

**IN THE COURT OF APPEAL  
AT NYERI**

**(CORAM: M'INOTI, KANTAI & MUMBI NGUGI, JJA.)**

**CIVIL APPEAL NO. E010 OF 2021**

**BETWEEN**

**IN THE MATTER OF THE ESTATE OF STEPHEN  
NGIGI KARWIGI (DECEASED)**

**ROYCE WANGARI NGIGI.....APPELLANT**

**AND**

**FAITH WANGUI NGIGI.....RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya at  
Murang'a (Kimondo, J.) dated 21<sup>st</sup> September 2021*

*in*

***HCSC No. 2807 of 2014)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This appeal relates to the estate of **Stephen Ngigi Karwigi (Deceased)** who died on 10<sup>th</sup> August 2013. The **appellant, Royce Wangari Ngigi**, stakes her claim to the estate of the deceased as his widow, claiming to have been married to him under Kikuyu customary law. The **respondent, Faith Wangui Ngigi**, is a daughter of the deceased and the surviving administrator of his estate. She asserts that the appellant is

not a widow of the deceased, but only attended to him as a hired caregiver. It is common ground that the deceased did not have any children with the appellant.

2. On 31<sup>st</sup> October 2014, the respondent and her late brother, **David Kamau Ngigi** applied for a grant of letters of administration to the estate of the deceased, which was issued on 6<sup>th</sup> July 2015. Subsequently, they applied for leave to introduce an alleged will of the deceased covering part of his properties. On 27<sup>th</sup> July 2016, they applied for confirmation of the grant and prayed that part of the estate of the deceased be distributed in accordance with the will, and the remainder by intestate succession as proposed in the summons for confirmation of the grant.
3. On 24<sup>th</sup> October 2016, the appellant lodged a protest in her capacity as widow of the deceased. She claimed to be entitled to four properties of the deceased, namely:
  - i) Loc.11/Maragi/1193/11**
  - ii) Loc. 11/Maragi/1193/89**
  - iii) Loc.11/Maragi/1463/9B; and**
  - iv) Loc.11/Maragi/4355**
4. Further, the appellant objected to the will on the grounds that it was executed prior to her marriage in 2009 and urged the

court to distribute the net estate of the deceased between the two houses of the deceased pursuant to **section 40** of the **Law of Succession Act**.

5. On 2<sup>nd</sup> May 2017, the High Court directed the summons for confirmation of grant and the protest be heard by *viva voce* evidence. The appellant testified on her behalf and called two witnesses, namely, her mother, **Grace Nduta Njoroge (PW2)** and her maternal uncle, **Uno Gachau (PW3)**. The respondent testified on her own behalf and did not call any witnesses.
6. By the judgment impugned in this appeal, the High Court found that the appellant was not married to the deceased under Kikuyu customary law nor was she a widow under the presumption of marriage; that **section 40** of the **Law of Succession Act** did not apply to the estate of the deceased; and that the appellant was not a dependant of the deceased. The appellant was however, awarded two properties, namely, **Elburgon/Arimi/Ndoshua Block 1/213** and **Elburgon/Arimi/Ndoshua Block 1/214**, which the court found the deceased had gifted her in 2011. The upshot was that the court dismissed the protest, allowed the estate of the deceased to be distributed as suggested

by the administrator

subject to a proper application, and directed each party to bear their own costs.

7. The appellant was aggrieved and, after lodging a notice of appeal on 25<sup>th</sup> September 2020, filed this appeal contending that the High Court erred by:

***i) holding that the appellant had not proved a Kikuyu customary marriage or in the alternative a presumption of marriage;***

***ii) ignoring or misapprehending the appellant's evidence and thereby arriving at a wrong conclusion; and***

***iii) placing on the appellant a burden of proof beyond reasonable doubt while lowering that on the respondent.***

8. During the hearing of the appeal on the Court's virtual platform, the appellant's learned counsel, **Mr. Wangai**, who held brief for **Mr. Mbutia** elected to rely on his written submissions dated 4<sup>th</sup> October 2024, without highlighting.

