REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 209 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE HABEL KAROBIA THUMI (DECEASED)

TERRY WAIRIMU KAROBIA……1ST APPLICANT

ANN WACHUKA KAROBIA……..2ND APPLICANT

VERSUS

PHILIP HABEL KAROBIA……..1ST ADMINISTRATOR

IRENE NJOKI KAROBIA…….2ND ADMINISTRATOR

AND

CATHERINE IGOKI RIUNGU……1ST PROTESTOR

LOISE KAROBIA……2ND PROTESTOR

JUDGMENT

Introduction

1. The Application before me is a summons for confirmation of grant of letters of administration of the Estate of the late **Habel Thumbi Karobia** issued by the Honorable Court on the 24th day of November 2022 to **Philip Habel Karobia, Irene Njoki Karobia** and **Terry Wairimu Karobia.**

2. The same was and is protested by **Monicah Muthoni Kimani**, who claims to be one of the deceased's wives and therefore entitled to the share of the deceased's estate together with her two sons namely; **Peter Muna Karanja** and **Antony Karanja Karubia.**

3. It is further protested by **Catherine Igoki Irungu** and **Loise Karobia**, both claiming a share on behalf of the estate of the two late deceased's sons namely, **Henry Kirago** and **Raphael Karobia.** The former claims that she was married to Henry Kirago and she claims Son his behalf and his beneficiaries, while the latter claims on behalf of her alleged father, **Raphael Karobia**

Objectors Case and Submission

4. It was **Monicah Muthoni Kimani's** evidence that, she started cohabiting with the deceased sometimes in 1978 in Flamingo Estate but later moved to Kimathi Estate. That she was blessed with two children **Peter Muna Karobia** and **Anthony Karanja Karobia** who were both sired by the deceased. She did annex the birth certificates of both children.

5. She stated the deceased formerly introduced himself to her family in 1983 and gave the initial requirements of a female goat and sheep to her parents which cultural practice is mandatory to any formation of a Kikuyu marriage. That a *debe* of honey and a trench coat were also given. The deceased gave an equivalent total of 40 goats; each goat was valued at Kshs 2,000/= meaning he gave Kshs 80,000/=. She stated though the deliberations were written down, she couldn't get her father's copies or the deceased copy who also carried his copy of the deliberations. She stated the elders who had accompanied the

deceased were **Joseph Mwendwa** and **Mr. Willy Ngugi** who are now deceased and couldn't be called to give evidence.

6. She further stated that on her father's side were his brothers **Harun Kamundi** and **Paul Ngarega** who are also deceased. She stated the deceased never completed the dowry payments of the Kshs 50,000/= for an equivalent of 50 goats since he passed on.

7. Monicah Muthoni Kimani gave evidence that, the deceased would visit her daily but never went to her house on 18th,19th and 20th and she started looking for him. Through **Philip Habel Karobia** the 1st administrator and a son from the 1st house, she learnt the deceased was in War Memorial Hospital where he was admitted and had sent Philip Habel Karobia to inform her which he did and Monicah Muthoni Kimani visited the deceased.

8. The deceased was discharged just before Christmas and went to the first wife's home. Monicah Muthoni Kimani later through Philip Habel Karobia came to learn that the deceased had been admitted to Karen Hospital in Nairobi. Since she has a case of high blood pressure, she sent her son Peter Muna Karobia who was based in Nairobi to go and see the father at Karen Hospital. Peter Muna Karobia informed her that the deceased's leg had been amputated. Later, he succumbed and Monica Muthoni's attempts to participate in the funeral arrangements taking place at KOKEB Restaurant in Nakuru town were frustrated. The deceased's daughter by the first wife **Ann Wachuka Karobia** chased her away.

9. She filed a suit in Nakuru **Chief Magistrate's Court Civil Suit No. 161 of 2012** seeking injunctive orders preventing the co-wife **Loise Wangeci Karobia** from interring the deceased's body. The orders were issued on 17th February 2012. The Interpartes hearing was to be on 23rd February 2012. On the 17th February 2012 when the application was come up for inter-partes hearing, the counsel for Loise Wangeci Karobia informed the court that, the deceased had been cremated on 16th February 2012. Indeed, a certificate of cremation was issued on 17th February 2012 the same day the suit was coming up for inter-partes hearing leaving the 1st objector with no alternative but file a citation which was compromised and letters of administration issued.

10. Monica Muthoni produced her son's birth certificates, Kenya Certificate of Secondary Education of Peter Muna Karobia issued for KCSE in the year 2001, City and Guilds Certificate bearing the same name, KCPE Certificate of the year 1997.

1st and 2nd Protestors Case and Submissions

11. The 1st and 2nd Protestors have invited the court to consider the extent to which the children of deceased dependant can be considered in the distribution of the estate of the deceased person.

12. That to determine the dispute the court is invited to consider three matters, firstly, the interpretation and application of **Section 41 of the Law of Succession Act.**

13. Secondly, the credibility and the bona fides of the administrators and lastly evidence to confirm that the beneficiaries were children/spouse of the respective deceased's dependant.

14. It is submitted that, the Applicant in this matter filed summons to enjoin in this succession cause under the principle of representation. The summons was filed on 29th May 2017 which summons was opposed by an affidavit sworn by **Loise Wangechi Karobia.**

15. That summons was later followed by the summons filed by **Terry Wairimu Karobia** seeking the revocation of the grant. The latter summons was opposed and the court gave directions that it be disposed of by way of written submissions. In the ruling delivered on 24th November 2022, the court revoked the grant, appointed new administrators and directed that summons for confirmation of grant be filed.

16. The court further invited any beneficiary who may be dissatisfied with the proposal to file an affidavit of protest. The application by the 1st and 2nd beneficiaries was tacitly subsumed by the court's ruling. Further, in **Estate of David Aura Wesonga 2022 KLR**, this court (W.M. Musyoka J) observed that the Law of Succession Act and the probate and administration rules do not provide for joinder of an interested party.

17. Therefore, any party seeking to join the proceedings may join without seeking leave. In line with the doctrine of *stare decisis*, this court is enjoined to uphold the said findings not as a binding precedent but as a matter of judicial comity. Although this was a principle from a court of

coordinate jurisdiction, the doctrine of *stare decisis* works to protects the interests of the beneficiaries to the extent that who have taken action in reliance on that decision.

18. That following the directions of the court, the administrators filed summons for confirmation of grant. The beneficiaries filed their respective affidavits of protest. The central theme of the beneficiaries' case was to demonstrate that they are entitled to a share of the net estate of the deceased. They stake their claim under the principle of representation as set out at **Section 41 of the Law of Succession Act.**

19. The 1st protestors' position is that she was married to **Henry Kiragu**, a son and a dependant of the deceased, who died before the distribution of the estate. They had two children, **Vivienne Wangechi Kiragu** and **Anthony Thumi**.

20. She maintained the position that the children of the deceased ought to be placed in the same position as their late father and to be given the share of the estate that should have been given to their father.

21. The 2nd protestor pleaded that, her and four other siblings were the children of the late **Raphael Karobia**. Her siblings were-

    a) **Lilian Wairimu**

    b) Habel Thumi

    c) Loise Wangechi

d) Rahab Wangui

22. Her plea was that they should be provided for as children of a deceased dependant.

23. That on their part the administrators took a common position that both **Raphael Karobia** and **Henry Kiragu** were persons of unsound mind and they were incapable of having family. They maintained the position that both Raphael and Henry died of complications arising from mental illness. Essentially and from the depositions and the oral testimony of the administrators, the applicability of the principle of representation was not in question. What was in question was whether the facts of this matter fall within the doctrine.

