18 years but would visit twice a year and her father had never informed her about a relationship with Lucy and had never heard about her and her children. That Hellen mentioned the children during burial arrangement. That she filed for limited grant before the lower court and at that time, she knew Lucy through the correspondences made by her lawyer and she went to court and stated that she was left out. That she and her mother visited the graveside in 2023 and did some renovation. That her opposition is based on the fact that Lucy was not married to the deceased as he had no capacity to marry. That the family including the deceased's siblings did not recognise her though Hellen and Patrick Gitonga recognised her. That the OCS was involved since the deceased died at home.
 18. On re-examination, she testified that the birth certificates were authenticated after the burial arrangements. That Lucy approached the lower court as a mother in interest of her children and not as a wife.
 19. PW2, Teresia Wanjiru Mbogo testified that she moved to the USA to help with Ngunre's school fees who was then in campus. She discussed this with the deceased who had no problem with it. That she used to speak to the deceased occasionally but time zoning was a problem but they maintained their relation. That the marriage was never dissolved and he never spoke about another family. That the beneficiaries of the deceased's estate are herself and her two children and the two minors. That Lucy was not a wife.
 20. On cross examination, she testified that she left Kenya in July 2012. That they moved to Nairobi in the year 1993 and since they had a workshop in Nanyuki, he would travel frequently to Nanyuki. That they stopped being consistently together in 2006. They had differences but they maintained the relationship. That she would visit him at his workshop since he was living with his mother. That the last time he met with him was in 2012. That he lost his mother around 2007 and a brother around 2008 or 2009 but did not attend their funerals. That she did not file an affidavit opposing Lucy's marriage and she did not consider her as a wife and that she has never met her. That the deceased could have married without her knowledge. That she had a marriage certificate. She testified that the deceased was being helped by his siblings during his illness. That she visited the grave site sometimes last year.
 21. On re-examination, she testified that the deceased was living in the family premises and after sometimes, she noted that the family were getting hostile. That the relationship with the in-laws was bad when she was living in Nairobi. That the in-laws never lived with her children.
 22. At the close of the case, both parties filed written submissions.

Objectors' Submissions

23. Counsel for the Objectors submitted that though the Petitioner argued that the deceased had no capacity to marry having contracted the first marriage under statute, section 3(5) of the *Law of Succession Act* (herein referred as the Act) recognises subsequent customary marriage and section 29 of the Act includes wife or wives of a deceased as dependents and beneficiaries. That Section 40 of the Act also provides that distribution of estate will be in accordance with the number of children in each house adding any wife surviving him. Therefore, Lucy was a wife as she was married under Kikuyu customary law, a system of law that permits polygamy, while the deceased was still married under statute to Teresia. Reliance was placed on the case of *Re Estate of Robert Ngundo Nyiva (Deceased)* (2021) eKLR and *Re*



estate of Adriano Welikhe Muliali (Deceased) [2020] eKLR where the courts affirmed that a woman who is able to prove customary marriage after a man had contracted statutory marriage is protected under Section 3(5) of the Act and is a wife for the purpose of the Act.

