



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 225 OF 2015

IN THE MATTER OF THE ESTATE OF BENSON NGAO WAMBUA- (DECEASED)

LUCIA NTHOKI NGAO

JOYCE KALEKYE NGAO.....PETITIONERS

VERSUS

RHODA NDUNGE.....OBJECTOR

RULING

1. The deceased, **Benson Ngao Wambua**, passed away on 18th September, 2014, aged 54 years. Subsequently, the Respondents herein, **Lucia Nthoki Ngao** and **Joyce Kalekye Ngao** in their capacity as the widows of the deceased vide the petition filed herein on 17th April, 2015, jointly petitioned. In their petition, apart from themselves as widows, they identified **Simon Wambwa Ngao**, **Stephen Kavoi Ngao**, **Simon Wambwa Ngao** and **Robert Mutisya Ngao** as the sons and beneficiaries of the deceased. Vide a grant issued on 8th September, 2015 and dated 14th September, 2015, the two petitioners were granted letters of administration intestate of the deceased's estate.

2. However, by Summons dated 13th April, 2015, the Objector herein, **Rhoda Ndunge**, applied for the revocation or annulment of the said grant. The application was based on the fact that the grant was fraudulently made by the making of a false statement or by concealment from the court of something material to the case. The second ground for seeking the said order was that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

3. According to the Objector, she was the deceased's 1st wife having gotten married to him under Kamba customary law in 1979 following the performance of all the rites and rituals in the presence of both family members and other witnesses. It was her evidence that since 1979 she lived with the deceased as husband and wife at his house in Dandora, Nairobi Plot No. 3/1609C before the Petitioners were married in 1990 and 1995 respectively. During the said union, they were blessed with one deceased called **Maureen Syokau**. However, in this petition, the petitioners failed to disclose that the Objector and her said daughter were dependants/beneficiaries of the deceased and his estate. It was further contended that the petitioners failed to disclose all the assets of the deceased such as Plot No. 1198, Yatta, Mutauni, Plot No. 1199, Yatta Mutauni, Plot No. 433, Yatta Utumoni, 3 shops with 15 rooms at Kithimani Market, House in Tala, on Plot No. 1055, Upcountry parcel of land No. 161-Kitui, Motor Vehicle KBZ 299, Lorry, Motor Vehicle KNP 730, Saloon car. The Objector further deposed that the deceased and herself lived on Plot No. 3/1609A situated in Dandora Phase III-Infills (hereinafter referred to as "the Dandora plot") where she was still residing while the petitioners lived upcountry.

4. According to the Objector, the deceased worked with the British Army as a mechanic and bought various parcels of land though he used to register them in his father's name, **Wambua Nzomo**. However, in 2008, the deceased bought Plot No. 3/1609A, in Dandora Nairobi and registered the same in his name and he and the Objector moved to live in it from his father's plot No. 3/1609A, in Dandora and they cohabited there till the deceased's death on 18th September, 2014. It was her evidence that she is the one who looked for the house to buy that is No. 3/1609A, in Dandora and after its purchase, she managed it as their property till his death and thereafter.

5. According to her the deceased's father wanted him buried at Kangundo on the land occupied by **Joyce Kalekye** and advised against any dispute as to the place of burial, an advice which she heeded but the petitioners did not, hence leading to the court dispute. The decision of the court was however contrary to the wishes of the deceased's father hence he did not attend the burial and warned them against attending the same hence the Objector's absence. Similarly, all the deceased's family members (father, mother, brothers and sisters) did not attend.

6. It was therefore her case that both herself and her said daughter stood to be disinherited if these proceedings were allowed to proceed in the manner intended hence her application.

7. In her oral evidence, the Objector reiterated the foregoing and testified that she knew the Petitioners and the Petitioners also knew her. According to her, **Joyce** stays in Tala at the deceased's home and that everyone had a plot from which they were receiving rent with **Joyce** collecting rent from Tala's two rooms and Kithiani's 15 rooms. However, during the lifetime of the deceased, everyone was staying in their plot with her staying and collecting rents from the Dandora Plot. It was her evidence that when the deceased was unwell she was taking care of him in Nairobi and brought him to Machakos Hospital and she was with him when he died when he told her that he did not want people to fight over his burial place as it was his wish to be buried at his father's home in Kangundo since the father was still alive. However, since **Lucia** collected the body before the case was determined, they did not attend the funeral. The Objector therefore testified that she would like to inherit the Dandora Plot.

8. In cross-examination, she testified that she married the deceased in 1979 during which time the deceased was a student at a polytechnic in Mombasa while she was at home in Kangundo where she was born. Even after their marriage, she continued staying at her home. It was her evidence that dowry was paid in 1985 though she could not recall the month. Since her father was dead by then, the dowry was paid to her elder brother, **Moses Mutua**, at a ceremony attended by one of her uncle, **Josephat Mutua**. According to her, due to the short notice, there were no neighbours and the ceremony was not a big one and was only attended by her brothers and sisters. From the deceased's side were his father, brother **Muthama** and sisters.

9. The Objector testified that the deceased's family brought three goats, one of which was slaughtered by **Muthama**. By that time her daughter **Maureen**, had already been born since she was born in 1979 and at the time of her testimony was 39 years old. According to her, the birth certificate showed her daughter as the daughter of the deceased, though the same was not filed in court. Her ID Card however showed her name as **Maureen Syokua Mutinda**, bearing her husband's name. According to the Objector, the said daughter attended school at Matungulu, Machakos Girls and Kenyatta University using the name **Maureen Ngao**, though her documents were not availed.

10. While the Objector testified that her relationship with the deceased was good, he however did not build for her a homestead. She however insisted that she was the 1st wife while the deceased had two other wives, **Joyce** and **Lucia** who were married after the Objector. However, both **Joyce** and **Lucia** had their homestead, while the Objector said that she had a homestead in Nairobi, a rental house, where she stays. According to her the deceased worked with British Army as a mechanic since 1986 and was first attached to Kahawa in 1986 during which time they were staying together at his father's plot in Dandora. By then the Petitioners were not yet married since **Joyce** got married in 1995 while **Lucia** got married in 1990.

11. According to the Objector, the deceased's father, **Simon Wambua Nzomo**, died in September, 2015, by which time she had filed her objection. However, the deceased mother, **Naomi Mukui Wambua**, though blind was still alive and she attended the dowry payment ceremony but could talk. She insisted that the deceased died in her hands at Machakos General Hospital in the absence of the Petitioners. She was however not given the burial permit. After the death of the deceased, the father went to court and the deceased took two months before his burial during which time the Petitioners were litigating over the place of burial. The Objector did not however participate in the dispute and never attended the burial. According to her, though the Petitioners knew her, they used to fight her whenever they went to Nairobi. It was her evidence that though she attended the burial of the deceased's father, she was not recognised as one of the deceased's wife at the funeral.

