



**Kagau & another v Kagau & another (Civil Appeal 467 of 2018)
[2025] KECA 696 (KLR) (11 April 2025) (Judgment)**

Neutral citation: [2025] KECA 696 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 467 OF 2018
J MOHAMMED, M NGUGI & FA OCHIENG, JJA
APRIL 11, 2025**

BETWEEN

JOHNNY NYAGA KAGAU 1ST APPELLANT

MOFFAT NYAGA KAGAU 2ND APPELLANT

AND

PHILIS WANJUE KAGAU 1ST RESPONDENT

CYRUS KATHURI KAGAU 2ND RESPONDENT

*(An appeal from the judgment and orders of the High Court of Kenya at Nairobi
(W. Musyoka, J.) dated 3rd May 2017 in Succession Cause No. 85 of 2006)*

JUDGMENT

Background

1. This appeal arises from the decision of the High Court in Nairobi Succession Cause No. 85 of 2006, wherein the High Court (W. Musyoka, J.) allowed the application for revocation of the grant of letters of administration in respect of the estate of Eustace Kagau Kangerwe (the deceased) issued to Johnny Nyaga Kagau and Moffat Nyaga Kagau (the appellants). The High Court held that Philis Wanjue Kagau (the 1st respondent) was the widow of the deceased and that her children were dependants and beneficiaries of the estate of the deceased. The High Court directed that the grant be amended to include the 1st respondent as a co-administrator.
 2. The appellants, aggrieved by the decision, filed the instant appeal.
- For context and reference in a later part of this judgment, we will reproduce the Memorandum of Appeal dated 28th January 2019 and the prayers sought from this Court verbatim:



1. “ The Learned Judge erred in law and in fact by finding that Philis Wanjue Kagau, the 1st Respondent, is a widow of the deceased and that her children, namely Irene Wawira, Judy Wawira, Faith Rachel Wambeti, and Immaculate Mercy Njura, were the rightful children of the deceased. The Learned Judge disregarded the evidence on record, which indicated that the first three children were not sired by the deceased, a fact admitted by the 1st Respondent, who had earlier sworn otherwise in an affidavit. No evidence of adoption was provided, and there was no proof, either through DNA evidence or oral testimony, that Faith Rachel Wambeti and Immaculate Mercy Njura were the biological children of the deceased. Furthermore, the Learned Judge had previously found that the birth certificates of the Objector/Respondent’s first three children were false documents.
 2. The Learned Judge erred in law and in fact by finding that Philis Wanjue Kagau, the 1st Respondent, was the deceased’s wife, based on wedding photographs featuring one of the Objector’s daughters and an affidavit of marriage whose maker was deceased and could not testify.
 3. The Learned Judge erred in law and in fact by failing to find that the deceased was in a monogamous marriage, thereby rendering any alleged customary marriage with the 1st Respondent invalid. The 1st Respondent failed to produce sufficient evidence to prove the existence of such a marriage.
 4. The Learned Judge erred in law and in fact by determining that the 1st Respondent’s four children were the deceased’s biological children and dependents without any supporting evidence of financial support or biological relationship.
 5. The Learned Judge erred in law and in fact by concluding that the 1st Respondent was the deceased’s wife without any corroborative evidence from either the 1st Respondent or her witnesses, and in total disregard of the evidence tendered by the Appellants.
 6. The Learned Judge erred in law and in fact by failing to consider the submissions filed by the Petitioners/Appellants and the Objector/Respondent. Notably, the Learned Judge, in his judgment, stated that the parties had not filed written submissions, despite the Petitioners/Appellants having filed their submissions on 5th September 2016, as acknowledged in open court.
 7. The Learned Judge erred in law and in fact by failing to consider all the issues in question. In particular, the Learned Judge did not address whether gifts of immovable property bequeathed by the deceased to the 1st Respondent should have been considered into the distribution of the estate.
 8. The Learned Judge erred in law and in fact by ruling that the Grant was obtained on false information, on the basis that the 1st Respondent should have been disclosed as a survivor of the deceased. This finding was contrary to the Petitioners/Appellants’ long- standing position that the 1st Respondent was not and had never been a wife of the deceased.
 9. The Learned Judge erred in law and in fact by failing to find that the 1st Respondent was merely an employee of the deceased and not his wife, in utter disregard of the evidence on record.”
3. The brief background facts are largely uncontested. The deceased passed away on 22nd January 2005, leaving behind an estate comprising several properties. Ann Njoka Kagau, the appellant’s mother, petitioned for letters of administration intestate on 17th January 2006. A grant of letters



of administration intestate was accordingly made to the then petitioner on 16th March 2006. The administratrix lodged a summons for the confirmation of the grant on 3rd October 2006. She proposed to have the estate devolve wholly upon her. The 1st respondent objected to the confirmation of the grant, asserting that she was the deceased's wife and that her children were dependants. She sought to be included as a co-administrator and for the estate to be distributed to all rightful beneficiaries.