24. As to whether Lucy was married to the deceased, he submitted that the allegations by Teresia that she lived with the deceased in Githurai until 2012 was not true for reasons that she claimed she had a good relationship with the deceased yet she did not know about his two other children born in 2008 and 2010, she did not know Lucy yet Lucy was the deceased's mother house help before she got married to the deceased, did not know when her brother-in-law passed on and did not attend his funeral, she did not know when her mother-in-law passed on and did not attend her funeral and she said she died in 2008 yet she died in 2014 as per the eulogy attached, that she claimed to be close to the deceased yet since 2000, she has never attended any family functions, she did not visit the deceased when he was sick nor his funeral and both wives were not included in the eulogy a decision that was made by the burial committee. Thus, this shows that she was distant from the deceased which shows that they were not close at all which lends credibility to Hellen's evidence. Further, Lucy testified that the deceased informed her that he had abandoned the first marriage. Reliance was placed on the case of in *Re Estate of Jecinter Njoki Okoth (Deceased)* [2020] KEHC 7562 (KLR) where the court discussed the concept of presumption of divorce and held that the objector in that case stopped being the deceased's husband when they separated and moved on.
25. Thus, Teresia should be estopped from denying Lucy's marriage to the deceased knowing that she and the deceased went different ways long time ago and moved on. Further, Hellen and Patrick, deceased siblings gave evidence as to the marriage between the deceased and Lucy and Lucy testified that the deceased's mother blessed their union and also attended the dowry ceremony. That there was therefore a constructive divorce between the deceased and Teresia meaning there was an opportunity for marriage between Lucy and the deceased. That there was proof that the first family became distant from the deceased.
26. He submitted that the photographs produced as LWN1a at page five of the further affidavit and at page 6 confirmed that Lucy had become part of the family and demonstrated her acceptance to the family. That dowry was paid which was confirmed by Patrick Gitonga Nguire. Further, her statement referred to purchase of Safaricom shares and that the deceased insisted that she open a bank account referring to herself as Lucy Wairimu Mbogo. That the account opening forms dated 28/03/2008 bear the name Lucy Wairimu Mbogo, a farmer at Muthaiga which was consistent with where the deceased's family lived and the next of kin was the deceased and relation was written as the husband. His address was indicated which was consistent with the titles before court and his ID and his telephone number. That the opening of the bank account was a demonstration of conduct expected of a man and his wife. Thus, Lucy has demonstrated that she cohabited with the deceased for a long time and contracted a customary marriage hence a wife and dependant of the deceased.
27. As to the Petitioner's case, he submitted that Teresia did not swear an affidavit in opposition of Lucy's status. She clearly was not aware of key events happenings in the deceased's family including the death of her mother in law. She could not recall the last time she visited Nanyuki and she was missing in the list of funeral contributors as per the objectors' list of documents. That the main objection as to Lucy's status was fronted by Patricia who alleged that Lucy was only a house help which Lucy did not deny but she later married the deceased and they left home to live in a rented house at Ithii-ni. Patricia also denied knowing Lucy during cross examination despite alleging that she was just a house help. That the fact that she said in the lower court that she was participating in the proceedings as a trustee of her children was explained in her further affidavit that the same was said by her advocate in mind of Section 40 and 41 of the Act. That the Petitioner's letter dated 14/04/2022 and annexed to Lucy's further affidavit



shows that the Petitioner admitted that Lucy was a beneficiary of the deceased's estate hence they are estopped from denying what they had admitted. He urged the court to apply the standard that were set by Supreme court in regards to presumption of marriage in the case of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR).

28. Regarding who should be appointed as the administrator of the estate, he submitted that Petitioners cannot be trusted to take care of the interest of the minor children considering their hostility towards them and Lucy and the fact that they live abroad which means that they cannot effectively manage the estate. That Patricia stated that she was unable to travel to Kenya to open a joint account as was instructed by the lower court which shows that this was evidence enough of their inability to perform estate administration duties. He urged the court to appoint the two windows, Teresia and Lucy as administrators and if the court is inclined to exercise its discretion, to ensure that Lucy is one of the administrators.