12. According to the Objector, though she was never given the burial permit, she obtained the death certificate and returned the ID Card. While admitting that she was aware that the deceased swore an affidavit in support of the application by **Lucia** to change her name to his, she was not aware that in the said affidavit, the deceased stated that she married **Lucia** in 1990 when he was a bachelor.

13. It was her evidence that the properties she listed in her affidavit belonged to the deceased. However, shown the search certificates, she confirmed that the same revealed that save for Ndalani/Ndalani/72 and Allotment for Plot No. 31609 all of them were registered in the names of the deceased's father. She disclosed that she was aware that there was a succession cause in respect of the deceased's father and that **Muthama** was the administrator. According to her she is the one who looked for the Dandora Plot which they bought from the City Council in 1994 at Kshs 100,000.00 and they were given allotment letter. However, the same was taken by **Joyce**. Though he approached the Chief of Ndunduni Village where the deceased came from, the Chief declined to give her a letter saying that he could not write a letter for one wife. She however insisted that her daughter was the child of the deceased and that her witnesses are the deceased's siblings. In her evidence she was only interested in the Dandora Plot.

14. According to her she used to stay with **Lucia**'s sons in the Dandora Plot and they used to call her mother. She testified that **Simon Wambua** was a student at Kenyatta Medical and used to visit during weekends while **Stephen Kanui** went in 2013 when he wanted to travel after finishing school. She however denied that it was **Stephen** who used to wash the deceased. He however admitted that there was a caretaker of the Dandora Plot, one **Benedict Ambani**, who used to collect rent and was staying at the same plot till the month before when he started paying rent. Prior to then, he used not to pay rent as that was his payment for the work he was doing.

15. In re-examination, the Objector stated that after the deceased married her, she continued staying in her home as the deceased had no homestead till 1994 when they started staying together in his father's plot. It was her evidence that the marriage was sealed by payment of for goats, one of which was slaughtered according to Kamba customary law. It was her evidence that the deceased married other wives due to her inability to get a son. It was however the deceased's decision to keep her in Nairobi. She clarified that the deceased's father only recorded his statement in the Kangundo Case but did not file a separate case. She insisted that she was the one who was nursing the deceased and not his son **Stephen** and that the Petitioners only visited him.

16. The Objector called **Daniel Muthama Wambua** as her witness and testified as PW2. According to his testimony, the deceased was his younger brother and had three wives, the Petitioners and the Objector, who had one child, **Syokau**. Though he was not sure of her exact age, he stated that she could be approaching 30 years. **Lucia** had two children, **Wambua** and **Kanuki** while **Joyce**'s children were **Wambua** and **Mutisya**. According to him, the first wife was the Objector, the second **Lucia** while the third, **Joyce**. It was his evidence that he got to know that the deceased got married to the Objector in accordance with the Kamba customary law in 1979 but they started staying together in 1985. According to him, there was a small ceremony attended by his family and the Objector's family in 1985 at which they performed *ntheu* – they took four goats and slaughtered one of them. According to him, since the deceased was going to work, the father told him to get married so that he does not get lost at his work.

17. PW2 denied that the Petitioners did not know the Objector since they used to meet the Objector whenever they visited the deceased. He averred that the Objector used to call him whenever the deceased was unwell and he used to inform the Petitioners. According to him, the deceased set a home for **Joyce** in Kangundo, **Lucia** in Kithimani while the Objector used to live in Nairobi with the deceased. According to him the deceased had plots in Ndundani, Kangundo, at Yatta in Kithimani, at Mwatate in Kanzani and in Dandora. He also had two lorries and a saloon in Yatta.

18. It was his evidence that they used to give their father money to buy land as he was the one who had the time though he would register them in his name. Accordingly, there was land belonging to the deceased but registered in the father's name.

19. It was disclosed that **Joyce** sued **Lucia** in Kangundo Court seeking to have the deceased buried at Kangundo where the father had designated since **Lucia** claimed that she was the first wife and wanted the deceased buried in Yatta. According to him, he did not attend the burial because the case ended on a Friday and the following day on Saturday **Lucia** buried the deceased. Similarly, the father, mother or his uncles did not attend the burial. It was his evidence that they did not attend based on the father's instructions. He however denied having told or facilitated **Joyce** to go to court. It was his evidence that it was the Objector who was taking care of the deceased in Dandora. According to him, the Court should give the Objector and her daughter their share of the deceased's properties.

20. In cross-examination, PW2 stated that he had known the Objector since 1979 and that in 1979n she was staying in his father's home. He however did not know the Objector's mother's home as she was not alive. He also did not know when her parents died. He insisted that he was present when the dowry was paid and he was together with his father **Wambua Nzomo**, his mother, **Mukui Wambua**, and his sisters, **Jennifer Mueni** and **Mukami**. Although his elder brother, **David Kimeu Wambua**, was alive together with his wife, **Martha Kimeu**, the did not attend the ceremony. According to PW2, while he was the secretary of the Nzomo Family functions, the chairman was **Simon Mulwa**, who however, did not attend the ceremony. According to him the goat was slaughtered by his son and another person who was hired. From the family of the Objector, he stated were two brothers, one of whom was called **Morris** to whom the dowry was paid.

21. He admitted that his father was aware of the Kangundo case (Civil Suit No. 130 of 2014) and that both of them recorded their statements in the said case and they were supporting **Joyce** therein though he insisted that they did not facilitate the filing of the case as **Joyce** did it on her own. However, referred to the said statements he admitted that he stated that the defendant therein, **Lucia**, was the deceased's first wife and that they did not mention the Objector. He however stated that his description of **Lucia** as the deceased's wife was due to the fact that the dispute was only between **Lucia** and **Joyce** and as between the two **Lucia** was the 1st wife. He however conceded that he was not forced to sign the statement in that case. Referred to an affidavit sworn by the deceased and **Lucia**, he confirmed that it was indicated that the deceased was a bachelor when he married **Lucia** the said case. He however insisted that the Objector was the deceased's first wife. While conceding that dowry payment is not done in secret under Kamba customs, the Objector's was conducted in a hurry so that the deceased could be released to go to work. In his evidence dowry payment can be formalised with only members of the family and few people present.