9. On proof of customary marriage and the presumption of marriage, the appellant submitted that she adduced sufficient evidence, including an affidavit of marriage authorising the appellant's change of name; a copy of eulogy where the appellant was recognised as a widow of

the deceased; some

photographs of the appellant including one with coffin of the deceased; a letter from the chief identifying her as a dependant of the deceased; and a copy of consent to grant of letters of administration intestate of the estate of the deceased which included her as a dependant.

10. It was further contended that a Kikuyu customary marriage was proved by the evidence of the appellant, PW2 and PW3, which showed that the deceased visited the appellant's home in Elburgon in 2012 in the company of some people and was met by people from her side and that he agreed to purchase a parcel of land for PW2, which he did and it was registered in the names of the appellant and PW2. The appellant argued that the evidence of PW2 showed that the deceased paid **Kshs. 30,000** for *mwati, harika* and *kiara* and a further **Kshs. 5,000** for getting up the elders and three crates of soda for the women. In addition, it was contended that the deceased bought two plots of land for PW2 as part of the dowry and that the evidence of PW3 corroborated the payment of dowry.
11. The appellant's counsel further submitted that the respondent did not produce any evidence of payment of the

appellant as a caregiver for the deceased, and that the respondent's explanation for inclusion of the appellant's name in the consent to making of grant, namely, that the inclusion was in good faith and on humanitarian grounds, was not convincing.

12. It was the appellant's further contention that the High Court erred by holding that the deceased did not complete *ruracio* as a ground for finding that there was no customary marriage between the appellant and the deceased. Counsel cited the decisions in ***In the Estate of James Njenga Kinuthia [2018] eKLR*** and ***Zipporah Wairimu v. Paul Mucheru***, H.C.C.C. No. 1280 of 1970 in support of the proposition that there is no time limit for the performance of the *ngurario* ceremony that even part payment of dowry validates a Kikuyu customary marriage. As for the two plots, it was contended that they were gifts, which were recognised under Kikuyu customary law as compensation to the mother of the bride.
13. Turning to the presumption of marriage which was argued as an alternative to Kikuyu customary marriage, the appellant relied on ***BKG v. NWT [2022] KEHC 16399 (KLR)***

on the

conditions for presuming a marriage, such as long

cohabitation and general repute as husband and wife. It was submitted that cohabitation of over four years coupled with treatment of the appellant as wife of the deceased by his family, were adequate. Further, that the change of the appellant's name; the chief's letter; the reference to her as a widow in the eulogy; and the prominent place she occupied at the burial of the deceased showed that the appellant and the deceased treated themselves as husband and wife. It was also contended that the description of the appellant as a survivor of the deceased in the petition for grant showed that she was a widow of the deceased.

14. Lastly, as regards misapprehension of evidence and burden of proof, the appellant submitted that she adduced sufficient evidence to prove her case and that the court erred by finding that it was not cogent. It was contended that to require evidence over and above what the appellant adduced was tantamount to requiring her to prove her case beyond reasonable doubt and that the respondent's burden was lowered by the court acting on her bare denials. For the above reasons the appellant urged the Court to allow her appeal.

15. Like the appellant's counsel, **Ms. Muriungi**, learned counsel who held brief for **Mr. Njau** for the respondent, opted to rely on written submissions dated 1<sup>st</sup> October 2025, without highlighting.
- 16.** On the first ground of appeal, counsel cited the decisions of the High Court in **Florence Wairimu Kanyora v. Njoroge** **Kinyanjui** [2005] eKLR and **Mwagiru v. Mumbi** [1967] EA 639 and submitted that the four essential steps in a valid Kikuyu customary marriage were the proposal by the man, the taking of beer to signify acceptance, payment of dowry (*rurachio*) and slaughtering the *ngurario* ram. It was contended that the appellant did not adduce evidence of having gone through the above stages and therefore did not prove the minimum requirements of a valid Kikuyu customary marriage.
17. It was further submitted that only two relatives of the appellant testified, without any independent witnesses and that the mere fact of taking a photo with the casket of the deceased did not confer on the appellant the status of a wife. The decision in **Mary Njoki v. John Kinyanjui** [1985] eKLR

was cited in support. The respondent also dismissed the

eulogy and the affidavit of change of the appellant's name as evidence of her marriage to the deceased, contending that such acts cannot confer marriage status.

