



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU &**

**J. MOHAMMED, JJ. A.)**

**CIVIL APPEAL NO. 20 OF 2015**

**BETWEEN**

**BEATRICE ADHIAMBO SIJENYI.....APPELLANT**

**AND**

**JOSEPHINE KAPUKHA KHISA.....FIRST RESPONDENT**

**CLIVE NANDASABA KHISA.....SECOND RESPONDENT**

**ZUWEINA SALIM.....THIRD RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya*

*at Bungoma (Mabeya, J.) delivered on the 16<sup>th</sup> December, 2014*

**in**

**HC. SUCC. CAUSE NO. 53 OF 2014)**

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***(CONSOLIDATED WITH)***

**CIVIL APPEAL NO. 28 OF 2015**

**IN THE MATTER OF THE ESTATE OF JOSEPH SIMIYU KHISA (DECEASED)**

**BETWEEN**

**ZUWEINA SALIM KHISA.....APPELLANT**

**AND**

**JOSEPHINE KAPUKHA KHISA.....1<sup>ST</sup> RESPONDENT**

**CLIVE NANDASABA KHISA.....2<sup>ND</sup> RESPONDENT**

**ESTHER MULEKYO KITHOME.....3<sup>RD</sup> RESPONDENT**

**BEATRICE ADHIAMBO SIJENYI.....4<sup>TH</sup> RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya*

*at Bungoma (Mabeya, J.) delivered on the 16<sup>th</sup> December, 2014*

in

**BUNGOMA P & A. 53 OF 2014)**

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**JUDGMENT OF THE COURT**

**Introduction**

[1] This is a judgment in regard to two appeals that were consolidated before us. The two appeals Civil Appeal No. 20 & 28 of 2015 arise from the judgment of the High Court (Mabeya J) delivered on 16<sup>th</sup> December 2014. Beatrice Adhiambo Sijenyi (Beatrice) is the appellant in Civil Appeal No. 20 of 2015, while Zuweina Salim Khisa (Zuweina) is the 1<sup>st</sup> respondent, Josephine Kapuka Khisa (Josephine), Clive Nandasaba Khisa (Clive), are the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively, and Esther Mulekyo Kithome (Esther) is the 4<sup>th</sup> respondent.

[2] Zuweina is the appellant in Civil Appeal No. 28 of 2015, and Josephine and Clive the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, while Esther is the 3<sup>rd</sup> respondent in Civil Appeal No. 28 of 2015. Both Esther and Zuweina have also filed cross appeals in Civil Appeal No. 20 of 2015. For the purposes of the consolidated appeals, Beatrice is the 1<sup>st</sup> appellant, Zuweina the 2<sup>nd</sup> appellant, Esther the cross-appellant while Josephine and Clive remain the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**The Background**

[3] The dispute in the High Court concerns the administration and succession of the estate of the late Joseph Simiyu Khisa (hereinafter referred to as the deceased). It is common ground that Josephine and the deceased were married under Luhya customary law and later wedded under the African Christian Marriage and Divorce Act. Clive and his sister Brenda Nelima Khisa (Brenda) were the only issues of this union. Josephine later moved to the United States where she lived with another man.

[4] Upon the deceased's death, Josephine and Clive petitioned the court for letters of administration for the estate of the deceased, listing the beneficiaries as themselves, Brenda, Esther, and Esther's three daughters A W K, K M K and J M K. This elicited objections from Beatrice and Zuweina. Beatrice claimed that her son-E K who was sired and maintained by the deceased had been left out. Zuweina on her part contended that she was the only widow to the deceased who is entitled to inherit him. She claimed that Josephine had divorced the deceased and remarried prior to the deceased's death, while Beatrice and Esther were only girlfriends to the deceased.

**The Trial in the High Court**

[5] During the trial, the parties entered into a consent in which some beneficiaries of the estate were agreed upon; and Clive and Jackson M. Khisa, a brother to the deceased mandated to be the interim administrators of the estate. According to the consent, those recognized as beneficiaries of the estate, were Clive, Brenda, E K (son to Beatrice), and the three daughters of Esther. It was agreed that the court would determine the status of Zuweina and her children, and also determine the objections lodged by Beatrice and Zuweina, and distribute the estate of the deceased.

[6] In his judgment, the trial judge confirmed Jackson M. Khisa and Clive, to be co-administrators of the estate. The learned judge held, *inter alia*, that there was no evidence of the dissolution of Josephine's marriage to the deceased and therefore, though guilty of infidelity in engaging in another relationship, she was still married to the deceased by the time of his death; that although Esther had a relationship with the deceased resulting in the three children, there was no marriage and she was therefore not a widow of the deceased; that Zuweina lived with the deceased in his house for a total of 8 years; that the deceased held out Zuweina as his wife; that the deceased and Zuweina had even sworn an affidavit to that effect, and therefore, Zuweina was for all purposes a wife to the deceased.

[7] In addition to the agreed beneficiaries, the learned judge ruled that Josephine and Zuweina were beneficiaries, and that Esther and Zuweina's three children were dependants. He therefore proceeded to distribute the estate accordingly.

**The Appeals**

[8] In her memorandum of appeal, Beatrice is aggrieved that the trial judge erred in failing to find that the deceased had two wives, and in failing to consider her as a dependant to the estate. Beatrice also challenged the distribution done by the trial judge maintaining that the same was not equal nor fair, nor did it take into consideration the shares that had been taken during the pendency of the trial; and that the trial judge did not distribute all the properties in the estate nor address the issue of ownership of Clinjob (K) Company Limited.

[9] Zuweina filed a notice of affirmation of the decision of the learned judge under **Rule 94** of the **Court of Appeal Rules**. In particular she supported the finding that she is a widow to the deceased; that the Jamhuri property and the two blocks of flats were properly distributed to her; that the two properties at Syokimau that she owned jointly with the respondent were properly distributed to her; and that Brenda Khisa was adequately provided for.

