Thiga & 2 others v Thiga (Civil Appeal 174 of 2020)
[2024] KECA 1393 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1393 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 174 OF 2020

S OLE KANTAI, F TUIYOTT & PM GACHOKA, JJA

OCTOBER 11, 2024

BETWEEN

LOISE NELIMA THIGA ..... 1ST APPELLANT

ROBINSON WANGOME THIGA ..... 2ND APPELLANT

GEOFFREY WACHIRA THIGA ..... 3RD APPELLANT

AND

BECKY NJOKI THIGA ..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Muchelule, J.) delivered on 28th October, 2019 in HCSC No. 127 of 2011)

JUDGMENT

1. Article 45 of *the Constitution* of Kenya recognizes the family as a natural and fundamental unit of the society and the necessary basis of social order. For this reason, the state, including the judicial arm of the government, is entrusted with the duty of protecting this unit. Time and again however, courts are invited to determine an unsettling dispute between two factions of a family in instances where the patron of the family or head of the household dies. That is the backbone of the issue for determination before this Court. We note that the dispute has been in court since 2011. It is our desired objective that the outcome from this Court shall settle the dispute with finality.

2. The deceased Robinson Wangome Thiga died intestate on 26th December, 2020. His estate was survived by the parties to the dispute. The appellants are the deceased's first wife and two children on the one part. On the other part, the respondent emphatically averred that she was the deceased's wife at the time of his death. The issue as to whether the respondent is a surviving wife of the deceased person is central to this dispute and we shall analyze the same comprehensively later in this judgment.

3. Following the deceased's death, the respondent petitioned the High Court for a grant of letters of administration. The respondent also cited the 2nd and 3rd appellants, to either accept or refuse her petition for grant of letters of administration intestate. The respondent estimated the value of the deceased's estate at Kshs. 100,000,000.00 comprised of land parcels, rental homes, chattels, funds in several bank accounts, stocks and shares. She also listed the liabilities of the estate as amounting to Kshs. 120,500.00 owed to Meji Rupshi & Company.

4. That petition was vehemently opposed. The appellants filed an objection to the making of grant of letters of administration dated 23rd June, 2011 on the following grounds: the respondent was not a wife within the meaning of section 3 (5) of the *Law of Succession Act*; the respondent failed to disclose crucial beneficiaries of the estate; the respondent was intent on disinheriting the beneficiaries of the estate; and the respondent had interfered with the management and operations of the estate. They also filed a petition by way of cross application for letters of administration intestate dated 4th October, 2011.

5. The petitions and the objection were heard by way of viva voce evidence before the trial court. In his judgment dated 28th October, 2019, Muchelule, J. (as he then was) acknowledged the excerpts of Dr. Eugene Cotran in his writings Restatement of African Law: Kenya Volume I the Law of Marriage and Divorce (London: Sweet and Maxwell, 1968) who opined that no valid marriage exists under Kikuyu Customary Law unless the ngurario ram is slaughtered. It was also stated that no valid marriage exists under the said customs without part payment of dowry. The learned judge exposited that customary law is dynamic and evolving. In the circumstances, one only had to demonstrate essential steps and ceremonies had been conducted in line with contemporary practice. The court held:

> "In the instant case, the deceased and the petitioner had lived together for about 13 years. The petitioner and PW2 stated that he sought to formalize this relationship under Kikuyu customary law. He went to the petitioner's parents' home. He found her maternal uncle (PW4) and other of her relatives. Dowry was negotiated. Part of it was paid to them in money form. The balance was by way of a cow and calf which he paid subsequently. He continued to stay with the petitioner until he died about 4 years later.
>
> I consider that, as was stated in Hortensia Wanjiku Yawe vs. The Public Trustee, Civil Appeal No. 13 of August 6, 1976 (sic), the onus of proving customary law marriage is generally on the party who claims it; the standard of proof is on a balance of probabilities; and the evidence as to the formalities required for a customary law marriage must be proved to that evidential standard. However, the court has to bear in mind that such customary marriage formalities keep evolving with time.
>
> On the evidence that was tendered before me, and considering all that I have said in the foregoing, I find that it has been established to the required standard that there was a valid Kikuyu customary law marriage contracted between the deceased and the petitioner. The petitioner was therefore the 2nd widow of the deceased, and a beneficiary of his estate.
>
> It is material to point out that PW2 is the eldest brother of the deceased. He stated that since 1990s he knew the petitioner to be the deceased's wife after he introduced her to him. In 2009, a family meeting called by the deceased, he introduced the petitioner to the family as his wife. In the meeting was their mother and siblings. When PW2's daughter was getting married in 1999 and his son got married in 2011, the petitioner participated in her capacity as the wife of the deceased. PW3 was a friend of the deceased for 18 years before the latter died. He knew the petitioner to be the deceased's wife after she was so introduced by him. PW6 is a house help in the King'ong'o home where the deceased and the petitioner lived

before the former died. She testified that the two employed her, and she knew the two to be married. PW7 worked for the deceased as a driver between 2003 and 2011. When he joined the employment he knew, from then onwards, that the petitioner was the deceased's wife. It is evident that after the burial of the deceased the 2nd and 3rd objectors sought to evict the petitioner from the King'ong'o home even when the deceased's mother resisted the attempt. It took the court to stop the eviction. Lastly, the message of condolences by the then President Mwai Kibaki, following the death of the deceased was delivered to the petitioner. That must have been in recognition that she was the deceased's widow.

... The deceased had no capacity to marry the petitioner, in view of his earlier civil marriage to the 1st objector. However, under section 3 (5) of the Act the petitioner is considered a wife for the purposes of succeeding the deceased as Kikuyu customary law marriage is a polygamous marriage."

6. Acknowledging that the deceased and the 1st appellant had been separated for a long time, the respondent and the 2nd appellant were appointed as joint administrators of the estate. The court then directed the administrators to file an application for confirmation of grant within 60 days.

7. It is those findings that precipitated the filing of the appeal before us. The appellants filed their notice of appeal dated 30th October, 2019. They subsequently filed another one on 13th November, 2019. They filed their undated memorandum of appeal that raised 7 grounds disputing the findings of the trial court. We have taken the liberty to summarize those grounds as follows: the trial court improperly interpreted section 3 (5) of the *Law of Succession Act* and thus erroneously concluded that the respondent was in a polygamous marriage entered under Kikuyu customary law with the deceased; the learned judge erred in finding that the long cohabitation between the respondent and the deceased crystallized into a presumption of marriage; the trial court improperly analyzed the evidence on record and thus erred in not appointing the 1st appellant as a joint administrator of the estate; the respondent was no better administrator over and above the 1st appellant; and the respondent fraudulently changed her name and as such, ought not to be an administrator.

8. In view of the foregoing, the appellants asked this court to allow the appeal, revoke the grant of letters of administration issued and revoke the appointment of the respondent as a co- administrator of the estate. The appellants further prayed for costs of the suit.

9. When the appeal was heard virtually on 14th May, 2024, learned counsel Mr. Asitiba appeared for the appellants while learned Senior Counsel Mrs. Thongori was present for the respondent. The parties disposed of the appeal by highlighting their diametrically opposed written submissions. The appellants relied on their written submissions dated 4th November, 2021 together with attached authorities as well as their supplementary written submissions dated 25th November, 2022. The respondent on her part relied on her written submissions and case digest, both dated 24th November, 2023.

10. According to the appellants, the respondent failed to qualify herself within the meaning of section 3 (5) of the *Law of Succession Act* for failing to demonstrate that she was married to the deceased under Kikuyu customary law. They contended that the ceremony was not backed by cogent proof as to demonstrate that cardinal customs took place to support her allegations.

11. They fortified, that since the respondent failed to demonstrate that the ngurario took place, the dictates of such a marriage had not been met. In addition, the respondent could not establish with cogent evidence that the sum of Kshs. 70,000.00 had been paid to her uncle, which, be that as it may, had not been paid to her paternal uncle.

12. The appellants further discredited the union by expressing aghast as to how PW3, the deceased's brother did not know about the ceremony. Additionally, the fact that the deceased's kin were absent meant that the ceremony could not be classified as marital under Kikuyu Customary Law. They challenged the respondent's allegations because it was untenable for the deceased to participate in such a ceremony when he had in the same year, been diagnosed with cancer and was on chemotherapy treatment.

13. On whether a presumption of marriage arose, the appellants submitted that the evidence adduced failed to meet the qualitative and quantitative test. That the evidence adduced was not pivotal enough to sustain that holding that there was a presumption of marriage. As long as the deceased was alive, they submitted, the respondent held herself out as a femme sole. This could be discerned from several documents belonging to the respondent where she either declared her marital status as single or declared her name as that which was assigned to her at birth to the exclusion of the deceased's surname.

14. They added that had the deceased been married to the respondent, nothing would have precluded him to declare himself married and having the respondent listed as his next of kin in his admission form to Nairobi Hospital dated 10th May,2009. Instead, the 2nd appellant was indicated as his next of kin.