24. The protestors wish to restate the principle of representation under **Section 41 of the Act**. Principle of representation, on an elementary application of **Section 29 of the Law of Succession Act**, a grandchild has no direct right to inherit unless she can prove that they were being maintained by the deceased immediately prior to his death. But the situation is different in situation where a dependant is but has been survived by wife and/or children.

25. In that case, the provisions of **Section 41** apply. The section provides as follows:-

> *"**Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the***

age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."

26. That, the principle under **Section 41** of the Act is the principle of representation. This position has been explained in Law of Succession by **William Musyoka, 2nd Edition, and Law Africa.** The author observed as follows: - The rule of substitution of a grandchild for his or her parents in all cases of intestacy where the parent dies before the intestate is known as the principle of representation ……. If a child of the intestate has predeceased the intestate or dies before attaining eighteen years, then the child's issued alive or *en ventre sa mere* at the date of the intestate's death will take in equal share per stirpes contingent to attaining the age of majority or if female, marrying under that age.

27. That, the same position was upheld **In The Matter of the Estate of Phyllis Muthoni Mínoti (Deceased) Succession Cause No. 117 of 2015 and In The Matter of the Estate of Luka Modole (Deceased) Succession Cause No 157 of 1992**.

28. In the latter case the court observed that:- **Section 41** states the position, *inter alia*, regarding the rights of children whose parents have died before inheriting their share of their own parents' estate……. Where reference is made in this Act to the "net intestate estate", or the

residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."

29. That it follows that in a case of a deceased dependant, his children (grandchildren of the deceased) are substituted for the deceased dependant. We invite the court to apply the principle to the facts of this matter.

30. As to whether the applicant's proved that they are children of deceased dependants? The 1st Applicant, **Catherine Igoki Riungu** stated on oath that, she was married to **Henry Kiragu**. It is not in dispute that the said Henry Kiragu was a son of the deceased herein.

31. She pleaded that they had two children, **Vivienne Wangechi Kiragu** and **Anthony Thumi**. She produced copies of birth certificate to confirm that fact. In her testimony she narrated the same set of facts. She stated on oath that they lived with the late Henry Kiragu until the date of his death.

32. She insisted that she had not filed this matter for her own benefit as a dependant of the estate but under the principle of representation and on behalf of the children.

33. In their depositions and evidence in rebuttal, the administrators took the opposite tangent. They set-out to demonstrate that the late Henry Kiragu was not married and that he was incapable of siring children. They further set out to demonstrate that the applicants never participated in any family functions particularly the burial ceremonies of their deceased kin.

34. That to prove the depositions that the late Henry Kiragu was a person of unsound mind, the administrators called **Dr. Njau,** a consultant psychiatrist. The protestors submit that, the evidence of the administrators does not rebut the applicant's case. First, the birth certificates are official documents issued by the registrar of births and deaths. They clearly indicated that the father to the two children born of the 1st applicant was Henry Kiragu. Since this was documentary evidence, it could only be rebutted by the production of documentary evidence. Under **Section 98 of the Evidence Act**, where a matter ought to be evidenced in writing, oral evidence is not admissible to rebut the contents of the documents.

35. The evidence that Henry Kiragu was the father to Vivienne Wangechi Kiragu and Anthony Thumi could not be rebutted by oral evidence of the administrators.

36. Secondly, the administrators pleaded that Henry Kiragu died of complications arising from his mental illness and that on account of the mental illness he was incapable of siring children. The fact of death and the cause of death are matters which are, as a matter of law, recorded

in a death certificate. The 1st applicant produced the death certificate of the late Henry Kiragu where it indicated that the cause of death was high blood pressure.

37. Thirdly, **Dr. Njau**, the consultant psychiatrist stated on oath that, the mental condition of both **Henry Kiragu** and **Raphael Karobia** were matters which were quite apart from their ability to sire children. He stated in jest that sometimes persons of unsound mind sire more children than persons of sound mind. This was a witness who had been called testify on the fact that both Raphael Karobia and Henry Kiragu were incapable of having a family. But his evidence was quite to the contrary.

38. Fourthly, the 2nd Applicant produced a notification of her birth which indicated that her surname was Karobia. She further informed the court, Lilian Wairimu was her sister. She produced minutes of a matrimonial dispute between her sister and One **David Meshack Cherono** which was attended by the deceased and one of the administrators Philip Habel Karobia. The minutes indicated that Lilian was the daughter of Raphael. This position was confirmed by Philip Karobia in cross-examination. The administrators took the position that the applicants were not members of their family since they never attended the social functions such as burial ceremonies.

39. The protestors submit that, filial relationships and attending social functions are disjunctive circumstances. The fact that one has failed to attend a social function such as a burial does not mean that she ceased to be a member of the family. There is a further reason for such non-

attendance. The administrators have consistently maintained that the Applicants are not members of their family and they were prepared to go to great length to ensure that the Applicants do not feature anywhere. They caused the publication of a death announced in the local dailies but failed to indicate the date of the burial. They proceeded and cremated him in pretext that that was his wish. The sole objective of the cremation was to defeat the court order which had been obtained stopping the burial. Further, upon the death of Raphael Karobia, they cremated him under the pretext that that was his wish.

40. That, the Administrator cannot use their own conduct to explain the failure by the Applicants to attend the burial ceremonies.

41. It is the protestors' submissions that the Applicants have discharged their burden of demonstrating that they are the wife and children of deceased dependants and under the principle of representation, they should be substituted for the deceased dependant. That the Administrators had the evidential burden of rebutting that evidence through credible and cogent evidence. The administrators are not credible witnesses and their evidence was actuated by a predetermined ulterior objective. The trail of their conduct points irresistibly to that conclusion.

42. The protestors set out the conduct that, upon the demise of the deceased, and having previously lost both Raphael Karobia and Henry Kiragu, the administrators hatched the plan to exclude all the potential beneficiaries.

43. The first step was to ensure total exclusion of such dependants from the burial arrangements. They ensured that the date of interment of the remains of the deceased was not stated to avoid objections.

44. Indeed, after the 1st protestor filed a suit to stop the burial, they quickly arranged for a cremation. This way, there was no possibility of exhumation even if the court issued an order.

45. The second step was to take possession and use of the properties forming the net estate. This included bank accounts and properties that were generating rents. The objective was to annihilate all the other dependants financially as the succession cause progressed. At cross-examination, Philip Karobia admitted that they had been collecting rent and maintaining themselves. To avoid court's scrutiny, Philip claimed that they have been paying the estate debts but he never produced proof of such debt. Since they were oblivious to the manner of proof of death and paternity, they took the position that their two brothers died of mental illness complication. They persisted on this position in spite of documentary evidence to the contrary.

46. They further maintained the position that the 1st Applicant's children were not the children of Raphael in spite of documentary evidence to the contrary. We submit that the conduct of the administrators paints them as persons who lack credibility. Their conduct in respect to the net estate points to a clear case of intermeddling. Their evidence was choreographed to ensure that the intermeddling is not detected and nobody else benefits from the estate. It is the protestors submission that, evidence cannot be taken in rebuttal of the Applicants' case. The

Applicants have proved their case under the principle of representation and the court should find as such.

47. With regards to the Division of the Net Estate that, **Section 38 of the Law of Succession Act**, provides, where intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of **Sections 41** and **42,** devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children. The emphasis of the section is equal distribution and not equitable.

48. That the mode of distribution proposed by the protestors is in line with the provisions of **Section 38.** And the protestors refer the court to the supplementary affidavit of **Catherine Igoki Riungu** from paragraph 15 and submit that, they have taken into account the interest of all the beneficiaries.

49. The protestors pray that, the court directs the administrators to give the full inventory of the assets of the deceased since it was clear that they had a clear intention of concealing some of the properties. Upon a full disclosure of all the properties of the deceased, the properties ought to be distributed in accordance with **Section 38** of the Act.

