REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION MILIMANI

FAMILY APPEAL E099 OF 2024

CAROLYNE FAITH NGONYO MUTINDA ..... APPELLANT

VERSUS

CAROLYNE MUNYASILI ..... RESPONDENT

(Being an appeal from the Ruling of Hon. E. Nyakundi (SRM) delivered on 27th June, 2024 in Nairobi Milimani Chief Magistrates Court Succession Cause No. E055 of 2023, In the matter of the Estate of Timothy Irimu Murigu alias Timothy Irimu alias Murigu Timothy Irimu)

JUDGMENT

1. The Deceased, **Timothy Irimu Murigu alias Timothy Irimu alias Murigu Timothy Irimu,** died on 7th August, 2021. The Respondent obtained grant of representation to his estate on 15th August, 2023 and the same was confirmed on 4th March, 2024. The Appellant brought an application dated 22nd March, 2024 seeking to revoke the confirmed grant under **Section 76** of the **Law of Succession Act.** She claimed that she was a 2nd wife of the Deceased and that the Grant had been obtained fraudulently and by concealment of material facts thereby disinheriting legitimate dependents of the Deceased.

2. The Court delivered a ruling on 27th June, 2024 in which dismissed the Appellant's application for revocation. The Court held that since it had confirmed the Grant on 4th March, 2024, it became *functus officio* as far as the Confirmation of the Grant was concerned. It also held that, once a Grant has been confirmed, the only recourse available to parties under civil law was to appeal or review, to the extent admissible under the **Law of Succession Act**

but not move the Court under **Section 76** of the **Law of Succession Act.**

3. The Appellant went back to Court through miscellaneous application dated 1st July, 2024 and amended on 31st July, 2024 in which she sought revocation of the Grant. The Respondents raised a Preliminary Objection arguing that the Appellant's application for revocation of the Grant was *res judicata*. The Court delivered a ruling on 12th August, 2024 in which it held that it was *functus officio*. It also observed that the Appellant was at liberty to file an appeal against the ruling delivered on 27th June, 2024, instead of a miscellaneous cause.
4. The Appellant was dissatisfied with the two rulings and appealed to this Court vide a Memorandum of Appeal dated 22nd August, 2024. She raised 23 grounds of Appeal, which were captured in 6 pages of her Record of Appeal. I have reproduced 13 of the 23 grounds as follows;

1)3. The Learned trial Magistrate misdirected herself in law and fact and arrived at a wrong conclusion in, having been a matter in which the

Appellant was completely in the dark about, since the Respondent had excluded the Appellant from the petition for Grant of Letters of Administration as well as in the proceedings/Summons for confirmation of Grant hence she was not party to the said proceedings.

2) ***4. The Learned trial magistrate erred in law and fact in failing to address the fact that the Respondent is guilty of fraudulently obtaining the Grant of Letters of Administration without involving the Appellant who is the widow of the Deceased and as well as the mother of T.B.W.I (a minor) who are rightful beneficiaries to the estate of the Deceased herein.***

3) ***5. The Learned Magistrate was wrong in issuing the Grant of Letters of Administration to the Respondent without the production of the birth certificate of minor T.B.W.I which would clearly have shown that the said child's mother is the***

Appellant herein and the father was the Deceased. The Appellant is guilty of fraud by concealment of a material fact to the effect that the Appellant is the mother of the Deceased's child; thereby hoodwinking the court to the effect that she (Respondent) is the mother of the minor while she herself had no child with the Deceased, in a blatant attempt to lock out the Appellant and manipulate the court so that she could take all the properties of the Deceased, thereby disinheriting the legitimate beneficiaries, the Appellant and the minor who are lawful dependants of the Deceased.

4) ***6. The Learned Magistrate erred in law and fact in failing to consider the ground that the proceedings to obtain the grant were defective in substance as the minor is mentioned in the petition as a child of the Deceased, yet only one administrator was appointed in the Grant of***

Letters of Administration contrary to the provisions of Section 71 (2A) of the Law of Succession Act.

5) ***7. That the Learned Magistrate erred in law and fact in failing to Summons for Confirmation of Grant particularly the prayer for the appointment of the Trustee of the child by the Appellant. The learned magistrate through the manipulation of the Respondent appointed a complete stranger one Judith Nekesa Mwanzo, who is unknown to the Appellant and the Minor, as Trustee of the minor who is the child of the Appellant and the Deceased while the Appellant is alive and well, a fact that the Respondent was very much aware of. All these orders were granted without the involvement and or consent of the Appellant which is an illegal act intended to defraud the Appellant and the Minor from their fair share in the estate, in complete contravention of the***

rights and welfare of the child as protected and enshrined in Article [..] of the Constitution of Kenya, 2010.

6) ***8. That the Learned trial Magistrate erred in law and fact in failing to appreciate the Respondent acted fraudulently by the making of a false statement or by the concealment from the court of something material to the case. In this case the Administrator deliberately concealed to the Honourable Court information about the existence if the minor's mother-the Appellant herein, while the court never made efforts to interrogate the Petition for Grant or the Summons for Confirmation of Grant.***

7) ***9. That the Learned magistrate misdirected herself in failing to address the fact that the Respondent misrepresented to the court that she was married to the Deceased while in fact she concealed the fact that she had long separated***

from the Deceased more than one year before the time of his death and that the Deceased had in fact filed for divorce against the Respondent vide Nairobi CMCC Divorce Cause No E029 of 2021 Timothy Irimu Murigu vs Carolyne Munyasili while she also filed a Cross-Petition against the Deceased. There was no existing marriage between the Respondent and the Deceased and the Respondent was not therefore a spouse to the Deceased at the time of his death. The Respondent is not therefore a proper person to be appointed administrator of the Deceased's estate and or be a beneficiary of the estate of the Deceased in exclusion of his surviving spouse-the Appellant.

8) ***10. That the learned magistrate erred in law and fact in failing to address the fact that the Respondent was guilty of non-disclosure of the full inventory of the estate of the Deceased.***

9) ***11. That learned trial magistrate erred in fact and law and granted orders of distribution of the estate despite the fact that the Respondent concealed to court the existence of other properties of the Deceased.***

10) ***12. That the learned trial magistrate erred in fact and in law in allowing the mode of distribution of the Deceased's properties as listed in the Respondent's Summons for Confirmation of Grant which included non-existent properties in the list of the Deceased's estate.***

11) ***13. The learned trial Magistrate erred in law and fact in law in failing to consider the prayers made in the Summons for Revocation of Grant dated 25th March, 2024 filed by the Appellant as well as the Appellant's fresh Summons for Revocation of Grant dated 1st July, 2024 and amended on 31st July, 2024 seeking Revocation of grant of Letters of Administration and setting***

aside of the orders confirming the Grant and instead ruling that the matter was functus officio yet the Appellant had filed a fresh application and introduced the minor as a party in the proceedings and the new prayer for setting aside of the orders confirming the Grant. The Magistrate further ignored the grounds put forward by the Appellant under Section 76 of the Law of Succession Act, hence failing to take into consideration the grounds thereof.

12) ***14. That the learned Magistrate erred in law and fact in failing to grant the Appellant an opportunity to present her case and in the circumstance, her right to a fair trial/hearing as enshrined in the Constitution was trampled on.***

13) ***22. That the learned magistrate failed in law to invoke the inherent jurisdiction conferred on the court under Section 76 to revoke the grant whether or not confirmed and further Rule 73 of***

the Probate and Administration Rules and instead placed undue reliance to extraneous matters while issuing the orders confirming the grant and the distribution of the estate.