**18.** Turning to the presumption of marriage, the respondent relied on the decision of the High Court in **Esther Wanjiku**

**Njau & Another v. Mary Waihato [2006] eKLR** and of this Court in **Mary Njoki v. John Kinyanjui** (supra) and submitted that the presumption of marriage is a common law principle and is dependent on proof of long cohabitation between the parties, the parties conducting themselves as husband and wife, and general repute among family and friends. It was contended that in this case the appellant never proved any of the above prerequisites.

19. Accordingly, the respondent urged the Court to dismiss the appeal with costs.

20. We have carefully considered this appeal, the judgment of the High Court, the grounds of appeal, the submissions and the authorities relied upon by the parties. Being a first appeal, we are required to reconsider the evidence, assess it and make our own independent conclusions, but always

remembering that we neither saw nor heard the witnesses.

To that extent, we shall not readily interfere with findings of fact by the trial court unless they are based on no evidence or on a misapprehension of the evidence or it is shown demonstrably that the trial court acted on wrong principle in reaching its findings. (See **Jaban v. Olenja [1986] KLR 661**).

21. As earlier indicated, this appeal turns on whether the appellant adduced sufficient evidence to prove a customary Kikuyu marriage between herself and the deceased, or in the alternative, whether she adduced evidence from which the court could presume a marriage between herself and the deceased.
22. Starting with the Kikuyu customary marriage, we bear in mind the holdings in **Kimani v. Gikanga [1965] EA 735** and **Gituanja v. Gituanja [1983] KLR 575** that the existence of a customary marriage is a matter of fact to be proved by evidence. In **Kimani v. Gikanga** (supra), **Duffus, JA** explained the position thus:

***“To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to***

**this case. As a**  
**matter of necessity the customary law must**  
**be**  
**accurately and definitely established. The**  
**Court**

***has a wide discretion as to how this should be done***

***but the onus to do so must be on the party who puts***

***forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law***

***would have to call evidence to prove that customary***

***law, as would prove the relevant facts of his case."***

**(Emphasis added).**

23. Secondly, a party who wishes to rely on a customary marriage must prove that the essential rites that underpin such a marriage were performed. In his book, ***Facing Mount Kenya: The Traditional Life of the Gikuyu***, Heinemann Kenya Reprint, 1988 at pages 165 to 170, Jomo Kenyatta identifies four stages in a kikuyu customary marriage. The first stage is the initial visit to the girl's home by the prospective bridegroom in the company of age mates to seek the girl's hand. If he is accepted, in stage two his parents visit the bride's parents bearing

*“njohi ya njoorio”* the beer for formally asking for the girl’s hand. The third stage involves taking *ruracio* (dowry) or part of it to the bride’s parents while the

last stage is the *ngurario* ceremony involving representatives of the two clans and friends when a sheep from the man's family is slaughtered at the girl's home, amid feasting.

24. In **MNM v. DNMK & 13 Others** [2017] KECA 171 (KLR) this

Court held as follows on essential rites of a valid Kikuyu marriage:

***“To prove a valid Kikuyu customary marriage, Eddah was obliged to adduce evidence showing on a balance of probabilities the essential rites and ceremonies, without which a Kikuyu customary marriage is not valid, were performed. On the essentials of a valid Kikuyu customary marriage, Dr. Eugen Cotran, in his seminal work Restatement of African Law: Kenya Volume 1 The Law on Marriage and Divorce, Sweet & Maxwell, 1968 explains that no marriage is valid under Kikuyu law unless the ngurario ram is slaughtered and that there can be no valid marriage under Kikuyu law unless part of the ruracio has been paid.”***

**(Emphasis added)**

25. Earlier in **Anastasia Mumbi Kibunja & 4 Others v. Njihia**

**Mucina & 3 Others [2013] eKLR**, this Court held that all the rites may not be accomplished, but significant ones must be performed.

