Musela v Wambui & another & 3 others (Civil Appeal E504 of 2020) [2024] KECA 679 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KECA 679 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E504 OF 2020

HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA

JUNE 14, 2024

BETWEEN

YOSE MUSELA ..... APPELLANT

AND

GRACE WAMBUI & BIDALI LIHASI ..... 1ST RESPONDENT

SUSAN NJERI ..... 2ND RESPONDENT

PETER NJOROGE BIDALI & OTHERS ..... 3RD RESPONDENT

FELIX MIDIRIKA ..... 4TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Musyoka, J.) delivered on 10th May 2019 in HC Succession Cause No. 2388 of 2012)

JUDGMENT

1. The appeal herein revolves around the Estate of one Lihasi Bidali alias Charles Lihasi alias Charles Lihasi Bidali who died on 21st July 2012 at Nairobi, Race Course Estate. The heirs and beneficiaries have yet to inherit their share of the estate for close to 12 years. The parties in court are still seeking the court's intervention in identifying the rightful heirs, hence this appeal each hoping for a favorable outcome.

2. To better appreciate what is before us, we have looked at the background of the matter. A plethora of petitions and applications were filed in the trial court. The appellant, Yose Musela Bidali (Yose), a son of the deceased initiated the court process. To his credit are three petitions touching on the estate. The first was a petition for grant of letters of administration intestate filed on the 4th of October 2012. The second was a petition for letters of administration ad colligenda bona filed on even date. Third was a petition for grant of letters of administration ad litem filed on the 5th of October 2012.

3. In the affidavit in support of the petition for a grant for letters of administration intestate dated 4th October 2012, the appellant deposed that the deceased left behind a widow, Jedidah Kisia Lihasi (Jedidah), five sons including himself, and six daughters. He also listed 9 properties as assets of the estate and declared no liabilities. All the properties named save one are located in Nairobi. Notable is that in the consent accompanying the petition, three named heirs did not sign the same, and that the letter introducing the deceased and his heirs, was from the Chief of Karamba-ini Location, Limuru.

4. The court declined the application dated 5th October 2012 seeking for grant of letters of administration ad colligenda bona.

   It required the applicant to file for a full grant, which in essence he had done the same day, as shown above.

5. In the 3rd petition dated 5th of October 2012, Yose sought a grant of letters of administration ad litem to preserve one of the estate's properties, namely; LR No 209/118/77. This was granted. However, it attracted opposition from Grace Wambui Bidali (Grace) and her son Bidali Lihasi (Bidali), the respondents herein, who filed a notice of motion dated 12th October 2012, seeking the revocation of the said grant or in the alternative for Bidali to be made a co-administrator.

6. The application was premised on the grounds that; the applicants are members of the deceased 2nd family; that LR No 209/118/77 is the family home of the 2nd family, the 2nd widow; Grace and her children have occupied the same since 1972; that the applicants are apprehensive that their exclusion from the proceedings touching on their home was done with ulterior motives; and that there was a Will which was left behind by the deceased.

7. In an affidavit in support of the application sworn by Bidali, he deposed that his mother Grace was the 2nd wife of the deceased having been married under Kikuyu customary law; that the two had one son; the deponent, and 3 daughters; that upon the death of the deceased, the first family excluded them from the burial arrangement; but for the respect of the deceased they held their cool; that the appellant has been elusive over the issues of the estate and failed to inform them as he petitioned the court for the various grants.

8. Peter Njoroge Bidali (Peter) and members of his family on their part filed a citation on the 6th of December 2012, where the citee was Yose. Further, on the 24th of January 2013, they filed a petition for grant of letters of administration intestate wherein they named heirs of the deceased to include; two widows, 5 sons, and 9 daughters. They also cited 9 properties, 2 vehicles, and bank accounts as assets of the estate. Interestingly their letter of introduction from the chief had additional information yet the said letter was written from the Office of the Chief of Karamba-ini, who had issued a letter of introduction with different information to the appellant.

9. Against the above backdrop, on 11th March 2013, and by consent of the parties, the court directed that the Will of the deceased be read to the beneficiaries within 30 days, and the same to be deposited in court. Following the reading of the said Will, on the 8th of April 2014, Felix Ayuya Midikira, an advocate and a named executor petitioned for probate of the written Will of the deceased.

10. The petition for making a grant of the written Will attracted objections from individuals claiming as heirs.

11. On the 27th of November 2014, Magdalene Mutugi Bidali, Laimani Bidali, George Kahura Bidali, Esther Wanjiku Bidali, Moses Munene Bidali, Josphat Kimani Bidali, Jane Nduta Bidali, Peter Njoroge Bidali (Peter) and Teresia Wagio Bidali filed an objection to the making of a grant claiming to be a widow and children of the deceased and contending that the deceased was so ill at the time he is alleged

to have written the Will that he could not possibly have known what he was doing. Further save for three of them, namely, Jane Nduta Bidali, Peter Njoroge Bidali, and Teresia Wagio Bidali, the other members of the said family had been left out of the said Will. They also filed an answer and a cross-petition on 10th December 2014.