4. The High Court, upon considering the evidence adduced, found in favour of the 1st respondent. It ruled that the deceased had cohabited with the 1st respondent for over two decades, had acknowledged her children as his own, and had made lifetime transfers of certain properties to her. The High Court further held that Ann Njoka Kagau (the appellant's mother) had obtained the grant through material non-disclosure by failing to include the 1st respondent and her children as beneficiaries.
5. The High Court's findings can be summarized as follows: the deceased, Eustace Kagau Kangerwe, passed away on 22nd January 2005, leaving behind an estate comprising several properties. The original administratrix, Ann Njoka Kagau, petitioned for letters of administration intestate, which were issued on 16th March 2006. She later passed away, and her sons, Johnny Nyaga Kagau and Moffat Nyaga Kagau substituted her as administrators by consent order recorded on 17th December 2014. The 1st respondent objected to the confirmation of the grant, asserting that she was the deceased's wife and that her children were dependants. She sought to be included as a co-administrator and for the estate to be distributed to all rightful beneficiaries. Initially, she claimed that she had cohabited with the deceased since 1966, but during the hearing, she later settled on 1980/1981 as the date of their customary law marriage. The High Court found the evidence unclear on the exact timeline but accepted that the deceased had executed a joint affidavit of marriage in 1987, which the High Court found persuasive evidence of a customary marriage.
6. The respondents opposed the application, contending that Philis Wanjue Kagau was an employee, not a wife, and that the deceased did not sire her children. The Deoxyribonucleic Acid (DNA) test ordered by the High Court was inconclusive due to chemical embalming of the body of the deceased. The original administrator's sons, who were later substituted as administrators, accused the 1st respondent of manipulating the deceased, forging documents, and fraudulently acquiring property.
7. The High Court examined evidence of marriage, including a joint affidavit of marriage sworn in 1987, but no witnesses were available to confirm the customary ceremony. The High Court found no evidence to dispute the authenticity of the affidavit and held that the 1st respondent was indeed a widow of the deceased. The High Court also found photographic evidence of the deceased attending family functions with the 1st respondent and her children.
8. Regarding the paternity of the 1st respondent's children, the High Court noted that the DNA test ordered was inconclusive due to the embalming chemicals that destroyed viable test samples. The 1st respondent initially claimed that the deceased sired all five children, but she later admitted that the first three were not biological children of the deceased. The High Court did not conclusively determine whether the last two children were biologically the deceased's but recognized all five children as heirs under Section 3(2) of the *Law of Succession Act*, which provides that children accepted and maintained by a deceased during his lifetime are entitled to inheritance.
9. The allegations of fraud and forgery were dismissed due to lack of independent evidence. The High Court observed that no police reports, land office records, or any court orders nullifying the alleged fraudulent transfers were produced. The impugned judgment emphasized that no credible evidence was presented to show that the 1st respondent forged documents or manipulated the deceased. The



High Court, therefore, ruled that the property transfers to the 1st respondent were legitimate and indicative of a spousal relationship rather than an employer-employee arrangement.

10. The High Court primarily focused on material non-disclosure rather than procedural irregularities. While the appellants argued that the 1st respondent was not properly listed as a beneficiary in the original petition, the High Court found that the initial administrator failed to disclose all legal heirs, which amounted to concealment of material facts. The High Court did not find it necessary to revoke the grant outright but instead amended it to reflect all rightful heirs. The 1st respondent was included as a co-administrator, alongside the two substituted administrators, the 1st and 2nd appellants. The summons for confirmation of the grant dated 14th October 2006 was struck out, and directions issued for a fresh application to be filed within 30 days from the date of the impugned judgment. The High Court further ordered that the case be transferred to the High Court in Embu for final determination, as all the estate properties were located within Embu County. The High Court awarded no costs, directing that each party should bear their own costs.

