REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2388 OF 2012

IN THE MATTER OF THE ESTATE OF LIHASI BIDALI alias CHARLES LIHASI alias CHARLES LIHASI BIDALI (DECEASED)

JUDGMENT

1. Charles Lihasi Bidali, the deceased, died on 21st July 2012, and thereafter Yose Musela Bidali, a son of the deceased, petitioned for a grant of letters of administration *ad litem* together with an application for a grant of letters of administration *ad colligenda bona*. The said application for grant of letters of administration *ad colligenda bona* was for purposes of preserving the estate, which Yose Bidali alleged was in danger of being wasted or taken away by 'some people.' The said application for a grant *ad colligenda bona* was declined with the court directing that the petition for the full grant be processed. Yose Musela Bidali had previously filed for a grant of letters of administration *ad litem* for purposes filing suit as personal representative of the estate regarding one of the properties of the estate, being LR No. 209/118/77. The said grant of letters of administration *ad litem* was issued to Yose Bidali on 4th October 2012. On 14th October 2012, Yose Musela Bidali filed a petition for grant of letters of administration *ad colligenda bona*.

2. On 12th October 2012, Grace Wambui Bidali and Bidali Lihasi, 1st Objectors, filed an application against Yose Bidali, seeking that the grant *ad litem* issued to him be revoked or, in the alternative, Bidali Lihasi be included as a co-administrator in respect of the grant *ad litem*. The 1st objectors stated that the grant *ad litem* was obtained by concealment of material facts, that the 1st objectors were members of the second family of the deceased, in terms of Grace Wambui being the second wife of the deceased and Bidali Lihasi, a son of the deceased by Grace Wambui. They also alleged that there was a will purportedly written by the deceased awaiting to be read by the firm of Messrs. Midikira & Company, Advocates. In his affidavit sworn on 5th December 2012, Bidali Lihasi deponed that attempts to have the purported will made public had been futile. He added the grant *ad litem* issued to Yose Bidali was being used by him to intermeddle with LR No. 209/118/77, which the 1st objectors claimed had been their home since 1972. They also accused members of the 1st family of sidelining them in the funeral arrangements of the deceased and the funeral itself.

3. The 1st Objectors petitioned for a grant of letters of administration intestate on 24th January 2013 after citations had been issued at their behest dated 5th December 2012. by an order of this court of 29th January 2013, the two petitions for the full grant of letters of administration intestate were consolidated with the 1st objectors being directed to file affidavits indicating how they considered themselves to be beneficiaries of the estate of the deceased.

4. In his response to the petition by the 1st objectors, Yose Bidali, stated that the deceased had only one wife, Jedidah Kisia Lihasi, married under the African Christian Marriage and Divorce Ordinance in 1954 at the Friends' Church, Kidundu in South Maragoli. He stated that at the time of filing the response, they could not trace the marriage certificate but he undertook to present the same to court once at hand. He denied that the deceased was ever married to any other person under any regime of marriage law. He impeached the credibility of the Chief's letter dated 28th November 2012 claiming that the said letter is a forgery as it was not written on the official government letterhead, and it did not prove marriage between the deceased and Grace Bidali. Yose Bidali further stated that Grace Bidali was married to someone else at the time that she claimed she was married to the deceased. He further claimed that Grace Bidali never had a permanent residence in Ngara, Nairobi. he impeached the credibility of the birth certificates annexed to the affidavit of Lihasi Bidali, to support their claim that the children of Grace Wambui had been sired by the deceased, stating that the certificates were fraudulently acquired as some were acquired way after the dates of birth of the alleged children, and that they bore one or two names and were obtained at the same time between January and February 1982. Yose Bidali stated that Grace Wambui Bidali was an employee of the business known as Bidali & Company which was started before 1972. He further contended that LR No. 209/118/77, the Ngara House, was acquired by his mother, Jedidah Bidali, and the deceased, who was registered as a trustee thereof way before 1972. He stated that Grace Bidali and other employees were accommodated in the Ngara house. Yose Bidali denied that the deceased was taking care of Grace Bidali and her children by way of financial provision. He conceded that there was actually a will left by the deceased. He stated that Midikira, advocate, the executor named in the said will had informed him that he was ready to read the same as long as all children of the deceased were available, especially those living outside the country.

5. The court directed on 11th March 2013, by consent of the parties, that the said will of the deceased be read to the beneficiaries within thirty (30) days from the said date and that the said will be deposited in court.

6. There was compliance with the said directions. A will dated 26th March 2012 was subsequently deposited in court. I have had occasion to peruse it. It was apparently signed by the deceased and witnessed by one Billy Amendi and another witness who is unnamed. the will stated:

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(a) That the testator had one wife, Jedidah Kisia Lihasi, whom he had married at the Friends Church under African Christian Marriage Act;

(b) That he had fathered children whose names were recorded as Rose, Lilian, Kaisa, Bidali, Kageha, Teresia, Jane and Peter;

(c) That his lawyer, one Felix Ayuya Midikira, had been appointed executor and trustee of the will;

(d) That he had the following assets: money in a bank account at Barclays Bank Moi Avenue branch, motor vehicles registration marks and numbers KAX 127L and KAT 883Y, LR. No. 209/118/77, Dagoretti/Thogoto/1814, Dagoretti/Thogoto/1815, Dagoretti/Thogoto/1817, Dagoretti/Riruta/3720, properties at Githurai, shares in Kamuthithi Society, LR Number 4859/12(Original Number 4859/2/1) LR Number 4859/12(Original Number 4859/2/1), LR No. 209/8053, L.R Number Tiriki/Gisambai/600, Shares in Utee Estate Limited, Plot Number 36 VII 364 Eastleigh and household items; and

(e) That he allegedly bequeathed the said assets as follows: -

(i) cash balance at Barclays Bank Limited, Moi Avenue Branch, to be used to pay off debts and other expenses related to execution of the will, with the balance being shared equally among the children named in the will;

(ii) motor vehicle registration mark and number KAX 127L, to Jedidah Kisia Lihasi;

(iii) motor vehicle registration mark and number KAT 883Y, to Kennedy Agufa Bidali;

(iv) LR. No. 209/118/77, to Jedidah Kisia Lihasi;

(v) Dagoretti/Riruta/3720, Dagoretti/Thogoto/1814, Dagoretti/Thogoto/1815, and Dagoretti/Thogoto/1817, to all his biological children;

(vi)properties in Githurai, shares in Kamuthithi Society and LR No. 4859/12(Original Number 4859/2/1), to Jedidah Kisia Lihasi;

(vii) LR No. 209/8053, to his children Grace Ageyo, Hellen Vuligwa, Flora Bidali, Joyce Asagi, Rose Wangari and Lilian Nyambura;

(viii) Tiriki/Gisambai/600, to Jedidah Kisia Lihasi;

(ix) shares in Utee Estate Limited, to Jedidah Kisia Lihasi;

(x) Plot No. 36 VII 364 Eastleigh, to Jedidah Kisia Lihasi; and

(xi) household items (including electronics, furniture, clothing, etc.), to Jedidah Kisia Lihasi.

7. On 28th May 2013, the executor named in the will, Felix Ayuya Midikira, petitioned for a grant of probate of the said written will of the deceased.

8. Magdaline Mutugi Bidali, filed an entry of appearance in these proceedings on 1st July 2013, stating that she was a widow of the deceased, together with their children Laimani Bidali, George Kahura Bidali, Esther Wanjiku Bidali, Moses Munene Bidali and Josphat Kimani Bidali, who I shall refer to collectively as the 2nd objectors. Another entry of appearance was filed in the cause on 31st July 2013, by Susan Njeri, who I shall hereafter refer to as the 3rd objector, stating that she too was a widow of the deceased.

9. The petition for probate dated 24th May 2013 was withdrawn on 26th May 2014 by consent, and the executor filed a fresh petition for grant of probate of the written will of the deceased. The said petition excited the filing of a number of objections.