Administrators Case and Submissions

50. The 1st Administrator maintains that, a grant of letters of administration of the Estate of **Habel Thumi Karobia** was issued by the Court on 24th November 2022 to **Philip Habel Karobia, Irene Njoki Karobia** and **Terry Wairimu Karobia.**

51. Subsequently, summons for confirmation of grant dated 19th December 2022 was taken out by the 3rd administrator, **Terry Wairimu Karobia**.

52. Affidavits of protest were filed by **Monicah Muthoni Kimani**, **Catherine Igoki Riungu** and L**oise Karobia.**

53. **Alfred Mwanga Simiyu** also filed a claim against the Estate as a creditor.

54. The matter proceeded to hearing by way of viva voce evidence.

The 1st Administrator has refined the following issues for the court's attention;

a) **Was the Objector ever lawfully married to the Deceased and, as such, entitled to be recognized as a beneficiary of the Deceased's Estate?**
b) **Are the Objector's children the biological children of the Deceased, and consequently, rightful beneficiaries of the Deceased's Estate?**
c) **Was the 1st protestor, Catherine Igoki Riungu, ever lawfully married to the Deceased's late son, Henry Karobia, and thereby entitled to inherit his share of the Estate?**
d) **Are the children of the 1" protestor the biological children of Henry Karobia and therefore entitled to the Estate of the Deceased as grandchildren?**
e) **Was the 2nd protestor, Loise Karobia, a daughter of the Deceased late son Raphael Karobia and therefore entitled to the Estate of the Deceased as a grandchild?**

f) **Is Alfred Mwanga Simiyu entitled to his Commission as a creditor in the Estate of the Deceased?**

55. On the first question, the 1st Administrator submit that their father, the late **Habel Thumi Karobia** never married the Objector. The Objector alleged that the Deceased allegedly married her sometime in 1992 under Kikuyu customary law. In addition, she purported that the Deceased was asked for 120 goats as dowry, out of which he managed to give 40 goats and remained with a balance of 50 goats. Also, that the Deceased was advised to bring "*mwati na harika*" a goat and sheep all female, a hat, a trench coat and honey, which he gave.

56. That with regards to Kikuyu customary marriage, the High Court of Nyeri in **Mutabi & mother v Metahi & 3 others 120251 KEIS 3044 (KLB)** at paragraph 32 of its Judgment, stated:

> ***"A kikuyu customary marriage (just like the marital customs of other African communities) consists of certain rites which must be performed. Further a customary marriage is not a clandestine or secret affair. It involves the coming together of two families and clans and is often conducted publicly and with much fanfare."***

57. That at paragraph 33 of the same judgment, the Honourable Court proceeded by stating the essentials of Kikuyu customary marriage. **Eugene Contran's Casebook** on Customary Law at page 30 sets out the essentials of Kikuyu Customary Marriage. These are stipulated as:
    a) That the parties must have capacity to marry and also the capacity to marry each other.

b) That the parties to the marriage and their respective families must consent to the union.
c) That no marriage is valid under Kikuyu customary law unless the *Ngurario* ram is slaughtered.
d) That, there can be no valid marriage under Kikuyu law unless a part of the *ruracio* (dowry) has been paid.

58. Still in the same judgment, the Honourable Court, at paragraph 34, cited the case of **Eva Naima & Another-vs-Tabitha Waithera Mararo [20181 eKLR** in which the Court of Appeal in observing that "*ngurario* ceremony did not take place stated as follows:-

> ***"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."*** *(Own emphasis)*

59. In this case, the Objector did not tender any evidence to show that the Deceased entered into a customary union with her. There is no evidence that a "*Ngurario* ceremony" was ever conducted. There is no evidence that dowry was ever paid.

60. Both the objectors' witnesses, **Benson Karanja Kimani** and **Charles Kuria Gichanjiru**, testified that they were present at the dowry ceremony under which the Deceased was demanded 90 goats, which contradicts the Objectors statement that the Deceased was demanded 120 goats.

61. That both witnesses were unable to recall the two companions who accompanied the Deceased to the alleged dowry ceremony. Indeed, the Objector's Witness, **Benson Karanja Kimani**, in his examination-in-chief stated:

> *"The Deceased was with two other people, but I cannot recall who they were. I objected until I was involved. They were keeping others away from the proceedings."*

62. That as stated earlier, marriage in the African context is not a clandestine or secret affair. It involves the coming together of two families and clans and is often conducted publicly and with much fun fare. If at all the dowry and marriage ceremony occurred, the two companions would have been known by the two witnesses. Relatives of the Deceased would have attended the occasion. The recorded proceedings of the ceremonies would have been produced by the Objector. The Objector would have been known by the administrators and the Deceased late wife**, Loise Wangechi Karobia.**

63. Additionally, the Objector in her examination-in-chief stated:

> *"The deceased was my husband, married in 1992 when he visited home in Flamingo Estate and gave the dowry price."*

64. However, in her cross-examination by Mr. Mwangi stated:

> *"On the affidavit and plaint, I said we started/got married in 1978"*

65. The referred pleadings form part of the court's record and its trite law that parties are bound by their pleadings as stated by the Court of

Appeal in Nairobi in the case of **Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR)** at paragraph 11 of its judgement:-

> ***"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the Appeal succeeds on that score."***

66. Therefore, it is clear the Objector's pleadings contradicts her testimonies on the question of when her alleged marriage to the Deceased occurred. It is evident that the marriage nor the dowry ceremony did not occur hence the contradiction.

67. That is pertinent to note that the Objector has never adopted the Deceased's name as her surname, despite her claim of having been married to him under Kikuyu customary law. In official documents, specifically her National Identity Card and NSSF card, which are included in the Petitioner's List of Documents dated 10th February 2015 - she is consistently identified as **Monicah Muthoni Kimani**. Notably, the section designated for husband' on the Objector's NSSF card is left blank, a critical omission that undermines her assertion of marriage to the Deceased. This absence of recognition in official records strongly

suggests that no lawful marriage existed between the Objector and the Deceased.

68. That, it is pertinent to note that, the Objector failed to attend or be involved in the burial arrangements and ceremony of the Deceased. Her claim that she was involved in the burial arrangements, however chased away by one of the administrators is not.

69. The referred pleadings form part of the Court's record and its trite law that parties are bound by their pleadings as stated by the Court of Appeal in Nairobi in the case of **Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR)** at paragraph 11 of its judgement:-

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72. Also it is pertinent to note that the Objector failed to attend or be involved in the burial arrangements and ceremony of the Deceased. Her claim that she was involved in the burial arrangements, however chased away by one of the administrators is not supported by evidence. None of her relatives nor her alleged children of the Deceased, attended or involved themselves in the burial arrangements and ceremony, despite the fact, the Deceased death was announced in the Daily Newspaper, inviting relatives and friends to daily meetings at Kokeb Hotel and Section 58 Nakuru.

73. Therefore, the Administrator respectfully submit that no evidence has been adduced to point to the existence of customary marriage between the Deceased and the Objector. Thus, the objector does not qualify as a beneficiary to the Estate of the Deceased nor as a dependant due to the lack of evidence of dependency.