Submissions by Counsel

11. At the hearing of the appeal, both counsel had filed their written submissions. Learned counsel, Mr. Kamunde was in attendance for the appellants while learned counsel, Mr. Peter Mugalo was in attendance for the respondents.
12. Mr. Kamunde submitted that the High Court erred in finding that the 1st respondent was legally married to the deceased, under customary law or otherwise. That the existence of a prior statutory marriage between the deceased and Anna Njoka Kagau, solemnized under the African Christian Marriage and Divorce Act (Repealed), precluded the deceased from contracting another valid marriage unless the first was lawfully dissolved.
13. Counsel relied on the case of *Sakina Sote Kaitany & Another v. Mary Wamaitha* [1995] eKLR, where this Court emphasized that a party seeking to prove a customary marriage must provide clear and persuasive evidence of compliance with customary rites. Counsel further submitted that the 1st respondent failed to prove that she fulfilled the requisite Embu customary marriage rites, including the essential ngurario ceremony and dowry payment, as outlined in *Restatement of African Law of Kenya, The Law of Marriage and Divorce, Volume 1* by Eugene Cotran. Counsel further highlighted inconsistencies in the 1st respondent's claims regarding the alleged marriage, noting her contradictory statements about the date and circumstances of the union. The appellants submitted that, in the absence of verifiable evidence, the High Court erred in recognizing the 1st respondent as the deceased's widow.
14. Counsel further submitted that the 1st respondent failed to establish that her children were the deceased's dependants or beneficiaries as required under Section 3(2) of the Law of Succession Act. Counsel relied on the decision of *EMM v. IGM & Another* [2014] eKLR, where this Court underscored the need for proof of a reasonable degree of permanency in the responsibility allegedly assumed by a deceased over a child. Counsel further submitted that the 1st respondent's claims regarding the paternity of her children were inconsistent, as she initially asserted that all her children were sired by the deceased, only to later concede that three of them were not biologically the children of the deceased. Counsel pointed to the "falsified" birth certificates, which were found to contain incorrect information regarding the paternity of the children, further undermining the credibility of the 1st respondent's assertions. Further, that beyond mere assertions, the 1st respondent provided no substantive proof that the deceased maintained, educated, or otherwise assumed permanent responsibility for her children, such as school fee payments or medical records. Counsel submitted that



the High Court overlooked these glaring discrepancies and wrongly presumed dependency in favour of the 1st respondent's children.

15. Counsel further submitted that the grant of letters of administration was lawfully obtained and that the respondents' assertion that it was procured through concealment of material facts is without factual or legal foundation. Counsel asserted that the omission of the 1st respondent and her children from the Chief's letter and subsequent petition for letters of administration intestate was based on the legal and factual position that they were not rightful beneficiaries of the estate. Counsel cited the case of *Joyce Ngima Njeru & Another v. Ann Wambeti Njue* [2012] eKLR, which relied on the case of *Matheka & Another v. Matheka* [2005] KLR 455, reaffirming that a grant can only be revoked under Section 76 of the *Law of Succession Act* if it is established that it was obtained fraudulently or through misrepresentation. Counsel maintained that the omission of the 1st respondent and her children was not fraudulent but based on the genuine belief, supported by evidence, that they had no legitimate claim over the estate. Counsel highlighted that, at the time of filing the petition, no verifiable evidence existed to demonstrate that the 1st respondent was the deceased's wife or that her children were legally recognized as his dependants. Counsel further submitted that the High Court erred in imputing fraudulent intent on the part of the appellants where none was demonstrated.
16. It was counsel's further submission that the properties gifted to the 1st respondent during the deceased's lifetime should be taken into account when distributing the estate, pursuant to Section 42 of the *Law of Succession Act*. Counsel relied on the case of *In the Estate of Solomon Kungania Murugu (deceased)* [2018] eKLR, where the court affirmed that gifts inter vivos must be factored into the final distribution of an estate to prevent undue advantage to any one beneficiary. Counsel further submitted that the 1st respondent was already the recipient of substantial immovable property from the deceased, including land and commercial plots, which, if considered, would amount to a significant portion of the estate. Counsel asserted that failure to account for these transfers would result in double allocation of assets, to the detriment of the other beneficiaries. Further, that the 1st respondent exercised undue influence over the deceased in securing the transfers, taking advantage of his age and declining health to gain control over prime assets. Counsel further submitted that, should the 1st respondent be found to be a rightful beneficiary, the value of the properties she already received should be deducted from any further entitlement she seeks from the estate.
17. Counsel further submitted that the High Court failed to appreciate the appellants' written submissions, which resulted in grave prejudice against their case. That having confirmed filing their written submissions in court, they had a legitimate expectation that the High Court would consider their arguments before rendering judgment. Counsel pointed out that both parties were present in court when a judgment date was set, suggesting that their submissions were indeed on record. Counsel asserted that it was incumbent upon the High Court to verify the existence of these submissions before proceeding to render its judgment. Counsel further submitted that the failure of the High Court to engage with their arguments, coupled with its apparent reliance on the respondents' case, undermined the principles of fair hearing and procedural justice. Counsel asserted that a miscarriage of justice occurred when the High Court determined the matter without due regard to the appellants' written submissions. Counsel urged that this Court should rectify the High Court's oversight and ensure that all parties' submissions are duly considered.
18. Counsel urged this Court to set aside the impugned judgment and declare that the 1st respondent was neither a widow nor a dependant of the deceased. Counsel submitted that the 1st respondent's children do not qualify as the deceased's biological or legally adopted children and therefore have no valid claim over the estate. Further, that the letters of administration were lawfully obtained without fraud, misrepresentation, or concealment of material facts. Counsel submitted that the estate should