15. Further justifying no existence of a marital union between the respondent and the deceased, the appellants propositioned that the two never obtained properties together. They expressed dubiousness in the receipts from the holiday destinations produced by the respondent to prove the contrary stating that they were adduced as an afterthought. Lastly, the appellants dismissed the respondent's change of name in her latest ID as suspicious and done in bad faith.

16. Finally, the appellants submitted that the evidence of the respondent's witnesses was incredible. They accused the respondent of intermeddling with the deceased's estate and was thus not deserving of the orders of this Court. Adding that service of pleadings was improper, that the respondent could not inherit the property in King'ong'o and that the 1st appellant ranked in priority as an administrator of the deceased's estate, the appellants prayed that their appeal be allowed.

17. On her part, the respondent submitted that no evidence supported the claim that the 1st appellant and the deceased were married in a civil union. Be that as it may, section 3 (5) of the *Law of Succession Act* recognized her as a wife for the purposes of succession proceedings. She submitted that the evidence adduced before the trial court extensively reinforced that she was married to the deceased under Kikuyu Customary Law until his death.

18. The respondent further submitted that the trial court rightly found a presumption of marriage since they had cohabited with the deceased person since 1993. She relied on the photographs produced in evidence as well as witness accounts. The respondent denied allegations of fraud. She submitted that it was not mandatory for a woman to take the name of her husband in the event of marriage. She added that the documentation bearing her single status could not be recorded otherwise as she did not have a marriage certificate. She noted that the appellants gave contradictory statements and were thus undeserving of the orders of the Court.

19. Finally, on whether the 1st appellant ought to have been appointed as the administrator of the estate, the respondent submitted that the trial court was vested with discretionary powers to appoint persons listed under section 66 of the *Law of Succession Act*. In that regard, nothing had been demonstrated as to allude to the fact that the court exercised its discretion injudiciously.

20. In addition, the respondent submitted that in any event, the 1st appellant had been separated from the deceased for a long time. She added that no prejudice would be suffered if her first born son, the

2nd appellant herein, administered the estate on behalf of their house. The learned judge's findings were thus free from any error. In her view thus, the appeal lacked merit. She prayed that the same be dismissed with costs.

21. We have considered the record of appeal, the submissions and the authorities cited by the parties. As a first appellate court, an appeal is by way of a 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 [See Selle & another vs. Associated Motor Boat Co. Limited & others [1968] EA 123].

22. The main issue for determination before this Court is whether the respondent ought to be considered a wife of the deceased in light of section 3 (5) of the *Law of Succession Act*.

23. Section 3 (5) of the *Law of Succession Act* provides that 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. Interpreting the import of this provision, this Court, constituted differently in Irene Njeri Macharia vs. Margaret Wairimu Njomo & another [1996] eKLR, held:

> "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 "

24. Section 2 of the *Marriage Act* CAP 150 Laws of Kenya, although operationalized in 2014, defines polygamy to mean the state or practice of a man having more than one wife simultaneously.

25. The onus is on the alleger to demonstrate that she entered into a polygamous union with the deceased person and thus meets the eligibility criteria set out in section 3 (5) of the Act. It is not disputed that the deceased was married to the 1st appellant. As a result of the union, they were blessed with two issues; the 2nd and 3rd appellants. It appears that the deceased and the 1st appellant later on separated. The respondent contended that it was after that separation that she and the deceased married by way of Kikuyu customary law. The respondent was vested with this burden to establish that she was married to the deceased.

26. It is also important to restate that for all the intents and purposes of section 3(5) of the *Law of Succession Act*, women that have contracted a marriage under a system of law permitting polygamy are recognized as wives within the meaning of the Act irrespective of the fact that the husband is in a subsisting monogamous marriage. The 2nd appellant thus could not be heard to argue that since the deceased was civilly married to his 1st appellant mother, he was estopped from entering into a subsequent marriage for purposes of succession.

27. In proving customary law, Duffus, JA. in Kimani vs. Gikanga (1965) EA 735, expressed himself as follows:

> " To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this

should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."

28. According to the respondent, she was married to the deceased under Kikuyu customary law in 1993 and began to cohabit immediately thereafter. The deceased visited her uncle, Peter Githiri Wahome (PW4) on 8th June, 2006 and paid part dowry on that day. This evidence was corroborated by PW4 who further added that the balance of the dowry was paid in December of that year when the deceased delivered a grade cow and a calf. In that ceremony, the deceased was only accompanied by his friend. None of his family members attended this ceremony. PW4 further explained that in the case of the respondent and the deceased, the ngurario and itara ceremonies did not take place but that did not invalidate the union between them.