12. On her part, Susan Njeri filed a summons for provision as a dependent on the 9th of December 2014, claiming as a widow who was left out of the deceased Will. It was her case that though their marriage was not formalized, the deceased provided for her shelter, food, clothing, and basic needs. She further claimed that the deceased had shown her properties he was to give her namely; L.R. Nos. Dagoretti/ Thogoto 1814, 1815 and 1817.

13. Grace and Bidali also filed an objection to the making of the grant on 11th December 2014 on the grounds: that the purported Will was not valid as it was neither paginated nor did it bear the deceased's signature and/or was not witnessed; that the purported Will was fraudulent as the same was purportedly executed when the deceased was incapable of writing or signing due to ill health; that though the same recognized Bidali and his siblings as the deceased's children, it failed to make provision for them as beneficiaries; and that the purported Will distributed approximately 80% of the estate to Jedidah who was aged 70 years at the time.

14. In support of the Will, Yose filed a replying affidavit dated 18th February 2015, stating that he had no reason to doubt the authenticity of the Will; and that the deceased was of excellent mental status. He annexed a medical report of Dr. Tamer E. Mikhail as an exhibit in support of his assertion. Further, he stated that the Will was witnessed by two people and annexed the affidavit of one Hassan Mukongo Omido.

15. Faced with the conundrum of applications, the trial court set the matter down for hearing by way of affidavit and evidence viva voce and the court formulated two issues for consideration namely;

    i. Whether the Will dated 26th March 2012 was valid.

    ii. Whether the 1st, 2nd, and 3rd Objectors were survivors of the deceased.

16. At the hearing the 4th respondent, Felix Mudikira an advocate testified first. He informed the court that he drafted the Will dated 26th March 2012, three months before the deceased's demise; that he was appointed executor and trustee of the Will;

    that previously he did legal work for the deceased including conveyancing and litigation; that though the deceased suffered a stroke, he was able to communicate effectively; that they had more than three sessions with the deceased before he finally prepared the impugned Will; that he was not present when the Will was executed; and that the deceased had taken several copies of the Will and eventually brought one duly signed.

17. Next to testify was Bidali. It was his testimony that his mother was the 2nd wife of the deceased and together they had four children; Hannah Njoki, Kaisa Catherine, Kagecha Bidali and himself; that the family lived in Parklands – Plot No 209/118/77, where he was born; that the deceased had three wives Jedidah, Grace, and Magdalene; that his family had relations with the first family, as they would meet during New Year celebrations; that he knew his father well; that his father carried him around the other homes to visit and work there as he was a handyman, and he would help with maintenance; that the deceased died at 83; that the first family did not involve his family in the planning of the deceased funeral, that they did not feature in the obituary as the deceased's children, yet this is an important aspect under Luhya traditions; that seven months after the deceased's burial they received a notice from Mukhwana Agencies to vacate their home; that they moved the court and got orders stopping the

eviction; that he knew the 4th respondent as the deceased's lawyer as he would instruct him frequently; and that he listed his father's properties.

18. He further informed the court that the Will was not read to his family and he faulted the same; as his mother's name, names of the 3rd wife, and other children of the deceased were missing; further, some assets were also omitted; that his father left some original titles with him, and therefore Clause 4 of the Will that mentioned bad relation between him and the deceased are not true, otherwise the deceased would not have left him the original title deeds for the Ngara property 209/118/77, the Racecourse property 209/8053 and Eastleigh property 36/VII/364; that the allegations that he was dealing with narcotics suggested envy of the good relations he had with his father as he redeemed himself; and that the deceased was a man of integrity and could not have disinherited or isolated them. He also asserted that the signature on the Will was genuine.

19. He listed his father's properties to include;

Ngara 209/118/77

Racecourse House

Plot at Eastleigh Section 7

House at Jerusalem House in Githurai

House in Dagoretti/Riruta Farm at Limuru, Riara Ridge

Farm in Tiriki, Kisambai

20. He listed the children of the deceased from the 3 houses as follows;

1st House

1. Jane (deceased)
2. Assa Ravasa
3. Musela
4. Evans & Hellen(twins)
5. Asaji
6. Flora
7. Kennedy
8. Lillian
9. Nyambura
10. Musa

2nd House

1. Hannah
2. Kaisa
3. Bidali

4. Kageha

3rd House

1. Laimani
2. Moses
3. Josephat
4. Peter
5. Esther
6. Jane
7. Triza

21. The third witness to testify was Emmanuel Kenga, a document examiner. He informed the court that he received a letter from Wangalwa & Co. Advocates requesting for examination of the signature on a copy of a Will and known signatures of the deceased; further, he stated that on further examination of the said signatures he formed the opinion that the individual characteristics of the signatures were not the same, hence the signature on the Will was made by a different author. He produced as an exhibit his report dated 5th February 2015.

22. Peter was the 4th witness, in his evidence he listed members of his family and the other two houses as heirs. He asserted that the deceased married his mother, Magdalene Mutugi Bidali in 1977; he gave details of his siblings affirming the names given by Bidali being children of the deceased; that his father provided for them including paying his school fees up to university level; that in 2008 the deceased was hospitalized at Coptic Hospital after he suffered a stroke; that before the said hospitalization the deceased used to visit them at their home frequently; thereafter he was confined to his house at Kariokor; that the deceased had difficulties communicating; he was unable to drive himself and it is the witness and his brothers who would drive him around; that by 2010 the deceased who used to communicate by writing was unable to write; that in 2011 the deceased brought his elder sons from the first family to visit them; that upon the demise of their father, their family was neither recognized nor involved in the burial plans and they let the first family proceed nonetheless; that he later learnt of a Will; that he doubted the signature on the Will; that he found it suspicious because as at 26th March 2012, his father was very ill, could not write, could barely talk and could hardly use hand signals; and that the asset purportedly left for the 5 of them is too small, yet the bulk is left to the first family.

23. The 2nd respondent also called Mackenzie Mweu a document examiner of 30 years standing who was the 5th witness. He testified that he received instructions to compare the signatures of the deceased; that he compared the signature on a certified copy of a Will with an original land transfer document, a sale agreement, a conveyance, and a charging document, all in their original form; and that he formed the opinion that there was no agreement between the signature in the Will and the other signatures. He produced his report dated 25th May 2016 as an exhibit.

24. The 3rd respondent Susan, was the 6th witness. In her testimony, she claimed to have lived with the deceased who she referred to as her husband between 2006 to 2012 when he died; and that initially he had rented a house for her in Thogoto and later at Kawangware Satellite. She laid claim over three properties; Thogoto Parcel Numbers 1814, 1815, and 1817, asserting that the deceased had indicated to her that he would transfer the said properties to her; that she was aware that Jedidah was the deceased wife; that the deceased had told her that he could not marry her as he was already married; that she had

come across the deceased's Will and had made inquiries and the deceased confirmed that that was his Will; that she knew and had met the 4th respondent as lawyer to the deceased severally; and that having lived with the deceased for seven years, she wanted provision from his estate.

25. The 7th witness to testify was Chief Inspector Alex Mwongera, a document examiner, who testified on behalf of the appellant. He informed the court that on 7th August 2015, his office received a certified copy of the last Will of the deceased, and a forensic report by Emmanuel Kenga with signatures on a comparison chart with a request to examine the signatures circled in those documents; he did his examination and formed the opinion that the signatures were by the same author. He indicated that he would have preferred original documents but the same were not made available. He produced his report dated 12th August 2015 as an exhibit. During cross-examination, he admitted that Emmanuel Kenga was his boss, senior in rank and experience but did not give reasons why he departed from Emmanuel Kenga's opinion, other than that he differed and that Mr. Kenga had used inferior machines.

26. The 8th witness to testify was Shumari Makoni, an officer from the Department of Civil Registration also called by the appellant. He informed the court that he prepared a report in respect of birth certificate No 0453741 which was the extract of the birth certificate of Moses Munene, born on 8th June 1980 at Pumwani Hospital, birth entry 2619XXX/XX, whose parents' name was given as Richard Kimani Kahura and Magdaline Mutugi Kahura; further that the records show that Moses Munene had a 2nd registration dated the 24th June 2011, where his date of birth given as the 8th June 2000, place of birth Kawangware, birth entry No 26147XXXXX, the parents were listed as Lihasi Bidali and Magdaline Mutugi Kahura.

27. He further testified that Hannah Njoki had been registered at birth on 5th July 1969 as a child - Njoki, date of birth 5th July 1969, place of birth Githiga (Kiambu), B/E No 130XXXX, the name of father was not shown, name of the mother was shown as Grace Wambui Wango; that Hannah Njoki too was registered twice, the 2nd time in Kiambu on 21st April 1982, as a late registration B/E No 130XXXX/XX; the place of birth was given as Githunguri, parents were shown as Lihasi Bidali and Grace Wambui Wango.

28. The witness further testified that births should be registered at birth or within 6 months of the birth of the child; that if one is doing a late registration it must be clearly stated as such; and that double registration is contrary to the law and an offense.