be distributed strictly among the legitimate heirs, as listed in the affidavits filed in support of the application for confirmation of grant. Counsel asserted that any allocation to the 1st respondent or her children would amount to unjust enrichment and an undue burden on the estate. Counsel further submitted that the High Court erred in expanding the scope of beneficiaries without sufficient evidentiary basis.

19. Counsel seeks an order that the impugned judgment be set aside, that the estate be distributed exclusively among the rightful heirs, and that any costs of this appeal be borne by the respondents. Counsel further submitted that any alternative finding by this Court should take into account the gifts inter vivos previously received by the 1st respondent. Counsel asserted that the principles of fairness, equity, and justice demand that the estate be distributed in a manner that upholds the legitimate rights of the deceased's lawful heirs while preventing unlawful claims from diluting their inheritance.
20. Mr. Mugalo, learned counsel for the the 1st respondent, opposed the appeal and submitted that the High Court did not err in its finding that the 1st respondent is a widow of the deceased within the meaning of Section 3(5) of the [Law of Succession Act](#). Counsel submitted that the 1st respondent cohabited with the deceased since 1980, and their customary marriage was formalized in 1981, evidenced by a joint affidavit sworn between her and the deceased. Counsel further submitted that the deceased's conduct, including his recognition of the 1st respondent's children as his own and his provision for them during his lifetime was evident. Counsel emphasized that the 1st respondent's evidence of cohabitation remained unchallenged and was corroborated by documents, including hospital records listing her as the deceased's next of kin. Counsel relied on the case of *Mary Wanjiru Githatu v Esther Wanjiku Kiarie* [2010] KLR 159, where this Court affirmed that long cohabitation can create a presumption of marriage, shifting the burden to the opposing party to disprove its existence. Counsel further submitted that no evidence was presented to refute the 1st respondent's claim of marriage, and the High Court did not therefore err in upholding her status as the widow of the deceased.
21. Counsel further submitted that the 1st respondent's children qualify as dependants of the deceased under Sections 3(2) and 29 of the [Law of Succession Act](#), as the deceased expressly recognized and voluntarily assumed responsibility for them. Counsel asserted that the deceased procured birth certificates for the 1st respondent's children and played an active role in their lives, including attending and participating in their ceremonies as a father figure. Counsel cited the case of *Estate of RYK (deceased)* [2018] eKLR, to affirm the position that children who a deceased person recognised and maintained qualify as dependants under the [Law of Succession Act](#). Counsel further asserted that the appellants' argument that only biological or legally adopted children can inherit is a narrow interpretation of the law that fails to account for the broader definition of dependants in the [Law of Succession Act](#). Counsel asserted that the 1st respondent's children, having been treated as the deceased's own, should not be excluded from benefiting from his estate, as doing so would be contrary to the principle of fairness in succession law.
22. Counsel further submitted that the grant of letters of administration was obtained through material non-disclosure and concealment of facts. That the appellants deliberately failed to disclose the 1st respondent's existence as the deceased's widow and the dependants under her care. Counsel further asserted that the grant was issued on the false premise that only the appellants were the rightful administrators of the estate. Counsel relied on the case of *Re: Estate of Wahome Mwenje Ngongoro (deceased)* [2016] eKLR, where the court held that failure to disclose all beneficiaries constitutes a ground for revocation of a grant under Section 76(b) of the [Law of Succession Act](#). Counsel asserted that the 1st respondent's exclusion from the grant was meant to disinherit her and her children, and as such, the High Court was justified in amending the grant to recognize her as a co-administrator.