Petitioners' Submissions

29. Counsel submitted that the Petitioners' case is that the rightful administrators are the Petitioners being the daughter and the lawful wife to the deceased. That she is cognisant of Lucy's minor children hence their interest will be protected without bias. It was submitted that the deceased married Teresia in 1990 hence he had no capacity to marry in accordance with Section 37 of the repealed *Marriage Act* and he was therefore incapable of contracting another marriage under custom or native law. Hence, Lucy cannot be deemed to be a wife and reliance was placed on the case of *Eva Naima Kaaka & another v Tabitha Waitthera Mararo* (2018) eKLR where the court discussed the elements of a Kikuyu customary marriage.
30. He submitted that as highlighted earlier, the deceased had no capacity to marry having contracted a civil marriage. That there was no indication that a ram was slaughtered as the minutes produced did not state so hence Ngurario was not performed and therefore there was no marriage. As to Ruracio, he submitted that the minutes revealed that the deceased did not complete the payment and he was to return on a later date to complete the dowry ceremony hence ruracio parameters were not met. As to cohabitation, the alleged ceremony was conducted in 2010 and they separated in 2015 hence the intention of the alleged marriage cannot be said to have been met. That all parameters must be met for a Kikuyu marriage to be deemed to be held and failure to perform one ritual should be deemed to have marred the entire process. That Lucy failed to meet any of the parameters hence she cannot claim that there was customary marriage between her and the deceased.
31. As whether there was marriage by dint of presumption of marriage, he submitted that without capacity to contract a marriage, presumption of marriage is a non-issue and reliance was placed on the case of *M v RM*(1985) and *Mabugu v Watari & 8 others* (Civil Appeal 205 of 2019) [2024] KECA 1015 (KLR) to emphasise that the deceased having contracted a statutory marriage lacked capacity to enter into new marriage without dissolving the first marriage and presumption of marriage could only arise where the concerned parties had capacity to enter into the marriage. Further, Lucy and the deceased could not be presumed to be in a marriage for reasons that they were together for a period of less than 10 years. Therefore, there can be no presumption of marriage as their relationship can barely be deemed to be quantitative/long cohabitation and the intention of marriage was not met. As to general repute, he submitted that this was not met as Lucy was not approached by the authorities regarding the irregularities that marred burial process nor was she involved during burial arrangements. That she did not attend the deceased's burial as a wife nor as a mother to his children and that their relationship could not be presumed to be a marriage.



32. He submitted that the issues raised by the Objector in her submissions did not qualify to nullify the fact that there was a statutory marriage between Teresia and the deceased which could only be dissolved via decree absolute by the court. Further, the photographs and eulogies she produced could not be proof of a relationship or a marriage as was held in *Lucy Wanjiru Mwangi v Daniel Njuguna Njibia & Florence Njeri Mwaura* (2016) eKLR and in the *re Estate of George Ndirangu King'ori alias Ndirangu King'ori (Deceased)* Succession Cause 24 of 2008) [2023] KEHC 20903 where the two courts above held that photographs and eulogies are not conclusive proof of any relationship or marriage. He urged the court to hold that the photographs and eulogy extracts held no weight in determining the nature of the relationship between the deceased and Lucy.
33. I have had occasion to consider the Petition and the objection lodged. I have had due regard to the evidence tendered and the learned submissions made by the respective counsel on record. Issues for determination crystalize to the following ;
- i. Whether Lucy, the 1st objector was the deceased's wife;
 - ii. Whether Teresia was the deceased's wife and;
 - iii. Who will be administrators of the deceased's estate.

Whether Lucy Wairimu Nderitu, 1st Objector, was wife to the deceased.

34. The position Lucy was a wife is challenged on account that the deceased had no capacity to contract another marriage having married the 2nd Petitioner, Teresia under the repealed *Marriage Act* and that by virtue of section 37 of the said *Marriage Act* it meant that he was incapable of contracting another valid marriage under custom or native law.
35. The said section 37 of the repealed *Marriage Act* stated that;
- “Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”
36. The marriage between the deceased and Teresia was solemnized on 02/03/1990 under the repealed *Marriage Act* as per the attached marriage certificate.
37. Justice Musyoka discussed the effect of section 37 in the case of *In Re Estate of Isaack Chege Kamau (Deceased)* [2015] eKLR in the following terms;
- “Section 37 of the *Marriage Act*, 1902 declares that once a man contracts a marriage under statute he would lose capacity to contract subsequent marriages under customary law during the pendency of the statutory marriage. Going by that provision, the deceased lost capacity to contract subsequent customary law marriages after 3rd May 1978. There is no evidence that the statutory marriage of 1978 was ever dissolved. This therefore means that the said marriage subsisted until the deceased died in 2005. Any purported marriages contracted by him between 3rd March 1978 and 2005 got caught up in Section 37 of the *Marriage Act*, 1902, and were therefore null and void. That would include the purported marriage contracted in 1986 between the deceased and the applicant. For as long as the deceased was alive, any purported marriage under customary law, or any other system of law, was a nullity.”



38. However, the said section as was observed by Musyoka J in the above case was blunted by enactment of section 3(5) of the [Law of Succession Act](#) which states that;

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

39. The Court of Appeal in [Irene Njeri Macharia v Margaret Wairimu Njomo & another](#) [1996] eKLR discussed the effect of section 3(5) while discussing the case of *In the Matter of the Estate of Reuben Nzioka Mutua (Deceased)* as follows;

“Our understanding of section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage which remained undissolved upto the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy. Parliament, in its wisdom, and whatever it might have intended to do, provided that:- “Notwithstanding the provisions of section 37 of the [Marriage Act](#) ...” Josephine was, nevertheless, a wife for the purposes of the [Law of Succession Act](#), and in particular sections 29 and 40 of the Act.”

40. Section 3(5) was further given effect [In re Estate of Robert Ngundo Nyiva \(Deceased\)](#) [2021] eKLR, where it was held;

“From the foregoing, the [succession Act](#) under section 3(5) comes in to protect women or children in unions contracted with a man after statutory marriage. The woman in such a union who is able to prove marriage is considered as a wife for purposes of succession. In the case of [Irene Njeri Macharia v Margaret Wairimu Njomo and another](#) Nairobi Court of Appeal Number 139 of 1994, Justices Omolo, Tunoi and Bosire held that section 3(5) of the [Law of succession Act](#) is meant to protect women who marry men under customary law, who are already married to or who subsequently marry another woman under statute. The woman married under customary law is regarded as a wife for succession purposes, notwithstanding that by virtue of Section 37 of the [Marriage Act](#) the man had no capacity to marry her.”

41. Therefore, the effect of Section 3(5) of the Act is that, even where a statutory marriage is contracted, a wife who is subsequently married under customary law is a wife for the purposes of succession notwithstanding the statutory incapacity of the man to marry under Section 37 of the [marriage Act](#).

42. Flowing from the foregoing, the next question is whether there was a valid marriage between Lucy and the deceased. Lucy’s case is that she was married under Kikuyu Customary Law as the deceased visited her kin and paid her dowry in 2010. This was corroborated by her father who testified that the deceased and his family visited his home to ‘accuse themselves of being thieves’ since they had taken his daughter away and they gave him Kshs.20,000/- as ‘stealing money’. They gave him a ram and a he goat in cash of Kshs.4,000/-. In total, they gave him Kshs.22,000/- and they said they would come another date. Calculations about the bride price were done at a sum Kshs.234,000/- which included goats and heifer but the deceased never returned to pay the dowry. Minutes of the ceremony were exhibited.



43. In his statement filed in court dated 06/05/2023, he clarified that Kshs.22,000/- paid was made up as follows;
- Kshs.2,000/- as fine for living with his daughter and having children without formal introductions.
- Kshs.4,000/- to cater for in-laws elders' beer.
- Kshs.10,000 for Mwati and Harika.
44. Further, the elders engaged the deceased's family and it was agreed that beside the dowry payment made on that day, the remaining dowry was Kshs.240,000/- which was made up of Kshs.40,000/- for heifer, Kshs.200,000/- for 20 goats. He stated that out of Kshs.240,000/-, Kshs.6,000/- was paid immediately and they left a balance of Kshs.234,000/-
45. Proof of the existence of a customary marriage is a matter of fact which must be substantiated by adduction of evidence. This was the dictum in *Gituanja v Gituanja* [1983] KLR 575 where the court stated that existence of a customary marriage is a matter of fact which must be proved by evidence.
46. In the case of *Hortensia Wanjiku Yawe v The Public Trustees*, Civil Appeal 13 of August 6, 1976 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."
47. As to what constitute Kikuyu customary marriage, the court of appeal in the case of *Eva Naima Kaaka & another v Tabitha Waitbera Mararo* [2018] eKLR quoted Eugene Cotran's "Casebook on Kenya Customary Law" at page 30 which sets out the essentials of a Kikuyu Customary marriage. These are stipulated as;
1. "Capacity; the parties must have capacity to marry and also the capacity to marry each other.
 2. Consent; the parties to the marriage and their respective families must consent to the union
 3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
 4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.
 5. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride grooms home".(emphasis added)
48. The 1st Objector, Lucy had the onus to prove the above factors. In her evidence, apart from the visit that was made in 2010 by the deceased and his kin, there was no mention of any ceremony. Her father categorically testified that the deceased's family visited him to accuse themselves for stealing her daughter without formal introduction. In his witness statement, he stated the elders agreed that the deceased was to pay Kshs.240,000/- as dowry and he only paid Kshs.6,000/- and left a balance of



Kshs.234,000/-. The deceased family were to return on a later date to pay the balance but that was not done.