26. The evidence of the customary marriage in this case was adduced by the appellant, PW2 and PW3. The deceased is said to have visited the appellant's mother once in Elburgon in 2012, one year or less before he died. He was in the company of other people and met the appellant with her people. The deceased decided to buy two parcels of land, **Elburgon/Arimi/Ndoshua Block 1/213** and **Elburgon/Arimi/Ndoshua Block 1/214** for the appellant's mother, which were registered in her name and that of the appellant. According to the appellant, those properties were part of the dowry.
27. According to PW2, when the deceased visited, he paid Kshs. 30,000 for *Mwati* and *Harika* and said he would buy land for her to be registered in her name and that of the appellant. According to PW2 the parcels were gifts, not part of the dowry.
28. The evidence of PW3 was that the visit by the deceased to Elburgon was in 2009 and he paid Kshs. 10,000 each for *Mwati* and *Harika* and a further Kshs. 10,000. There was no further visit.
29. In finding that the appellant had not proved a Kikuyu customary marriage between herself and the deceased,

the

High Court considered the following factors: the deceased visited the appellant's home only once; the *ruracio* was not completed; only the appellant's relatives testified on the alleged customary marriage with no independent witnesses; the requisite stages of a valid Kikuyu customary marriage, including *ruracio* and *ngurario* were not proved; there was fundamental contradiction between the appellant and PW2, with the former claiming that the parcels of land were part of the dowry and the latter claiming they were gifts; and that, in any case, it was inconceivable under Kikuyu customary law that dowry would be paid to the bride herself.

30. Having carefully re-evaluated the evidence on record and taking into account the essentials of a valid customary Kikuyu marriage that we have set out above, we are satisfied that the High Court, properly and on sound grounds, found that the appellant had not proved a valid customary Kikuyu marriage between herself and the deceased. The paucity of the evidence adduced by the appellant left the court with only one option, and that was to find that the appellant, on whom the onus lay to prove the customary marriage, had failed to do so on a balance

of probabilities.

**31.** There was absolutely no credible evidence that essential steps in a valid Kikuyu Customary marriage were undertaken. In **Eliud Maina Mwangi v. Margaret Wanjiru**

**Gichangi** [2013] eKLR, this Court rendered itself as follows on the essential rites in a Kikuyu customary marriage:

***“According to Dr. Cotran, there is no valid Kikuyu customary marriage without the slaughter of the ngurario ram. It is patently clear that the ngurario is not performed by mere delivery of a ram or sheep. As described in Jomo Kenyatta’s Facing Mount Kenya, Heinemann Books, 1988, Chapter VII, ngoima ya ngurario is a rather elaborate ceremony involving the slaughter, roasting and sharing of particular parts of the ram between specific members of the the two families...Even if we allow room for evolution and development pf customary law, it does not appear to us that ngurario under Kikuyu customary law has today transformed into a causal ceremony performed by a delegation of just two people.”***

We agree with and affirm that reasoning.

**32.** We will only add that from the record, there is no merit in the assertion that the High Court raised the bar on the standard of proof or failed to appreciate or consider the

appellant's

evidence. The evidence adduced by the appellant was carefully considered by the High Court, but from its own gaps and inconsistencies, it was woefully incapable of meeting the standard of proof on a balance of probabilities.

**33.** That leads us to the alternative question of presumption of marriage. Again, like in a customary marriage, the onus was on the appellant to lead evidence from which the court could presume that she was married to the deceased. In **Anastasia**

**Mumbi Kibunja & 4 Others V. Njihia Mucina & 3 Others**

(supra) this Court held that the presumption of marriage, entails long cohabitation so that by general repute the community takes the man and woman as husband and wife, even if they did not solemnise their marriage in any recognized form. The factors from which the court may presume a marriage include long cohabitation, general repute as husband and wife, children born of the relationship, and acquisition and ownership of property together, among others.

**34.** The essential facts in this case are that the appellant started cohabiting with the deceased in his house from

17<sup>th</sup> December 2009, meaning that by the time the deceased died

on 10<sup>th</sup> August 2013, they would have been together for slightly less than four years. At the time of his death, the deceased was 78 years old, diabetic and an amputee since 2005. He would have been around 74 years old when he allegedly started cohabiting with the appellant as husband and wife. He did not have children with the appellant.