[10] Zuweina challenged part of the judgment on four (4) grounds of appeal contending that the learned judge erred: in delivering a judgment that was deficient; in ordering the distribution of the estate in a skewed manner; deciding the matter against the weight of evidence and not making provisions for a section of the deceased's dependants. Zuweina sought to have the judgment set aside; appropriate provision made for her children as dependents of the deceased; the finding that Josephine is a widow of the deceased quashed and set aside; the deceased's properties redistributed in a fair manner; liabilities provided for; and the ownership of Clinjob (K) Company Limited determined.

### **The Cross-Appeal**

[11] In her memorandum on the cross appeal, Esther raised 15 grounds contending that the trial judge failed to appreciate the needs of her three daughters in distributing the current monetary assets of the estate; that the distribution was unfair; and contrary to the mandatory provisions of the Law of Succession Act. Further, that the trial judge erred in failing to find that she was a wife to the deceased; in failing to appreciate that she was a dependant of the deceased together with her children; in making a finding that Zuweina was a wife to the deceased; in allowing Zuweina to inherit twice (that is, from her former husband, and the deceased); and in awarding Zuweina assets that should have gone to Esther and her children.

### **The Representation**

[12] In arguing this appeal, Beatrice was represented by Mr. Ochang' Ajigo, Zuweina by Mr. Charles Kanyangi, Josephine and Clive by Ms Janet Wekesa, and Esther by Ms Khasoa. Each party filed written submissions that were duly highlighted during the hearing by the respective counsel.

### **Submissions for Beatrice**

[13] For Beatrice it was submitted that the learned judge did not distribute the estate fairly and equally; that the distribution to E K a minor, was not sufficient for his current and future educational needs, nor was it done in accordance with section 28(c) of the Law of Succession Act; that the allocation of the rural matrimonial home of the deceased to the minor was contrary to the finding that Josephine was the wife to the deceased and who therefore should have retained the matrimonial home; that the allocation to Clive was unmerited, and the benefits that he had already received were not taken into account; and that the learned judge failed to follow the guidance given under **section 42** of the **Law of Succession Act**.

[14] Further, it was argued that the learned judge failed to ascertain the ownership and status of a number of assets including motor vehicle KBV 192F; that the minor was prejudiced by the failure to distribute to him a share in the Riruta Satellite Property (Riruta Property); that under **section 17(2)(1)** of the **Pensions Act, Cap 189** Laws of Kenya, Brenda, Clive and Esther did not qualify to be allocated the deceased's gratuity; that the court having found that Esther was not a widow, the distribution made to her was null and void; that the trial judge erred in discriminating against Beatrice when her position was similar to that of Esther; that there was sufficient evidence adduced upon which the learned judge ought to have upheld Beatrice's claim as a dependent of the deceased; that the order in regard to costs did not in effect award any costs to Khasoa & Company Advocates nor would it be proper to elevate the advocate to the status of a beneficiary entitled to benefit from the estate.

### **Submissions for Zuweina**

[15] For Zuweina, it was submitted that although Zuweina was happy with the judgment, she was aggrieved by the finding that Josephine was a widow of the deceased, and by the distribution of the estate. She maintained that Josephine was not a widow of the deceased entitled to benefit from his estate as she had moved on with her life and was happily married to another man; that the allocation of part of the gratuity to Josephine was contrary to the Pensions Act; that Clive being over 21 years old should not have been given 30% of the deceased's pension nor was Brenda, who is also over 21 years old, married, and working entitled to the 10% gratuity that she was given.

[16] With regard to Esther, it was submitted that her allegation that she was the deceased's 2<sup>nd</sup> wife was untenable, and that the learned judge erred in providing for her from the deceased's pension as she was neither a wife nor a child of the deceased. As to her three children, though they were entitled to inherit, only A qualified for the pension as the other two were born after the deceased's death, and not included as beneficiaries. As for Beatrice it was argued that she was not entitled to anything from the estate of the deceased, but that her son E K, though properly identified as a beneficiary, was grossly underprovided for in the distribution.

[17] As regards Zuweina's three children, it was maintained that the learned judge misdirected himself in finding that they could only inherit through their mother. It was asserted that they were dependents of the deceased under **section 29(a) & (b)** of the **Law of Succession Act**, and therefore entitled to inherit from the deceased's estate.

[18] Finally, it was maintained that Zuweina was the only widow of the deceased entitled to his pension; and that having contributed to the construction of the Riruta property while Josephine was in the United States, she should be given a section of that property. The court was urged to dismiss Josephine's claim to property allegedly acquired jointly with the deceased between 1990 and 2008, as these claims ought to have been brought under the Married Women's Property Act during the lifetime of the deceased.

### **Submission for Josephine and Clive**

[19] For Josephine and Clive, it was submitted in regard to Josephine's marital status to the deceased (at the time of his death), that though it was not disputed that Josephine got involved with another man and bore a child, her marriage with the deceased was never dissolved; that no evidence was produced in support of her alleged subsequent marriage; and therefore, the learned judge was right in finding that she remained the wife of the deceased up to the time of his death.

[20] It was submitted that Zuweina, did not rely on her long cohabitation with the deceased to support her marriage but claimed that there

was a Bukusu Customary Marriage; that Zuweina was unable to produce any evidence in support of the alleged customary marriage; and that the court misdirected itself in relying on the affidavit of marriage allegedly sworn by the deceased and the appellant. It was argued that the deceased had no capacity to contract a customary marriage with Zuweina or anyone else, as there was still a monogamous marriage existing between him and Josephine.