29. Demystifying cultural practices under Kikuyu customary law, PW4 explained that marriage under Kikuyu customary law commences with the payment of a male and female goat. Thereafter, dowry follows, then the ngurario and the itara formalities. The purpose of the itara is for the girl to identify where the kitchen is. This ceremony takes place after payment of sufficient dowry.

30. The appellants countermanded this evidence by stating as follows: the deceased was not physically capacitated to conduct a marriage ceremony in that year since he was diagnosed with cancer and immediately commenced chemotherapy treatment; the absence of ngurario and itara protocols meant that there existed no union of marriage; there was no conclusive proof that the sum of Kshs.70,000.00 had been paid as part dowry; and the dowry paid (if any) ought to have been to the respondent's paternal uncle and not his maternal uncle as was the case herein.

31. The learned judge, in establishing the subsistence of a valid customary marriage between the respondent and the deceased, relied on the literary texts of Dr. Eugene Cotran in Restatement of African Law: Kenya Volume I The Law of Marriage and Divorce (London: Sweet and Maxwell, 1968). The following is recorded regarding Kikuyu customary law:

> "A marriage proposal is conveyed to the girl. If it is favourably received, the girl's parents are invited to the home of the prospective husband to partake in the "njohi ya njurio", the beer of asking the girl's hand. Thereafter, the first instalment of ruracio is taken to the girl's father. Further instalments follow until a sufficient amount of the full marriage consideration, stipulated by the girl's father has been offered and accepted to seal the engagement. Next a day is fixed for the engagement ceremony (ngurario), i.e. the pouring out of the blood of unity. A ram (ngoima ya ngurario) is sent from the boy's father to the girl's home, where the ceremonial feast is prepared. The ram is slaughtered, and the girl eats the kidneys as a sign of consent to the betrothal. The betrothal is complete when this ceremony has been performed. The ngurario ceremony is followed by a further ceremonial feast (guthinja ngoima). This feast is attended by members of the parties' clans, and after the slaughter of a sheep provided by the boy's family, the families exchange presents. After the guthinja ngoima ceremony, the bride is brought to the bridegroom's home by mock capture. This procedure of capture is now obsolete... No marriage is valid under Kikuyu law unless the ngurario ram is slaughtered... There can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid."

32. According to the above text, what can be discerned thus is that certain practices have eroded overtime. This was further affirmed by the evidence of PW4 who was present and participated in the said ceremony. Critically too, once part of the ruracio has been paid, the marriage remains valid under Kikuyu customary law.

That although there are set practices, customs continue to change overtime bringing to the foe that customary law is not static. This Court, in Ontweka & 3 others vs. Ondieki [2024]KECA 11 (KLR), held as follows regarding the dynamic living nature of customary law:

> " In applying customary law, we must appreciate and recognize the living nature of customary law. This was the holding of the South African Constitutional Court in Pilane and Another v Pilane and Another (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) which held as follows:
>
> > "The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs... Our history, however, is replete with instances in which customary law was from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to *the Constitution* and cannot be accepted."

33. The dogma of customary law in our view must adapt to the changing novelties of our modern day society. If we continually adopt a rigid approach, then several customary practices would be invalidated thereby clogging the recognition of certain ceremonies. In our view, and in the present circumstances, we find that the learned judge ably found that the payment of the dowry did indeed seal the union of the deceased and the respondent. A ceremony took place on 8th June, 2006 under Kikuyu customary law as to establish that the respondent and deceased were joined in holy matrimony.

34. Although the appellants argued that certain basic principles were not adhered to, we find that they were not fatal to the respondent's contentions. Furthermore, no sufficient evidence was adduced by the appellants as to disprove that indeed no such ceremony took place; their arguments were only conjectures.

35. It is noteworthy that the 1st appellant does not deny having separated with the deceased for years. It is also not denied by the appellants that the deceased and the respondent lived in their King'ong'o home for years. The respondent is the one who took care of the deceased in his twilight years and the evidence clearly shows that the attempt to evict the respondent from the matrimonial home only happened after the death of the deceased. This is one of the interesting features of succession battles; parties emerge to take interest in a person when he is silently resting in a grave with no right of reply and yet, in their lifetime, they had little interest in his or her welfare.

36. We note that the respondent urged the Court to find that based on their long cohabitation, an inference of marriage by presumption could be drawn. Mustafa, JA. in Hortensia Wanjiku Yaweh vs. The Public Trustee, Civil Appeal No. 13 of 1976 stated that:

> " I can find nothing in the "Restatement of African Law" to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation.

> In my view all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view, is applicable to all marriages howsoever celebrated."