49. When the particulars of the alleged dowry are compared with the essentials of a Kikuyu Customary marriage as described by Eugene Cotran, it is clear that certain basic elements necessary for a Kikuyu customary marriage were absent. For instance, the ngurario is an integral part of the ceremony that signifies the existence of a Kikuyu customary marriage. Lucy did not point to a ngurario having taken place. This is because a fundamental component of a ngurario is the slaughtering of a ram or goat.
50. There is no mention that a ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Petitioner and the deceased.
51. Be thus as it may, on the facts before the court, a question arises as to whether a presumption of marriage can be made as between Lucy and the deceased.
52. Counsel for the Objectors submitted that the photographs produced as LWN1a at page five of the further affidavit and at page 6 confirmed that Lucy had become part of the family and demonstrated her acceptance to the family. Further, her statement referred to purchase of Safaricom shares and that the deceased insisted that she opened a bank account referring herself as Lucy Wairimu Mbogo. That the account opening forms dated 28/03/2008 bears the name Lucy Wairimu Mbogo and a farmer at Muthaiga which was consistent with where the deceased's family lived. The next of kin was the deceased and relation was written as the husband. His address was written which was consistent with the titles before court and his ID as well as his telephone number. That the opening of the bank account was a demonstration of conduct expected of a man and his wife. Thus, Lucy has demonstrated that she cohabited with the deceased for a long time. He urged the court to apply the standard that were set by Supreme court in regards to presumption of marriage in the case of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR).
53. Lucy testified that she met the deceased in 2006 when she was working for his mother and they started living together in the same year. In 2008, they were blessed with their first born son and in 2010, their second child was born. On cross examination, she testified that people in the village knew her as a wife. That she started living with the deceased in 2008 when she got pregnant and they continued living together until 2013. Her father testified that he knew the deceased and at one time, he attended his son's burial.
54. OW3 in his written statement stated that when the deceased engaged in a relationship with Lucy and started a family with her, he had the blessings of their mother and the whole family. OW4 in her written statement stated that the deceased married Lucy in 2007 and their marriage was blessed with two children. That their mother loved Lucy and she was elated when the deceased took her as a wife. They lived in Nanyuki town but frequently visited her mother. The deceased was running his business whilst Lucy was taking care of children and did some farming at their parcel of land in Muthaiga. She stated that Teresia and Lucy were deceased's wives.
55. As stated by Mustafa JA in the case of *Hortensia Wanjiku Yawe v Public Trustee*, CA No. 13 of 1976, long cohabitation as a man and wife gives rise to a presumption of marriage. The Court in the case of *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* [2009] eKLR held that the presumption of marriage could be drawn from two conjoined factors, namely, long cohabitation and acts of general repute. It stated that;

“ Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is



not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.”

56. In *Mary Njoki v John Kinyanjui Mutheru & 3 Others* 1985 eKLR the Court of Appeal stated as follows;

“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (*supra*). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”

57. More recently, the Supreme court in *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (*supra*) set out the parameters within which a presumption of marriage can be made as follows;

“

- “1. The parties must have lived together for a long period of time.
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both parties.
5. The parties must have held themselves out to the outside world as being a married couple.
6. The onus of proving the presumption is on the party who alleges it.
7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
8. The standard of proof is on a balance of probabilities.

The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.”

58. In the instance case, Lucy testified that she met the deceased in the year 2006 while she was working for his mother and that they started living together in the same year. She however testified in cross examination that they started living together in 2008 when she got pregnant with their first child and they separated in the year 2013. Their relationship was confirmed by OW3 and OW4, the deceased’s



brother and sister who referred to her as the deceased's wife. Further, there was evidence that part payment of the dowry was paid though the process was not concluded. There was birth of two children out of the union. Further, a bank statement was attached whereby the deceased was listed as her next of kin in his capacity as a husband. The photographs produced to show the presence of the deceased in her brother's funeral and her participation in family gathering was produced.