74. Also it is the Objector's case that she cohabitated with the Deceased at Flamingo Estate before moving to Kimathi. The issue of cohabitation that leads to "presumption of marriage" was properly settled in the case of **Hortensiah Wanjiku Yawe -vs- The Public Trustee [1976]** as cited in **Mutahi & another v Mutahi & 3 others [2025] KFHC 3044 (KIR)** at paragraph 39 of its judgment, which stated:-

> ***“The presumption is nothing more than an assumption arising out of long co-habitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. Once the appellant proved that she was living with the deceased as man and wife over 9 years she was in law presumed to be married to the deceased unless the contrary be clearly proved.”***

75. The next question would be whether sufficient evidence was adduced to lead to a 'Presumption of marriage' between the Deceased and 'Virginia'. In the case of **Hortensiah Wanjiku Yawe -vs- The Public Trustee [1976]** the court stated as follows:-

> ***"(i)The onus of proving customary law marriage is generally on the party who claims it.***
>
> ***(ii) The standard of proof is only usually for a civil action namely "on the balance of probabilities."***
>
> ***(iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard.***

(iv)Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it.

(v)Only cogent evidence to the contrary can rebut the presumption.

(vi) If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage."

76. Indeed, the Objector in her witness statement dated 14th January 2015, claims to have been cohabiting with the Deceased from the year 1978 at Flamingo Estate before moving to Kimathi Estate. However, in her sworn Supporting Affidavit dated 17th February 2012 in **Nakuru CMCC NO.161 of 2012** swore that she was married to the Deceased in the year 1976. It is apparent that the evidence of the pleadings of the Objector is fabricated hence the contradiction.

77. Further, cogent evidence has been produced by the Administrators in their Petitioner's Further List of Documents dated 23rd January 2017 in rebuttal to Objector claim of cohabitation. In the referred List of Documents, letter dated 28th July 2016 from the County Government of Nakuru clearly indicates that House No.736A Kimathi Estate belongs to **Peter Muna Wangare** as their tenant while House No. 751 C belongs to **Monica Muthoni Kimani** as their tenant.

78. The Further List of Documents includes bundles of rent cards pertaining to Houses No. 751C and 736A within the Kimathi Housing Estate. These rent cards clearly demonstrate that the Objector and Peter Muna Wangare were paying rent for the respective houses. Notably, the rent

card for House No. 751C further reflects that, at one point, the registered tenant was the Objector's father, Samwel Kimani despite these records, the Objector has not adduced any evidence to establish that the Deceased owned property in Kimathi Estate or ever resided or cohabitated with her therein.

79. On the second issue, the Administrators submit that, the Objector's two children, namely **Peter Muna** and **Anthony Karanja Karobia,** are not the biological children of the Deceased. Their birth certificates, produced as exhibits and marked **'MMKVa** and **'MMKVb'** in the Objector's Affidavit of Protest dated 30th January 2023. do not name the Deceased as their father.

80. The Certificate of Birth Serial No.54723, exhibit and marked **"MMKVa",** issued to Peter Muna does not name the Deceased as the father. There is no entry under the father's name, yet somehow the child Objector decided to obtain an identity card using the name Peter Muna Karobia in order to include the name of the Deceased. The names on his identity card do not correspond with names on the Birth Certificate and there is nothing to show that the Deceased authorized and for consented to the use of his name on the Identity card.

81. In the Certificate of Birth Serial No.54672, exhibit and marked "**MMKVb"**, of Antony Karanja, the Fathers name is given as "**Habel Thumu Karubia**". These are not the given names of the Deceased. The names of the Deceased are "**Habel Thumi Karobia**" which the Objector has never controverted in these proceedings.

82. It is also important to note that both certificates of birth relied upon by the Objector were issued on 21st and 22nd February 2013, over a year after the Deceased, Habel Thumi Karobia, passed away on 31st January 2012. This Honourable Court, in **Mutahi & another. x. Mutahi & 3 others [2025] KEHC 3044 (KLR),** in addressing the probative value of birth certificates obtained posthumously, in paragraph 54 of it judgment, held as follows:

> ***"A certificate of birth obtained after the death of the deceased would raise doubt as its genuiness and the court is entitled to a plausible explanation for such turn of events*."**

83. That the Objector has not presented any plausible explanation for such a tum of events and the very real possibility that these documents were obtained deliberately with a view of presenting them as evidence to support the Objector claim cannot be ignored. Given the numerous anomalies in the Certificates of Birth, we respectfully submit to this Honourable Court to find that the same do not constitute evidence of paternity.

84. In any event, a Certificate of Birth, even though a proper one, is not adequate proof of paternity. In the matter of **Kamau Muigai (Deceased) (2018) eKLR as cited in Mutahi & another Mutahi & 3 others [2025] KEHC 3044 (KLR)** at paragraph 54 of its judgment, Hon. Justice Musyoka held as follows:-

> ***"Regarding the second Applicant there is a Birth Certificate on record that places the name of the late son of the Deceased on record as her father. The family claims that***

> ***she was not related to them as she was not introduced as such. The certificate was obtained before the alleged father died. I am however, alive to the fact that a certificate of Birth is not adequate proof of paternity....."*** *[Own emphasis]*

85. Similarly in the Matter of **<u>The Estate of Peter Murava Chege Alias Murava Chege (2019) eKLR as cited in Mutahi & another v Mutahi & 3 others [2025] KEHC 3044 (KLR)</u>,** Hon. Justice A. K. Ndungu held that:-

> ***"In this time and age of considerable scientific discovery, development and achievement, where a dispute arises as to the paternity of an individual, there is no better way to settle that issue with finality than through a dependable DNA test."***

86. That, in any case, the only name in common with that of the Deceased is **"Karobia**". People can and often do bear similar names. The name **"Karobia**" was not reserved for the Deceased alone.

87. The Objector went on to claim in her witness statement dated 14th January 2015 that the Deceased was fully involved in her children's lives. She alleges that the Deceased paid their school fees and paid dowry for their son Peter Muna. There is no evidence tendered to prove that the Deceased met any of the above expenses. No invoices for school fees sent to the Deceased were produced. No evidence of payment dowry was availed. These remain unproven allegations.

88. Therefore, we respectfully submit that, the Objector's children are not the biological children of the Deceased, as no credible evidence has been adduced to support such a claim. Consequently, they do not qualify as beneficiaries of the Deceased's Estate within the meaning of the Law of Succession Act. Further, there is no evidence to demonstrate that they were dependants of the Deceased immediately prior to his demise, and as such, they do not meet the legal threshold to be considered as dependants under **Section 29** of the Act.

89. That, on the 3rd question, the Administrators submit that the 1st protestor has never been married to the Deceased Late son **Henry Kiragu Karobia**. In her Supplementary Affidavit and Affidavit of Protest dated 12th April 2023, she keeps on referring to the Late Henry Kiragu Karobia as her husband. However, there is no evidence availed to show that the Late Henry Kiragu Karobia entered into a civil or customary union with her.

90. Further, she depones at paragraph 9, that her claim to the Deceased Estate is through her alleged husband who was a dependant to the Deceased Estate and by application of the principle of representation she stands in the shoes of the Late Henry Kiragu. The principle of representation was properly handled in the case of in **re Estate of Luna Mutava Kioko (Deceased) [2021] KEHC 8894 (KIR)**, where this Honorable Court held at paragraph 31 of its ruling that:-

> ***For the objector to step into the shoes of his late father and properly make a claim to the property which belongs to his father, he must prove that he is a legal representative of his***

father. The Term "Legal Representative" Is Defined In Section 2 Of The Civil Procedure Act As Meaning:

> ***"A Person Who In Law Represents The Estate Of A Deceased Person, And Where A Party Sues Or Is Sued In A Representative Character The Person On Whom The Estate Devolves On The Death Of The Party So Suing Or Sued."***

91. Same Court agreed with holding in the **HCC Succ No. 36 Of 2017 - Khalid Abdi Frahim Vs. Asha Ibrahim Hast & Charles Macharia** That:-

> ***The Position In Law As Regards Locus Standi In Succession Matters Is Well Settled. A Litigant Is Clothed With Locus Standi Upon Obtaining A Limited Or A Full Grant Of Letters Of Administration In Cases Of Intestate Succession. In Otieno V Ougo [1986-1989] EALR 468, The Court Rendered Itself Thus:***
>
> > ***... An Administrator Is Not Entitled To Bring Any Action As Administrator Before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."***

92. It therefore follows, that without evidence that the 1st protestor is a legal representative of the Estate of her alleged Deceased husband, **Henry Kiragu Karobia,** she cannot purport to lay claim to properties where her interests is derived from the interest of her alleged husband,

since she is not staking the said claim in her own right but in her capacity as a beneficiary of her alleged husband's Estate.

93. Consequently, the 1st protestor does not qualify as a beneficiary nor as a dependant to both the Estate of her alleged husband and the Deceased herein as no evidence has been adduced in support of such claims.

94. On the 4th question, the Administrators submit that the two children of the 1st protestor namely **Vivenne Wangechi Kiragu** and **Anthony Thumi**, are not the biological children of the **Late Henry Kiragu Karobia.** As earlier stated a Certificate of Birth is not adequate proof of paternity. In addition, the Certificate of Birth of Anthony Thumi clearly does not bear the surname of Deceased herein which is Karobia, while the Certificate of Birth for Vivienne Wangechi Kiragu ought to have been named after her alleged grandmother, **Loice Wangeci Karobia**.

95. Furthermore, their alleged paternal grandmother, Loice Wangeci Karobia swore a Replying Affidavit date 4th September 2017, that the Late Henry Kiragu and Raphael were not married and they did not have any children. Moreover, neither the 1st protestor nor her children participated in the burial arrangements of their alleged husband and/or father, and no plausible explanation has been provided to this Honourable Court to account for their absence.

96. Accordingly, the children of the 1st protestor are not entitled to any share of the Estate of the late Henry Kiragu Karobia, nor do they qualify as his legal representatives, as no letters of administration have

been obtained in respect of his Estate. Further, they do not meet the threshold of dependants under the law, as no evidence has been adduced to support such a claim.

97. On the 5th question, the Administrators submit that the 2nd protestor, **Loise Karobia** is not a child of the **Late Raphael Karobia**. She claims to bear the name Loice Karobia in her Supplementary affidavit dated 12th April 2023, in support she attached her Birth notification marked **LW-2.**

98. That this Honourable Court in **Mutahi & another v Mutahi & 3 others [2025] KEHC 3044 (KIR),** in regard to naming in the Kikuyu Community, held in paragraph 80 as follows:-

> ***"In as much as the Gikuyu Community does have naming patterns for children born within a marriage, the fact of naming alone is not in my view sufficient proof of paternity. This would be too tenuous a link. A mother is free to give her child any name she wishes and name alone cannot entitle a person to inheritance rights."***

99. That, naming alone is not adequate proof of paternity. She further claims that one **Habel Thumi Muthoni**, named as a grandchild in the published death announcement of the Deceased, is her brother. However, no evidence has been tendered to prove the alleged blood relationship.

100. In addition, she annexed copies of minutes marked **'LW4',** purportedly attested by one of the Administrators and her alleged father,

concerning a domestic dispute involving her alleged sister, **Lilian Wairimu**, and her husband. Yet again, no evidence has been provided to establish that Lilian Wairimu is indeed her sister. Notably, the 2nd protestor is neither mentioned in the said minutes nor did she execute them.

101. Lastly, as submitted earlier in the case of **HCC Succ No. 36 Of 2017- Khalid Abdi Frahim Vs. Asha Ibrahim Hast & Charles Macharia** That:-

> ***... An Administrator Is Not Entitled To Bring Any Action As Administrator Before He Has Taken Out Letters Of Administration. If He Does, The Action Is Incompetent As Of The Date Of Inception."***

102. It therefore follows, that without evidence that the 2nd protestor is a legal representative of the Estate of her alleged Deceased father, Raphael Karobia, she cannot purport to lay claim to properties where her interests is derived from the interest of her alleged father, since she is not staking the said claim in her own right but in her capacity as a beneficiary of her alleged father's Estate.

103. For the foregoing reasons, the 2nd protestor has failed to prove her claim of being a child to the Deceased late son **Raphael Karobia**.

104. That the last question, the Administrators submit that, the **Alfred Mwanga Simiyu** is not entitled to commission as a creditor to the Estate. As per his Affidavit dated 2nd February 2015, he claims that the Deceased previous Advocate instructed him to look for properties on

behalf of the Deceased herein could invest in Nairobi. However, no evidence has been produced in support of this allegation.

105. He further depones that, he is entitled to a commission of Kshs. 3,432,150 arising from services allegedly rendered in locating properties at Wilmary Estate and for managing and collecting rent on behalf of the Deceased, as evidenced by the document annexed and marked **"AMSI".** However, no evidence has been tendered to demonstrate the existence of any agency agreement or property management contract between the alleged creditor and the Deceased. Moreover, the said document marked **"AMSI"** bears no indication or acknowledgment of receipt by the Deceased's former advocates or any endorsement confirming its authenticity or execution.

106. Accordingly, the Administrators respectfully submit that, the alleged creditor's claim is unsubstantiated and without merit, and should therefore be dismissed for want of evidence.

107. The Administrators respectfully urge this Honourable Court to dismiss the Objector objection to the making of grant, the 1st and 2nd Protestors affidavits of protest and the Creditor Affidavit as they lack merit and unsupported by sufficient evidence and the Administrators further pray that the 3rd Administrator's Summons for Confirmation of Grant dated 19th December 2022 be allowed with costs.

2nd Administrator's case and Submissions

108. The 2nd Administrator refined the following issues for the court's attention

a) **Whether or not the protest by Monicah Muthoni Kimani, the alleged deceased's 2 wife is merited.**
b) **Whether or not the protest by Catherine Igoki Irungu, the alleged deceased son's wife, is merited.**
c) **Whether or not the protest by Loise Karobia, the alleged deceased's granddaughter, is merited.**
d) **Whether or not the protest by Alfred Mwanga Aminga, the alleged deceased's creditor, is merited.**

109. On the 1st issue the 2nd Administrator contends that the protest is unmerited there is Lack of Proof of Marriage by **Monicah Muthoni Kimani** to the deceased.

110. First and foremost, the protester has not demonstrated that she was indeed a wife to the deceased and thus cannot be entitled to any share of the estate of the deceased as such. She claims to have been married under customary law. However, based on the evidence on record, there is no proof of the mandatory requirements for presumption and fulfillment of a customary marriage especially under the Kikuyu culture. Proof of customary marriage is a question of fact which is proved by evidence. The following judicial decisions shed light on how court have dealt with the establishment of this preponderant issue;

111. The Court of Appeal in **Hottensiah Wanjiku Yawe vs. The Public Trustees [1976] eKLR**, a landmark case in this matter and cited with approval in one of the most recent case of **AKK v PKW (Family Appeal E013 of 2023) (2024) KEHC 11948 (KLR) (Family) (14**

August 2024) (Judgment)eKLR laid down three principles regarding proof of customary marriages in court as follows:

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

112. The Ingredients of a Kikuyu Customary marriage was stated in **Eugene Cotran Restatement of African Customary Law** as;

a) ***Capacity, the parties must have capacity to marry and also the capacity to marry each other.***
b) ***Consent, the parties to the marriage and their respective families must consent to the union Ngurario;***
c) ***no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.***
d) ***Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid***
e) ***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 under the captured procedure when the marriage is consummated after the eight days seclusion, and nowadays when the bride comes to the bride grooms home".***

113. That this position has been restated in several decisions by the courts. In **Mary Wanjiru Gathatha v Esther Wanjiru Kiarie Eldoret CA 20/2005** Nyamu J. gave the essentials of a Kikuyu Customary marriage as; Co-operating Consent, N*gurario* slaughtering a ram, *Ruracio* Bride price and Commencement of cohabitation. All these are fungible. All must be present for one to prove kikuyu customary marriage.

114. In the instant case, four of the five elements are highly challenged being consent by the parties and their respective families, *ngurario, ruracio* and even commencement of cohabitation. It behooved the protester, **Monicah Muthoni** to adduce compelling evidence to establish the elements in question, she failed to do so.

115. More particularly and as to consent, the family of the deceased was not aware of such marriage. As a matter of fact, the protester and her two main witnesses stated that they could not remember the two deceased family members that consented and/or attended any event leading to such marriage. This then leads us to the next important ingredient being *Ngurario*. *Ngurario* as earlier stated is the slaughtering of a ram. There was no evidence adduced to that effect. The witnesses don't even seem to understand that the same was necessary and that it ever happened.

116. That, most important of all is *Ruracio.* The same is a ceremony for dowry payment. It is too public and many people would normally attend the same as fanfare. It is hard to question the same since there are so many witnesses that evidence the event. The mere fact that no family

member except the protester and her two witnesses seem to be familiar with it, is a clear demonstration that it never occurred and we humbly invite the Honorable Court to consider it as such.

117. That these events are normally scripted and/or recorded. There was no evidence adduced to that effect. As a matter of fact, the protester was very fast to state that *ruracio* was recorded but she did not give any evidence to that effect. To cover up what appears to be an apparent lie, she stated that the deceased went with a copy and she also had her copy but were all kept by the deceased.

118. That the explanation defeats logic and the core custom. The very reason why each party is given their copy is to prevent such mess. Either one gets lost and can't be retrieved or a party questions the validity of marriage as is the case herein. As if that is not enough, the elders including the parents or the family of the wife remain with a copy. There is no explanation as to the whereabouts of the same.

119. That the dowry per se is also not clear what it was. The protester testified that the deceased was to pay 120 goats whereas the two witnesses testified that the deceased was to pay 90 goats. One would wonder why that huge discrepancy. There was and there is no viable explanation that was and can be implied to such a contradiction. It can only be that both testimonies were crafted to mislead the Honorable Court only to be incapacitated by their own inconsistencies.

120. The Administrators invites the Honorable Court to consider the following judicial precedence in furtherance of the above arguments and/or positions;

121. That the above cited case of **AKK v PKW (supra)** proceeded to state as follows;

> ***"A customary law marriage is a covenant of marriage sealed by the other customary ingredients and for the Kikuyu these ingredients are well known and documented. if he courts were to fail to take this into account, they would be giving recognition to the "come we stay' marriages which are neither customary nor statutory***

122. That 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 cannot be said that a valid Kikuyu customary marriage came into existence between the appellant and respondent.

123. In the 2nd Administrators view, the omission of *Ngurario* as a rite regaled the existence of a Kikuyu customary marriage. I therefore and that the trial magistrate did not err in making a finding in this Instant case that rites of customary marriage must be performed as required and that *Ngurario* was not conducted and therefore parties were not married under Kikuyu Customary Law.

124. In The Estate of **Joseph Gathigo (Deceased) Priscilla Waruguru Gathigo Vs Virginia Kanugu Gathigo (2004) eKLR** cited with approval in **Walford Ngugi Njambi & another v Eunice Wanjiru**

Wambui & 2 others [2022] eKLR, the superior court stated as follows:-

> ***"I find the evidence adduced by the protestor on proof of alleged marriage to the deceased fell short of proving the alleged marriage... there was no independent witness to customary formalities. There was no evidence that the elders from the deceased relatives who participated in the said marriage. There was no evidence that 'ngurario ram was slaughtered. The Court finds there was no marriage between the deceased and the Respondent"***

125. That, the instant protester has not proved the alleged marriage to the deceased on the basis that was no independent witness to testify on customary formalities. The protester only brought the witnesses that were not independent and only appeared to be biased and in total support of the protester's case. They cannot be said to be independent and further their credibility is also in question having contradicted some issues as well as their inability to critically remember what really conspired. It is now trite law that testimonies of such witnesses are inadmissible and we humbly invite the Honorable Court to treat them as such.

126. That is not enough, even the most important documents that must indicate the husband of the protester did not at all indicate the name of the deceased. For instance, NSSF registration number and by the protester's own admission, the deceased's name is not indicated. One would wonder why anyone would be married with someone yet there is nothing to show them being together as husband and wife.

127. It is the 2nd Administrators contention that there is Lack of Proof of paternity of the two children to the deceased, that the protester herein has not exhausted her burden of proving paternity of the two children to the deceased and as such her protest to that extant is also unmerited.

128. Under this head and without belaboring too much, by the mere fact that the protester could not prove her marriage to the deceased, there is a presumption and high possibility that the kids she has does not belong to the deceased. However, we are also not blind to the fact such can be the deceased's children but now born out of wedlock. We will then proceed and determine whether the protester has proven paternity of the two children to the deceased which in our humble view, she has not

129. The 2nd Administrator wish to bring to the attention of the Court that, the Applicant did not adduced any evidence probative enough to prove that indeed the deceased was the father to the two alleged children. The birth certificates produced did not bear the name of the deceased and therefore one could not tell how the two children were deceased's children. They are namely, **Peter Muna Karanja** and **Antony Karanja Karobia**. The deceased bore the name **Habel Thumi Karobia**. None of his names appears in the birth certificates of the two children. That alone should disqualify the two children from being deceased's children.

130. Antony's Birth Certificate purports to indicate the deceased as his father. It indicates the name **Habel Thumu Karobia**. That name is also not the correct capture of the deceased's name, a clear Indication that the said birth certificates could have been an attempt to force the deceased to being the father of Antony. It also means that at the time of acquiring the birth certificate, the name of the deceased was strange to either the protester or the two children and that is why it was incorrectly indicated in the produced birth certificates. That cannot be an error apparent on the face of record.

131. Most importantly, the two birth certificates were all acquired a year after the demise of the deceased. That raises a lot of doubts as to their genuineness. One would wonder why they were Issued a year after the demise, and another would answer that to force the children to being those of the deceased. We invite the Honorable Court not to allow such people from disinheriting the right beneficiaries to the deceased's estate. We place reliance in the following case of **Mutahi & another vs Mutahi & 3 others (2025)KEHC(3044)eKLR**, where the superior court in addressing the probative value of birth certificates obtained after the demises held as follows;

> ***"A certificate of birth obtained after the death of the deceased would raise doubt as its genuineness and the court is entitled to a plausible explanation for such turn of events."***

132. The protester has not proffered any plausible explanation why the birth certificates were obtained after the demise and any conclusion that the same were obtained only to present them as evidence in support of the

protester's case which is too remote, cannot be overruled and we invite the Honorable Court to treat them as so and consequently declare them as inadmissible and/or consider them as not to have any probative value. In any event, birth certificate, even a proper one, is not an adequate proof of paternity as it was held in the **matter of Kamau Mulgal (Deceased) (2018) eKLR** Hon. Justice Musyoka in the following manner:-

> ***"Regarding the second Applicant there is a Birth Certificate on record that places the name of the late son of the Deceased on record as her father. The family claims that she was not related to them as she was not introduced as such. The certificate was obtained before the alleged father died. I am however, alive to the fact that a certificate of Birth is not adequate proof of paternity....."***

133. That, in the current era and/or generation, medical technology has made it very easy to determine the children of any person. DNA test has become the order of the day in answering the question of paternity question. As a matter of fact, birth certificates are no longer final as to proof of paternity but dependable DNA test is.