37. The respondent called seven witnesses to establish that the deceased and herself lived together as husband and wife. PW2,the deceased's brother, testified that since 1999, he has always known the respondent as the deceased's wife. That in fact, she was instrumental in his son's and daughter's separate wedding ceremonies in that capacity.

38. PW3, the deceased's long term crony, also confirmed that the respondent was the deceased's wife. PW3 and the respondent accompanied the deceased to India where he was receiving treatment. He recalled that she actively participated in the funeral arrangements of the deceased. PW5, the respondent's former colleague, PW6, the respondent's housekeeper, PW7 the deceased's former driver and PW8, the deceased's friend, all confirmed that the respondent and the deceased lived together as husband and wife in King'ong'o, Nyeri.

39. The respondent testified that she began cohabiting with the deceased in 1993 at King'ong'o Nyeri. She was alive to the fact that the deceased was married to the 1st appellant in the 1960s but separated in the 1980s.

40. The respondent added that the deceased worked in Nairobi and stayed in the Kitisuru home from Monday to Thursday and would travel back to Nyeri for the weekend. The deceased worked in Nairobi as an electric engineer. He was the founder and managing director of Sigma Engineering Company Limited.

41. She recalled that they traveled together severally both in and out of the country. Relying on several receipts, the respondent stated that she was referred to as Mrs. Thiga. She added that it is for this reason that she would later join the deceased and the 2nd appellant in India when he was receiving treatment. She was later introduced to his family and friends as his wife.

42. The respondent recalled how she took care of the deceased when he was unwell and on certain occasions, other than the 2ndappellant, was listed as his next of kin. All witnesses confirmed that indeed the respondent took care of the deceased when he was unwell until his death.

43. There were also several photographs taken over the years between the respondent and the deceased. There were other photographs capturing the 2nd appellant, the deceased and the respondent together. Instructively, some of the photographs were taken at the King'ong'o home. In other photographs shared on email, the 2nd appellant was seen to be surprised by the growth of his son who had stayed with the respondent and the deceased for some time.

44. The deceased's mother is also seen as a person that significantly recognized the respondent's status. Before her death, she barred anyone from evicting the respondent in the home based in King'ong'o.

45. The Court of Appeal in Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie (2010) 1 KLR 159 held as follows regarding presumption of marriage:

> "There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife.

> The doctrine of presumption of marriage is based on section 119 of the *Evidence Act*, Cap 80, Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

46. In Njoki vs. Mutheru [2008] 1 KLR (G&F) 288, the Court said:

> "...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'."

47. The above facts were not challenged by the appellants. They create a chain for a solidified union and cohabitation that could give rise to the presumption of a subsisting marriage. The facts were not challenged by the appellants to the required standard. In fact, the record shows that the 2nd appellant was not candid with the truth. For instance, he initially stated that he only became aware of the respondent upon the filing of her petition. However, he would continue to describe how he met the respondent during the burial of his brother in 2006. He also did not dispute the photographs taken, the skype calls and the email exchanges he shared with the respondent.

48. In another instance, the 2nd appellant purported to state that indeed the 3rd appellant called the respondent informing her that he wanted to move into the King'ong'o home. He would then renege on these facts denying that no such conversation ever took place.

49. The record also shows that when the 2nd appellant took the deceased's briefcase from the King'ong'o home, he was in communication with the respondent and sought permission to gain access to the home. There would be no basis for having such a conversation if indeed the respondent was not a resident of the said home.

50. On the issue of the identity card, it is our view that nothing turns on it. It is not denied that during the deceased's lifetime, the respondent applied for the issuance of a new ID to reflect the names as stated in the pleadings herein. However, the ID was only issued after the death of the deceased person in 2011. In Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie (supra), this Court expressed itself as follows:

> "The cases of Machani and Njoki above were based on the old thinking and it is noteworthy that Parliament realised that women who genuinely had been taken as wives were discriminated against merely because dowry had not been paid or that there had been no ceremony to solemnise the union and by *Act No. 10 of 1981*, Parliament added section 3(5) of the *Law of Succession Act*, Cap 160, Laws of Kenya to the effect 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 the Act."

51. This Court takes the same approach. We are satisfied with the respondent's explanation of the arguments raised by the appellants. In our view, nothing can defeat the respondent's status as the

deceased's wife at the time of his death. Her overwhelming evidence was watertight and proved that on a balance of probabilities, the respondent was a wife within the meaning ascribed to it under section 3 (5) of the *Law of Succession Act*. This is a fact that the appellants lived with when the deceased was alive and they have to accept, however painful to live with it, even in his death.

52. Consequently, we uphold the findings of the learned judge. In the circumstances, we find that the appeal herein lacks merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

S. ole KANTAI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR