



**In re Estate of Stanley Manyara Murithi (Deceased) (Civil Appeal  
E027 of 2023) [2024] KEHC 7024 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7024 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E027 OF 2023  
TW CHERERE, J  
JUNE 6, 2024**

**BETWEEN**

**HELLEN NTHIORI MANYARA ..... 1<sup>ST</sup> APPELLANT**

**ELIAS MUTUGI MANYARA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ROSEMARY GATIMBI M'NCHEBERE ..... RESPONDENT**

*((Being an appeal from the judgment and decree in Meru CMCC  
Succession Cause No. 51 of 2020 by Hon. E.Mbicha on 25th January, 2023))*

**JUDGMENT**

**Background**

1. Stanley Manyara Murithi (Deceased) died on the 21<sup>st</sup> January, 2020. Upon his demise, Hellen Nthiori Manyara (1<sup>st</sup> Appellant) Petitioned for Probate of the deceased's written will dated 12th August, 2019 which only recognized her and her four children as beneficiaries of Deceased's estate.
2. When Rosemary Gatimbi M'Nchebere (Respondent) got wind of the filing of the Cause, she filed an affidavit of protest on the ground that she had not been provided for yet she was married to the deceased who had recognized her son as his own.
3. In her testimony, Respondent she married deceased under Meru customary law and he adopted her son as his own. She stated she cultivated deceased's land Nyaki/Kiburine/874 and cohabited with deceased on his plot known as Isiolo B/Pesa/9 until his death. She stated she and her son contributed to the deceased's funeral expenses and produced Mpesa statements for her and her son indicating Mpesa transfers to the Elias Mutugi Manyara (2<sup>nd</sup> Appellant). She also tendered photographs she'd taken with her son and deceased. She additionally tendered a receipt for rent paid by a tenant, an Equity account



ATM card in the joint names of herself and Deceased, Deceased's treatment notes and two chiefs letters indicating she was married to the Deceased.

4. Objector's brother stated that Deceased married the Respondent and gave a sheep to their family. Mathias Thurania Muthuri a neighbour of the Respondent stated that Respondent lived with the deceased as man and wife.
5. Hellen Nthiori Manyara (1<sup>st</sup> Appellant) denied that the Objector was married to deceased. She also denied that Appellant contributed to the Deceased's funeral expenses. She stated that Respondent was a tenant of the Deceased at his plot known as Isiolo B/Pesa/9 and at deceased's land Nyaki/Kiburine/874 where she'd leased ½ acre.
6. Concerning the will, 1<sup>st</sup> Petitioner stated it was signed by her husband but she did not know the persons that witnessed it.
7. Deceased's brother Gerevasio Mugambi Muriithi stated he did not know the Respondent before she filed her protest in this Cause.
8. Bernard Mworira stated that Respondent had leased ½ acre of deceased's land Nyaki/Kiburine/874 for one year in 2013.
9. After hearing the parties, the trial court found that the evidence on record supported a case for presumption of marriage between the Respondent and the deceased and Respondent was a beneficiary of deceased's estate.
10. The trial court also made provision for the Respondent and distributed ¼ of Nyaki/Kiburine/874 and Isiolo B/Pesa/9 plot to the Respondent.
11. Aggrieved by the finding of the trial court, Appellants filed this appeal mainly on two grounds. Firstly, that Deceased made a valid will and secondly that Respondent's case for presumption of marriage did not meet the required threshold.

### **Analysis and Determination**

12. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

13. I have considered the appeal in the light of the evidence on record and submissions on behalf of the parties and the issues for determination are:
  1. Whether Deceased's will was valid
  2. Whether there as evidence to support presumption of marriage between the Deceased and Respondent
  3. Whether a case was made out for provision of the Respondent from deceased's estate



14. Concerning the first issue, no evidence was led to discredit Deceased's will. The Will not having been challenged, I find as did the trial magistrate that it was valid.
15. Presumption of marriage is a well-settled common law principle that long cohabitation of a man and woman with a general reputation as husband and wife raises a presumption that the parties have contracted marriage. However, a presumption of marriage is a rebuttable presumption and can disappear in the face of proof that no marriage existed. (See Supreme Court Petition No. 9 of 2021. [\*Mary Nyambura Kangara v Paul Ogari Mayaka\*](#))
16. According to [\*Halsbury's Laws of England, Matrimonial and Civil Partnership Law\*](#) (Volume 72) 5<sup>th</sup> Edition 2015: "Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary."
17. Similarly, *Bromley Family Law* 5<sup>th</sup> Edition provides that: "If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married."
18. Section 119 of the [\*Evidence Act\*](#), Cap 80 Laws of Kenya is also instructive. It provides as follows: "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Similarly, *Bromley Family Law* 5<sup>th</sup> Edition provides that: "If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married."
19. Our courts have applied the doctrine of presumption of marriage in several cases. In [\*Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another\*](#) [2009] eKLR, the Court of Appeal stated as follows:

"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. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed".
20. The Respondent stated that she lived with Deceased his plot known as Isiolo B/Pesa/9 until he fell sick and subsequently died. It was also her evidence that she lived in deceased's plot No. Isiolo B/Pesa/9. Mathias Thurania Muthuri a neighbour of the Respondent stated that Respondent lived with the deceased as man and wife. Respondent buttressed her evidence by production of an Equity Bank ATM card which revealed that she held a joint account with the deceased.
21. The 1<sup>st</sup> Appellant conceded that deceased lived in Isiolo but she could not confirm if he lived with the Respondent. 1<sup>st</sup> Appellant also conceded that Respondent lived on deceased's plot No. Isiolo B/Pesa/9. Her evidence that Respondent was a tenant was not proved.
22. Having considered the fact of the corroborated evidence that Respondent cohabited with deceased on his plot known as Isiolo B/Pesa/9 from 2011, cultivated deceased's land Nyaki/Kiburine/874 and even had a joint bank account with him, I find as did the trial magistrate that the common cause of natural events favour the presumption of marriage between the Deceased and Respondent.



23. As regards provision to the Respondent, the trial magistrate correctly interpreted Section 3(5) of the Law of Succession Act that though the deceased had contracted a monogamous marriage with the 1<sup>st</sup> Appellant, the Respondent was nevertheless a wife for the purposes of this the Law of Succession Act and in particular sections 29 and 40 thereof. (See In re Estate of Libasi Bidali (Deceased) (2019) eKLR and In re Estate of Justus M'murithi M'bagiri (Deceased) [2019] eKLR).
24. There having been no evidence to demonstrate that Respondent's son was a dependent of the deceased, I find that the trial court rightly excluded him from benefiting from the estate of the deceased.
25. Section 26 of the Law of Succession Act provides as follows:
- “Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”
26. The Court of Appeal in Marete v Marete & 3 others (Civil Appeal E014 of 2023) [2024] KECA 371 (KLR) (22 March 2024) (Judgment) cited Erastus Maina Gikunu & Another v Godfrey Gichuhi Gikunu & Another [2016] eKLR with approval where it observed as follows:
- “...it is important to say here that, although there is this freedom, Section 26 of the Act enjoins the testator to make reasonable provision for his dependants. The court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom, but also imposing certain limitations and protection against disinheritance.”
27. In the circumstances, even though the Deceased's Will is valid, the mode of distribution is so skewed so as to render the Respondent literally disinherited. The Will failed to meet the guidelines set out under Section 28, leaving Respondent wholly disinherited. Since all of the deceased's free property was distributed in the will, it is my view that the only way that the Court can make reasonable provision for all the dependents of the deceased, including the Respondent, is to invalidate the last written Will of the deceased and distribute the properties that comprised the estate of the deceased under the intestacy laws of the Law of Succession Act.
28. In the circumstances, I find that the learned trial magistrate rightly made provision for the Respondent and since no material has been placed before the court to warrant any interference with the decision of the learned magistrate, the decision is upheld. The appeal is devoid of merit and it is accordingly dismissed with no orders as to costs.
29. The residual of Deceased's estate shall be distributed equally between the Hellen Nthiori Manyara and her children Elias Mutugi Manyara, Bonface Koome Manyara, Edwin Mutuma Manyara and Carol Makena Manyara.

**DELIVERED IN MERU THIS 06 TH DAY OF JUNE 2024**

**WAMAE. T. W. CHERERE**

**JUDGE**



**Appearances**

**Court Assistants - Kinoti/Munene**

**For Appellants - Mr. Mwirigi for Mwirigi & Nzomo Advocates**

**For Respondent - Mr. Mokuu for Mokuu Obiria & Co. Advocates Associates**