29. The 9th witness was also called by the appellant, one Gladys Naliaka Soita, a fingerprint officer working with the National Registration Bureau in the Registrar of Persons department, who confirmed that Magdalene Mutugi Kahura was the same person as Magdalene Mutugi Bidali having changed her name vide a change of particulars dated 15th November 2012. Further, she testified that one Agnes Nyaguthii Bidali applied for a change of name to Laimani Bidali.

30. On his part, Yose (appellant) testified that he was the son of the deceased and Jedidah; that they were 12 siblings but one died; and that his parents were married in 1954 in church under the African Christian Marriage & Divorce Act and were issued with a marriage certificate. He gave a chronology of the places his father worked and how he went about acquiring property over the years; further, he informed the court that his father suffered a stroke in 2008 and was admitted to Avenue Hospital; that after discharge from the hospital, the deceased did not recover fully, his speech was affected and his utterance changed permanently; further that he too was surprised to learn of the existence of a Will but not so much, as his father had brought up the matter on several occasions. He denied that the respondents were blocked from participating in the deceased's funeral arrangements. He recognized Bidali, Kageha, and Kaisa as his siblings having met them in the 1980s. He further informed the court that he had never seen the 3rd respondent before and asserted that she was not a wife to the deceased.

31. Upon hearing the parties, the learned judge (W. Musyoka, J.) arrived at a determination and made the following orders:

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

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

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

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

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

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

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

32. Aggrieved by the judgment, the appellant preferred this appeal. In his memorandum of appeal, he raised nine (9) grounds of appeal which we take the liberty to summarize as follows:

    That the learned judge erred;

    i. in making a finding that Grace Wambui and Magdalene Mutugi were widows of the deceased and that their respective children were children for purposes of succession to the estate of the deceased and were at liberty to make applications for reasonable provisions, out of the estate of the deceased when he had already upheld the Will;

    ii. in finding that Grace Wambui and Magdalene Mutugi were widows when he had made findings that they were not widows for purposes of section 3(5) of the Succession Act;

    iii. by making findings that would re-open the matter for presentation of new evidence when all parties had presented all their evidence in support of their position and thereby allowed a back-door appeal of his own decision;

    iv. by making orders that can be used to oppress the proper beneficiaries of the estate and deny them their full entitlements as discerned by the deceased in his Will;

    v. in failing to dismiss the objectors' claim in its entirety despite finding that the Will was valid;

    vi. by making orders that were not supported by the pleadings before him and by making orders that would completely meddle with the testamentary freedom of the deceased and render the Will useless.

33. The appeal was heard on the GoTo virtual platform and canvassed by way of written submissions and brief highlights by counsel representing the parties. In his submissions, learned counsel for the appellant collapsed the 9 grounds of appeal into four thematic areas as follows;

    a. Whether Grace and Magdalene were widows of the deceased for purposes of section 3(5) of the Succession Act.

b. Whether the children of Grace Wambui and Magdalene Mutugi were children of the deceased despite overwhelming evidence and findings that the children were not sired by the deceased.

c. Whether the judge erred by making findings that were not supported by the pleadings before him and which would call for the presentation of new evidence when all parties had presented all their evidence in support of their positions and thereby allow a back-door appeal of his own decision?

d. Whether part of the orders completely meddles and interferes with the testamentary freedom of the deceased and renders the Will useless.

34. On whether Grace and Magdalene were widows, learned counsel for the appellant submitted that despite the judge making findings that the 1st and 2nd respondents had not proved their marriage to the deceased, he erred by finding that marriages existed by presumption. In support of his assertion, learned counsel relied on the case of *Phyllis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* [2009] eKLR where the court held that whether a marriage could be presumed, is a question of fact and not dependent on any system of law except where excluded by written law. Counsel further submitted that there was uncontested evidence that the deceased was married to Jedidah under Christian rites and a marriage certificate produced in evidence; yet no evidence was placed to support the alleged long cohabitation; further that Grace and Magdalene were best placed to testify or adduce evidence on the existence of the marriage or long cohabitation with the deceased, but instead they relied on the affidavits by their respective sons; and the evidence their sons adduced in court. Learned counsel further contended that the mere fact of giving birth to a child could not be the basis of raising the concept of the presumption of marriage. In this regard, learned counsel relied on the case of *NLS v BRP* [2016] eKLR, where the court was of the view that no presumption of marriage could be made as there was no long period of cohabitation and neither did the parties take themselves to be married and that what existed was a simple friendship which led to the birth of the child.

35. On whether the children of Magdalene sired outside marriage could be classified as the deceased's children, learned counsel submitted that there was no evidence to support the allegation that the deceased had taken in children sired by Magdalene outside their relationship to be his children; that no evidence was led to prove that the deceased had either paid their school fees, bought them food, paid any of their bills or in any way participated in their lives or upbringing; that he led evidence to the effect that some of these children had forged birth registration documents and were facing criminal charges over the same. In addition, he contended that the named children did not testify before the court nor did they assert their claims. Further, there was no prayer before the court to declare them as beneficiaries of the deceased. He relied on the case of *MNM v DNMK & 13 others* [2017] eKLR, where the court held that it was the duty of "S" to attend court and present her case if she so wished and that the learned judge did not err in holding that there was no credible evidence based on which he could find that "S" was a child of the deceased.

36. On whether the judge made findings on matters not supported by pleadings before him, and whether this would necessitate the calling of new evidence, learned counsel submitted that the respondent's witnesses were extensively cross-examined on how the deceased supported them. Susan indeed filed a claim for dependency yet the judge failed to come up with a list of who the rightful beneficiaries of the deceased are and directed that claims for dependency be dealt with at the confirmation stage of the matter. Further, he submitted that parties are bound by their pleadings; and that the alleged dependents had a chance to present their evidence but chose not to. In support of his contention, learned counsel relied on the case of *Elizabeth O. Odhiambo v South Nyanza Sugar Co. Limited* [2019] eKLR.

37. On whether the court had interfered with the wishes of the deceased, learned counsel submitted that by its orders, the court disturbed the deceased's wishes by imposing widows as probable dependents and allowing applications for the provision that no one had sought. Further, the respondents have not appealed or challenged the finding by the judge upholding the Will. To buttress his argument, learned counsel relied on the case of *Re Estate of Abdulkarim Chatur Popat* [2020] eKLR and *John Wagura Ikiki & 7 others v Lee Gachigia Muhoga* [2019] eKLR.

38. In his submissions, learned counsel for Bidali contended that the trial judge properly made a finding that Grace and Magdalene were widows of the deceased, and as a result of the finding, their respective children were thus children of the deceased for purposes of succession; that the judge based his finding on evidence which demonstrated that Grace had lived together with the deceased since the year 1971 and they had sired three biological children; and that the deceased took in one other child sired outside the union as his own. Learned counsel further contended that the right to make an application for reasonable provision is a statutory right, that the judge only restated the law; that there was no contradiction in the judgment as to Grace and Magdalene being widows of the deceased; and lastly, that the appellant did not demonstrate which of the children had obtained fraudulent birth and identity documents.

39. Learned counsel further submitted that there is no cogent evidence to support the allegation by the appellant that the judge made findings that would re-open the matter for the presentation of new evidence; that he made orders that would be used to oppress the alleged proper beneficiaries of the estate; that dispositions in a Will are not absolute; that courts have re-opened Wills where it has not adequately catered for those left out; that the appellant failed to demonstrate which orders issued by the court were not compatible with the pleadings filed by the parties. In addition, learned counsel urged the court that in determining the matter to direct who would perform the functions of distribution of the estate; and that distribution should be made to all of the children of the deceased.

40. On his part, the 2nd respondent's (Peter) learned counsel submitted that the court was right in relying on the doctrine of presumption of marriage. He contended that the mere existence of a monogamous marriage between the deceased and Jedidah did not override the fact that the deceased and Magdalene cohabited for a long period with the deceased providing a home for Magdalene and their children in Thogoto; and the fact that the deceased attended all family functions including their children's graduations. Further, learned counsel pointed out that there is a contradiction in the appellant's arguments, who on one side wants the Will upheld, yet he faults the court's recognition of Magdalene's children as children of the deceased, some of whom are recognized as such in the Will. In support of his assertion, learned counsel relied on the case of *Hortensia Wanjiku Yawe v Public Trustee* [1976] eKLR and *Beatrice Adhiambo Sijenyi v Josephine Kapukha Khisa & 2 others* [2018] eKLR. The court considered that a marriage may be presumed due to long cohabitation by virtue of the country's common law heritage.

41. On the allegations that Magdalene procured a fake birth certificate for one of her sons, Moses Munene Bidali, it was submitted that the allegation was not sufficiently proved as the only documents tabled before the court were a charge sheet and Magdalene's statement; that the status of the case was unknown; and, in any event, since the court had established that Magdalene's children are indeed children of the deceased, it then follows that both Magdalene and the children are recognized as dependants under the provisions of Section 29 of the *Law of Succession Act* (the Act).

42. In addition, learned counsel submitted that the learned judge did not interfere with the testamentary freedom of the deceased, rather he recognized that there were heirs that were left out of the Will and could be catered for if they sought for provision under Section 26 of the Act.

43. On the other hand, learned counsel for the 2nd respondents joined issue with the appellant's counsel in faulting the judge for adjudicating issues that were not presented in court and submitted that the judge delved into whether the 2nd respondents were survivors of the deceased but did not declare them as dependents. Learned counsel submitted that the court did not determine the question of dependency, but rather the issue of survivorship. Learned counsel relied on the case of *Re Estate of Cecelia Wanjiru Kibiche (Deceased)* [2016] eKLR to draw the distinction.