[21] In addition, it was argued that Zuweina was not entitled to the properties acquired by the deceased between 1990 and 2004 when Josephine and the deceased lived together; and that contrary to her submissions Zuweina did not present any evidence of her contribution towards the Riruta property. The High Court decision in the *Estate of the late George Cherioio Chepkosiom deceased [2017]* eKLR, was relied upon for the submission that Josephine having been gainfully employed, contributed to the acquisition of the property and therefore the learned judge was wrong in dismissing her entitlement on grounds of spousal interest contribution.

[22] As regards the Jamhuri house it was submitted that this was the matrimonial home constructed while Josephine was living with the deceased and in which home Clive and Brenda had lived; that the house was of great sentimental value to Josephine and her children; and therefore the distribution of the house to Zuweina was greatly unfair. Further, it was submitted that the learned judge erred in failing to follow section 42 of the Law of Succession Act that requires any gift *inter vivos* to be taken into account.

[23] As regards the distribution made by the trial judge to E K, it was submitted that his needs were well catered for by the court as he was given 1,000,000/= from the insurance and 10% of the gratuity as well as a property in Webuye valued at Kshs.9.5 million. It was maintained that contrary to the submissions, E K was not allocated the rural matrimonial home in Makanga but was allocated a property in Webuye.

[24] As for Esther, it was posited that being neither a child nor a beneficiary of the estate, the court erred in allocating her 20% of the gratuity as well as Kshs.302,000/= from the insurance. It was argued that Esther's three children having been allocated one full block in the Riruta property; Kshs.2,000,000/= from the insurance money; 50% of the gratuity; shares in Ufundi Sacco; shares in National Bank of Kenya; and a motor vehicle; were grossly overprovided for. The court was therefore urged to reconsider a fairer mode of distribution among all the beneficiaries.

[25] As regards Clive, it was submitted that his allocation was proper and in accordance with his father's wish that he runs his businesses. The court was therefore urged to uphold the distribution. It was argued that given the allocation to Brenda, she was the most disadvantaged beneficiary in the judgment; that all the deceased's beneficiaries were entitled to be treated equally and therefore Brenda should not have been discriminated against on account of her gender or marriage. The court was therefore urged to correct the unfairness.

[26] With regard to Zuweina's children, it was submitted that no evidence was presented before the court to support the claim of dependency. That the children being now adults, working and having inherited from their biological father, they were not entitled to any provision from the deceased's estate.

[27] On accounting for the profits of the estate of the deceased, it was submitted that the alleged rental income from the properties were highly exaggerated; that the maintenance expenses were not taken into account; that it was also not taken into account that some of the properties were unoccupied, and that the audited accounts reveal net rental income which is what has sustained Clive and his young family, as well as Esther and her three daughters.

[28] As regards the distribution of the gratuity, it was argued that the deceased having died intestate, gratuity was not excluded property as provided under section 32 of the Law of Succession Act; that the gratuity formed part of the deceased's estate and the learned judge was right in distributing the same; and that in any case at the time of the deceased's death both Clive and Brenda though over 21 years were at University pursuing their education and therefore entitled to the gratuity under **section 17 (2) (1)** of the **Pensions Act**. As regards Clinjob Company limited, it was maintained that there was evidence that the company belonged to Josephine and Clive, and was therefore not available for distribution. The court was therefore urged to order assets of the company including vehicles to be returned to Josephine and Clive.

[29] On legal costs, the court was urged either to order all parties' lawyers' fees to be paid from the estate or each party to pay their own legal fees. Finally, Josephine and Clive urged the court to readjust the distribution of the deceased's estate in accordance with a comprehensive proposal, which they made providing for all the identified beneficiaries.

### **Submissions for Esther**

[30] For Esther it was submitted that **section 3(5)** of the **Law of Succession Act** recognizes polygamy and cultural laws of communities in inheritance matters; that this was in favour of Esther's recognition as a wife of the deceased; that Josephine who is the deceased's first wife recognized Esther; and that the deceased's community through its "lufu" minutes also recognized Esther as a wife to the deceased.

[31] The case of **Hottensiah Wanjiku Yawe v Public Trustee** CA 13 of 1976 was relied upon for the proposition that long co-habitation as man and wife gives rights to presumption of marriage, which can only be rebutted through cogent evidence. In this case, there was not only evidence of long co-habitation, but also the three children resulting from that co-habitation. The court was therefore urged to find that Esther was not only a mere dependent but a widow of the deceased.

[32] The Court was urged to invoke section 3(5) of the Law of Succession Act and recognize Esther as a widow under **section 40** of the **Law of Succession Act**. It was pointed out that motor vehicle KAV 897Y that was given to Esther, is useless as it had an accident and requires substantial repairs; and that it had incurred demurrage charges which stood at Kshs.750,000/= at the time of judgment. Further, the trial judge was faulted for adopting a skewed, discriminatory and unequal distribution, as 82 houses were distributed among only eight of the heirs, which was contrary to law, the principles of equity, and good conscience.

[33] On the advocate's fees, the court was urged to uphold the orders made by the trial judge for two reasons. First, that the advocates had

acted for the estate and the fees were in accordance with what was agreed with the administrators. Secondly, that schedule 10, of the Advocate's Remuneration Order, that deals with probate and administration, recognizes the rights of the advocates to earn a percentage from the estate or as agreed under part V; that this presupposes that the amount comes from the estate as the legal fees is paid by the administrators and becomes the first lien on the estate as per the Advocate's Act; and that **section 81 of the Law of Succession Act**, clearly provides for payment of liabilities of the estate as one of the duties of the administrators. The court was urged to uphold the advocate's fee as agreed and paid from the estate, or in default order that it be deducted pro rata from the benefits of the five automatic heirs.