23. Counsel further submitted that the deceased gifted the 1st respondent immovable property during his lifetime, and such gifts inter vivos must be taken into account in the distribution of the estate. Counsel asserted that two properties were transferred to her by the deceased, as evidenced by title deeds and search records. Counsel further submitted that the appellants' claim that the 1st respondent had not provided sufficient evidence to prove these gifts is unfounded, as the documents presented in court clearly indicate the deceased's intention to provide for her. Counsel relied on the case of Estate of Ruth Nyakanini Rukwano (deceased) [2010] eKLR, where the court held that gifts inter vivos should be considered when distributing an estate. Counsel contended that the properties that the 1st respondent received formed only a small fraction of the deceased's estate, which was valued at Kshs.100 million, and therefore, her entitlement to further inheritance should not be diminished on the basis of the gifts.
24. Counsel further submitted that the High Court correctly applied the doctrine of presumption of marriage based on long cohabitation and the deceased's conduct. Counsel submitted that the deceased treated the 1st respondent as his wife in all material respects, including financial arrangements, joint property ownership, and familial responsibilities. Counsel cited the case of Hortensia Wanjiku Yawe v Public Trustee and MNM v D.N.M.K & 13 Others [2017] eKLR, both of which affirm that courts may infer marriage where parties have lived together in a manner suggestive of a marital union. Counsel further submitted that the appellants' contention that there was no formal customary marriage does not negate the reality of the relationship, as the presumption of marriage is a question of fact rather than formal legality.
25. Counsel further submitted that the High Court properly considered hospital records as corroborative evidence of the 1st respondent's status as the deceased's wife. Counsel asserted that the appellants' claim that such records lack legal significance is flawed, as they demonstrate the deceased's own recognition of the 1st respondent as his spouse. Counsel highlighted that the deceased's three sons did not dispute her cohabitation with their father, and in the case of Estate of PWM (deceased) [2016] eKLR, the court emphasized that a deceased's actions, including financial support and official documentation, are relevant in determining dependency. Counsel further submitted that the hospital admission form, in which the 1st respondent was listed as the deceased's next of kin, was not challenged by the appellants and thus stands as evidence of her marital status.
26. Counsel further submitted that the 1st respondent was rightfully included as a co-administrator of the estate, as her exclusion from the original grant was based on misrepresentation of facts. Counsel further submitted that under Re: Estate of Wahome Mwenje Ngongoro (deceased) [2016] eKLR, failure to include all rightful beneficiaries constitutes grounds for revocation of a grant. Counsel further submitted that the appellants had full knowledge of the 1st respondent's relationship with the deceased but intentionally omitted her to gain undue advantage over the estate. Counsel asserted that the 1st respondent's appointment as a co-administrator ensures equitable representation of all dependants and beneficiaries of the estate.
27. Counsel further submitted that the High Court fairly considered the submissions of both parties and arrived at a just determination. Counsel asserted that the High Court correctly applied the law in affirming the 1st respondent's status as a widow and her children's entitlement as dependants. Counsel relied on the case of MWG v EWK [2010] eKLR, where the court held that credible evidence of long-standing marital relationships should lead to a presumption of marriage. Counsel prays that the appeal be dismissed with costs, as the appellants have failed to provide sufficient grounds to overturn the impugned judgment.



Determination

28. This Court has carefully considered the record, the submissions by counsel, the authorities cited and the law. This being a first appeal, it is the duty of this Court to review the evidence adduced before the lower court and satisfy itself that the decision was well founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 this principle was enunciated thus:

“... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

29. We have identified and framed the following as the issues for determination: whether the High Court erred in law and in fact:

1. by finding that the 1st Respondent was the widow of the deceased and that her children were rightful dependants and beneficiaries of the estate;
2. in ruling that the grant of letters of administration was obtained through false information and material non- disclosure, warranting its revocation or amendment as was done in this case;
3. in failing to consider inter vivos gifts made by the deceased as sufficient reason to exclude the 1st respondent;
4. in failing to consider the appellants’ evidence, including written submissions and supporting documents; and
5. who should bear the costs of the appeal.

