



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(NAIROBI LAW COURTS)

Misc Appli 8 of 2003

ANN WANJIRU NJONGEPLAINTIFF

AND

NEWTON GIKARU GATHIOMI

FREDRICK MBUGUA GATHIOMI

KENNETH NJOROGE GATHIOMI.....DEFENDANTS

JUDGMENT

By originating summons dated 20.01.03 and filed on 13.02.03 brought under section 3A of the Civil Procedure Act, Cap. 21 and Order XXXVI rule 1 of the Civil Procedure Rules, ANN WANJIRU NJONGE who claims to be an heir and beneficiary of the estate of WILDRED GATHIOMI NJONGE prayed for the following orders, namely:-

1. THAT the honourable court be pleased to pronounce a presumption of marriage between the applicant herein and one LEONARD NJONGE GATHIOMI (deceased), first born son of WILFRED GATHIOMI NJONGE.
2. THAT the costs of this application be in the cause.

The grounds upon which the application is based are:-

- a) THAT the applicant and LEONARD NJONGE GATHIOMI (deceased) had lived together for 24 years at the time of his death and had for all that time conducted themselves as man and wife and recognized as such before right thinking members of the public.
- b) THAT there are four issues of the union between the plaintiff and the said LEONARD NJONGE GATHIOMI (deceased).
- c) THAT unless this application is allowed, the applicant and her children are in danger of being disinherited by the respondents herein.
- d) THAT it is in the interest of justice that this application be allowed.

The application is supported by the affidavit of the applicant Ann Wanjiru Njonge sworn on 20.01.03.

This matter was initially heard before the Hon. Lady Justice M. Koome but hearing was not completed before her. The matter came up before me for the first time on 22.06.06 whereat the plaintiff was represented by learned counsel, Mrs E.A. Siaji while the defendants were represented by learned counsel, Mr F.S. Mwaura. These are the same counsel who had conducted the earlier part of the proceedings before Koome, J and they consented that the remainder of the proceedings could be conducted before any other Judge.

The only oral testimony given before me in this case was that of the 2nd defendant, Fredrick Mbugua Gathiomi who told this court that he was giving evidence in his capacity as an administrator of the estate of his late father, Wilfred Gathiomi Njonge and that he (Fredrick) was also giving evidence on behalf of the other two defendants who are his brothers and that they had duly authorized him to represent them in this matter.

The court record shows that on 17.07.03 the initial trial Judge (Koome, J) directed, *inter alia*, that the originating summons herein be determined by way of oral evidence in addition to affidavit evidence on record.

The plaintiff who has also been referred to variously as applicant and complainant swore an affidavit on 20.01.03 in support of her originating summons of the same date. She also gave oral evidence and called four other witnesses to give oral evidence in support of her case before Koome, J.

The evidence of the plaintiff, who testified as P.W.1, may be summarized as under. She is a nurse by profession. The man, LEONARD NJONGE GATHIOMI she is asking this court to presume she was married to died on 27.10.2000. The plaintiff filed this case after learning that the brothers of Leonard had filed High Court Succession Cause No.447 of 2001 in relation to the estate of their father, Wilfred Gathiomi Njonge but omitted Leonard from the list of beneficiaries to Wilfred's estate. It is the plaintiff's case that she met Leonard in 1974; that she started cohabiting with him as her husband in 1976; that she got 4 children with him over a span of 24 years; that she and her children depended on the late Leonard Njonge Gathiomi and are, therefore, entitled to Leonard's share of the estate of his late father Wilfred Gathiomi Njonge. The plaintiff informed the initial trial Judge that the defendants in the present case were given a temporary grant of letters of administration of Wilfred Gathiomi Njonge's estate and that she applied for its revocation but the revocation proceedings have not been concluded as she has to wait for finalisation of the originating summons now under consideration vide which she seeks pronouncement of presumption of marriage between her and the late Leonard Njonge Gathiomi.

The plaintiff told the initial trial Judge that Leonard worked as intelligence officer in Special Branch, which has now been re-designated as National Security Intelligence Service. It was her case that she and Leonard never worked at the same station and that due to demands of work and frequent transfers, the two of them were not able to live together. The children she says she got with Leonard are give as follows:-

- a) Elsie Nyawira - born in 1977
- b) Patrick Kariuki - born in 1979
- c) Simeon Nderitu - born in 1982
- d) Grace Wairimu – born in 1984.

None of the 4 children is named after Leonard's family line as is customary among the Kikuyu ethnic group to which she and Leonard belong. The plaintiff's name in her Identity card is ANN WANJIRU GITHOGORI, the surname being that of her father. The plaintiff was taken to task by defendants' counsel about these anomalies in the naming system and her response was as follows:

'The names on the Identity card is Ann Wanjiru Githogori. I took the Identity card in 1996. I was still living with the late Leonard Njonge Gathiomi. I had tried to change but it was not possible. The deceased refused to allow me to use his name. He kept saying he would change but he never did it

Elsie Nyawira was born in 1977. She is named after my mother. Patrick Kariuki is named after my father. Grace Wairimu is named after my sister. Simeon Nderitu is named after my brother. The father of these children is Leonard Njonge Gathiomi. The late Njonge's father was Gathiomi and his mother was called Rahabu Wanjiru. My late husband did not tell me to name the children after his parents. We used to discuss about naming of the children but he would say I name them after my people. He did not give me any reason.'

The plaintiff maintained in her evidence that the children were educated by the late Leonard Njonge, although she conceded it is not possible to tell from the school fee receipts she produced that Leonard paid the fees. The plaintiff said it was agreed between her and Leonard that he would pay the school fees while she took care of food for the children and that he gave her the money for fees and she made the payment.

It was also the plaintiff's evidence that she registered the birth of the children immediately they were born and that she included the late Leonard Njonge as their father. She said that although she and Leonard did not live together but visited each other at times during leave or week-ends as appropriate, the two of them were considered as man and wife both at Leonard's place of work and also at her place of work. With regard to the former, the plaintiff attempted to produce a letter suggesting she was recognized at Leonard's place of work but her attempt to do so was successfully objected to by defendants' counsel.

The plaintiff told the initial trial Judge that in 1998 she was allocated a *shamba* by Wildred Gathiomi (Leonard's father) to cultivate at Nyarariga where Wilfred lived and that in the same year Leonard's mother fell sick, that she took her to a couple of hospitals and to a clinic within Nairobi. The plaintiff said she took care of Leonard's mother for 2 weeks and later she was admitted at Kikuyu hospital where she (plaintiff) continued visiting her on daily basis until she passed away in October, 1998. It was the plaintiff's evidence that she lived at Nyarariga for 7 months from August, 1999 to March, 2000 and that she left Nyarariga following an incident on 25.03.2000 when the 1st defendant herein threatened her and her children with a *panga* and that she left after a week of harassment, to take residence at a Tigoni hospital flat where she had been posted from Nyeri provincial hospital. She said she told Leonard who was working in Nairobi about the threats to her and he had no objection to her moving out of Nyarariga. The plaintiff said she continued staying in Tigoni until Leonard died in October, 2000.

The plaintiff said she learnt about Leonard's death through his sister and she (plaintiff) proceeded to Nyarariga to participate in his funeral arrangements. She testified that she used to attend the funeral committee meetings until something unusual happened, i.e. when her name and those of her children were omitted by the committee which said that Leonard did not have a family. She said she was in a state of shock but there was very little she could do at the time but after Leonard's burial she went to the Chief's office for assistance as she wanted to apply for letters of administration and that the chief told her he had to call elders. The plaintiff concluded her evidence- in- chief as under:

'One of the respondents came before the Chief and some elders from each side. The Chief and his committee of elders ended that I was not the wife of the deceased (Leonard Njonge Gathiomi). I was not satisfied and I went to consult a lawyer and I filed this case through Mary Wangari. The succession cause started later.'

I have already given some highlights of the plaintiff's evidence in her cross-examination. I now add the following. In response to other questions in cross-examination, the plaintiff said Leonard, whom she invariably referred to as her husband, acquired Plot No.743 at Gilgil several years before he died, in his sole name. This happened when she and Leonard were living together. She did not contribute towards purchase of the plot. The plaintiff reiterated she moved to Nyarariga where Leonard's parents lived and that she used to cultivate the land. She did not specify the land but I take it to be the *shamba* she had told the court Wilfred Gathiomi Njonge had allocated her. She said she used to live in the house of her mother-in-law; that she did not have a house of her own; and that Leonard never built one for her. She acknowledged that Leonard was the eldest brother in his family; that he was a very senior officer in the National Security Intelligence Service; that she had notified him of the threats to her by the 1st defendant but he (Leonard) never took any steps to reinstate her and the children back to the Nyarariga family

home. She added that Leonard found she was comfortable at the Tigoni hospital flat.

The plaintiff acknowledged that Leonard was assaulted in 1999 after which he developed a problem and needed constant care. However, she continued to live at Tigoni hospital working as a nurse while Leonard lived at Nairobi Kahawa West with another lady, to her (plaintiff's) knowledge, whose relationship to him she initially said she did not know. However, while answering another question during cross-examination, the plaintiff said in connection with the other lady:

'My husband was living at Kahawa West in a rented house. He used to have household goods. I did not make arrangements to take away the household goods. After he was buried I did not bother with his personal effects due to hostility the that I found. I used to sort out my legal rights (?) and that of my children. I did not bother to find out whether there were rent arrears because my husband was already living with another woman like a wife who had the responsibility to pay the rents. The respondents should know the whereabouts of deceased personal effects. It was difficult for me to find them because of the other woman who was living in the same house. I know the deceased was living with another woman. I confronted the deceased about the woman he was living with and the deceased said the lady he was living with was washing his clothes.'

The plaintiff, who said she was 53 years old, also said she was with Leonard 2 weeks before he died; that a sister of Leonard notified her of his death through telephone; that she (plaintiff) lived at Tigoni while Leonard lived at Nairobi Kahawa West with another woman; that it was Leonard's responsibility to formalize his marriage to her (plaintiff); that she and Leonard did not have any ceremony in church; that no steps under Kikuyu customary marriage have taken place in her case; that the parents of the late Leonard Njonge have never gone to her parents' home and that her parents and Leonard's have never met and never knew each other.

During re-examination, the plaintiff said she did not know how Leonard reacted to his brother the 1st defendant after receiving her report of the 1st defendant's threats towards her. She also said Leonard used to go to her during week-ends or week-days and leave in the morning; and that he used to be on duty almost all day. Finally the plaintiff said she applied to be included as a dependant of Leonard Njonge who was also dependant on the estate of his father, Wilfred Gathiomi Njonge.

The next plaintiff's witness (P.W.2) was Patrick Kariuki who is the plaintiff's son. It transpired when the time came for him to testify that he had been sitting in court when his mother the plaintiff was giving her evidence and he heard it all. The fact was drawn to the initial trial Judge's attention at the outset and the Judge made a note of the fact, allowed him to testify but reserved her ruling on what to do with his evidence in due course. P.W.2's evidence was essentially that he was aware his mother the plaintiff was, through this case, trying to establish presumption of marriage between her and the late Leonard Njonge Gathiomi whom he (P.W.2) described as his father. P.W.2 alluded to family gatherings having taken place at Nyarariga home of Wilfred Gathiomi Njonge's Nyarariga home during Easter holidays between 1985 and 1988 which he attended as did also some other family members. He also talked of the plaintiff and his siblings having visited Leonard in Mombasa while Leonard worked there in 1986 when he (P.W.2) was 7 years old. He alluded to his grandmother as having died on 27.10.2000, which cannot be correct as his own mother the plaintiff put Leonard's mother's year of death as 1998, which tallies with the defence case. However, P.W.2 subsequently cited 1998 as the year of Leonard's mother's death. P.W.2 also talked of family photographs having been taken during the 1986 Mombasa trips. Asked if there were photographs taken of him and Leonard, P.W.2 answered in the negative. P.W.2's evidence basically tended to repeat what the plaintiff had told the court.

The third plaintiff's witness (P.W.3) was James Ndungu Mungai. He said Leonard was his cousin as Leonard's mother and his mother were sisters. The essence of P.W.3's evidence was that he knew about the plaintiff through Leonard before 1993 when Leonard talked about her and that he later met the plaintiff in 1993 at Leonard's Nyarariga family home in Limuru when he (P.W.3) had gone there to visit Leonard's mother who was ailing. It was P.W.3's evidence that Leonard was not present at the Nyarariga home and that it is Leonard's mother who introduced the plaintiff to him as Leonard's wife and that Karikuki who was looking after cows was called to come and greet him (P.W.3) and that Kariuki was

described as Leonard's son. P.W.3 added that Leonard's mother later died, he (P.W.3) attended her funeral and again met the plaintiff on that occasion. P.W.3 also testified that Leonard subsequently died and he (P.W.3) attended Leonard's funeral where he again met the plaintiff. P.W.3 said that he had never seen his parents going to Ann Wanjiru's home for wedding ceremony. He also said he was not very close to Leonard and that he has never visited Ann (plaintiff) and the children since Leonard died and that he has not been summoned by Leonard's brothers to attend any meeting. P.W.3 said he believed Ann (plaintiff) was the wife of Leonard as he was told by Leonard's mother in 1998 and that he and Leonard's mother were alone in the sitting room when she told him that the plaintiff, who was preparing food elsewhere, was Leonard's wife.

The fourth plaintiff's witness (P.W.4) was Moses Njunge Kiratu. He described himself as being of the same clan and family with Leonard and said in 1974 he was doing business and staying in Mombasa where Leonard was also working and he (P.W.4) met the plaintiff when Leonard took her to his (P.W.4's) place. P.W.4 said he understood the plaintiff had gone to visit Leonard in Mombasa and that when Leonard took the plaintiff to P.W.4's place, Leonard introduced the plaintiff as his wife and that the plaintiff told him the children were in Nyeri in school. P.W.4 also said he met the plaintiff again at the funeral of Leonard's father and thereafter at Leonard's funeral. P.W.4 added that he did not notice anything unusual during Leonard's burial and he did not visit the plaintiff where she lived because he was staying far away. He (P.W.4) said he departed from Mombasa in 1985 and left Leonard there. During cross-examination, P.W.4 said the plaintiff was introduced to him in Mombasa in 1984 and that was the first time for him to be introduced to her. He said the second time he saw the plaintiff was at Leonard father's funeral and the third time he saw her was at Leonard's own funeral. Later P.W.4 said he moved from Mombasa, in 1986. This witness, P.W.4 added that his father and Leonard's father were brothers; that his grandfather used to visit the firm of Leonard frequently and he and P.W.3 talked a lot but the issue of dowry in respect of Ann's (plaintiff's) marriage to Leonard was never discussed. P.W.4 confirmed that he did not know the plaintiff's parents and that he never attended any ceremony of marriage between the plaintiff and Leonard.

The final witness for the plaintiff (P.W.5) was Mohamed D. Jillo Jarha. He told the initial trial Judge that he worked in the National Security Intelligence Service as an intelligence officer since 1999. He produced as Plaintiff Exhibit 6 a copy of letter dated 25.03.02 which he said he wrote to Mary Wangari & Co. Advocates of Nairobi in response to their letter vide which they lodged certain enquiries and he responded saying records held in the National Security Intelligence Service office indicated the following as Leonard Njunge Gathiomi's next of kin:-

1. Anne Wanjiru Njunge - Spouse
2. Elsie Nyawira Njunge - Daughter
3. Patrick Kariuki Njunge - Son
4. Simon Nderitu Njunge - Son
5. Grace Wairimu Njunge - Daughter.

He described the letter he wrote as being of 25.02.02 (it is actually dated 25.03.02) in reply to the said Advocate's letter of the 'same' date. In response to questions in cross-examination, he said he did not have the letter from the Advocates which he again described as being of 25.02.02. It was his evidence that he extracted the information contained in his copy letter from Leonard's files which he did not bring to court. Neither the letter from Mary Wangari & Co. Advocates nor Leonard's files from which P.W.5 said he had extracted the information contained in his reply of 25.03.02 were produced before court.

At the conclusion of P.W.5's evidence, plaintiff's/applicant's counsel announced that to be the close of the applicant's case. This was on 06.10.05. The matter was adjourned to 17.11.05 for further hearing but it could not proceed and it was re-scheduled to 22.06.06. However, on 24.04.06 the initial trial Judge directed that the case be mentioned on 27.04.06 with a view to getting an alternative hearing date since

there were many cases on 22.06.06. At the mention on 27.04.06 the parties opted to have further hearing of the case conducted before any other Judge on 22.06.06 and that is how it came before me on 22.06.06 but it could not proceed as the 2nd defendant who was to testify on his own behalf and on behalf of his co-defendants was not in court. The case was re-scheduled for further hearing on 27.07.06.

On 27.07.06 defendant's counsel opened the defence case by calling the 2nd defendant, Fredrick Mbugua Gathiomi to testify on his own behalf and on behalf of the other defendants. His evidence may be summarized as under.

The 2nd defendant told the court that he is aged 59 years, has lived at the family home at Nyarariga in Limuru Division and was doing mixed farming there. Both his parents were dead, his father, WILFRED GATHIOMI NJONGE having died on 27.08.93 while his mother, Rahab Wanjiru Gathiomi died on 10.10.98. The 2nd defendant told the court he was one of the administrators of his late father's estate. He confirmed that the late LEONARD NJONGE GATHIOMI was the first born among his siblings and that he (Leonard) died on 27.10.2000. Leonard was employed in Kenya's National Security Intelligence Service at the time of his death and he had attained the rank of Senior Assistant Commissioner of Police. The 2nd defendant was emphatic that to the best of his knowledge, Leonard was NOT married. He had put up no house and had no homestead at the father's *shamba* in Nyarariga, Limuru. He used to live in Government quarters where he was posted in the various provinces.

Regarding the plaintiff herein, the 2nd defendant said he met her for the first time in 1999 when she went to his parents' rural home at Nyarariga, alone. The late Leonard was there and he introduced the plaintiff. The introduction went something like: 'Meet Ann' and that Leonard introduced the plaintiff Ann as a friend, NOT as a wife. The 2nd defendant told the court that the next time he met the plaintiff was at the late Leonard's funeral in 2000. The 2nd defendant did not recall seeing the plaintiff at his mother's funeral. He said, however, there were many people during the funeral.

The 2nd defendant told the court that his parents never went to the plaintiff's parents to pay dowry for her; that he never knew the plaintiff's parents; and that the plaintiff's parents never visited his parents at their home. The 2nd defendant said he was very close to his late brother, Leonard but Leonard never told him who the plaintiff was to him and he took the plaintiff to be Leonard's friend. To the 2nd defendant's knowledge, the plaintiff never went to his parents' rural home during his late father's lifetime and he (2nd defendant) never knew the children the plaintiff said she had with Leonard. The 2nd defendant pointed out that none of the said children was named after any member in his family line.

It was the 2nd defendant's evidence that at the time of Leonard's death in 2000 he was living at Kahawa West with a woman called Nancy Nyokabi but NOT with the plaintiff. Nyokabi had lived with Leonard for about 3 years prior to Leonard's death and Leonard used to take Nyokabi to his parents' rural home over week-ends. Leonard and Nyokabi did not, however, have children. It is Nyokabi who broke the news of Leonard's death to Leonard's siblings and other relatives. The plaintiff went to the rural home of Leonard's parents on either the 5th or 6th day after Leonard's death. She got there during Leonard's funeral preparations. Nancy Nyokabi was present during the funeral preparations and during the burial itself.

The 2nd defendant proceeded to tell the court that after Leonard's burial, a dispute relating to the plaintiff's claim to have been Leonard's wife was heard before the Limuru Senior Chief where the plaintiff represented herself while the 2nd defendant represented the Wilfred Gathiomi Njonge family and that the Senior Chief and elders assisting him came to a decision that the plaintiff was NOT the late Leonard's wife. The 2nd defendant produced as Defence Exhibit 1 a copy of the proceedings which had taken place before the Senior Chief and elders.

Reacting to certain claims made by the plaintiff in her affidavit sworn on 20.01.03 in support of her originating summons, the 2nd defendant denied the plaintiff's claim in paragraph 6 of her affidavit that

she settled at the rural home of Leonard's parents and pointed out that Leonard never put up a house there. He added that in the Kikuyu community to which Leonard's family belongs, a son who marries cannot live with his wife in his parents' house – he has to put up his house in the same compound. Regarding the plaintiff's claim that she looked after Leonard's ailing mother in 1998, the 2nd defendant denied her claim and pointed out that she was then posted at far away Nyeri Provincial General Hospital. It was the 2nd defendant's evidence that when his mother (also Leonard's mother) was hospitalized, it is the 2nd defendant and his siblings who looked after her and not the plaintiff.

With regard to the plaintiff's claim at paragraph 7 of her supporting affidavit that she lived at Leonard's parents' rural home with her 4 children, the 2nd defendant denied the plaintiff's claim.

The 2nd defendant denied the plaintiffs' claims in paragraphs 8 and 9 of her affidavit that the 1st defendant chased her away from Leonard's parents' rural home, pointing out that there is no way that could have happened without his knowledge as he was living within the same compound.

Responding to the plaintiff's claim in paragraph 20 of her affidavit that she used to take care of Leonard during his hospitalization prior to his death, the 2nd defendant testified that in 1999 Leonard was viciously attacked at the gate to his Nairobi Kahawa West residence. Nancy Nyokabi was with him as was also his official driver. All three were attacked leading to their hospitalization at Kenyatta National Hospital. At that time it is Nyokabi who was living with Leonard, NOT the plaintiff. The 2nd defendant said he visited Leonard daily while in hospital following the attack and that he never found the plaintiff at the hospital during his visits there.

The 2nd defendant concluded his evidence-in-chief thus:

'There can be only one reason for the plaintiff taking interest in claiming to be my late brother Leonard's wife – benefits from Leonard's former employer and from my late parents' estate.'

At the conclusion of the 2nd defendant's evidence –in-chief, he was subjected to rigorous and searching cross-examination by plaintiff's counsel. Some highlights of his evidence under cross-examination are given below.

The 2nd defendant started living in Nyarariga from about mid-1999. Before that he lived where he worked in Nairobi. Between 1968-1971 he lived with Leonard in the same house while Leonard worked with the then East African Railways and Harbours. Leonard joined Special Branch (now National Security Intelligence Service) in 1971 and the two of them never lived under the same roof again. The 2nd defendant acknowledged that after joining Special Branch Leonard worked in different stations and provinces: Kakamega, Bungoma, Mombasa, Kwale, Malindi, Garissa, Embu and Nyati House in Nairobi. The 2nd defendant visited Leonard only at two stations, ie Bungoma and Embu and that when he visited him there Leonard was not living with any woman. The 2nd defendant acknowledged that the plaintiff used to work as a nurse in Government hospital and that a nurse in Government hospital is liable to transfer from station to station. The 2nd defendant could not be certain if the plaintiff and Leonard used to visit one another prior to 1999. The 2nd defendant told the court that during the proceedings before the Limuru Senior Chief, he learnt from the plaintiff that she was posted to Tigoni Sub-District Hospital from Nyeri Provincial General Hospital. The 2nd defendant did not recall meeting the plaintiff prior to 1999. He said he first met the plaintiff's children during preparations for Leonard's funeral.

Asked whether he had put up a house at his parents' rural home at Nyarariga, the 2nd defendant said he had not and that most of the times he has lived in his parents' house at the rural home. He said he got married in 1978 and that his family is settled in Kahawa Wendani opposite Kenyatta University within Nairobi. His family occasionally goes to his parents' rural home to collect foodstuffs and go back to Kahawa Wendani the same day – they don't sleep at Nyarariga. He visits his family at Kahawa Wendani from time to time. He clarified that during occasions like burials, his wife and children would stay at the

Nyarariga rural home and that it is permissible during such occasions for them to spend the night there. Neither the 2nd defendant nor his brothers put up houses at their parents' home at Nyarariga. The 2nd defendant emphasized that it is taboo if he is married for him to raise his family in his parents' house but they can sleep there when visiting. He said if the plaintiff and her children visited his parents' rural home, he would have known. It was his evidence that they did not. He said before 1999 he used to visit his parents' rural home two or three times a month and during his holidays as his mother was not in good health. He was informed of major events there and if the plaintiff and her children visited that home, that would not be a minor matter and he would have known about it.

The 2nd defendant acknowledged that his mother was in ill-health for almost 20 years and it is he and his siblings who took the responsibility of caring for her after their father's death. Their wives also assisted. A lady worker, Wameja worked at the Nyarariga rural home and she used to clean the house and cook for the 2nd defendant's ailing mother. The 2nd defendant said that when his mother was admitted at Kikuyu hospital for 3 weeks, he visited her virtually every lunch time but he never met the plaintiff there. His brothers visited her also. When one of them missed to pay her a visit, at least one other would be there and, upon his return, brief the others about happenings there. The 2nd defendant said he did not recall meeting the plaintiff at Nairobi in 1974 or being introduced to her then by Leonard.

Regarding Nancy Nyokabi, the 2nd defendant said when he first met her she was introduced to him by Leonard as a friend and that she lived with Leonard from 1997 up to the time of his death in 2000.

On the issue of Leonard's eulogy, the 2nd defendant testified that when it was read out, in draft, the plaintiff queried why she and her children were not included in the life history of Leonard Njonge Gathiomi as his wife and children. The 2nd defendant recounted the response the plaintiff was given as follows:

'She was questioned by elders whether she was married in church, customarily or formally. She was asked whether any of her children was named from our family line. Her answers were in the negative. Elders advised her to wait until after Leonard's burial and come to the family and discuss the matter. After the burial, plaintiff never came back to discuss the matter. Later we received summons from Senior Chief Limuru to go to the Chief's office.'

The 2nd defendant denied the plaintiff's claim that the family of Wilfred Gathiomi Njonge had embraced her and her children prior to Leonard's death or that the family later made an about-turn after Leonard's death. The 2nd defendant was emphatic that as far as Wilfred Gathiomi Njonge's family is concerned, Leonard was not married as the plaintiff herself acknowledged before the court that there had been no marriage between her and Leonard Njonge Gathiomi.

Answering a question as to whether he was in a position to say who the father of the plaintiff's/applicant's children is, the 2nd defendant said he was not in a position to say. The question had been posed in the context that the children's birth certificates reflected against the column for 'Name and Surname of Father', the name Leonard Njonge Gathiomi. The 2nd defendant responded as under:

'When a woman gives birth in hospital, she is asked about the father of the child and the hospital takes down the name given by the woman as the father. No supporting evidence is required. Applicant failed to prove to Intelligence Department where my late brother Leonard Njonge was working that she was married to him. That is why the Department referred the matter to our local Senior Chief at Limuru. She also failed to prove to the Senior Chief that she was married to Leonard. The Chief had to form a panel of elders. The panel of elders gave a verdict that the applicant was never married to Leonard – after a hearing. Proceedings of the panel of elders are before court. The panel based their verdict on evidence tendered by both sides. In Kikuyu culture, children have to be named in a certain way, e.g. 1st son is always named after father of the husband (paternal grandfather). 1st daughter always named after mother of husband. Nothing of the sort happened in this case. All the children of applicant named after mother's family line. That can

only happen when a woman is not married.'

The 2nd defendant proceeded to tell the court that under Kikuyu custom, the parents of the man and the woman should always meet with clan elders to discuss dowry. He pointed out that his parents and plaintiff's parents don't know each other and never met over this matter. The 2nd defendant added that the plaintiff's/applicant's official documents, like identity card, personal official file with the Ministry of Health are in her maiden name. In the 2nd defendant's view, if the plaintiff died before Leonard, the latter would never have qualified to claim her benefits or even her body for burial.

Asked about James Kamau Mungai who gave evidence for the plaintiff (his middle name was recorded by the initial trial Judge as Ndungu), the 2nd defendant acknowledged him to be his cousin. The 2nd defendant pointed out that James Mungai's evidence was not corroborated as both the people he quoted, ie the 2nd defendant's mother Rahab and the 2nd defendant's brother, Leonard are dead.

The 2nd defendant was also asked about Moses Njonge Kiratu (his middle name was recorded by the initial trial Judge as Njunge) who likewise gave evidence for the plaintiff and the 2nd defendant denied any relationship between the said Moses Kiratu and himself. I pause here to observe that the said Moses Kiratu told the initial trial Judge that his (Kiratu's) father and Leonard's father were brothers.

It was the 2nd defendant's position that no Kikuyu father who has never met the alleged in-laws (plaintiff's/applicant's parents in the present case) would recognize the woman in question as his son's wife or her children as his grandchildren.

The 2nd defendant told the court he was testifying before the court on behalf of the other two defendants/respondents who are his brothers and that even before the Limuru Senior Chief and panel of elders his co-defendants had mandated him to appear on behalf of the Wilfred Gathiomi Njonge family and he did. He added that if the plaintiff/applicant was Leonard's wife, she should be able to prove it. He reiterated that the plaintiff was not Leonard's wife and said the Wilfred Gathiomi Njonge family would have nothing to gain by rejecting the plaintiff if she was Leonard's wife.

During his re-examination, the 2nd defendant confirmed that he is one of the administrators of the estate of his late father, Wilfred Gathiomi Njonge and that he appeared on behalf of the deceased's family in High Court Succession Cause No.447 of 2001 relating to his said father's estate; that he swore all the affidavits in the succession cause; that the plaintiff/applicant applied in the succession cause to share the late Wilfred Gathiomi Njonge's estate; that he (2nd defendant) was given consent by members of the Wilfred Gathiomi Njonge's family to represent the family before the Limuru Senior Chief and elders, before High Court Succession Cause No. 447 of 2001 and also before this High Court Miscellaneous Application No. 8 of 2003. He said he has no personal grudge against the plaintiff/applicant as a person. He pointed out that there are several neighbours at his parents' Nyarariga home and that if the plaintiff/applicant was known as Leonard's wife, there would have been a neighbour to testify in her favour but there was none.

At the conclusion of the 2nd defendant's evidence, defendants' counsel announced that to be the close of the defence case.

Counsel for both parties asked to be and were authorized to put in written submissions and they subsequently did so.

The plaintiff has prayed to the court to pronounce presumption of marriage between her and the late Leonard Njonge Gathiomi based on alleged long cohabitation, and the birth of 4 children during the said cohabitation.

Plaintiff's counsel sought to rely on the following cases:-

1. Re Thompson; Langham –vs- Thompson (1904) 91 LT 680

The brief facts were that from 1856 to 1866 a man and woman lived together as man and wife and had 5 children. There was evidence they had been treated as man and wife by friends and neighbours, and that the children had been recognized by the head of the father's family. In 1866 the woman left the man who in 1874, while she was still alive, married another woman. In 1904 the question of legitimacy of the children was raised. It was held that the presumption in favour of marriage having taken place had been established.

2. Re Taplin, Watson –vs- Tate (1837)3 AIIER 105

The brief facts were that T.B. lived in Rockhampton from 1860 with a certain lady; they held themselves out as husband and wife, and they and their children were received in local society, which would not have been the case had there been any suggestion of irregularity. The birth certificates of the children recorded the marriage of the parents as having taken place at Ballan, Victoria, on January 1860, but no such marriage was registered there, although registration there had been compulsory for some years. In 1873, T.B.'s father, who lived in England, executed a deed covenanting to make certain payments to the children or their mother and this deed contained these words: "the following reputed children of his deceased son," T.B., "which children are now in England with their mother E.M., otherwise E.B". It was held: (i) that the absence of any entry in the register of marriage was not sufficient to rebut the presumption of marriage of T.B.; (ii) that the words in the deed of 1873 were insufficient to rebut the presumption; (iii) that the presumption of marriage can be rebutted only by evidence of the most cogent kind, and the children in question ought to be declared to be the lawful children of T.B. and his wife E.B.

3. In re Shephard. George –vs- Thyer (1904)1 Ch 456

The brief facts were that an English man and woman traveled to France with the intention of getting married, and there purported to go through a form of marriage; and they had since lived together in England as man and wife for thirty years and had several children. There was some evidence of recognition of the children by the family.

It was assumed by the court that a marriage such as was alleged was impossible according to French Law and the habits of law-abiding people in France. It was held that this fact was not sufficient to rebut the presumption in favour of marriage arising from the long-continued cohabitation of the parties as man and wife (for purposes of the children being treated as lawful children of the man and woman in question and to share in the man's estate).

4. Re Taylor (deceased). Taylor –vs- Taylor & Another (1961)1 AII ER 55

The brief facts were that the plaintiff, who was born in 1911, claimed to be the legitimate son of John Taylor who died intestate in 1955, and to be entitled to a share in his residuary estate. In support of his claim the plaintiff adduced evidence including the following: (i) evidence of reputation given by six witnesses who testified that John Taylor and one Izender had lived together as Mr & Mrs Taylor in a small community from 1908 until Izender's death in 1913 and were accepted by the community as husband and wife; (ii) certain certificates, ie. Birth certificates relating to the 4 children born to John Taylor and Izender between 1904 and 1911, and the death certificate of Izender; (iii) evidence that Izender was buried in consecrated ground and was entered in the register of burials as the wife of John Taylor; and (iv) evidence of oral declaration made by John Taylor to the effect that he had married Izender. On appeal from a decision that the court should conclude that John Taylor and Izender were lawfully married, it was held that the evidence of cohabitation and acceptance as husband and wife by a small community for the period from 1908 until 1913 terminated by Izender's death gave rise to the presumption that John Taylor and Izender were lawfully married; on the evidence the defendants had not clearly proved that the inference was wrong, the latter question being one of fact for the trial judge from whose conclusion in the present case the Court of Appeal would not differ. Appeal dismissed.

5. Hortensiah Wanjiku Yawe –vs- Public Trustee: Court of Appeal Civil Appeal No. 13 of 1976

The brief facts were that the appellant Hortensiah claimed she was the widow of the deceased, Yawe. This was disputed and the trial Judge found against Hortensiah. She appealed against that finding. The Court of Appeal for East Africa found there was unchallenged evidence that Hortensiah had cohabited with Yawe for 9 years during which 4 children were born out of the cohabitation. Also that by general repute the parties cohabited as man and wife in a matrimonial home for 9 years. It was held by the Court of Appeal that these factors weighed in favour of presumption of marriage and that the learned trial Judge had erred in ignoring them. Hortensiah's appeal was allowed and she was declared a wife.

On the other hand, defendants' counsel deemed the cases cited by plaintiff's counsel as distinguishable on factors from the present case. He urged the court to ignore them and instead be guided by the case of:

Mary Njoki –vs- John Kinyanjui Muthuru & 4 Others: Kenya Court of Appeal Civil Appeal No. 71 of 1984.

The verdict of the court went by majority decision (Kneller & Nyarangi, JJA- as they then were) (Madan, JA dissenting). The brief facts as found by the court were that the appellant, Njoki did not undergo any form of marriage with the deceased, Peter Gachukia; although she claimed to have cohabited with him from 1969-1975, the trial court found no real cohabitation had been established; and that there were no issues of the cohabitation. The trial court declined to pronounce presumption of marriage. Njoki appealed and, as indicated above, the Court of Appeal did by majority decision dismiss the appeal.

I have given due consideration to the evidence, both oral and by affidavit, tendered by the parties and also duly considered the case law cited and rival submissions made by their respective counsel.

This is not a simple case to decide, having regard to the emotive nature of the subject involved and the competing evidence on record. I have endeavoured to capture major aspects of the evidence in considerable detail and I shall in this part of the judgment concentrate on what I consider to be the key themes emerging from the evidence and the conclusions to be drawn therefrom.

The essence of the plaintiff's case is that she wants the court to pronounce presumption of marriage between her and the late Leonard Njonge Gathiomi to enable her to claim what would be the late Leonard Njonge Gathiomi's share of the estate of his late father, Wilfred Gathiomi Njonge. The plaintiff seeks to rely on what she described as her long cohabitation with Leonard, and the birth of the 4 children she said she had with Leonard.

The evidence establishes that the plaintiff/applicant, Ann Wanjiru Njonge and the late Leonard Njonge Gathiomi are of Kikuyu extraction. The plaintiff told the court that she met the late Leonard in 1974, that she started cohabiting with him in 1976 and that she got 4 children with him between 1977-1984; that she and Leonard never worked at the same station at any one given time but that they visited each other during leave or week-ends; that they were husband and wife and were so known at both their respective places of work.

One of the documents put in evidence before this court is the record of proceedings of 10.04.01 before the Limuru Senior Chief assisted by elders. This record was put in evidence by the 2nd defendant without objection from the plaintiff's side. Indeed the plaintiff acknowledged taking part in those proceedings and her only quarrel with them was two-fold: (i) that a letter of 21.05.01 ascribed to the Senior Chief to the effect that the plaintiff and Leonard stayed together for 24 years should also have been produced by the 2nd defendant to form part of the record but that he did not produce it; (ii) that the verdict of the Senior Chief and the elders rejected her claim to have been Leonard's wife. Plaintiff's counsel purported to introduce the letter in evidence through her written submissions. Of course the letter could not competently be tendered in evidence that way and I reject the back-door attempt to make the letter part of the record of evidence in this case. The said letter is hereby expunged from the court record. I accept the proceedings before the Limuru Senior Chief and elders as forming part of the evidence before this court, minus the alleged Senior Chief's letter of 21.05.01. The proceedings before the Senior Chief show that when the plaintiff was asked what kind of marriage she underwent with Leonard, whether kikuyu customary law, church marriage or civil marriage, her answer was:

“He (Leonard) had come to my mother who had given him a green light for our affairs and that dowry was to follow.”

Asked whether Leonard ever returned to her mother, either alone or with elders, the plaintiff replied that Leonard never did. It is noteworthy that the visit the plaintiff said Leonard made to her mother was purportedly made by him alone and that the year it was supposedly made has not been specified. There is no evidence of any dowry paid in respect of the plaintiff or evidence of exchange of visits between Leonard’s parents and the plaintiff’s parents. Indeed the 2nd defendant categorically told the court that the two sets of parents never met or knew each other, ie the two families were strangers to each other.

I note that the plaintiff and Leonard were employed by the Government of Kenya plaintiff as a Nurse and Leonard as Senior Assistant Commissioner of Police as at the time of his death – quite a senior position. Yet there is no evidence of any attempt made by them for them to be posted to one station or district. This sounds curious.

Another curious aspect of the relationship between the plaintiff and Leonard relates to her naming of the 4 children after her own family line instead of the children being named after Leonard’s family line as is reported to be the norm among members of the Kikuyu community, to which both parties belong. The elders who took part in the proceedings before the Limuru Senior Chief were Joseph Karanja Kiratu, Peter Njenga Kuria and Mukoma Mbira. They sound Kikuyu and were apparently also puzzled by the mode of naming the children, they queried it and the plaintiff answered as under:

‘Elder: Why are the four (4) of your children not named in the Deceased’s (Leonard’s) Family?’

Answer: **He refused it.**

During the proceedings before the Senior Chief and elders, the 2nd defendant put searching questions to the plaintiff as to why she maintained her maiden identity at her place of employment and she responded as follows:-

‘Question: You gave your name as Ann Wanjiru, is that all you are known by?’

Answer: I am known as Anne Wanjiru Githogori, the latter being my father’s name.

Question: Is there any reason why you had not been registered in the name of your husband (Leonard)?

Answer: Yes, because I could not get the official documents.

Question: You are a civil servant, does your file indicate whether you are married or not married?

Answer: **As single.**

Question: What is your beneficiary in your file?

Answer: **That is confidential.’**

I pause here to observe, with regard to the plaintiff’s admission before the Senior Chief and elders that she maintained her maiden status at her place of work, that when she was questioned about the same issue in the court proceedings before the initial trial Judge, her answer was that she had tried to change her maiden name to Leonard Njonge’s name but it was not possible as Leonard refused to allow her to use his name. Yet the plaintiff has maintained before court that Leonard readily allowed her to include his name as her children’s father in their birth certificates – very curious!

It is also noteworthy that when the plaintiff learnt of Leonard’s death, she took time off during one of

the days before his burial and went to Leonard's place of employment. During the proceedings before the Senior Chief and elders, the plaintiff was questioned about that visit and she responded as under:

'Elder: when you had gone to Nyati House, what was your main purpose?

Answer: Anything related or belonging to the late Njonge.

Elder: What made this matter be referred to the Chief?

Answer: Nothing was wrong. It was only the Chief's recommendation that was required.'

It seems clear from the elaborate inquiry the Limuru Senior Chief instituted with the assistance of elders, whom I take to have been local, that the Chief entertained doubts about the plaintiff's claim to have been married to Leonard, and the proceedings there show that the plaintiff did not satisfy the Senior Chief and the local elders that she was married to Leonard. It is to be recalled in this regard that she was, *inter alia*, asked at the Senior Chief's proceedings if the Kikuyu ceremony called *Ngurario* had been performed and her answer was that no such ceremony had been performed. She added, however, that despite the various anomalies outlined above regarding her status vis-à-vis Leonard, she nevertheless '... found out (during her visit to Nyati House) that me and my children had been given the (Will) to inherit my late husband.' She said she was then referred to the area chief to get a letter confirming she was married to Leonard, only to be subjected to an inquiry before the Senior Chief and elders who concluded she was not married to Leonard. She has asked the court to disregard the verdict/finding of the Senior Chief and local elders and find that her reported association with Leonard amounted to marriage, through long cohabitation.

In the plaintiff's attempt to get from the court a pronouncement of marriage, the plaintiff testified on her own behalf and called 4 witnesses to support her case. One was her own son, Patrick Kariuki (P.W.2). The purport of his evidence was that he knew Leonard as his father. His principal source of the information leading him to that conclusion would be his mother the plaintiff – it is common knowledge that a child gets no opportunity to witness the act which results in his or her conception. Patrick Kariuki sat in court while his mother was testifying and heard her evidence. There is no valid explanation for this, it is suspicious and I ignore the evidence given by Patrick Kariuki.

The third plaintiff's witness was James Kamau Mungai (P.W.3). He said he was Leonard's cousin and this was acknowledged by the 2nd defendant. P.W.3 alluded to a visit he said he made to his aunt, Leonard's mother at Nyarariga in 1998 when she was ailing. He said the plaintiff was at the home cooking (presumably in the kitchen) and that Leonard's mother told him in the sitting room, in the plaintiff's absence, that the plaintiff was Leonard's wife; and that Kariuki, who was looking after cows, was called in to greet him and that Leonard's mother described Kariuki as Leonard's son. I pause here to observe that if the visit alluded to took place, it is not clear to the court why Leonard's mother would introduce the plaintiff to P.W.3 in the plaintiff's absence. P.W.3's evidence was apparently called to corroborate the plaintiff's evidence. As the plaintiff herself gave no evidence of the said visit, there was no evidence to corroborate.

P.W.3 also talked of having met the plaintiff at Leonard's mother's funeral and later at Leonard's own funeral. It is common ground that the plaintiff was at Leonard's funeral. That is where she staked her claim of having been Leonard's wife, through long cohabitation.

Although the 2nd defendant said he met the plaintiff for the first time at the Nyarariga home in 1999, he also acknowledged that before that year he was not physically resident there but only visited the home from time to time. It seems possible, therefore, for the plaintiff to have visited the Nyarariga home on a previous occasion but whether any such visit would establish long cohabitation between the plaintiff and Leonard would depend on the existence or otherwise of other evidence relating to the cohabitation alluded to by the plaintiff. The onus of establishing long cohabitation, which is a question of fact, lies on the plaintiff, on a balance of probabilities.

The fourth plaintiff's witness was Moses Njunge Kiratu (P.W.4). He described himself as being of the same clan and family with Leonard, who was the 2nd defendant's brother. P.W.4 said that in 1974 he was doing business and staying in Mombasa; that the plaintiff visited Leonard in Mombasa; and that Leonard took the plaintiff to where P.W.4 was staying and introduced her as his wife. I note in this connection that the plaintiff herself told the court that although she first met Leonard in 1974, she did not start cohabiting with him until 1976. I cannot therefore, understand how Leonard would have introduced the plaintiff as his wife in 1974!

The last plaintiff's witness was Mohamed D. Jillo (P.W.5). He told the court that he worked at Nyati House, Nairobi with Leonard and that following a certain written request from Mary Wangari & Co. Advocates of Nairobi, he wrote to the said Advocates to the effect that records held at the National Security Intelligence Service office showed that Leonard had given the following as his next of kin: Anne Wanjiru Njunge – Spouse; Elsie Nyawira Njunge – Daughter; Patrick Kariuki Njunge – Son; Simon Ndiritu Njunge – Son; and Grace Wairimu Njunge – Daughter. The letter which purportedly prompted P.W.5. to examine Leonard's employment records and from which he said he extracted the above information was not produced, neither were the records themselves produced for scrutiny. Did Leonard appoint his supposed next of kin through one instrument or several instruments? When was/were the instrument/instruments executed and in what circumstances? Such important questions in the proof process were left to speculation.

The plaintiff told the initial trial Judge that in 1998 she was allocated a *shamba* by Leonard's father, Wilfred Gathiomi Njunge to cultivate. In this regard, it is to be recalled that the 2nd defendant testified that Wilfred Gathiomi Njunge died on 27.08.93. I have no reason to doubt that Wilfred Gathiomi Njunge died in 1993 as stated by the 2nd defendant, about whom I had made a marginal note describing him as a 'very calm man'. Wilfred could not, in the circumstances, have allocated the plaintiff any *shamba* in 1998!

Two elements of cohabitation seem central for purposes of drawing the conclusion of presumption of marriage: Longevity and repute that the cohabitees or cohabitants have demonstrated by their mode of life that their association does, to all intents and purposes, amount to a marriage. The production of children is a relevant factor to be taken into account but, as Nyarangi, JA (as he then was) observed in Mary Njoki's case (*supra*), the presence of children is only one of the factors to be considered in favour of presumption of marriage. It is not of itself sufficient to establish the existence of marriage or cohabitation. Indeed in this day and age where medical science has advanced to the level of being able to facilitate conception of test-tube babies, the mere presence of children does not by itself necessarily establish that the biological father and mother have cohabited.

What is cohabitation in law? The Oxford Dictionary of Law defines cohabitation, *inter alia*, as:

'Living together as husband and wife. Married persons generally have a right to expect their spouses to live with them. Unmarried people living together as husband and wife (cohabitants) do not usually have the status of a married couple.'

Baron's Dictionary of Legal Terms (2nd Edition) defines cohabitation as:

- 1. the act of living together; often statutorily expanded to include living together publicly, as husband and wife;**
- 2. having sexual intercourse.'**

The element of cohabitants living together publicly is instructive vis-à-vis presumption of marriage.

To the best of my knowledge, each organized society has its recognized formalities or requirements, guided by commonly held and shared values of the society, which lead to the formation and recognition of a valid marriage. When such requirements are not fulfilled, the questioned association fails to gain

social validation for purposes of reaping benefits that would normally accrue to associations that are socially accepted as constituting marriage. Those who choose to disregard the societal norms deemed to build up to the institution of marriage, which is essentially a sociological outfit, do so at the risk of foregoing social validation of their association and of losing the benefits which go with associations or unions recognized as such.

To sum up, the following emergent key issues are highlighted:-

Ø The plaintiff maintained that she and Leonard lived together for 24 years, ie from 1976-2000, as man and wife and that they were recognized as such by right-thinking members of the public. Who are those members of the public?

Ø The plaintiff acknowledged that she and Leonard never worked at the same station and that due to demands of work and frequent transfers, the two were not able to live together. It is noteworthy that both worked for the Government, the plaintiff as a Nurse and Leonard as an Intelligence Officer rising to the high level of Senior Assistant Commissioner of Police. Yet there is no evidence of any attempt by them to get posted to one station or even district – not even once. Did they seriously desire to live together?

Ø The plaintiff said she took her identity card in 1996 when she was living with Leonard, yet she used her maiden name allegedly because Leonard refused to allow her to use his name. What is the import of this vis-à-vis Leonard's attitude towards the plaintiff?

Ø The plaintiff said Leonard did not tell her to name the children after his parents and that he gave her no reason. A diligent cohabitant with an eye on being recognized as a spouse would be expected to ask questions about the other cohabitant's intentions. The plaintiff apparently asked no questions.

Ø The plaintiff said that although she and Leonard visited each other at times, either during leave or week-ends, they were nevertheless considered man and wife at both their respective places of work. But there is evidence that at the plaintiff's place of work she described herself as single. And her lawyer submitted that such things happened because of the hustle involved in changing one's status. My response is that those who choose to indulge in such indolence should be prepared to pay the price.

Ø The plaintiff said she lived at Nyarariga for 7 months from August, 1999 – March, 2000. In this connection, I note that she acknowledged that the elders at the Limuru Senior Chief's proceedings were from both sides, i.e. her side and the side of the defendants. Yet there was no single elder or neighbour, who could vouch for the plaintiff's reported 7 months stay during which she said she cultivated the *shamba* given to her by Wilfred.

Ø The plaintiff was asked about plot No.743, Gilgil and she said Leonard bought it in his sole name while the two were living together and that she made no contribution towards the purchase price. Yet she was working. Why did she not make a contribution, was there a problem between the two?

Ø The plaintiff said she informed Leonard about the threats she said the 1st defendant made against her but that Leonard never took any steps to reinstate her and her children to the Nyarariga family home, and added that Leonard found she was comfortable at her Tigoni hospital flat.

Ø There is evidence from the 2nd defendant that between 1997 and the time of his death in 2000 Leonard lived at Nairobi Kahawa West with Nancy Nyokabi. The plaintiff acknowledged that she never bothered to find out after learning of Leonard's death whether there were rent arrears for the house he was living in and her (plaintiff's) explanation was that she did not bother because Leonard was living with another woman like a wife, who had the responsibility to pay the rents. At least those 3 years of life Leonard's cannot be said to have been years of cohabitation between the plaintiff and Leonard.

Ø The plaintiff acknowledged that she and Leonard did not have any ceremony in church; no steps under Kikuyu customary marriage; parents of Leonard have never gone to her parents' home and the two sets of parents have never met each other or knew each other, ie they were total strangers.

Ø While P.W.4 said Leonard introduced the plaintiff to him as a wife in 1974, the plaintiff herself testified that her cohabitation with Leonard did not start until 1976. On the other hand, the 2nd defendant testified that as late as 1999 Leonard introduced the plaintiff to him as a friend. How could Leonard have introduced the plaintiff as a wife before the purported cohabitation?

Ø The evidence on record points to the alleged introduction of the plaintiff as a wife having been done to a select few. This raises the question: Why?

Ø According to the 2nd defendant, the plaintiff went to the rural home of Leonard's parents at Nyarariga in Limuru on the 5th or 6th day after Leonard's death. Yet the plaintiff was staying at Tigoni sub-District Hospital within Kenya. Why the delay? Such are hardly the actions of a cohabitant.

Ø With regard to the plaintiff's complaint of having been threatened with a *panga* at Nyarariga home by the 1st defendant on 25.03.2000, the 2nd defendant retorted that such an incident could not have happened without him knowing about it as he was living in the same compound and that no such incident occurred. In this connection, the 2nd defendant testified that he has been living at his late parents' Nyarariga home since around mid – 1999, which evidence I accept.

Ø Regarding the plaintiffs' claim that she lived at Leonard's parents' Nyarariga home with her children for 7 months, if true, the elders who participated in the proceedings at the Limuru Senior Chief's office were likely to have known about her presence there but apparently they did not.

Ø The 2nd defendant said the Wilfred Gathiomi Njunge's family had nothing to gain by rejecting the plaintiff if she was Leonard's wife, pointing out that there are many neighbours at the Wilfred Gathiomi Njunge's home and that if the plaintiff was known there as Leonard's wife, it should not have been too difficult for her to find and bring at least one neighbour to court and give evidence in support of her case. No neighbour was brought.

This case has facts peculiar to itself and different from the cases cited in support of the plaintiff's case. The central issue is not that of mere absence of fulfillment of requisite formalities to constitute a marriage known to the law but also that no credible evidence was tendered to establish the long cohabitation claimed, which is what would have enabled the plaintiff's claim to stand.

The upshot is that the plaintiff's action fails and I make the following final orders:-

- a) Prayer 1 in the originating summons dated 20.01.03 and filed on 13.02.03 is hereby dismissed.
- b) I make no orders as to costs.

Orders accordingly.

Delivered at Nairobi this 20th day of April, 2007.

B.P. KUBO

JUDGE