22. Asked about the properties in the deceased's name, he told that court that he did not know their number and would not be surprised if they were only two while the rest were in their father's name. Asked about the succession cause in respect of his father's estate, he admitted that he was the administrator thereof and had not involved the petitioners and the objector therein. According to him the petitioners had kept away from him since the death of their father but admitted that they ought to have an interest in the father's succession. He however denied that his intention was to disinherit the petitioners and stated that once the letters are issued to him, he would involve them. He however stated that he did not disclose to the chief about his father's wives when he went to get a letter for his father's succession.

23. PW2 insisted that the deceased was not a bachelor when he married **Lucia**. He stated that his interest was simply to ensure that every person/wife gets their share of the deceased's property including the ones registered in the names of the father.

24. **Moses Mutua Mbithi**, the Objector's elder brother, testified as PW3. According to him, the Objector was married in 1979 by the deceased though prior to their formalisation of the marriage they were friends. Later, the deceased's family took to their home three goats and slaughtered one in 1985 in a ceremony known as *ntheo*. According to him, the ceremony took place in his house as their father was dead though their uncle was present. It was his evidence that the deceased's family was represented by deceased's parents, his brother, mother and sisters. From the Objector's family were PW3, his wife, elder brother and sisters. It was his evidence that the ceremony was not conducted in secret since Kamba custom only requires members of the two families and not neighbours.

25. According to him the Objector had a child known as **Maureen Syokau** who stays in Nairobi. However, the Objector was not built for in the deceased's rural home.

26. In cross examination the witness clarified that his two other brothers are **Onesmus Mbithi** and **Maxwell Mbithi** and that he does not have a brother called **Morris**. According to him the dowry payment was made in his presence and in the presence of his brother and two wives and at that time he was 25 years. However, his sisters were not there. He admitted that he has an elderly uncle known as **Josephat Mulwa** though at the time he had many maternal uncles who did not attend. While his father was present, there were no neighbours.

27. While in such ceremonies notes should be taken, he was not sure whether this happened. He reiterated that three goats were taken and one was slaughtered. He however denied that six or four goats were taken and that one was slaughtered. He however clarified that three goats were left after one was slaughtered and that they were four. While he stated that he knew **Joyce Kalekye**, who has a homestead at Ndunduni he did not know **Lucia**. He however confirmed that no home was built for the Objector at home as she had a home in Nairobi for renting. According to her **Maureen Syokau** is between 36-37 years and has her own family though he could not state with certainty that she was a daughter of the deceased. It was his case that since he was the one who built in his father's homestead, dowry could only be paid at the homestead.

28. In re-examination, he reiterated that he did not have a brother called **Morris** and that any allegation that dowry was taken to the Objector's brother called **Morris**, that was mistaken. According to him traditionally maternal uncles to not attend such ceremonies and since he had only one paternal uncle who was in Nairobi, he could not attend. According to him the house in Nairobi was built on the land the deceased and the Objector bought.

29. It was submitted on behalf of the Objector that she testified and gave evidence to demonstrate that she was indeed the 1st wife of the deceased. She gave vivid explanation as pertains the ritual of marriage that was witnessed by both family members and further that she indeed had a child with the deceased named **Maureen Syokau**. She gave further testimony that she lived with the deceased at his father house in Dandora plot no. 3/1609C till 2008 when the deceased bought property in Dandora Plot No. 3/1609A. They cohabited in the said premises as husband and wife, till his demise in 2014. That the petitioners **Lucia Nthoki** and **Joyce Kalekye** were married by the deceased in 1990 and 1995 respectively. They were all aware that she was his 1st wife. She further strengthened her testimony by confirming that the property bought by the deceased has been in her hands and she has been managing the same since before her late husband's death.

30. The above sentiments were then echoed by one **Daniel Muthama Wambua** (the deceased's brother) who confirmed the marriage between the two. He further confirmed that the objector had a child with the deceased and she has been managing the property. He acknowledged the acts of the petitioners were based on malice and that the issuance of grant letters of his deceased brother's estate should factor in the objector either as an administrator or true beneficiary.

31. It was therefore submitted that from the testimonies of the **Rhoda Ndunge** (the objector) and one **Daniel Muthama Wambua** (the deceased's brother), it is not in doubt that the objector was indeed the wife of the deceased following the celebration of customary marriage under Kamba law back in 1979. It was also acknowledged and proved that the deceased had a daughter with the deceased thus a complete family unit recognized by law and indeed in terms of succession requiring to be recognized as beneficiaries to the estate of the deceased. Thus the acts of the petitioner seeking grant letters without informing the objector was illegal and the grant is ripe for revocation.

32. According to the Objector, the petitioners filed the said petition in disregard to the rules of Probate and Administration in that they failed to notify the objector and further failed to disclose material facts. In this regard reference was made to rule 26 of the **Probate and Administration Rules** which states;

(1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the Applicant.

(2) An Application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation or written consent in form 38 or 39 by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.

33. The Court was urged to note that notice was not issued to the objector and her consent was not sought by the petitioners. On this ground alone we urge the court to revoke said grant letters.

34. As regards the case for the petitioners, it was submitted that it is settled law that a person who approaches the court for grant of relief, equitable or otherwise is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court to bring out all facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If she/he is found guilty of concealment of material facts or making an attempt to pollute the pure steam of justice, the court not only has the right but a duty to deny relief to such a person. The Court was urged to note the deliberate acts of the petitioners to conceal material facts in an attempt to evade justice thus revoke grant letters issued to them.

35. It was further submitted that the petition is defective in substance which defect is of such character as to substantially affect the regularity and correctness of previous proceeding thus ripe for revocation. The Court was thus urged to enter judgment in favour of the Objector and revoke grant letters issued to the petitioners.

36. On their part the Petitioners relied on the evidence of DW1, **Lucia Nthoki Ngao**. According to her, the deceased was her husband to whom she got married in 1990 in accordance with the Kamba customary law, just as was the case of his other wife, **Joyce Kalekye Ngao**, whom he married in 1995. It was her evidence that she had two children with the deceased, **Simon Wambua** and **Robert Mutisya**. It was her evidence that when the deceased died he was working with the British Army in Nanyuki.

37. It was her evidence that the Objector was not married to the deceased and that since her marriage to the deceased she never heard of her till she filed her objection. Similarly, she had never seen the Objector's alleged daughter. According to her, when she got married to the deceased, in 1990, they went to live in Dandora Phase One in the deceased's father's Plot No. 3/1609C which was one roomed house. She however left Dandora in 1990 and went to stay in Nunguni in Matungulu, the deceased's ancestral home after she got a job as a teacher, leaving the deceased still staying in Dandora since he was stationed in Kahawa Garrison. Although she used to visit him with her children, she never met the Objector.

