



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 20 OF 2009

M. W. G..... APPELLANT

AND

E. W. K..... RESPONDENT

(Being an appeal from the judgment and decree (Ibrahim J) given on 13th May 2008 in the matter of the estate of the late Ephantus Githatu Waithaka (deceased) in

ELD HC P & A 244 OF 2002

JUDGMENT OF BOSIRE, J.A

On 13th May 2008 Ibrahim J. pronounced judgment in High Court Succession Cause No. 244 of 2002 decreeing that E.W.G (the petitioner) and M.W.G (the objector) be the joint administrators of the estate of E. G.W (the deceased). The objector was aggrieved and by a notice of appeal dated and filed in the superior court on 23rd May 2008 declared her intention of challenging that decision on appeal. Following that notice this appeal was filed.

The main, if is not the only issue in this appeal is whether the petitioner is a widow of the deceased in absence of evidence that she was not married either under statute or under a system permitting polygamy. In his judgment Ibrahim J. rendered himself thus:

“I do find that there was no formal marriage between the deceased and the petitioner. However, both the petitioner and the objector hail from the Kikuyu Community. Kikuyu Customary Law is a system of law which permits polygamy. Notwithstanding, the absence of a formal marriage under Kikuyu customary law between the petitioner and the deceased, I do find that by virtue of the long cohabitation of fifteen (15) years, recognition and acceptance by the family members, relatives and friends that the two were “husband and wife”, coupled with the birth of the three children this Court is entitled to and I hereby infer and declare the existence of a marriage by presumption and/or cohabitation between the petitioner and the late Ephantus Gitathu Waithaka.”

The memorandum of appeal has ten grounds, but as earlier stated and as conceded to by Mr. Gicheru, learned counsel on record for the appellant, M.W.G, the only issue is whether the petitioner as respondent in the appeal is a widow of the deceased within the meaning of section 3(5) of the Law of Succession Act; Cap 160 of the Laws of Kenya. It was also the main issue at the trial, and the record is clear on that. Before the trial started Mr. Machio, counsel on record for the petitioner addressed the court as follows:

“We are ready, but we are trying to agree on a small issue. We have agreed that you resolve one important issue, i.e. a determination on whether the petitioner is a wife and children are heirs under the Law of Succession Act. We intend to adduce oral evidence. We have agreed that objector will have the first go.”

Mr. Akhaabi, then appearing for the appellant as objector confirmed the issue and then called the objector as a witness. The appellant

then called witnesses who outlined Kikuyu Customary Law on marriages. In her evidence the objector stated that she got married to the deceased in 1968, she was unaware whether her deceased husband had another wife, but she recalled that in 1996 she met the deceased at an Eldoret hospital where both of them had been living with her deceased husband, that on becoming saved she realized what she was doing was not proper, and she had therefore renounced that behaviour. She further testified that on a later date, the deceased told her that he had had three children with the petitioner and that it was his wish that the three children but not their mother be given a share of his estate upon his death. Birth certificates for those children were given in evidence and they show the petitioner as the mother with the deceased as their father. The objector does not doubt this fact but her case is that the deceased had told her that the petitioner was not a wife but a woman he had for leisure. But the evidence on record shows that the petitioner was being treated by the deceased more as a wife than a woman for leisure. She was attending family functions. For instance during the burial of the deceased's sister the deceased was photographed with both the petitioner and objector standing astride him. There are several other photographs evidencing that fact. Despite those photographs the objector denied the petitioner was a person known to her, or that she had been involved in social functions in the deceased's family during his lifetime. I observe that her name was included in the deceased's obituary notice in a daily newspaper as the wife of the deceased.

The petitioner in her evidence stated as follows: She started cohabiting with the deceased as his wife in 1986; they lived in various estates in Eldoret; the deceased was paying rent for houses they occupied. They had three children, E, born in September, 1987, K, born in August 1992, and A born on 2nd February, 1994. The objector was aware of her marriage to the deceased as she often visited her with the deceased. Her children used to visit the objector and at some point in time E lived with her for some time, and the objector was meeting his school fees regularly. There were family meetings after the deceased died, and in those meetings those present were categorical that the petitioner was the deceased's widow. She conceded there was no marriage solemnized between her and the deceased under either Kikuyu Customary Law or any other law. Several witnesses, however, testified that the petitioner is the deceased's widow.

Mr. Gicheru's submission in this appeal is straightforward. The trial Judge by holding that the petitioner is the widow of the deceased, based his decision on presumption of marriage. In Mr. Gicheru's view, it is only a customary law marriage of course excluding Mohamedan Marriages, which permits polygamy. Citing the case of Njoki vs. Mutheru [1985] KLR 874 he submitted that the doctrine of presumption of marriage is unknown under customary law.

In answer Mr. Machio for the petitioner relied on long cohabitation, the children the petitioner had with the deceased and other evidence to urge the court to presume a marriage between the deceased and the petitioner.

There is a 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 as follows:-

“119. 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.”

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife.

The objector was married by the deceased under Kikuyu Customary Law. That being so and both sides conceded as much, the

deceased had the capacity to enter into another marriage relationship provided the marriage was not a prohibited one as earlier on stated. Evidence was adduced in the court below that the petitioner and the deceased had three children. She was living with him as at the date of his death. Evidence was adduced to the effect that the deceased was paying the rent for the house the petitioner was living in with her children. Besides, several witnesses testified that during the deceased's lifetime he was living with and treating the petitioner for all intents and purposes as a wife. It is no wonder, therefore, that the deceased specifically told the objector that the children he had with the petitioner were his children and needed to be given a share of his estate. It is not in the common and natural course of human conduct for a man to accept children he has fathered with a certain woman but reject their mother unless for good reason. We have no evidence on record to suggest that for one reason or another the deceased did not want the petitioner. On the contrary the evidence shows that the deceased and his family had no problem with the petitioner.

Having come to the foregoing conclusion, the only other issue remaining is whether the deceased's relationship with the petitioner was bigamous. There is no doubt that, that relationship was potentially customary in nature. The deceased according to Kikuyu Customary Law is the one who was obliged to pay dowry for the petitioner. As at the date of his death he had not done so. Cohabitation is one of the essentials of a Kikuyu marriage. Likewise providing residence and maintenance for a wife are among the other essentials of a Kikuyu marriage. The main component lacking here is dowry. There is no fixed time for paying dowry. Cotran, in his works, The Restatement of African Law (Kenya) Vol. 1, (The Law of Marriage And Divorce) states that dowry may be paid by instalments and may even be paid after cohabitation has taken place. It would appear that if other essentials are satisfied but dowry is not paid, it may be paid even after one of the parties to the relationship is dead. It is clear from Cotran's works that elopement is a common feature among the Kikuyu, and such relationship in most cases matures into an acceptable Kikuyu marriage upon payment of dowry. In the foregoing circumstances it cannot be said that the relationship the deceased had with the petitioner is bigamous. So contrary to submissions by Mr. Gicheru for the objector it is in circumstances as existed between the deceased and the petitioner in which a presumption of marriage may be raised.

Moreover, the former Court of Appeal for East Africa, held in the case of Hortensiah Wanjiku Yawe vs. The Public Trustee, Civil Appeal No.13 of 1976, among other things, that long cohabitation as a man and wife may give rise to a presumption of marriage in favour of the party asserting it, in this case, the petitioner. That case has been followed or approved over the years by courts in this country in several cases, among them : Kituu v. Nzambi [1984] KLR 411. In Machani vs. Vernoor [1985] KLR 859, this court held:-

“Where there is no marriage but parties are living together in an association that could be seen as that of husband and wife, they are living together in a state of concubinage. Children begotten of such an association have no legal rights since no legal obligation can be enforced against the father on behalf of the children in the absence of any legislation, since the Affiliation Act was repealed.”

On the facts and circumstances of that case, the above quoted statement can only be regarded as obiter. I say so advisedly. One, the parties in that case, the woman, started cohabiting with the man while her marriage to a third party was still subsisting. In those circumstances regardless of the length of her cohabitation with the man, the relationship could only be regarded as concubinage. It is therefore distinguishable from this case on the facts. It should be recalled that in the Machani case, the man neither accepted the respondent as wife nor did he accept the children as his. He rejected both the children and their mother.

In Njoki v. Muthuru [1985] KLR 874 this court by a majority (Kneller and Nyarangi JJ.A) held that there was no evidence before the High Court to show the existence of any form of marriage including a common law marriage in the sense in which that form of marriage is recognized in England, or that the circumstances of Kenya and its inhabitants permitted the application of such a marriage. Madan J.A, dissented and was of the view, and rendered himself, as material, as follows:-

“In Yawe Mustafa J.A. delivering the leading judgment of the court said that there is nothing in Kikuyu Customary Law opposed to the concept of presumption of marriage. Wambuzi P. said (ibid)

the presumption is nothing more than an assumption that the parties must be married irrespective of the nature of the marriage actually contracted. I would add also irrespective of marriage if one is not actually contracted.

It is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for along 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 cases of Machani and Njoki (the majority decision) were based on the old thinking. It is noteworthy that Parliament realized that some women who genuinely had been taken as wives were discriminated against merely because, as in this case, dowry had not been paid, or that there had not been any ceremony to solemnize the union. By Act No.10 of 1981, Parliament added section 3(5) to the Law of Succession Act, Cap 160 Laws of Kenya. That subsection reads as follows:

“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.”

In view of that provision and the decision in Yawe vs. Public Trustee (supra), it is quite clear that the petitioner cannot in the circumstances of this case, be regarded otherwise than as the widow of the deceased.

In the result I would dismiss this appeal with costs to the respondent, both here and in the court below.

Dated and delivered at Nairobi this 23rd day of April 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

JUDGMENT OF TUNOI, J.A

I have had the advantage of reading in draft the judgment prepared by Bosire, J.A. I agree with it in every respect, and cannot usefully add anything. As I concur with the orders proposed by him, those shall be the orders of the Court in this appeal.

Dated and delivered at Eldoret this 23rd day of April 2010.

P.K. TUNOI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF NYAMU, JA

The appellant, *Mary Wanjiru Githau*, according to the record before this Court, was married to the late *Ephantus Githau Waitthaka* under the Kikuyu customary law in 1968.

On the other hand, according to the judgment of the superior court, the subject matter of this appeal, the respondent, **Ephantus Githau Waitthaka** lived together with the late **Ephantus Githau Waitthaka** as “husband and wife” from 1986 until his death on 9th April, 2002, a continuous period of approximately fifteen years during which period three children were born of the relationship.

The appellant in her evidence in the superior court did recognize the three children of the respondent as heirs of her husband’s estate but she did not recognize the respondent as a wife. In recognizing the children, she said that this because it was the wish of her late husband.

The genesis of the dispute between the parties is that the respondent as petitioner had applied for letters of administration of the estate of the late W and the appellant as objector had objected to the issuance of the letters of administration to her. The respondent’s application was grounded on **section 3(5)** of the Laws of Succession Act (see Statute Law Repeals and Miscellaneous Amendments No. 10 of 1981) as a wife so as to take part in the administration of the deceased estate and partake her share of the estate.

In its findings, the superior court, Ibrahim, J stated inter-alia:-

“I find that there was informal marriage between the deceased and the petitioner. However, both the petitioner and the objector hail from the Kikuyu community. Kikuyu customary law is a system of law which permits polygamy.

Notwithstanding, the absence of a formal marriage under Kikuyu customary law between the petitioner and the deceased, I do find that by virtue of the long cohabitation of fifteen (15)years recognition and acceptance by the family members, relatives and friends that the two were husband and wife. Coupled with the birth of the three children this court is entitled to and I hereby infer and declare the existence of a marriage by presumption and/or cohabitation between the petitioner and the late E.G.W”

The court proceeded to order:

“I hereby order the issuance of the Grant of letters of Administration in the joint names of the petitioner and the objector.”

Aggrieved by the judgment of the superior court, the appellant lodged this appeal on 22nd January 2009 in which she was represented by **Mr Gicheru** advocate while the respondent was represented by **Mr Machio**, advocate.

The appellant raised ten (10) grounds of appeal as under:-

- 1. The learned Judge erred in law and fact in failing to find and hold that the petitioner/respondent had pleaded and solely based her case on an alleged marriage between her and the deceased under the provisions of the Kikuyu customary law which she failed to prove.**
- 2. The learned Judge erred in law and fact in inferring and declaring a marriage by presumption in favour of the petitioner/respondent when the petitioner/respondent had not pleaded and or sought such a declaration.**
- 3. The learned Judge erred in law and fact in basing his judgment on an unpleaded issue.**
- 4. The learned Judge erred in law and fact in declaring a presumption of marriage in favour of the petitioner/respondent even after rightly holding that the petitioner/respondent had not proved any Kikuyu customary law marriage between the petitioner/respondent and the late E.G.W.**
- 5. The learned Judge erred in law and fact in failing to find and hold that section 3(5) of the Law of Succession Act can only be invoked in aid of a woman who had contracted a valid marriage under a system of law which permits polygamy.**
- 6. The learned Judge erred in law and fact in failing to find and hold that a common law presumption of marriage could not bring the petitioner/respondent within the Provisions of section 3(5) of the Succession Act particularly having found and held that there was no valid Kikuyu customary law marriage between the petitioner/respondent and the deceased.**
- 7. The learned Judge erred in law and fact in failing to find and hold that no declaratory order in the nature of a presumption of marriage could be made in succession proceedings where the petition was based on a contention that the petitioner was married under customary law and was not seeking any order of presumption of marriage.**
- 8. Without prejudice to the foregoing, the learned Judge erred in law and fact in failing to find and hold that the petitioner/respondent did not establish the legal ingredients for a declaration of presumption of marriage.**
- 9. The learned Judge erred in law and fact in giving a contradictory judgment.**

Mr Gicheru in his submissions stated that the superior court was wrong in granting relief not claimed in the application for letters of administration by the respondent and this was evident from the contents of the objection and the cross petition; that the pleadings consisted of the petition, cross-petition and the two affidavits filed by the petitioner and the objector; proof of marriage under a system of law which must be adduced under a system that permits polygamy pursuant to the provisions of **section 3(5)** of the Law of Succession Act; in the written submissions of the respondent a specific admission was made that the respondent was not the deceased's wife under the Kikuyu customary law and at page 159 of the judgment the court made such a finding as a matter of fact and law yet the court went on to contradict itself by holding that there existed a Kikuyu customary law marriage by presumption, that the fact that the appellant and the respondent hailed from the Kikuyu community did not per se provide proof of marriage between the deceased and the respondent; the respondent according to the evidence adduced never attended family gatherings and the relationship between the deceased and the respondent did not contain the ingredients capable of constituting a presumption of marriage under the Kikuyu customary law because unlike the English common law the Kikuyu customary law did not recognize a marriage by presumption and finally that in any event, proof of any such presumption must be by way of evidence from witnesses and not a finding of law by a court plucked from the air. In this regard, he submitted that neither the deceased brother nor his sister recognized the respondent as a wife of the deceased yet the two were the closest relatives of the deceased.

On his part, Mr Machio while conceding that there was no marriage under Kikuyu customary law between the respondent and the deceased submitted that all the same there was sufficient evidence before the court that the respondent was the wife of the deceased due to fifteen years cohabitation; three children for the relationship; payment of rent by the deceased on behalf of the respondent including school fees and finally that one of the children of the respondent was for some time staying with the appellant; the meeting of elders recognized the two wives; the funeral programme in which the respondent participated reinforced the issue of marriage and finally, the court had been invited by the parties to declare whether there was a marriage by presumption and finally, Mr Machio relied on the case of ***Macharia vs Njomo & another (2008) KLR (G & F) 754*** for the proposition that the three children of the respondent were entitled to inherit from the deceased estate the validity of the marriage notwithstanding.

At the outset, I must state that the issue of the three children inheriting from the deceased estate is not in contest at all, as the appellant had indicated that it was the deceased's wish inter-vivos for them to inherit and in addition both the Law of Succession Act and the Children Act have provisions on inheritance and parental responsibility respectively, status of marriage notwithstanding.

However, on the issue of marriage, I have had the advantage of reading the majority judgments of my brothers Bosire, J.A. and Tunoi, J.A. and with great respect, I respectfully dissent. The majority judgment fails to take into account the provisions of section 6 of the Judicature Act concerning this Court's Jurisdiction on matters relating to the application of customary law. The section states:-

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

In addition the judgment of the superior court is with respect is itself patently contradictory, thus it makes a finding of the non-existence of a marriage under Kikuyu customary law between the respondent and the deceased and at the same time declares a marriage by presumption a concept which is a stranger to the Kikuyu customary law. The learned judge literally plucked the presumption concept from the English common law contrary to the Judicature Act. Moreover, no such declaration was sought in the pleadings at all since the matter before him was a succession matter. Contran's Restatement of African Law Vol. 1 – The Law of marriage and Divorce clearly specifies the essentials of a Kikuyu customary marriage as:-

‘Cooperating, consent, ngurario - slaughtering of a ram, ngurano – bride price and commencement of cohabitation.’

At the hearing, the superior court was able to ascertain the existence of the above ingredients as between the appellant and the deceased but the same attributes were conspicuously lacking as between the respondent and the deceased. With respect, the concept of justice demands the application of the same standard – to the parties before a court of law.

The court’s findings concerning the existence of a Kikuyu customary law marriage was not based on any evidence at all and was with respect a finding plucked from the air and an unfortunate imposition of a presumption of marriage to the well documented requirements of a Kikuyu customary marriage. Moreover, the court’s judgment flies in the face of a line of binding authorities on the point starting with *Ernest Kinyanjui Kimani vs Muiru Gikanga & another (1965) EA pg 735* where the court held:-

i. while African customary law is neither notorious nor documented it must be established for the court’s guidance by the party intending to rely on it, and this the appellant had failed to do;

ii. as a matter of practice and convenience in civil cases, the relevant customary law, if it is inapplicable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties ...

In *GITUANJA v GITUANJA [1983] KLR 575* THE Court held inter-alia:-

(2) “The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario.”

Surely, although the payment of rent and cohabitation might appear attractive attribute of marriages pursuant to the English common law or any other Kenyan communities, they do not constitute acceptable ingredients of a marriage under the Kikuyu customary law and this finding constitutes a serious misdirection both in fact not in law.

Again in the case of *NJOKI v MUTHERU (1985) KLR 874*, this Court rendered itself as follows:-

- 1) The existence of a custom must be established by the party who intends to rely on it. The applicant had failed to establish before the High Court Judge a common law marriage was recognized by the customary laws of the Kikuyu.**
- 2) There was no evidence before the High Court Judge on which he could find the existence of any law of marriage between the appellant and the deceased including a common law marriage in the sense in which that form of marriage is recognized in England, or that the circumstances of Kenya and its inhabitants permitted the application of such a marriage in this case.”**

I re-echo the same findings here and also point out that there is nothing in the challenged judgment to show that the judge was alive to the above authorities and the principles they enunciate.

The case of *HORTENSIAH WANJIKU YAWE vs PUBLIC TRUSTEE* has been relied on in support of the view that there can be a Kikuyu customary law marriage by presumption. With respect, I disagree. The relevant observation by Mustafa J.A. states:-

“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 the issue of their union, and in my view, is applicable to all marriages, however, celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage”

Even going by the wording of the above observation it cannot be said that in a relationship such as that of E and the deceased, where there was no proof of the well known major ingredients of the Kikuyu customary law marriage such as consent, ngurario and ruracio the evidence of cohabitation and repute perse would constitute a valid marriage under the Kikuyu customary law. It becomes a customary

marriage recognized by virtue of **section 3(2)** of the Judicature Act because of the presence of the specified customary ingredients. It is a massacre of such a custom for anyone to suggest that a presumption of marriage per se can constitute a marriage under any system of law whether customary or common law unless it is accompanied by the other essential ingredients pertaining to a particular system of marriage. A presumption based on cohabitation remains a presumption but it cannot constitute a customary law marriage without the essential ingredients. The presumption cannot itself form the super structure of a Kikuyu customary law marriage or any other, it can only be part of the issue whether factually there is a marriage. The contention that there can be a Kikuyu customary law marriage by virtue of a presumption imposed by a court is fallacious and hollow even on the basis of YAWE case (supra). Thus, in the matter before the Court, M was able to prove that in her relationship with the deceased, she did undertake all the necessary steps as required under the Kikuyu customary law but when it came to the turn of E, she failed to prove a single step or the necessary ingredients in her relationship with the deceased, but all the same, the superior court by a simple act of plucking the presumption from the air did convert the respondent as having been married under the Kikuyu customary law allegedly “because both M and E hailed from the Kikuyu community”. With respect, I find this finding intellectually untenable and a very serious subversion of the principle of certainty of law appearing in the face of the same judgment. What is good for the gander is good for the goose. Why was the presumption of marriage not applied to M who was required to prove it all the way along the lines well documented by *Eugene Contran*?

The presumption of marriage is a concept that could very well match with the common law principles of marriage but I do not hold the view that the 12th August, 1897 reception clause found the Kikuyu customary law lacking in some essentials so as to justify the importation of common law into the Kikuyu customary law of marriage or any other customary law marriage. What the learned author Eugene Contran did was to restate the customs but he did not invent them. Indeed the recognition of the customary law marriages by the subsequent Marriage Act, **Section 37** was based on their status as recognized by each community and not on any assumed presumption of marriage. To illustrate the point if a Kikuyu cohabits with a Chinese, for that relationship to constitute a marriage it must first contain all ingredients relating to either Kikuyu customary law or under a foreign Chinese system recognised under the law of Kenya, pursuant to the foreign provisions. Cohabitation is a piece of evidence but cannot per se constitute a marriage.

Turning to the facts of the case before us, there was no Kikuyu ceremony at all as between the deceased and the respondent as well described by Madan, J. as he then was in the case of *ZIPPORAH WAIRIMU vs PAUL H.C.C.C. NO. 1280 OF 1970* (unreported) where, in his customary broad mind suggested that perhaps an error or a “slip up” in the formalities or ritual should not invalidate a Kikuyu customary law. With respect, even such intellectual generosity cannot be extended to the respondent herein leave alone allowing herself to enjoy the status of a Kikuyu customary marriage under the banner of a presumption of marriage which literally hangs in the air. Such a finding in my view and with great respect defies logic, custom and the law and should not find any space in our developing jurisprudence. The judgment itself reveals arbitrariness and lack of proportionality in that the learned Judge went beyond the provisions of section 3(5) under which the application for the issue of letters of administration was grounded. Parties cannot consent out of statute. By making a finding of marriage, unsupported by the pleadings the evidence and the relevant law, this part of the judgment is with respect a nullity.

In this regard, **section 3(5)** of the Succession Act reads:-

“Notwithstanding, the provisions of any other written law, a woman married under s 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.”

With respect the respondent was not **married** under a system of law as contemplated by the section and the section did not apply to her and therefore the judgment is with respect, a clear misapplication of this provision. If the respondent was not married under a system that

recognizes polygamy, the provision would not apply to her. In my judgment, I must however make it clear that I fully appreciate the significance of cohabitation and financial support in terms expressed in the Children Act and the importance of parental responsibility to children but these are different concepts.

In conclusion, perhaps it is important to observe that, customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the other necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the “come we stay” marriages which are neither customary nor statutory.

All in all, I would allow all the grounds of appeal and in particular that there was no marriage in terms of **section 3(5)** of the Law of Succession Act.

In the result, I would set aside the decree dated 13th May 2008 and issued on 21st January 2009 and order that the letters of administration be issued in the sole name of the appellant herein.

I would so order.

DATED and delivered at Nairobi this 23rd day of April 2010.

J.G. NYAMU

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JUDGE OF APPEAL