59. All these to me are acts of general repute that a presumption of marriage could be inferred.
60. Acts of general repute, were held to be synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their nature they are a determinant of whether a presumption of marriage can be found to exist.
61. On the material before court, I cannot think of a better union that fits the bill of a presumed marriage than that between the deceased and Lucy. The union was complete with a partial payment of dowry. Lucy was known to the deceased's family as a wife of the deceased. They had 2 children together. The denial of the union by the Petitioners could only mean 2 things; either they are feigning lack of knowledge of this union or they were totally far removed from the deceased's life and thus ignorant of issues surrounding his personal life.
62. I make a determination of a presumption of marriage and conclude that on that basis Lucy was a wife to the deceased.

Whether Teresia was a wife.

63. The uncontroverted evidence is that Teresia and the deceased solemnized their marriage under the repealed Marriage Act and two children were born out of their marriage. The objectors did not dispute the fact that Teresia's marriage to the deceased was never dissolved.
64. However, the Objectors' counsel submitted that Teresia stopped being a wife when they separated and moved on and he relied on the case of *in Re Estate of Jecinter Njoki Okoth (Deceased)* [2020] KEHC 7562 (KLR) where the court discussed the concept of presumption of divorce and held that the objector in that case stopped being the deceased husband when they separated and moved on.
65. That this was buttressed by the fact that she was not aware of key events happenings in the deceased's family including the death of her mother in law and brother-in-law. She could not recall the last time she visited Nanyuki and she was missing in the list of funeral contributors as per the objector's list of documents. That she testified that she lived with the deceased in Githurai until 2012 and that she had a good relationship with the deceased yet she did not know about his two other children born in 2008 and 2010, she did not know Lucy yet Lucy was the deceased's mother house help before she got married to the deceased, that she claimed to be close to the deceased yet since 2000, she has never attended any family functions, she did not visit the deceased when he was sick nor his funeral. Thus, this shows that she was distant from the deceased which shows that they were not close at all.
66. As to who is a wife, section 3 of the Act states as follows:-

“wife” includes a wife who is separated from her husband and the terms “husband” and “spouse,” widow” and “widower” shall have a corresponding meaning.”
67. In the Law of Succession by Justice William Musyoka it is stated that:

“For the purpose of the rules of intestacy, a divorced spouse has no rights to the intestate's estate; a judicially separated spouse is, however, entitled. This applies to all legal marriages whether contracted under statute or customary law. Customary law marriages include the



woman-to-woman marriage arrangements. Under Section 3(1) of the [Law of Succession Act](#), a separated wife is considered a wife for succession purposes. The divorced spouse may make a claim under the family provisions in Section 26 of the [Law of Succession Act](#) for reasonable provision from the estate. The definition in Section 29 of a dependant for the purpose of Section 26 includes a former wife or former wives recognized as such and protected under Section 3(5) of the [Law of Succession Act](#).”

68. However, K. H. Rawal J was of different view in [Nelja Wanjiru Gitumbi v Jacinta Wanjiru Gitumbi, Joseph Kagwiri Gitumbi](#)[2003] eKLR where she held that;

“In my opinion, the moot question is not the marriage between the two but the effect of total and continued separation from 1979 and the Applicant being given a portion of her father’s land. Even as per the counsel for the Applicant he stressed more on the presumption of marriage due to long cohabitation and repute. If so, the long separation will, in my humble opinion, be presumed as evincing an intention on the part of the Applicant of dissolution of the marriage. More so when her father has taken her back and settled her on his own land by apportioning a piece from the land. She has never gone back except for attending two funerals. No evidence was led that she participated in those funerals as a daughter in law and a widow. I must confess that I did not get much help from any precedents, which I tried to look for General perusal of Conran’s book of Customary Law cannot guide me in the instant case. In my opinion, for all practical purposes the couple has severed the relation of marriage with the knowledge of all concerned. I can thus find and do find that the Applicant, at the time of the death of the deceased Gitumbi Kiguni was not his wife.”