134. The 2nd Administrator places reliance in the Similarly in the Matter of The Estate of **Peter Muraya Chege Alias Muraya Chege (2019) eKLR** cited with approval in the above cited **case of Mutahi & another(supra)** where Hon. Justice A. K. Ndungu held that:-

> ***"In this time and age of considerable scientific discovery, development and achievement where a dispute arises as to***

the paternity of an Individual, there is no better way to settle that issue with finality than through a dependable DNA test":

135. That, in light of the above arguments, it is difficult to imply any paternity of the two children on the deceased herein. It is therefore our humble submission that the two children are not children of the deceased and as such not entitled to any share of the deceased's estate and we pray that the Honorable Court holds as such.

136. As to whether or not the protest by **Catherine Igoki Irungu**, the deceased son's wife, is merited the administrators contend that, as a matter of procedure and principle, the protester herein does not have *locus standi* to claim any share of the deceased's estate on behalf of the deceased's son, **Henry Kiragu**. They submit as such on the basis that for any party to claim a share from the deceased's estate on behalf of another, he/she must first obtain grant for letters of administration or probate for the estate of which he/she claims on its behalf. The protester herein does not have a grant of letters of administration of the estate of the deceased's son, Henry Kiragu and such does not have *locus* to claim on his behalf. We invite the Honorable Court to hold as such and dismiss her from the proceedings herein on that account. We place reliance on the following judicial precedence;

137. The Court of Appeal in **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR** when discussing the issue of locus standi in succession causes stated as follows:

> ***"the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession."***

138. We fully associate ourselves with the decision In **re Estate of Elijah Kaseke Makau (Deceased) [2021] eKLR,** where Justice Odunga held as follows;

> ***"He therefore stakes his claims on the fact that his deceased mother was entitled to inherit from the estate of the deceased. There is no dispute that his mother was a daughter of the deceased and was therefore entitled to inherit from the deceased estate. However as rightly held by my leamed brother, Kiarie, J his claim can only succeed if he proves that he is the legal representative of her estate. In other words, the mere fact that he is a son to Regina Ndinda Makau, does not entitle him to automatically step into the shoes of her deceased mother."***

139. Moreover, Kiarie Waweru Kiarie, J in **Gabriel Simall & 7 Others vs. George Oduor Oloko [2020] eKLR,** argued as hereunder,

> ***"Whereas I agree with the Learned Judge, such must be clothed with legal powers to do so; he/she must first out seek and obtain letters of administration of their parents' estate. This is when he can claim his/her parents' inheritance from the estate of the deceased. In the instant case the appellants have not demonstrated that they have***

obtained letters of administration to allow them to stake any claim in the estate of the deceased."

140. The 2nd Administrator contends lack of proof of marriage to the deceased son. That, in any event, the protester has not in any way proven that indeed she was married to the deceased's son, the late Herry Kiragu and one would struggle so much on what account is to consider her as a beneficiary of the deceased son's estate, it is on those accounts that we are of the view that not only does she lack *locus standi* to claim on behalf of the estate of the late Henry Kiragu, for lack of legal grant of representation, but also has not proven her marriage to the said deceased's son. She did not avail any marriage certificate to that effect

141. As a matter of fact, the law **Loise Wangeci Karobia**, the wife to the deceased, in her replying affidavit sworn on the 4th day of September 2017, before her demises makes it clear that her two sons namely, Henry Kiragu and Raphael were not married. As if that is not enough, it is also confirmed even by way of psychiatric evidence that the said son had mental illness and as such did not have capacity to marry. That evidence has not been controverted by way of any other evidence and it stands as valid and we invite the Honorable Court to consider that as the right position. We further associate ourselves with the authorities and submissions with respect to the first issue as to validity of customary marriage.

142. The 2nd Administrator contends there is Lack of proof of paternity of the two children as the deceased's deceased son.

143. That the protester also approaches the Honorable Court together with two children namely, **Vivenne Wangeci Kiragu** and **Antony Thumi** that she claims to be belonging to the deceased's son, Henry Kiragu. Again, for lack of the said *locus standi* she cannot claim on their behalf. Be that as it may, there is no proof of paternity of the two children to the deceased's son, the late Henry Kiragu. She has availed birth certificates just like it was the case with the first protester being Monicah Muthoni. However, the birth certificate of **Antony Thumi** does not bear the surname of the deceased herein, which is **Karobia**.

144. That raises a serious doubt of how and why. On the other hand, Vivienne Wangeci Kinagu ought to have been named after her alleged grandmother, Loise Wangeci Karobla as a result of those inconsistencies and/or doubts, clearly, the paternity of the two children is highly questionable, in any event and as earlier stated, and birth certificate is not adequate proof of paternity.

145. In light of this therefore, the 2nd Administrator is of the view that the two children herein are not children of the late Henry Kiragu and as such no share of the deceased's estate can be transferred to them on behalf of their alleged father as they have failed to so prove.

146. As to whether or not the protest by Loise Karobia, the Alleged Deceased's Granddaughter, Is Merited? It is the 2nd Administrators case the protester herein, being a granddaughter and just like the above protester, does not have *locus standi* to claim on behalf of the estate of her alleged father Raphael Karobia. She did not first obtain

letters of administration to the estate of the late alleged father. Without belaboring so much on this point, the 2nd Administrator reiterate the position above, associate herself with the decision In **re Estate of Elijah Kaseke Makau (Deceased) [2021] eKLR,** where Justice Odunga held as follows;

> ***"Similarly, in my view, the Protestor can only claim entitlement to the estate of the deceased is he satisfies two conditions. First he ought to prove that he was being maintained by the deceased. He does not claim so and there is no evidence along those lines. He therefore stakes his claims on the fact that his deceased mother was entitled to inherit from the estate of the deceased. There is no dispute that his mother was a daughter of the deceased and was therefore entitled to inherit from the deceased estate. However he rightly held by my learned brother, Kiarie, J his claim can only succeed if he proves that he is the legal representative of her estate. In other words, the mere fact that he is a son to Regina Ndinda Makau, does not entitle him to automatically step into the shoes of her deceased mother."***

147. Moreover, Kiarie Waweru Kiarle, J in **Gabriel Simali & 7 Others vs. George Oduor Oloko [2020] eKLR**, argued as hereunder,

> ***"The second instance is where the grandchild can stake his claim on his/her parents' right to Inherit. Musyoka J. in the case of Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR described such a right in the following terms:***

"grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren Inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents

Whereas I agree with the Learned Judge, such must be clothed with legal powers to do so, he/she must first out seek and obtain letters of administration of their parents' estate. This is when he can claim his/her parents' inheritance from the estate of the deceased. In the instant case the appellants have not demonstrated that they have obtained letters of administration to allow them to stake any claim in the estate of the deceased."

148. Being as it may, she has not proven her paternity to the deceased's son, Raphael Karobia. Following her alleged grandmother's replying affidavit sworn on the 4th day of September 2017, before her demise, makes it clear that her two sons namely, Henry Kiragu and Raphael were not married and did not have children. The protester herein has availed birth certificate as proof of paternity. Before even going further, birth certificate alone is not adequate proof of paternity.

149. That she further claims that, she is rightly named after her alleged grandmother, **Loise Karobia**, it is now trite that, just as production of

birth certificate, naming alone is not adequate proof of paternity and the 2nd Administrator invite the Honorable Court to dismiss the protester's view on the contrary. Further, names can be similar and using that as proof of paternity, people will be waiting for their namesake's to die and come claiming that they were part of the family and thus heirs according to the Law of Succession. These positions were reiterated with approval in the earlier cited case of **Mutahi and another (eKLR)** in the following manner,

> ***"The only name in common with that of the Deceased is 'Mutahi. People can and often do bear similar names. The name 'Mutahi' was not reserved for the Deceased alone."***
>
> ***"In as much as the Gikuyu Community does have naming patterns for children born within a marriage, the fact of naming alone is not in my view sufficient proof of paternity. This would be too fenuous a link. A mother is free to give her child any name she wishes and name alone cannot entitle a person to inheritance rights."***

150. That, it is based on the above that we are of the view that the protester herein not only does she lack the *locus standi* but also has not proven her paternity to the deceased's son, Raphael Karobia and as such cannot claim any share on behalf of the deceased son's estate. They humbly invite the Honorable Court to dismiss her on that account.