5. She asked the Court to allow the appeal and set aside the Grant of Letters of Administration issued on 4th March, 2023 to the Respondent as well as the orders confirming the Grant of Letters of Administration issued on 15th August, 2024 by Honourable E.M Nyakundi. She also prayed that, the Appellant together with the child's grandmother Diana Mwikali Mutinda Mutisya be appointed administrators of the estate of the Deceased and the distribution of the rightful shares of the Appellant and the Deceased's child - **T.B.W.I** to the estate of the Deceased be determined afresh.
6. Lastly, she requested that the orders made on 4th March, 2024 as contained in the Certificate of Confirmation of Grant, appointing Judith Nekesa Mwanzo as Trustee of Baby **T.B.W.I** (a minor) as Trustee be vacated and the minor's

grandmother Diana Mwikali Mutinda Mutisya be appointed as Co-Administrator of the Estate, as Trustee of the Minor.

7. The Appeal was canvassed by way of written submissions.

Appellant's written Submissions

8. The Appellant submitted that the Grant issued to the Respondent should be revoked on grounds that there was fraudulent non-disclosure of material facts by the Respondent. She argued that the Respondent concealed the existence of the Appellant as the rightful spouse of the Deceased. She submitted that, once the Deceased and the Respondent separated, she married the Deceased under Kamba customary law and that dowry was paid in that respect. He also stated that the Deceased had indicated her as his next of kin in a policy he had taken with the ICEA Lion Insurance Company.
9. She also submitted that the Respondent fraudulently misrepresented that she was the Deceased's wife. She argued that these claims were without merit, as the Respondent had long separated from the Deceased prior to

his death and that the Deceased had already initiated divorce proceedings against the Respondent. She submitted that while the legal divorce may not have been finalized, the separation and the divorce proceedings demonstrated that the Deceased no longer considered her as his wife.

10. The Appellant submitted that she is a dependent under **Section 3 (5)** of the **Law of Succession Act** and thus entitled to inherit from the Deceased's estate. She also argued that the proceedings to obtain the Grant were defective in substance because the Respondent failed to appoint two administrators where a minor is a beneficiary and that she appointed a stranger as Trustee for the minor. She also submitted that the Respondent did not disclose the full inventory of the Deceased's property such that some properties were omitted in the distribution.

11. Lastly, the Appellant submitted that the Respondent had already collected monies amounting to Kshs.11,000,000.00 from Nairobi Water & Sewerage company. She argued that, where it is found that the Respondent has transferred any of the Deceased's property,

the Court should order her to give an account and inventory and pay back to the estate all monies and properties already transferred in her name. She submitted that where monies have been withdrawn and properties transferred, the Court should declare the same as illegally obtained and order the Respondent to pay back to the estate.

Respondent's written Submissions

12. The Respondent submitted that she is a lawful and rightful beneficiary of the Deceased's estate in the capacity of a widow and that she was fully entitled to institute the succession proceedings. She argued that there was no concealment of material facts from the court and that the allegations to the contrary are unfounded and unsupported by evidence. She submitted that her marriage to the Deceased subsisted throughout the lifetime of the Deceased and at the time of his death. She also submitted that the Appellant was not a wife of the Deceased and did not qualify as a beneficiary of the Deceased's estate.

13. The Respondent also submitted that the grant does not disinherit the minor, arguing that she was duly recognized in the Petition and Certificate of Confirmation of Grant and was bequeathed several properties to be held in trust for her by a trustee. For this reason, she argued that she ensured that the Minor's rights and interests were fully protected and that she was provided for. She submitted that any dispute by the Appellant regarding the adequacy or nature of the assets does not alter the fact that the minor was included in the distribution and was not disinherited.

14. Lastly, the Respondent submitted that there was no concealment of any information whatsoever regarding the properties making up part of the estate. She argued that the properties alleged to have been omitted from the Petition cannot be included in the Succession cause because of several reasons; some are not governed by the **Law of Succession Act,** others are owned jointly by the Deceased and the Respondent and hence not subject to the succession proceedings, and yet others are subject matter in the Deceased's grandfather's succession cause.

Issues for Determination

15. Having considered the grounds of appeal and the submission by the Appellant, I find that there are five (5) issues for determination;

a) **Whether the Appellant's application for revocation of grant dated 22nd March, 2024 was merited.**

b) **Whether there was Concealment of something material to the case.**

c) **Whether the Appellant is a wife of the Deceased, and therefore a dependant under Section 3 (5) of the Law of Succession Act.**

d) **What Reliefs are available to the Appellant?**

e) **Who should be appointed the Co-administrator in this Cause?**

16. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial Court afresh, evaluate, analyze it, and come to its own independent conclusion, but always bearing in mind that the trial Court

had the advantage of observing the demeanor of the witnesses and hearing them give evidence, and give allowance for that. (See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR.**

17. Accordingly, this Court is being required to undertake a wholesome review of the Appellant suit at the lower Court and come up with its conclusion.

Whether the Appellant's application for revocation of grant dated 22nd March, 2024 was merited

18. **Section 76 of the Law of Succession Act** provides for the grounds under which a court can revoke a grant of letters of administration. The section provides as follows;

> ***"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***
>
> ***(a) that the proceedings to obtain the grant were defective in substance;***

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

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

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

19. The Court in **In re Estate of Amos Kiteria Madeda-Deceased [2022] eKLR** interpreted the said provision in the following terms;

"21. The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. A reading of Section 76 shows that the grounds can be divided into the following

categories: - (a) the propriety of the grant-making process; (b) mal-administration or (c) where the grant has become inoperative due to subsequent circumstances".

20. The Appellant submitted that the Grant issued to the Respondent should be revoked. For this to happen, it was upon the Appellant to demonstrate the existence of any or some of the grounds provided for under **Section 76**. That said, I shall relook at the Appellant's application for revocation of Grant dated 22nd March, 2024, to determine whether the said application disclosed any or some of the grounds for revocation.

21. In the application, the Appellant claimed that the Grant was obtained fraudulently and by concealment of material facts. The Application was supported by an affidavit sworn by her and dated the same date. She averred that the Respondent was the estranged 1st wife of the Deceased and that the two were in the process of divorcing at the time of the death of the Deceased, in **Divorce Cause No. E029 of**

2021 Timothy Irimu vs Carolyne Munyasili. She attached a copy of the Petition for Divorce.

22. The Respondent filed a replying affidavit dated 1st April, 2024, in which she did not comment on the issue of the divorce proceedings. Instead, she stated that she enjoyed an uninterrupted and continuous lawful marriage with the Deceased up until the date of his unfortunate passing.

23. I have relooked at the records to ascertain whether the Deceased had in fact initiated divorce proceedings against the Respondent. I have looked at the Petition for Divorce allegedly filed by the Deceased when he initiated the said divorce proceedings. I have also seen the answer to Petition and Cross-petition allegedly filed by the Respondent in response to Divorce Petition. The pleadings cite the case as **Divorce Cause No. E029 of 2021**. The Answer to Petition and Cross-petition shows that it was signed by the Respondent.

24. I note that the Respondent did not respond to the issue of the divorce proceedings between her and the Deceased.

Additionally, she did not disown the copy of the answer to Petition and Cross-petition which bears her signature. She had an opportunity to file a further affidavit and clarify this issue to the Court, but she did not. In the circumstances, I find that the Appellant has established, on a balance of probabilities, that there were subsisting divorce proceedings between the Respondent and the Deceased at the time of his death.

25. I associate with the observations of the Court in **VJC v BSW [2024] eKLR**, where the Court held that parties are deemed legally divorced once the Divorce Court pronounces its Judgment declaring the marriage as dissolved and issues a *Decree Nisi*. It observed as follows;

> ***"However, as regards proof of dissolution of the marriage, in my, view, that is sufficiently done once the Divorce Court pronounces its Judgment declaring the marriage as dissolved and issues a Decree Nisi. In this case, although it seems that neither of the parties has bothered to pursue extraction of the Decree Absolute, it is not denied***

that the marriage was dissolved by the Court vide its Judgment delivered way back on 20/09/2019, 5 years ago and further, neither of the parties denies that they have both accepted that fate".

26. Similarly, the Court in **In re Estate of Salim Juma Hakeem Kitendo (Deceased) [2022] eKLR** held that an estranged spouses remains legally married until the conclusion of their divorce proceedings. It observed as follows;

"71. Therefore, in the absence of any divorce certificate or any witness in accordance with the Islamic law to confirm the divorce between the deceased and the objector, the allegations of divorce remain unsubstantiated. I have no doubt that the deceased did not complete any divorce proceedings against the objector and that by the time the deceased died, he was still lawfully married to the deceased. Consequently, the objector is for all purposes and intents a widow to

the deceased and therefore a beneficiary to the deceased's estate".

27. Based on the above authorities, I find that, the marriage between the Respondent and the Deceased had not been legally dissolved at the time of his death. Even though they had separated and the divorce proceedings were underway, the Respondent remained his wife because the divorce Court had not rendered a judgment declaring the marriage dissolved, and had not issued a *Decree Nisi*. Accordingly, I find that the Respondent was for all intents and purposes a widow of the Deceased and a beneficiary to the Deceased's estate.

28. I have seen the Respondent's petition for Letters of Administration Intestate together with the supporting affidavit both dated 29th May, 2023. I have gone through the contents and the averments therein. She described herself as a wife of the Deceased and disclosed that the Deceased had a daughter (the minor in question). On the face of the petition forGgrant, in my view, the Respondent did not make fraudulent statements.

Whether the Respondent concealed Something Material to the Case

29. The Court has also considered whether the Respondent concealed something material to the case. From the record, it is evident that the Respondent, while filing for the letters of the administration, did not disclose to the court the fact that the minor was not her biological daughter. Without that clarification, it is reasonable to assume that the Court presumed the minor was the Respondent's biological daughter. It is also reasonable to assume that the Court believed that the Respondent was out to protect the interests of the minor because it believed that she was her biological daughter.

30. I also note that the Respondent appointed one Judith Nekesa Mwanzo as the trustee of the Minor. The Appellant claimed that the said person is the Respondent's relative - being her sister-in-law. I presume that the lower Court did not see anything strange with this appointment, because it had been made to believe that the minor was the

Respondent's biological daughter. In my view, the lower Court would have been hesitate to allow such an arrangement had it been informed that the minor's mother was alive, well, and able to articulate the best interests of the Minor.

31. In the end, I find that the Respondent's failure to disclose to the Court the fact that the minor was not her biological daughter amounted to the concealment from the Court of something material to the case as per **Section 76 (b)** of the **Law of Succession Act**. In that case, I find that the G rant is for revocation.

Whether the Appellant is a wife of the Deceased, and therefore a dependant under Section 3 (5) of the Law of Succession Act

32. In her application for revocation of the grant, the Appellant claimed that she was married to the Deceased through Kikuyu-Kamba customary laws in early 2021. The Respondent denied the said marriage and maintained that the Appellant did not have the legal capacity to marry the

Deceased at the said time because the Appellant herself was in another subsisting monogamous marriage which had not been dissolved at the time she alleges she married the Deceased.

33. I have relooked at the record to determine whether the Appellant had the legal capacity to marry the Deceased at the time she alleges they contracted the customary marriage. According to the documents on record, the Appellant was married to one **D.N.M** in 2010 but she filed a divorce against him in **Divorce Cause No E1283 of 2020**. The divorce Court made a Decree *Nisi* on 16th July, 2021 and the same was made absolute on 16th August, 2021.

34. Thus, based on the observations of the Court in **VJC v BSW (Supra),** it means that the marriage between the Appellant and **D.N.M** was legally dissolved on 16th July, 2021, when the Decree *Nisi* was made. Until that time, I find that the Appellant was in a monogamous marriage with **D.N.M** and thus she did not have the legal capacity to contract marriage with the Deceased, or anyone else.

35. In the instant case, the Deceased died on 7th August, 2021. This means that, the only time that the Appellant was free to legally contract a marriage with the Deceased was between 17th July, 2021 and 7th August, 2021.

36. In the supporting affidavit to the application, the Appellant averred that she was married to the Deceased under customary law in early 2021. She produced an affidavit dated 28th July, 2021, in which she stated that the customary rites were conducted on 19th July, 2021. I have seen that the application was disposed of by way of written submissions and the parties did not give oral evidence on the application. Accordingly, the parties did not adduce oral testimony concerning the alleged customary marriage between the Appellant and the Deceased.

37. The lower Court did not address itself to the issue of the alleged customary marriage because the Court declared itself *functus officio* and declined to look the merits of the application. However, I do not think that the lower Court was *functus officio* in the circumstances.

38. I associate with the observations of the Court in **Asvalu v Ashiundu & another [2025] eKLR**, where the Court held that **Section 76** of the **Law of Succession Act** provides for instances where the court can be allowed to revoke or annul the Grant notwithstanding the fact that it has been confirmed. The Court held as follows;

> ***"It is trite that the court largely becomes functus officio once it has issued a certificate of confirmation of letters of administration. However, section 76 of the Law of Succession Act provides for instances where the court can be allowed to revoke or annul the Grant notwithstanding the fact that it has been confirmed and provides that;- "***
>
> > ***A Grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—……***

By virtue of section 76 of the Law of Succession Act, the court had discretion to entertain an application for revocation or annulment of grant."

39. Similarly, the Court in **In re Estate of the Late Epharus Nyambura Nduati (Deceased) [2021] eKLR** faced a similar question and held as follows;

"38. In light of the above, I invoke the inherent powers of this court granted under Article 159 of the Constitution and Section 76 of the Law of Succession Act and make the order to revoke the letters of grant of administration issued to the Petitioner and subsequent confirmation as it was obtained fraudulently by the making of false statement or by the concealment from court of something material to the case particularly in relation to the sale of the 2 acre portion of Nyandarua/Oljoro Orok Salient/1881 belonging to the Applicant's husband."

40. Based on the above authorities, I find that the Appellant's application for revocation of the Grant was rightly before the Court, and that the Court had the jurisdiction to hear the application, notwithstanding that it had confirmed the grant. In my view, that is the correct interpretation of **Section 76** of the **Law of Succession Act,** where it stated; ***"A Grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion."***

41. I shall now relook at the issue of the alleged customary marriage. Appellant produced two affidavits one sworn by her and another one sworn by the Deceased, both dated 28th July, 2021. In the affidavits, they averred that they married each other under Kamba customary law on 19th July, 2021. I note that in her earlier affidavit dated 22nd March, 2024 she had indicated that they got married under the customary law in early 2021. In the latter affidavit, she also indicated that they swore an affidavit to that effect on 1st April, 2021.

42. Kenyan Courts have established the requirements for proving a customary law marriage. In **Hortensia Wanjiku Yawe v The public Trustees, Civil Appeal 13 of August 6, 1976**, the Court established the principles regarding proof of customary marriages in Court as follows;

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

43. In **DCK v GKM; RNM (Interested Party) [2020] eKLR**, the Court interrogated on how a party should proof customary marriage and held as follows;

> ***"The plaintiff did not adduce any evidence to prove a marriage between her and the defendant. She pleaded that they contracted a customary***

marriage under Kalenjin Customary Law in 2014. <u>One would have expected a document to show payment of dowry or a witness to confirm that indeed the plaintiff and the defendant cohabited as husband and wife between 2014 and 2018 but none was availed.</u>

In the instant case, no attempt was made to prove a marriage between the plaintiff and defendant. Even if the cause is undefended, the plaintiff should have demonstrated in her pleadings and formal proof that there existed a marriage. The plaintiff was so vague in claiming that they contracted a Kalenjin Customary marriage."

44. Similarly, the court in **<u>In re Estate of Solomon Jirongo (Deceased) [2019] eKLR</u>** faced a similar question and observed as follows;

"The applicant has provided a dowry payment agreement as proof of the marriage. <u>There is no corroborating evidence on the formalities of the</u>

customary law agreement or any proof in form of witness statements that prove that the customary marriage process took place. ***In my opinion the dowry agreement does not prove that there was a marriage to the deceased on a balance of probabilities. However for the purpose of inheritance there are basis upon which marriage can be presumed of which this court needs not ignore at this juncture."***

45. In the instant case, the Appellant did not adduce additional evidence to corroborate and substantiate her claims that they contracted the customary marriage on 19th July, 2021. She did not call witnesses to testify that the customary marriage and the rites took place. In that case, I find that her alleged marriage to the Deceased was unproved.

46. Lastly, the common law presumption of marriage on the basis of long cohabitation does not apply in the circumstances of the case. This is because, as I have already found, the only time that the Appellant was free to legally

contract a marriage with the Deceased was between 17th July, 2021 and 7th August, 2021. This period is roughly 21 days, which in my view, is too short to establish what the law refers to 'long cohabitation.'

47. That notwithstanding, I note that the Deceased had a special relationship with the Appellant. The Deceased himself described the Appellant as a 'friend' in his Insurance Policy with ICEA LION Life Assurance, in which he allocated her 100% benefits. In the said form, he stated that he nominated the Appellant as his "**trusted friend as the beneficiary due to ongoing court case**." Even though she was not his wife, I find that it was within his rights to choose whomever he decided as his kin and beneficiary.

What Reliefs are available to the Appellant?

48. I have seen the mode of distribution approved by the Court. It shows that the minor was to get 2 properties that is, Title Number Mavoko Town Block/3/76114 measuring 0.030 Hectares and Pine Court Plot No 12 Ruiru Kiu Block 2

(Githunguri)/24744. These two properties were to be held by the Respondent and the one Judith Nekesa Mwanzo in trust for the minor. On the other hand, the Respondent allocated herself 6 properties, namely, Motor Vehicle Mazda CX5 Registration No KCZ 016F, 2 Accounts at Stanbic Bank, 1 Account at SBM Bank, Nairobi Water dues, Account No CU1857 at Username Real Estate.

49. On the face of it, it appears to this Court that the mode of the distribution leans in favor of the Respondent and does not favor the Minor. This is particularly so, given that the minor did not have anyone who would have articulated and protected her interests during the Confirmation of the Grant and in the distribution of the said assets. The lower Court might have missed to note this because it had been made to believe that the minor was the Respondent's biological daughter.

50. In the course of this appeal, the Appellant submitted that one of the 2 properties allocated to the minor, *Pine Court Plot No 12 Ruiru Kiu Block 2 (Githunguri)/24744*, does not form part of the Deceased's estate as the sale of

the said land was cancelled and the Deceased never purchased it. She also submitted that the other asset allocated to the minor, *Mavoko Town Block/3/76114*, was very small and it is in the interior of Mavoko and not worth much in value.

51. In addition, it also emerged that, possibly, some properties of the Deceased were left out in the list of Properties. The Appellant claimed that some of the properties left out included;

a) ICEA Lion Money Market Fund Account No. 104199

b) L.R No Kajiado/Ntashart/14205 measuring 0.045 Ha.

c) L.R No Donyo Sabuk/Komarock Block 1/90143 measuring 0.04 Ha.

d) L.R No Kajiado/Ntashart/12738 measuring 0.04 Ha.

e) Iria-ini/Kaguthi/1375 measuring 0.0335 Ha holding in trust for the Minor.

f) *Jamii Sacco Society Account No. 13429.*

52. All these factors point to the inevitable conclusion that this is a case where the parties must file a fresh Summons for Confirmation with a new mode of distribution at the lower court for a fresh consideration of the distribution of the assets between the Respondent and the Minor.

53. In light of all these concerns, I find that in the interest of justice, the Grant must be revoked. The same is hereby revoked. I, however, hereby issue fresh Grant of Representation to the Respondent, being the surviving widow of the Deceased, and the first in priority in terms of the **Law of Succession Act.**

Who should be appointed the Co-administrator in this Cause?

54. It is evident that there exists a continuing trust because one of the beneficiaries is a minor. The law requires that in such cases, the administrators must be at least two (2). In other words, the estate should have more than one Administrator.

55. In **In re Estate of Ndirangu Francis Kiago (Deceased) [2023] eKLR**, the Court discussed continuing trusts where one of the beneficiaries is a minor. It observed as follows;

> ***"In the instant case, the Respondent while petitioning for the letters Administration clearly specified that the other beneficiaries were minor children…, it is clear that a continuing trust results where there are minor beneficiaries involved and there are assets like land forming part of the estate of the beneficiary. In this case then there exists a continuing trust……***
>
> ***Where there is a continuing trust and only one person is appointed as an Administrator, the remedy does not lie in revocation of the grant but the court has the discretion to appoint a Co-Administrator as provided by Section 66. The Applicant herein does not fall under the category above since he is the father of the deceased, and***

since the deceased had a spouse and children, they are the only ones entitled to the estate of the deceased. However, in fulfillment of Section 58, since there exists a continuing trust, the estate should have more than one Administrator."

56. The question before this Court is who should be the other additional administrator. The law governing this issue is **Section 58 of the Law of Succession Act** which provides that:

58. Number of administrators where there is a continuing trust

(1) Where a continuing trust arises—

(a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation;

(b) ……

(2) ***Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion***.

57. **Section 66 of the Law of Succession Act** gives final discretion as to who should be appointed an Administrator of an estate in the following preference: -

a) Surviving spouse or spouses, with or without association of other beneficiaries

b) Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided under Part V

c) The Public Trustee; and

d) Creditors

58. The Appellant herein does not fall under the category above since she is not a spouse, she is not a beneficiary, and she is not a creditor. It appears from the record that there were no other beneficiaries of this estate, other than the minor and the Respondent. All the other relatives of the Deceased were not involved in the proceedings and I presume that they did not have interest in these succession proceedings. Thus, in these circumstances, the Court is unable to get the additional administrators from other beneficiaries under clause (ii) above.

59. I note that the issue at hand concerns the welfare of a child. The guiding principles when considering matters concerning children's welfare are found in the Constitution that requires that the best interests of the child be of paramount importance. **Article 53(2) of the Constitution** provides:

> ***"A child's best interests are of paramount importance in any matter concerning the child."***

60. The same principles are echoed in **Section 4(2) and 3(b) of the Children Act, 2022** that provides that:

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration… to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

61. Based on the above constitutional and statutory provisions, I find am of the view that, in cases where there is a continuing trust, it is in the best interest of the minor(s) to have an administrator who is capable of protecting the minor's interest during the succession proceedings. It is also my considered view that, a person aspiring to be appointed an administrator in these circumstances ought to be someone who has the best interest of the minor(s) at heart.

62. At the lower Court, the minor did not have someone who could look out for her interests, and that explains why the mode of distribution confirmed by the lower court appears to lean in favor of the Respondent and did not favor the minor. Thus, to rectify that and prevent a repeat of such an occurrence, the Court must appoint someone who is capable of safeguarding the minor's interests during the succession proceedings.

63. I have already found that the Appellant herein does not fall under the category of persons eligible for the appointment of as an administrator under **Section 66** of the

Law of Succession Act. However, due to the very unique circumstances of the case, and the constitutional requirement to protect the best interests of the Minor, I find that the Appellant should be appointed the second administrator. Being the mother of the minor, I presume that she is the most appropriate person to look out for her interests during the succession proceedings and capable of holding the same for her until she is legally able to take up her share.

64. I hereby appoint the Appellant as the second co-administrator. The Administrators shall file fresh summons for Confirmation of Grant (with a new mode of distribution) at the lower Court within 90 days of this judgment.

65. In the end, the Appeal succeeds, albeit partially.

Disposition

66. These are the final orders of the Court;

a) The Appeal succeeds and the Grant of Representation issued to the Respondent on 15th

August, 2023 and confirmed on 4th March, 2024 is hereby revoked.

b) A new Grant of Representation is hereby made jointly to the Appellant and the Respondent.

c) The administrators shall file fresh summons for Confirmation of Grant (with a new mode of distribution) at the lower Court within 90 days of this judgment.

d) I make no orders as to costs.

67. It is so ordered.

DATED, DELIVERED and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **16TH** day of **MARCH, 2026.**

……

HON C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mrs Waiganjo Advocate for the Appellant

No attendance for the Respondent