10. The 2nd objectors filed an objection to the making of grant on 1st December 2014, and an answer to the petition and cross-petition on 11th December 2014, and cited the following reasons: -

(a) that at the time the deceased was alleged to have made a will he was physically ill and incapacitated to extent that he could not make a valid will

(b) that due to the illness he would not have known what he was doing; and

(c) that the will made provision for only three of the objectors namely: Jane Nduta Bidali, Peter Njoroge Bidali and Teresia Wagio Bidali leaving out the rest of the members of the 2nd objectors family.

11. The 3rd objector filed, on 9th December 2014, a summons for provision as a dependant, stating that she was a widow of the deceased,

and that she had not been provided for in the will. She asked that she be given properties Dagoretti/Thogoto/1814, Dagoretti/Thogoto/1815 and Dagoretti/Thogoto/1817, which she claimed were verbally given to her by the deceased. She added that she was being maintained by the deceased immediately prior to his death.

12. On 11th December 2014, the 1st objectors similarly filed an objection to the making of a grant citing, *inter alia*, that:

(a) That the purported will was not valid as it was neither paginated nor did it bear the deceased's signature and/or it was not witnessed;

(b) That the purported will was fraudulent as the same was purportedly executed when the deceased was incapable of writing or signing due to ill health;

(c) That the purported will recognized Bidali Lihasi and others as the deceased's children but failed to make provision for them as beneficiaries; and

(d) That the purported will was strange as it distributed approximately 80% of the property to Jedidah Kisia Lihasi who was aged 70 years at the time.

13. In a reply filed on 30th February 2015, the 3rd objector stated, *inter alia*, that the will dated 26th March 2012 was actually valid and that the deceased knew exactly what he was doing at the time of making the will, and that he never lacked mental capacity even after he suffered a stroke. The 3rd objector expressed doubts as whether Hannah Bidali was child of the deceased as she was born in 1969, yet her mother, Grace Wambui Bidali, claimed that she married the deceased in 1972. She added that one of the objectors, Moses Munene**,** was not a son of the deceased, as he was born to Magdalina Mutugi Kahura and one Richard Kimani Kahura, according a certificate of birth that she had attached to her affidavit. She further claimed that she personally knew Magdalina Mutugi, who was married to one Michael Gikonyo**,** who was the father her children. She added that Magdalina changed her name to Magdalene Mutugi Bidali in December 2012. The 3rd objector deponed that the relationship between the deceased and Bidali Lihasi had deteriorated due to his expulsion from school and accusations of drug abuse, which landed him in and out of jail. The 3rd objector stated that Grace Wambui Bidali was an employee of the deceased.

14. Yose Musela filed a replying affidavit on 18th February 2015, stating that he had no reason to doubt the authenticity of the will, saying that the deceased's mental status was "excellent" and he annexed a medical report by one Dr. Tamer E. Mikhail to back up his claim. He further stated that the will was witnessed by two people, and he annexed an affidavit of one of them, Hassanali Mukongo Omido**,** the other unnamed witness who averred that he was the one of the witnesses who attested the will. he reiterated that the deceased had one legal wife, the said Jedidah Kisia Lihasi and annexed a copy of a marriage certificate issued on 25th March 2013.

15. Directions were given on 21st January 2014 for disposal of the objection proceedings by way of *viva voce* evidence. The matter was disposed of by way of affidavit and *viva voce* evidence, where the parties and their witnesses breathed life to the averments made in their various filings, and they were extensively cross-examined. they then filed written submissions on diverse dates.

16. I have perused through the documents and processes filed by the parties hereto, inclusive of the written submissions, as well as the recorded oral testimonies, and I have identified the following as the issues for determination -

a) whether the will dated 26th March 2012 was valid; and

b) whether the 1st, 2nd and 3rd objectors were survivors of the deceased.

17. On the validity of the impugned will, it was the case by the executor, Felix Ayuya Midikira, that the deceased was in his right state of mind when he instructed him to prepare a will, and that the deceased knew what he wanted to do pertaining the will. In his testimony, he stated that he was the one who drafted the will dated 26th March 2012, saying that he had previously drafted two other wills for the deceased in 2009. He added that the will was executed by the deceased and attested to by one Billy Amendi and that though the name of the other witness was not indicated, the deceased informed him that it was signed by one Hassanali Omido. he further testified that the deceased was communicating effectively. He relied on a medical report by Coptic Hospital, dated 25th October 2013, which confirmed that the deceased, though ill, was 'fully conscious, oriented to time, place and persons and was of average intelligence and aware of his surroundings.' He added that there was no evidence tendered by the objectors to controvert that position.

18. In his written submissions, the executor cited and relied on the decisions in *Re Estate of Samuel Ngugi Mbugua (deceased)* (2017) eKLR and *Re Estate of Murimi Kennedy Njogu(deceased)* (2016) eKLR**,** where it had been held that section 5(3)(4) of the Law of Succession Act, Cap 160, Laws of Kenya, creates a presumption that the maker of a will is of sound mind unless otherwise proved, and that the burden of proof as to the unsoundness of his mind was on the person who alleged that he was not. He submitted that the persons who acted as attesting witnesses to the will had confirmed the deceased's signature and their own. He submitted that ill health and physical infirmity was not a ground to invalidate a will.

19. On the issue of forgery, he relied on *Re Estate of Kimani Kahehu (deceased)* (2018) eKLR in respect of the standard of proof required for forgery, where the court in part stated that it was up to the applicant who alleged that the will was a forgery to prove the same. He further submitted that it was usually necessary to subject the impugned document to testing of the impugned signatures by a document or handwriting expert. He submitted that the objectors' position that the will was a forgery was made before the said objectors got document examiners to prepare reports which were presented in court, and that the said reports were sought solely for the purpose of vindicating and validating their position. It was his further submission that the evidence of one of the handwriting experts, Mr. Emmanuel Kenga, did not identify the documents used for purposes of comparison with will, a fact the executor submitted, was conceded by expert himself when he

testified. The executor added that handwriting expert did not attach the documents he used during his document-examination in his report. The executor urged the court not place any weight on the expert's report. On the document examination report prepared by Mr. McKenzie Mweu, it was his submission that that expert had relied on photocopies and information from one of the objectors Peter Njoroge Bidali for his examination rather than on original documntss. He supported the report of Mr. Alex Mwongera, who he claimed was in government service unlike the other document examiners. In the report by Mr. Mwongera it was confirmed that the signature appended to the will matched that of the deceased. He submitted that all the beneficiaries, seventeen (17) in number, save for Bidali Lihasi, did not object to the will. He added that failure by a testator to make provision for dependants was not a ground to invalidate a will.

20. Yose Musela Bidali's case was that the will was properly executed, and that the attesting witnesses, Billy Amendi and Hassanali Omido, testified in court, confirming that they had seen the deceased execute the will. He agreed with the examination report of Mr. Mwongera, and impeached the credibility of the other examiners' qualifications. He added that Mr. Mwongera employed the use of the latest technology at the Directorate of Criminal Investigations (DCI) which he claimed was unavailable to the other examiners. He further submitted that the opinions of the other examiners failed to meet the threshold of an opinion that could influence court. He relied on *Re Estate of Njoroge 'B'(Deceased)* 2018 eKLR. He concurred with the executor that the incapacity of the deceased as alleged by the objectors was not proved by them. he could not reconcile how the deceased, whose health had apparently deteriorated in 2008, after a mild stroke, as claimed by the objectors, had capacity to execute transfer forms in respect of the Ngara house in 2011 to them. He added that he had produced at least two medical reports confirming that the deceased was of physically and mentally sound, a fact he said was also conceded by the objectors. He relied on *Atter & others vs. Atkinson & Anor* (1869) L.R (I.P) D 665 and *Wingrove vs. Wingrove* (1885) 11 P & D 81. He added that the deceased had on two previous occasions mentioned that he had intended to write a will and that the deceased had attempted transfers of some properties consistent with the intentions in his will, and that he had indeed confirmed that there was a will.

21. The 1st objectors' case was that the deceased was physically and mentally suffering for a long time and that he did not understand what he was doing at the time of making the alleged will. They referred to the testimony of Hassanali Omido, who they claimed stated that the signature on the original will was a bit different from the one he was accustomed to. They cited the testimonies of the executor, the attesting witnesses Billy Amendi and Hassanali Omido, Yose Musela and Peter Njoroge Bidali, in concluding that the deceased could not talk, was aided to walk, was incoherent, used signs to communicate and sometimes used written notes to communicate, and sometimes needed an interpreter to communicate with the executor. The 1st objectors questioned the medical reports produced as evidence by Yose Musela. They stated that Dr. Tamer of Coptic Hospital did not tender oral evidence on his medical report, and, therefore, the contents of the report were not tested through cross-examination of the maker of the document. They added that between 2008 and 2012 the deceased was in and out of hospital. They submitted that the law of mental capacity encompassed sound mind, sound memory and sound understanding. They stated that the deceased had forgotten he had other houses and properties because of his incapacity.

22. It was the case by the 2nd objectors that the deceased did not leave a valid will as he did not have the requisite capacity to make one at the time he purported to have done so. They added that the signature in the alleged will purported to be that of the deceased was forged. They submitted that according to the executor, the deceased struggled to talk and that their communication was through sign language. They submitted that according to one of the attesting witnesses, Billy Amendi, the deceased appeared sick on the day of the alleged execution and attestation, and his communication was incoherent. they submitted that according to the testimony of the 1st objector, Bidali Lihasi, the deceased suffered a stroke and lost the strength on one side of the body and lost his power of speech. They further relied on the testimony of Peter Njoroge Bidali, that the deceased had difficulty in walking as his health had deteriorated and that by 2010, he could not write, and that he could at times he used his thumbprint when signing documents. Peter Njoroge Bidali added that in 2011 the deceased suffered another stroke and that he could not talk or write and could not use sign language and therefore he could not have been in a position to give instructions for the drafting of a 'complex document as the alleged will.' They faulted Yose Musela's testimony as being contradictory in that he initially stated that the deceased could not walk or talk or drive by himself, and yet he was still able to collect rent and make summaries until the time of his death. They added that the fact that Yose Musela applied for a grant of representation in intestacy indicated that he was not aware of the existence of any will, saying that the executor could not have failed to disclose such vital information as the existence of a will to the family. On the issue of forgery, they relied on *Elizabeth Kamene Ndolo vs. George Matata Ndolo* Nairobi CACA No. 128 of 1995, where the Court of Appeal had stated that an allegation of forgery had to be proved based on a standard much higher than that required in ordinary civil cases but certainly not beyond reasonable doubt as in criminal cases. They submitted that they sought to prove that allegation by instructing Mr. Mweu, with thirty (30) years' experience, who concluded that the alleged signature of the deceased in the will was a forgery. They submitted that Mr. Mweu's conclusions were corroborated by those of Mr. Kenga. They found it odd that Yose Musela sought to prove the authenticity of the will by instructing his own document examiner if at all he had no doubt about the deceased's signature authenticity. It was their further submission that it took more than a year for the will to be deposited in court, submitting that that was because the executor was buying time to fabricate the will. They submitted that the evidence of Hassanali Omido indicated that he noticed differences between the deceased's signature in the will compared to his normal ones. They concluded their submissions by stating that there was overwhelming evidence that the will dated 26th March 2012 was a forgery obtained by fraud, and asked that the same ought to be declared void.

23. It was the case for the 3rd objector, that from the evidence on record, the deceased made the will dated 26th March 2012. She added the deceased must have been of sound mind and memory, and understood the nature of what he was doing and the properties he was bequeathing. It was her submission that every witness stated that in as much as the deceased was sick, he was aware of what he was doing and that he was aware of the nature of transactions he was handling and the people he was dealing with.

24. Part II of the Law of Succession Act provides for validity of wills, which is dependent on the capacity of the maker.

25. The Court of Appeal, in *Ngengi Muigai & another vs. Peter Nyoike Muigai & 4 others* [2018] eKLR, stated as follows: -

> *'… there is a four-pronged attack on the validity of the Will. It is claimed that it…was a forgery; …We shall examine those sub-issues seriatim.*

26. Firstly, the formal requirements of a valid Will are provided for in Section 11 of LSA which states:

11. No written will shall be valid unless -

a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.'

26. A will is said to be valid if it is made in proper form by a person who has the requisite capacity to make it.

27. The law on capacity is stated in section 5 of the Law of Succession Act. The maker ought to be a person of sound mind, who is not a minor. The provision goes on to state that the soundness of mind of the maker is to be presumed unless at the time of executing the will he was not in a state of mind as not to know what he was doing, on account of either mental or physical illness, or drunkenness, or any other cause. The burden of proving lack of capacity on account of lack of a sound mind is cast on the person alleging that the deceased lacked such capacity. Related to that is the provision in section 7 of the said Act, with regard to wills caused by fraud or coercion or importunity or mistake. Such wills are stated to be void.

28. In the case of *In Re Estate of GKK (Deceased]* [2013] eKLR**,** it was stated that:

'In addition to having testamentary capacity, a testator must know and approve the contents of this Will. A testator will be deemed to have known the contents of his Will if he is aware of its contents and understands the terms. Approval is seen from the execution of the Will and in John Kinuthia Githinji vs. Githua Kiarie & Others, Civil Appeal No.99 of 1988, it was held that it is essential to the validity of the Will that at the time of its execution, the testator should have known and approved its contents … section 5(1) of the Law of Succession Act embodies the principle of testamentary freedom by providing that any person is capable of disposing of his property by Will so long as he is of sound mind. Testamentary capacity has been described as the testator's ability to understand the nature of Will making. This test was set by Cockburn CJ in Banks vs. Goodfellow where he stated as follows:

"He must have a sound and disposing mind and memory. In other words, he ought to be capable of making his Will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them."

This test, applied and set in Banks vs. Goodfellow (supra), was applied with approval by the Tanzania Court of Appeal in Vaghella v Vaghella (1999) 2 EA 351), where it was stated that the validity of a Will derives from testamentary capacity of the testator and from the circumstances attending to its making. This has also been applied in the Kenyan cases of In the Matter of the Estate of James Ngugi Muigai HCSC No.523 of 1996 and also in Mbugua vs. Mbugua Civil Appeal No.23 of 1982.

In Broughton v Knight (1873) 3 P and D 64, the Court held that the testator must have;

'A memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him so that he can decide whether or not to give each of them any part of his property by Will … From a clear reading of Section 11(c) of the Act, to be present at signing means that the witness must be capable of seeing the testator sign the Will and thereafter attest to that fact. The witnessing is to the signature of the testator and cannot be anything else. In Re Colling (1972) 1 WLR 1440, it was held that if a witness left the room before the testator completed his signature, the attestation will also be invalid.'

29. In *Atter & Others vs. Atkinson & Anor* (1869) L.R. (I.P) D 665, it was held that where a Will is prepared by a person who takes a substantive benefit under it, the Will cannot be invalidated if it is proved that the testator was of sound mind, memory and understanding. Further, in *Wingrove vs. Wingrove* (1885) 11 P & D 81, the court stated as follows -

'To make a good will, a man must be a free agent. But not all influences are unlawful. Persuasion appeals to the affections of ties of kindred, to a sentiment of gratitude for past services or pity for future destitution or he like, these are all legitimate and may fairly be pressed on a testator … in a will, the testator may be led but not driven and his will must be the offspring of his own volition and not the record of some else.'

30. In *In re Estate of Murimi Kennedy Njogu - Deceased* [2016] eKLR, it was stated that: -

'It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. [4] The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of Miller vs Minister of Pensions, [5] Lord Denning said the following about the standard of proof in civil cases: -

'The … {standard of proof} … is well settled. It must carry a reasonable degree of probability … if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist … The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of mental capacity. This was the holding of the court in the case of In Re Estate of Gatuthu Njuguna (Deceased)[8] where it quoted an excerpt from Halsbury's Laws of England,[9]

"Where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."'

31. In *In re Estate of Magayu (Deceased)* [2018] eKLR, it was stated that: -

"The applicants contend that the validity of the Will was questionable as at when it was purportedly made the deceased was aged 113 years; that he lacked the capacity to make such a WILL as he was also sickly due to his advanced age and lacked the requisite disposing mind;

The onus or burden of proof to such a contention lies with the applicants; it is note-worthy that the applicants adduced no evidence to controvert the petitioners evidence on the deceased's capability of comprehension and that the deceased was possessed of competent understanding; in summary the applicants called no medical expert nor did they produce any medico-legal report to prove their allegations on the deceased's mental infirmity at the material time to support the lack of testamentary capacity of the deceased at the time of making the will ... "

32. In situations where there are conflicting expert reports, it was held in *Iskorostinskaya Svetlana & another vs. Gladys Naserian Kaiyoni* [2019] eKLR, that: -

' In light of the conflicting reports by the two experts, this court must therefore assess the evidence and form its opinion as to whether the questioned Will was authored by the deceased. In Kenya Ports Authority vs. Modern Holdings [E.A.] Limited [2017] eKLR; Civil Appeal No. 108 of 2016 (Mombasa) the Court of Appeal held that:

"We agree with the learned Judge that in the event of conflicting expert evidence, it is the duty of the court to consider the evidence and form its opinion. However, in so doing, the court must give cogent reasons why it prefers the evidence of one expert over the other."

The question of the alleged forgery of the impugned Will should therefore be determined by the other evidence adduced by the parties

… A reading of several articles relating to handwriting analysis disclose that original documents are required in carrying out analysis of handwritings. Handwriting experts also need several documents with the known signature of the deceased in order to reach an opinion on the signature on a questioned document.

17. In an article titled Forgery and forensics-or-, how not to forge a will and get away with it, chba.org.uk written in 2015, Alexander Learmonth, Barrister, TEP identified other challenges as follows:

"Handwriting analysis

My experience of handwriting evidence is that it is plagued with difficulties. The idea is that an expert can closely examine the handwriting or signature of the deceased on the disputed document, and look for differences and similarities as compared with known examples. The expert will be looking at letter formation, fluency and spontaneity, and pen pressure and line quality to determine whether it is a genuine signature of the person it purports to be, or a 'simulation'. I suppose they use the neutral terms simulation as there may be innocent reasons for copying someone's signature. Almost invariably, the expert will require the original disputed document to inspect. So there may have to be an application to court to have it released. (I don't include that as a drawback, because almost all testing involves having the original.)

Drawbacks

I think there are three main drawbacks with handwriting evidence:

1) Comparable

Any expert worth their salt will want to see a large number of undisputed original examples of the testator's handwriting, particularly I think in the case of a signature. In some cases, it can be hard to assemble a large number of undisputed original signatures.

2) Effects of ill health

Wills are often made by the unwell or infirm. Muscle weakness, arthritis, medication, symptoms of shaking can all affect the appearance of a signature, as well as just the effect of being propped up in bed rather than sitting at a desk.

3) Reliability

The discipline of handwriting analysis accepts that it is more of an art than a science. Hence they tend to use a seven or even nine-point scale to represent their findings, between conclusive or strong evidence that it is the signature of the relevant person at one end, through moderate and weak, no evidence either way in the middle, then weak evidence that it is a simulation, to moderate, strong and conclusive evidence that it is so.'

33. In *Christopher Ndaru Kagina vs. Esther Mbandi Kagina & another* [2016] eKLR the court gave an extensive and intricate analysis on expert evidence, where it was held in different parts of the judgment that: -

'…the general rule is that questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. Expert testimony must be subjected to vigorous cross-examination and ought to be weighed along with all other evidence.

The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions. [8] … I find useful guidance from a passage from a judgment by Sir George Jessell MR in the case Abringer v Ashton[9] where he described expert witnesses as "paid agents." Almost 100 years later Lord Woolf joined the list of critics of expert witnesses in his Access to Civil Justice Report, when he said: -

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."[10](Emphasis added)'

'It is important to bear in mind the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. [13] Four consequences flow from this as reiterated by this court in the case of Stephen Wang'ondu vs The Ark Limited.[14]

Firstly, expert evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[15]

…A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative[18] or manifestly illogical.[19] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence.

It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof.'

34. The Court of Appeal in Rael *Mwonjia Gichunge & another vs. Faud Mohammed Abdulla* [2014] eKLR held that: -

'The contradictions in the two expert reports raised an issue of burden of proof. If the two contradictory handwriting expert reports are to be given zero evidential weight and cancel each other, what is left is to determine who has the burden to prove that the ... is a

forgery. The legal adage is he who alleges must prove ...'

And in *James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 others* [2014] eKLR it was stated that: -

> *'Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the Law of Succession Act to make reasonable provision for the dependant…'*

35. It is my opinion that the three reports by the experts do not independently help the court to make a determination with finality as to the authenticity of the deceased's signature. This is because all of them relied on copies of the impugned will, as opposed to the original will in arriving at their findings. I also sense that those reports had some level of bias and were generated to suit the interests of the parties who sourced them rather than assist the court with impartiality as is required of expert evidence. It is my opinion that the impugned signature in the will belongs to the deceased and that the differences between that signature and the ones made in his other documents were minor and did not negate its authenticity. The court has to decide on the authenticity of the deceased's signature based on other available evidence. I find the evidence of Billy Amendi and Hassanali Omido cogent and unshaken. I have no doubt that it is the deceased who took the will to both of them and that he gave a personal acknowledgment of his signature to the witnesses, who thereafter attested to his signature on the will in his presence.

36. I find it curious that the executor and Yose Musela relied on the medical report by Dr. Tamer E Mikhail, but chose not to call him to be cross-examined on its contents. However, I do note that it was the objectors who had an issue with the competence of the deceased to make the impugned will. It was incumbent upon them to call medical evidence on the mental condition of the deceased at about the time of the making of the will. The only available evidence is that by Dr. Tamer, which stated that the deceased was of average intelligence and aware of his surroundings during the period between November 2008 and July 2012 when the said doctor treated him. I respectfully disagree with the 1st and 2nd objectors' submissions that the deceased's lack of coherence in speech and remote mobility affected his mental capability.

37. I find that the deceased was physically unwell, but had the mental capacity to execute the will dated 26th March 2012. It is my opinion that the will dated 26th March 2012 was properly executed by the deceased and that his signatures were properly attested by the witnesses.

38. The court determines validity of a will, and construes it, and does not rewrite or recreate it. It upholds it so long as there is evidence that it was made in proper form by a person who had the requisite capacity, and his intentions and wishes can be ascertained from the body of the testament. The court in *In the Matter of the Estate of Late Sospeter Kimani Waithaka* Succession Cause 341 of 1998 *stated that* -

> *'The Will of the departed must be honored as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries or dependents, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.'*

And *In re Estate of Chadrakant Devchand Meghji Shah (Deceased)* [2017] eKLR the court said that: -

> *'Rule 17 of the First Schedule of the Law of Succession Act provides that a testator shall be presumed to calculate against intestacy and that a construction avoiding intestacy shall be preferred. Although the rule makes a presumption against intestacy, the function of this Court is to construe the testator's Will, not to make a new will for him…'*

39. On the second issue, it is critical to understand who the three categories of claimants were in relation to the deceased. Their cases, as they appear to me from the record, are that they were also survivors of the deceased, who ought to have been provided for in his will, and whose exclusion from benefit suggested that the will did not reflect the wishes of the deceased.

40. According to the impugned will, the deceased allegedly only recognized one wife, who had had allegedly married under statute. A copy of an entry of marriage certificate was placed before the court as proof of that marriage. The will further indicated that the deceased other children, apart from the ones he had with his statutory wife, the others were named as Rose, Lilian, Kaisa, Bidali, Kageha, Teresia, Jane and Peter**.** In his affidavit in support of the petition for probate of written will the executor listed the survivors of the deceased as Jedidah Kisia Lihasi, Asa Lavasa Bidali, Evans Mulindi Bidali, Grace Ageyo Ogoli, Hellen Vurigwa Bidali, Florence Oresia Bidali, Joyce Asagi Bidali, Rose Wangare Bidali, Kennedy Agufa Bidali, Lilian Nyambura Bidali and Musa Sabwa Bidali.

41. The 1st objectors submitted that the deceased was a polygamous man, who had more than twenty-three (23) children, with many of them not adequately provided for in the will. They added that there was no evidence on record to suggest or prove that Jedidah Kisia Bidali was the only wife of the deceased. They challenged the authenticity of the entry of marriage put in evidence by Yose Musela. They further submitted that there was no evidence or explanation as to where the original marriage certificate was. They accused Yose Musela of circumventing the provisions of sections 67 and 80 of the Evidence Act, which required that documents be proved by primary evidence. They impeached the credibility of the marriage entry certificate stating that the officer who purportedly made it was not disclosed and the certification stamp was not appended. It was their submission that the said marriage certificate was a forgery and should not admitted. They added that the name indicated in the said marriage certificate was Jerida Kisia and not Jedidah Kisia. The pleadings filed by the 1st objectors contend that the deceased left following survivors from their home which they referred to as 'the second home' - Grace Wambui Bidali, Bidali Lihasi, Hannah Bidali, Kageha Bidali and Kaisa Bidali.

42. It was the submission of the 2nd objectors that Magdalene Mutugi Bidali alias Magdalina Mutugi Kahura was a wife to the deceased having been married in 1977. It was submitted that she cohabited with him as husband and wife at their family home in Thogoto at Dagoretti. They added that there was a Kikuyu traditional wedding ceremony known as *ngurario*, that was conducted to authenticate their marriage, as evidenced in the photographs that they had placed on record. They added that Magdalene Mutugi Bidali and the deceased had six biological children, namely: Esther Wanjiku Bidali, Moses Munene Bidali, Josphat Kimani Bidali, jane Nduta Bidali, Peter Njoroge Bidali and Teresia

Wagio Bidali. They added that the deceased took in Laimani Bidali and George Kahura Bidali as his own children. On the relationship between Magdalene and the deceased, the 2nd objectors submitted that they jointly owned their Thogoto home at Dagoretti and the deceased was in the process of transferring some properties to be jointly owned between them. They asserted that was sufficient evidence that their relationship was not casual. It was their submission that Magdalene Mutugi Bidali was a wife under section 3(5) of the Law of Succession Act, and they relied on the case of *Irene Macharia vs. Margaret Wairimu Njomo* Civil Appeal Number 139 of 1994 which had defined the effect of section 3(5) of the Law of Succession Act.

43. It was the submission of the 3rd objector that the true survivors of the deceased were those listed in the Will dated 26th March 2012. She also asserted that she was also a true survivor of the deceased. She submitted that she only knew of Jedidah Kisia Lihasi as the only wife to the deceased, and that Magdalene Mutugi had been married to one Richard Kimani Kahura whom she never divorced.

44. Yose Musela submitted that none of the objectors had a claim to the estate as no evidence had been adduced to show that the deceased was supporting them before his demise. He further argued that there was no cross-petition or application for provision under section 26 of the Law of Succession Act on record. He submitted that that was fatal to the objectors' claims in respect of section 68 and 69 of the Law of Succession Act. He relied on the decisions in Re *Estate of Grace Nyambura Waweru (Deceased)* (2017) eKLR and *Re Estate of Zuhura Salim Dossa – Deceased* (2014) eKLR. It was his submission that the deceased was statutorily married to one wife, Jedidah Kisia Bidali and the marriage certificate produced was not disputed or objected to at the time of production. He relied on section 38 of the Evidence Act on admissibility of a fact in issue made by public servant in the discharge of his official duty such as the marriage certificate. He submitted that the deceased had no legal capacity to marry any other wife at all and he relied on the case of *SMM alias GSM alias SSM vs. CAKM* (2017) eKLR. He added that the section 37 of the now repealed Marriage Act, Cap 150, Laws of Kenya, was a mirror of section 9 the new Marriage Act. He relied on *MNM vs. DNMK & 13 others* (2017) eKLR. He added that the misspelling of Jedidah's name could not invalidate the marriage and concluded by submitting that there was no reason to interfere with the intentions of the deceased in distributing his estate as per the will.

45. In *In re Estate of Wilfred Kihara Kariuki (deceased)* [2018] eKLR the court held that:

> *'On the first issue as to marriage, the 1st Administrator asserted that the deceased lacked the capacity to contract another marriage during the subsistence of his earlier marriage. The Petitioner presented a certificate of marriage no. 296271 which indicates that she and the deceased contracted a marriage under the African Christian Marriage and Divorce Act (CAP. 151) on the 8th Of November, 1975. The Act has since been repealed by the Marriage Act No. 4 of 2014…Under section 6(2) of the Marriage Act, a Christian, Hindu or civil marriage is monogamous. Section 6(3) of the Act provides that a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous. A marriage under CAP. 151 is a Christian marriage by virtue of its section 3(1) which states that the Act applies to marriages of Africans, one or both of whom profess the Christian religion. Section 9(3) stipulates that such a marriage can only be dissolved by a valid judgment of divorce and if one illegally contracts another marriage while it remains undissolved, they shall be guilty of bigamy.*

33. The evidence presented before the court clearly demonstrates that the deceased lacked the capacity to contract a marriage having contracted a monogamous union with Tabitha Waithira, the 1st Administrator herein. With this finding, the issue of presumption of marriage dissipates … M/s Nyambura for the 1st Protester submitted that the 1st Protester is a wife for the purposes of succession and cited section 3(5) of the Law of Succession Act which provides thus:

> *"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."*
>
> *The question that follows then is whether Lilian Wanjiru, the 1st Protester herein, is a wife for the purposes of succession and therefore entitled to share in the estate of the deceased.*

35. In the case of Irene Njeri Macharia vs. Margaret Wairimu Njomo & Another [1996] eKLR, Omolo, Tunoi, & Bosire JJ A held that:

> *"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 at 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…*
>
> *…Josephine was, nevertheless, a wife for the purposes of the Law of Succession Act, and in particular sections 29 and 40 of the Act.*
>
> *In the appeal before us, we have said we do not know whether the first respondent and the deceased ever went through any ceremony of marriage; we are also not certain if the concept of a presumed marriage could be applied to their circumstances. In the absence of such evidence, we are unable to say whether she could qualify as a 'wife' under the provisions of section 3(5) of the Law of Succession Act."*
>
> *…….*

'37. Eugene Cotran's "Case Book on Kenya Customary Law" sets out the essentials of a Kikuyu Customary marriage at page 30 as follows:

1) Capacity: the parties must have capacity to marry and also 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 customary 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. That is 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.

38. The requirements outlined in the book were restated by the Court of Appeal (Nambuye, Kiage & Murgor, JJ A) in the case of Eva Naima Kaaka & Another vs. Tabitha Waithera Mararo [2018] eKLR. The appellate court further observed that:

"When the particulars of the alleged ceremony are compared with the 'essentials of a Kikuyu customary marriage' as described by Eugene Cotran, and Gituanja vs. Gituanja [1983] KLR 575 it is plain to see 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. But our reevaluation of the evidence does not point to a ngurario having taken place. This is because a fundamental component of ngurario is the slaughtering of a ram or goat.

During the visit to Nyeri in 2011, no slaughter of a ngurario ram was evident…From the above it becomes apparent that, no 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 Waithera and the deceased.

It is also worth noting that Waithera did not provide any description or particulars of the alleged ceremony; her evidence is clear, "…there was no marriage…" Essentially, her testimony was limited to 2008 when the deceased, together with one Joseph and Karanja, who are elders and his friends, visited her parents to introduce the deceased as the person who intended to marry her. It would seem that it remained just that: an intention, to marry. The learned judge erroneously concluded that Waithera was married to the deceased under the Kikuyu-Maasai Customary Law, despite the cogent evidence that the essentials of such a marriage were not satisfied. In our view, this omission negated the existence of a Kikuyu customary marriage, and we so find."

"…Lilian did not tender any evidence to show that the "ngurario" ram or goat was slaughtered to signify the contracting of a Kikuyu customary marriage. A common law marriage can also not be presumed since the deceased lacked capacity to marry.

40. Consequently, the 1st Protester cannot benefit from the provisions of section 3(5) of the Law of Succession Act since she did not contract a marriage to the deceased under Kikuyu customary law. By failing to satisfy the requirements needed to be recognized as a wife for the purposes of succession, I find that Lilian Wanjiru is therefore not entitled to inherit from the deceased's estate as a wife.

In the case of EMM vs. IGM & another, Civil Appeal No.114 of 2012, the Court of Appeal at Nairobi (Karanja, M'inoti & Murgor JJA) while dealing with a similar issue, observed thus:

"The next issue is whether the appellant proved on a balance of probabilities that he was a child of the deceased whom the deceased had taken into his family as his own and was being maintained by the deceased immediately prior to his death…

We would have expected some form of evidence to show support from the deceased towards the appellant while he was a pupil in Nairobi Primary and when he was a student at Nairobi School…

Additionally, the definition of a 'child' in section 3(2) of the Law of Succession Act includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellant has to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the appellant"

46. From the evidence tendered by the parties, it is evident that the deceased did take responsibility over the Protester's children and raise them as his own. The Protester presented different photographs taken with the children and the deceased and both the 1st and 2nd Administrators on different occasions…It is also important to determine whether Lilian, the 1st Protester, can qualify as a dependant and therefore share in the deceased's estate. In Succession Cause No. 78 of 2010, Milena Bora vs. Liana Tamburelli [2016] eKLR, Chitembwe J, while deliberating on a similar issue, opined thus:

"The dispute herein revolves around the issue as to whether the objector can qualify to be the deceased's beneficiary. Black's Law Dictionary defines a beneficiary as a person for whose benefit a property is held in trust, especially, one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy etc.), or assignment…or to receive something as a result of a legal arrangement or instrument.

A person whom another is in a fiduciary relation, whether that relation is one of agency, guardianship or trust.

…Under section 29 of the Succession Act, a dependant or a beneficiary need not be a close family member. Any person who the deceased took care of during his lifetime can qualify to be a dependant. In the case of Eves vs. Eves [1975] WLR 1338, [1975] 3 ALL E.R 768, a couple cohabited whilst married to other persons and they sired children before their respective divorces were finalized. Subsequently, their relationship broke down and the "wife" was kicked out together with her children. The woman had greatly contributed to the improvement of their home though not financially. The court held that a constructive trust had arisen. Mr. Eves was declared to hold the legal estate on trust for the benefit of the parties.

In the case of Cooke vs. Head [1977] l WLR 518, the court stated the following:

"Whenever two parties by their joint effort acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. This does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too."

…The objector may qualify to be the deceased's dependant if she can be given an opportunity to explain her position before the court…Upon hearing the objector's evidence, the court will decide as to whether there is a constructive trust as this line of claim can be implied from the objection, as well as whether the objector was the deceased's dependent even if she was not the deceased's wife."

49. The evidence presented before this court demonstrates that both Lilian and her children depended on the deceased when he lived. While this court has found that Lilian does not qualify as a wife, she nonetheless qualifies as a beneficiary entitled to share in the deceased's estate. Lilian and her children are therefore entitled to share in the estate of the deceased as dependants.'

46. In *In Re Estate of Fredrick Clavence Kittany* [2002] eKLR, it was held that: -

'That the 1st objector who claims to be a widow of the deceased married under customary law is not a widow as shown by the law and the legal principles cited to the court. She lacks capacity to marry a man whilst his marriage under the Act subsist. Even if there was a marriage which they still deny Sally was not properly married according to Kipsigis Customary Law as no dowry was paid and no ceremony conducted and if any ceremony was conducted they object to the same as the same was not proved and was not conducted in accordance with the laid down procedures and so it did not meet the required standards. None of the family members from either side attended the ceremony and none of the witnesses who allegedly attended the same came to give evidence to prove this fact … I was also referred to the amendment to section 3 of the Law of Succession Act Cap 160 laws of Kenya where section 3(5) was introduced and whose wordings are;

"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 nonetheless a wife for the purposes of this Act and the particular sections 79 and 40 thereof and her children are accordingly children within the marriage of this Act.''

'...In this court's view the operative words "where her husband has contracted a previous or subsequent monogamous marriage to another woman." This court's interpretation of that amendment is that where it is proved that the deceased had previously contracted a valid customary law marriage and then subsequently contracted a subsequently statutory marriage both wives will inherit his estate. Likewise, where the deceased contracted a previous statutory marriage and then subsequently contracted a customary marriage for purposes of the Succession Act only both women are wives.'

47. The Court of Appeal, in the case of *MNM vs. DNMK & 13 others* [2017] eKLR held that:

'To reach the conclusion that the deceased was married to D under Kikuyu customary law, the learned judge had to have before him evidence. In Gituanja v. Gituanja [1983] KLR 575, this Court held that the existence of a customary marriage is a matter of fact, which is proved by evidence. (See also Kimani v. Gikanga [1965] EA 735.) … 'To prove a valid Kikuyu customary marriage, E was obliged to adduce evidence showing on a balance of probabilities the essential rites and ceremonies, without which a Kikuyu customary marriage is not valid, were performed. On the essentials of a valid Kikuyu customary marriage, Dr. Eugen Cotran, in his seminal work Restatement of African Law: Kenya Volume1 the Law on Marriage and Divorce (supra) explains that no marriage is valid under Kikuyu law unless the ngurario ram is slaughtered and that there can be no valid marriage under Kikuyu law unless part of the ruracio has been paid. (See also Zipporah Wairimu v. Paul Muchemi, HCSCNO 1880 of 1970). … Although she later on changed track and insisted that dowry was paid and ngurario performed, there is no credible evidence on record to prove that … In Mbogoh v. Muthoni & Another [2006] 1 KLR 199, this Court stated that where the requirements of statutory or customary marriage have not been proved and the issue of presumption of marriage has been raised, the Court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable. (See also Kimani v. Kimani & 2 Others [2006] 2 KLR 272).

The presumption of marriage has been recognised in our jurisdiction for a long time. (See for example Hortensia Wanjiku Yawe v. Public Trustee, CA No. 13 of 1976). In MWG v. EWK [2010] eKLR, this Court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact. As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the Hortensia Wanjiku Yawe v. Public Trustee (supra), Wambuzi, P. noted that the presumption of marriage has

nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system. Madan, JA (as he then was) articulated the rationale of the presumption of marriage in the following famous words in Njoki v. Mutheru [2008] 1 KLR (G&F) 288:

"It is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the "husband", or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband"."

The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (Mbogoh v. Muthoni & Another, (supra). Mustapha, JA added in Hortensia Wanjiku Yawe v. Public Trustee (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption. (See also Kimani v. Kimani & 2 Others (supra)… Having found E a widow of the deceased by virtue of the presumption of marriage, we do not see why she cannot be a beneficiary under section 3(5) of the Law of Succession Act…The section was introduced in 1981 by the Statute Law (Repeals & Miscellaneous Amendments) Act, No. 10 of 1981. The purpose of the amendment was to mitigate the rigours of decisions such as Re Ruenji's Estate (supra) and Re Ogola's Estate (supra), which did not recognise as beneficiaries widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage. To the extent that a marriage arising from a presumption of marriage is a marriage that is potentially polygamous, the prior monogamous marriage of the deceased to M would not preclude E from being recognised as a beneficiary of the deceased. (See Irene Njeri Macharia v. M Wairimu Njomo & Another, CA No 139 of 1994, Miriam Njoki Muturi v. Bilha Wahito Muturi, CA No. 168 of 2009 and Muigai v. Muigai & Another [1995-1998] 1 EA 206).'

48. The Court of Appeal, in *Eva Naima Kaaka & another vs. Tabitha Waithera Mararo* [2018] eKLR, said on presumption of marriage that: -

'This Court in the case of Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another [2009] eKLR in holding 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." (emphasis ours)

In the case of Mary Njoki vs John Kinyanjui Mutheru [1985] eKLR, Nyarangi JA underscored factors that would rebut a presumption of marriage when he stated that:

"…The fact that the appellant and the deceased together visited the deceased father's home or that she attended the funeral of the deceased's father is not material. The appellant was a friend of the deceased and she accompanied him to the funeral in that capacity. That is how friends treat one another. And on account of the cohabitation the appellant could not help meeting and knowing and even assisting the relatives of the deceased including the respondents. The appellant's own evidence proved that there had been no meeting between her family members and those of the deceased, and that there had been no marriage ceremony of any kind or form and that there was no meeting of mind between the father and the deceased and the appellant's father. This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married, that was the cogent evidence that an essential element required for a valid Kikuyu marriage had not been satisfied. The effect of all this is to rebut a presumption of marriage."'

49. In the *Ngengi Muigai & another vs. Peter Nyoike Muigai & 4 others* case (supra)**,** the Court of Appeal cited the case of *Kimani Mathenge Muriuki & 2 Others vs. Patricia M. Muriuki & Another* HC Succession Cause No. 976 of 1994, where the court in dismissing an application for provision of a dependant, stated as follows: -

'As for Lucina Muthayo Wanjeri, she was born after her mother left the deceased. It is the burden of the mother to prove on a balance of probabilities that the deceased was the father of the child. Her mother merely said that the deceased was the father without providing concrete evidence. The respondents dispute that she is a child of the deceased. Her certificate of birth shows that her mother did not give the name of the deceased as her father. It would appear she was not named after the mother of the deceased...There is evidence that Lucina did not live with the deceased though it is accepted that she used to visit the deceased occasionally. There is no concrete evidence of direct assistance by the deceased. It is true that she accompanied the deceased abroad once and deceased referred to her as his daughter in the affidavit to support application for passport. It is also true that she was named in the funeral programme as a child of the deceased. But the deceased was dead and had no control of the events after his death. I do not think the mere occasional references of Lucina as his child in a few documents without concrete evidence that deceased was the natural father of the child; that they lived together as father and child; that she was absorbed in the family of the deceased or that the deceased voluntarily assumed permanent responsibility over her, is sufficient to show that she was a dependant of the deceased in such sensitive matters as inheritance. I conclude therefore that it has not been proved that Lucina is a dependant.'

50. In the case of *Lucy Wambeti Bedan vs. James Njue Cindano* [2015] eKLR, the court ruled that:

'It is my considered view that late birth registration in Kenya is within the law and does not render a birth certificate invalid. Registration of persons at the age of 20 is also within the law. In the absence of evidence to the contrary from the respondent, the birth certificate and the identity card of Ruth Moreen Njeri Nyaga must be treated as valid documents.'

51. Having perused the parties' submissions, testimonies, evidence and authorities cited above, it is my finding that Jedidah Kisia was statutorily married to the deceased under the African Christian Marriage and Divorce Act and that the Certificate of Entry of Marriage placed on record is conclusive proof of the said marriage. The allegation of forgery cannot stand as the same was not been demonstrated or proven, neither was the authenticity of the document seriously controverted by the objectors as is the requirement with such allegations. I also find that a misspelling of Jedidah's name cannot be a ground to invalidate or negate the marriage between the deceased and her.

52. Regarding Grace Wambui Bidali's claim that she was married to the deceased in the year 1972 under Kikuyu Customary Law, I did not find any proof thereof. A marriage under Kikuyu customs must be established through proof that the customary rites of marriage were performed, the most notorious of which are performance of *ngurario* and payment of *ruracio*. There is no evidence that these ceremonies were observed. Can I presume marriage between the deceased and the said Grace Wambui? She did not take the witness stand, and therefore did not lead any evidence as to the circumstances of her relationship with the deceased. She left it to her son to do so. Yet a child cannot speak for a parent in matters of this nature. She was the most suitable person to testify on her relationship with the deceased. Such a relationship turns on such sensitive matters as cohabitation, sexual relations, childbearing, and the like, which a child is, no doubt, unqualified to lead evidence on. The impression I got was that the said Grace Wambui was alive. No explanation was given for her failure to testify. The first family took the position that she was an employee of the deceased and that as such she was accommodated in one of the deceased's properties. She appears to have had children with the deceased, including her co-objector, Bidali Lihasi. The other children are Kaisa and Kageha. All three are recognized in the impugned will of the deceased as his children. It would be inconceivable that the deceased would father three children with a woman that he was not married to. I take judicial notice of the fact that Grace Wambui was Kikuyu by ethnicity, going by her second name, yet her three children bear the names of the community that the deceased hailed from, Luhya. Significantly, Bidali Lihasi seems to have had been named after the father of the deceased. From the fact that Grace Wambui lived in the deceased's property and bore him three children whom she gave Luhya names, I am inclined to find that the two had cohabited, and I hereby presume that there was a marriage between them. I find that the deceased did recognize his three biological children with her, and I shall presume, upon the foundation of the cohabitation, that he had taken in and also accepted Hannah Njoki as his own child.

53. It is my finding that Magdalene Mutugi Bidali alias Magdalina Mutugi Kahura was not a wife of the deceased under customary law. She claimed to have had been purportedly married under Kikuyu Customary Law. Such a marriage was not sufficiently proved. There was no evidence that the *ngurario* ceremony was performed, and there was no evidence adduced that part of the dowry, *ruracio*, was paid. Had the said Kikuyu customary marriage been proved, Magdalene would have been considered a wife by dint of section 3(5) of the Law of Succession Act. I note that she claims to have had several children with the deceased, five in number, being Esther Wanjiku Bidali, Josphat Kimani Bidali, Jane Nduta Bidali, Peter Njoroge Bidali and Teresiah Wagio Bidali. Curiously, she gave all five of them Kikuyu middle names as opposed to Luhya names. It is a notorious fact that most Kenyan African communities are patrilineal, save for the Digo and the Duruma, and children belong to the father and are consequently named predominantly following the customs of the father. The fact that none of the children allegedly sired by the deceased bear Luhya names can be telling. The fact that a Kikuyu woman purportedly married to a Luhya man gave all her children with such a man Kikuyu names suggests that she never regarded herself as married to him. However, I note from the will of 26th March 2012 that the deceased recognized the last three of the said five children, that is to say Jane Nduta Bidali, Peter Njoroge Bidali and Teresiah Wagio Bidali, saying that he had fathered them. Just like in the case of Grace Wambui, I would find it inconceivable that the deceased would have had three biological children with a woman that he was not married to. Consequently, on that account, I am persuaded that the deceased and the said Magdaline Mutugi did cohabit and the three children were conceived during the period of the said cohabitation. I find that the deceased did recognize his three biological children with her, and I shall presume, upon the foundation of the cohabitation, that he had taken in and also accepted Laimani Bidali, George Kahura Bidali, Esther Wanjiku Bidali and Josphat Kimani Bidali as his own children.

54. Although I have designated Susan Njeri as 3rd objector in these objection proceedings, her case is strictly different. She has not objected to a grant being made to the executor. Indeed, she takes that position that the impugned will was valid. Her case is that she was a dependant of the deceased and what she has placed before me to determine is an application under section 26, for reasonable provision out of the estate of the deceased given that the deceased had not made provision for her out of the impugned will. She did testify at the trial. She confirmed that traditional rites under Kikuyu customs were not performed, and therefore she was not a customary law wife. She, however, testified that she had cohabited with the deceased at Kikuyu in a rented house between 2006 and 2012. What I find curious is her testimony to the effect that Jedida was the only valid wife of the deceased that she knew, and the position she took that the impugned will was valid even as it declared Jedidah was the only wife, meaning that the deceased himself did not recognize her as such. I am not persuaded, from the material placed before me, that she was a wife of the deceased at any time. I did not find any material from which I could presume marriage between her and the deceased.

55. Under the marriage statutes a man who had contracted a previous statutory monogamous marriage, such as a Christian marriage, has no capacity to contract another marriage, under any system of marriage, during the pendency of the previous statutory monogamous marriage. If he does contract any other marriage despite pendency of the statutory monogamous marriage, that other marriage would not be valid or recognized in law so long as the man is alive. However, upon his death, and by virtue of section 3(5) of the Law of Succession Act, such subsequent marriages would be recognized for the purposes of succession under the Law of Succession Act, to the extent that they were contracted under systems of law that permit polygamy. In the instant case, the deceased had contracted a statutory monogamous marriage with Jedida Kisia. By the time of his death, the said marriage was still subsisting for it had not been dissolved. I have found that Grace Wambui and Magdaline Mutugi were his wives. The two, however, did not establish that they were married under a system of law that recognized polygamy. I presumed them to be wives on account of the circumstances of cohabitation and other factors. The two cannot therefore seek refuge under section 3(5) of the Law of Succession Act. The Law of Succession Act does not address their case. It my view that it is moot whether presumption of marriage can be made in circumstances of a subsisting statutory monogamous marriage, but the Court of Appeal has generally made such presumptions. I am bound by such decisions, and I shall therefore treat Grace Wambui and Magdaline Mutugi as widows of the deceased for purposes of succession.

56. Issues of dependency were raised with regard to Susan Njeri, and other survivors of the deceased, and I feel that I need to my mind to the matter. Under Kenyan law, dependency is provided for under Part III of the Law of Succession Act. Part II of the Act governs situations

where a person dies in testate. The validity of the will is tested on the basis of the provisions of Part II, and at confirmation of the grant of probate the estate is distributed as the terms of the will, to the persons named in the will as beneficiaries. Part V of the Act governs cases of intestacy. The estate of a person who dies intestate is distributed as the provisions in Part V. the provisions in Parts II and V of the Act are mandatory for estates that fall for distribution under these Parts. Part III is however not mandatory. It is of application only where a person has invited the court to apply it, and where the acts of the case are suitable for its application.

57. From the language of section 26 of the Act, the court can only exercise discretion upon being invited by way of an application by or on behalf of a dependant. Unlike section 76 of the Act where the court can act on its own motion, under section 26 the court can only act where there is an application before it. For avoidance of doubt the said provisions states 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 as the court thinks fit shall be made for the dependant out of the deceased's net estate.'*

58. My reading section 26 is that the discretion given to the court under that provision is not to be exercised *suo moto*, but upon application by the party. It should therefore not be open for the court to declare any individual as a dependant of the deceased unless there is before the court an application under section 26. This is particularly so as section 28 of the Act sets out the mater that the court considers before it can decide whether or not to exercise discretion under section 26. A party inviting the court to exercise discretion under section 26 must adduce evidence or place before the court the material envisaged under section 28. That would be material relating to the nature and amount of the deceased's estate, the capital or income from any source of the dependant, the future and existing means and needs of the dependant, any advancements or gifts made to the dependant by the deceased during lifetime, the conduct of the dependant towards the decease, the situation or circumstances of other dependants and beneficiaries under the will, and the general circumstances of the case. Therefore, unless there is an application is tailored around sections 26 and 28 of the Act, it may be imprudent for a court to purport to recognize a party as a dependant or to pronounce reasonable provision for a party during the hearing of a confirmation or revocation application, or in objection proceedings.

59. The other thing is that a dependant for the purposes of the Law of Succession Act is not any person who was dependant on the deceased in the ordinary everyday sense during his lifetime. A dependant for the purpose of the Act has been assigned a special meaning by section 29 of the Act. A person who is a dependant under the Act, and therefore entitled to move the court under section 26 and to benefit from the discretion provided for under that provision has to bring themselves within the meaning of section 29. For avoidance of doubt the said provision states as follows –

> *'For the purposes of this Part, "dependant" means –*
>
> *(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
>
> *(b) Such of the deceased's parents, stepparents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*
>
> *(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.'*

60. My understanding of the provision is that it creates two categories of dependants, those that do not have to prove dependency and those who have to. The first category is stated in section 29(a) and it includes wives and children. Legally men are obligated to maintain their wives, while parents are obligated to provide for their children. It is a legal imperative. It follows that the individuals under this category ought to be provided for under the will of the deceased and in intestacy. Where they are not catered for they law allows for intervention, on their application. All they need to prove is that they were related to the deceased by way of being either his wife or their child. The second category is of those individuals listed in section 29(b) and (c) of the Act. The persons listed here have to prove that they were dependent on the deceased immediately prior to their death before the court can intervene to make provision for them. Legally, there would be no obligation on the deceased, during lifetime, to provide for them. it will be noted that the person listed in the second category, save for husbands, are members of the deceased's extended family. Those in the second category, unlike those in the first category, do not automatically qualify as dependants, they must demonstrate, by way of concrete evidence, that they were in fact dependent on the deceased immediately prior to his death.

61. It will be noted further that the persons identified as dependants in section 29 of the Act are members of the family of the deceased, except for children that the deceased had taken in as his own. For a person to qualify to be a dependant he or she must be related to the deceased, unless they are a child that the deceased that was maintaining and had taken in as his own. They must demonstrate that they were either the deceased's spouse or child or parent or stepparent or step child or grandchild or grandparent or sibling or half-sibling. These categories are not open. Clearly, not any Kamau, Onyango or Mutiso can qualify to be a dependant. It would appear that women that the deceased associated or cohabited with or had affairs with, to the extent that he was not formally married to them and a marriage cannot be presumed in their favour, do not qualify to be dependants as defined in section 29. The only females who can qualify to be dependants are wives or daughters or stepdaughters or mothers or stepmothers or grandmothers or granddaughters or sisters or half-sisters or female children that the deceased had taken in as his own. I am not persuaded that any woman that the deceased might have cohabited with, who did not fit the description of a wife or spouse or widow, can be said to have been his dependant for purposes of succession under the Law of Succession Act.

62. I have seen material that suggests that where the deceased and a who had property dealings, yet they were not married, she could be treated as a beneficiary for the purpose of having the property conveyed to her. this envisages a situation where there is deed which settles property in her favour. It about she being a beneficiary under some instrument. A beneficiary and a dependant refer to different capacities. A

beneficiary would be a person drawing a benefit under some instrument, such as a will or trust or some deed; while a dependant has the meaning assigned to it by section 29. Succession in this case is governed by statute, the Law of Succession Act, there is nothing in the statute which states the position that constructive trusts be construed as making a person who was not related to the deceased in the manner envisaged in section 29 a dependant within the meaning of the provision.

63. I need to point out that the proceedings that I conducted orally were for the purpose of determining the objections by the various parties to the petition placed on record by the executor. The objections turned around the question of the validity of the will of the deceased. The other question revolved around the statuses of the objectors in relation to the deceased. I note that the 1st objectors had filed an application for reasonable provision. I shall not determine it at this stage. Neither shall I make any determinations as to whether any of the persons that I have identified as surviving spouses and children of the deceased, and who were not provided for in his will, were dependants of the deceased. Dependency turns on questions of distribution of property. The ideal situation should be that any pending dependency application be disposed of simultaneously with an application for confirmation of grant. I trust that the application for dependency by Susan Njeri has been spent upon my finding that there was no marriage between her and the deceased.

64. In the end I shall dispose of the objection proceedings in the following terms: -

a) That I declare that the written will on record, dated 26th March 2012, is valid;

b) That a grant of probate of the written will, the subject of (a) above, shall accordingly issue to the executor named in the said will;

c) That I declare that Grace Wambui and Magdaline Mutugi are widows of the deceased and that their respective children are children for purposes of succession to the estate of the deceased herein;

d) That the individuals named in (c) above have liberty to move the court appropriately for reasonable provision out of the estate of the deceased before the grant made in (b) above is confirmed;

e) That any applications filed under (d) above shall be heard simultaneously with the summons for confirmation of grant to be filed by the executor herein within forty-five (45) days;

f) That each party shall bear their own costs; and

g) That any party aggrieved by the orders that I have made herein has a right to move the Court of Appeal appropriately within twenty-eight (28) days of this judgment.

DATED AND SIGNED AT NAIROBI THIS ……24th ……. DAY OF ……April,……. 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS ….10th …...DAY OF ….may….2019

A ONGERI

JUDGE