69. I associate myself with the sentiments of R. Nyakundi J [in re Estate of Jecinter Njoki Okoth](#) (*supra*) where he held that;

“Divorce is not the procedure of filing for a decree nisi in court per se. On a much broader perspective, divorce pertains to the intention and conduct of parties. If parties in a marriage shows an intention not to continue with their marriage or conduct themselves unmarried persons, then the same should be treated as such. The law cannot attach obligations upon persons who have decided to part ways but fail to formalize the same, because that is not the true reflection of what they want. In that regard the objector stopped being the deceased’s husband when they separated and moved on. For all intents and purposes, I find the marriage between the objector and the deceased to have been overtaken by events. ...In my Judgment pursuant to Section 119 of the Evidence Act, it is proper for their marriage to be construed for purposes of the Law to have ended by presumption of divorce, notwithstanding that no formal petition was filed in a Court of Law to be decreed as such in accordance to the Law.”

70. Musyoka J [In re Estate of Stanley Paul Buliba \(Deceased\)](#) (Succession Cause 2A of 2019) [2023] KEHC 2702 (KLR) was of a different view when he held that;

“There is evidence, therefore, that the deceased and the applicant were separated or lived apart for a long time, and remained apart until he died. However, there is no evidence that the 2 marriages, the one under statute and the other under customary law, were dissolved. Under both law, separation by itself is not evidence of a dissolution of marriage. Of course, when parties live apart for a long time, it may be deduced, ipso facto, that that is proof that there was no marriage, for cohabitation is at the core of marriage, and where there is no cohabitation, one cannot seriously talk of any marriage. That is, however, the de facto



position. If the marriage was valid under civil or customary law, the fact that the parties ceased cohabitation, seemingly permanently, that of itself would not bring the marriage to an end, for a valid marriage, that is one where the requisite ceremonies that make it valid were observed, as opposed to one presumed from cohabitation, can only be ended through the processes decreed by the law or system under which the marriage was contracted. For a civil marriage, it would be a decree of divorce by a competent court of law. For the customary law marriage, it would be through the processes of the relevant customary law, prescribed for the purposes of ending or terminating the customary law marriage. One of such processes include return or refund of dowry. The other way of ending or terminating a customary law marriage, is by way of a judicial decree of divorce. No evidence was placed before me to the effect that the civil marriage had been terminated by a judicial decree of divorce. Similarly, no evidence was adduced to establish that the customary law marriage had been terminated, either through the customary law processes or by way of a judicial decree of divorce. Consequently, it will be my conclusion, that, despite the long separation between the applicant and the deceased, the applicant was still a spouse of the deceased, as at the time of his demise. She, therefore, survived him, and she was a surviving spouse for the purpose of the intestacy provisions in Part V of the *Law of Succession Act*.”

71. I respectfully disagree with Musyoka J in the above case as I hold the view that in circumstances where a spouse has abandoned the other for a considerably long time playing no role in the others life either in social or economic spheres thus clearly demonstrating a total cut of any link between the parties, it would be unconscionable for such a party to seek to benefit from property and resources harnessed by a long abandoned spouse unless such property be property which is matrimonial property and in that case the claim would not be a claim for inheritance but one enforcing rights to the property based on contribution.
72. I have applied my mind to the facts in this case. A quick recap of Teresia’s evidence both in examination-in-chief and in cross- examination is that she moved to the USA to help with Ngure’s school fees who was then in campus. She discussed this with the deceased who had no problem with it. That she used to speak to the deceased occasionally but time zoning was a problem but they maintained their relation. That the marriage was never dissolved and he never spoke about another family. That the beneficiaries of the deceased’s estate are herself and her two children and the two minors. That Lucy was not a wife.
73. On cross examination, she testified that she left Kenya in July 2012. That they moved to Nairobi in the year 1993 and since they had a workshop in Nanyuki, he would travel frequently to Nanyuki. That they stopped being consistently together in 2006. They had differences but they maintained the relationship. That she would visit him at his workshop since he was living with his mother. That the last time he met with him was in 2012. That he lost his mother around 2007 and a brother around 2008 or 2009 but she did not attend their funerals. That she did not file an affidavit opposing Lucy’s marriage and she did not consider her as a wife and that she has never met her. That the deceased could have married without her knowledge. That she had a marriage certificate. She testified that the deceased was being helped by his siblings during his illness. That she visited the grave site sometimes last year.
74. This evidence demonstrates a union that was long dead as between the deceased and Teresia. Teresia flew to the USA to, in her words, ‘to help in Ngure’s school fees’. She confirms that she stopped being consistently together with the deceased in 2006. She was not involved in the affairs of the deceased’s family including burials of his mother and sibling. More importantly, despite the deceased falling ill and attending several hospitals, Teresia played no role either in financial support in payment of bills or in care giving. She remained in her comfort in far-away land and did not even contribute in the burial arrangements. Indeed, she did not attend the burial of the deceased.