[34] In response to Beatrice's submissions, it was submitted that her son E K being admitted into the list of heirs compromised her claim; that Beatrice was not a wife to the deceased but only a girlfriend; that she moved on with other relationships and married one Mr. Odhiambo; that Beatrice never initially opposed the distribution of the estate but opted for negotiated democracy to protect her reputation; that her appeal was therefore an afterthought, frivolous and brought in bad faith. In regard to accountability by the interim administrators, it was admitted that Esther received rent from houses as net after estate maintenance, but that this amount was used to pay her rent and maintain herself and her children. In regard to pension, it was argued that she deserves 75% of the pension.

[35] In response to Zuweina's appeal, it was argued that she did not prove her alleged customary marriage; that the 'lufu' minutes did not recognize her as the widow of the late Joseph Khisa nor did the immediate relatives of the deceased have any knowledge of her as the wife to the deceased; that Zuweina swore an affidavit wherein she indicated that she was not a wife but a licensee and business partner of the deceased; that the house in Ngara having been bought when Zuweina and the deceased were having a relationship, should be distributed in accordance with section 28 of the Law of Succession Act.

[36] In regard to Zuweina's children, it was submitted that they were neither beneficiaries nor dependents of the deceased as they were not adopted by him; that Zuweina was unable to provide any evidence to show that the deceased provided for the children; that the children remain children of their natural father Mohammed Omar, and did in fact inherit from him; that it would be unfair for Zuweina and her children to inherit twice having previously inherited from Mohamed Omar's estate; and that the children were in any case now adults. The Court was urged to order Zuweina to account for the rent that she had been receiving from the Jamhuri property, and to pay Esther the value of motor vehicle KBV 192F that Zuweina allegedly sold.

[37] Further, it was argued that Beatrice had no *locus standi* to challenge the judgment, and that her appeal should not only be dismissed but she should also be condemned to pay the costs of the appeal. Finally, the court was urged to dismiss Zuweina's appeal and allow Esther's cross appeal.

#### **The Mandate of the Court and Issues for Determination**

[38] This being a first appeal, the mandate of this Court is as set out under section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya, and Rule 29 (1) of the Court of Appeal Rules. These provisions give the Court power to re-appraise the evidence, take additional evidence, and finalize the appeal by making appropriate orders that may include confirming, reversing or varying the decision of the trial court.

[39] In *Selle & Another -vs- Associated Motor Boat Company Ltd & Others [1968] EA 123*, this Court explained the principles under which its mandate is exercised 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 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 facts 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.”***

[40] We have carefully considered and re-analyzed the evidence that was adduced before the trial court, and the submissions made by the respective parties. We note that during the trial it was not disputed that the deceased and Josephine were married under the African Christian Marriage and Divorce Act; that as at the time of the deceased's death, Josephine had been living in the United States of America with another man with whom she had had a child; that although there was evidence that Josephine had lodged a petition for divorce there was no evidence of the divorce having been granted or the marriage having been terminated; and that as at the time of his death the deceased had been living with Zuweina and her three children since 2008. We also take note of the fact that the appointment of Clive and Jackson M. Khisa as administrators of the estate has not been challenged, and that the identification of Clive, Brenda, Esther's three daughters and E K as beneficiaries of the estate remain unassailed.

[41] Taking into our account our mandate as a first appellate Court as earlier explained, we find several issues that arise for our determination in these consolidated appeals. The issues include: whether the marriage between Josephine and the deceased was at the time of the deceased's death still in existence; and if so whether Josephine is entitled to inherit the deceased's estate; whether Zuweina was a wife to the deceased and if so whether she was entitled to inherit his estate; whether Zuweina's three children were dependents of the deceased entitled to be provided for from the estate of the deceased; whether Esther was a wife or a dependent of the deceased entitled to inheritance or provision from the estate; whether Beatrice was a wife or dependent entitled to be provided for from the deceased's estate; and whether the distribution of the deceased's estate as done by the trial judge was equitable and fair taking into account any gift *inter vivos* and the situation of the respective heirs/dependents, if not, what would be fair and equitable to each beneficiary.

#### **Analysis and Determination**

[42] It is apparent from the record of appeal that the objection filed by Beatrice in the High Court was not filed on her own behalf but on behalf of her son E K who was sired by the deceased. Beatrice did not at any time in the proceedings either in her affidavit of protest, or objection, or evidence before the trial court claim to be a wife or dependent of the deceased. That claim was raised for the first time in her

memorandum of appeal that she filed against the judgment of the trial court. From the submissions, it is clear that Beatrice only complained because in the distribution, the trial judge made a direct allocation to Esther in addition to the distribution made to her children. In the opinion of Beatrice she was in the same position as Esther, and she felt cheated and discriminated against as she was not given a similar allocation.

[43] We note that the trial judge could only deal with the issues that were before him. As reflected in her affidavit of protest sworn on 9<sup>th</sup> July 2014, the objection lodged by Beatrice concerned her son E K not being named in the petition as a beneficiary in the estate of the deceased despite his being a son to the deceased. This complaint was partially resolved by the consent entered into by the parties on 16<sup>th</sup> and 17<sup>th</sup> July 2014 whereby E K was recognized as a beneficiary in the estate of the deceased. Unlike the position of Esther who claimed to be a wife and dependent of the deceased, the status of Beatrice either as a wife or dependent of the deceased was never in issue before the trial judge.

[44] Thus, the trial judge cannot be faulted for failing to make any finding in regard to the status of Beatrice or making a direct distribution from the estate to Beatrice. Nor is the issue whether Beatrice is a wife or dependent of the deceased open to us for determination in this appeal. We find that as regards the appeal lodged by Beatrice the only valid issue for determination is whether the distribution made to E K was adequate taking into account the provisions of section 35(3) of the Law of Succession Act. We shall revert to this issue shortly.

[45] As already noted, the fact of Josephine and the deceased having been married is not in dispute. What is in dispute is the dissolution of the marriage. The institution of marriage is a sacred institution that determines the status of parties in the society. As is evident from the vows that are exchanged, marriage is a contract that is intended to last for a lifetime. Thus, in a situation where the fact of marriage is not in dispute such as that obtaining before us, the burden lies upon the person who is alleging that the marriage is no longer in existence to establish that fact.

[46] In the circumstances, before us the burden lies upon Zuweina and Beatrice who maintain that the marriage between Josephine and the deceased was dissolved, to prove that fact. In this regard all that has been established is that there were divorce proceedings filed by Josephine, and that the deceased contested the divorce. Josephine maintained that despite the divorce proceedings having been filed, there was no dissolution of the marriage.

[47] The marriage between Josephine and the deceased was solemnized under the African Christian Marriage and Divorce Act Chapter 151(now repealed). Under that Act, the Matrimonial Causes Act Chapter 152 governs dissolution of such a marriage. Under section 10 of the Matrimonial Causes Act, the court is under a duty once a petition for divorce is presented to it to consider the evidence and if it finds the grounds upon which the petition is anchored proved, to pronounce a decree of divorce. However, there is a proviso in subsection 10(2) that the court is not bound to grant the divorce if the petitioner has been guilty of adultery.

[48] In the case of Josephine who had petitioned for divorce in Kisumu Divorce Cause Petition No. 4 of 2008, there was undisputed evidence that she was involved in an adulterous relationship with another man. A Marriage Licence issued on 12<sup>th</sup> May, 2008 was produced in evidence that showed that Josephine and one Glenn Lewis Truman (Truman) went through a ceremony of marriage in the County of Madison State of Illinois in USA on 18<sup>th</sup> May, 2008. The admissibility of this document was challenged and the objection was upheld in the judgment.

[49] We wish to state that an objection on admissibility of documents, ought to be ruled on, at the earliest opportunity, so that in the event the objection is upheld, the document is expunged from the record and cannot be referred to thereafter. In this case, the document remained on record and it is only in the judgment that the court held that it is not admissible. The document having been available, as the learned judge considered the issues, the possibility of the learned judge having been influenced by the document cannot be ruled out.

[50] In regard to the alleged divorce between the deceased and Josephine, a defence dated 8<sup>th</sup> May, 2008 filed in Kisumu Divorce Cause Petition No. 4 of 2008, was produced in evidence. That being so it was not possible for the pleadings in the divorce proceedings in Kisumu Divorce Cause Petition No. 4 of 2008 to have been finalized, proceedings heard, and a divorce decree issued between 8<sup>th</sup> May, 2008 and 18<sup>th</sup> May, 2008 to enable Josephine to have legally remarried another man.

[51] In addition, Section 15 of the Matrimonial Causes Act provides that if a decree for divorce is granted, it is in the first instance a decree nisi that can only be made decree absolute after six months. There was no evidence of any findings by the court before whom the divorce petition was filed, nor was there any evidence of a decree nisi or a decree absolute having been issued

[52] We find that the purported marriage between Josephine and Truman was nothing more than an adulterous union as Josephine's marriage to the deceased was still subsisting, and she had no capacity to contract another marriage. Josephine has admitted as much even confirming that she had a child born out of this relationship in 2011. In view of this adulterous relationship that Josephine was involved in, even if she had established the grounds upon which her petition for divorce was anchored, the proviso to section 10(2) of the Matrimonial Causes Act was applicable and the court was not bound to issue the divorce.

[53] In light of the above we have no hesitation in coming to the conclusion that Josephine was legally still the wife to the deceased at the time of the deceased's death. The difficult question that we must now address is whether Josephine is a widow of the deceased entitled to inherit the deceased's estate. This question is difficult because the conduct of Josephine has not been consistent with that of a wife to the deceased. She blatantly admits having entered into an adulterous relationship with Truman, and going through a marriage ceremony with him, which ceremony she admits was null and void because she was still married to the deceased.

[54] In the decision of *Irene Njeri Macharia v/s Margaret Wairimu Njomo & Another [1996] eKLR*, this Court while reiterating that it ought not to disinherit widows, ruled that the Court in determining the distribution should take into account factors such as the circumstances of the widow and the other beneficiaries. In that case, the Court taking into account the fact that the widow had benefited from immovable property transferred to her by operation of the law following the death of her husband as the property was jointly owned, and that the other beneficiary was a minor whose needs should be catered for, gave a token distribution of Kshs 10/= to the widow, out of cash of Kshs

186,086/= that formed the distributable estate of the deceased. We shall revert to Josephine's entitlement to inheritance after considering the position of Zuweina and Esther.

[55] The deceased's marriage to Josephine was under the African Christian Marriage and Divorce Act and therefore a monogamous marriage. Nonetheless Section 3(5) states as follows:

***“3(5) 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.”***

[56] In the case of *Irene Njeri Macharia v/s Margaret Wairimu Njomo & Another* (supra), this Court considered section 3(5) of the law of succession Act and ruled that for the purposes of the Law of Succession Act, section 3(5) overruled section 37 of the marriage Act, such that a woman married to a man who had no capacity to contract a marriage under section 37 of the Marriage Act is considered a wife for the purposes of the law of succession provided she is married under a system of law which recognizes polygamy. What this means is that notwithstanding the monogamous nature of the marriage between the deceased and Josephine, if Zuweina could establish that she was married to the deceased under a system that permits polygamy such as a customary marriage, she would be considered a wife entitled to inherit the deceased.

