REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram M.K. Ibrahim, S. Wanjala, Njoki Ndungu, I. Lenaola & W. Ouko, SCJJ.)

PETITION NO. E030 OF 2024

IN THE MATTER OF THE ESTATE OF LIHASI BIDALI ALIAS CHARLES LIHASI ALIAS CHARLES LIHASI BIDALI (DECEASED)

-BETWEEN-

YOSE MUSELA ..... APPELLANT

-AND-

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

PETER NJOROGE BIDALI, MAGDALINE MUTUGI BIDALI, GEORGE KAHURA BIDALI, ESTHER WANJIKU BIDALI, JOSEPHAT KIMANI BIDALI, JANE NDUTA BIDALI TERESIA WAGIO BIDALI and LAIMANI BIDALI .....2ND RESPONDENTS

SUSAN NJERI .....3RD RESPONDENT

FELIX MIDIKIRA .....4TH RESPONDENT

(Being an Appeal from the Judgment of the Court of Appeal at Nairobi (Omondi, Ali-Aroni and Ngenye, JJ.A) dated 14th June 2024 in Civil Appeal No. E504 of 2020)

Representation
Mr. Kirimi David for the Appellant
(Kinyanjui, Kirimi & Company Advocates)

Mr. Wangalwa Oundo for the 1st Respondent
(Wangalwa Oundo & Company Advocates)

Ms. Diana Ndirangu for the 2nd Respondent
(J. Thongori & Company Advocates)

Mr. Jaoko Alexander for the 3rd Respondent
(Nchoe, Jaoko & Company Advocates)

Mr. Chacha Odera for the 4th Respondent
(Oraro & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court is a Petition dated 18th July 2024 and filed on 19th July 2024. It is premised on Articles 163 (3) (b), (4) (a), and 159 of the Constitution of Kenya 2010, Section 15A of the Supreme Court Act CAP 9B of the Laws of Kenya, Rule 36 of the Supreme Court Rules 2020 and all other enabling provisions of the law. It challenges the Judgment of the Court of Appeal (*Omondi, Ali-Aroni, & Ngenye, JJ. A*) dated 14th June 2024 in ***Civil Appeal No. E504 of 2020*** which upheld the decision of the High Court.

B. BACKGROUND

[2] This case concerns the estate of Lihasi Bidali, also known as Charles Lihasi or Charles Lihasi Bidali, who passed away on 21st July 2012. Subsequent to his demise, the distribution of his estate became necessary and in response, the appellant, the deceased's son, initiated a succession cause before the High Court.

C. LITIGATION HISTORY

i. Proceedings before the High Court

[3] Before the High Court, the appellant petitioned for the grant of letters of administration intestate, deponing that the deceased left behind a widow, Jedidah Kisia Lihasi, five sons, including himself and six daughters. He listed nine (9) properties as assets of the estate and declared no liabilities. Furthermore, he petitioned for a grant of letters of administration *ad colligenda bona* to preserve the estate, which he claimed was in danger of being wasted or

taken away by *'some people'*. However, the court declined to grant this petition and directed that the petition for the full grant of administration be processed.

[4] The appellant went ahead to also file for the grant of letters of administration *ad litem* to act as a personal representative of the estate concerning one of the properties of the estate, specifically LR. No. 209/118/77; this was granted. As a result, it triggered opposition from Grace Wambui Bidali and her son, Bidali Lihasi (*the 1st respondent*) who sought the revocation of the grant or, in the alternative, for Bidali Lihasi to be made a co-administrator of the estate.

[5] According to the 1st respondents, they are members of the deceased's second family. Grace, the second wife of the deceased, was also allegedly married to the deceased under Kikuyu customary law and together, they had one son and three daughters. It was also claimed that they established their family home on L.R. No. 209/118/77, where they have lived since 1972 and that, although the first family excluded them from the deceased's burial arrangements, the 1st respondents were apprehensive that their exclusion from the proceedings touching on their home was done with ulterior motives. Besides, they declared that the deceased had left behind a written Will which ought to guide the court on distribution of the contested estate.

[6] By consent of the parties, the court directed on 11th March 2013 that the Will of the deceased be read to the beneficiaries within 30 days and the same to be deposited in court. Following the reading of the Will, the executor, Felix Ayuya Midikira (*the 4th respondent*), petitioned for a grant of probate of the written Will of the deceased. This attracted objections from a number of individuals claiming to be heirs of the deceased.

[7] The 1st respondents specifically contended that the purported Will was not valid as it was neither paginated nor did it bear the deceased's signature and/or was not witnessed. Further, that it was fraudulent, since it was purportedly executed when the deceased was incapable of writing or signing any document due to his ill health. They added that, although it recognized Bidali Lihasi and his siblings as the deceased's children, it failed to make provision for them as

beneficiaries and distributed approximately 80% of the estate to Jedidah Kisia Lihasi, who was aged 70 years at the time.

[8] In similar fashion, Magdaline Mutugi Bidali, who also claimed to be the widow of the deceased; and Laimani Bidali, George Kahura Bidali, Esther Wanjiku Bidali, Moses Munene Bidali, Josphat Kimani Bidali, Jane Nduta Bidali, Peter Njoroge Bidali, and Teresia Wagio Bidali as children of the deceased (hereinafter *the 2nd respondents*); filed an objection to the making of the grant, an answer to the petition, and a cross–petition premised on the following grounds: that at the time the deceased allegedly made the Will, he was physically ill and incapacitated to the extent that he would not have known what he was doing. Furthermore, that the Will only made provision for Jane Nduta Bidali, Peter Njoroge Bidali, and Teresia Wagio Bidali leaving out the rest of the family members.

[9] On her part, Susan Njeri (*the 3rd respondent*) filed summons for provision as a dependant, claiming that she was a widow who was left out of the deceased's Will. She argued that although their marriage was not formalized, she was being maintained by the deceased prior to his death, having cohabited with him in a rented house between 2006 and 2012. She also claimed that the deceased had verbally given her properties L.R. Nos. Dagoretti/Thogoto 1814, 1815 and 1817 which she sought to be transmitted to her.

[10] Meanwhile, the appellant, in support of the Will, stated that he had no reason to doubt the authenticity of the Will, as it was witnessed by two persons and the deceased was in excellent mental health at the time of signing the will, a fact supported by the medical report of Dr. Tamer E. Mikhail.

[11] Upon hearing the parties' arguments, in a Judgment delivered on 24th April 2019, the court (*Musyoka J*) identified the following issues for determination: *(i) Whether the Will dated 26th March 2012 was valid*; and (ii) *Whether the 1st, 2nd, and 3rd Objectors (herein the 1st, 2nd and 3rd respondents respectively) were survivors of the deceased*.

[12] Regarding *whether the Will dated 26th March 2012 was valid* and considering the three reports produced by the parties, the court concluded that

the three expert reports did not independently help the court in making a determination with finality on the authenticity of the deceased's signature. This was because all of them relied on copies of the impugned Will as opposed to the original Will, and also the reports had some level of bias generated to suit the interests of the parties who sourced them rather than assist the court.

[13] Nonetheless, the learned Judge was of the opinion that the impugned signature in the Will belonged to the deceased since the differences between the signature and the ones made in his other documents were minor and did not negate its authenticity. Further, that the evidence of Billy Amendi and Hassanali Omido, who were witnesses to the Will, was cogent and unshaken. On this account, the learned Judge had no doubt that it was the deceased who took the Will to both witnesses and gave a personal acknowledgment of his signature to them, who thereafter attested to his signature on the Will in his presence.

[14] With regard to the deceased's health, the learned Judge disagreed with the submissions of the 1st and 2nd respondents who argued that the deceased lacked coherence in speech and that his remote mobility affected his mental capability. The trial Judge found that, while the deceased was physically unwell, he had the mental capacity to execute the Will dated 26th March 2012. Consequently, the court held that the Will dated 26th March 2012 was valid as it was properly executed by the deceased and that his signatures were properly attested by the witnesses.

[15] Concerning *whether the 1st, 2nd, and 3rd objectors (herein the 1st, 2nd and 3rd respondents respectively) were survivors of the deceased* the court evaluated the relationship of each of the parties with the deceased.

[16] To begin with, the court acknowledged that Jedidah Kisia was statutorily married to the deceased under the African Christian Marriage and Divorce Act, and that the Certificate of Entry of Marriage placed on record was conclusive proof of the said marriage. Furthermore, the allegation of forgery could not stand, as it had not been demonstrated or proven; and a misspelling of Jedidah's name could not serve as a ground to invalidate or negate the marriage between the deceased and her.

[17] With respect to Grace Wambui's claim, the trial Judge determined that there was no proof that she was married to the deceased in the year 1972 under Kikuyu Customary Law. Considering that for a marriage to be recognized under Kikuyu customs, the learned judge opined that, it must be established through proof that the customary rites of marriage were performed, the most notorious of which are performance of *ngurario* and payment of *ruracio*; there was no evidence that these ceremonies were observed, he concluded.

[18] Conversely, as to whether the learned Judge could presume marriage, he observed that Grace Wambui did not take the witness stand and therefore did not lead any evidence as to the circumstances of her relationship with the deceased. She left it to her son to do so, yet a child cannot be said to speak for a parent in such sensitive matters as cohabitation, sexual relations, child bearing, and the like. Even so, the learned Judge noted that there was no doubt that she bore children with the deceased including Bidali, and two daughters: Kaisa and Kageha. All the three were also recognized in the impugned Will as the deceased's children. To that end, the learned Judge concluded that it would be inconceivable that the deceased would father three children with a woman that he was not married to.

[19] For the above reason, the court took judicial notice of the fact that Grace Wambui was Kikuyu by ethnicity, based on her second name; while her children bore the names from the community the deceased hailed from, the Luyha community; and significantly, Bidali Lihasi appeared to have been named after the father of the deceased. What's more, the learned judge stated, considering that Grace lived in the deceased's property and bore him three children, whom she gave Luyha names, the learned Judge was inclined to find that the two cohabited as man and wife. On this basis, the learned Judge presumed that there was a marriage between Grace and the deceased and further held that the deceased recognized his three biological children with her, and upon the foundation of the cohabitation, presumed that the deceased had taken in and accepted Hannah Njoki (*Grace's daughter*) as his own child.

[20] Relating to Magdaline Mutugi Bidali, the court similarly found that the claim that she was purportedly married under Kikuyu Customary Law had not

been sufficiently proved. In respect of the claim that she had five children with the deceased, being; Esther Wanjiku Bidali, Josphat Kimani Bidali, Jane Nduta Bidali, Peter Njoroge Bidali, and Teresia Wagio Bidali, the learned Judge observed that she had given all five of them Kikuyu middle names as opposed to Luhya names, which was telling. This suggested that she never regarded herself as married to the deceased. Nevertheless, in the Will, the deceased recognized the last three of the said children that is Jane, Peter and Teresia acknowledging that he fathered them. In the same vein, the learned Judge found that it was inconceivable that the deceased would have had three biological children with a woman that he was not married to.

[21] On that account, the trial Judge was persuaded that the deceased and Magdaline did cohabit and the three children were conceived during the period of the said cohabitation. Consequently, the court found that the deceased did recognize the three as his biological children he had with her, and upon the foundation of the cohabitation, had taken in and accepted Laimani Bidali, George Kahura Bidali, Esther Wanjiku Bidali and Josphat Kimani Bidali as his own children.

[22] Susan Njeri, the 3rd respondent, on her part raised no objection to the grant being made to the executor, and claimed to be a dependant of the deceased by placing before the court an application under Section 26 of the Law of Succession Act for reasonable provision from the estate, being that the deceased made no provision for her out of the impugned Will. However, the trial court was not persuaded that she was ever a wife of the deceased, nor was there any evidence to support a presumption of marriage between her and the deceased.

[23] It was the court's further finding that, under the marriage statutes, a man who has contracted a previous statutory monogamous marriage, such as a Christian marriage, has no capacity to contract another marriage under any system of marriage during the pendency of the previous statutory monogamous marriage. If he does contract another marriage despite pendency of the statutory monogamous marriage, that marriage would not be valid or recognized in law so long as the man was alive. However, upon his death, and by virtue of Section 3 (5) of the Law of Succession Act (hereinafter *the Act*), such

subsequent marriages would be recognized for the purposes of succession under the Act, to the extent that they were contracted under systems of law that permit polygamy.

[24] Bearing all the above findings in mind, the learned Judge concluded that the deceased had contracted a statutory monogamous marriage with Jedidah, and by the time of his death, the marriage was still subsisting as it had not been dissolved. Further, that though Grace Wambui and Magdaline Mutugi were presumed to be wives based on cohabitation and other relevant factors, the trial Judge found that they could not invoke Section 3(5) of the Law of Succession Act, as they had not demonstrated that their unions were contracted under a system of law that permits polygamy. In the Judge's view, it remained a debatable question whether a presumption of marriage can lawfully arise where there is a subsisting statutory monogamous marriage. However, noting that the Court of Appeal has consistently upheld such presumptions, and being bound by that precedent, the Judge concluded that Grace Wambui and Magdaline Mutugi were to be treated as widows of the deceased for purposes of succession.

[25] On the issue of dependency, the learned Judge held that he would not determine at that time whether any of the persons identified as surviving spouses and children of the deceased, who were not provided for in the Will, were dependants of the deceased. This is for or the reason that dependency turns on questions of distribution of the property of which the ideal situation would be for any dependency application to be disposed of simultaneously with an application for confirmation of grant, he concluded. Notwithstanding the foregoing, the application for dependency by the 3rd respondent was deemed spent upon the finding that there was no marriage between her and the deceased.

[26] Consequently, the learned Judge proceeded to issue the following orders:

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

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

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

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

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

(f) *That each party shall bear their own costs;* and

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

ii. Proceedings before the Court of Appeal

[27] Aggrieved, the appellant preferred an appeal to the Court of Appeal being, ***Civil Appeal No. E504 of 2020***, premised on nine (9) grounds which the court summarized as follows: that the learned Judge erred;

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

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

(iii) *by making findings that would re-open the matter for presentation of new evidence when all parties had presented all their evidence in*

support of their position and thereby allowed a back-door appeal of his own decision;

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

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

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

[28] In a Judgment delivered on 14th June 2024 the court (*Omondi, Ali-Aroni & Ngenye JJ.A*) delineated the following as the issues arising for determination: *(i) Whether the trial court was right in presuming that Grace and Magdaline were wives of the deceased based on the concept of presumption of marriage and therefore wives under Section 3 (5) of the Act*; (ii) *Whether the court erred by making a finding that children of Grace and Magdaline were children of the deceased*; (iii) *Whether the court erred in finding that the children of Grace and Magdaline though not biological children of the deceased were nonetheless beneficiaries of the estate*; and (iv) *Whether the learned Judge interfered with the deceased's Will.*

[29] With regard to the first issue, *whether the trial court was right in presuming that Grace and Magdaline were wives of the deceased based on the concept of presumption of marriage and therefore wives under Section 3 (5) of the Act,* the Court of Appeal agreed with the trial Judge to the extent that the circumstances surrounding the lives of Grace and Magdaline with the deceased, including the siring of children and long cohabitation, led to no other inference than that they lived as husband and wife under a *'come we stay arrangement'* which connotes to a large extent the presumption that the parties were married. Furthermore, the appellate court agreed that the deceased married Jedidah under the African Christian Marriage and Divorce Act and had subsequently cohabited in a *come we stay* marriage with both Grace and Magdaline, as

evidenced by the facts placed before the trial Judge. Consequently, the appellate Judges concluded that both Grace and Magdaline were in a marriage with the deceased.

[30] Likewise, the Court of Appeal explained that Section 3 (5) of the Law of Succession Act addressed a historical issue that remains alive in the country today. That the Section brought to light and provided a remedy for the injustice many Kenyan women suffered due to the situations they found themselves in, where husbands who had previously married under monogamous marriage legal regimes took them in as wives under customary law; a scenario explicitly related by the Court of Appeal in ***Irene Njeri Macharia Vs Margaret Wairimu Njomo & another*** [1996] eKLR.

[31] Drawing on its own finding in ***MNM Vs DNMK & 13 others*** [2017] eKLR, the Court of Appeal however faulted the trial Judge to the extent that he found that Section 3 (5) of the Law of Succession Act did not apply to the circumstances of Grace and Magdaline. The appellate Judges were of the opposite view that Section 3 (5) of the Law of Succession Act ought to be read alongside Article 20 of the Constitution, which seeks to provide meaning to the current situation facing women in Kenya. By applying Articles 20 and 27 of the Constitution, and without discriminating against women in *'come we stay'* marriages or situations where partial customary practices are met and parties enter into long cohabitation, the learned appellate Judges determined that the circumstances that led to the enactment of Section 3 (5) of the Law of Succession Act apply *mutatis mutandis* to women who find themselves in *'come we stay'* marriages, a prevalent phenomenon in the country. To find otherwise, the appellate court judges concluded, would amount to injustice and discrimination to the myriad of Kenyan women who find themselves in such situations. To that end, the Court of Appeal found that for the purposes of the Act, Grace and Magdaline were widows of the deceased.

[32] Subsequently, the appellate court held that the *children sired by Grace and Magdaline* during their unions with the deceased were children of those unions and therefore heirs of the deceased, and more so as dependants for purposes of Section 29 of the Law of Succession Act.

[33] On *whether Grace's daughter* Hannah Njoki and *Magdaline 's children*: Laimani Bidali, George Kahura Bidali, Esther Wanjiku Bidali, and Josephat Kimani Bidali *sired outside their respective unions with the deceased were heirs of the deceased's estate*, the court did not find any reason to depart from the trial Judge's findings on this question. The court therefore agreed that the deceased did, in fact, accept his wives' children sired outside the unions as his own, in view of the sufficient evidence provided through affidavits, sworn statements, and several pictures attesting to that fact.

[34] In relation to w*hether the learned Judge interfered with the deceased's Will* the appellate Judges found no fault in the trial court's finding that the issue of dependency could be raised by those left out of the Will based on Section 26 of the Law of Succession Act, for reasonable provision at the time of distribution; and that the court would be better placed to address any pending matters before the confirmation of the grant of probate. Accordingly, the appeal was unsuccessful save for the finding relating to Section 3 (5) of the Law of Succession Act.

iii. Proceedings before the Supreme Court

[35] Discontented, the appellant has filed this appeal before this Court under Articles 163 (3) (b), (4) (a), and 159 of the Constitution of Kenya 2010, Section 15A of the Supreme Court Act, Rule 36 of the Supreme Court Rules 2020, premised on twelve (12) grounds which may be summarized as follows: that the Court of Appeal;

(i) acted without jurisdiction by reframing the issue of Section 3 (5) of the Law of Succession Act which was never in dispute;

(ii) failed to exercise jurisdiction under Article 164 (3) of the Constitution in declining to determine the only issue before it being that of a presumption of marriage by refusing to adhere to the prerequisites set by the Supreme Court in the case of ***MNK Vs POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)*** *(Petition 9 of 2021) [2023] KESC 2 (KLR) (Family), offending the doctrine of stare decisis as encapsulated in Article 163 (7) of the*

Constitution, as regards establishing a presumption of marriage and thus misapplied the law on Section 3 (5) of the Law of Succession Act, visiting injustice to the appellant and the only legitimate widow of the deceased as recognized in the Will;

(iii) *erred in enacting a come we stay marriage scenario in our laws where none exists since there is no law in place governing cohabitees in long term relationships;*

(iv) *acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters of Articles 20 and 27 of the Constitution which were not raised at the High Court and thus proceeded to misinterpret the same and make erroneous and prejudicial findings;*

(v) *erred in law and fact by making findings that completely took away the right to a fair trial of the appellant under Article 50 of the Constitution where the issue of the rightful children and survivors of the deceased was tried summarily and chapter closed by the Court of Appeal sitting as if it was the primary court exercising primary jurisdiction;* and

(vi) *erred in law and fact by making conclusions that are not supported by evidence on record interfering with the appellant's right to a fair trial contrary to the clear provisions of Article 50 of the Constitution.*

[36] Accordingly, the appellant seeks the following reliefs:

(a) *That this petition be allowed.*

(b) *That the Judgment of the Court of Appeal in Civil Appeal E504 of 2020 delivered on 14th June 2024 be set aside and the Appeal therein be allowed.*

(c) *A declaration that Jedidah Kisia Lihasi is the only legal and legitimate wife and thus only widow of the deceased and no*

presumption of marriage can arise in favour of Grace Wambui and or Magdaline Mutugi.

(d) A declaration that the children of Grace Wambui and Magdaline Mutugi not named in the will and or sired by the deceased were not children of the deceased for purposes of his succession.

(e) A declaration that this was not a proper case for allowing application for reasonable provisions by dependents at all.

(f) That the costs of this Petition and the Appeal be awarded to the appellant herein.

(g) Any other relief as the Court may deem fit and just to grant in the interest of justice.

D. PARTIES RESPECTIVE CASES

i. Appellant's Case

[37] The appellant in their submissions dated 13th September 2024 outline four issues for determination before this Court.

[38] First, on *whether this Court has jurisdiction to hear this appeal*, the appellant submits that the issues of contestation did not revolve around the interpretation or application of the Constitution in the High Court. However, issues of Articles 20 and 27 of the Constitution were introduced by the Court of Appeal in the impugned decision. And so, the issues fall under the exemption as highlighted in the case of ***Geoffrey M Asanyo & 3 others Vs Attorney General;*** SC Petition No. 21 of 2015 [2018] eKLR under which this appeal falls.

[39] Secondly, *on whether the Court of Appeal wrongly reframed the issue of Section 3 (5) of the Law of Succession Act and declined to determine the real issue before it, that is, presumption of marriage and made erroneous and prejudicial findings thereof hence violating the appellant's right to a fair hearing contrary to the clear provisions of Article 50 of the Constitution*, the appellant argues that the primary issue that was before the Court of Appeal was presumption of marriage and the trial Judge's failure to cite the Court of Appeal decisions he claimed to be bound by. He further argues that the Court of Appeal,

declined to make a finding on presumption of marriage and instead reframed the touching on issue of Section 3 (5) of the Act, focusing on the issue of widows for purposes of succession, which was not the issue raised in the Memorandum of Appeal or submissions by all parties before it.

[40] In addition to the above, the appellant contends that the Court of Appeal erred in interpreting Articles 20 and 27 of the Constitution in relation to Section 3(5) of the Act, without providing him an opportunity to be heard, as guaranteed under Article 50 of the Constitution; and further argues that the court failed in its constitutional duty under Article 164, leaving him without adequate recourse. The appellant furthermore claims that the misapplication of Articles 20 and 27 of the Constitution in relation to Section 3(5) of the Act has led to a grave injustice to him and his family.

[41] The appellant went on to submit that the Court of Appeal failed to adhere to the principles set out by the Supreme Court in the ***MNK Case*** (supra), by addressing *come we stay* marriages and likening them to a marriage within the confines of Section 3 (5) of the Act. That this act disregarded the Supreme Court's finding that Kenya has no laws to protect parties in cohabitation in case of a dispute. Therefore, in his view, it was erroneous for the Court of Appeal to create a *come we stay* marriage which is not legislated.

[42] Third, on *whether the Court of Appeal offended the principle/doctrine of stare decisis as encapsulated in Article 163 (7) of the Constitution*, in view of Article 163 (7) of the Constitution, the appellant argues that the appellate court declined to employ this Court's precedent in ***MNK Case*** (supra) regarding the prerequisites for establishing a presumption of marriage. Had it done so, he argues, the court would have concluded that the 1st, 2nd and 3rd respondents had not proved their case to be presumed as wives of the deceased.

[43] Lastly, *on whether the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters of Articles 20 and 27 which were not raised at the High Court, and thus proceeded to misinterpret the same and make erroneous and prejudicial findings without according the appellant a fair hearing in accordance with Article 50 of the Constitution*, the appellant reiterates his earlier averments,

asserting that the Court of Appeal's application or interpretation of the Constitution to Section 3 (5) of the Act was never a ground of appeal, thus violating his right to fair hearing. To support this assertion, the appellant references this Court's decision in ***Zachariah Okoth Obado Vs Edward Akong'o Oyugi & 2 other*** (Petition 4 of 2014) [2014] KESC 22 (KLR) in which the Court allowed the petition to avoid miscarriage of justice, and thus seeks the same outcome in this appeal.

ii. 1st Respondents' Case

[44] The 1st respondents filed grounds of opposition dated and filed on 15th August 2024, and written submissions dated 25th September 2024 and filed on 30th September 2024.

[45] On *whether the Court of Appeal wrongly reframed the issue of Section 3 (5) of the Law of Succession Act* the 1st respondents submit that, in determining the appellant's first ground of appeal, the trial Judge had erred in finding Grace Wambui and Magdaline Mutugi were widows of the deceased and their respective children were children for purposes of succession to the estate of the deceased. They added that the appellate court needed to deal with two issues in that regard: first, whether Grace and Magdaline were widows, and, second, whether they were widows for purposes of succession and therefore entitled to a share of the deceased's estate. As a result, the 1st respondent contends that, in determining whether a party is a widow, interpretation of Section 3(5) of the Law of Succession Act is paramount, as it applies to wives who are married by a man who has previously contracted and is in a subsisting monogamous marriage, as is the case with the 1st and 2nd respondents herein. Therefore, in their view, the Court of Appeal rightly held that the circumstances that led to the enactment of Section 3(5) applied *mutatis mutandis* to *come we stay* marriages which the court equated to presumption of marriage.

[46] The 1st respondents further submit that the Court of Appeal in applying Articles 20 and 27 of the Constitution, stated that once the status of wife is conferred upon a party, they should not be discriminated in comparison to other wives and should be treated as a wife for purposes of succession, regardless of the nature of the marriage. In presuming the existence of a marriage between

the deceased and the 1st and 2nd respondent spouses, the Court of Appeal made its finding based on facts, not law. Therefore, the Court of Appeal rightly exercised its jurisdiction under Article 164 (3) of the Constitution by analyzing the circumstances that led to the presumption of marriage by the High Court between the deceased and Grace, based on the evidence adduced in the High Court, and holding that, in the interest of justice, the issue of the application or otherwise of Section 3 (5) of the Law of Succession Act ought to be determined accordingly.

[47] Regarding *whether the Court of Appeal offended the principle/doctrine of stare decisis as encapsulated in Article 163 (7) of the Constitution,* the 1st respondents assert that, although the Court of Appeal did not specifically state the strict parameters in ***MNK Case*** (supra), it based its analysis on the said strict parameters being that: (a) the parties must have lived together for a long period of time; (b) the parties must have the legal right or capacity to marry; (c) the parties must have intended to marry; (d) there must be consent by both parties; (e) the parties must have held themselves out to the outside world as being a married couple; (f) the onus of proving the presumption has to be strong, distinct, satisfactory and conclusive; and (g) the standard of proof is on a balance of probabilities. As such, taking into account that the other parameters outlined in ***MNK Case*** (supra) did not arise in this specific circumstance, as they were not in dispute, the 1st respondents assert that the Court of Appeal did not depart from the parameters set out by the Supreme Court and was within the bounds of Article 163 (7) of the Constitution.

[48] Concerning *whether the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters of Articles 20 and 27 of the Constitution,* it is the 1st respondents' submission that the appellate court did not act *ultra vires* or without jurisdiction in relying on Articles 20 and 27 in determining the question of Section 3(5) of the Act because it quoted the Articles to aid/buttress in the interpretation of the said Section. The issue was in their view not one of interpretation of Articles 20 and 27, but rather the question of succession with respect to wives in a presumed marriage.

iii. 2nd Respondents' Case

[49] The 2nd respondents filed grounds of objection dated 8th August 2024 and filed on 13th August 2024 as well as written submissions dated 20th September 2024 and filed on 28th September 2024. Therein, the 2nd respondents identifies the following two issues arising for determination by this Court: (i) *Whether this Court has jurisdiction to hear and determine the matter*; and (ii) *Whether the Court of Appeal was right in coming to its finding with the applicability of Section 3 (5) of the Act and in declaring "come we stay" unions valid in the circumstances of this appeal.*

[50] With regards to the first issue on jurisdiction, the 2nd respondents contend that the appeal falls outside the jurisdiction invoked by the appellant, as it does not demonstrate any trajectory of constitutional interpretation or application. Moreover, that the appeal has not rationalized the transmutation of the issues from an ordinary subject of leave to appeal to a meritorious issue involving the interpretation or application of the Constitution, so that it becomes an appeal as of right, a matter falling within the appellate jurisdiction of the Supreme Court under Article 163(4)(a) of the Constitution.

[51] On the second issue, it is the 2nd respondents' contention that the Court of Appeal did not ignore the doctrine of *stare decisis,* as the Supreme Court in the ***MNK Case*** (supra) did not render itself in respect to Section 3(5) of the Law of Succession Act. The 2nd respondents also claim that the Court of Appeal rightly relied on the doctrine of presumption of marriage, which remains applicable even after the enactment of the Marriage Act, 2014. Further, that the mere existence of a monogamous marriage to Jedida does not override the fact that the deceased was in fact subsequently married to Magdaline, having satisfied two key ingredients of law: first, that both parties held themselves out as a married couple, and second, the parties cohabited for a long period at their matrimonial home in Thogoto in Kikuyu. Therefore, the appellate court did not retrospectively develop the law by finding that Grace Wambui and Magdaline Mutugi were widows of the deceased on the basis of a *come we stay* marriage. That the court merely stated that the law as has been since 1985 when Madan JA (as he then was) articulated the rationale of the principle of presumption of marriage in ***Mary Njoki Vs John Kinyanjui Mutheru*** [1985] eKLR.

iv. 3rd Respondent's Case (In Support of the Appeal)

[52] The 3rd respondent filed her replying affidavit sworn on 28th August 2024 and written submissions dated 12th September 2024 and filed on 24th September 2024.

[53] On *whether this Court has jurisdiction to hear this appeal*, the 3rd respondent affirms that this Court has jurisdiction since the Court of Appeal delved into the interpretation of Articles 20 and 27 of the Constitution, which although never an issue at the trial court, nor did the parties submit or canvass on the application of these provisions nonetheless requires this Court's further input. Therefore, she urges this Court to depart from the principle that constitutional interpretation must rise through the superior courts, as this case falls within the exceptions, and to exercise its discretion by finding that it is clothed with inherent jurisdiction to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates.

[54] On *whether the Court of Appeal had jurisdiction to make findings under Section 3 (5) of the Law of Succession Act*, the 3rd respondent contends that, given the fact that the High Court had found that the objectors were not widows for the purpose of succession as contemplated in Section 3 (5) of the Law of Succession Act, bearing in mind that they did not testify that they were widows; and neither the appellant nor respondents appealed this finding; relying on the Court of Appeal decision in ***Wachira Vs Ndanjeru*** [1987] KLR 252, the 3rd respondent urges this Court to find that the Court of Appeal was bound only by the issues raised in the Memorandum of Appeal.

[55] Regarding *come we stay marriages*, it is the 3rd respondent's contention that the Court of Appeal fell into error by failing to consider the legal doctrine of presumption of marriage and proceeding to hold that Section 3(5) of the Law of Succession Act applies *mutatis mutandis* to women in such unions. She also claims that this position offends the doctrine of *stare decisis,* established in the ***MNK Case*** (supra), and is also discriminatory. Accordingly, she urges this Court to allow the Petition of Appeal.

v. 4th Respondent's Case (In support of the Appeal)

[56] The 4th respondent filed his replying affidavit sworn on 16th August 2024 and written submissions dated the same day and filed on 19th August 2024.

[57] The 4th respondent raises two issues for determination. First, *whether this Court has jurisdiction to hear and determine the Petition*, the 4th respondent contends that the Court of Appeal, in making its determination on the interpretation and application of Section 3 (5) of the Law of Succession Act, correctly based its interpretation on the application of Articles 20 and 27 of the Constitution. Therefore, this Court has jurisdiction to hear this appeal. The 4th respondent further relies on several of this Court's decisions, including ***WMM Vs EWG*** (Petition 33 (E037) of 2022) [2023] KESC 36 (KLR); ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** Petition No. 2 of 2012 [2012] eKLR (***Lawrence Nduttu case***), to support this submission.

[58] Second, *whether the Court of Appeal in anchoring its decision on the interpretation of Section 3(5) of the Act on the application and interpretation of Articles 20 and 27 denied the parties a right to be heard under Article 50 of the Constitution*, the 4th respondent submits that the application or interpretation of Articles 20 and 27 Constitution to Section 3 (5) of the Law of Succession Act was never a ground urged in the appeal. He argues in that regard that a court should not make any findings on unpleaded matters or grant any relief not sought by a party in the pleadings. By the Court of Appeal anchoring its decision on the application of Articles 20 and 27 of the Constitution therefore, the 4th respondent asserts that the parties were not given an opportunity to be heard on that question during the hearing of the appeal. As a result, the 4th respondent contends that the parties were denied their right to a fair hearing contrary to Article 50 (1) of the Constitution, since they were not given an opportunity to address the appellate court on the application of Articles 20 and 27 of the Constitution.

E. ISSUES FOR DETERMINATION

[59] From our own evaluation of the foregoing arguments, the pleadings and the decisions of the two superior courts below, we consider the following two questions to be the only issues falling for the determination of this appeal:

i. *Whether the Court has jurisdiction under Article 163(4)(a) of the Constitution to determine the appeal.*

ii. *If the answer to i) above is in the affirmative, whether the Court of Appeal erred in its decision of 14th June 2024.*

[60] As has been the practice of this Court, for appeals brought pursuant to Article 163(4)(a) of the Constitution, before delving into the appeal, we must first satisfy ourselves that this Court has jurisdiction to determine the appeal. As we stated in ***Lawrence Nduttu Case*** it is the Court's primary duty as the ultimate custodian of the Constitution to satisfy itself that the appeal meets the constitutional threshold.

[61] Jurisdiction can only be exercised by a court as conferred by the Constitution or written law. As we held in ***Samuel Kamau Macharia Vs Kenya Commercial Bank Limited & 2 Others,*** Civil Application No. 2 of 2011 [2012] KESC 8 (KLR), a court's jurisdiction flows from either the Constitution or legislation, or both. A court cannot therefore arrogate to itself jurisdiction exceeding that which is conferred upon it by the Constitution or Law.

[62] The Supreme Court's appellate jurisdiction is set out in Article 163(4) of the Constitution of Kenya which states as follows:

> *"(4) Appeals shall lie from the Court of Appeal to the Supreme Court –*
>
> *a. as of right in any case involving the interpretation or application of this Constitution; and*
>
> *b. in any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."*

[63] The guiding principles for the exercise of this Court's appellate jurisdiction were set out in the ***Lawrence Nduttu Case (Supra)*** where we held that for this Court to have jurisdiction pursuant to Article 163(4)(a) of the Constitution:

> ***"(28) The appeal must originate from a Court of Appeal case where issues of contestation revolved around the***

interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a) (emphasis ours). If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in article 163(4) (a), the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in article 163(4)(a). It is the Court's duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold."

[64] In ***Rutongot Farm Ltd Vs Kenya Forest Service & 3 others*** SC Petition No. 2 of 2016 [2018] KESC 27 (KLR), we determined that in order to address the issue whether the Court has jurisdiction or not, the questions that need to be answered are:

i. *What was the question in issue at the High Court and the Court of Appeal?*
ii. *Did the superior Courts below dispose of the matter after interpreting or applying the Constitution?*
iii. *Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?*

[65] Applying the aforementioned principles to the facts of this case and the respective determinations of the two courts below that we have set out earlier,

we note from the record before us that the genesis of the matter is ***Succession Cause No. 2388 of 2012*** instituted by the appellant herein. He petitioned the Court for the grant of *ad litem* together with an application for a grant of letters of administration *ad colligenda bona* for the estate of Lihasi Bidali alias Charles Lihasi alias Charles Lihasi Bidali (Deceased)**,** his father.

[66] The appellant listed Jedidah Kisia Lihasi as the widow, alongside five sons and six daughters, and declared nine properties as belonging to the decased with no liabilities. His initial application for a limited grant to preserve the estate was declined, and the court directed that a full grant be pursued. He later obtained a limited grant to act in relation to LR No. 209/118/77, prompting objections from Grace Wambui Bidali and her son Bidali Lihasi (1st respondent), who claimed to be from the deceased's second family under Kikuyu customary law. They asserted that they had lived on the disputed land since 1972 and as such, objected to their exclusion from the succession process. They also claimed that the deceased left behind a Will. The Will was later read following a court order, and Felix Ayuya Midikira (the 4th respondent), the Executor, applied for probate, which drew further objections.

[67] The 1st respondent challenged the Will's validity, alleging it was unsigned and fraudulent as the deceased was unwell when it was purportedly made. The Will recognized their family but excluded them from inheritance, allocating about 80% to Jedidah Kisia Lihasi. Magdaline Mutugi Bidali and her children (2nd respondent) also objected, arguing that the deceased was incapacitated and that most of them were left out of the Will. Susan Njeri (3rd respondent) claimed to be a dependent widow, asserting cohabitation with the deceased and a verbal gift of three Dagoretti/Thogoto properties. The appellant defended the Will's validity, citing witnesses and a medical report by Dr. Tamer E. Mikhail attesting to the deceased's mental soundness.

[68] The trial court was confronted with determining whether the Will dated 26th March 2012 was valid, which the Court found in the affirmative. As to whether the 1st, 2nd, and 3rd objectors (herein the 1st, 2nd and 3rd respondents respectively) were survivors of the deceased, the court evaluated the relationship of each of the parties with the deceased. In making its

determination on the second issue, the Court had to make a factual inquiry to determine who was indeed married to the deceased, how and when they were married, and whether the children born out of those relationships belonged to the deceased. Based on the foregoing, it is apparent that the matter turned purely on factual issues. This inquiry or the trial court's findings had no bearing on the application or interpretation of the Constitution at all.

[69] The gist of the appellant's instant appeal revolved around the manner in which the Court of Appeal tackled the application of Section 3(5) of the Law of Succession Act and proceeded to juxtapose its application against Articles 20 and 27 of the Constitution. The appellant contends that these issues were not raised before the High Court, and it was therefore prejudicial for the Court of Appeal to have addressed them as he was not accorded an opportunity to address the Court of Appeal on the same, thereby infringing on his right to a fair hearing in accordance with Article 50 of the Constitution

[70] The issue regarding Section 3(5) of the Law of Succession Act stems from paragraph 55 of the High Court's Judgment, where the Learned Judge expressed his views on why he considered that Section 3(5) of the Law of Succession Act did not apply to the circumstances of Grace Wambui and Magdaline Mutugi, who were presumed to be wives based on cohabitation and other relevant factors. In the trial Judge's considered view, the said parties could not invoke Section 3(5) of the Law of Succession Act, as they had not demonstrated that their unions were contracted under a system of law that permits polygamy. However, despite his views, he made note that the Court of Appeal has consistently upheld such presumptions of marriage, and being bound by that precedent, the Judge concluded that Grace Wambui and Magdaline Mutugi were to be treated as widows of the deceased for purposes of succession. Paragraph 55 of the trial court's judgment is reproduced verbatim hereunder:

> *"55. Under the marriage statutes a man who had contracted a previous statutory monogamous marriage, such as a Christian marriage, has no capacity to contract another marriage, under any system of marriage, during the pendency of the previous statutory monogamous marriage. If*

he does contract any other marriage despite pendency of the statutory monogamous marriage, that other marriage would not be valid or recognized in law so long as the man is alive. However, upon his death, and by virtue of section 3(5) of the Law of Succession Act, such subsequent marriages would be recognized for the purposes of succession under the Law of Succession Act, to the extent that they were contracted under systems of law that permit polygamy. In the instant case, the deceased had contracted a statutory monogamous marriage with Jedida Kisia. By the time of his death, the said marriage was still subsisting for it had not been dissolved. I have found that Grace Wambui and Magdaline Mutugi were his wives. The two, however, did not establish that they were married under a system of law that recognized polygamy. I presumed them to be wives on account of the circumstances of cohabitation and other factors. The two cannot therefore seek refuge under section 3(5) of the Law of Succession Act. The Law of Succession Act does not address their case. It is my view that it is moot whether presumption of marriage can be made in circumstances of a subsisting statutory monogamous marriage, but the Court of Appeal has generally made such presumptions. I am bound by such decisions, and I shall therefore treat Grace Wambui and Magdaline Mutugi as widows of the deceased for purposes of succession."

[71] From our reading of the decision of the Court of Appeal, the Learned Appellate Judges at paragraphs 58 to 62 sought to address the trial Judge's views and in doing so reiterated its previous decisions explaining the historical context and constitutional underpinning by making reference to Articles 20 and 27 of the Constitution. To be clear, the Court of Appeal upheld the finding of the trial Court to the effect that Grace Wambui and Magdaline Mutugi were to be treated as widows of the deceased for purposes of succession.

[72] Upon careful consideration, it is apparent that, while the decision of the Court of Appeal made reference to Articles 20 and 27 of the Constitution in affirming its position and findings regarding the application of Section 3(5) of the Law of Succession Act to presumption of marriages, the core of the

appellant's grievance lies in contesting the concurrent evaluation of factual and evidentiary matters. To our minds therefore, there is no discernible issue that requires this Court to interpret or apply the Constitution afresh. The constitutional provisions referred to were neither the subject of novel interpretation nor applied in a manner that raised any substantial controversy requiring this Court's intervention. What the appellant essentially seeks is a re-evaluation of findings that have already been conclusively settled by the trial court and affirmed by the Court of Appeal. Such a challenge, devoid of a demonstrable constitutional trajectory, does not fall within the appellate jurisdiction of this Court under Article 163(4)(a) of the Constitution.

[73] As we held in ***Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others*** (Petition 45 of 2018) [2020] KESC 9 (KLR), mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under Article 163(4)(a) of the Constitution. It is only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under Article 163(4)(a) of the Constitution.

[74] We are also minded to reiterate what we stated in ***Daniel Kimani Njihia v Francis Mwangi Kimani & another*** (Civil Application 3 of 2014) [2015] KESC 19 (KLR):

> "*This Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first*

appellate Court, as that would stand in conflict with the terms of the Constitution."

[75] Similar sentiments were expressed in the ***Lawrence Nduttu case*** that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. For the aforementioned reasons, we find and hold that this Court lacks jurisdiction to determine the appeal herein. Accordingly, we down our tools at this stage.

F. COSTS

[76] On the issue of costs, in line with our decision in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***, Petition No. 4 of 2012; [2014] KESC 31 (KLR), and taking into account the nature of this matter, there shall be no order as to costs.

G. ORDERS

[77] Consequently, we make the following orders:

i. ***The Petition of Appeal dated 18th July 2024 and filed on 19th July 2024 be and is hereby dismissed.***
ii. ***There shall be no order as to costs of the appeal.***
iii. ***We hereby direct that the sum of Kshs.6,000= deposited as security for costs upon lodging of this appeal, be refunded to the appellant.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **5th** day of **September, 2025.**

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

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

REGISTRAR
SUPREME COURT OF KENYA