75. It is not lost on the court that the deceased had to retreat back to his mother's home to live there and it is then that he got cosy with the 1st Objector who was then working at the home and a relationship blossomed. It is clear to this court that the deceased was a man long abandoned by Teresia. The marriage between the two, in my view, existed only on paper, the marriage certificate.
76. I associate myself with the legal sentiments of Rawal J and Nyakundi J in their decisions in *Nelia Wanjiru Gitumbi v Jacinta Wanjiru Gitumbi, Joseph Kagwiri Gitumbi* and *In re Estate of Jecinter Njoki Okoth (supra)* respectively and make the conclusion that for all practical purposes the couple had by the time of the death of the deceased severed the relation of marriage with the knowledge of all concerned. I thus find and hold that Teresia was not a wife of the deceased at the time of his death.
77. Further, she was not a dependant of the deceased as she was living an independent life abroad.
78. Any holding to the contrary would in my view fly in the face of the constitution dictate under Article 45(3) of the *Constitution* where it is provided;
- (3). Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
- I would interpret this constitutional dictate purposively to mean that none of the parties in a marriage should steal a march on the other and gain advantage over the property of the other should they be estranged in circumstances that that render their union dead.
78. I take the view that it would be a travesty of justice of monumental proportions to allow a spouse who during the existence of marriage abandons the other spouse for a lengthy period engaging in independent economic and social activities with no regard at all to the other spouse only to return and seek to inherit what the other spouse could have toiled to put together in her long absence.

Who should be appointed as administrators of the Estate.

79. The Petitioners proposed that they be jointly appointed as administrators of the deceased's estate. The Objectors' counsel argued that the Petitioners could not be trusted to take care of the interest of Lucy's minor children considering their hostility towards them and Lucy and the fact that they live abroad which means that they cannot effectively manage the estate as was demonstrated by Patricia who stated that she was unable to travel to Kenya to open a joint account as was instructed by the lower court which shows that this was evidence enough of their inability to perform estate administration duties. He urged the court to appoint the two widows, Teresia and Lucy as administrators and if the court is inclined to exercise its discretion, to ensure that Lucy is one of the administrators.
80. Under section 66 of the Act, this court has the discretion as to the person or persons to whom grant may be issued. In exercising that discretion, the court has to take into account the best interest of all the beneficiaries. The said section provides for order of preference as to whom the grant can be issued and it states as follows;
- “When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—
- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;



- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

81. For the interests of all the parties to be catered for and noting that there are minor beneficiaries, and in light of the finding that Teresa has been found not to be a wife, am persuaded that it is right and fitting to appoint the 2nd Petitioner, on the one hand, and the 1st Objector and 2nd Objector (for purposes of co-administration in the interests of the minor children) on the other hand, as the administrators of the estate of Henry Mbogo Kuria (deceased).
82. I make the following orders;
- a. Letters of administration intestate be issued jointly to Patricia Wangari Mbogo, Lucy Wairimu Nderitu And Patrick Gitonga Ngure
 - b. A summons for the confirmation of the grant be taken out within 3 months hereof.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF JULY 2025.

A.K. NDUNG’U

JUDGE