[57] Zuweina told the trial court that she was married to the deceased under Bukusu customary laws. She supported this assertion by annexing an affidavit of marriage duly sworn before a Commissioner for Oaths by herself and the deceased. However, there is no system of marriage that was known as marriage by affidavit either at the time the affidavit was sworn or now. A customary marriage can only be established through cogent evidence. Therefore, Zuweina could only establish a customary marriage, first, by adducing clear evidence from an elder or expert on Bukusu customary law regarding the customary rites necessary to establish a Bukusu customary marriage. Secondly, by adducing evidence confirming when and how these customary rites were performed in the case of Zuweina and the deceased. Only then can the affidavit evidence be relied upon to support the marriage.

[58] In this instance, there was no evidence regarding the requirements for a Bukusu marriage, nor was there any specific evidence upon which a conclusion could be arrived at that Zuweina and the deceased were married under Bukusu customary law. That left only a presumption of marriage and as the trial judge correctly puts it at paragraph 38 of his judgment:

***“...where a person would like to prove a marriage relationship of husband and wife in the circumstances where there was no marriage certificate or acts of customary practices conducted, such a person must give strong and consistent evidence of that fact. She must show that the other party held her out to the public or treated her as his wife. Positive testimonies of people who knew the couple would be an added advantage....”***

[59] In her evidence presented before the trial court, Zuweina testified that since the year 2008, she had lived openly with the deceased as husband and wife, to the full knowledge of the deceased's two elder children and other family members. This assertion was confirmed by the deceased's brother Dr John Mbotela Khisa who testified that the deceased and Zuweina had lived together for about eight years as husband and wife. It is apparent that even Clive and Brenda lived with Zuweina in the deceased's house in Jamhuri for some time until they left for further studies in the United States of America. Thus, there was sufficient evidence that confirmed that Zuweina and the deceased lived together holding each other out as husband and wife from 2008 to 2013 which is a period of about six (6) years.

[60] The presumption of marriage arising from long cohabitation has been applicable in Kenya by virtue of the country's Common Law heritage. The presumption has been applied in several cases including *Hottensiah Wanjiku Yawe v Public Trustee* (supra) in which cohabitation for a period of 9 years was held to be sufficient to raise a presumption of marriage.

[61] The deceased having died before the enactment of the Marriage Act, which came into force on 20<sup>th</sup> May 2014, that Act cannot be applied retrospectively. In addition, although the provision in the Marriage Bill leading to the enactment of the Marriage Act, had a provision that provided for recognition of marriage by cohabitation, which provision was omitted in the Marriage Act, this does not affect the presumption of marriage which is not only a presumption anchored on common law but also supported by section 119 of the Evidence Act. That section states as follows:

***“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.”***

[62] In this case, Zuweina and the deceased lived together for a period of about 6 years, holding each other out as husband and wife to friends, work colleagues, neighbors and family. Zuweina was indicated as the wife to the deceased in the APA Health insurance policy, and NHIF card. She was the one present at the deceased's side when the deceased died. She participated in the funeral arrangements and was indicated as the deceased's wife in the program. As evident from the customary 'Lufu' minutes Zuweina was the one in possession of a number of documents relating to the deceased's assets. There was also evidence that Zuweina and the deceased had bought a few properties jointly. [63] Thus, there was overwhelming evidence that the deceased had taken Zuweina as his wife; that they both held themselves out as a married couple, and lived together in the matrimonial home. It is immaterial that Zuweina is a Muslim and that the deceased was a Christian, as the presumption of marriage is independent of religious affiliation. Although the deceased had no capacity to marry as his marriage to Josephine was still subsisting, Zuweina qualified to be a wife under section 3(5) of the Law of Succession Act, as there was a presumption of a marriage.

[64] As the deceased was already married the presumption is that his marriage to Zuweina was a polygamous marriage. Zuweina is therefore entitled to inherit the deceased under the Law of Succession Act. However, in distributing the deceased's estate, it must be taken into account

that Zuweina has already benefited by operation of the law through the doctrine of survivorship by acquiring the properties known as LR 12715/8197 & LR 12715/8196 that she owned jointly with the deceased.

[65] As regards Zuweina's three children, it is not disputed that they were offspring of Zuweina's first marriage. The deceased did not formally adopt them as his children but nevertheless took them in and lived together with them from the time he started cohabiting with Zuweina until his death. Going by the birth certificates that were produced in evidence, the ages of Zuweina's children at the time of the death of the deceased were 19 years, 26 years and 27 years.

[66] The trial judge's view in regard to the position of these children is reflected at paragraph 52 of his judgment as follows:

***“ ...These children did not testify. They never filed any affidavits. From the record, it is clear that they are now adults who would have attended court and vouched their case. They did not do so. Although the evidence is that they were living with the deceased in the matrimonial home, Clive Khisa told the court that their only dependency on the deceased was food and shelter. The alleged payment of their school fees and other needs was not proved. I hold therefore that they only depended on the deceased for food and shelter because they lived with their mother and the deceased under the same roof and nothing more.”***

[67] In considering the position of Zuweina's children, section 29 of the Law of Succession Act that defines “dependant” is relevant. That section states as follows:

#### **29. Meaning of Dependant**

**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, grand-parents, 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; (emphasis added)**

[68] We take the view that a dependant's position under section 26 of the Law of Succession Act is not exactly the same as that of a beneficiary. A dependant has no automatic entitlement to the deceased's property, but has merely a right to a provision from the estate so that he/she is not rendered destitute by the death of the deceased who has been the provider. A dependant cannot therefore claim equal rights with the beneficiary in the distribution of the estate but is only entitled to reasonable provision from the estate, determined in accordance with the court's discretion. That discretion must of course be exercised judicially taking into account factors such as the extent of the estate, the age and needs of the dependent, and balancing this against the interest of the beneficiaries.

[69] As at the time the deceased died, Zuweina's children were all still in school/college. The trial judge only took into account the evidence of Clive who for obvious reasons restricted the dependency of Zuweina's children to food and shelter. The judge appeared to have been unimpressed by the fact that Zuweina's children did not attend court to fight their own battle but left it to their mother to do so. This was not a fair observation. Zuweina being the one who was dealing with the deceased in maintaining the family, she was in a better position to know what came from the deceased and what came from her. In addition, the deceased's brother Dr. John Khisa who testified as PWI stated that the deceased treated Zuweina's children as his own. In our view, the natural consequence of the deceased and Zuweina cohabiting and holding themselves out as husband and wife, would be that as a man, the deceased would fully provide for Zuweina and her children, at least as a measure of his love and commitment to his relationship with Zuweina. As evident from the joint investments such commitment was not only restricted to food and shelter.

[70] In finding that the dependency of Zuweina's children on the deceased was limited to food and shelter only, the trial judge erred as it was clear that the deceased had taken Zuweina's children into his family as his own and did not discriminate against them. As noted above, section 29 of the Law of Succession Act includes “children whom the deceased had taken into his family as his own” as dependants. In this case, Zuweina's children were all above the age of eighteen (18) years at the time the deceased died. The Law of Succession Act does not define a child. However, the Constitution in Article 260 defines a “child” as any individual who has not attained the age of eighteen (18) years. Therefore, Zuweina's three adult children do not qualify as dependants under section 29 of the Law of Succession Act, nor are they entitled under section 26 of the Law of Succession Act to be provided for from the estate.

[71] As regards Esther, the issue is whether she qualifies to be a wife under section 3(5) of the Law of Succession Act, or a dependant under section 29 of the Law of Succession Act. Like Zuweina, Esther needed to establish that she was married to the deceased under a system that recognizes polygamy in order to qualify to be a wife under section 3(5) of the Law of Succession Act. In her affidavit and evidence before the court, it was clear that although Esther had a relationship with the deceased that resulted in the birth of A K in 2006, there was no cogent evidence that the deceased and Esther went through any ceremony of marriage, nor is there any evidence that they lived together and held each other out as husband and wife. In fact the members of the deceased's family initially disputed the paternity of Esther's twin daughters. It is therefore not surprising that in her affidavits that were well captured by the trial judge in his judgment, Esther never claimed to be a wife of the deceased but claimed to be a dependant.

[72] The trial judge who observed her testify was not impressed with her demeanor. At paragraph 35 of the judgment the judge noted:

***“I saw Esther Kithome testify. She not only struck me as an evasive person but outright untruthful. I find her evidence to be full of contradictions and unreliable.”***

[73] After analyzing the evidence in regard to Esther, the trial judge concluded at paragraph 39 as follows:

***“In the present case Esther did not lead any evidence to show that the deceased had rented the premises she was staying in, that the deceased ever lived or spent days in those premises as one of his homes; or whether how and where the deceased held her as a wife. To my mind she was only able to prove that she had a relationship with the deceased, which resulted in children being born. Giving birth is not evidence of any marriage. To my mind Esther only proved that she was a dependant of the deceased and not a widow.”***

[74] We concur with the learned judge that there was no evidence to support Esther’s belated contention that she was a wife to the deceased as she was unable to prove that she was married to the deceased. That being the position, Esther failed to demonstrate that she was a woman married to the deceased under a system of law that allows polygamy. She did not therefore qualify to be a wife under section 3(5) of the Law of Succession Act, such as to come within the definition of a dependant as provided under section 29 of the Law of Succession Act.

[75] We find that in coming to the conclusion that Esther was a dependant, the trial judge misapplied section 29 of the Law of Succession Act. The intermittent assistance that she may have received from the deceased to take care of the children did not render her to be a wife or dependant. It was simply an acknowledgement by the deceased of his parental responsibility towards their daughter A. Thus the trial judge erred in making a direct distribution to Esther. The status of her three children as beneficiaries in the estate was agreed by consent and is therefore not in issue.

[76] Having determined the status of the parties, we now come to the issue of distribution of the estate of the deceased. In accordance with our analysis and findings, and the consent that the parties entered into in the trial court, we come to the conclusion that the beneficiaries of the deceased’s estate are: Josephine, Clive, Brenda, E K, Zuweina and Esther’s three daughters A, K and J.

[77] Coming back to the entitlement of Josephine to inheritance, there is no doubt that she lived with the deceased from 1990 to 2006 when she left for the United States of America. During the period of 16 years there were properties acquired within the family in regard to which Josephine had an interest. Josephine had the option to assert this right during the lifetime of the deceased under the Married Women Property Act, but she failed to do so. We appreciate that she was in salaried employment and that during the time she lived with the deceased she may have made some contribution to the acquisition of the properties that the deceased acquired between 1990 and 2006.

[78] Nevertheless, we cannot overlook the conduct of Josephine. Though a widow of the deceased, she abandoned the deceased during his lifetime and has been flagrantly enjoying life with another man. The most valuable property that is now attracting attention, Dagoreti/Riruta/370 was developed in 2009 when she was away in the United States. According to Clive, the deceased used to send money to the U.S. to support her and Josephine. Josephine cannot therefore claim to have contributed to this development. To the contrary, it would appear that it is Zuweina who provided the deceased with the necessary emotional support and stability during the period that the property was developed. While the Court would not wish to disinherit Josephine, it would be amoral to allow her to reap from the death of the deceased. Indeed, that would be tantamount to allowing her to dance on the deceased’s grave. In accordance with the decision in ***Irene Njeri Macharia vs Margaret Wairimu Njomo & Another*** (*Supra*), she only deserves a token.

[79] We note that there was a dispute concerning the distribution of Block 63/440 (Jamhuri property). The evidence was that by the time Josephine left for the U.S. that was the matrimonial home where the deceased and the two children of the marriage were living. Zuweina started cohabiting with the deceased in 2008 and they lived in the same house. There is therefore no doubt that this house was the matrimonial home. Although Josephine laid claim to the house, asserting that the property was acquired and developed jointly by the deceased and herself, there was no evidence to confirm this assertion. Moreover, Josephine’s purported emotional attachment to the home cannot hold in view of the fact that she abandoned it for her new life in the USA. The emotional attachment of Clive and Brenda to the home is inconsequential, as the two have moved on each having their own families. On the other hand, the Jamhuri house was the matrimonial home that Zuweina has been living in, and still lives in. It is therefore only fair that the Jamhuri house be distributed to Zuweina.

[80] There was an issue concerning the distribution of the gratuity that was due from the deceased’s employer Kenya National Highways Authority (KENHA). It was argued that only the wives of the deceased were entitled to this gratuity. However, there is a distinction between death gratuity and dependent’s pension. While death gratuity is an amount payable to the estate of the deceased as the deceased’s final dues from his employer under section 18 of the Pensions Act, dependent’s pension is a monthly payment made under section 17 of the Pensions Act, to the deceased’s wife or children for five (5) years immediately following the deceased’s death. In this case, the amount due from KENHA is death gratuity which amount is payable to the estate of the deceased and distributable as an asset in the estate.

[81] Clinjob Company (K) Limited was another issue of concern. The issue is whether the company belonged to Josephine and Clive or whether the company and the assets were part of the deceased’s estate and available for distribution. During the trial, a certificate of incorporation of the company dated 22<sup>nd</sup> May 2003, and a Memorandum and Articles of Association of the Company were produced in evidence. These documents confirm that Clinjob Company (K) Limited is a limited liability company incorporated under the Companies’ Act. It is evident that Clinjob Company (K) Limited is a separate legal entity. The deceased may have had some interest in the company. However, such interest can only be addressed in accordance with the companies Act and in separate proceedings. For this reason, the properties and motor vehicles that are in the name of Clinjob Company (K) Limited are not available for distribution through succession to the heirs of the deceased.

[82] In regard to costs, the trial judge stated at paragraph 65 of his judgment as follows:

***“These proceedings were conducted on a certificate of urgency. It took a record eight (8) months to conclude this matter. I certify the issues raised in this matter to have been novel and complicated. It was submitted that each party to bear own costs. However, the costs of Khasoa and Company are indicated to be payable from the estate (APA Insurance monies) in the sum of Kshs.3 million whilst the rest is distributed as shown above. I accordingly certify as such. It is so decreed.”***

**[83]** We are unable to understand the justification for the trial judge singling out Khasoa and Company Advocates. There was no agreement that the costs of this advocate would come from the estate, nor is there any justification for the amount stated by the judge. Moreover, though Khasoa and Company Advocates were appearing for Clive and Josephine, they cannot ride on the fact that Clive is an administrator of the estate, as Clive did not instruct the advocate in his capacity as an administrator. Clive was pursuing his own agenda regarding his personal interest in the estate.

**[84]** It is appreciated that the matter may have been complicated and time consuming, but the costs ought to have been either agreed or taxed by the Deputy Registrar. All the advocates who have participated in these proceedings have contributed to the resolution of the succession dispute. We therefore set aside the order made by the trial judge in regard to costs and direct that the sum of Kshs.3 million from APA Insurance Group Life be set aside to cater equally for all the advocate's costs, and that the costs of all the parties advocates in this Court and in the High Court be either agreed or taxed.

**[85]** For reasons already stated, we set aside the distribution made by the trial judge and redistribute the properties to the beneficiaries as follows:

**Josephine Khisa**

(i) Bungoma /Naitiri /1830 (jointly with Clive)

(ii) Ndivisi/Khalumuli/2102

**Zuweina Salim Mohammed.**

(i) All household items in the Jamhuri house;

(ii) Nairobi/Block 63/440,

(iii) Dagoreti/Riruta/370 (Block 3 - six (6) one bedroomed units).

(iv) 20% gratuity KENHA

(v) Shares in Ufundi Sacco of Kshs.172,481/=

(vi) Kshs.802,000/= (APA Insurance group life)

(vii) MV Rush KBL 912H

**Clive Khisa:**

(i) Dagoreti/Riruta 370 (Block 1)

(ii) Bungoma/Naitiri/1830 (jointly with Josephine)

(iii) KBK 948T

(iv) Shares in Safaricom 8,500

(v) Kshs.1,000,000/= (APA Insurance group life)

(vi) All monies in the following accounts, Kenya Commercial Bank, Barclays Bank of Kenya, Equity Bank, Co-operative Bank

(vii) 15% KENHA gratuity

**Brenda Khisa:**

(i) Dagoreti/Riruta/S.370 (Block 2)

(ii) 15% Gratuity

(iii) Kshs.1,000,000/= (APA Insurance group life)

**A, K & J K**

(To be held in Trust By Esther M. Kithome)

(i) Dagoreti/Riruta/S. 370 Block 4)

(i) KVA 897 Y

(ii) Shares in National Bank of Kenya

(iii) Kshs.2,000,000/= from APA group life

(iv) 30% KENHA gratuity

**E K:**

(i) Dagoreti/Riruta S/370 Block 3 (6 one bedroomed units, 1 bedsitter and 2 single rooms)

(ii) Kshs.1,000,000/= from APA Insurance

(iii) 20% KENHA gratuity

**[86]** The order on costs shall be in accordance with paragraph 84 of this judgment.

Those shall be the orders of the Court.

**Dated and delivered at Kisumu this 26<sup>th</sup> day of April, 2018.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**