44. Learned counsel for Susan Njeri submitted that the judge contradicted himself by holding, on one hand, that the marriage between the deceased and Jedidah was monogamous, and that there was no evidence that Grace and Magdalene were married to the deceased under customary law or any other law; and on the other hand, the judge went ahead to apply the doctrine of presumption of marriage, finding that they were widows for purposes of succession. Learned counsel relied on the case of *Irene Njeri Macharia v Macharia Wairimu Njomo & another* [1996] eKLR, to buttress her argument.

45. Learned counsel further submitted that the finding that Grace and Magdalene were widows under Section 29 of the Act but not widows under Section 3(5) of the Act, was an error in the judgment and that having found that Grace and Magdalene were not widows, Section 29 of the Act was no longer applicable to them.

46. This is a first appeal, and we are minded to consider, analyze, and evaluate the evidence on record afresh and reach our conclusion, but also warn ourselves that we did not have the advantage of seeing or hearing the witnesses and make an allowance for this.

    This court in *Selle v Associated Motor Boat Co.* [1968] EA 123, expressed itself on this issue 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. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270."

47. From a careful perusal of the record of appeal, parties' submissions, and the law, the issues arising for determination can be discerned as follows:

    a. Whether the trial court was right in presuming that Grace and Magdalene were wives of the deceased based on the concept of presumption of marriage and therefore wives under section 3(5) of the Act.

    b. Whether the court erred by making a finding that children of the Grace and Magdalene were children of the deceased.

    c. Whether the court erred in finding that the children of Grace and Magdalene though not biological children of the deceased were nonetheless beneficiaries of the estate.

    d. Whether the learned judge interfered with the deceased's Will.

48. Three women claimed to be widows of the deceased. Jedidah, whose son, Yose claimed to be the only wife of the deceased had been married under Christian rites in 1971, and it was urged, based on the said marriage that the deceased could not marry any other woman. Indeed, there is no contention from any

of the other parties that Jedidah in her 70s was the deceased wife. All parties in the suit acknowledge this fact.

49. Grace, the mother of Bidali on the other hand, in several affidavits on record claimed that the deceased had two wives; Jedidah as the 1st wife and she as the 2nd wife having been married under Kikuyu Customary Law, in 1972, in a Kikuyu marriage ceremony that she claimed to have been performed in Githiga Village, Kiambu. It is also her case that she sired with the deceased one son, Bidali Lihasi, and three daughters namely Hannah Bidali, Kaisah Bidali, and Kageha Bidali. She further informed the court that whilst Jedidah, resided in Limuru, she resided with her family on LR No 209/118/77 along Kolobot Road, within the Parklands area. Further, it was her case that the deceased set up a tailoring shop for her; Bidali & Company which she runs to date;

    that in their early years, she assisted the deceased in also providing for the 1st wife's children; and that together with the deceased they not only ran the tailoring business, they also had a construction business. From the said businesses, they acquired properties now forming the estate; one of the deceased's vehicles KAX 127L was used by her family.

50. On the part of the 3rd respondent, Peter Njororge Bidali claimed that his mother Magdalene, was the 3rd wife of the deceased having been married to the deceased in 1977; that Magdalene has 8 children; six of whom she sired with the deceased; and that the deceased established their matrimonial home in Thogoto. In addition, the deceased took in and treated Magdalene's two other children as his own.

51. Susan Njeri who interestingly did not seek a widow's status, brought her application under Section 26 of the Act. Her case is that she cohabited with the deceased from 2006 to 2012; and that the deceased rented for her a house in Thogoto. She denied that the deceased had other wives other than Jedidah, and vouched for the authenticity of the Will.

52. Neither Jedidah, Grace nor Magdalene testified in court, though Grace filed an affidavit. All three litigated through their sons, Yose, Bidali, and Peter.

53. The trial court in its judgment found that Jedidah was married under Christian rites and dismissed the allegation raised based on the spelling of Jedidah's name on the marriage certificate and the allegation of fraud. After citing a host of authorities, the trial court appreciated that Grace and Magdalene although claiming they were married under Kikuyu Customary Law, failed to place before the court proof that the necessary steps to cement a Kikuyu Customary marriage such as "ngurario" and payment of dowry were performed. The trial court also considered the provision of Section 3(5) of the Act and indicated that the said section did not address their plight. In his own words, the trial judge in paragraph 55 of the judgment stated:

> "...The two, however, did not establish that they were married under a system of law that recognizes polygamy. I presume them to be wives on account of the circumstances of cohabitation and other factors. The two cannot therefore seek refuge under section 3(5) of the *Law of Succession Act*. The *Law of Succession Act* does not address their case. It is my view that it is moot whether presumption of marriage can be made in circumstances of a subsisting statutory monogamous marriage, but the court of appeal has generally made such presumptions. (sic) I am bound by such decisions, and I shall therefore treat Grace Wambui and Magadalene Mutugi as widows of the deceased for purposes of succession."

54. We do agree with the trial judge to the extent that the circumstances surrounding the lives of the two women with the deceased, including the siring of children and long cohabitation, no other inference can be drawn other than they lived as husband and wife respectively under 'come we stay arrangement'

which connote to a large extent the presumption that the parties are married. It is largely an accepted form of marriage in our country.

55. In this instance, the deceased married Jedidah under the African Christian Marriage and Divorce Act, and thereafter cohabited in a 'come we stay' marriage with both Grace and Magdalene as evidenced by the facts placed before the trial judge. Indeed, the trial judge considered the long cohabitation the deceased had with Grace, and the fact that they sired a son and three daughters. We need not add the fact that in her affidavit, Grace deposed that she carried out business with the deceased as her husband; she took care of all her husband's children from the 1st family without distinction; that the said children would visit her; and the relation went further to include Jedidah who in a picture celebrating the departure for Grace's daughter who was traveling abroad, where Jedidah had joined other family members. We find thus that the trial court had sufficient evidence of the union between the deceased and Grace. Put differently, Grace's side had placed evidence on a balance of probabilities that the two were in a marriage.

56. On the part of Magdalene, the court was informed that she had lived with the deceased since 1977 and sired children with him. There is an acknowledgment even in the impugned Will of her three children. The trial court observed that for one to have cohabited over time and sired three children who are acknowledged, the relationship ought to be presumed to be that of a couple living together as husband and wife. We too agree that they had a union together, and the said union from the fact that they had sired three children. Their conduct and how they held out to other family members cannot be anything short of a marriage.

57. Upon the death of the deceased, the relevant Act for purposes of succession is the *Law of Succession Act*. Section 3(5) of the Act has set out its parameters as to who will be considered a wife and children for purposes of succession. Section 3(5) of the Act provides that:

> "Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."

58. Section 3(5) of the Act speaks to a history that remains alive in our country today. The section brought to light and gave a remedy to the injustice many Kenyan women suffered due to the situation they found themselves in, where husbands who previously married under monogamous marriages took them in as wives under customary law. The scenario was explicitly captured by this Court and put in context in the case of *Irene Njeri Macharia v Margaret Wairimu Njomo & another* [1996] eKLR. The court stated:

> "Our understanding of section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage which remained undissolved upto the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy. Parliament, in its wisdom, and whatever it might have intended to do, provided that:- "Notwithstanding the provisions of section 37 of the *Marriage Act* ...
>
> Josephine was, nevertheless, a wife for the purposes of the *Law of Succession Act*, and in particular sections 29 and 40 of the Act.".

59. In *MNM v DNMK & 13 others* [2017] eKLR this Court considered a similar situation where the deceased had married his first wife under customary law; and said to have divorced her but with no proof that the same was dissolved. He got into a 2nd marriage though it is not clear how the same was contracted. Then he had a statutory marriage with a 3rd wife said to have been dissolved, though no evidence was adduced. Again, he got himself a 4th wife who claimed but failed to prove customary marriage, and where there was cohabitation for 6 years. They held themselves out as, man and wife, and there was a clear recognition by family. This Court had this to say:

> "This leads us to the question whether on the evidence before it, the court could have presumed a marriage between the deceased and E based on cohabitation and the parties holding themselves out to society as husband and wife. In *Mbogoh v Muthoni & another* [2006] 1 KLR 199, this Court stated that where the requirements of statutory or customary marriage have not been proved and the issue of presumption of marriage has been raised, the Court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable. (See also *Kimani v Kimani & 2 others* [2006] 2 KLR 272).
>
> The presumption of marriage has been recognised in our jurisdiction for a long time. (See for example *Hortensia Wanjiku Yawe v Public Trustee*, CA No 13 of 1976). In *MWG v EWK* [2010] eKLR, this Court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact. As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the *Hortensia Wanjiku Yawe v Public Trustee* (supra), Wambuzi, P. noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system.
>
> Madan,JA (as he then was)articulated the rationale of The presumption of marriage in the following famous words in *Njoki v Mutheru* [2008] 1 KLR (G&F) 288:
>
> > "It is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the "husband", or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband."
>
> The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (*Mbogoh v Muthoni & another*, (supra). Mustapha, JA added in Hortensia Wanjiku Yawe v Public Trustee (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage

in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption. (See also *Kimani v Kimani & 2 others* (supra)".