38. It was her evidence that the deceased fell sick with diabetes in 2012 when he was in Nanyuki and she took him to Mater Hospital. In 2014 when he again got sick, he was admitted at Kangundo general Hospital after which he went to stay with **Kalekye** till he recovered. He was also admitted at Bishop Kioko Hospital then at Machakos General Hospital where he succumbed. She testified that she was with him with his brother, **Daniel Muthama** and **Jennifer Mueni**, her sister when he died. She therefore denied that the deceased died in the Objector's arms. After the death of the deceased, she was given burial permit. However, a difference arose between her and **Jennifer** as to who was supposed to be given the burial permit, as the latter wanted it to be given to her brother but the doctors insisted that she should be given. After that she went to Yatta.

39. According to DW1, on 20th September, 2014, she with the extended family went to Kangundo to arrange for the burial and they agreed to bury the deceased in Yatta, his first wife's home. She later heard that **Jennifer** and **Daniel** persuaded **Joyce** to file a case to stop the deceased's burial lest DW1 took all the property. This was in Kangundo Case No. 130 of 2014. As a result, the deceased's body stayed in the mortuary for two months till 14th November, 2014 when the case was dismissed and she was allowed to bury the deceased. In that case the people supporting **Joyce** were **Daniel Muthama** and the deceased's father, **Simon Wambua**, who filed a statement therein in which he

confirmed that DW1 was the deceased's first wife, a position also confirmed by the statement of **Daniel Muthama**.

40. According to DW1, during the time of the case, she never heard about the Objector or her daughter, **Maureen**, as they never attended the funeral arrangements or the burial. It was her evidence that prior to the deceased's death they went to Kithimani Law Courts on 8th November, 2012, where they swore an affidavit to facilitate her change of names in the identity card. In the said affidavit they stated that they got married in 1990 while both of them were single as the deceased was a bachelor then. It was therefore DW1's averment that it was not true that the Objector was married in 1979 since by the time he got married to the deceased. She only found the deceased's elder brother's (**David Kimeu**) wife, called **Martha**. She however confirmed that her bride price was paid by the deceased's father, **Simon Wambua**, the deceased's mother, **Naomi Mukui Wambua**, the deceased's elder brother's wife, **Martha Wayua Kimeu**, and other relatives such as the deceased's uncle **Simon** and **Stephano** and the neighbours. On her side were her parents, brothers and sisters, elders and neighbours. However, **Daniel Muthama** was not present as he was living in Yatta by then. She however reiterated that the clan's head, **Simon Mukui Nzomo**, was present.

41. On 10th August, 2013, a second dowry payment ceremony was conducted at which **Daniel Muthama** was present. It was her position that if there had been a similar ceremony for the Objector, the deceased's father and brother would not have recorded a statement to the effect that DW1 was the deceased's first wife. According to her, the Objector is being used by Jenifer and **Daniel** to get the Dandora Plot and the plots in Ndalani where she stays, and Ndalani/1179 which she was cultivating, both of which properties were the name of the deceased's father, **Simon Wambua**. While reiterating the averments in the replying affidavit as regards the ownership of the plots in question, she denied that the Objector was staying in Dandora. According to her, when she married the deceased, Plot No. 1609 belonged to the deceased's father and that it was an empty plot. However, in 1994, the City Council sold it to the deceased and in 2006 the deceased started constructing on it and finished the construction in 2008. In 2009, he was transferred to Nanyuki from Nairobi and left the plot under the charge of a caretaker, one **Ben Ambani**, who used to collect rents therefrom and stayed on the plot, having been given a room to stay without paying rent. It was DW1's evidence that the deceased never stayed in Plot 1609A but used to stay in the one room in Plot 3/1609, which was adjacent to plot 3/1609. It was her case that the Objector, the said **Daniel Muthama** and **Jennifer** wanted to take the said plot from them.

42. According to DW1, she was unaware if the Objector was collecting rents from the said plot since they never allowed her to do so. After the death of the deceased. It was her son, **Stephen Kavoi**, who was using the room when he was in college. She was however informed by the said son that **Daniel** and **Jennifer** went and removed everything from the plot. Upon calling the said caretaker, she was informed that the said two people and told the caretaker that the deceased had no plot there and that they would be collecting rents. Upon reporting the matter to the chief, the petitioners were advised to petition for grant of letters of administration which they commenced. It was while the matter was proceedings that the Objector turned up hence the reason why they were not collecting the rents from the said plot in Dandora. She insisted that the Objector and her said daughter were not related to the deceased in any way and had no right to inherit his property.

43. In cross-examination DW1 denied that she had ever separated from the deceased as was alleged by **Joyce** before the Kangundo case and insisted that she had stayed with the deceased at Dandora many times. In her evidence **Joyce** was being pushed by Jennifer **Mueni**, **Daniel Muthama** and Josephine Mukami, the deceased's brother and sisters. It was her evidence that her father in law was not opposed to the deceased being buried in Yatta the first time and even contributed Kshs 5,000/= and never chose any burial ground for family members as many of his children have their own homes. According to her, both her father in law and mother in law did not go for the burial of the deceased due to old age. However, **Daniel Muthama** and his wife, and the deceased's sisters. On the other hand the deceased's uncle **Simon Muli Nzomo** and the family of **Simon Wambua Nzomo**'s first son attended the funeral. According to her testimony, **Simon Wambua Nzomo** was older than **Simon Muli Nzomo**.

44. DW1 testified that her son **Stephen** stayed in the deceased's plot at Dandora from the time he was young between 2012 and 2014 but not with the Objector as his step mother. It was her evidence that there was money being collected from the Dandora Plot by the caretaker who used to hand it over to the deceased and when the deceased died, the caretaker sent the money to DW1 for two months by phone while spending some towards the needs of the said **Stephen**. Later, **Daniel** and **Jennifer** started collecting the rents. She was however unaware that the Objector was staying on the said plot.

45. According to her the deceased used to give the father the money to buy land but they were registered in the names of the father. However, the plots in the names of the father were omitted from the assets of the deceased which were disclosed in the court papers. She testified that she was collecting rents from Plot 72 while **Joyce** was collecting rents from the plot in Tala. She insisted that since the Dandora plot belonged to the deceased, the petitioners were the rightful claimants of the rents therefrom.

46. DW2, **Joyce Kalekye**, testified that the deceased was her husband and she was the 2nd wife while the 1st wife was **Lucia**, DW1, who was married in 1990 while herself was married in 1995. Both were married under Kamba customary law and she had two children with the deceased, **Simon Wambua Ngao** and **Robert Mutisya Ngao**. Upon her marriage to the deceased they stayed at Ndunduni with the deceased, a mechanic employed by British Army. Though the deceased was staying at Nanyuki, during leave he would return to Ndunduni or Yatta, where DW1 stays.

47. The witness however stated that she did not know the Objector and only saw her for the first time in court. She was therefore not aware that the Objector got married to the deceased in 1975 and was unaware of her said daughter, **Maureen Syokau**. Similarly, her children did not know them. She therefore denied that the Objector was staying with the deceased who died on 18th September, 2014.

48. After the death of the deceased, the deceased's brother, **Daniel Wambua** and his sister, **Jennifer Mueni**, informed her that the deceased's father had refused to have the deceased buried in Yatta as he wanted him buried in Ndunduni. Accordingly, a suit was filed in Kangundo being case no. 130 of 2014, by herself stopping the deceased's burial at Yatta with the knowledge of the deceased's father, **Simon Wambua**. In his statement in support of the said case, the deceased's father averred that **Lucia**, DW1 was the deceased's first wife while DW2 was his 2nd wife. **Daniel** also recorded a statement in the said case in which he confirmed the same position. However, the Objector did not feature anywhere as the deceased's wife and was not present during the funeral arrangements. After the dismissal of the case, the deceased was buried in Yatta, though she did not attend the funeral. She was unaware if the Objector attended. However, the Objector has never gone home as a wife of the deceased.

49. After the burial of the deceased, the petitioners resolved their differences and agreed with DW1 to jointly petition the court for grant. She however denied that the deceased died in the Objector's hands and that he died in Hospital and was taken to the mortuary by DW1. According to her they used to visit him in hospital. She testified that her dowry was paid in 1995 in the presence of **Simon Muli**, the deceased's uncle, who was the family chairman, the deceased's father, **Martha Kimeu**, wife to the deceased's brother in the presence of neighbours. She was however not aware of any dowry ceremony in respect of the Objector. At the time of her testimony, she stated that the deceased's mother was still alive. To her the deceased never stayed with the Objector as husband and wife. After confirming the registration of the various plots she confirmed that the lorry was sold by her in order to get money for school fees for the children.

50. DW2 confirmed that while they only mentioned the properties which were in the names of the deceased, they omitted the others. It was her evidence that the land where she stays was clan land registered in the names of the father but which the deceased inherited from him. However, there were properties bought by the deceased which were registered in his father's name. While she admitted that the deceased was born in 1956 while she was born in 1975 and nothing stopped the deceased from marrying in 1979, she insisted that the Objector was not married to the deceased. It was her evidence that she never used to see the Objector in Dandora and that the deceased was staying in Ndunduni till his death. At Dandora, he was however staying with his son, **Stephen** who was taking care of him during his illness but before that was staying alone. There was also the caretaker, Benson.

51. It was her evidence that the fees for the Kangundo case was paid by the deceased's sister and that she was not literate so the lawyer drafted all the documents and they signed. She however confirmed that she did not attend the deceased's funeral. Neither was it attended by the deceased's father, mother, sister and brother. While unaware of the reasons for their failure to attend, she stated that they did not like the burial at Yatta. At the time of the death of the deceased the rental for the Dandora House were being collected by Benson and upon their reporting the matter to the chief, they were advised to file a petition.

52. She confirmed that the said caretaker was still staying in the Dandora plot and was not paying rents.

53. DW3, **Simon Muli Nzomo**, the deceased's uncle testified that the deceased had two wives, **Lucia** and **Joyce**. He however did not know the Objector and they did not recognise her. According to him he attended the dowry ceremonies for DW1 and DW2 but not that of the Objector. It was his evidence that his brother never informed him about the marriage between the deceased and the Objector.

54. In cross-examination he confirmed that he was the head of the Nzomo family and he was not aware that the deceased separated from DW1. According to him DW1's dowry was paid in 1990 while DW2's dowry was paid in 1995.

55. He however confirmed that there was a case and the deceased's father did not attend the burial though some, including himself attended. He was however unaware if the deceased lived with the Objector in Nairobi where he had a rental house where the petitioners used to stay when they were in Nairobi though he never visited the Nairobi House. He however stated that he would be surprised if the deceased had another wife in Nairobi since he never built a house for her and never took her home.

56. **Martha Kimeu Wambua**, testified that she was a sister in law to the deceased having been married in 1973 to the deceased's elder brother. During that time the deceased was a young boy at Matungulu Primary School and was unmarried. He got married in 1990 to **Lucia Ndhoki Ngao** as his first wife and in 1995, he married **Joyce Kalekye Ngao**. According to her, as the first person to be married in the family, she never saw the Objector and never witnessed her dowry being paid. To her there was no way such dowry ceremony could be organised without her knowledge. She however attended the dowry ceremonies for DW1 and DW2. It was her testimony that she had never seen the Objector's said daughter Maureen and that she was the Object in court for the first time.

57. According to her the petitioners used to visit the deceased in Nairobi and that herself and her husband also used to visit him. It was her evidence the deceased used to register his properties in his father's name. She however confirmed that there was a burial dispute when the deceased died but denied that the Objector was the deceased's wife as she would have known had she been his wife.

58. DW5, **Stephen Kavoi Ngao**, testified that he was the deceased's son with **Lucia Ndhoki Ngao**. She however did not know the Objector and denied that he used to stay with her. He however testified that he used to stay with the deceased in Dandora and Nanyuki between 2012 and 2014 and they would stay in one room in his grandfather's house. It was his evidence that there was no other woman staying with them and when the deceased was unwell it was him who was taking care of him in Dandora with the assistance of the Caretaker. It was his evidence that he first saw the Objector in court when she was testifying. It was his evidence that the caretaker, **Ambani**, was staying in the next plot and that even his father did not stay there. However, **Ambani** was told by his father's brother and sister to stop collecting the rent and that they were the ones to do so. He however stated that he did not know the Objector's daughter **Maurine** and that even if she came to court he would not recognise her.

59. It was submitted on behalf of the petitioners that the objector simply made allegations of fraud without proving the same. In this respect the petitioners relied on **The Matter of the Estate of P.W.M –Deceased [2013] eKLR, Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR** and submitted that the objector instant case simply made allegations of fraud without meeting the threshold for arriving at such a finding.

60. It was further submitted that the objector failed to discharge this duty as provided in Section 109 of the Evidence Act yet it was incumbent upon her to prove that she was the first wife of the Deceased as alleged. In their submissions, the petitioners noted the following:

a) The petitioners do not recognise the objector as the 1st wife of the deceased. The objector on the other hand recognizes the petitioners as deceased's wives.

b) It is intriguing how the alleged dowry ceremony in respect of the objector was hurriedly conducted according to Objector Witness No.3 who was allegedly informed of the same on Friday and on Sunday the dowry was paid (barely in two days).

- c) The alleged dowry ceremony was not attended by any neighbours, uncles, aunties or any member of the extended family but only mother, father, sisters and a brother to the deceased.
- d) According to Objector's witness No.2 the alleged dowry was paid to the objector's brother one **Maurice** a clear illustration that the alleged dowry ceremony was a made up story since Objector Witness No.3 one **Moses Mutua Mbithi** stated that the dowry was paid to him.
- e) A traditional marriage is a communal affair. It is matter involving both families, that of the man and the woman. It is not a private matter for the man or even the woman. Both their families must be involved because the woman thereafter becomes a member of the man's extended family. This process is intended for the protection of the woman for it gives her status and recognition as a wife in that extended family. It would appear that the whole affair herein was conducted in secrecy, if at all there were such ceremonies. It does not have the hallmarks of a traditional marriage.
- f) That the deceased's mother one **Naomi Mukii** who is still alive and in good health allegedly attended the dowry ceremony but was not called as a witness. It is the Petitioners' submission that the deceased 's mother would have been the most crucial witness to call to confirm or refute the allegation that the deceased herein was married to the objector or not.
- g) The objector alleged that she was blessed with one child with the deceased namely **Maureen Syokau** who was allegedly born in the year 1979 but did not produce any birth certificate, copy of national identity card or school certificate for the said **Maureen Syokau Mutinda** or even bring her as a witness in the case.
- h) The objector claims to have been the 1st wife of the deceased and one wonders why she did not bother over the burial of the deceased despite the protracted burial dispute between the two petitioners that lasted about 2 months or thereabouts. This alone arouses curiosity with respect to a woman who says that she had been validly married customarily to the deceased as the 1st wife.
- i) The objector did not come forward and identify herself together with the alleged daughter of the deceased namely **Maureen Syokau** following the death of **Benson Ngao Wambua**-(Deceased) and no evidence was led to show that anybody obstructed her from playing a role.
- j) The objector did not have any photographic evidence of the alleged dowry ceremony or any minutes of the alleged ceremony.
- k) If indeed the objector was the first wife of the deceased, one wonders why she was not known to the deceased's father **Simon Wambua Nzomo** (deceased). The said **Simon Wambua Nzomo** had indeed written a statement in support of the case filed by **Joyce Kalekye Ngao** against **Lucia Nthoki Ngao** over the burial of the deceased being Civil Suit No.130 of 2014 at Kangundo law courts.
- l) The evidence of Objector's witness No. 2 **Daniel Muthama Wambua** appears rather intriguing in that whereas she had earlier supported **Joyce Kalekye** (Petitioner Witness No.2) as the second wife of the deceased, he now turns to support the objector as the 1st wife of the deceased.
- m) Objector witness No. 2 **Daniel Muthama Wambua** confirmed to having written a statement in support of the case filed by **Joyce Kalekye Ngao** against **Lucia Nthoki Ngao** over the burial of the deceased in Civil Suit No.130 of 2014 at Kangundo law courts.
- n) On 8th November 2012, the deceased and Petitioner Witness No. 1 **Lucia Nthoki** swore a joint affidavit before the Resident Magistrate, Kithimani Law Courts in which clearly stated that they got married in the year 1990 under Kamba Customary Law and practice and that at the time he was a *bachelor*.
- o) There was no "*Ntheo*" ceremony conducted in accordance with Kamba customary marriage and no evidence of dowry negotiation, dowry payment and cohabitation were demonstrated. The evidence led in support of the objector's case was trumped up to validate non-existence claim.
- p) The Objector did not avail any witness to give credence to her alleged allegation that she had cohabited with the deceased in Dandora, Nairobi since 1979 to 2014 when the deceased passed away.
- q) Petitioner Witness No.4- **Martha Kimeu Wambua** categorically stated that that she wondered how her father in law whom she was staying with would go and allegedly attend a dowry ceremony of her son in respect of the objector without her knowledge since dowry ceremony is not a secret family affair.
- r) Petitioner Witness No.3 **Simon Muli Nzomo** categorically stated that he was the family head (chairman) of the Nzomo family and as such he attended all family functions including the dowry ceremonies for both **Lucia Nthoki** and **Joyce Kalekye Ngao** and that at no point did he attend any dowry ceremony in respect of the objector.
- s) Objector witness No. 2 stated that the objector's child with the deceased was called **Joyce Syokau** and not **Maureen Syokau** a clear indication that he did know the name of the alleged child.
- t) There was no matrimonial home built for the objector by the deceased to signify that she had been married and as such the objector ought to have led sufficient evidence to support her allegation of cohabitation with the deceased after the alleged customary marriage. She did not do so and no material was placed before the court upon which the court can hold that the deceased and the

objector cohabited as husband and wife.

u) No evidence was led as to why the alleged dowry in respect of the objector had to be paid to her younger brother, **Moses Mutua Mbithi** (Objector Witness No. 3) and not the objector's parents or the elder brother of the objector and no any expert witness on Kamba customs was called to confirm if payment of dowry to a younger brother was part of the Kamba marriage custom.

v) The Objector is an intruder and stranger to the estate of the deceased and who only turned up after the deceased's demise to claim entitlement with the support of the deceased's brother.

w) The Objector did not produce any documentary evidence to confirm whether they had sired any child with the deceased as alleged.

x) It was not proved that the deceased was taking care of the objector and her alleged daughter before he died.

y) The Objector has failed to prove that she was married to the deceased and that her child **Maureen Syokau** was sired by the deceased.

61. In support of the submissions the petitioners relied on **In Re Estate of Geoffrey Muchiri Kamau [2016] eKLR**, **Anna Munini & Another -vs- Margaret Nzambi [1984] eKLR**, **Hortensiah Wanjiku Yawe vs. The Public Trustee** Court of Appeal Civil Appeal 13 of 1976 and **Raphael Ratemo & Another vs. Emily Musinai [2017] eKLR**.

62. It was the Petitioners' submission that the applicant's summons for revocation of grant cannot cause an otherwise valid grant to be revoked. To them, the objector has not placed any material before the court to show that she was the 1st wife of the deceased and that grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding the allegation was made in ignorance or inadvertently. They submitted that the Objector should find no solace and this Honourable Court should not allow her to find any.

63. The Court was therefore urged to dismiss the applicant's chamber summons application dated 13th August 2015 with costs for being an abuse of the court process.

Determination

64. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

65. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

66. In this case the Objector's case was based on grounds (b) and (c) above. Her contention was that that the Petitioners did not disclose the fact that she is the 1st wife of the deceased and that they together sired a daughter. The second ground was that the Petitioners never disclosed all the deceased's properties.

67. It was her evidence that they got married under Kamba customary law in 1979 following the performance of all the rites and rituals in the presence of both family members and other witnesses. It was her evidence that dowry was paid in 1985 though she could not recall the month. Since her father was dead by then, the dowry was paid to her elder brother, **Moses Mutua**, at a ceremony attended by one of her uncles, **Josephat Mutua**. According to her, due to the short notice, there were no neighbours and the ceremony was not a big one and was only attended by her brothers and sisters. From the deceased's side were his father, brother **Muthama** and sisters. However, her witness, **Moses Mutua Mbithi**, her own brother, who was allegedly present during the ceremony testified that his two other brothers are **Onesmus Mbithi** and **Maxwell Mbithi** and that he does not have a brother called **Morris**. According to him the dowry payment was made in his presence and in the presence of his brother and two wives and at that time he was 25 years. However, his sisters were not there. He admitted that he has an elderly uncle known as **Josephat Mulwa** though at the time he had many maternal uncles who did not attend. According to him, there were no neighbours. PW1, **Daniel Muthama**, on the other hand testified that from the family of the Objector, were two brothers, one of whom was called **Morris** to whom the dowry was paid.

68. It is therefore clear that even the persons who were present during the alleged ceremony cannot be ascertained due to the contradictions in the evidence of the Objector and her witnesses. It cannot be by coincidence that **Daniel Muthama**, stated that the dowry was paid to **Morris** while DW3 insisted it was in fact paid to him and that he was unaware of a brother called **Morris**.

69. While the Objector testified that the deceased's family brought three goats, one of which was slaughtered by **Muthama, Muthama**

himself who testified as PW2, was categorical that the goat was slaughtered by his son and another person who was hired.

70. The Objector, despite being aware of the proceedings before Kangundo Court in which the Petitioners were battling over who was to bury the deceased, decided for some strange reason to keep off. In the said proceedings both the deceased's father and the deceased's brother, **Daniel Muthama**, the only witness of the Objector from the deceased's family, stated that the deceased had only two wives, the Petitioners herein. As if this was not enough, the deceased himself had sworn in an affidavit that at the time he married DW1, **Lucia**, they were both single and he was a bachelor. After the termination of the Kangundo proceedings, the funeral ceremonies proceeded with the Objector not appearing anywhere in site. She did not even deem it fit that either herself or her daughter should pay last respect to the deceased. While there were family members who never attended, they had an explanation for having not attended the burial of the deceased as being in compliance with the deceased's father's instructions. However, the Objector seems to have had none.

71. As regards, the Objector's cohabitation with the deceased, only PW2 testified to that. Having already averred that the deceased's only wives were the Petitioners, his evidence must be treated with a lot of suspicion. To be believable the Objector ought to have called another witness to confirm PW2's testimony. There was the mother of the deceased and the caretaker, both of whom were never called.

72. As regards the alleged dowry ceremony, it is clear that if it ever took place, it was conducted in a hurry and almost in secrecy. None of the persons present save for PW2 and the Objector's brother testified to confirm its occurrence. As I have stated above their evidence contradicted each other in material respects. Ordinarily payment of dowry in African Culture is never a private affair especially where it is being conducted in a rural set up. That dowry is not paid in secrecy was conceded to by PW2 though according to him, it was meant to enable the deceased go back to his work and that there was a fear that the deceased would get lost unless the ceremony was arranged. This explanation, with due respect was not convincing. Just like in statutory marriage some independent witnesses do often participate therein. In this case no other ceremony seems to have taken place thereafter and after the ceremony, the couple seems to have not even immediately stayed together but the Objector continued staying at her parent's home while the deceased proceeded to his place of work.

73. Dealing with the essentials of Kamba customary marriage, **Kneller, J** (as he then was) in **Anna Munini & Another vs. Margaret Nzambi [1984] eKLR** expressed himself as hereunder:

“The usual steps taken for a marriage between a Kamba man and a Kamba woman according to their customs were not dealt with in much detail in the evidence. Nzambi's father Muli said they included these:-

“..... the man has to ask the woman to marry him and if she agrees they begin living together. An elder of the man's clan goes to the parents of the girl and says they are married. There are two types of marriage. First, where it is the first time she is married or secondly it is not the first time. Her parents must know if she is to be married on any occasion but the first. She will have returned from the previous marriage to the home of her parents. On the first occasion the parents will not know she is married until the man sends a messenger to tell them their daughter is with him, married to him.

The man's father prepares African liquor. He takes it to the father of the woman. He tells the girl's father his son has married the girl. The fathers then meet when the man's father brings the girl's father 7 goats. The seventh is eaten. The father of the man then pays the agreed dowry. The standard rate is plenty of African liquor prepared by the boy's father, the amount the elders on each side fix as the dowry, say 8 head of cattle, 46 goats, Kshs 5,000 (or Kshs 4,000 or Kshs 3,000) cash.”

The others who spoke about them each added further ones but they were by no means unanimous about them. Thus, between them, they listed these. Each party must consent to the marriage. The bride-price or dowry must be paid by the man's father, or, if he is dead, his guardian, in the presence of some elders. The mother of the groom must discuss the proposed marriage of her son with the father of the girl (and, presumably inspect her”) If it is a second or third marriage then the man must tell his wife or wives he is marrying again so they may go and see the woman and attend the ceremonies. (Munini and Musangi were adamant that if this were omitted, why then the union was no marriage).

At the end Mr Mututo brought in Dr Cotran's summary of the essentials of a valid marriage in kamba customary in Kenya: *I Marriage and Divorce*, 1st edn, (1968) 28 which is :-

- (a) Capacity**
- (b) Consent**
- (c) Slaughter of a billy goat**
- (d) Marriage consideration**
- (e) Cohabitation**

Dr Cotran deals with each, save for cohabitation, in greater detail beforehand (see pp 23 and 24) and I set out some of these details.

At one time the male and female had to be circumcised to marry (p 23). The female may still not marry before she has had her first menstrual period. The man may enter into any number of marriages provided each subsequent one is valid. A woman may not do so while her husband is alive. Consanguinity, affinity, a blood brotherhood relationship or the fact that the intended parties were breast fed by the same woman are bars to marriage among the Wakamba.”

Dr Cotran has the same steps in the formation of the marriage as those in the evidence though he has it that the mother of the man visits the mother of the woman to see that she is satisfied, though which mother is meant to be satisfied is not clear. At any rate it is not the man's father she visits, as Ruth Gatongu would have it. Then there are visits with presents of goats and beer made by the man's father or relatives to the woman's father (and during one of those the dowry is fixed) and a return visit by the man's father and some of his elders to see what sort of family his daughter is joining. Later, the girl is collected by her future husband and escorted to his house. He is accompanied by one male and two female relatives. The bride's neck is smeared with ghee by her mother-in-law on arrival. The marriage is not consummated that night but on the next. The bride is visited by her friends on the third day with presents and they wail with regret because she has left the ranks of the unmarried (and what the husband's reaction to that, if he hears it, is not revealed).

Dr Cotran includes one that was not touched upon in the evidence. One of the billy goats (which he calls a ram) belonging to the man's father or guardian must be slaughtered by the woman's father and its blood allowed to seep into the ground.

So some of the conditions are in the evidence and some in the book and some in both. It all depends, of course, on what questions the witnesses in this trial and members of the special law panels, made up of persons having special knowledge of the Kamba law, were asked. They were not the same and they were more numerous for the panel."

74. In my view, what happened between the Objector and the deceased, if it occurred at all did not meet the essentials of Kamba customary marriage. Duffus, JA in Kimani vs. Gikanga [1965] EA 735 at pg. 739 pronounced himself as follows on customary law:

"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."

75. I associate with the sentiments expressed by Musyoka, J In Re Estate of Geoffrey Muchiri Kamau [2016] eKLR that:

"it is clear that the traditional marriage is a communal affair. It is matter involving both families, that of the man and the woman. It is not a private matter for the man or even the woman. Both their families must be involved for the woman thereafter becomes a member of the man's extended family. This process is intended for the protection of the woman for it gives her status and recognition as a wife in that extended family...Indeed, it would appear that the whole affair was conducted in secrecy, if at all there were such ceremonies. It does not have the hallmarks of a traditional marriage in my view...That should be taken against the absence of sufficient evidence to support cohabitation between the deceased and the applicant after the alleged customary law marriage...When the deceased died, neither the applicant, nor her daughter, nor her other relatives were in the picture. They did not appear to have been aware of the fact that he was ailing and had been hospitalized. They were not in the picture during the mourning period, nor at the funeral, yet there was no evidence that anybody had obstructed them from playing a role in the same. That is a matter that should arouse curiosity with respect to a woman who says that she had been validly married customarily. From the foregoing, I find myself unable to hold that the applicant was a customary law wife of the deceased. She cannot therefore seek refuge in section 3(5) of the Law of Succession Act."

76. It is clear that the people whom the Objector called to support her case could not be termed as impartial witnesses. One was his brother while the other was a person, **Daniel Muthama**, had a bone to pick with DW1. Having failed to successfully stop DW1 from burying the deceased through DW2, and the two petitioners having buried their hatchet and resolved to work together, it is not surprising that he sought out the Objector herein as the means through which he would achieve his objective.

77. As regards cohabitation, Musyoka, J expressed himself In Re Estate of Geoffrey Muchiri Kamau (supra) as follows:

"Perhaps the applicant can argue that a marriage could be presumed from cohabitation. The principle of presumption of marriage from prolonged cohabitation was stated in *Hortensia Wanjiku Yawe vs. The Public Trustee Nairobi* CACA No. 13 of 1976. This is considered to be the local case *classicus* on the principle. It was said in that case that a marriage could be presumed from a prolonged cohabitation between a man and a woman. The said decision has been followed with approval in a number of cases. The foundation of the principle is cohabitation. There must be proof that the man and woman lived together for a considerable period of time. That then is considered alongside other factors; such as the couple had a child or children together, the children were named following a traditional pattern which suggests marriage, property acquired jointly or together by the parties as would be the case in a marriage, among others. I have carefully gone through the evidence presented before me. I have already concluded that there is no material upon which I can hold there was what can be described as cohabitation between the parties, long enough for the court to find that there was prolonged cohabitation. None of the witnesses called by the applicant could categorically say that the two lived together. Most of the witnesses presented allegedly related to the applicant and the deceased at the work place and not at their residence. None of them could coherently describe how the two lived together. Then there is the child who did not know her father until she was in Standard Six, yet she was alleged to have been born within wedlock. The evidence about the deceased's hospitalization and subsequent death is also telling. The applicant was apparently unaware of all that. She never visited the deceased in hospital, nor even participated in the funeral arrangements after he died. It telling that she did not even attend the interment of his remains. Her relatives, including her own daughter, did not attend the burial. All these factors taken together do not, in my view, support a case that there had been a prolonged cohabitation from which I could presume marriage."

78. In this case only PW1 testified as regards the purported cohabitation between the deceased and the Objector. The Petitioners who testified

that they would visit the deceased in Nairobi stated they never knew the Objector till she appeared in Court. There was no evidence about the existence of her daughter who never even made appearance in court. The Objector admitted that she never had a homestead constructed for her by the deceased and this was supported by her own witnesses, which was rather strange for the 1st wife who was so close to the deceased that at the time of the deceased's death she was the only one by his side. There was even no evidence in form of photographs taken between the deceased and the Objector of that cohabitation for a couple that was staying in town.

79. In this case, going by the Objector's own evidence that though the Petitioners knew her, they used to fight her whenever they went to Nairobi and that when she attended the burial of the deceased's father, she was not recognised as one of the deceased's wife at the funeral, an attendance no one, even her own witnesses testified to, she ought to have been put on notice that in the event of the deceased's death, she would not find the going easy. In such circumstances, for her to take a laid back approach when the battle for the burial place was raging between the petitioners, was uncharacteristic with what is expected of a first wife in her circumstances. It is therefore not surprising that the only property of the deceased that the Objector lays claim to is the Dandora plot.

80. Having considered the facts of this case, I am not satisfied that the Objector has proved to the required standards that she was a wife of the deceased. In the premises, the Summons dated 13th April, 2015, fails and are dismissed but with no order as to costs.

81. It is so ordered.

Read, signed and delivered in open Court at Machakos this 4th day of March, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzei for Mr Nzavi for the Objector

Mr Musila for Mr Kingoo for the Petitioners

CA Geoffrey