30. The foundational question for determination of all the issues is whether the High Court properly found that the 1st respondent was the widow of the deceased and that her children were dependants of the deceased within the meaning of the *Law of Succession Act*. The High Court examined evidence of marriage, including a joint affidavit sworn by the deceased and the 1st respondent in 1987, photographs depicting family gatherings, and hospital records listing the 1st respondent as the deceased’s next of kin. The Court also considered the evidence of long-term cohabitation, spanning over two decades, during which the deceased was publicly acknowledged as the 1st respondent’s husband.

31. Section 3(5) of the *Law of Succession Act* recognizes a woman married under a system of law that allows polygamy as a wife for purposes of succession. The doctrine of presumption of marriage, as reaffirmed in prior judicial decisions, provides that long cohabitation and reputation as husband and wife can give rise to a rebuttable presumption of marriage. The High Court found that the deceased had treated the 1st respondent as his wife in both public and private settings, and there was no evidence to disprove this relationship. The appellants contended that the deceased’s prior statutory marriage precluded the existence of a subsequent customary marriage.

32. In the case of *Joseph Gitau Githongo v Victoria Mwhiki Munya* (Civil Appeal 227 of 2005) [2014] KECA 366 (KLR), this Court reaffirmed the principle that prolonged cohabitation as man and wife gives rise to a presumption of marriage. This presumption, however, is not absolute and may be rebutted, but only by cogent and compelling evidence to the contrary. This Court further emphasized that this presumption is not confined to statutory marriages but extends to customary law, underscoring its broad application within Kenya’s legal framework.



33. In support of this principle, the High Court relied on the decision in *Mary Wanjiru Githatu v Esther Wanjiru Kiarie*, [*CA No. 20 of 2009*](#) (Eldoret), where this Court (Bosire, JA), observed as follows:

“In circumstances where parties do not have capacity to marry, a marriage may be presumed if the facts and circumstances show that the parties, by prolonged cohabitation or other surrounding factors, demonstrated an intention of living together as husband and wife.”

34. The rationale for this doctrine was further stated in *Joseph Gitau Githongo v Victoria Mwhaki Munya* (*supra*), where the Court explained:

“The presumption of marriage is a concept born from an appreciation of the realities of life. When a man and a woman cohabit for a long period without solemnizing their union through a recognized form of marriage, a presumption of marriage arises. If the woman is left destitute, either by being abandoned by the ‘husband’ or upon his demise, both of which are common occurrences, the law, subject to the requisite proof, bestows upon her the status of ‘wife.’ This recognition enables her to qualify for maintenance or a share in the estate of her deceased ‘husband.’”

35. This doctrine has been consistently applied in Kenyan jurisprudence, as evidenced by a line of cases, including but not limited to *Peter Hinga v Mary Wanjiku*, [*CA No. 94 of 1977*](#) and *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* (*supra*). Where parties have cohabited for a prolonged period and held themselves out as husband and wife, a presumption of marriage arises. This presumption, however, remains subject to rebuttal by credible and compelling evidence to the contrary. Does presumption of marriage create a marriage? A short answer to this question is that it does not. It serves as a safeguard, ensuring that the rights of individuals in informal marital arrangements are recognized and protected under the law.

36. We therefore accept that in view of the appellant’s inability to dislodge the 1st respondent’s claim for presumption of marriage, the facts (including the transfer of properties during the lifetime of the deceased to her), it is more probable that she was a wife and not an employee as alleged by the appellants. We have also noted the half-hearted admission where the appellants plead, in the alternative, that the High Court should have considered the gifts *inter vivos* as sufficient provision for her and a valid reason for her exclusion. The perfection of the gifts is more probable in the context of familial interdependence that goes beyond an employer-employee relationship alleged by the appellants.

37. We would like to comment about the appellant’s position that the absence of rites and libations needed to solemnize marriages in the African customary sense is a death knell to a claim for presumption of marriage. In the case of *MNM vs. DNMK & 13 others* [2017] KECA 172 (KLR), this Court found that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary. This Court pronounced itself as follows:

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



Trustee (supra), Wambuzi, P. noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system.

Madan, JA (as he then was) articulated the rationale of the presumption of marriage in the following famous words in *Njoki v. Muthuru* [2008] 1 KLR (G&F) 288:

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

38. The second issue for our determination is that of dependency. A good starting point is a strict textual interpretation of Sections 3(2) and 29 of the *Law of Succession Act*. Section 3(2) provides that:

“References in this Act to ‘child’ or ‘children’ shall include a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

39. On the other hand, Section 29 defines dependants as follows:

“For the purposes of this Part, ‘dependant’ means—

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death; and
- b. such of the deceased’s parents, step-parents, grand- parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

40. The High Court found that the deceased had acknowledged and maintained the 1st respondent’s children by providing for their welfare and education, thereby meeting the criteria under Section 3(2) of the *Law of Succession Act* and falling within the category of dependants defined under Section 29 of the *Law of Succession Act*. Although the DNA test ordered by the High Court was inconclusive due to chemical embalming of the deceased’s body, the court noted that dependency is not limited to biological parentage. The High Court further found that the appellants did not present any evidence to challenge the 1st respondent’s assertions that the deceased played a parental role in the children’s lives.



41. In *Waiyaki & another v Kamau & another* [2024] KECA 1151 (KLR), a case where the question and facts surrounding the issue of dependency were strikingly similar, this Court affirmed a decision to presume dependency, stating as follows:

“We agree with the learned judge that under the Act, it is easy to determine whether a person is a child of a deceased person. At paragraph 16 of the impugned judgement, the learned judge stated thus: ‘Whether or not a person is a child of a deceased person is a matter that can be resolved in several ways. One is where the child is born within wedlock. In such case there is a presumption that the couple in wedlock was (sic) the child’s biological parents. Where it turns out later that the said parents were incapable of having children, then, if the infertile parent is female there would be a presumption of adoption; and if male a presumption of adoption or that the female parent begat the child with another but the male partner assumed parental responsibility. Where the child was born outside wedlock and thereafter her mother married and moved in together with the child, it is presumed that the man formally adopted the child and assumed parental responsibility’.”

“The evidence that was adduced before the trial court clearly showed that the Respondents were children of the deceased. It matters not that they were born out of wedlock. The deceased expressly recognized and accepted them as his children and voluntarily assumed permanent responsibility over them.

Therefore, for all intents and purposes, the Respondents were children of the deceased within the meaning ascribed thereto under section 3 (2) of the *Law of Succession Act*”.

42. Counsel for the appellants contended that the 1st respondent had misrepresented the paternity of her children and that the birth certificates for some of the children contained inaccuracies. The High Court acknowledged inconsistencies in the 1st respondent’s testimony but held that such discrepancies did not outweigh the evidence demonstrating that the deceased had treated the children as his own. We therefore find that the High Court correctly applied the provisions of the *Law of Succession Act*, which extend dependency to persons whom the deceased had accepted and maintained during his lifetime. In light of the evidence, we find no basis to interfere with the High Court’s finding that the 1st respondent was a widow of the deceased and that her children were his dependants.
43. We have considered the issue of whether the grant of letters of administration was obtained through false information and material non-disclosure, warranting its revocation. Section 76 of the *Law of Succession Act* provides that a grant may be revoked if it was obtained through fraud, misrepresentation, or concealment of material facts. The High Court found that the appellants failed to disclose the existence of the 1st respondent and her children when petitioning for letters of administration, despite being aware of their relationship with the deceased. The High Court determined that this omission amounted to material non-disclosure, justifying the revocation of the grant.
44. The appellants contended that they did not fraudulently omit the 1st respondent but acted on their genuine belief that she was not a rightful beneficiary of the estate. However, material non-disclosure does not require fraudulent intent, it is sufficient that relevant information was withheld, whether deliberately or inadvertently. Failure to disclose all legal heirs constitutes a valid ground for revocation of a grant. The High Court, on a preponderance of all the facts and evidence placed before it, found that the appellants had knowledge of the 1st respondent’s relationship with the deceased and the children’s dependency but omitted them from the list of beneficiaries, making the grant defective.
45. We affirm the conclusion and finding that the appellants knew of the 1st respondent’s relationship with the deceased, and that her interdependence and extensive dealings with the deceased, including raising



children together, could not be that of an employee. The appellants also tacitly conceded that even if that was the case, the 1st respondent should have been satisfied with her gift inter vivos. The fact that they want to make a decision on what they believe is her entitlement outside the four corners of the *Law of Succession Act* is unacceptable and we cannot countenance it.

46. In *Kamundia & 6 others vs. Maingi & 3 others* [2022] KECA 753 (KLR), the Court considered a similar question, and in agreeing that concealment of material facts vitiates a grant, stated as follows:

“There was therefore concealment of material facts from the time the petition was filed. In *Re Estate of Moses Wachira Kimotho (deceased) Succession Cause 122 of 2002* [2009] eKLR, this Court made pronouncements on the importance of disclosing all material facts before a court of law while seeking a grant of letters of administration and confirmation thereof. It observed;

“I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the Respondent been forthright and candid and included the Applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The Respondent knew of the Applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.”

47. The High Court exercised its discretion to amend the grant instead of revoking it outright. The decision ensured that all rightful beneficiaries were accounted for without unnecessarily delaying the administration of the estate. Section 76 of the *Law of Succession Act* grants the court the power to revoke a defective grant, but where the omission does not affect the substantive validity of the grant, an amendment may be sufficient to cure the defect. The High Court’s approach was, therefore, legally sound. The appellants’ argument that the High Court should have revoked the grant entirely and issued fresh letters of administration has no merit since there is a judicial finding by the High Court, which we now uphold, that identifies the beneficiaries that should be included as beneficiaries of the estate.

48. We have also considered whether the properties gifted to the 1st respondent by the deceased during his lifetime should have been accounted for in the distribution of the estate. Section 42 of the *Law of Succession Act* provides that gifts inter vivos must be considered when distributing an estate to prevent undue enrichment of any one beneficiary. The High Court found that the 1st respondent had received immovable property from the deceased, but these gifts formed only a small portion of the total estate. The High Court further held that there was no evidence that these gifts had been obtained fraudulently or under undue influence. In light of these findings, we find that the High Court did not err in holding that the 1st respondent’s entitlement to a share of the estate should not be diminished solely on the basis of gifts inter vivos.

49. This is also not an issue at this point. The High Court reserved the issue of distribution for the High Court in Embu, and we would be remiss if we descended into that realm at this point since this is not



a justiciable question yet. The mode of distribution is reserved for the High Court upon the filing of a certificate of confirmation of grant, and only then can this Court's jurisdiction be invoked on appeal on that question. For now, that is not a justiciable question before this Court. We say no more on this issue.

50. The appellants further contended that the High Court failed to consider their written submissions, thereby violating their right to a fair hearing. The record indicates that the appellants filed their written submissions on 5th September 2016 when the matter came up for mention to take a judgment date, but the High Court erroneously stated that no submissions had been filed. In view of this Court's duty to reevaluate a matter, which we have done, we hold that the omission did not materially affect the outcome of the case as this Court's decision is based on the re-assessment of the evidence presented during the hearing and evidence now contained in the record of appeal.
51. The principles of fair hearing require that all pleadings and evidence be considered, but where the final determination is supported by clear factual findings, an omission to mention written submissions does not automatically render the impugned judgment defective, more so where that judgment relies on the viva voce evidence taken before the court. For the avoidance of doubt, this Court has considered the appellant's submissions dated the 5th September 2016 and filed on the same day.
52. We also wish to state that this Court, sitting on a first appeal, has a duty to reevaluate the matter. We have done so, and reached a decision that is based on our own assessment of the record, evidence and the law. We have stated above that we have considered the entire record of appeal. Submissions are meant to be a summary of a party's case to persuade the court. This Court has discharged the duty by reconsidering the evidence, evaluating it and has arrived at its own decision. This duty was laid out in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR where this Court pronounced itself as follows:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”.
53. Counsel for the appellants sought an order setting aside the High Court's decision and declaring that the 1st respondent was neither a widow nor a dependent of the deceased. They further sought an order directing that the estate be distributed strictly among the heirs listed in their application for confirmation of grant. Having reviewed the evidence and the applicable legal provisions, we find that the High Court correctly applied the law and arrived at a just and fair determination.
54. Accordingly, the appeal is hereby dismissed. The judgment of the High Court in Succession Cause No. 85 of 2006 is upheld. Considering the relationship of the parties, we direct that each party shall bear their own costs of the appeal.
55. We also make a further order that the file shall be transferred to the High Court in Embu within 14 days of the delivery of this judgment. Parties are directed to file the Summons for Confirmation of Grant as ordered in the judgment by the High Court on 3rd May 2017 in Nairobi Succession Cause No. 85 of 2006 - In the Matter of the Estate of Eustace Kagau Kangerwe
56. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2025.

JAMILA MOHAMMED



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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