151. As to whether or not the Protest by **Alfred Mwanga Aminga**, the alleged Deceased's Creditor, Is merited? It is the 2nd Administrator's

submission that, the alleged creditor **Alfred Mwanga Aminga** is not entitled to commission as a creditor to the estate of the deceased. No evidence that has been tendered to support his allegation that he had been contracted by the deceased's advocates to look for properties in Nairobi on behalf of the deceased. There is no valid agreement has been tendered to that effect and as to delivery of the said services. He also claims for a commission on account of allegedly locating properties at Wilmary Estate and for managing and collecting rent on behalf of the deceased. Similarly, no evidence has been tendered to that effect, not even an agency agreement or property management contract has been tendered. A commission to the tune of above Kshs. 3 Million is huge sum of money and parties cannot just agree orally or otherwise, on contract of such magnitude. If the same is allowed to ventilate, it may lead to unjust enrichment of the creditor herein and disinherit the beneficiaries from what is rightly theirs unjustly.

152. That, this is a succession and/or a probate court and not a civil court to determine the presence or absence of a contractual agreement between the deceased and any other person. As long as the administrators do not recognize any agency or agreement of whatever nature between the deceased and the alleged creditor herein, then this court does not have jurisdiction to handle and determine whether in deed there were any money owed to the creditor. That sort of jurisdiction lies elsewhere and the creditor ought to have approached the Honorable Court differently. In verdict therefore, the creditor not only did he fail to prove his case but also is in the wrong court and should be dismissed as such and possibly be directed to file his

unmerited claim elsewhere. They placed reliance in the following judicial precedence;

153. That this position was reiterated with approval in **re Estate of Joseph Kipkirui Chuma (Deceased) (Succession Cause 114 of 2014) (2022) KEHC 14648 (KLR) (31 October 2022) (Ruling) eKLR,** as follows;

> *"**In this court's view, succession causes should be smooth salling causes limited to disputes between family members and limited to questions whether a property is or not a part of the not estate, whether one is or is not a child to the deceased, whether one had been gifted by the deceased during the deceased life and therefore such gifts need to be taken into account in the scheme of distribution."***
>
> ***"It is not the mandate of succession cause to delve into the dealings over the estate property before or after death. Where there be a controversy as to whether any transaction was undertaken and not concluded even by the deceased before death, and where the administration do not admit such liability, the only avenue open to such a claimant is to establish its claim before a civil court, in the usual way, then seek to enforce the resultant decree against the estate*."**

154. That the Honorable Court in that case gave clear illustration on the nature of claims that are not and should not be part of the subject of

litigation before succession court. The superior court in that respect observed that;

> ***"Disputes against the estate or indeed against the beneficiaries and the administrators by 3rd parties, are not inheritance disputes and thus ill-suited to be handled within a succession cause. It is the view of the court that claims other than those asserting the right to be entitled to inherit must not be invited into the dispute between inheritors. It is desirable to exclude the third party claims so that the family handles their issues and disputes as family.***
>
> ***It is unfortunate that some of the overly old succession causes pending in court have been held hostage in the court system by pure civil claims, either based on contracts or just claims upon trust. To this court such confusion must be discouraged by the court standing its ground and asserting that only inheritance disputes need be dealt with in probate cases. That is the view that I find to be firmly entrenched and trite from decisions of the High Court and courts of equal status and permits to the Court of Appeal."***

155. That as it is clearly observed hereinabove, it is therefore our humble submission that the nature of claim by the creditor is contractual in nature and purely civil and as such should be discouraged from the realm of succession court. They therefore submit that the same be

considered as such, and possibly the creditor be directed to file his contractual claim before the appropriate court.

156. That in light of the foregoing factual and legal analysis, they humbly submit that the protesters claims including that of the creditor be dismissed with costs to the estate of the deceased.

Analysis and Determination

157. In consideration of the case before court I was minded to consider the following as issues for determination;

a) Whether or not the protest by Monicah Muthoni Kimani, the alleged deceased's 2nd wife is merited.

b) Whether or not the protest by Catherine Igoki Irungu, the alleged deceased son's wife, is merited.

c) Whether or not the protest by Loise Karobia, the alleged deceased's granddaughter, is merited.

d) **Whether or not the protest by Alfred Mwanga Aminga, the alleged deceased's creditor, is merited.**

158. On the 1st issue this court finds that the Objector **Monicah** failed to demonstrate that she was married under Kikuyu Customary Marriage, cohabitation with the deceased in itself cannot constitute marriage, and the five elements of Kikuyu Customary Marriage has not been showcased or satisfied.

159. This court thus finds that **Monicah Muthoni Kimani** was not married to the deceased to qualify to succeed the deceased.

160. As for the 2nd issue as to whether the 2nd protestor her four other siblings were **Lilian Wairimu**, **Habel Thumi**, **Loise Wangechi** and **Rahab Wangui** are the children of the late **Raphael Karobia**. The court is unpersuaded that firstly the protestor had proper legal standing before the court to agitate on the issue and secondly the court finds the evidence adduced to be in sufficient to qualify them as dependents in this instant matter under **Section 26.**

161. In my view as I have held elsewhere, the production of the birth certificate alone is not proof that that child is the deceased's.

162. While a Birth Certificate can be used to prove paternity, It was thus incumbent that the applicant do prove on a balance of probabilities that is required to demonstrate that her children were dependent of the deceased during his lifetime and are therefore a dependent under **Section 26 of the Law of Succession Act**.

163. The standard and burden of proof provided by the Evidence Act ought to be discharged; he who alleges must prove. **Section 107** of the **Evidence Act** places the burden of proof on the party that alleges. In **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others (2014) eKLR** the Supreme Court held inter alia: the person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the

obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.

164. In the Absence of proof of marriage, it would be important for the applicant to demonstrate that, the deceased had accepted her children **Peter Muna Karobia** and **Anthony Karanja Karobia** as his children and that Peter Muna Karobia and Anthony Karanja Karobia were maintained by the deceased immediately before his demise.

165. I am afraid that this evidence is lacking and the Applicant never tendered any evidence that the deceased had accepted him as his own and took care of him immediately before his demise.

166. Children born out of wedlock that seeks recognition in adulthood as beneficiaries to an intestate deceased person's estate must showcase and demonstrate that the deceased had accepted him/her during his lifetime and took care of him/her without which such a person cannot be regarded as a dependant.

167. The 1st protestor's has failed to demonstrate she was married to Henry Kiragu, and as for the birth certificates, of **Vivienne Wangechi Kiragu** and **Anthony Thumi** as produced, the court does find that they cannot automatically make them beneficiaries in the absence of a grant of letters of administration in the estate of their deceased father.

168. This court equally find that the alleged creditor failed to prove that he was owed any monies by the deceased to qualify as a creditor his protest/objection is equally dismissed.

169. I am inclined to dismiss All protest and objections especially the summons dated 29th May, 2022 and allow the summons for confirmation of grant dated 19th December, 2022.

170. I am inclined to grant costs to the Administrators.

171. Any Party Aggrieved has a 45 day leave to Appeal which period shall act as stay against execution.

172. A mention shall be held after 60 days to review the progress

It is so ordered

Signed Dated and Delivered at Nakuru
This 7th day of November, 2025.

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Mohochi S.M.
Judge