35. Other than the two relatives who testified as regards the alleged customary marriage, no witness, with the exception of the appellant herself, testified that they or the community treated the appellant and the deceased as husband and wife. In holding that a presumption of marriage was not proved in

**Anastasia Mumbi Kibunja & 4 others v. Njihia Mucina &**

**3 Others** (supra), this Court reasoned as follows:

***“No witness told the High Court that the deceased and Elizabeth lived together for so long as to gain general repute that indeed the deceased and Elizabeth Nyambura were husband and wife.”***

36. The appellant, however, relied on a number of pieces of evidence which she contended cumulatively showed that she was a widow of the deceased. These were an affidavit

of change of name; eulogy of the deceased where she  
was

described as a widow; some photographs with the deceased, including one by his coffin; a letter from the chief describing her as one of the survivors of the deceased; and inclusion of her name in the petition for grant of letters of administration as a beneficiary.

37. The respondent, while not denying some form of relationship between the deceased and the appellant, maintained that she was not a widow of the deceased, but a dedicated hired caregiver, whom the family appreciated and considered part of it and was prepared to provide for from the estate of the deceased.
38. After considering each piece of evidence that the appellant relied upon, the High Court was not persuaded that it could form the basis upon which the court could presume a marriage. Regarding the affidavit on change of name, the court found that it stated that the deceased married the appellant under Kikuyu customary law in 2009, which was long before the deceased visited her home in 2012; that its real purpose was to facilitate change of name, and therefore was not evidence of marriage. On the photos at the funeral and the eulogy, the court agreed with the respondent that

they were prepared by the appellant's friends at Makuyu, probably for the purpose of supporting a claim to the estate, and as regards the letter of the chief, the court found that it was obtained by the appellant alone and that she was the one who supplied the chief with the list of beneficiaries.

39. Once more, we would agree with the High Court that there was no credible evidence on the basis of which the court could presume a marriage. Most of the evidence adduced by the appellant appears to have been deliberately tailor-made to make out her case as a widow of the deceased.

**40.** The evidence on record shows that the appellant first moved into the appellant's home in Makuyu in 2009 to assist in taking care of him as he was elderly, diabetic and an amputee. Far from proving that the appellant was cohabiting with the deceased as husband and wife, the court found that the above pieces of evidence showed that the relationship between the parties had developed into a close one. However, that in itself is not sufficient to lead to a presumption of marriage. In ***Eva Naima Kaaka & another v. Tabitha***

***Waithera Mararo*** [2018] KECA 762 (KLR), this Court held

thus:

***“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that a woman is not a mere concubine but that the long cohabitation has crystallised into a marriage and it is safe to presume the existence of a marriage.”***  
**(Emphasis added).**

41. We would only add that if indeed the appellant was the widow of the deceased, it does not make any sense that the letter she procured from the chief at her own initiative does not refer to her as such but merely a survivor. More importantly, if indeed the appellant was a widow, she would have applied for grant of letters of administration in that capacity where she has priority over the respondent and her deceased co-administrator.
42. Taking all the evidence on record into account, we agree with the High Court that far from proving a presumption of marriage, the evidence supports the respondent’s position that the deceased and his family treated the appellant as part of the family and appreciated her service to the deceased, for which they were prepared to provide for her.

That would be the context in which the deceased purchased the two

properties in Elburgon and the inclusion of the appellant among his dependants.

43. For all the above reasons, we find no merit in this appeal and hereby dismiss it in its entirety. Because of the nature of the case and the prior amicable and cordial relationship between the parties, we direct each party to bear their own costs. It is so ordered.

**Dated and delivered at Nyeri this 25<sup>th</sup> day of March, 2026.**

**K. M'INOTI**

.....  
**JUDGE OF  
APPEAL**

**S. ole KANTAI**

.....  
**JUDGE OF  
APPEAL**

**MUMBI NGUGI**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original*

*Signed*  
**DEPUTY REGISTRAR**