60. Based on the finding of this Court in *MNM v DNMK & 13 others*, we fault the learned judge to the extent that he found that Section 3(5) of the Act did not apply to the circumstances of Grace and Magdalene. We are also of the view that Section 3(5) of the Act ought to be read alongside Article 20 of the *Constitution* which provides that to give meaning to the current situation facing women in Kenya:

> 20
>
> (1) The Bill of Rights applies to all laws and binds all state organs and persons.
>
> 2. Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom
>
> 3. In applying a provision of the Bill of Rights, a court shall-
>
> a. develop the law to the extent that it does not give effect to a right or fundamental freedom, and
>
> b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
>
> 4. In interpreting the Bill of Rights, a court, tribunal, or other authority shall promote-
>
> a. the values that underlie an open and democratic society based on human dignity, equality, equity and freedom
>
> b. the spirit, purport and objects of the Bill of Rights.
>
> Further, Article 27(1) provides that:
>
> Every person is equal before the law to equal protection and equal benefit of the law.

61. Applying Articles 20 & 27 of the *Constitution*, and without having to discriminate against women in "come we stay" marriages or where partial customary practices are met and parties enter into long cohabitation, we find and hold that the circumstances that led to the enactment of Section 3(5) of the Act apply mutandi mutandis to women who find themselves in 'come we stay' marriages, a prevalent phenomenon in our country as this is the right thing to do. Finding to the contrary will smack of injustice and discrimination to the myriad of Kenyan women who find themselves in such situations.

62. Having arrived at the above determination, we find and hold therefore for purposes of the Act that Grace and Magdalene are widows of the deceased.

63. It follows therefore unless proved to the contrary that, children sired by Grace and Magdalene during their union with the deceased are children of the said unions and therefore heirs of the deceased, and more so for purposes of Section 29 of the Act.

64. On whether Grace's daughter Hannah Njoki and Magdalene's children, Laimani Bidali, George Kahura Bidali, Esther Wanjiku Bidali, and Josphat Kimani Bidali sired outside their respective unions

with the deceased are heirs of the deceased estate, Grace's and Magdalene's case is that the deceased took in their children and treated them as his own. However, Yose's counsel submitted that there was no evidence placed before the court to support the claim. Further, the said children had not applied to be considered as dependents and that the trial court had delved into matters not before it. In any event, none of them appeared to testify, and by the court allowing further applications for dependency, it was giving a second chance to the said persons to move the court at the distribution stage.

65. Learned counsel for Bidali submitted that the trial judge in as far as indicating that parties may make applications under Section 26 of the Act was simply restating the law and cannot be criticized by restating a provision of the law.

66. Learned counsel for Peter submitted that there was overwhelming evidence that the deceased provided a home for Magdalene and all her children; and attended their key functions, such as graduations.

67. As for the learned counsel for Susan Njeri, he supported the position taken by Yose's counsel. He contended that once the court found that Grace and Magdalene were not widows within the meaning of Section 3(5) of the Act, he should not then have found that they were dependents under Section 29 of the Act and entitled therefore to apply for provisions under Section 26 of the Act.

68. The trial judge in his judgment found that there was evidence by conduct that indeed the deceased did take in his wives' children sired outside the union with him as his and we do find that indeed there was sufficient evidence by way of affidavits, statements made on oath and several pictures attesting to the fact. We do not see any reason to depart from the judge's findings.

69. The final issue is whether the trial court by making a finding that Grace, Magdalene, and their offspring may move the court under Section 26 of the Act, interfered with the wishes of the deceased. In his judgment, the trial judge explained very well that the judgment was confined to the objections raised to the Will's validity. Further, it was his view that the dependency issue may well be filed by those left out of the Will, based on Section 26 of the Act at the time of distribution. This, he noted, since Grace had sought for provision as a dependent. As for Susan Njeri the judge was of the view that since she was not a widow, her application under Section 26 of the Act fell through the cracks.

70. In our view, the judge was systematic and needed to do so due to the myriad of applications filed at the time. He dealt with two issues as he considered the validity of the Will. He found that the Will was valid and had not been challenged. Secondly, he came up with a list of heirs which is for consideration in this appeal. We do not fault the judge's wisdom on that.

71. Section 26 of the Act deals with provision for dependants not adequately provided for by Will or on intestacy as follows:

> Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

72. Further Section 29 of the Act provides that:

For the purposes of this Part, "dependant" means—

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b. such of the deceased's parents, step-parents, grandparents, grandchildren, 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.

73. The trial judge by referring to Section 26 of the Act was restating the law and he cannot be faulted. The trial judge was of the view that the court would be better placed just before confirmation of the grant of probate, to dispose of any pending matters. Indeed, courts have severally stepped in situations where dependent's or survivors of a deceased, have been left out of Wills of deceased persons to make provision for them.

74. In the case *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR this Court had this to say on Section 26 of the Act:

> "...This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act..."

75. In the end save for our finding as relates to Section 3(5) of the Act, the appeal is unsuccessful. It is hereby dismissed.

76. This being mainly a family matter, each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

ALI ARONI

.....

JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR