



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1056 of 2005

LUCY WAMBUI MAINA.....PLAINTIFF

VERSUS

DICKSON MUHIA MUTTY & 2 OTHERS.....DEFENDANTS

JUDGMENT

The plaintiff **LUCY WAMBUI MAINA** filed a plaint through her counsel Biwott Korir & Company Advocates on 26th August 2005. The defendants were named as **DICKSON MUHIA MUTTY**, **SAMUEL KUNGU MUTTY** and **WILLIAM GITAU MUTTY**. In the plaint, the plaintiff averred that she was the lawful wife of **STEPHEN MWANGI MUTTY**, now deceased and the defendants are the brothers of the deceased. It was averred that the deceased died on 22nd August 2005 at PCEA Kikuyu hospital where his remains were pending burial. It also averred that on 23rd August 2005, the defendants physically ejected the plaintiff and her siblings from her house and expressly intimated that they would exclude the plaintiff from burial arrangements, despite the plaintiff having been residing together with the deceased at the time of his passing and being the plaintiff's lawfully wedded wife. It was also averred that the actions of the defendants more irregular and unlawful as the deceased had been married to the plaintiff in 1998, having performed all requisite ceremonies under Agikuyu customary law. The plaintiff therefore had every right to participate and personally oversee and attend the interring ceremony of the deceased. The plaintiff sought the following orders –

- (a) That a permanent injunction (do issue) restraining the defendants, by themselves, their agents, servants and/or any other person authorized or purporting to be authorized by them from removing for burial the remains of **STEPHEN MWANGI MUTTY** (deceased) from PCEA Kikuyu hospital mortuary, and/or interring the same.
- (b) Costs of this suit.
- (c) Any other relief this Honourable Court may deem fit and just.

The plaintiff later on 16th September 2005 filed an amended plaint. It was averred that the deceased and plaintiff were living as husband and wife since 2001 and that the two were presumed to be married under law. In the amended plaint there was an additional order sought, that –

“(a) (i) The body of Stephen Mwangi Mutty be released to Lucy Wambui Maina for burial”.

The defendants filed a joint defence on 18th November 2005 through their counsel M/s Ndumu Kimani & Company Advocates. They denied that the plaintiff was the wife of **STEPHEN MWANGI MUTTY**.

They admitted being brothers of the deceased but denied that on 23.8.2005 they physically ejected the plaintiff and her siblings from her house. They also denied that they intimidated the plaintiff or that they would exclude the plaintiff from burial arrangements as under Kikuyu customs, burial was a public affair. They averred that the plaintiff attempted to take possession and control of the house and assets of the deceased. They also averred that the plaintiff could not take a pivotal role in the burial arrangements of the deceased, but could participate as a friend. They denied that the plaintiff had resided with the deceased at the time of death and also denied that the plaintiff was lawfully married to the deceased, as the Kikuyu customary ceremonies had not been performed.

The defendants also filed an amended defence and counter claim on 8.2.2007, through their advocates Kinoti & Kibe & Company Advocates. In their amended defence and counterclaim they admitted that the plaintiff resided together with the deceased at the time of death of the deceased but averred that the plaintiff was living with the deceased who died of AIDS as a friend and domestic assistant from about 2004. They also averred that the plaintiff was married to one STEPHEN NJOROGE KANYONI under statute until 22nd February 2003 when the said marriage was dissolved in Thika Divorce Cause No. 7 of 2002, therefore the plaintiff had no capacity to customarily marry the deceased in 1998. They also averred that the object of the plaintiff's suit was to prevent the burial of the deceased without lawful cause or justification and retain possession of the deceased's house and control his estate. They also averred that the defendants jointly and severally had custody of the deceased's daughter aged 10 years MERCY WAMBUI MWANGI. They further averred that contrary to what the plaintiff averred in the plaint paragraph 11, there were proceedings relating to the same subject matter in Githunguri SRMCC No. 113 of 2005 DICKSON MUHIA JEREMIAH & ANOTHER – vs – LUCY WAMBUI MAINA, which had however been withdrawn by consent on 20.9.2005.

In the counterclaim the defendants claimed that the plaintiff unlawfully instructed Kikuyu PCEA hospital not to release the body of the deceased which had made the defendants to incur mortuary charges which by 5th December 2005 had been Kshs.80,000/=, which amount the defendants claimed from the plaintiff. They also averred that the defendants as the adult next of kin of the deceased had a right to bury him on the family land Land Parcel No. Githunguri/Nyaga/194 where his late wife Elizabeth Mutty Wahu was also buried in 2001.

The defendants asked that the plaintiff suit be dismissed and/or struck out with costs and further that they further prayed for judgment against the plaintiff for -

- (a) a mandatory injunction to be issued to allow the defendants to take the remains of Stephen Mwangi Mutty and inter the body at Githunguri in Land Parcel No. Githunguri/Nyaga/194.
- (b) An injunction to restrain the plaintiff, her servants and agents from interfering in any manner whatsoever in the funeral arrangements and burial of the deceased save attending the said burial.
- (c) Special damages in the sum of Kshs.80,000/=.
- (d) The plaintiff be ordered to pay further expenses for preservation of the deceased up and till his remains are interred.
- (e) Interest on the above at the rate of 20 per cent from the date of filing this suit till payment in full.
- (f) Costs of the suit.
- (g) Such further orders as the court may deem fit and just to grant.

The plaintiff filed a reply to the amended defence and defence to the counterclaim. She averred in the reply to amended defence that she had full control of her late husband's estate when he died with the consent of the deceased, and that she had the custody control and care of MERCY till after death of the deceased, when the said child of 10 years of age was forcefully abducted by the defendants. She also averred that the suit at Githunguri was filed by the defendants after she had filed this suit. In the defence

to the counterclaim, the plaintiff reiterated that she was the lawful wife of the deceased and averred that as the lawful wife she was entitled to inter the deceased in the family land parcel No. Githunguri/Nyaga/194 as she had superior rights over the defendants. She asked the court to strike out the defendant's amended defence and counterclaim with costs and enter judgment for her in terms of the amended plaint.

Before the hearing of the case, injunction orders were given by the High Court restraining the defendants from removing the deceased's body from PCEA Kikuyu hospital mortuary pending the hearing and determination of the case.

The plaintiff testified in the case and called five (5) other witnesses. The plaintiff testified as PW1. It was her evidence that she knew the three defendants as brothers of her husband Stephen Mwangi Mutty. She stated that she lived with Stephen Mwangi Mutty (now deceased) since the year 2000, when they lived at Kitengela. In December 2001 the deceased took her to his house at Nyaga Location in Githunguri. The deceased was a police officer, an officer commanding police station. In January 2002 the deceased was posted to Rongai in Nakuru and left her at Githunguri with five children, four of whom she bore before getting married to the deceased and one child of the deceased who was born before they got married. It was her testimony that she was the lawful wife of the deceased under Kikuyu customs as in the year 2002 she went with the deceased to her parents. She was previously married to a man called Steven Njoroge. However, they divorced vide Thika Divorce Cause No. 7 of 2002. It was after divorce that I underwent the customary marriage with the deceased. The deceased died on 22.8.2005 and was continuously sick from April 2005. She also testified that she paid Kshs.10,000/= for the admission to hospital before the deceased died. In the morning of 22.8.2005 at about 6.00 a.m. she was called on the phone and informed that her husband had died. She immediately sent for someone to tell Samuel Kungu and Kirutu. They went to the hospital with Samuel Kungu, William Gitau, Anne Wanjiku and Kirutu. At the hospital they found that Dickson Muhia had already gone there and made arrangements to take the body. When she enquired about that, they said that they should go home. While at home, her brothers in law went into the house of Kungu and came to her house after 30 minutes and demanded the identity cards of the deceased and threatened her while banging tables. She had to sneak out of the back door and report to the police. When she came back with the police, she found that they had broken the bedroom door and removed all documents. The police advised her to go to court, that's why he filed this case.

It was her evidence that since December 2001, she lived at Githunguri in the house of the deceased as his wife. The defendants were their neighbours at Githunguri. When her step mother died in 2004 they all went for the funeral at Nyahururu and photographs were taken and speeches given. Her life with her brothers in law (the defendants) was cordial until the death of the deceased. It was her evidence that in 2004 they went to her father's home at Nyahururu and paid bride price and slaughtered a goat to signify the customary Kikuyu marriage between her and her late husband. Photographs of the occasion were taken, and her brothers in law attended the occasion. It was also her testimony that there were social occasions such as birthday parties in which the defendants attended and photographs of such occasions were taken. It was also her testimony that the case that was filed by the defendants at Githunguri against her was filed after the filing of this case. She wanted the court to order that she buries her husband and give him his due respect, as a wife and that she can bury the deceased together with the defendants provided she is recognized as a wife. To show that she was a wife of the deceased, she played in court video tapes of the burial of her step mother where the 2nd defendant gave a speech as an in-law.

In cross-examination she stated that she was married in 1979 to Stephen Njoroge which marriage was converted to a statutory marriage in 1984 and had four (4) children of that marriage. That they lived with the deceased since 2000, initially as friends but bride price was paid in 2004. However, she was treated by the deceased as a wife since 2001 because she had gone with the deceased to her parents at Nairobi. It was her testimony that her father and mother were alive. She did not know when the father of the deceased died, however, she was aware that a brother of his father in law called KERUTU was alive. When they went to Nyahururu to pay bride price, KERUTU also went there. When they went to pay dowry in 2004 all the brothers of the deceased were present together with friends they went there in two Nissan vehicles. She did not know the chairman of Mutty's family. Though they took photographs of the occasion, those photographs were either stolen or destroyed. She contended that she went to live at

Githunguri in December 2001. The identity cards of her biological children were in the name of their biological father, however, the deceased used to take care of them. The funeral notice in the newspapers mentioned five (5) children including Mercy Wambui who was the biological child of the deceased. She denied being out to deceive the public she stated that no Kikuyu custom was conducted for adoption of her four children by the deceased because some Kikuyu customs had been overtaken by Christianity. There was also no legal adoption.

She contended that in March 2004 when they went to Nyahururu on the side of the deceased there was Dickson Muhia, William Gitau, Samuel Kungu and David Kirutu a cousin of the deceased and Mzee Kirutu who was the uncle of the deceased. This was the time of reporting that they were going to send bride price. The next journey was in May 2004. It involved all the people who went in March. This time bride price was paid and a goat was slaughtered. People from the deceased's family and his father's family entered into a house but she remained outside. Her brothers entered that house, and her father did not call any other relatives. She contended that Kshs.100,000/= was paid, but she did not know the person who handed over the money, as she did not witness the event. She did not know whether anything was reduced to writing. She contended that when one lives with someone under Kikuyu customs, a marriage could be presumed. She contended that dowry was paid for her in May 2004 while her marriage to the previous husband was dissolved on 22.10.2002. However, she did not know the difference between separation and divorce and admitted that decree nisi was issued on 17.7.2003 and was to be made absolute after 4 months.

She contended that she was a businesswoman while the deceased was employed with the police department. She stated that she went to Githunguri 4 months after the death of the deceased's first wife. She conceded that letters of administration to the estate of the late wife of the deceased were in the name of the deceased and Kungu and stated that she was the one who advised the deceased to join Kungu as co-administrator. She denied that it was because she knew that deceased was very sick that made her move to Githunguri in order to claim from the estate.

She stated that she did not know the details of a Kikuyu customary burial that brothers are the ones to bury a brother, but she wanted to bury her husband as a wife, where his late wife was buried. That land belonged to the father of the deceased.

She admitted that there was a pending case in which she was charged with attempting to transfer a vehicle of the deceased. She denied having sold some cows belonging to the deceased. She stated that she came to court and obtained an order stopping the burial of the deceased. She was aware that hospital charges were to be paid and that she had not paid any of those charges; and would pay when given the body. She did not know that the brothers of the deceased were paying the charges. She contended that the court would determine who would pay the charges.

She also stated that at the burial of her stepmother Samuel Kungu was wearing a pastor's collar. He was asked to talk and introduced those who had come with him. She did not know what he meant when he said in the middle there was a sin.

In re-examination she stated that bride price was paid in 2004, not 2002. She stated that there were six goats and one tin of honey. On the alleged forgery for transfer of the motor vehicle she stated that the allegation was not true, as her brothers in law had taken all documents. She also stated that her brothers in law had gone to Githunguri court and got orders to prevent her from taking the body. She stated that the late addressed her as wife since 2001 and introduced her to his relatives as a wife.

DAVID MBUGUA KIRONJI alias KIRUTU testified as PW2. It was his evidence that he is a cousin of the deceased. He testified that the plaintiff was the wife of the deceased though the deceased had a previous wife. According to his evidence the plaintiff was brought by the deceased to Githunguri in December 2001.

In February 2004 the deceased said that he wanted to go to the father of the plaintiff to pay dowry. They went there with other members of the deceased's family including brothers and they were told that

they would not be rejected. Then the deceased decided that they go in March, and on 13.3.2004 they went to the parents of the plaintiff, almost the whole family – including the brothers of the deceased and deceased's younger uncle. It was his evidence that the deceased had Kshs.70,000/= and friends contributed Kshs.30,000/= at Naivasha before proceeding to Nyahururu. The money Kshs.100,000/= was given to GEOFFREY MUTTY. There was also honey and goats. They arrived, were welcomed at the home of the father of the plaintiff and had food. However, he did not get involved in the discussions on payment of bride price.

He testified that on 20.8.2005 he was telephoned by the plaintiff to go and take the deceased to Kikuyu hospital. He went there and together with others took the deceased to hospital. After about 2 days the plaintiff called him in the morning, and when they went to Kikuyu hospital he found that the deceased had died. It was his testimony that the plaintiff paid medical charges for the deceased's hospitalization and was issued with receipts. However, at the hospital after the deceased died, DICKSON stated that he wanted to transfer the body to a place that he did not disclose.

He also testified that he and the plaintiff used to manage a vehicle belonging to the deceased, and the plaintiff used the income to pay medical expenses for the deceased. After the deceased died DICKSON demanded for the money from the vehicle, and he gave the brothers of the deceased Kshs.8,000/= as he found that the situation was acrimonious. He stopped going to the homestead of the deceased and learnt later that the brothers of the deceased had chased away the plaintiff.

In -examination he stated that it was the father of the deceased who was related to his grandmother. He stated that his father was of another lineage from that of the deceased as Kikuyu customs follow the male lineage. That he went to Nyahururu as a friend not as a member of the family of the deceased (Kiberege family). He insisted that dowry for Lucy was paid in March 2004. He maintained that on 13.3.2004 they sent Kshs.100,000/= and 6 goats to the plaintiff's father. He denied the bride price is handed over by the clan of the bridegroom. He also stated that the current Kikuyu practice was that a wife decided where a husband was to be buried. However, he did not know the old Kikuyu traditions or customs on who made decisions on burials.

PW3 was FRANCIS GICHUHI KAMAU MAINA. He was a brother of the plaintiff and worked at University of Nairobi. It was his evidence that the deceased was married to his sister the plaintiff. That bride price was paid on 13.3.2004 and he was present. Six goats and a tin of honey were also given to his parents. The bride price was handed over to his father by one GEOFFREY NGIGE MUTTY. The family of the deceased also late attended the funeral of his step mother.

In cross-examination he stated that he had not visited his sister's homestead at Githunguri. He thought it was not strange that both he and his father had not visited his sister's homestead at Githunguri. He did not know that under Kikuyu customs payment of dowry was the last ceremony in a marriage, however, no elders were present when bride price was being paid for the plaintiff. The njohi ceremony was not conducted. He was aware that Lucy was previously married to Stephen Kanyoni. He stated that his father was currently a sick man. He would be surprised if the family of the deceased denied that Lucy was married to the deceased. He contended that under Kikuyu customs his sister (the plaintiff) had a right to bury her husband (the deceased). He did not know whether under Kikuyu customs a dead man is buried by his eldest son, or in absence of that son, by his brother.

In re-examination he stated that his father suffered a stroke and was bedridden.

PW4 was JANE WAIRIMU MUNENGE. She was a neighbour of the plaintiff at Githunguri kwa Michael. The plaintiff came to Githunguri in 2001. The witness also went to Nyahururu for the payment of bride price for the plaintiff. She was aware that the plaintiff wanted to bury the deceased on the farm of her late father. The defendants also wanted to bury the deceased on the same farm. It was her evidence that though she was married under Kikuyu customary law, her in laws only went to her father's home once and paid Kshs.50,000/=.

In cross-examination she stated that she did not have any relations with the Kiberege family, but was a

friend of the plaintiff. She was merely told by the plaintiff on the date of visit to Nyahururu that the bride price available was Kshs.70,000/=. The witness contributed Kshs.1,000/=. In her view the plaintiff should bury the deceased. It was also her contention that the Christianity some ceremonies such as Ngurario were sometimes skipped in marriages. PW5 was FRANCIS NJAU MBUGUA. It was his evidence that he took video photographs and recorded a video tape for the burial of the plaintiff's step mother. Part of the video was placed in court where the 2nd defendant herein was recorded as giving a speech and stating that his brother got married in that family.

He stated in cross-examination that he did not have that video cassette in his custody, as it was kept by those who called him to testify in court.

PW6 was HENRY MWIKIA. It was his evidence that he was a friend of the deceased and the plaintiff. He attended the ceremony at Nyahururu where bride price was paid for the plaintiff. However, we could neither remember the date nor the amount paid.

In cross examination he stated that he came from a different family from that of the deceased. He stated that he was in the house at Nyahururu when bride price of Kshs.100,000/= was paid for the plaintiff.

The last witness for the plaintiff was MICHAEL MWENDA MBUGUA (PW7). It was his testimony that he was the chief of Ngewa location confirmed as Chief recently but an assistant chief since 1997. It was his evidence that he knew the deceased, the brothers of the deceased and the family of the deceased. In cross-examination he stated that after the death of the deceased GEOFFREY NGIGE, DICKSON GITAU and MUHIA went to him to write for them a letter that the plaintiff was not a wife of the deceased. However, on 25.10.2005 he wrote a letter on instructions of the District Officer that the plaintiff was the wife of the deceased. He did not confirm whether the plaintiff had a marriage certificate.

In re-examination he stated that he knew that the deceased was married to another wife and therefore the letter by his predecessor chief dated 29.01.2001 could have reflected the true position at the time.

That was the plaintiff's case. Six witnesses testified in the defence case.

DW1 was SAMUEL KUNGU KIBERENGE. It was his evidence that he was a preacherman with African Independent Pentecostal Church of Africa. The deceased was his elder brother. It was her evidence that though the plaintiff has brought this suit claiming to be the wife of the deceased, she was merely a business partner or associate of the deceased from 2000. He testified that the plaintiff was married to another man, they have 4 children who were now in London, and that marriage had not been dissolved, as they have a pending divorce case.

The deceased had a wife called ELIZABETH who had died. He however met the plaintiff with the deceased at Kamukunji police station in 2000 even before ELIZABETH died, and the deceased informed him that he was doing business of selling telephone sets with the plaintiff. Because of the relationship between the deceased and the plaintiff ELIZABETH who was married to the deceased in church on 8.4.1978 made complaints, but she died in 2001 before the issue was resolved. ELIZABETH and the deceased had only one child MERCY WAMBUI MWANGI, who was put under the care and custody of the witness by the deceased. He contended that though the plaintiff claimed to have been staying at Githunguri since 2001 his memory was that she started staying at Githunguri Nyaga in February 2005, when the deceased came home after retiring. It was also his evidence that other than having left several land assets, the deceased left behind cows some of which were sold by the plaintiff. The vehicle KAR 185 J was bought with funds from the estate of the late wife of the deceased, which were to be held in trust for her daughter Wamboi. He contended that at the time of alleged marriage of the plaintiff to the deceased, she already had adult children, and a woman with adult children cannot be married under Kikuyu customary law. He contended also that since the previous marriage of the plaintiff was initially a customary marriage the bride price had to be refunded before the plaintiff could re-marry. That dowry has not been refunded so the plaintiff could not remarry. He dismissed the affidavit of the applicant sworn on 25.8.2005 as containing falsehoods on the alleged marriage of the plaintiff to the deceased in 1998. He contended that all the children of the plaintiff were registered in the name of their actual father who is not

the deceased. It was his evidence that he was not consulted in making the notice of the death of the deceased in the newspapers. That notice erroneously stated that the deceased had five (5) children. The plaintiff was the one who first stopped them from removing the body of the deceased from hospital which had made the brothers of the deceased pay large amounts of money, which they claim to be refunded from the plaintiff. He remembered going to Nyahururu on 13.3.2004 where the deceased wanted the father of the plaintiff to be asked whether he could marry the plaintiff. However, the family did not have prior meetings on the issue. Secondly, when they reached there and discussed the issue, the father of the plaintiff refused to marry Lucy to the deceased as he had not refunded the dowry paid by the estranged husband of the plaintiff. The father of the plaintiff did not call his relatives because he did not intend to marry the plaintiff to the deceased. As a Kikuyu customary marriage required the presence of elders, since no elders attended the function at Nyahururu, there was no marriage celebrated. He denied that Kshs.100,000/= was paid. He accepted that in the video recoding that was shown in court, that he indeed referred to the plaintiff as wife of the deceased. However, what he meant was that the plaintiff was a "come we stay wife" not a real wife. Therefore the plaintiff was not a wife of the deceased. He could not accept that his late brother be buried by a come and stay wife. Under Kikuyu customary law a man was buried by either or son, or if there is no son by his brothers. Since the deceased did not leave a will, he should be buried under Kikuyu customary law.

In cross-examination he stated that on 13.3.2004, when they went to Nyahururu, they left home together with the plaintiff who had come there with Kironji. He admitted that at Nyahururu they discussed about a marriage proposal by his brother the deceased. He stated however that as relatives of the deceased they did not like the plaintiff. He stated that on 13.3.2004 the plaintiff was actually free to marry, she had no inhibition. When they wanted to take the body of the deceased on 23.8.2005 they did not tell the plaintiff because they did not recognize her as wife. He admitted that the reference in the affidavit of the plaintiff that she was married to the deceased in 1998 was corrected to read 2001. He stated that during the lifetime of the deceased he did not pay for any expenses of the child WAMBOI. Up to September 2005 the child WAMBOI was at ARUDUS ACADEMY before she was transferred to another school in Naivasha. He admitted that he did not produce any documents for his assertion that he had joint bank accounts with the deceased. He contended that the plaintiff used to come at home at Githunguri intermittently to see the deceased from February 2005. However, he did not know where the deceased lived. He did not have any business relationship with the deceased. He denied that the plaintiff was farming at Githunguri.

In re-examination he stated that between 2001 and 2005 the plaintiff used to go to Githunguri from time to time. She had a mobile telephone shop at Githunguri.

DW2 was DICKSON MUHIA. It is his evidence that he has been a businessman at Maralal since 1963. He comes to Githunguri only when there are family functions. He knew his brother the deceased to have one wife who is dead. The plaintiff is not the deceased's wife.

He could remember that in April 2004 he went to Naivasha and then to Nyahururu (Rwathia) together with the deceased, the plaintiff and other relatives. Their brother the deceased did not disclose the purpose of the mission before the trip. They ate and celebrated at a hall and went into the main house of the father of the plaintiff. In the house Stephen Kirutu told the father of the plaintiff that they had come for friendship with the plaintiff. The father of the plaintiff declined as he had already received dowry for the plaintiff which he had not refunded. He stated that no money was paid to the father of the plaintiff, and no goats were given as their visit was the first visit out of the traditional four visits and in any event the father of the plaintiff had declined the request. He testified that he had paid Kshs.30,000/= as part of the preservation of the deceased's body at Kikuyu hospital. He maintained that a woman could not bury a deceased man under Kikuyu Customs as she cannot dress the deceased. He stated that he was asking for costs.

In cross-examination he stated that he had a close relationship with his late brother. He stated that they went and filed proceedings in the Githunguri court after the plaintiff served them with summons. He stated that they started staying with the child WAMBOI in August when the deceased got very sick. He stated that the deceased told him at Naivasha in 2004 that he wanted to marry the plaintiff. He was

opposed to the plaintiff burying the deceased on their late father's land.

In re-examination he stated that his brother SAMUEL only took care of the child MERCY because he is far from Githunguri. He maintained that no Kikuyu customary marriage was conducted at Nyahururu.

DW 3 was WILLIAM GITAU KIBERENGE. It was his evidence that he was a brother of the deceased. That he had seen the plaintiff with the deceased first at Kamukunji police station when the deceased was OCS there. He saw the plaintiff at the deceased's house at Githunguri in 2003. The plaintiff used to visit Githunguri from time to time. He could remember the trip to Nyahururu on 3.4.2004. They did not contribute money but he went to Nyahururu to the home of the plaintiff's father where they asked for the plaintiff. However, the father of the plaintiff declined and stated that the plaintiff was already married to one STEPHEN KANYONI and had children. The father of the plaintiff stated that he could not give the plaintiff in marriage, as he still had the bride price of KANYONI.

It was his evidence that no bride price of Kshs.100,000/= was paid and no goats were slaughtered. The four stages of ceremonies for a Kikuyu customary marriage were not conducted, so the plaintiff cannot claim to be the wife of the deceased. He testified that he had been charged in two criminal cases recently at Githunguri. One of those cases was finalized and he was discharged. The second case was still pending.

It was his evidence that they could not allow the plaintiff to bury the deceased at his father's farm. In any case, under Kikuyu customs a male deceased person was either buried by his eldest son or his brothers. However, as brothers of the deceased they would bury the deceased at their father's farm.

In cross-examination, he stated that he met the plaintiff at Kamukunji in 1998. He also met her later at Kitengela when the deceased was working at Kitengela. That was 2000 and that was the time that the deceased informed him that the plaintiff was his concubine. He stated that when the deceased died the plaintiff was staying at Nairobi. He denied that the plaintiff was living at Githunguri when the deceased died. He admitted that the deceased lived with the deceased from the time that he retired. He contended that he did not know the purpose of the trip to Nyahururu. He stated that after the death of the deceased, they locked the plaintiff out of the house of the deceased because they did not know her. He stated that under Kikuyu customs a wife also went to the mortuary and participated in the burial, if there was agreement with the brothers. He admitted going to Nyahururu for the burial of the plaintiff's step mother.

DW4 was KIRUTU NJOROGE. He was an uncle of the deceased. He remembers going to Nyahururu to the home of the father of the plaintiff with the deceased and brothers of the deceased. The deceased told him to inform the father of the plaintiff that he wanted to marry the plaintiff. As the uncle of the deceased, he told the father of the plaintiff in a house that the deceased wanted to marry the plaintiff. However, the father of the plaintiff declined saying that he had already given the plaintiff in marriage and would not give her out in marriage twice. They went away and no bride price was paid, and no other Kikuyu customary marriage ceremonies were conducted. He contended that the plaintiff was not the wife of the deceased. In any case, under Kikuyu customs it was brothers who were entitled to bury a deceased man.

In cross-examination he stated that he was not told by the deceased before hand the purpose for the visit to Nyahururu. He also stated that a woman can be regarded as a wife even if only some of the Kikuyu marriage traditions have been complied with. Merely living together could not make people become married to each other.

DW 5 was JOEL GICHARU MUNGAI. He worked at Kikuyu PCEA hospital as acting administrator. It was his evidence that mortuary charges were Kshs.800/= per day for the first 7 days. Thereafter the charges were Kshs.1050/= per day. He was aware that the body of STEPHEN MUTTY was in the hospital mortuary since he died in August 2005. They did not get a court order but they received communication from the wife and brothers not to release the body. The accumulated bills had reached Kshs.479,346/= but some had been paid by WILLIAM GITAU leaving a balance then of Kshs.68,250/=.

In cross-examination he stated that the hospitals invoicing system showed the name of the patient or the body, not the payer. However, the admission form and the name of the person who brought the patient could be available. He stated that he had met the brothers of the deceased a number of times.

In re-examination he stated that he had not seen a woman by the name LUCY MAINA.

DW6 was ANNE WANJIRU NJOROGE. It was her evidence that she was the wife of the eldest brother of the deceased. Under Kikuyu customs if there was to be a marriage of the deceased she could know and participate in the arrangements. She never knew of a marriage function at Nyahururu nor were there any discussions on a marriage between the deceased and the plaintiff. What she knew was that the deceased was married to a wife who had predeceased him and they had one child MERCY.

In cross-examination she stated that she had been seeing the plaintiff at Githugnri Nyaga – kwa Michael, but did not know where she lived. She did not know that the plaintiff used to live with the deceased at Githunguri since 2004. However, at one time the deceased went to her house with a child called ESTON MAINA, whom he said was a child of a friend. She contended that if bride price is paid one can be taken to be married, even if Ngurario is not performed. She herself converted her customary marriage to a Christian marriage before conducting ngurario.

That was the defence case. At the close of the evidence, parties counsel filed written submissions, which they highlighted in court. The plaintiff's counsel Mr. Misati highlighted that they had established the existence of a marriage on the balance of probabilities. He sought to rely on the case of **Yawe – vs – PUBLIC TRUSTEE**. He urged the court to find that the plaintiff was validly married to the deceased under Kikuyu customary law, or that there was a presumption of marriage. He asked for the prayers sought by the plaintiff for counsel the defendants highlighted that the existence of a marriage had not been proved on the balance of probabilities. He submitted that the defendants had proved their counterclaim for a mandatory injunction to bury the deceased.

Counsel contended that the plaintiff was not a personal representative under section 3 of the Law of Succession Act therefore had no obligation to bury the deceased. He submitted also that in the plaint, the plaintiff did not ask for declarations that she is married under Kikuyu customary law or a presumption of marriage. The court cannot therefore grant reliefs which were not prayed for.

He submitted that as per the decision in the OTIENO –vs- OUGO case, the customary law applicable in patrilineal societies, is that of the man.

The first issue that arises is whether the plaintiff herein is a wife of the deceased. The plaintiff claims to be a wife married to the deceased under Kikuyu customary law, alternatively, that there is a presumption of marriage as she had lived with the deceased as wife and husband for many years until his death. The defendant's counsel has argued that the existence of a marriage was not prayed for in the plaint and amended plaint. Therefore the court cannot decide on an unpleaded issue. That cannot be so. In the amended plaint there are specific paragraphs on the existence of a marriage. Also, though there is no prayer for such a declaration the evidence on both sides raises the issue predominantly, and I will have to decide on it. The defendants contest the existence of a marriage. They claim that no Kikuyu marriage ceremony was not conducted as the father of the plaintiff rejected the proposal as he had already married off the plaintiff to someone else and received bride price which he had not refunded. They also contend that the marriage between the plaintiff and a Mr. Kanyoni was subsisting to date, as bride price paid by him had not been refunded. Therefore technically, even today the plaintiff cannot be a wife of someone else.

There is no dispute that the deceased was married to another woman called ELIZABETH. There is no dispute that ELIZABETH died in about 2001. There is no dispute that there is only one child of that marriage called MERCY who is still a minor. There is no dispute that the plaintiff was married under statute to KANYONI and that the two had four children. There is no dispute that divorce proceedings in that marriage were filed and a decree for dissolution of marriage made. There is no dispute that the deceased has been living with or associating with the plaintiff even before his wife ELIZABETH died

and even before a decree for divorce was issued in the case between the plaintiff and KANYONI. There is no dispute that relatives of the deceased went to Nyahururu in 2004 to the home of the father of the plaintiff and asked for the plaintiff to marry the deceased.

On whether there was a Kikuyu customary marriage conducted, that there was bride price of Kshs.100,000/= paid to her father in 2004 at Nyahururu, it was her evidence that she did not go into the house where the handing over of that money was to take place. She was also not the one to give that money anyway. Most other witnesses who attended that ceremony state that the money might have been there but it was not given out because the father of the plaintiff refused. The defendants and their uncle DW4 KIRUTU were present. They gave reasons for that, which are based on Kikuyu customs. Only the brother of the plaintiff PW3, and PW6 a friend testified that bride price of Kshs.100,000/= was paid. All the defence witnesses who were present during the occasion stated that the proposal for marriage was rejected by the father of the plaintiff. I find the reasoning the defendants consistent with Kikuyu and African customs. The absence of elders from both side at that function, and absence of other relatives of the father of the plaintiff convinces me that no bride price was paid. Therefore it is my finding that no bride price was paid and no customary Kikuyu marriage was celebrated between the plaintiff and the deceased.

Did the presumption of marriage arise in the circumstances of this case?

Did the presumption of marriage arise in the circumstances of this case?

IN HORTENSIA WANJIKU YAWE –vs- PUBLIC TRUSTEE – Civil Appeal No. 13 of 1976, Mustafa JA held –

“Mr. Oluoch for the respondent reported by Mr. Kithyoma, for the Public Trustee, submitted in effect that as the marriage claimed was under customary law, the presumption would not apply. I do not agree. In the first place, no authority was cited to us that the presumption does not apply to customary law marriages and secondly, the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than a presumption arising out of long cohabitation and general repute that the parties must be married irrespective of the

The evidence both sides shows that the deceased had cohabited for a longtime possibly from 1998, but certainly from 2001. There is evidence that the deceased used to introduce the plaintiff as his wife. The defendants admit this. In 2004 the deceased took the defendants and their uncle KIRITY to the father of the plaintiff at Nyahururu to try to formalize cohabitation under Kikuyu customs, so as to be legally married under Kikuyu customs. The proposal was rejected by the father of the plaintiff. There is evidence that they were cohabiting together at Githunguri, when the deceased died. In my view, the presumption of marriage did arise in this case.

It is therefore my finding that at the time the deceased died in 2005, the plaintiff was his wife by way of presumption of marriage.

The next issue is whether the plaintiff is entitled to bury the deceased. I am told that under Kikuyu customary law, a man is usually buried by his elder son or his brothers. I was referred to Eugene Cotran’s Restatement of African Law, the case of OTIENO –vs- OUGO & ANOTHER [1987] KRL 407, and the case of NJOROGE –vs- NJOROGE & ANOTHER [2004] 1KLR 611.

It is clear that under Cotran’s Restatement of African Law, under Kikuyu customs a deceased man is buried by his eldest son, or his brother. In OTIENO –vs- OUGO & ANOTHER the Court of Appeal held, inter alia, that –

“(4) An African citizen of Kenya

to divest himself of the association with the tribe of his father if those customs are matrilineal. The

deceased having been born and bred a Luo, he remained a member of the Luo tribe and subject to the customary of the Luo people, which was patrilineal.

(6) (d) A widow has no right under custom to bury her husband and as she does not become the head of the family upon her husband's death."

In the more recent case of NJOROGE –vs- NJOROGE & ANOTHER, Ojwang Ag. J. held, inter alia, that –

"6. Kikuyu custom, the basis of which the applicant founded her claim to marital status, was precisely what could decidedly deny her claims to the body of the deceased. It was not contested that under Kikuyu customary law today, responsibility for the burial of a man falls in the first place on his eldest son and on the brother of the deceased."

I find that the deceased being a Kikuyu man, the Kikuyu customs on burial apply. Therefore the brothers of the deceased, who are represented by the defendants have a right to bury the deceased, as against the plaintiff. Of course the plaintiff can attend and participate in the burial of the deceased, but the responsibility is for the brothers of the deceased. I must state that succession entitlement and burial responsibilities are different matters.

The plaintiff has asked for an injunction to issue against defendants their servants, agents and other persons authorized by them from removing the remains of Stephen Mwangi Muttey (the deceased). In view of my decision above, this prayer of the plaintiff cannot succeed and I dismiss the same.

I will now turn to the counterclaim of the defendants. The defendants ask for several orders. In view of my decision above, prayer (a) and (b) of the amended defence and counterclaim have to be granted, and I grant the same.

Prayer (c) is for special damages of Kshs.80,000/= and prayer (d) is for further expenses of preservation of the deceased till his remains are interred. The evidence before me is that both the plaintiff and the defendants asked the PCEA Kikuyu hospital not to release the body to the other side. It was known that preservation costs would be incurred at the mortuary for preservation of the body.

I have been told that the defendants have paid mortuary charges. I was not shown any demand from the hospital indicating who is responsible for payment. I find no legal justification for granting those two prayers. If the defendants have chosen to pay those expenses, so be it. If there was an administrator for the estate, we would probably talk about whether the estate could meet the costs. For now, there does not appear to be any administrator. I decline to grant (c) and (d) of the counterclaim of the defendants.

The defendants have asked for interest at the rate of 20%. No basis has been laid in court for that prayer. I will not grant that prayer. I dismiss prayer(e) of the counterclaim.

Both the plaintiff and the defendants have asked for costs of the suit. Considering the family emotions and other circumstances in this matter, I will order that each party bear their respective costs of the suit.

Consequently, I allow the suit in part and the counterclaim in part and I declare and order as follows –

1. The plaintiff is not married to the deceased under Kikuyu customary law, but is the lawful wife of the deceased by presumption of marriage, and was such a wife when the deceased died.
2. The deceased subject to Kikuyu customary laws of burial and his son or brothers have a right to bury him, though the plaintiff as a wife can participate or attend the burial.
3. A mandatory injunction is hereby issued allowing the defendants to take the remains of Stephen Mwangi Mutt

4. y and inter alia the body at Githunguri land parcel No. Githunguri/Nyaga/194.

5. An injunction be and is hereby issued to restrain the plaintiff, her servants and agents from interfering in any manner whatsoever in the funeral arrangements and burial of the deceased save attending the said burial.

6. Each of the parties herein will bear their respective costs of these proceedings.

It is so ordered.

Dated and delivered at Nairobi this 3rd day of July 2007.

George Dulu

Judge

In the presence of –

Mr. Misati for the plaintiff.

Mr. Kibe Mungai for the defendant.