



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 303 OF 2005

ESTHER WANJIKU NJAU.....1ST PLAINTIFF

LUCY NJOKI NJAU..... 2ND PLAINTIFF

-VERSUS-

MARY WAHITO..... DEFENDANT

JUDGEMENT

**1. PROTRACTED DISPUTE REGARDING BURIAL PLACE FOR A YOUNG MAN:
INTRODUCTION**

The long trial now concluded with this judgement, had as its antecedent the life, and the death on 19th August, 1999 of **Joseph Njau Kairu**. It was not in dispute that the deceased had established a home in Gatundu, Kiambu District, where he had a matrimonial home with two wives, **Esther Wanjiku Njau** and **Lucy Njoki Njau** – the plaintiffs. Grudgingly or otherwise, it was also acknowledged that there was yet another woman in the life of the deceased, the defendant, who is referred to in a number of formal documents as **Mary Wahito Njau**. **Mary**, it was common ground, had much earlier been married to one **Patrick Ngariuku** (who died in 1973 or 1974), and she had been identified by the name **Mary Wahito Ngariuku**. She came into the life of **Joseph Njau Kairu** after the death of **Patrick Ngariuku**.

Mary had several children with **Patrick Ngariuku**. There was a dispute as to whether her last two children born after **Ngariuku's** death, and especially her son **James Githaiga** who was born in 1978, were sired by **Joseph Njau Kairu**. But the prior question was with regard to **Mary's** status, following the death of **Patrick Ngariuku**: Did she become a wife of **Joseph Njau Kairu**? A resounding negative answer to that question is returned by the plaintiffs, at a most delicate moment in normal life at **Mary Wahito's** household, at her Langata residence in Nairobi. **Mary's** son, who is consistently and officially described as **James Githaiga Njau** was on 8th March, 2005, at the age of 26 years, killed in a traffic accident in Nairobi; and she wishes to bury him beside **Joseph Njau Kairu's** grave, in the Gatundu family home which is physically occupied by the plaintiffs herein. The two wives who are the plaintiffs will have none of it; for to them **Mary Wahito** was not a wife of **Joseph Njau Kairu** and, consequently, her deceased son was not a child of **Joseph Njau Kairu**.

Not only has the Court the task of determining the marital question, which focuses upon the defendant; the Court must also determine a related probate-and-administration question, namely the entitlement of the late **James Githaiga Njau** to a burial place on the estate, or under the auspices of the estate, of the late **Joseph Njau Kairu**.

2. PLAINTIFF'S PLEADINGS

Both plaintiffs were widows of the late **Joseph Njau Kairu**. The 1st plaintiff had been granted letters of administration for the estate of the deceased, by the Thika Chief Magistrate's Court in Civil Case No. 225 of 2000.

It is asserted in the plaint of 16th March, 2005 that after the defendant's son died on or about March 8, 2005 in a road accident, the defendant "without any colour of right caused an advertisement to be published in the *Daily Nation* newspaper announcing the death of her said son and naming the plaintiffs as step-mothers to the deceased and herself as a widow to the late **Joseph Njau Kairu**." The plaintiffs pleaded that on March 12, 2005 the defendant, without any colour of right, "hired grave-diggers [who] invaded the plaintiffs' deceased husband's estate parcel of land No. Kiganjo/Kiganjo/395 intending to dig thereon a grave." The plaintiffs, it is pleaded, used police officers at the Gatundu Police Station to disperse the grave-diggers. The plaintiffs plead that the defendant is still intent on burying her son on the plaintiffs' deceased husband's property despite the plaintiff's protests; and that the defendant placed an advertisement in the *Daily Nation* newspaper of 16th March, 2005 giving the date of burial for her deceased son as March 17, 2005 at Ikuma Village, Kiganjo Location, Gatundu Division, Thika District.

The plaintiffs pleaded that the defendant was not a wife to the late **Joseph Njau Kairu** and so had "no beneficial interest or right over the estate and hence cannot bury her son thereon." They also averred that the defendant has filed **Succession Cause No. 282 of 2005** against the 1st plaintiff, and that the same is pending before the High Court.

The plaintiffs' prayers are for –

- (i) a declaration that the defendant is not entitled to bury her late son on L.R. No. Kiganjo/Kiganjo/395 and 396 or any of the properties in the estate of the late **Joseph Njau Kairu**;
- (ii) a permanent injunction restraining the defendant by herself, her agents, servants and/or employees from burying the deceased on L.R. No. Kiganjo/Kiganjo/395 and 396 or any of the properties in the estate of the late **Joseph Njau Kairu**;
- (iii) costs of the suit;
- (iv) any other relief such as the Court may deem fit to grant.

3. PLAINTIFFS' CONTEMPORANEOUS INTERLOCUTORY APPLICATION

Contemporaneously with the filing of suit, the plaintiffs sought interim relief, by their Chamber Summons application of 16th March, 2005. By this application, brought by virtue of ss.3A and 63(c), (e) of the Civil Procedure Act (Cap.21) and Order XXXIX, rules 1, 2, 3 and 9 of the Civil Procedure Rules, the plaintiffs/applicants sought two main reliefs: (i) that a temporary injunction be issued against the defendant by herself, her servants and/or employees restraining them from burying the deceased on the property known as Kiganjo/Kiganjo/395 and 396 at Ikuma Village, Kiganjo Location, Gatundu Division, Thika District or any other of the properties comprised in the estate of the late **Joseph Njau Kairu** pending the hearing of this suit or until further orders of the Court; (ii) that this order be enforced by the officer-in-charge of Gatundu Police Station and the Area Chief, Kiganjo Location.

The grounds stated in support of the Chamber Summons application of 16th March, 2005 coincided almost perfectly with the pleadings in the main suit, and the depositions of the 1st plaintiff in support of the application, to which the 2nd plaintiff added her voice by further depositions on 18th April, 2005, touched on the very core of the dispute between the parties. **Mr. Justice Ransley** heard the application *ex parte* when it came before him under certificate of urgency on the day of filing (16th March, 2005), and made orders granting a temporary injunction.

4. DEFENDANT'S DEPOSITONS

This was in every sense an urgent matter, as the plaintiffs had already won orders of Court *ex parte*, and consequently the defendant's deceased son remained – as he has to-date remained – committed to the cold-rooms of the mortuary.

The defendant had a set of replying affidavits filed on her behalf, responding to the plaintiffs' Chamber Summons, on 7th April, 2005. **Mary Wahito's** replying affidavit of 7th April, 2005 contested the essential claims in the plaintiffs' application, claims which, as already remarked, were the very same ones set out in the plaintiffs' main pleadings.

For instance, the defendant deponed that her first husband, one **Shadrack Ngariuku** had died in 1973 leaving her with five children, and she thereafter met and, under Kikuyu customary law, married **Joseph Njau Kairu** as his second wife – the first wife being the 2nd plaintiff herein; and that the defendant's second marriage brought forth issue in the shape of two children, **Ann Njeri** (born in 1975) and **James Githaiga** (the deceased son in question herein) (born in 1978). The defendant deponed that the late **Joseph Njau Kairu** had been the polygynous husband to her just as he had been also to **Lucy Njoki Njau** as the first wife (2nd plaintiff) and to **Esther Wanjiku Njau** as third wife (1st plaintiff) – until his death.

The defendant averred that the late **Joseph Njau Kairu** had accepted her children from the first marriage as his own and they, virtually all, took his name as surname for all purposes – and this *status quo* has to-date remained undisturbed.

The defendant deponed that three years after the death of **Joseph Njau Kairu**, she travelled to the United States of America (in 2001). When she returned in 2005 she learned that her co-wives (1st and 2nd plaintiff) had secured for themselves, in **Thika Chief Magistrate's Court Succession Cause No. 225 of 2000**, letters of administration for the estate of the late **Joseph Njau Kairu**; and in the said succession proceedings the deponent and her children had been left out of the listing of beneficiaries. The defendant has since then filed summons for the revocation of the said grant of letters of administration, in **Nairobi High Court Succession Cause No. 282 of 2005**.

The defendant deponed that her son with the late **Joseph Njau Kairu**, namely **James Githaiga Njau**, had died in a traffic accident on 8th March, 2005 and, in accordance with Kikuyu customary law, the deceased son should be buried “*next to his father on his father's and/or ancestral land.*”

The defendant deposed that it is her desire that her deceased son be buried next to his father on plot No. Kiganjo/Kiganjo/395 at Gatundu-Ikuma; but her co-wives, the 1st and 2nd defendant, have obtained a Court order to prevent the said burial taking place. Of the proceedings lodged by the plaintiffs herein, the defendant averred (para. 33):

“that I believe that the application made by my co-wives [is] in bad faith, actuated by malice, and aimed at alienating me and my children from inheriting what is rightfully ours from the estate of my late husband as has already been demonstrated by their petition for a grant of letters of administration wherein my children and I were excluded”.

5. MERGING SUIT INTO THE CHAMBER APPLICATION

As already noted this is an unusual case by the nature of its urgency, and by the fact that the burial place for the body of **James Githaiga Njau** could not be determined until the lengthy evidence had been taken and the equally lengthy submissions of counsel entertained. The matter turned out, unfortunately, to be so prolonged, hearing commenced on 22nd April, 2005 and ended on 31st July, 2006. But its unique circumstances led to certain crucial consents between counsel. On 22nd April, 2005 learned counsel for the plaintiffs, Mr. **Githinji** proposed formally that the pleadings in and motions of the main suit be merged into the Chamber Summons application of 16th March, 2005 and that in the course of hearing the application, all required evidence be taken. Learned counsel **Mr. Miller**, for the defendant, concurred –

and his rationalisation of the special arrangement, I think, gives reason for the proposed modification of trial procedure; in his words:

“The application is one in which we concur. The respondent’s son’s body is lying in a morgue. That will continue until the Court determines the question. There are affidavits sworn by various deponents on both sides. Some of the evidence is in photographs, which support the case for the respective parties – and these are annexed to the affidavits. We relied on O.XVIII, rule 2(1) and made an application before **Osiemo, J.** The evidence is in the affidavits, but the Court may order attendance of deponents for cross-examination – the law allows such a departure from normal procedure ...

“Quick disposition of the matter would assist, in resolving the state of limbo [now prevailing] for both parties. This can only be through quick taking of evidence.”

Learned counsel **Mr. Kimani**, also for the plaintiffs was in full agreement with counsel’s proposal; and I gave direction as follows:

***“Learned counsel for the 1st plaintiff/applicant and learned counsel for the respondent are in agreement that the plaintiffs’ Chamber Summons of 16th March, 2005 be merged into the main suit and heard with finality at this level. The special circumstances of this matter, which concerns burial, have been urged as justification. All the four counsel involved are in agreement on this question.*”**

***“Counsel rely on O.XVIII, rule 2(1) which states: ‘Upon any application, evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent...’*”**

***“The parties are ready with their witnesses, and they ask that they be allowed to proceed with the case.*”**

***“I think the justice of this matter, as the parties themselves also fully agree, dictates that the interlocutory application be merged into the main suit; and I therefore formally merge the same. I direct that this is the basis upon which the cause shall be disposed of.”*”**

6. RESPONDENT WAS NOT LEGALLY MARRIED TO, AND HER CHILDREN WERE NOT ISSUE OF DECEASED: INTRODUCTION OF APPLICANTS’ CASE

Learned counsel **Mr. Kimani** introduced the plaintiff’s case, on the basis that what was before the Court was a *burial dispute*; the defendant wanted to inter the remains of her son on land belonging to the plaintiffs – L.R. No. Kiganjo/Kiganjo/395 and L.R. No. Kiganjo/Kiganjo/396; but she was unknown to the plaintiffs. The plaintiffs disputed the defendant’s claim to be a widow of **Joseph Njau Kairu**; and they would prove that **Joseph Njau Kairu** had not legally married her; and the plaintiffs would prove that none of the defendant’s children are the children of **Joseph Njau Kairu**.

7. WIDOW, ADOPTIVE AND BIOLOGICAL CHILDREN ARE ALL HEIRS; AND DECEASED SON HAS RIGHTS TO BE BURIED ON INTESTATE ESTATE: INTRODUCTION OF RESPONDENT’S CASE

Learned counsel **Mr. Miller** stated that the defendant’s first husband had died, leaving her with several children; and she then re-married **Joseph Njau Kairu** who also died, leaving her with the children of her first marriage whom he had adopted, as well as with two children who were born of her second marriage. One of these two, **James Githaiga Njau**, died on 8th March, 2005; and it was the defendant’s desire that her deceased son be buried at the side of his father, **Joseph Njau Kairu**, at Gatundu-Ikuma, Plot No. Kiganjo/Kiganjo/395.

The respondent would be showing that she, **Mary Wahito Njau**, “is actually one of the widows of the

deceased, **Joseph Njau Kairu**". She would be showing, too, that **Joseph Njau Kairu** had adopted the children born of the respondent's first marriage to **Shadrack Ngariuku**. The respondent would show further, that she and the late **Joseph Njau Kairu** had two children from their marriage. The respondent would show that she and her children were entitled to a share in the estate of **Joseph Njau Kairu**, and that her son, **James Githaiga Njau**, is entitled to a burial place next to the grave of **Joseph Njau Kairu**.

8. ORAL TESTIMONIES

(a) *The Applicant's Case*

PW1, **Esther Wanjiku Njau** (1st plaintiff) was sworn in the Kikuyu language on 22nd April, 2005 and was conducted through the examination-in-chief by learned counsel **Mr. Kimani**. She testified that she was the second widow of **Joseph Njau Kairu** having been married in 1979 after **Lucy Njoki Njau** (2nd plaintiff) had already been married in 1975. She testified that she had seven children:

(i) **Teresia Nduta Njau;**

(ii) **Jane Njambi Njau;**

(iii) **Veronica Wangoi Njau;**

(iv) **Michael Njoroge Njau;**

(v) **James Muiruri Njau;**

(vi) **Rose Wanjiru Njau;**

(vii) **Stephen Muthaba Njau**

PW1 testified that she had given birth to **Teresia Nduta Njau** in 1976, before she married **Joseph Njau Kairu**, and she was named after her own grandmother. **Jane Njambi Njau** was born in 1980, and was named after the mother of **Joseph Njau Kairu**. **Veronica Wangoi Njau** was born in 1981 and named after PW1's mother. **Michael Njoroge Njau** was born in 1985 and named after PW1's father. **James Muriuki Njau** was born in 1983 and named after the father of **Joseph Njau Kairu**. **Rose Wanjiru Njau** was born in 1987 and named after the sister to **Joseph Njau Kairu**. **Stephen Muthaba Njau** was born in 1991 and named after the elder brother to **Joseph Njau Kairu**.

PW1 testified that she had one and only one co-wife, **Lucy Njoki Njau** who had no children of her own. She averred that when she married **Joseph Njau Kairu** she found the matrimonial home to be at Kiganjo in Gatundu, in the house of **Lucy Njoki Njau**. To-date PW1 lives in the same house with **Lucy Njoki Njau**; they cook together and take their meals together.

PW1 gave evidence as to the compliance with Kikuyu customs, in the solemnization of her marriage to **Joseph Njau Kairu**. She testified: "When I got married in 1979 I took my husband to my parents; and bridewealth was paid in full in 1984." She averred that as at 1979, **Joseph Njau Kairu** was in the business of selling motor spare parts along Kombo Munyi Road, at Gikomba in Nairobi. He used to commute between Gikomba and the Gatundu matrimonial home.

PW1 testified that she knew the respondent not as having been a wife to **Joseph Njau Kairu**, but as having been a friend to him. She said she was suing the respondent "because she is claiming a burial place on my land." She had first met **Mary Wahito** in 1983; PW1 on her way to the clinic (presumably in Nairobi) would pass through **Joseph Njau Kairu's** motor-parts business at Gikomba, and she came to know that the respondent had a business also on Kombo Munyi Road. Her business was known as Haraka Body Builders, whereas **Joseph Njau Kairu's** was known as Jasho Motor Spares. PW1 had in 1983 found the respondent at Jasho Motor Spares at Gikomba, and **Kairu** had then introduced her to PW1; **Kairu** had used the words: "This lady is called **Mama Githaiga**." PW1 became, thereafter, so close

to the respondent that she would visit her at Haraka Body Builders even in the absence of **Joseph Njau Kairu**. In PW1's words: "She became my friend. I would spend some time with her. She would visit us at the Gatundu home; we also visited her at Langata." PW1 testified that she and the 2nd plaintiff "did not talk about her [**Wahito's**] social life." She went on to testify: "True, **Wahito** became a friend of the whole family, including my co-wife"; and in the Christmas season or other days of rest, PW1 said, "we would visit one another; she would come home; we would also go to her home; she would come with her children, or with a lady friend; my husband used to drive us to Langata to visit **Wahito**; we would go together, he did not go to Langata alone; we used to request him to take us; if he ever went alone we couldn't know."

PW1 went on to testify that **Joseph Njau Kairu** did not always return to the Gatundu home after work: "There were times my husband did not come home; he would tell us he had gone to buy motor vehicle parts..."

PW1 testified that **Mary Wahito** had children, and sometimes she brought them along to the Gatundu home. She did know seven children of **Wahito's**. She knew them as:

(i) **Wamboi**;

(ii) **Rose Muthoni**;

(iii) **John Maina**;

(iv) **Jackline Wanjiru**;

(v) **Ann Njeri**;

(vi) **Michael Wanjohi**;

(vii) **James Githaiga**.

PW1 gave evidence that the naming of the defendant's seven children was not compliant with the Kikuyu customary practice: because the first child would be named after the husband's mother or father – depending on sex of the child; and, of the defendant, PW1 averred, "none of her children is named after my husband's relatives." From that testimony PW1 proceeded to aver: "**Mary Wahito Njau** is a friend – not a widow of the deceased." PW1 went on: "I deny that **Wahito** is a widow of my late husband. She never came to visit when my husband was ailing and hospitalised. She did not participate when my husband died."

PW1 testified that the late **Joseph Njau Kairu's** motor spare parts business which he used to run along Kombo Muniyiri Road at Gikomba, in Nairobi was in 1996 shifted to Kenyatta Road in the Gatundu area, and she is the one who took it over in that year. The defendant, she averred, would visit the new business premises from time to time, "but she stopped at some stage"; "intimate relationship [between her and **Kairu** declined]." PW1 testified that in the newspaper (*Daily Nation* of 27th August, 1999) announcement of the death of **Joseph Njau Kairu**, only the plaintiffs had been mentioned as widows and not the defendant (pl's exh. No.1). She also produced the funeral programme for **Joseph Njau Kairu** dated 28th August, 1999 (pl's exh. No.2) which gave the life history of **Joseph Njau Kairu** and which stated that his first wife (2nd plaintiff) had been married in 1974 and his 2nd wife (1st plaintiff) in 1979 – and that the two were the surviving widows, the 1st plaintiff being left with seven children. PW1 produced photographs taken on the occasion of the burial rites for **Joseph Njau Kairu** (pl's exhibits Nos. 3, 4 and 5). She averred that under Kikuyu customary practice widows are photographed in front of their departed husband's coffin; and such a photograph (pl's exh. No.3) showed only **Esther Wanjiku Njau** and **Lucy Njoki Njau** (the plaintiffs). From the images on the several photographs, PW1 declared: "**Wahito** does not feature anywhere."

PW1 had other documentation to show that **Mary Wahito** had not been a wife to **Joseph Njau Kairu**. Pls' exh. No. 6 was a loan guarantee form dated 26th November, 1993 in which the deceased had guaranteed the defendant a loan, and she had there been named **Mary Wahito Ngariuku** and described as a "friend"; and this meant, in the evidence of PW1, that only friendship had bonded the defendant to **Kairu**.

On her gravamen in this Court, PW1 testified: "What provoked me to come to Court was, **Mary Wahito** sent some people to come to our home and take [grave-construction] measurements on the ground...They marked a place. The marks were on the elevated side of the grave of **Joseph Njau Kairu** – about one metre from the grave. They even dug a pit, and installed pegs...[A few days earlier]...in the *Daily Nation* of 11th March, 2005 (pls' exh. No.7) they had announced the death of **James Githaiga Njau** and included our names on the obituaries page. They had described the deceased as beloved son to **Joseph Njau Kairu**... and they had attempted to identify with the members of our family. We were not consulted when the advertisement was put up." So offended by the defendant's *Daily Nation* announcement, she took it upon herself to visit that newspaper's offices "and showed them how they should correct the advert. I asked them to remove immediately the names related to my late husband." When *Daily Nation* appeared to be delaying publication of the death-announcement correction as demanded, PW1 made a second visit to the newspaper's offices, on a Sunday, and made a payment to meet the cost of correction. PW1 got *Daily Nation* on 11th March, 2005 to do a re-typeset of the intended correction; and on 12th March, 2005 (pls' exh. No.8) a "corrected" version was published – which "deleted all the names that we wanted to have changed." PW1 went on to aver: "**James Githaiga** is not related to us; he was a child of **Mary Wahito Ngariuku**. I don't want him buried on my land, since we do not know him."

PW1 went on to testify that when **Peter Kairu Muthaba**, the father of **Joseph Njau Kairu** died in 1997 and when **Jane Njambi Kairu**, the mother of **Joseph Njau Kairu** died in 2003 the plaintiffs had participated in the burial rites whereas the defendant had been absent.

PW1 testified that following the death of **James Githaiga**, the defendant in the company of others had visited the Gatundu home of the late **Joseph Njau Kairu**. They had gone there asking for the identification of a burial site for the deceased. PW1 (probably together with PW2) had responded that "**Samuel Wainaina**, our senior brother-in-law, was the right person to advise on such a thing, and so they should go and see him." PW1 gave the defendant the contact telephone numbers for **Samuel Wainaina**, and she called **Samuel Wainaina** who gave appointment for the desired meeting. According to PW1, even though **Samuel Wainaina** had given the appointment, the defendant failed to see him, and thereafter she only saw the defendant's emissaries putting up beacons for grave-construction at the Gatundu home, "without our knowledge." Though this is hearsay, it is significant that PW1 gave the evidence, in relation to the defendant's telephone appointment to see **Samuel Wainaina**: "They did not see him at the agreed time."

Esther Wanjiku Njau was cross-examined by learned counsel **Mr. Miller** on 10th May, 2005 and she testified as follows. That she was the late **Joseph Njau Kairu's** second wife, married in 1979 after **Lucy Njoki Njau** had already married the deceased in 1975: "They [the deceased and 2nd plaintiff] knew each other in 1974, but officially they got married in 1975." It is to be noted that in her evidence-in-chief PW1 had already testified that **Lucy Njoki Njau** had married the deceased in 1974; she now averred that she was not changing her testimony, but was merely "clarifying". Of her own children, PW1 averred: "I had seven children with **Joseph Njau Kairu**; they are all his children." She averred that the first of her children was **Teresia Nduta Njau**, born in 1976 and was now 29 years old; but she got married in 1979. She said: "**Teresia** was born three years before I got married. I met the deceased in 1975 and we knew each other. When I had met the deceased in 1975 I had known he had a first wife, whom I met only later, in 1979." PW1 testified that although she married the deceased in 1979, it was only later, in 1981, that she took her husband to her parents' home, at Gituamba, in the Gatundu area; and on that occasion **Joseph Njau Kairu** made payment of bridewealth. Only later still, in 1984, did the *Ngurario* rite take place, allowing the said marriage to take place under Kikuyu customary law. PW1 testified that the first payment of bridewealth, accompanied with the *uracio* rite, took place in 1981; and in 1984, in her words, "we officially became man and wife." This position, PW1 averred, did not make her the third wife; in her words: "I found only one wife before me; and I have never heard of the other, **Wahito**, being mentioned."

PW1 testified that **Joseph Njau Kairu** introduced her to motor spare-parts business only in 1996, “when he started feeling unwell”; but earlier on, whenever she was in Nairobi she would visit Jasho Motors in Gikomba, where the deceased ran his main business; and it is in the course of these visits that, in 1983, she came to know the defendant as a family friend. She testified that she had been visiting Jasho Motors from 1979 when she got married to **Joseph Njau Kairu**. She averred: “Whenever I visited Nairobi, I was shown the mother of **Githaiga**; and from 1983 I used to meet her at Haraka Body Builders [opposite Jasho Motors].”

PW1 testified that **Lucy Njoki Njau** the first wife of **Joseph Njau Kairu** did not protest when she, PW1, married the deceased. She averred that her objection to the claim by the defendant that she too was a widow of the deceased, was not “because she has children like I do.”

PW1 averred that while he plied his business at Gikomba, the deceased used to commute home in Kiganjo, Gatundu. But she was aware there were times when the deceased would not return home at the end of the day; and the explanation given: “he said he was searching for vehicle parts in Nakuru, Meru, etc.; he could stay around with us for a month before leaving...” PW1 believed that the deceased had not rented a house in Nairobi; but she could not inquire further about the failure by the deceased to return home, because, in PW1’s words, “as a man he goes places I know not”. The witness appeared to be amused as she gave the foregoing answer and in expression of some quiet mirth, she ceased to be clear – and I recorded so. PW1 went on to say that whenever **Joseph Njau Kairu** went out in search of supplies, “he could even stay away for a week.” On one occasion, in 1988, the deceased had travelled to Japan and spent as much as three weeks away from home; and for at least two days in the month, he would not return home. The witness in giving testimony about her late husband’s absences from home, showed a demeanour lacking in candour, and I made a record as follows:

“Witness does not appear very focussed, but rather evasive, in responding to the questions.”

On repeated questioning, the witness testified: “three or four times a month he [the deceased] would be absent.” She further testified: “I do not know if on the days of his absence he was staying with **Wahito**. I could not suspect...I did not monitor his movements; if he lied, I could not tell; even if I suspected he was lying, there was nothing I could have done, for I was under [his authority]. I sometimes suspected; but there was nothing I could do. I sometimes suspected he had an affair with **Wahito**.” As PW1 made the foregoing remarks I observed her demeanour, and recorded as follows: “Tendency on the part of the witness to be evasive.”

PW1 could not remember over what period she had suspected an affair between the defendant and the deceased; she said: “I think it was in the 1990s I suspected he was having an affair with **Wahito**. He would spend too many nights outside; and I suspected he went to **Wahito’s** place. I only suspected **Wahito**. If he had been visiting others apart from **Wahito**, I could not know. When I investigated, I formed the impression he was spending those nights at **Wahito’s** place.”

PW1 went on to aver that she had suspected a close relationship between the deceased and the defendant in 1988; but she only conducted her investigations in the 1990s. PW1 averred: “in the 1990s I asked him; he told me he visits that place, but he was not married to **Wahito**.”

PW1 testified that while there was a close family friendship between those in the Gatundu home of the deceased, and those in the Langata home of the defendant, it was no more than friendship; in her words: “**we** had not married [**Wahito**]. It was the normal friendship. We were also, all of us, friends.”

Upon further cross-examination, PW1 testified that in 1988, she had asked **Joseph Njau Kairu** if he was friends with **Mary Wahito**. The answer: “he said they were only doing business together.” PW1 further averred: “I just suspected the relationship between **Wahito** and my husband; but I did not know the truth. I just suspected they were married, but the deceased denied. He said they were just friends.” Why did she ask the deceased this question? In PW1’s words: “I asked because he insisted so many times that we visit each other – with **Wahito**.”

Since PW1 testified that she had suspected that a marriage relationship did exist between the defendant and the deceased, the Court inquired whether any special manifestation of married partnership had been noticed. The answer was:

“The friendship was so intimate that I suspected marriage. There was no other woman with that kind of privileged relationship.”

The witness averred that she had not asked **Wahito** if she was a wife to the deceased – because the deceased had told PW1 that this was no more than a family friendship.

PW1 testified that as she lives in one house with 2nd plaintiff, the two had shared in the suspicion that there was a marriage existing between the deceased and the defendant, and that even the anxieties expressed to the deceased had been addressed in the presence of both plaintiffs herein. PW1 thus testified:

“Lucy [the first wife] also shared my suspicion that there was a relationship between the deceased and **Wahito**. **Lucy** used to tell me that since we are under [the charge of] our husband, we had to be satisfied with his explanations. He used to give us explanations; and we got satisfied with his explanations.”

Observing the demeanour of the witness as she thus testified, I recorded this: “I note that this lacks conviction.” PW1 went on to testify that she was the first to suspect the existence of a marriage between the deceased and **Wahito**; and this came about because she, rather than **Lucy**, was the one who used to make frequent visits to Nairobi, and thus had the best opportunity to witness how the deceased related with the defendant.

PW1 testified that she and the 2nd plaintiff from time to time visited the defendant at her Langata home in Nairobi, and even took photographs with her. The witness averred: “many times we visited each other, at Kiganjo and at Langata.” She could not remember when the plaintiffs and their children began visiting **Wahito** and her children at Langata – but she thought it was in the 1980s.

PW1 testified that two of **Wahito**’s children, **Njeri** and **Githaiga**, would in the late 1980s have been, respectively, nine, and six years of age. The witness had not, she testified, addressed her mind to **Githaiga**’s parentage; and she did not know who his father was. She testified that when she saw the death of **Githaiga** announced in the *Daily Nation*, under the name **James Githaiga Njau**, she visited the newspaper offices and got the name to be corrected and re-published as **James Githaiga Ngariuku** – because the defendant had once told her that her (defendant’s) husband had been a man by the name **Ngariuku**.

PW1 averred that she would not dispute that the said **Ngariuku** had died in 1973 – because “I do not know.” She went on to justify her act of varying a death notice in the *Daily Nation*: “**Ngariuku** is dead, and **Njau** is dead. If I get a child today, I can name the child after **Njau**, because there is no other father. I [changed the *Daily Nation* advert] because the mother of the late **James Githaiga** was the [widow] of **Ngariuku**.” She went on to declaim: “**Njau** is not the biological father of **James Githaiga**. I do not know the father of **James Githaiga**. When **Githaiga** was born, we were not told, so that we could share. If **Wahito** was married in our home, the child could have been named after my husband’s father or brother. The naming [of **Githaiga**] does not comply with Kikuyu customs.” And she declared: “*Those are the only reasons why I dispute the paternity of the child.*”

PW1 testified that on many occasions when the late **Joseph Njau Kairu**’s Gatundu household went visiting the defendant’s Langata household, there was merry-making, with barbeques, drinks and socializing with other visitors. In PW1’s view, on all the occasions of those visits at Langata, no individual man stood out as father-figure, and the children in the Langata household had referred to **Joseph Njau Kairu** as “uncle” and not as “daddy.” So close, however, were the members of the Langata household to those of the Gatundu household that, in the words of PW1, “no others have been so close to us as a family, so we could take family photographs with them as we did with **Wahito** and her children.”

PW1 averred that she *did* know that the late **Joseph Njau Kairu** was helping **Wahito** financially, but this was not the reason for suspecting that there existed a marriage between the two; for the two were in Nairobi, and PW1 “could not tell what they were doing together.” PW1 did “not know if the deceased was visiting **Wahito** alone”; again in her words: “There are many things about the deceased and **Wahito** which I do not know.”

PW1 thought the deceased had not married **Wahito**, and her reasoning here is not related to things perceived, but is more concerned with *cultural assumptions* – so in this regard it is hearsay evidence; it may, however, be set out here:

“If he paid bridewealth for **Wahito**, he could not have gone alone to do it; I would know. Even if I might not have known he had a *ruracio* ceremony for **Wahito**, my co-wife would have known, and we would know.”

The witness believed the deceased’s actions would have betrayed themselves through the *requirements of compliance with certain Kikuyu customary practices*; and as she knew the deceased to be of sound mind, and to be an upright person, he could not have skipped the relevant cultural rites.

When shown the personal accident policy taken by the deceased, with British American Insurance Company, dated 1st May, 1990, and in which the beneficiaries were three women, **Lucy Njoki Njau**, **Mary Wahito Njau** and **Esther Wanjiku Njau** (all indicated as wives, and in that order), PW1 said she knew nothing about it; and she knew nothing of the Nairobi address shown on the document, as she thought the deceased had only Gatundu and Juja addresses.

Learned counsel **Mr. Miller** continued with cross-examination on 11th May, 2005 when PW1 testified that she “had no knowledge” as to whether the deceased had provided financial and general support for the several children of **Mary Wahito**; she was equally unaware that **Wahito**’s Langata residence had been purchased on mortgage guaranteed by the late **Joseph Njau Kairu**. When shown schooling and travel documents in which all of **Wahito**’s children bore the name **Njau** as surname, PW1 averred: “I do not know why **Wahito**’s children would call themselves **Njau**”; and she added: “it is possible I did not know some things about the deceased.”

PW1 was shown several photographs which, however, she denied to have been family photographs; she saw them as only photographs of friends. In one of these photographs appeared **Mary Wahito** and **Joseph Njau Kairu**; in another, **Mary Wahito**, **Esther Wanjiku** (1st plaintiff), **Lucy Njoki** (2nd plaintiff), one **Mary Njeri** one **Peter Nyaga** and one **Mary Wanjiku** – and they were all seeing off **Mary Wahito**’s daughter, **Rose Muthoni Njau** who was flying off to the U.S.A. for further studies.

PW1 averred that the defendant had not attended the burial rite for the late **Joseph Njau Kairu**; and that she did not know if her brother-in-law, **Samuel Wainaina** had made any threats against her if she attended. She averred that the said **Samuel Wainaina** was the single person to give authority if **Wahito**’s son, **James Githaiga Njau**, was to be buried at Gatundu. She said: “**Samuel [Wainaina]** is the elder brother to my late husband; we cannot act without his direction.” But the witness then contradicted the foregoing averment:

“They did not seek our authority as to where the grave should be dug. We passed our message to **Samuel [Wainaina]**.”

And still another contradiction:

“I could have objected if Samuel said the body be buried next to the deceased; because I never knew **Wahito** as wife of **Njau**, or **Githaiga** as son of **Njau**.”

PW1 testified that **Joseph Njau Kairu** died intestate, and that after his death, the two plaintiffs obtained grant of letters of administration from the Chief Magistrate’s Court at Thika, listing as beneficiaries only themselves and all PW1’s children (including **Teresia Nduta** who was born three years before Pw1’s

marriage to the deceased). PW1 testified:

“I excluded **Wahito** and her children, because we did not know her as a wife to the late **Joseph Njau Kairu**.”

The witness testified that in the said Thika Chief Magistrate’s Court Succession Cause, the plaintiffs herein had listed as part of **Joseph Njau Kairu’s** estate the parcel of land on which he lies buried, namely L.R. No. Kiganjo/Kiganjo/395.

Learned counsel **Mr. Miller** continued with cross-examination on 12th May, 2005. When he showed school documents for **Wahito’s** children, indicating that the payor of the fees was none other than **Joseph Njau Kairu**, PW1 expressed doubts as to the authenticity of the documents; and at this point I observed the demeanour of the witness, and recorded: “*I notice a deportment of evasiveness on the part of the witness.*” To the question whether it was normal to have **Wahito’s** school-going children all identifying themselves on the school records by the **Njau** name, PW1 said:

“Yes it is normal. It all depends on the consent of the deceased. But there could be no such consent to marriage without my knowledge. Women can be kept by men, and even fees paid by men; but they don’t have to be wives. I do not know whether **Wahito** was a ‘kept’ woman. If she was married, she would have been brought to our family ...”

PW1 restated that she objected to **Wahito’s** son being buried at the Gatundu farm. Noting from the record from Thika High School (where **James Githaiga** was a student from 1996-1999) that his name is officially recorded as **James Githaiga Njau**, the witness declaimed.

“**Njau** is shown as the surname ... So the name **Njau** appears on ... official documents, and in the school record. Only the name **Kairu** is missing. If **Kairu** was there, then I would accept that he was the son of my deceased husband. The only problem is absence of **Kairu**. That is the reason why I do not want him buried near my husband’s grave. He was brought to us and shown to us as our son. If **Wahito’s** children come and say the deceased was their father, I would not accept it. They were not brought to us and presented to us as our sons and daughters. If they say the deceased is the only father they knew, and that he supported them financially and materially, we still will not accept; they were not brought to us and introduced as part of us”.

PW1 testified further, on re-examination by learned counsel **Mr. Githinji**, as follows. When she got married, her father-in-law and mother-in-law, her husband and her co-wife (2nd plaintiff) all went to PW1’s parents’ home, for the purpose of formally reporting that PW1 was now in **Joseph Njau Kairu’s** household; and on that occasion the quantification of bridewealth (*ruracio*) was done – the same being delivered in 1981. By that act, it was now open for **Joseph Njau Kairu** to make further bridewealth presentments; and in 1984 the Kikuyu customary marriage now took place, with both parents of **Joseph Njau Kairu** present. Also present on that occasion were PW1’s senior co-wife, **Lucy Njoki Njau**, and three brothers of **Njau Kairu**, namely **Peter Muthaba**, **Samuel Wainaina** and **Peter Nyaga**. The witness testified that not only had her marriage to **Joseph Njau Kairu** been a valid one in terms of detailed *compliance with customary practice*, but in addition, all children born to her had been properly named, in a manner compliant with Kikuyu customary law: some named after the parents of **Njau Kairu**; some named after their own grandparents; and traditional festivities played out during the naming ceremonies. All this, PW1 averred, “was done openly”. She contrasted it all with the circumstances surrounding the alleged marriage of the defendant: “If my husband said he was marrying **Wahito**, I would not have raised any problem.” She was objecting to the burial of **James Githaiga Njau** beside **Joseph Njau Kairu** because:

“**Wahito** did not tell me **James** was from the deceased as the father, neither did **Njau** say that.”

Earlier on, P.W.1 had testified as to the circumstances which led to the plaintiffs excluding **Wahito’s** children from the list of beneficiaries, when they took out letters of administration for the estate of **Joseph Njau Kairu**. But on re-examination, PW1 had new grounds for the exclusion of those children:

“**James Githaiga Njau** did not come to us to lay a claim to **Njau**’s property.”

On further re-examination by learned counsel **Mr. Kimani**, PW1 averred that although the defendant had been her friend, “I never asked her questions relating to her [relationship with] the deceased. The friendship was between **Wahito** and [myself]; my husband was not in it; we only talked about women, not men”. As the witness gave this response I observed her demeanour, and thus recorded: “Evasiveness of witness apparent”.

PW2, **Lucy Njoki Njau** was sworn on 19th May, 2005 and led through the examination-in-chief by learned counsel **Mr. Kimani**. She testified that she lives at Gatundu and is a widow of **Joseph Njau Kairu**, who she knew in 1974 and married, the marriage being “reported” in 1975. She averred that she had married **Njau Kairu** under Kikuyu customary law and their matrimonial home was at Gatundu, where she had a co-wife, **Esther Wanjiku Njau**, married in 1979. PW2 averred that in the process of her marriage to **Njau Kairu**, the *ruracio* rite had been performed in 1977, attended by both parents of **Njau Kairu**, and by **Samuel Wainaina** and **Peter Muthaba** (brothers of **Njau Kairu**), and entailing the presentment of goats, brew, and money as bridewealth. She averred that the 1st plaintiff had been similarly married, with the *ruracio* rites performed in 1982, in the presence of her parents and **Njau Kairu**’s parents, **Samuel Wainaina**, **Peter Muthaba** and **Peter Nyaga**. PW2 testified that from 1974 to 1979 she had lived happily with her husband though she had no children, and upon being consulted she gave her consent to **Joseph Njau Kairu** to marry a second wife, **Esther Wanjiku Njau**. PW2 averred that she had not known of any other wife to **Njau Kairu**, until **Esther Wanjiku** was introduced to her in 1979; and **Esther** was brought into her house, and since then the two have lived together under one roof.

PW2 testified that in the period 1974 through to 1979, **Joseph Njau Kairu** was running a motor vehicle spare-parts business at Gikomba in Nairobi; he had no rented house in Nairobi; he would return home at Gatundu after work each day.

Esther had a child, **Teresia Nduta**, with whom she came into the polygynous marriage; and within the marital union she gave birth to six other children. Of **Teresia Nduta**, P.W.2 testified: “They [PW1 and **Joseph Njau Kairu**] told me they had been friends before I came to know, [and she was their child]. “ PW2, like PW1, affirmed that PW1’s children had been named in the perfect mode as dictated by Kikuyu customary practice.

PW2 testified that she came to know **Mary Wahito** in 1983: “she was a friend to **Esther Wanjiku**. They knew each other when **Esther** was expecting **James Muiruri**. When **James Muiruri** was born, **Wahito** came to my place to see the child.” On that occasion, PW2 averred, the defendant had introduced herself as **Mary Wahito Ngariuku**; and later PW2 visited her at her Langata residence. Thereafter there were regular mutual visits; in the words of PW2, “We used to visit during Easter and Christmas holidays”. The visits were family visits, and PW2 would visit Langata in the company of the wives of **Njau**’s brothers – with **Njau** himself driving them thither. **Njau** would tell them, PW2 testified, that “we were visiting **Wahito** as a family friend.” PW2 got to know **Wahito**’s seven children well; but she averred: “I do not know who they are named after. None of them is named after relatives of my deceased husband.” She averred that **Mary Wahito** was “not the second wife of the deceased”; her reason was: “When the second wife was brought the deceased introduced me to her – and she was introduced as the second wife.”

PW2 averred that **Esther Wanjiku** had applied for letters of administration, for the estate of the late **Joseph Njau Kairu**; and she was aware that the grant of letters of administration to **Esther Wanjiku** has been challenged in 2005 by **Mary Wahito**.

PW2 refuted the impression created in the depositions that **Mary Wahito** had married **Joseph Njau Kairu** in 1972 and that she is second wife to the deceased; and she asserts that none of **Mary Wahito**’s seven children was sired by **Joseph Njau Kairu**. She testifies that since **Mary Wahito**’s children were born, **Rose Muthoni Njau** in 1965, **John Maina Njau** in 1967, **Michael Mugo Njau** in 1969 and **Jackline Wanjiru Njau** in 1972 when **Njau Kairu** was mostly at school, they could not have been sired by **Njau Kairu**; and she disputes that **Ann Njeri Njau**, born in 1975 could be the child of **Njau Kairu**, since that is the time she herself married the deceased. Of **James Githaiga Njau** born in 1978, PW2 merely expresses

doubts: “I do not know whether that’s *Njau’s* child.”

PW2 wondered why one of *Mary Wahito’s* children, the eldest, *Wambui*, was not named in the proceedings filed challenging the grant of letters of administration to *Esther Wanjiku Njau*.

PW2 later tells of 1974 as the year during which *Mary Wahito* alleges she had married *Njau Kairu*; she avers that the claim is “lies coming from *Wahito*. We never saw them at our home.” She further avers that she “could not have suspected that *Wahito* was my husband’s wife. She was older than my husband; so I could not have suspected that they were friends or spouses”. PW2 avers that *Njau Kairu* “never introduced *Wahito* as his second wife”; and she never asked *Wahito* whether she was a friend of my husband. I could not ask because of her age. I never heard that *Njau* took *ruracio* to *Wahito’s* home.”

Learned counsel *Mr. Kimani* continued with examination-in-chief on 24th May, 2005, and PW2 continued to testify as follows. When her father-in-law had died in 1997 neither the defendant nor any of her children had participated in the burial arrangements; and when *Joseph Njau Kairu* died in 1999, the defendant “did not attend the funeral and was not part of the funeral committee”; and further more, the witness averred, “I did not see any of her children at the funeral”; *Wahito* was not mentioned [in the funeral programmes]; “none of her children was mentioned as a child of *Njau*”; “*Wahito* did not come to us and say she was one of the widows”; “she did not come to object to he exclusion”; “none of her children complained”; “nobody complained of any exclusions”. The witness referred to the photographs taken during the burial rites for *Joseph Njau Kairu*, showing the two plaintiffs standing by the coffin (plaintiff’s exhibit No. 3 and No. 4).

Of the late *James Githaiga Njau*, PW2 averred: “I never heard that *James Githaiga* was a son of the late *Njau*. At *Njau’s* funeral it was not said *Githaiga* was entitled to anything. He cannot be buried next to *Njau*; he is not *Njau’s* son. He is not named after any member of *Njau’s* family. I saw *Giathaiga* with *Njau* when we were visiting *Mama Githaiga ...*”

On further examination by learned counsel *Mr. Githinji*, PW2 testified that those in the *Njau* family, such as *Rose Wanjiru Kairu*, *Mary Wambui Kairu*, and *Peter Nyaga Kairu* who have averred that the defendant was a wife to *Joseph Njau Kairu*, had not said the truth, especially as such an affirmation had not featured six years earlier, during the burial ceremony for *Joseph Njau Kairu*.

Learned counsel *Mr. Miller* cross-examined PW2 on 31st May, 2005 and testimony was then given as follows. PW2 averred that she had become friends with and gone to live with *Joseph Njau Kairu* in 1974, but got married in 1975; and that although the funeral statements for *Joseph Njau Kairu* showed her to have been married in 1974, she was actually married in 1975. The witness testified that she never met *Mary Wahito* (defendant) before 1983 – and this was at *Njau’s* Gatundu home. On that occasion the defendant had come to visit the 1st plaintiff, who was her friend and who told PW2 she had met the defendant at her workplace at Gikomba, in Nairobi. PW2 averred that the entire *Njau* household at Gatundu was in the habit of visiting the *Wahito* residence at Langata in Nairobi, and that she herself first joined the visiting party to Langata in 1984. subsequently, in the course of the 1980s, the 1st plaintiff told PW2 that she “suspected a friendship” between the defendant and *Mary Wahito*; and they resolved to ask *Joseph Njau Kairu* about it – which they later did at Gatundu and their husband denied it; and thereafter “the question was never raised again”. The visits between Gatundu and Langata were frequent, and *Njau Kairu* did not habituate the Gatundu family to visiting the home of any woman other than *Mary Wahito*. However, notwithstanding such suggestive evidence, PW2 averred: “I do not know if the deceased and *Wahito* were friends; they could have been friends without my knowledge.” She testified further that she did not know “whether [*Njau Kairu*] was taking care of *Wahito*” She averred that had *Joseph Njau Kairu* been taking care of *Wahito*, then she would expect him to, among other things, ensure the supply of domestic needs for *Wahito*; assist the children by buying clothes and paying school fees; pay *Wahito’s* workers, etc. PW2 did not expect that *Njau Kairu* would purchase a home for the defendant; because “a man with a family cannot buy a home for a woman outside, unless cheating has taken place”.

Mr. Miller continued with cross-examination on 14th June, 2005, when PW2 testified that she and her late

husband had not adopted any child: “we had no child from outside that we were looking after.” When shown the insurance policy taken out by **Joseph Njau Kairu**, with British American Insurance Company, dated 1st May, 1990 in which she was named alongside two other “wives” as beneficiaries, she averred that she knew nothing of it; and she expressed surprise that **Mary W. Njau** had in that document been named as a wife. Of **Wahito** PW2 said: “I knew **Wahito** then as a family friend only”. PW2 went on to testify:

“I don’t know why he indicated he had three wives. I know of only two.”

But when asked if **Joseph Njau Kairu** might have been abnormal when he indicated he had three wives, PW2 testified:

*“My husband was mentally sound. I did not know of him doing abnormal things. I do not know why he listed her as a wife. I am surprised **Mary Wahito** is shown as a wife.”* But she then went on to aver that since **Njau** used to keep the plaintiffs informed of his actions, “*he could not have married [**Wahito**] without our knowledge*”. The witness then acknowledged that **Njau** was not keeping the plaintiffs informed on all things always, save that “*he told us all the important things*”. Of the defendant PW2 averred:

“It was not possible for **Mary** to have been a wife without our knowledge. We do not know if he was married to **Mary Wahito**. We did not know. I did not know.”

PW2 was not aware that in 1984 **Mary Wahito** had purchased her Langata house, on the basis of suretyship provided by the late **Joseph Njau Kairu**. How come? PW2 averred: “*He did not inform us he was standing surety for someone who would get a bank loan*”; but she then added: “*I have seen many cases of people standing surety without being the husband to the beneficiary*”. That suretyship, PW2 averred, “*shows he did some things in darkness with **Mary Wahito**, without telling me*”. Similarly, of a possible marriage relationship, PW2 averred: “*I do not know there was a marriage similarly in darkness*”. She averred that she couldn’t tell why **Njau Kairu** guaranteed the loan for **Wahito**; and “*similarly I do not know why he included her in the insurance policy*”. She did not know of “*anyone else for whom [**Njau Kairu**] guaranteed purchase of a house. He never did it for me ... I do not know why he did not do it for **Esther**.*”

Shown a letter from the Principal, Karatina Secondary School dated 25th April, 2005 indicating that the late **Joseph Njau Kairu** had paid the secondary school fees of **Wahito’s** sons, **John Maina Njau** and **Michael Wanjohi Njau**, PW2 averred that such fees would have been paid without her knowledge. She remarked: “*I do not know why the deceased would pay school fees for **Wahito’s** children.*”

Cross-examination continued on 21st June, 2005 when PW2 testified that **James Githaiga** “*was son to our lady friend, **Mary Wahito***”, and maintained that she did “*not know the father of **James Githaiga***”. She went on to testify:

“I know **James Githaiga** died several months back. We are the ones who stopped the burial. He is not our child. He could not be buried on our land.”

PW gave contradictory testimony at this point. She said:

“Had **Wahito** been married [to **Joseph Njau Kairu**] we would have allowed the burial [of **James Githaiga**] even if the mother [defendant] did not attend **Njau’s** funeral.”

But she then proceeded to aver:

“Even if it is proved that **Wahito** was married to **Njau**, I cannot allow the burial on our land.”

And PW2 went on to say:

“even if *Njau* were alive and he wanted to bury *Githaiga* at Kiganjo, I would have said he purchases land elsewhere and bury *Githaiga* there.”

On re-examination by learned counsel *Mr. Githinji*, PW2 began doubting whether, truly, all of *Wahito's* children had been formally known by the surname *Njau*; she said: “*I have not been shown a document by which Njau authorized the use of his name [by Wahito's children].*”

PW3, *Samuel Wainaina Muiruri* was sworn on 20th June, 2005 and conducted through the examination-in-chief by learned counsel *Mr. Kimani*. He testified that he is a businessman at Pangani in Nairobi, and does know the plaintiffs as the widows of the late *Joseph Njau Kairu*. *Njau Kairu* was his brother, some eight years younger; and he had other brothers, *Peter Muthaba Kairu*, *Peter Nyaga Kairu*, *Henry Kariuki Kairu* and two sisters *Rose Wanjiru Kairu* (single) and *Mary Wambui Kairu* (married). He said he had good relations with all his siblings, as well as with her sisters-in-law (including the plaintiffs herein). PW3 said he was born in 1944 while *Joseph Njau Kairu* was born in 1952, and it fell upon him to apprentice *Njau Kairu* and to get him started in a successful business venture. *Njau Kairu* had worked with PW3 at Jasho Motors at Gikomba until 1980, when he left the business to *Njau Kairu* on his own.

PW3 testified that when *Joseph Njau Kairu* joined him in the Gikomba motor spare-parts business in 1970, *Njau Kairu* was still unmarried; but he later, in 1975, married the 2nd plaintiff herein. The groom, when he was planning to get married, brought *Lucy Njoki Njau* (2nd plaintiff) to see PW3 at Gikomba and told him of his family-making plans. *Njau Kairu* informed PW3 that already *Lucy Njoki* was living with him at his house, at Eastleigh, Nairobi. And PW3 then participated in the marriage rites by making an early visit, accompanied by his parents and his uncle, to the home of the parents of *Lucy Njoki Njau*. The visiting party stated the purpose of their visit, and arrangements for marriage began; and on several occasions bridewealth, in the form of domestic animals, was delivered to the bride's parents' home. This was marked, sometime in 1977, with the final *ngurario* rite, which betokened the full solemnization of the marriage.

PW3 continued to give his evidence-in-chief on 4th July, 2005. He averred that the 1st plaintiff, *Esther Wanjiku Njau*, had married *Joseph Njau Kairu* as second wife in 1979, and that the Kikuyu customary marriage rites had been performed. The relatives from the groom's home, including PW3, paid a visit to the 1st plaintiff's parents in 1981 – taking bridewealth, in the shape of traditional brew, goats and money. PW3 testified that the ultimate marriage ceremony, the *ngurario*, took place in 1984. The significance of *ngurario*, PW3 testified, was that the marriage rites had reached their climax; and all that was now left, as a debt between the groom and the bride's parents, was friendship. *Ngurario*, it was averred, entailed the slaughtering of a goat, for a ceremonial feast.

PW3 testified that the 1st plaintiff had seven children – *Nduta*, *Muiruri*, *Janet Njambi*, *Wangui*, *Njoroge*, *Muthaba* and *Wanjiru*. He averred that the plaintiffs lived in one house at Gatundu, which the late *Joseph Njau Kairu* had enlarged from bungalow to double-storied house.

PW3 testified that he had had cordial relations with the late *Joseph Njau Kairu*, and that when in 1974 he took out an insurance policy (dated 19th August, 1974) (plaintiff's exhibit No. 9) with British American Insurance Company Limited, PW3 had been named as the beneficiary. And when he took out another policy with British American Insurance Company Limited dated 8th January, 1978 (Plaintiffs' exhibit No. 10), the beneficiaries were the 2nd plaintiff and PW3. On 2nd October, 1986 *Joseph Njau Kairu* took out an insurance policy with American Life Insurance Company Limited (Plaintiffs' exhibit No. 12), and named his beneficiaries as – (i) *Esther Wanjiku*, 30 years old (wife); (ii) *Lucy Njoki*, 34 years old (wife); (iii) *James Muiruri*, 4 years old (son); (iv) *Michael Njoroge*, 2 years old (son). PW3 testified that in the said life insurance document, no other person was mentioned as a beneficiary.

PW3 testified that he has always had good relations with his siblings, and no quarrels have arisen within the family since the death of *Joseph Njau Kairu* in 1999. However, since February, 2005 some of PW3's siblings have challenged the position of the plaintiffs herein, in relation to the devolution of the estate of *Joseph Njau Kairu*. In addition, the witness averred, *Mary Wahito* (the defendant) was also raising two

specific problems – both touching on the estate of **Joseph Njau Kairu**. Firstly **Wahito** is *challenging the grant of letters of administration* which the 1st plaintiff had secured at the Thika Chief Magistrate’s Court; and secondly – and more urgently – **Wahito** is claiming *burial space* on the landed estate of the late **Joseph Njau Kairu**, for the burial of her son **James Githaiga Njau** who died in *March, 2005*.

So, to PW3, who is **Mary Wahito**, and what is her standing in the family set-up of the late **Joseph Njau Kairu**? If **Wahito** was **Njau’s** wife, then, clearly, she would be entitled to a share of the estate of **Joseph Njau Kairu**. And if she had a share of that estate she could use what devolved upon her as of right, including for her children. Besides, if **Wahito’s** children could in law be identified as the children of **Joseph Njau Kairu**, or as children who were, in fact, dependant upon him, then they will, in law, be entitled to a share of the estate of **Joseph Njau Kairu**; and it would follow, in that event, that **Wahito’s** deceased son, **James Githaiga Njau**, would in death (as is now the case) be entitled, in law, to a resting place on the landed estate of the late **Joseph Njau Kairu**. These points will be analysed later in this judgment, along with the evidence such as will emerge, and in parallel with such customary law as may be found to be in force.

PW3 testified that he first met **Mary Wahito** in 1974 and he knows her “very well”. Her husband then, **Shadrack Ngariuku**, had a business along Kombo Munyiri road at Gikomba, opposite PW3’s motor vehicle spare-parts business unit. **Ngariuku** died in a motor accident in 1974, and was buried at his native village in Nyeri District. **Mary Wahito** then took charge of **Ngariuku’s** vehicle body-building business at Gikomba.

PW3 testified that **Mary Wahito** was expectant in 1974, when she took charge of her deceased husband’s business, and she four months later, gave birth to a baby girl, who was named **Njeri**. It was PW3’s evidence that he had, in 1970, brought his younger brother, **Joseph Njau Kairu** to apprentice him in business in Nairobi; and the young man engaged in other works on behalf of PW3, before settling at the Jasho Motors at Gikomba in 1975. In the meantime, **Mary Wahito** now had a constant presence along Kombo Munyiri Road, where she operated the vehicle body-building works and in this business, worked closely with Jasho Motors of PW3 and (now) **Joseph Njau Kairu**. When **Joseph Njau Kairu** settled at Jasho Motors, he found that already **Mary Wahito** was well known at Jasho Motors; in the words of PW3, “*he found us as friends*”; and he added, “*We all were friends at the place of work*”. In 1980 PW3 left Jasho Motors and also left Kombo Munyiri Road, and **Joseph Njau Kairu** took charge.

What was the relationship between **Mary Wahito** and **Joseph Njau Kairu**? The witness testified: “**Mary Wahito** was just a friend to us”; “It is not true that **Mary Wahito** was the wife of **Joseph Njau Kairu**. On no occasion did my brother tell me that he had married **Wahito**. **Mary Wahito** was a family friend in every respect. She knew us well; she knew our home; we knew her home ... We visited one another as friends.” He added that **Joseph Njau Kairu** ended school in 1969 and was circumcised in 1972 and in customary practice, he could not possibly have married **Wahito** in 1972; for the year of circumcision is a cleansing-up period known in the Kikuyu tradition as “*toa mbiro*”.

PW3 averred that it was also not possible for a second wife (as **Mary Wahito** has been said to be) to have been married by **Joseph Njau Kairu** in 1974 – because the first wife, **Lucy Njoki Njau**, had been married in 1975.

PW3 averred that **Mary Wahito** (defendant) had not had any child with **Joseph Njau Kairu**: “*If she had had a child with Joseph Njau Kairu, he would have told us so; and if he had a child outside marriage, then that child would bear the name Kairu; and we would have organised a celebration*”.

PW3 averred that his own siblings, **Rose Wanjiru** and **Peter Nyaga**, who are saying that **Wahito** had been married to **Joseph Njau Kairu**, were “*not saying the truth; they had been young and did not know what was happening*.” To those two siblings, DW3 attributed ulterior motives: “**Rose Wanjiru** is claiming land; **Peter Nyaga** is also demanding land – in both cases, from the estate of the deceased”. He accused the two siblings of “*fetching Mary Wahito from America, so they may use her to demand property from my deceased brother’s estate*”.

PW3 resorted to the funeral programme for the late **Joseph Njau Kairu**, to explain **Mary Wahito's** status. He averred that the funeral programme had mentioned only two widows – the plaintiffs herein – and “*nobody complained of exclusion*”. He testified that he had not seen **Mary Wahito** at the burial ceremony, and he suspected she was just passing her time at Langata and at Gikomba – since DW3 “*never heard that she had left the country*”. PW3 testified: “*Since I had attended the burial of [Wahito's] mother, I would have welcomed her to the funeral of my brother*”.

DW3 testified that he had good relations with **Wahito** and he could not begrudge her anything. Of himself, DW3 said: “*It is not true that I am a troublesome person who creates misunderstandings and chaos*”.

Learned counsel **Mr. Githinji** continued with examination-in-chief on 11th July, 2005. PW3 testified that he holds the position of trustee in relation to the estate of his late father (who died in 1997), and that he would administer the same for the benefit of all beneficiaries – including the late **Joseph Njau Kairu** who, he said, was represented by the two plaintiffs herein. He averred that he had been present when bridewealth was paid in the marriage of the 1st and 2nd plaintiffs, but not when the same was done in respect of **Mary Wahito**. He testified that he was not aware bridewealth had been sent to **Wahito's** native home at Karatina in 1979. PW3 averred that in Kikuyu customary practice, bridewealth paid for a woman such as **Wahito** would have been returned to the **Ngariuku** family; but he was not aware that a ceremony for the return of bridewealth, in respect of **Wahito**, had taken place.

PW3 averred that **Joseph Njau Kairu** had “*never told me that he had adopted Wahito's children*”. He testified that what existed was a close family friendship with **Wahito's** household; in his words: “*We went to Wahito's residence in Langata many times*”.

PW3 testified that the late **Joseph Njau Kairu** had many parcels of land, apart from the 5 ½ -acre one on which the two plaintiffs have their residence. The witness did not know whether any of those several parcels of land had been dedicated to **Wahito's** personal use.

The witness testified that the plaintiffs had asked him whether the late **James Githaiga** could be buried “*on our land*”; and his response was: “*It is not possible; because we do not know that child; he is not ours; I know nothing about him; and even his mother, I don't know her as ours ... I asked if Wahito had requested burial place; but no request was made*”.

PW3 averred that no request for burial place had been made to him; but he would in any case have refused burial on L.R. No. Kiganjo/Kiganjo/395 – because he has many other lands and “*I can allow him to be buried on one of them*”. He went on to testify: “*I had not known Githaiga as a child of Njau; therefore I would not accept that he be buried on Njau's land.*”

Learned counsel **Mr. Miller** began the cross-examination on 11th July, 2005, and continued on 14th July, 2005, on which occasion PW3 testified that his father who died in September, 1996 had entrusted his whole estate to PW3 rather than to his elder brother **Peter Muthaba** to distribute to the members of the family. PW3 averred that such instructions were given gradually over a long period of time, but in September, 1996 he had not been available to see his father at the end of his life. He testified that he also held titles for properties in the name of his mother, who died in 2003 even though grant of letters of administration has not been obtained.

Mr. Miller continued with cross-examination on 26th July, 2005, on which occasion PW3 testified that he was aware the late **Joseph Njau Kairu** used to take out life insurance policies, and that most of them were those of British American Insurance Company Limited. When shown the policy which **Joseph Njau Kairu** took on May 1, 1990 which listed three women (the plaintiffs and the defendant) as beneficiaries and described each as wife, PW3 said she knew of only two wives of the late **Joseph Njau Kairu**; in his words: “*This business about three wives is not true. Nobody in our family knows about that ... [Njau] could not have a wife not known to me. He was my very good brother; I knew him well.*” He doubted whether the signature on the insurance form was truly that of **Joseph Njau Kairu**; and he declaimed: “*My brother was not mad. If he says he had three wives, I know nothing about it ... So it will be false.*”

Mr. Miller continued with cross-examination on 26th September, 2005 when PW3 stated: *“I don’t agree it is my brother who took out those insurance policies in the name of the three women. Even though the policies are stamped, they cannot be true ... I cannot accept them to be true even if a witness came from the insurance company to say they are true.”*

Of **James Githaiga Njau**, PW3 averred: *“I do not know him very well. I first saw him when he was very young, at one-to-two years of age. I was with the mother even before **Githaiga** was born. I knew **Wahito** before she gave birth to **Githaiga**. **Wahito** was a friend before she gave birth and after she gave birth. The child is not that of my brother.”*

On re-examination by **Mr. Githinji**, PW3 testified that the defendant’s identity card, which recorded her name as **Mary Wahito Njau**, was false, and that her real name is **Mary Wahito Ngariuku**. He averred that in his family, there was nobody by the name **Githaiga**, nor anyone by the name **Ann Njeri** (children of **Mary Wahito**). He testified that he came to know **Mary Wahito** in 1974, and that **James Githaiga** would have been born in 1978; and that in 1974 **Joseph Njau Kairu** and **Mary Wahito** *“had already known each other”*.

PW4, **John Kinyumu**, was sworn on 27th September, 2005 and led through the examination-in-chief by learned counsel **Mr. Kimani**. He testified that he was a Registrar of Persons, Grade I, based at the National Registration Bureau headquarters. He was a gazetted Registrar of Persons and his duties included investigation and prosecution of offences under the Registration of Persons Act (Cap. 107) He testified that he had received witness summons, which he had signed on 21st September, 2005 on behalf of the Principal Registrar of Persons. The summons required him to come to Court with a print-out and photograph in respect of Identity Card No. 4854215; and so he had now brought the required particulars before the Court. He testified that by his records, the holder of Identity Card No. 4854215 was one **Mary Wahito Ngariuku**, born in 1948 and hailing from Konyi Location in Nyeri District. Of the copy of the Identity Card No. 4854215, serial No. 212872124 which the defendant held, in the name **Mary Wahito Njau**, PW4 averred that the two identification cards bore one common number, and the particulars were also similar. The card in the name of **Mary Wahito Njau** was produced on 17th February, 1997. The witness found that the card bearing the name **Mary Wahito Ngariuku** had been reported lost, and the defendant had then applied for a duplicate copy. The witness denied that the Identity Card in the name of **Mary Wahito Njau** had been produced by the serial number which he had, and so he disputed the validity of the Identity Card held by the defendant. The witness could not, however, make a definite confirmation as the defendant had lost her original Identity Card, allegedly during a robbery (and the matter having been reported to the police).

On cross-examination by learned counsel **Mr. Miller**, PW4 averred that the registration of persons bureau had been computerized in 1995, and that previously all records of the registration process had been kept manually. On 5th November, 1995 a second generation of Identity Cards had been issued, for the reason that there used to be duplications under the previous, manual system. Since then, PW4 averred, he had never seen a case of duplication of Identity Card numbers.

PW4 testified that the Registration of Persons Bureau had a procedure for the change of names on the Identity Card, and one reason for making such change is change of marital status. Whenever a request for change of names was made, there would be supporting documents, including affidavits in the case of persons married under customary law – and such information would be kept in manually-recorded files. He averred that he had not brought to Court any manual record touching on the instant matter. He testified that such manual records were stored in a restricted area so defined under the law – and there were four different locations where such records were stored. He averred that what he had brought to Court was only a computer extract, which he said was *“not complete, it cannot have all the information”*. He acknowledged that his computer record had referred to **Mary Wahito Ngariuku** incorrectly as **Mary Wahito Ngariuki**.

(b) The Respondent’s Case

The defence case began on 25th October, 2005 when DW1, **Peter Nyaga Kairu** was sworn and entered upon his testimony. He averred that he was a businessman aged 55 years, and the late **Joseph Njau Kairu** had been his elder brother, in a family of seven siblings – the living ones today being: **Samuel Wainaina; Peter Muthaba; Peter Nyaga; Henry Kariuki; Mary Wambui; and Rose Wanjiru.**

DW1 testified that the late **Joseph Njau Kairu** had three wives and not two; and that their ranking by seniority was as follows: (i) **Lucy Njoki** (2nd plaintiff); (ii) **Mary Wahito** (defendant); and (iii) **Esther Wanjiku** (1st plaintiff). In DW1's recollection, **Lucy Njoki** would have been married about 1973 or 1974; and he was himself involved in the facilitation of the marriage. He is the one who had been sent to ask **Lucy Njoki** to pay the crucial visit to **Joseph Njau Kairu** which marked the beginning of the cohabitation, ahead of the customary matrimonial rites which then followed – and that was in 1973 or 1974.

DW1 testified that **Joseph Njau Kairu's** second wife was **Mary Wahito**, the defendant herein. He, DW1, had come to live in Nairobi, where he was also working, in 1975. At that time **Joseph Njau Kairu** and his elder brother **Samuel Wainaina Muiruri** (PW3) were working together in a motor spare-parts shop on Kombo Munyiri Road, Gikomba in Nairobi, and **Mary Wahito** was working in a neighbouring business. There was a common approach to the discharge of **Mary Wahito's** work and the work of the two brothers; those in the said spare-parts shop would fetch water for washing the motor vehicles in **Wahito's** workshop. In the course of 1976 DW1 came to the realization that there was a special relationship between **Joseph Njau Kairu** and **Mary Wahito**. Evidence of such a relationship was that, **Joseph Njau Kairu** sometimes drove **Wahito's** car; the two would go out together for meals; they were close with each other. **Joseph Njau Kairu** would send DW1 together with an employee at the motor spare-parts shop, by name **Obuto**, to take foodstuff and related supplies to **Mary Wahito's** residence at Umoja Estate in Nairobi. DW1 from time to time would find **Joseph Njau Kairu** at **Mary Wahito's** residence at Umoja Estate – in the morning and in the evening. DW1 came to know that **Joseph Njau Kairu** was staying overnight at **Mary Wahito's** residence, and he would volunteer this information to the witness. At times **Joseph Njau Kairu** left his own car at the work-place, and went away after work with **Mary Wahito** in her car; and the two would return to work the following day in the same car. **Wahito** was then referred to as **Mama John** – as she had a son by the name **John Maina**.

DW1 testified that **Joseph Njau Kairu** did take **Mama John** to his rural home at Gatundu, and introduced her to his own mother – in the presence of the witness; and he introduced **Mary Wahito** as his second wife, to the whole extended family at Gatundu. On that occasion, the date of which the witness could not remember, **Joseph Njau Kairu**, again in DW1's presence, took **Mary Wahito** to the home of **Lucy Njoki's** (2nd plaintiff) parents – and introduced **Mary Wahito** to **Lucy Njoki** and **Lucy Njoki's** parents as his second wife. On that occasion when **Joseph Njau Kairu** introduced **Mary Wahito** as his second wife, just after the birth of **James Githaiga**, a carnival setting prevailed and a goat was slaughtered. The young **Githaiga** had been brought to the Gatundu home, and, DW1 averred, **Joseph Njau Kairu** told **Lucy Njoki Njau** that “**Githaiga** was his son, and one of us”. Accompanying **Mary Wahito** on this visit to Gatundu, were five of her older children, and **Joseph Njau Kairu** introduced all of them as his children. DW1's testimony on **Lucy's** reaction is that she “was very happy”.

DW1 gave further testimony, in respect of **Wahito's** children, that: “**Njau's** children with **Wahito** were two – **Githaiga** and **Njeri**”. He further testified that a friendly relationship thereafter developed between **Lucy Njoki** and **Mary Wahito**: “**Mary** would visit our rural home, and **Lucy** would also visit **Mary's** home at **Langata, Nairobi**”. DW1 averred: “**Lucy** would spend a night in **Langata**; and **Wahito** would visit **Gatundu** and spend the night there; **Njau** would also spend the night in **Langata**: Sometimes I would myself drop him off at **Langata**, and I would later pick him up from there. **Lucy** had very good relations with **Wahito's** children. They called her **untie**. During the holidays, **James Githaiga** would live with **Lucy** in **Gatundu**.”

DW1 testified that **Samuel Wainaina Muiruri** (PW3) who was living in Nairobi, “was not present when **Joseph Njau Kairu** introduced **Wahito** at home.” However, DW1 did testify, “**Samuel Wainaina** came to know that **Wahito** was wife to **Joseph Njau** ... In all our family occasions since the marriage, **Mary Wahito** has always been with us, and **Samuel Wainaina** has also been present.” DW1 averred that “**Samuel Wainaina** related well to **Mary Wahito** ... I heard **Wainaina** refer to **Wahito** as **Njau's** wife.”

DW1's instance of such an occasion: a Harambee fund-raising at Langata, for **Samuel Wainaina Muriruri**, where **Mary Wahito** was guest of honour in her capacity as wife of **Joseph Njau Kairu**. Such was the informal understanding within a reasonably close-knit larger family – in which nick-names were often used to identify individual members: **Baba Muiruri** was **Samuel Wainaina Muiruri**; DW1 was also referred to as **Baba Muiruri**; **Joseph Njau Kairu** was referred to as “**Jasho**”, or “**Baba Njambi**”. At the said Langata Harambee fund-raising, DW1 would frequently refer to **Wahito** as “**Jasho's wife**”. This led DW1 to appreciate that **Samuel Wainaina Muiruri** recognized **Wahito** as a wife to **Joseph Njau Kairu**.

DW1 averred that he knew the late **James Githaiga Njau** to be the son of **Joseph Njau Kairu**, and even though he did not know what **Samuel Wainaina** thought on this matter, in his perception, “[**Samuel Wainaina**] treated **Githaiga** as his brother's son.” The children of the three brothers – **Samuel Wainaina**, **Joseph Njau Kairu** and DW2 “grew up together, and went to school together; they were all recognized as our children”.

In **Peter Nyaga's** testimony, the late **Joseph Njau Kairu** was a traditional polygamist with three wives; and the second wife was **Mary Wahito**; the third wife being **Esther Wanjiku** (1st plaintiff). In DW1's recollection, **Esther Wanjiku** got married after **Mary Wahito**. He was not invited to any marriage rite in respect of **Esther Wanjiku**; and he never heard of any marriage ceremony held to solemnize **Esther Wanjiku's** marriage during the lifetime of **Joseph Njau Kairu**; he only heard of such a marriage rite for **Esther Wanjiku** being held after **Njau's** death; the important *ngurario* ceremony for **Esther** was only done in 2004, whereas **Joseph Njau Kairu** died in 1999. This, DW1 averred, was not in any way abnormal in Kikuyu customary practices; *ngurario* can be done posthumously. Although DW1 was informed of the planned *ngurario* ceremony he did not attend.

DW1 testified that his late brother **Joseph Njau Kairu** had personally told him that **James Githaiga** was his son; and evidence of such consanguine relationship also took the form of **Joseph Njau Kairu** presenting young **Githaiga** to his first wife **Lucy Njoki**, so they could stay together.

Mr. Miller continued to lead DW1 through the examination-in-chief on 30th November, 2005 when the witness testified that **Mary Wahito** had been in all respects a member of the family of **Joseph Njau Kairu**; and he produced a family photograph (defendant's exhibit No. 1) taken in 1989, on the occasion of his (DW1's) own wedding. Present at the occasion, and shown in the photograph, are the three women in this suit: **Lucy Njoki**, **Esther Wanjiku** and **Mary Wahito**; and the witness affirmed: “They came as wives of my brother. I invited them; for we lived together [as members of one family].” Also shown in the same photograph are other members of the family: **Peter N. Muthaba**; the wife of **Samuel Wainaina**; the wife of **Peter N. Muthaba**; the wife of **Wilson Muthaba Mwaniki**; DW1's sister, **Rose**; and **Danson Kamuti Kimani** (a neighbour). All these people attending the wedding ceremony, DW1 testified, recognised **Mary Wahito** as a wife of **Joseph Njau Kairu**.

DW1 next produced another family photograph taken during the burial ceremony for **Mary Wahito's** mother (def's exhibit No.2) at Karatina – on an unascertained date. Of the said funeral ceremony, DW1 averred: “All our family went to the burial.” And he remembered well the following as having been present: his own mother, **Jane Njambi Kairu**; **Lucy Njoki** (2nd plaintiff); **Esther Wanjiku** (1st plaintiff), **Samuel Wainaina**; **Teresia Wanjiku Wainaina** (wife of **Samuel Wainaina**, PW3); **Rose Wanjiru**, DW1's sister; **Peter Muthaba**, DW1's brother. DW1 testified: “I was also present. We were attending because **Mary Wahito** was a wife of **Joseph [Njau Kairu]**. My mother was there. She understood she was attending the burial of the mother of **Mama Githaiga**. She knew **Mary [Wahito]** as wife of **Joseph Njau Kairu**.” Also included in the said funeral photograph were: **Joseph Gakahu Njau** (a cousin) and **Ngugi Mwaniki**, DW1's brother. The witness averred: “We knew we were attending the burial of the mother of **Mama Githaiga**, mother to our sister-in-law.”

DW1 testified that he knew **Rose Muthoni Njau** and **John Maina Njau**, both children of the defendant, as the children of the late **Joseph Njau Kairu**; for the deceased had told him he was caring for the two children and paying their school fees. DW1 averred that he was certain “all school fees for **Mary Wahito's children**” were paid by **Joseph Njau Kairu**. He went on to testify: “**James Githaiga** was **Joseph Njau's child**, and should be buried where his father was buried.”

On cross-examination by learned counsel **Mr. Kimani**, DW1 testified that his formal schooling was limited, and his memory of dates was not very clear; but that he could remember the events in his family which occurred in the period from 1973 onwards. He could remember that it was in 1974 that he settled in Nairobi, and began working with his brother **Samuel Wainaina** (PW3); and **Samuel Wainaina** was at that time already working in one business with the late **Joseph Njau Kairu**. Sometime in the 1970s **Joseph Njau Kairu** left his Mathare Estate house to DW1, and he moved on, during the period he was in business partnership with **Samuel Wainaina** along Kombo Muniyiri Road in Gikomba, Nairobi. The two senior brothers were apprenticing DW1 as a motor mechanic; and he was doing odd jobs – such as selling spare parts, and cleaning motor vehicles. For the cleaning of the motor vehicles, DW1 and other employees would obtain water from **Mary Wahito's** business just across the road.

Mr. Kimani continued with cross-examination on 7th December, 2005 when DW1 gave further testimony on his role in the marriage of **Lucy Njoki, Joseph Njau Kairu's** first wife. He averred that the deceased had not yet made full payment of bridewealth as it had been quantified by **Lucy Njoki's** parents – and that this obligation was only discharged after **Njau's** death, and this was then marked by the *ngurario* ceremony (“*final celebration and confirmation [of the marriage]*”). DW1 as the youngest brother, played the main role in the *ngurario* rites; but **Samuel Wainaina** (PW3) was also present. Consequently, DW1 averred: “**Lucy [Njoki]** is now fully married, and there is nothing outstanding.”

Of **Mary Wahito** (defendant), DW1 testified that when he came to live and work in Nairobi, in 1974, he “*found Mary Wahito working together with Samuel Wainaina and Joseph Njau Kairu.*” As at that time, “*Mary Wahito had her own business,*” “*Samuel Wainaina and Joseph Njau Kairu had their own business,*” “*Mary Wahito had her own residence*”, “*Joseph Njau Kairu was then married to Lucy Njoki.*” Lucy got married to **Joseph Njau Kairu** before DW1 started living permanently in Nairobi; and he “*came to stay permanently in Nairobi in 1974.*”

When DW1 took up permanent residence in Nairobi he “*used to see Mary Wahito at her own business, under her own name.*” He had not known **Wahito's** husband, and he used to call her “**Mama John.**” Then after one year, that is in 1975, DW1 “*realized that Mary was Joseph Njau Kairu's wife*”; “*they started staying together, or becoming close; they went to lunch together; he could visit Mama John. She had children but I don't know how many they were.*” As at today, DW1 testified, “*I have known [that] Wahito has six children; some are abroad, and some are here; Muthoni is abroad, as are also some other two.*”

DW1 averred that he was not himself involved in the ceremonial steps of the marriage process for **Mary Wahito**. He would be left at the place of work when visiting parties went to **Wahito's** parents' home in Nyeri; he did not know whether **Samuel Wainaina** was ever on the visiting team – but he knew that **Ngugi Mwaniki** (deceased) had been on such a visit, as were still others such as one **Tom Muiruri** and one **Banga. Ngugi Mwaniki** was a member of the **Njau** family, though not the others. DW1 did not know whether his mother had joined such visiting parties, but he did know that his father had not attended. He was also not sure if his sister **Rose** had been part of the visiting group.

DW1 testified that in the continual rites of marriage, his own lorry (reg. No. KYN 259), had on one occasion transported goods to **Mary Wahito's** natal home at Karatina, in Nyeri District. These goods, which included farm inputs, were delivered at **Wahito's** parents' home in the name of **Joseph Njau Kairu**; and the date of delivery could have been sometime in 1987. DW1 was himself a passenger in the said delivery lorry, which was driven by his driver, and also carried his turn-boy. **Joseph Njau Kairu** himself had on that occasion also come, in a small car with **Mary Wahito** and two other persons, to the home of **Wahito's** parents. DW1 after making the delivery, left **Joseph Njau Kairu's** party at **Wahito's** parents home. On yet another occasion, a visit was made to the Karatina home of **Mary Wahito's** parents – with **Joseph Njau Kairu** and **Mary Wahito** travelling in one vehicle, and DW1 driving his own vehicle. The visiting party, on that occasion, met **Mary Wahito's** mother, brothers and relatives. The visitors remained at the Karatina home for a day, and returned to Nairobi in the evening.

There was, thereafter, a third visit to Karatina, this time to attend the burial ceremony for **Wahito's** mother who had died, and DW1 was one of those in attendance. Since then, he has not been back to **Wahito's** natal home.

DW1 stated his perception that **Mary Wahito** was married to the late **Joseph Njau Kairu**: “I used to stay with my brother; they did everything together. I can confirm that **Lucy [Njoki]**, **Mary [Wahito]** and **Esther [Wanjiku]** were all wives of **Joseph Njau Kairu**. **Joseph Njau** was my real brother; I knew all his matters.”

Learned counsel **Mr. Kimani** continued with cross-examination on 8th February, 2006 when DW1 gave testimony regarding the 1st plaintiff, **Esther Wanjiku**, as a widow of the late **Joseph Njau Kairu**. He testified that the 1st plaintiff was third wife to **Joseph Njau Kairu**, and that her marriage had taken place in 1980, at a time when **Njau Kairu** was running a petrol station at Ichaweri in the Gatundu area. **Esther Wanjiku** had been working at a pub, close to **Njau Kairu's** petrol station at Ichaweri. DW1 remembers that traditional practices were observed in the marriage of **Esther Wanjiku** (referred to as **Mama Nduta**), as there was an advance visit by the **Njau** family to her parent's home – the date is not ascertained. DW1 did not remember whether **Samuel Wainaina** was one of those in the said visiting party, but he (DW1) himself did not attend, nor did his parents or sisters. The witness did not know whether **Lucy Njoki** or **Mary Wahito** was part of the party in the first visit to **Esther Wanjiku's** parents' home. DW1 recalls **Joseph Njau Kairu** intimating that he would be taking bridewealth to **Esther Wanjiku's** parents. After **Esther Wanjiku** was married she was taken to live at the house where **Lucy Njoki** lived, in Gatundu; but **Mary Wahito** was living at Langata, in Nairobi. **Esther** remained with **Lucy** in the same home, and to-date they have lived together, in mutual esteem, at Gatundu. DW2 testified that whereas **Lucy** has no child, **Esther** has (he thought) six children – **Nduta**, **Njambi**, **Muiruri**, **Njoroge**, **Wangui** and **Muthaba**. **Nduta** was named after **Esther's** mother; **Njambi** after DW1's mother; **Mururi** after DW1's father; **Njoroge** after **Esther's** father; **Wangui** after **Esther's** sister; **Muthaba** after DW1's late brother **Peter Muthaba**. DW1 recalled that **Esther Wanjiku** has a seventh child, **Rose Wanjiru**, named after his sister. Out of the seven children, four are named after DW1's relatives.

On the question of the naming of children, to which learned counsel devoted much attention, DW1 averred that none of **Mary Wahito's** children was named after his relatives; and he thought this was explained by the fact that they were all born in Nairobi. He did not know how **Githaiga** had been given that name; but he thought this arose from the fact that: “**Mama Githaiga** was brought to my mother, and then there was agreement between **Njau** and my mother that he was going to marry **Mama Githaiga**.” What agreement?

DW1 averred:

“There was an agreement of marriage. He couldn't have married her with those children, unless there was an agreement. The agreement was verbal. My mother could not write.”

DW1 testified, however, that he himself was not part of the said “agreement.”

DW1 testified that he did know the pluralistic setting of the late **Joseph Njau Kairu's** family: “I was very close to **Njau**. All the wives came when I was very close to **Njau**. **Esther** came with a child – and gave birth to several children while staying with **Njau**. **Wahito** has seven children. I know that the children of **Wahito** acquired the **Njau** name. I don't know how. **Githaiga** became **Njau**; and all correspondence shows the **Njau** name...; I don't know whether **Githaiga** should have been **Muiruri Njau** or **Githaiga Njau**.”

DW1 testified that he had been on the funeral committee for **Joseph Njau Kairu** in 1999, but he could not remember whether the eulogy prepared for that occasion attributed to **Njau** two or three wives. He recalled that **Mary Wahito** had not attended the burial ceremony, though her children had attended. However, **Mary Wahito** had indeed been at the Gatundu home before the burial of **Joseph Njau Kairu**, but she did not then return for the occasion of burial. DW1 testified that he did not know why **Mary Wahito's** name was excluded from the naming of widows of the deceased, in the eulogy script. He also did not know why **Mary** had not returned to Gatundu for the final rites. The proceedings of the funeral arrangements, DW1 averred, were being conducted by **Samuel Wainaina** who stood out as the head of the family. DW1 was concerned about the marginalisation of **Mary Wahito** in the funeral arrangements, and she sought to talk to **Wahito** after the burial ceremony – and she had told him that **Samuel Wainaina**

had issued directives that she was not to attend the burial ceremony.

DW1 testified that he had, in February, 2005 filed a suit against the two plaintiffs herein, in respect of some 40 acres of land which he claims; but he was not aware that the defendant had also filed a cause against the same two plaintiffs challenging the grant of letters of administration which **Esther Wanjiku** had obtained in relation to the estate of the late **Joseph Njau Kairu**. He averred that the 1st plaintiff had obtained grant of letters of administration without informing the other widows, and without informing him. DW1 averred that as soon as 1st plaintiff obtained grant of letters of administration from the Magistrate's Court, she began on arrangements to have the disputed 40 acres of land registered in her own name – and hence DW1's suit.

DW1 was cross-examined by learned counsel **Mr. Githinji** on 9th February, 2006 and he testified further that he was not aware of any special procedure that must accompany the re-marriage of a woman in Kikuyu customary practices; and **Joseph Njau Kairu** had not told him that he had returned half of the bridewealth to the **Ngariuku** family – where **Mary Wahito** had previously been married. **Njau** had built his own home about half a kilometre from his parents' home; and he had made a formal introduction of **Mary Wahito** as his wife at the home of his parents, and this was followed by a party and merry-making at **Njau's** own home – which event was attended by, among others, **Rose Wanjiru** – **Njau's** sister; **Mary Wambui** – **Njau's** sister; **Peter Muthaba** – **Njau's** brother; both of **Njau's** parents. **Mary Wahito** had **Githaiga** with her on that occasion – a young boy possibly aged one-to-two years. **Njau** on that occasion presented young **Githaiga** to **Lucy Njoki** (2nd plaintiff), and “**Lucy** was happy when **Wahito** was introduced to her.”

DW1 testified that **Esther Njoki** lacked authority for obtaining grant of letters of administration for **Joseph Njau Kairu's** estate, because she needed to have the approval of himself, his siblings and the other co-wives, as a basis for an application such as the one which led to the grant.

On re-examination by learned counsel **Mr. Miller**, DW1 testified that the deceased, **James Githaiga Njau** was named after his father, **Joseph Njau Kairu** who was the husband to **Mary Wahito**.

DW2, **Rose Wanjiru Kairu** was sworn on 9th February, 2006 and examined-in-chief by learned counsel **Mr. Miller**. She testified that she was a younger sibling of **Joseph Njau Kairu**; she was the daughter of **Peter Kairu Muthaba** and **Jane Njambi**.

DW2 first met the defendant in 1975, at **Joseph Njau Kairu's** place of work on Kombo Munyiri Road, Gikomba in Nairobi. **Mary Wahito's** workshop was situated across the road from the business run by DW2's brothers. Sometime in December, 1975 **Joseph Njau Kairu** fetched DW2 in his car, and brought her and her brother **Peter Nyaga Kairu** (DW1) to Nairobi for traditional initiation procedures. DW2 was then about twelve years old. **Joseph Njau Kairu** entrusted her to **Mary Wahito** who he introduced as his wife, to take her to the midwife at Makadara in Nairobi for the initiation procedures, while he himself took **Peter Nyaga** for circumcision. From that time in 1975, the witness averred, “**Mary** was coming home regularly with her children, even when **Joseph Njau Kairu** was not himself at home.” On the first occasion of visiting the Gatundu home, **Mary Wahito** had come with her children, whom she took to **Lucy Njoki's** house. On that occasion **Joseph Njau Kairu**, **Mary Wahito** and her children, stayed for a while in the **Njau** home and then they all went to the home of DW2's father. The witness was present, and both her parents were present when **Joseph Njau Kairu** formally introduced **Mary Wahito** to his own mother. Already by that time, **Mary Wahito** had come to the Gatundu home repeatedly, and now, “**Joseph** told my mother **Mary** was his wife, and he had married her;” and DW2's mother “just welcomed them.” From there, **Joseph Njau Kairu**, **Mary Wahito** and her children went down to DW2's father's second home where he had a younger wife. These events were taking place, in DW2's reckoning, in 1978 or 1979. At that time **Lucy Njoki** was already married to **Joseph Njau Kairu**, and **Lucy** stayed at her residence and did not join the rest when they went out to visit the parents on that particular occasion. **Mary Wahito's** children who were present on that day were: (a) **Rose Muthoni**; (b) **John Maina**; (c) **Michael Wanjohi**; (d) **Jackline Wanjiru**; (e) **Ann Njeri**; and (f) **James Githaiga**. **James Githaiga** was very young – “not even one-year old.” **Ann Njeri** at the time would have been four-five years old. DW2's

mother “expressed pleasure about the young boy, **Githaiga**.” There was much happiness around, as **Lucy Njoki** had, in 1978, wanted to adopt a child – she being childless – but DW2’s parents had objected. In DW2’s words: “Mother was happy; because now there would be no need to adopt a child.” On that occasion **Joseph Njau Kairu** said “**Ann Njeri** was his child; ...[and] he said he had adopted all the other children.”

DW2 testified that there were clear signs that **Mary Wahito** (defendant) was a wife of the late **Joseph Njau Kairu**. There was “no occasion of celebration at our home, or my mother’s or brothers’ homes that was not attended by **Mary Wahito**; and she came [in her capacity] as **Njau’s** wife. Even for Harambee fund-raising, we always invited her in her capacity as **Njau’s** wife.” She was always involved in local home savings and credit societies, along with her children. The family had a special such economic set-up, called *Mbari ya Muthaba*, and this brought together all members of the extended family, including wives and children, and **Wahito** was always involved: “**Mary** was a member; she saved as we did; she came as **Njau’s** wife”.

How did **Lucy Njoki** (2nd plaintiff) regard **Mary Wahito** (defendant)? In DW2’s testimony, **Lucy** in every respect regarded **Mary Wahito** as her co-wife. The two visited each other without inhibitions and “had no mutual difficulties at any time; many times she spoke of **Mary** as *muiru*, meaning [in Kikuyu language] co-wife; and **Mary** also saw **Lucy** the same way. **Lucy** saw **Mary’s** children as her own children. These children used to visit her and she would live with them. There were no complaints of anything untoward. The children would stay even for a month with **Lucy**. They called her *untie*; and **Lucy** called them the children of her *muiru*.”

Were there any ritual observances attending **Mary Wahito’s** attainment of spousal status in relation to **Joseph Njau Kairu**? DW2 averred: “For **Mary** to become wife, **Njau** visited **Mary’s** original home in Nyeri. He went with *Wazee* [male elders] - **Muiruri, Tom, Ndabutha, Baga**.” DW2 did not remember the date when **Njau** made this Nyeri visit – but believed it took place in the aftermath of **Wahito’s** formal introduction at the Gatundu home. It was an arranged visit during which the bridewealth presentment rite known as *ruracio* took place; **Njau’s** mother had been duly informed, together with **Njau’s** brothers – but the brothers did not attend.

It was later, after the *ruracio* ceremony at Nyeri, DW2 testified, that **Esther Wanjiku** (1st plaintiff) was married; and in her recollection **Esther** was married in the 1980s. DW2 gave an account of the context in which, in her perception, **Esther Wanjiku** had been married by **Joseph Njau Kairu**. In 1980 DW2 was working at **Joseph Njau Kairu’s** petrol station at Ichaweri in Gatundu. She recalls that at that time, **Esther Wanjiku** was serving as a bar tender at Ichaweri, not far from **Njau’s** petrol station. She was, at that time in 1980, expectant; and DW2 heard it said among her work-mates that **Esther** was a girl-friend of **Joseph Njau Kairu**, even though **Njau** himself never mentioned it. When she later gave birth, **Esther’s** infant child was brought to **Lucy Njoki** (2nd plaintiff) and was named **Njambi**, after DW2’s mother – and this was in 1980. **Esther** herself was not, on that occasion, brought along and introduced to **Joseph Njau Kairu’s** parents; only later still was she formally introduced to her husband’s parents, and **Esther** now settled in as a wife and even joined the family savings-and-credit society, *Mbari ya Muthaba*, subsequently becoming its treasurer.

DW2 gave testimony on the place of **Mary Wahito** in the family life of the wider *Muthaba* family; she produced a family photograph of unascertained date (defendant’s exhibit No. 1) – taken on the occasion of **Peter Nyaga’s** wedding. She showed her own image, set next to that of **Mary Wahito**; and she pointed out other persons appearing in the photograph – such as **Esther Wanjiku; Peter Nyaga; Mary Njeri** (wife of **Peter Muthaba**); **Teresia Wanjiku** (**Samuel Wainaina’s** second wife); **George Gakahu** (best-man). At the wedding ceremony there had been a session of introductions; and all the co-wives including **Mary Wahito** were properly introduced.

DW2 next referred to the photograph taken on the occasion of the burial ceremony for **Joseph Njau Kairu** in 1999 (plaintiffs’ exh. No. 3C). She could identify the family members in the photograph, but noted that **Mary Wahito** had not been present. She had not known why **Mary** had not attended, but later learned from her that “**Samuel Wainaina** had told her not to attend.” However, DW2 averred, all of

Mary Wahito's children had attended the said burial ceremony.

DW2 testified that she herself had prepared the first edition of the obituary for the late **Joseph Njau Kairu**, and while she was doing this, **Samuel Wainaina** asked her not to mention any wives of the deceased: *"I did what he said, for he was our elder."* This first edition of the obituary was published in the *Daily Nation* of 21st August, 1999 (defendant's exh. No. 3); but thereafter **Samuel Wainaina** made a modification which he published in the *Daily Nation* on 27th August, 1999 (plaintiffs' exh. No. 1), and this one now stated that the late **Joseph Njau Kairu** had had only two wives – 1st and 2nd plaintiffs herein; and this was the final announcement which was being followed only the following day (Saturday) with the burial; there was no opportunity to raise any queries at this stage.

Learned counsel **Mr. Miller** continued with the examination-in-chief on 14th February, 2006 when DW2 explained how it had not been possible to challenge **Samuel Wainaina's** final death announcement which made no mention of **Mary Wahito** as a widow of **Joseph Njau Kairu**; in her words: *"We did not ask questions, because there was no time. Burial was the following day; and we never returned to that question."*

Referring to plaintiffs' exhibit No.8 – the death announcement on the late **James Githaiga** put out by the plaintiffs herein – the witness remarked that the reference was to **James Githaiga Ngariuku**, whereas to her knowledge, the deceased was the son of **Joseph Njau Kairu**, and his true name was **James Githaiga Njau**. The correct announcement had been placed by **Jane Njambi Nyaga**, DW2 testified, and had been published on 11th March, 2005 (plaintiffs' exh. No. 7); and thereafter **Esther Wanjiku** (1st plaintiff) published in the *Daily Nation* of 12th March, 2005 the contradicting announcement which referred to the deceased not by his correct name, but as **James Githaiga Ngariuku**.

DW2, together with **Peter Nyaga, Mary Wahito** and others were on the planning committee for the burial of **James Githaiga Njau**, and they are the ones who had authorized **Jane Njambi Nyaga** to put up the earlier death announcement which identified the deceased correctly. Even when the planning committee published a correction of **Esther Wanjiku's** contradictory announcement of 12th March, 2005 **Wanjiku** returned to the media to repeat her contradictory announcement. In the words of DW2, "each time we put up one, they put up a counter-obituary. An inquiry at the *Nation Newspapers*, DW2 testified, had revealed that the counter-obituaries on **James Githaiga Njau** were the handiwork of **Esther Wanjiku**. When a planning committee meeting for the burial of **James Githaiga** had taken place at the Kenyatta International Conference Centre had been held, neither **Samuel Wainaina, Lucy Njoki** or **Esther Wanjiku** who had been informed about it, did turn up. Upon the death of **James Githaiga Njau**, DW1 and other members of the planning committee had sent three people to Gatundu - namely **Muthigani** (DW3), his wife, and **Mary Wahito**. What report did they bring back? "They reported to the committee; they said **Lucy** and **Esther** had agreed to burial at Gatundu, except that they would first ask **Samuel Wainaina** who was the family head." But DW2 was then surprised to see the plaintiffs herein "publish the counter-obituaries." DW2 averred: **"Ngariuku** was not the father of **Githaiga; Githaiga** was born in 1978; **Ngariuku** died in 1973."

DW2 testified that as from 1987 she was working with the late **Joseph Njau Kairu** at his business premises on Kenyatta Road, Gatundu; and while so engaged she had witnessed the deceased filling in forms for an insurance policy cover with British American Insurance Company, and that in these forms, **Joseph Njau Kairu** had named his three wives as the beneficiaries. The witness averred that she was present when the deceased signed the forms, in 1990; and that it is she who prepared the payment cheque in respect of the insurance policy. She produced the relevant insurance document (defendant's exhibit No.4), and testified that she was asked to keep a copy of the policy even as her deceased brother cracked the joke *"that his wives could kill him if they knew he had an insurance policy for them."* The said policy, however, expired in the course of time as the deceased had not kept up with payments of premium. This fact came to light when DW2, **Samuel Wainaina** (PW3) and **Peter Muthaba** tried after **Njau Kairu** fell ill in 1999, to apply the insurance policy in defraying a hospital bill. The certificate had constantly been kept by DW2 all through from the date of issuance in 1990, and one copy had been kept in **Joseph Njau Kairu's** safe at his business premises on Kenyatta Road.

DW2 testified that **Mary Wahito** had started co-habiting with **Joseph Njau Kairu** when she had four children from her earlier marriage – **Rose Muthoni; John Maina; Jackline Wanjiru;** and **Michael Wanjohi**. The four children, the witness testified, had been accepted by **Njau** as his own children and he provided for them and paid their school fees: cheques were drawn for that purpose at the Kenyatta Road business premises. **Njau** would sign the school-fee cheques and leave them for DW2 to fill in the details and to dispatch. In the words of the witness: “*He was paying the fees; he did all things as father of those children.*”

When **Wahito’s** children attained the age of majority and had to take Identity Cards under the Registration of Persons Act (Cap.107), these were sought and obtained in the **Njau** name; which led to a protest by **Samuel Wainaina** (PW3). DW2 learned that **Wainaina’s** complaint about **Wahito’s** children taking Identity Cards in the **Njau** name had been lodged with DW2’s mother, who informed DW2 she had told off **Wainaina**, by citing a sagacious Kikuyu aphorism: “*If you love a cow, you take the tether too.*”

DW2 testified that **Mary Wahito** had three other children, so that in all she had seven children. The eldest child, a daughter named **Wambui Ngariuku**, had remained in Nyeri District with her grandmother, and did not become part of the **Njau** household. Then there were the youngest two, **Ann Njeri** and **James Githaiga**, who DW2 averred were the biological children of **Joseph Njau Kairu**; the deceased had so informed DW2, and, in her testimony, **Njau** “*cared for them and paid their fees, and he paid using cheques which I [myself] prepared.*”

Contrary to the evidence given on the plaintiffs’ side, DW2 averred that **Mary Wahito** had attended the burial ceremony for the late **Njau’s** father in 1997 and that she did so in her capacity as the wife of **Joseph Njau Kairu**; and on that occasion the one who was absent was **Samuel Wainaina** (PW3) who had been held in remand at Thika over suspected crime. But **Mary Wahito** had not attended DW2’s mother’s funeral in 2003, as she was away in the United States of America.

DW2 testified that even though **Samuel Wainaina** had now held himself out as the patriarch of the larger **Muthaba** family and the steward of the household of the late **Joseph Njau Kairu**, the deceased had not shown much confidence in him. The witness remembered that, back in 1991 **Njau Kairu**, while traveling to Japan, had preferred to leave his financial affairs under the care of **Peter Nyaga** (DW1) but not **Samuel Wainaina** (PW3). In 1992 the police were investigating the origin of an Isuzu lorry which **Joseph Njau Kairu** had purchased, and when he found himself in difficulty it is **Peter Nyaga** he sought for assistance, and not **Samuel Wainaina**. On another occasion **Joseph Njau Kairu** was away in Nakuru when burglars broke into his house; and when he was informed, he sent word that **Peter Nyaga** rather than **Samuel Wainaina**, should take the responsibility of doing a follow-up. And in 1999 when **Joseph Njau Kairu** had his fatal bout of illness while at Gatundu he never thought of **Samuel Wainaina**, but instead asked for a half-brother, **Ngugi**, PW1 and PW2 to come along and take him to hospital; and as they drove to hospital **Njau Kairu** still did not have **Samuel Wainaina** (who was in the near neighbourhood) informed, but rather asked for **Peter Nyaga** whose home was much further away. **Peter Nyaga** was immediately called, came along to the hospital, and signed all the admission papers for the late **Joseph Njau Kairu**. On an earlier occasion DW2 had asked **Njau Kairu** why relations between him and **Samuel Wainaina** were frosty, and the answer was: “*in the sharing out of property, Samuel Wainaina had taken for himself all the prime plots, out of lands which both of us had secured.*”

DW2 averred that “it is a big surprise **Esther Wanjiku** turned her back on **Mary Wahito.**” She further testified: “I don’t understand why **Samuel Wainaina, Lucy Njoki** and **Esther Wanjiku** are rejecting **Mary.**” Neither of the two plaintiffs had ever had a problem with **Mary Wahito**, in the lifetime of **Joseph Njau Kairu**, and indeed, **Esther** would from time to time stay in **Mary’s** Langata residence taking care of **Mary’s** children. Now and again, during **Njau Kairu’s** lifetime, **Mary Wahito** had been the guest of honour in fund-raising meetings for the education of the children of **Samuel Wainaina**, being invited thus to serve by none other than **Teresia, Samuel Wainaina’s** wife.

DW2 testified that **Mary Wahito’s** house in Langata had been purchased by **Joseph Njau Kairu**, and that she had witnessed cheques being drawn by **Njau Kairu** for that purpose. She remembered that there was a

time when **Mary Wahito** was away in the United States of America, and **Njau Kairu** drew a cheque for the sum of Kshs.200,000/=, for payment of the mortgage on her Langata house.

The question of where to bury dead relatives had surfaced earlier, during the life of **Joseph Njau Kairu**, and his conviction was that deceased children should be interred in their father's lands. DW2 testified that **Samuel Wainaina** himself had wanted to bury his deceased daughter, **Joyce Wanjiru** at a public cemetery; and **Joseph Njau Kairu** was so disturbed about it that he offered his own land, for the burial of **Samuel Wainaina's** daughter; and it is this opposition that led **Samuel Wainaina** to change his mind and bury **Joyce Wanjiru** at his Ruiru farm. DW2, in the light of that earlier incident, believed that the late **James Githaiga Njau** as the child of **Njau**, should be laid to rest where his father had been buried, at Gatundu. DW2 testified that the extended **Muthaba** family had always opposed **Samuel Wainaina's** inclination to burying deceased members of his own immediate family in public cemeteries – and indeed he had done just that in the case of his first wife **Jane Njambi**, as well as his son, **Stanley**. DW2 testified that neither of the plaintiffs had initially had objections to **James Githaiga Njau** being buried in Gatundu, and so the real obstacle would have been none other than **Samuel Wainaina**.

Learned counsel **Mr. Kimani** began his cross-examination on 16th February, 2006 and DW2 restated that she first met **Mary Wahito** in 1975 when she was 12 years old; **Njau** could have been some 23 – 24 years old, and he had a wife, **Lucy Njoki** (2nd plaintiff). DW2 then was a pupil in primary Standard 5, and was able to travel to and from Nairobi by public means. DW2 was at the time, she averred, able to appreciate relations between males and females. **Joseph Njau Kairu**, at that time, referred to **Mary Wahito** as **Mama John**, and he told DW2 that **Mary** was his wife. DW2 testified that even when she was much younger, in 1969, **Njau** had told her he was going for his initiation into adulthood; and in December 1975 she too went for her initiation into adulthood, and that is the year **Njau** told her that **Mama John** was his wife. As it turned out, DW2 testified, it was **Mama John** herself who took her to the initiation process, even as **Joseph Njau Kairu** at the same time took **Peter Nyaga Kairu** for his own initiation. When counsel put it to DW2 that in Kikuyu customary practice, an initiate would have had to stay restricted in a house for some eight days, she said this custom did not apply to her, as she soon gained her freedom and travelled home, to be with her mother in Gatundu. However, DW2 saw her initiation counselor (*mutiiri*) as **Mary Wahito**, who from time to time visited her at Gatundu following the initiation. In DW2's words: "*There was no requirement of persistent counseling; so I just stayed with my mother; mutiiri's task was to take me to and from initiation.*" DW2 averred that the initiation procedure and its requirements had evolved over time, so that "these days initiates are taken to Church for counseling."

But when was **Mary Wahito** customarily married by **Joseph Njau Kairu**? It was, according to DW2, in December 1979. **Lucy Njoki**, according to DW2, married **Joseph Njau Kairu** in 1974; and **Esther Wanjiku** married him in 1980. **Mary Wahito**, according to DW2, was living together with **Joseph Njau Kairu** from 1975 to 1979, and in that year (1979) she was formally introduced to the extended **Muthaba** family at Gatundu, as a wife. In the words of DW2: "*They were staying together from 1975, and actual marriage took place in 1979.*"

When DW2 was shown the charge document on **Wahito's** Langata property (plaintiffs' exhibit No.5), which gave her name as **Mary Wahito Ngariuku**, DW2 said such a document surprised her. And when shown a loan document with Kenya Industrial Estates in which **Njau** had stood as guarantor for **Mary** in 1993 (plaintiffs' exhibit No. 6A), and in which **Njau** described himself merely as "friend", DW2 expressed her apprehension that such a document could only be a "forgery." But responding to further questions on this point, DW2 said: "*That is their own business; it is for them how they related to each other.*"

DW2 testified that **Mary Wahito** had attended the formal introduction of **Esther Wanjiku** as a wife to **Joseph Njau Kairu**, at his Gatundu home, and **Mary** showed no unfriendliness towards **Esther**. A celebration on that occasion took place, known in Kikuyu customary practice as "*kula njahi*."

DW2 testified that as at 1979, when **Lucy Njoki** (2nd plaintiff) had wanted to adopt children, family objections had been expressed; and in that year **Mary Wahito** had been introduced as a wife to **Joseph Njau Kairu** – and she had come along with six children. This had a significance; in the words of the

witness: “Since **Njau** had children with **Wahito**, there was no need to adopt; and **Njau’s** children with **Wahito** were **Njeri** and **Githaiga**.” DW2 believed that in 1979 **Njeri** would have been four-to-five years old. DW2 did not agree with learned counsel that **Njeri** absolutely had to be named after a member of the extended **Muthaba** family; in her words: “A father and a mother name their children as they want. In tradition, **Njeri** would have been **Njambi** – but this is a matter for the child’s parents to decide.” In the case of **Githaiga**, DW2 averred: “In our family there is no **Githaiga**; in tradition, he would have been named **Kairu**.”

Learned counsel **Mr. Kimani** continued with cross-examination on 21st February, 2006 when DW2 testified that of her own two children only one, **Njambi**, is named after her mother; but the other, **Wambui**, “is just a name I came up with.”

DW2 testified that **James Githaiga Njau** had died at 25 – 26 years of age, when he was still at school, had no home of his own, and had no job.

On cross-examination by learned counsel **Mr. Githinji**, DW2 testified that several marriage-process visits had been made by **Joseph Njau Kairu** to **Wahito’s** parents in Nyeri. But on the question of some “interested parties” not knowing the detailed modalities of **Wahito’s** marriage to **Njau**, DW2 averred: “**Njau** was following his own methods of conducting the marriage activities. Not many people knew what he was doing; but he went with elders to **Wahito’s** place many times.”

On **Njau’s** relationship with **Wahito** as a wife, DW2 testified that he had given **Wahito** land to use, at Mutomo in Gatundu; and that even today **Wahito** farms that land in Gatundu. In DW2’s words: “She [**Wahito**] has really exploited that [Mutomo] plot. It is under **Njau’s** name. It is several acres in size.”

Learned counsel **Mr. Miller** re-examined DW2 on 23rd February, 2006 and further clarification of testimony was made as follows. **Mary Wahito** uses two parcels of land in Gatundu, both situated at Mutomo: the first comprises two-to-three acres, and the other measures one-quarter of an acre. **Wahito** has been using the two parcels of land since 1991. Over the years **Mary Wahito**, **Esther Wanjiku** and DW2 had been farming on **Joseph Njau Kairu’s** lands situated along Kenyatta Road, in Gatundu. When, in 1991, the three of them stopped using the Kenyatta Road land, **Mary Wahito** was given the Mutomo plots by **Joseph Njau Kairu**; and to-date she continues to exploit those lands. **Lucy Njoki** and **Esther Wanjiku** too have agricultural plots at Mutomo.

DW2 testified that the late **James Githaiga** had been at Gatundu during the funeral congregations in hour of **Joseph Njau Kairu** in 1999, and that he was also present at the burial ceremony which followed. Similarly, all of **Mary Wahito’s** children had been present at the Gatundu home during the ceremonies leading to the final rites for **Joseph Njau Kairu**. **Wahito** herself had attended the funeral ceremonies, but she had not been present during the burial ceremony.

DW3, **Charles Muthigani**, was sworn on 23rd February, 2006 and examined-in-chief by learned counsel **Mr. Miller**. He testified that he was a contractor-engineer aged 54, and a close family friend to the late **Joseph Njau Kairu**. He had first met **Mary Wahito** at her Langata house in 1985, when her daughter, **Rose Muthoni Njau**, introduced the two families. It was in April 1985 that DW3 met **Joseph Njau Kairu**, at their Langata home. Over the years, the two families became close, and developed long-lasting relations of friendship. **Joseph Njau Kairu** himself introduced **Mary Wahito** as his wife, to DW3; and **Mary** told DW3 that **Njau Kairu** was her husband. DW3, thus, clearly understood in 1985 that **Mary Wahito** was married to **Joseph Njau Kairu**; and in the witness’s words: “The two were very close”; “**Njau** would spend nights there at Langata. I know that. I observed that many times. They were together. We were very close to them.” DW3 knew **Njau** had other wives; and these other wives were properly introduced to DW3 and his family. Family festivities used to be held at the Langata home, attended by all the **Njau** wives and children, and to which DW3 and his family would be invited. On the first occasion when such a gathering took place and **Njau** introduced his several wives, DW3 noticed that the entire **Njau** family was closely-knit; in DW3’s words: “We were invited – I don’t remember on what date. He [**Njau**] was close with the three wives. He introduced to us the first wife, who stood up; he said this was his first wife – **Lucy**; then the second wife, **Mary Wahito**, was introduced; and then **Esther Wanjiku** was

introduced as the third wife.” During these introductions, **Wahito’s** children were present; **Esther Wanjiku’s** children were present; **Peter Nyaga’s** wife and children were present. **Njau** had told DW3 that **Lucy Njoki** had no children. DW3 knew that some of **Mary Wahito’s** children were **Joseph Njau Kairu’s** biological children. He knew that **James Githaiga** was **Njau’s** biological son; and also that **Njau** had taken all of **Wahito’s** children as his own, without discrimination. Of **Githaiga**, DW3 averred:

“**Githaiga** was his biological child. He told me so. We were close. I have no doubts in my mind, **Githaiga** was **Njau’s** biological son.”

DW3 had “no doubts that **Mary Wahito** was **Njau’s** wife; all proper introductions had been made, and I cannot now begin to doubt; **Njau** confirmed to me that **Mary** was his wife, and **Githaiga** was his sown.”

DW3 produced a photograph of uncertain date, taken at Muhoho High School (defence exhibit No.6); and he testified that **Esther Wanjiku’s** son was at that school together with his own son. The photograph shows a Parents’ Day at the school – and the persons attending. On the photograph, DW3 could easily identify – **Muiruri (Esther Wanjiku’s** son); **Esther** herself; **Nduta (Esther’s** daughter); **Charity Mumbi** (DW3’s wife); **Wangui (Esther’s** daughter); and **Muthaba (Esther’s** brother-in-law). DW3 then showed in a family photograph taken at **Wahito’s** Langata home (defence exh. No. 7): **Esther Wanjiku** serving meat to **Mary Wahito** and **Joseph Njau Kairu** (and as she served, she exuded happiness and smiled with contentment); **Teresia Wanjiku – Samuel Wainaina’s** second wife. DW3 was at the function captured in the photograph; and on this occasion as on many other such occasions, he formed an impression: “I saw signs of a happy family.” Such was the impression emerging from yet other family-festivity photographs which DW3 produced: defence exh. Nos.8, 9, 10.

DW3 testified that he was in Kenya when **Joseph Njau Kairu** became fatally ill, suffering from diabetes and losing his eyesight. **Njau** was already in a coma when DW3 came to know of it, and he soon thereafter died.

DW3 had not been brought into the tasks involved in the funeral arrangements, and, given his closeness to the family he was surprised, but thought his closeness to **Mary Wahito** would have been the reason. He apprehended that there was an emerging split in the **Njau** family, following the demise of the family head. On the burial occasion for **Njau**, DW3 attended with his family, but noticed that **Mary Wahito** was not there. This was lots of surprise for the witness, and he came to realize that there was an emerging problem in the **Njau** family. He, however, found **Mary Wahito’s** children, including **James Githaiga Njau**, at **Njau’s** Gatundu home, during the burial ceremony. He took both **Githaiga** and **Michael (Wahito’s** children) and went away with them after the burial. DW3 later learned from **Githaiga**, who in his view “looked devastated”, that “his mother had been threatened by family members; so she feared for her life and did not come.”

DW3 testified that the apparent split in the **Njau** family following his death, was never healed, and then it was, unfortunately, in the context of such a misunderstanding, that **James Githaiga Njau** was killed in March, 2005 in a road accident.

DW3 was chairman of the burial committee which was formed for the late **James Githaiga Njau**. The committee was meeting at the Kenyatta International Conference Centre in Nairobi. The committee had invited all of **Njau’s** widows as well as **Samuel Wainaina**, to attend. They had given indications that they would attend, but they failed to turn up. This non-co-operation on the part of those in **Njau’s** Gatundu household, immediately presented a problem and indeed a crisis – as **James Githaiga Njau** had to be buried, and **Mary Wahito** wanted the young man’s remains to be laid to rest next to his father’s grave, in Gatundu. DW3 and his wife and **Mary Wahito** visited Gatundu on 11th March, 2005 and on their way passed through **Peter Nyaga’s** home. They went upto the **Njau** residence, and spoke to **Lucy Njoki** (2nd plaintiff) and **Esther Wanjiku** (1st plaintiff). The two widows did not inform DW3 and his party that they had any reservations to the burial of **James Githaiga Njau** as planned, but they shifted the focus of decision-making, to the household of **Samuel Wainaina**: “**Samuel** had to be asked.” And they gave DW3 **Samuel Wainaina’s** cellular phone number – in effect, asking them to obtain consent from the **Wainaina** household. **Lucy Njoki** and **Esther Wanjiku** had informed DW3 and his party that “**Samuel Wainaina**

was the person left to them as a caretaker.” When DW3 called **Samuel Wainaina** he said he was traveling towards Matasia in the suburbs of the city, and he would return the call. He never did. So DW3 called **Peter Nyaga** and asked him to help in communicating with **Samuel Wainaina**. Later DW3 and his team had a meeting with **Peter Nyaga** at Gikomba; and **Peter** then made efforts to communicate with **Samuel Wainaina**; but again, **Wainaina** apparently did not co-operate. He did not call DW3, and so in the arrangements for the burial of **James Githaiga Njau**, it became clear to the funeral committee that no business could be done with **Samuel Wainaina**. The committee then decided to put up *press announcements* of burial to take place on the land of the father of the deceased.

DW3 testified that in the preparations for the burial of **James Githaiga Njau**, a newspaper and a radio announcement were published, for burial at Ikuma village in Gatundu, the home and burial place of the late **Joseph Njau Kairu**. No progress, however, was made, as the very two widows who had advised the funeral committee to obtain approval from **Samuel Wainaina**, are the ones who now, by *ex parte* proceedings, interrupted the planned burial for **James Githaiga Njau**. On 16th March, 2005 **Esther Wanjiku** and **Lucy Njoki** filed a suit against **Mary Wahito**; and on the same date they moved under certificate of urgency to obtain *ex parte*, an injunction against the burial at Ikuma of **James Githaiga Njau**. Litigation then commenced, and so the body of the deceased *remains in the mortuary to-date*.

Such a state of affairs, in DW3’s perception, is revolting, especially in the light of the cordial family relations that had over the years marked the **Njau** family until his death. In DW3’s own words: “*To us as a family, this is a nightmare. I can’t comprehend. I wish it would never happen to anyone at all – least of all to the Njau family.*”

According to DW3, “**Githaiga** should be buried next to his father. **Wahito**’s children bear **Njau**’s name; **Njau** told me these were his children. They used his own Identity Card when they were making applications for their own Identity Cards. **Njau** never denounced the children of **Wahito**.” On identification, DW3 gave further testimony on **Wahito**’s children’s attachment to the identity of the late **Joseph Njau Kairu**. In 1987 **Wahito**’s daughter **Rose Muthoni Njau** was due to travel to the United States of America for further studies. To facilitate her travel, **Joseph Njau Kairu** instructed DW3 to take **Rose** to the American embassy and have the requisite travel documents prepared for her. DW3 completed the task, and **Rose Muthoni Njau** travelled to the U.S.A., being seen off at the airport by the core of the **Njau** family households – all of **Njau**’s wives; **Peter Nyaga Kairu**; **Samuel Wainaina**; DW3 and his wife.

In 1989, again, **Rose Muthoni Njau** was travelling to the United States of America, and her foreign currency needs had to be attended to. It is DW3 who was asked by **Joseph Njau Kairu** to prepare the requisite documents for **Rose**; and he personally filled in the Central Bank of Kenya Exchange Control form dated 21st August, 1989 – in the name of **Rose Muthoni Njau**; and **Njau** himself signed the document, in his capacity as the *father* of **Rose**.

DW3 testified that **Joseph Njau Kairu** was the one paying the fees to enable **Rose** to be in the U.S.A. as a student; and he also paid fees in the U.S.A. for **Rose**’s brother, **John Maina Njau**. DW3 came to know of this because he would help with the processing of the said fees; he said: “I had a contact with the U.S. embassy; and so the late **Njau** was relying on me.”

DW3 testified that on the day of the burial of **Joseph Njau Kairu**, he had taken **James Githaiga Njau** to stay over at his home. **Githaiga** was then a student at Thika High School, and DW3 did the shopping for him as he was returning to school. As he drove **Githaiga** to school, DW3’s car had broken down at Ruiru, near **Esther Wanjiku**’s shop; and **Esther** (1st plaintiff) had provided a towing bar for the vehicle; **Esther** on that occasion gave **James Githaiga Njau** Kshs.200/= as pocket money; and of her general mien on that day, DW3 testified: “She was warm, and I saw the motherly instinct in her.”

Learned counsel **Mr. Kimani** began his cross-examination on 27th March, 2006. On that occasion DW3 averred that the late **Joseph Njau Kairu** did, in his perception, respect the Kikuyu culture, save that he had adopted a different approach in the naming of the children he had with **Mary Wahito**; on this point the witness averred: “[his mode of] naming children did not make him [any the] less traditional.”

In DW3's testimony, **Joseph Njau Kairu** had a biological child (**James Githaiga Njau**) and several adopted children with **Mary Wahito**. He had not, however, discussed the details of the adoption with **Joseph Njau Kairu**.

DW3 testified that he had been so concerned about the split in the **Njau** family which he saw at the funeral at Gatundu, that he later talked about it to both **Mary Wahito** and **Esther Wanjiku** – and both said they did not understand how the split had arisen. For some time DW3 was not aware of any further developments on the matter, as **Mary Wahito** had travelled to the U.S.A. in 2000 and she remained there for some time, visiting her daughter.

Learned counsel **Mr. Kimani** did not continue with cross-examination on 3rd April, 2006 as DW3 fell ill while in Court, and the matter proceeded on 5th April, 2006 when the witness testified that he had no occasion to discuss with **James Githaiga Njau** the issue of succession after **Joseph Njau Kairu** died. In his view, “[**Githaiga**] was too young, and he had no reason to discuss [**Njau**’s] properties with [**Githaiga**].”

DW4, **Mary Wahito**, was sworn and began her testimony on 5th May, 2006. She testified that she was born in 1948; went to school at Ndumaini in Nyeri, attaining Standard 5; married **Shadrack Ngariuku** in 1963, and had with him five children – **Lucy Wambui**, **Lucy Muthoni**, **John Maina**, **Michael Wanjohi** and **Jackline Wanjiru**. The **Ngariuku** family had lived at Makadara in Nairobi, where **Shadrack Ngariuku** was running a business known as Haraka Body Builders on Kombo Muniyiri Road, Gikomba. He died in 1974, in a road accident, and **Mary Wahito** (defendant) continued to run the business at Gikomba. And while thus engaged in business, the defendant subsequently met **Joseph Njau Kairu**. From time to time **Njau Kairu** would come to the defendant's business premises, and so she came to know him. The defendant's firm would do soldering for **Joseph Njau Kairu** who was dealing with scrap metal at his own enterprise, just across Kombo Muniyiri Road.

In the course of time **Joseph Njau Kairu** and **Mary Wahito** became friends, beginning from 1974. So intimate did this friendship become, the two started co-habiting at a house in Makadara Estate in 1974; and in 1979 they moved to a different house at Umoja Estate, and continued co-habiting. Of this relocation, DW4 testified: “I moved with **Njau** and my children to Umoja.” Then they purchased the Umoja house – **Njau** himself paying the price. In the words of the defendant: “**Ngariuku** left me in a rented house. The non-rented house was the Umoja one, purchased by **Njau**.” And thereafter the couple purchased yet another house, No. A150 at Akiba Estate in Langata – the current residence of **Mary Wahito**. Of this house, the defendant averred: “It is [registered] in my name. **Njau** and I purchased it. We entered it in 1984. When **Njau** died we were living at Akiba, Langata.” Of her occupation at different times of the several houses, **Mary Wahito** testified: “With **Njau** we lived at Makadara, Umoja, and Langata. There was no other place where I lived with **Njau**.” Of the progressive stages of her relationship with **Joseph Njau Kairu**, the defendant averred: “Friendship began in 1974. Our friendship was known. I went with him up to our place in Nyeri. He visited my parents in 1979. We used to go there several times before, but the 1979 visit was a special one. He wanted to see my parents. He told my parents on that occasion that he wanted me to be his wife. He went to my parents with goats. He had elders with him – I can remember **Baga wa Njeri**, **Tom Mwaniki**, **Peter Muthaba** [**Njau**'s brother]. I had gone home ahead of them, and they then followed. The goats were three, named (i) **Mwate**, (ii) **Niharika** and (iii) **Ndurume**. They also brought money to my parents. This was the process of ‘*ku-racia*’, and it was a statement that **Njau** wanted a wife. My father then had long died, but my mother was there. Agreement was reached. A goat was slaughtered and eaten.”

Mary Wahito testified that the late **Joseph Njau Kairu** had sought her hand in traditional marriage, and had performed the *ruracio* ceremony at her parents' home in Nyeri. Another traditional celebration, known as *gutinia kiande* should ordinarily have followed later; but in her testimony this did not take place. Her explanation of this omission is that *gutinia kiande* had not, before her marriage, taken place for the first wife of **Njau** (**Lucy Njoki**), and so it would not be conducted for her. The said ceremony was done only after **Njau**'s death, in the case of **Lucy Njoki** (in 2000, whereas **Njau** died in 1999). The man who performed the traditional rite posthumously, in the case of **Lucy**, was **Peter Nyaga Kairu** (DW1). **Mary Wahito** testified that later after the *gutinia kiande* had been done for **Lucy Njoki** it was also done

for **Esther Wanjiku** (1st plaintiff) – by someone not a member of the family. **Mary Wahito** has not had such a ceremony performed for herself after the death of **Joseph Njau Kairu**; but she believes that “even though that rite was not performed, one is still a wife, because ‘*ku-racia* is the most important step.” The defendant has not had the final traditional marriage rite done for her only because, in her words: “I have not had an opportunity.”

DW4 averred that the late **Joseph Njau Kairu** had three wives, these being (i) **Lucy Njoki**; (ii) **Mary Wahito**; and (iii) **Esther Wanjiku**; and she, the defendant, had two biological children with the deceased, namely **Ann Njeri** (born in 1975), and **James Githaiga** (born in 1978). Of the two children, the defendant testified: “Those were the children of **Joseph Njau Kairu**. He was the only man then, in my life.” **James Githaiga** was born when the defendant and **Joseph Njau Kairu** still lived at Makadara Estate. The first occasion when **Njau** took all the children to his Gatundu home was in 1979, and these children were: **Lucy Muthoni**, **John Maina**, **Michael Wanjohi**, **Jackline Wanjiru**, **Ann Njeri** and **James Githaiga**. **Wahito**’s first child, **Lucy Wambui**, did not come along as she had been living in **Nyeri**. On this visit, **Wahito** and her children were led by **Njau** to the house of **Lucy Njoki** (2nd plaintiff), who was at home, in the company of one **Jane Njambi**; **Wanjiku wa Nyaga**; and other close relatives and members of the family. **Njau**’s mother was called and she came to **Lucy Njoki**’s house. On that occasion, DW4 testified, “**Njau** told **Lucy**: This is my wife; when you ask where I am, I am with her in Nairobi.” This statement, DW4 averred, was “said before everybody”; and DW4’s name was given as **Mama John** – meaning the mother of **John Maina**. At this announcement, DW4 averred, **Njau**’s mother had asked: “Are you marrying her with all her children?”, to which **Njau** answered “yes”; and **Njau**’s mother responded: “If you love her, then we too love her.” **Lucy Njoki**, on that occasion, was cheerful and hospitable. She cooked food for the new members of the family, and she had invited all her brothers’ wives to be at her house that evening with the words “*muiru anakuja*”: “My co-wife is coming.”

Mary Wahito and **Njau** and her children drove from **Lucy**’s home into the compound where **Njau**’s mother lived; and **Njau**’s father, who was at the time in his second home, was brought along to meet **Wahito** and the children. **Njau**’s father, who by then had gone blind, was brought into the home by **Njau**’s step-mother; and **Njau** told him he had brought home a guest, a wife, called **Mama John**. The old man greeted **Wahito**, and welcomed her with the words “*karibu*”. **Njau**’s mother had also made a meal; and so **Wahito** and her party, and all members of the family had a feast.

DW4 testified that the new family bonds were strengthened in December, 1979 when her son **John Maina** was undergoing initiation rites in Nairobi; **Njau**’s mother, **Lucy Njoki** and others came along, and there was merry-making. On that occasion, DW4 averred, **Joseph Njau Kairu** called his mother, and intimated to her that both **Ann Njeri** and **James Githaiga** were his biological children; and she expressed happiness and avowed her love for children.

DW4 testified that from 1979 she developed friendship with **Lucy Njoki** (2nd plaintiff) and they freely visited each other; and **Lucy** would even come to Umoja Estate and take all the children; and sometimes these children could stay with **Lucy** in Gatundu for days. It was **Mary Wahito**’s understanding all along, whenever **Lucy** cared for her children, or took them away, that she did so because she “was taking these children as the children of *muiru*.” The children became fond of **Lucy** and referred to her – as they still do today – as untie. When schools closed, **Wahito**’s children would go to Gatundu and stay with **Lucy**, and she would care for them as if they were her own children.

Lucy Njoki visited **Mary Wahito**’s Langata residence many times, especially during the Easter, Christmas and other public holidays; and **Mary** would always welcome her “*kama muiru wangu*” – “as my co-wife.” DW4 further averred: “**Lucy** and I used to talk as co-wives. I would even go with my children to visit [her] and even stay overnight, without being invited. **Njau** would be present. The house was large. **Njau** had a separate bedroom. We could all be there in the same house.” DW4 averred, in relation to her deceased son: “**Lucy** loved **Githaiga**...**Githaiga** could go on his own to visit **Lucy**...In the whole **Njau** family, **Githaiga** was well known.”

DW4 averred that all along up to the death of **Joseph Njau Kairu**, **Lucy Njoki** remained a good friend to her; but – “bad relations came...after **Njau** died. **Lucy** herself is the one who spoilt the good relations.

When **Njau** died, **Lucy** took the position that I was a stranger. I do not know how and why she turned against me.” During the funeral for **Njau** DW4 had gone to Gatundu, but found that **Lucy** no longer had good grace, and it proved difficult to relate to her as a co-widow. The emerging misunderstandings rendered it impossible for DW4 to be at the burial ceremony for **Njau**; and after **Njau**’s death in 1999, DW4 went to the U.S.A. where she remained for some time. When, in March, 2005 **James Githaiga** died, DW4 visited Gatundu and spoke to **Lucy Njoki**; and what did **Lucy** say: “She said she did not want to allow **Githaiga** to be buried until **Samuel Wainaina** had been consulted.” On her part, **Mary Wahito** averred that she has “no animosity towards **Lucy Njoki**.”

Learned counsel **Mr. Miller** continued to lead **Mary Wahito** in her evidence-in-chief on 15th May, 2006, when the witness gave testimony regarding **Esther Wanjiku** (1st plaintiff).

DW4 testified that she first met **Esther Wanjiku** (1st plaintiff) in 1980, at **Njau**’s Gatundu home; and this was during a family function – welcoming a child born to **Esther. Njau**, while at his Umoja Estate residence with **Mary Wahito**, had told **Mary** that he had a new wife who had a child. **Njau** and **Wahito** then drove to Gatundu, and found **Lucy Njoki** at her residence in the company of **Esther Wanjiku**, **Mary Njeri Muthaba** – wife of **Njau**’s eldest brother – and a lady known as **Mama Mukami** – wife to a cousin of **Njau**’s. This visit was marked with celebrations at the birth of a child, involving the eating of “**Njahi**.” **Esther**’s child was a girl, named **Njambi**. **Njau** made a speech and introduced **Esther**, whom he referred to as *muiru* in relation to **Lucy Njoki** and **Mary Wahito**.

DW4 testified that she developed cordial relations with **Esther Wanjiku** who had several children – **Veronica Wambui**, **Jane Njambi**, **James Muiruri**, **Njoroge**, **Rose Wanjiru** and **Alex Muthaba** – with **Joseph Njau Kairu** in the period starting from 1980. These children over the years visited **Mary Wahito** at her Langata home, from time to time, and she regarded them as her step-children. She would take care of **Esther**’s children and even drive them to the Gatundu home when schools re-opened.

DW4 testified that **Esther Wanjiku** had a seventh child, **Nduta**, with whom she had come into the marriage with **Joseph Njau Kairu**. **Nduta** started going to nursery school at the very beginning of her mother’s cohabitation at Gatundu with **Joseph Njau Kairu**. Of **Esther**’s children, DW4 testified: “**Esther**’s children referred to me as untie; but they recognized me as their mother. Her children and my children were good friends.”

The three women in **Njau**’s life were close, and conducted themselves as members of one large family. DW4 testified that she had travelled to the United States in 1991, to see her children who stay there; and **Esther** is the one who took care of her domestic matters: “**Esther** is the one who came to Langata to take care of my house. She came with her two children.” On many occasions **Mary Wahito** would visit the Gatundu home with her children; and all of them would sleep “in the same house with **Esther** and **Lucy**. The house had five bedrooms, and each wife had a room, and [**Joseph Njau Kairu**] too had a room [to himself].”

When Njau became fatally ill, it is **Esther Wanjiku** who came with his driver (one **Ngugi**) to inform DW4 that **Njau** had been hospitalized at Aga Khan Hospital. Up to that point in time, the two women had accorded each other recognition and respect, but, DW4 averred: “After **Njau**’s death, my relations with **Esther** deteriorated. I don’t know why. They no longer spoke to me well, not the way it used to be before. Both **Esther** and **Lucy** ceased to be friendly”.

DW4 testified that **Esther Wanjiku** had taken over **Njau**’s Juja business after he died. Following **Njau**’s death **Mary Wahito** visited **Esther** at the said business, and inquired about a farm which **Njau** had left at Juja. **Esther** was evasive, and said “she did not know if [**Wahito**] had a share [in the said farm].”

Following the death of **James Githaiga**, **Mary Wahito** again went and spoke to **Esther Wanjiku**, concerning burial in Gatundu; again, **Esther** along with **Lucy Njoki**, was evasive and said “only [**Samuel Wainaina** could answer...”

Mary Wahito averred that she has “no animosity towards **Esther Wanjiku**. I have not refused to talk to

her. But she does not talk to me.”

On the naming of new-born children, DW4 felt there was nothing improper in the way her late son, **James Githaiga**, was named. In her words: “**Esther’s** son with **Njau**, **James Muiruri**, is named after **Njau’s** father. And my son was **James Githaiga Njau**. **Githaiga** was my brother – and that is the name I gave to **James Githaiga**. When we gave birth to **Githaiga** we had not decided yet that we would get married; and **Joseph Njau Kairu** was away in Nakuru, at work, when I delivered the baby; he returned to find that I had already given the name **Githaiga**; and **Njau** himself is the one who gave the name **Njau** to **Githaiga**.”

Mary Wahito testified that she had first come to know **Joseph Njau Kairu**, in 1974, before coming to know his brother, **Samuel Wainaina**. As at that time, DW4’s relations with **Samuel Wainaina** were not bad; but later in 1974 when **Wainaina** came to know of the relations between **Wahito** and **Joseph Njau Kairu**, he showed displeasure. On this point, DW4 testified: “He saw that I was in the company of **Njau**. He saw there was a relationship. He did not like it. **Wainaina** knew I had children; and he told **Njau** off; how could he [**Njau**] involve himself with me and I had children.” DW4 further averred: “**Wainaina** himself spoke to me and I could see his unhappiness. He would decline to talk to me. Sometimes we spoke. Sometimes we did not talk to each other. **Njau** knew about the bad relations between me and **Wainaina**. Many times **Njau** introduced me as his wife in the presence of **Wainaina**.” And then one day, at an occasion at the matrimonial home of a sister of **Njau’s**, **Mary Wambui**, wife of one **Karogi**, which was attended by **Wainaina**, **Njau** and the three women in his life, **Njau** asked his wives to stand up, and **Mary Wahito** stood up alongside **Lucy Njoki** and **Esther Wanjiku**. Then on still another occasion, being a marriage-related ceremonial visit to **Esther Wanjiku’s** natal home at Gituamba, **Joseph Njau Kairu** stood up and introduced all his three wives, in the presence of **Samuel Wainaina**. Such a scene, DW4 testified, was re-enacted many other times as well, and thus **Samuel Wainaina** could not deny knowledge of the marital relation which she had with the late **Joseph Njau Kairu**.

DW4 testified that the lukewarm relations between herself and **Samuel Wainaina** persisted in a somewhat stable condition until the death of **Joseph Njau Kairu**, and since then **Wainaina** no longer talks to her. There was, therefore, difficulty when following the death of **James Githaiga Njau** the plaintiffs demanded that the defendant must talk to **Samuel Wainaina**, but on the question of burial within the landed estate of **Joseph Njau Kairu**. It was the late **Njau’s** family friend chairing the **Githaiga** burial committee, **Charles Muthigani** who spoke to **Wainaina**, but **Wainaina** would not avail himself for any further discussion, and he occasioned the transitory time during which a *suit* and an *application* were filed by **Esther Wanjiku** and **Lucy Njoki**, to halt the burial plans. **Wainaina’s** brother, **Peter Nyaga Kairu**, had also spoken to him on the matter, but he was *unavailable* for any discussions at all.

DW4 testified that the **Githaiga** burial committee had invited **Njau’s** Gatundu family as many as three times, to attend the deliberations which were in progress at the Kenyatta International Conference Centre, but none of them turned up. It is then, that announcements were published in the press indicating that burial would take place at **Joseph Njau Kairu’s** home at Ikuma, Gatundu. Further progress was stopped by the suit and the parallel application. The burial committee planned on burial on the *fourth* day following **James Githaiga Njau’s** death; but **Esther Wanjiku** then came up with confusing counter-advertisements which described the deceased as **James Githaiga Ngariuku** (plaintiffs’ exhibit No.8). In the counter-advertisements, even **James Githaiga Njau’s** siblings, who had been referred to by the **Njau** surname, had their names changed to bear the **Ngariuku** surname. Since DW4’s son had always been known and recognized as **James Githaiga Njau**, the defendant returned to the press to correct the impression created by **Esther Wanjiku’s** counter-advertisement; but this only led **Esther** to return to the press with a new counter-advertisement purporting to sever all association between **James Githaiga Njau** and **Joseph Njau Kairu**. Immediately thereafter, **Esther** appeared as *1st* plaintiff, with **Lucy Njoki** as *2nd* plaintiff, to secure legal imprint to the purported severance of all association between the household of **Mary Wahito** and that of the late **Joseph Njau Kairu**.

DW4 related the circumstances surrounding the death and burial of **James Githaiga Njau** in 2005 to those surrounding the death and burial of **Joseph Njau Kairu** in 1999. In the words of the witness: “After [**Joseph Njau Kairu**] died, a death announcement was made in the press (plaintiffs’ exh. No.1) which

made no mention of my name. The only names listed are those of **Lucy Njoki Njau**, **Esther Wanjiku Njau** and **Esther's** children. They never listed me as one of the widows. And their reason is that **Njau** married me when I already had children. But they never raised that point when **Njau** was alive. Now **Njau** is dead; so they will raise any issue. Yet **Esther** also came into the marriage with a child.”

DW4 produced many **Njau** family photographs taken over the years, in which she had appeared alongside the plaintiffs, as a wife of the late **Joseph Njau Kairu** (defence exhibits No. 1, 2, 7, 8,9).

DW4 also produced an insurance certificate (defence exh.No.4), which the late **Njau Kairu** had taken with British American Insurance Co. Ltd in the 1990s, and in which the beneficiaries had been named as **Njau's** three wives, and in the correct order of seniority: **Lucy Njoki Njau**; **Mary W. Njau**; and **Esther W. Njau**.

DW4 testified that the late **Joseph Njau Kairu** had given security for the mortgage loan, in 1984, which enabled her to purchase her Langata house (defence exhibit No.11); and also that he had taken full responsibility for school-fee payment for all her children.

Learned counsel **Mr. Miller** continued with examination-in-chief on 16th May, 2006 when DW4 produced a letter from the Principal of Thika High School regarding the status in that school of the late **James Githaiga Njau** who had been a student from 1996 to 1999 (defence exh. No. 12). The student's name is stated as **James Githaiga Njau**, and his father's name is stated as **Njau Kairu**. DW4 also produced (defence exhibit No.13) a letter from the Principal Karatina Secondary School, relating to the enrolment and attendance there, of **John Maina Njau** (registered in 1982; left in 1985); and it is stated that the fees required to be paid, had been provided by **Joseph Njau Kairu**.

DW4 testified that she had five children with her first husband, **Patrick Ngariuku**, before she married **Joseph Njau Kairu**; and that right from the beginning of primary schooling, these children were identifying themselves by the **Njau** surname. The exception was **Lucy Muthoni** who had reached primary standard 2 by the time of DW4's second marriage, and she also, at that stage, changed her surname from **Ngariuku** to **Njau**. **Lucy Muthoni Njau** is grown-up today and stays in the United States of America, with her identification card bearing the name **Lucy Muthoni Njau** (defence exhibit No.14). All her children, DW4 testified, bear the **Njau** name, and all their official papers of identification speak exclusively in those terms. She produced exhibits Nos.15 (certificate in name of **John Maina Njau**); 16 (passport No. A-587968 dated 17th August, 2000, of **James Githaiga Njau**); 17 (Identify Card for **James Githaiga Njau**, issued on 20th December, 1996 during the lifetime of **Njau** himself).

Mary Wahito produced several photographs to show the actual social connection that she had over the years, along with all her children, enjoyed within the **Njau** family set-up, by virtue of her marital relations with the late **Joseph Njau Kairu**: defence exhibit No. 18 shows family members attending a Christmas party at **Wahito's** Langata home, on 25th December, 1986; defence exhibit No. 19 is taken on the same occasion – and shows all the three women in **Njau's** life, with their wider family members; defence exhibit No. 20 shows another such Christmas occasion, at the Langata residence; defence exhibit No. 21 shows the family in Easter celebrations at the Langata residence; defence exhibit No.22 shows another such festive occasion at the Langata residence; defence exhibit No.23 shows another such occasion, with the notable presence of **Joseph Njau Kairu**, **Ann Njeri Njau**, **James Githaiga Njau**, **Mary Wahito** and others; defence exhibit No.24 is another such festive occasion at Gatundu – and shows the three women in **Njau's** life, their children, and other members of the broader family; defence exhibit No.25 shows a strong representation of the family (with **Mary Wahito**, **Lucy Njoki** and **Esther Wanjiku** present) seeing off **Wahito's** daughter **Rose Muthoni Njau** who was travelling to the United States of America; defendant's exhibit No.26 shows **Mary Wahito** and **Joseph Njau Kairu** entering the Langata residence.

Mary Wahito ended her evidence-in-chief with the plea that her son, **James Githaiga Njau**, be interred at the graveside of **Joseph Njau Kairu**, at Ikuma in Gatundu. She urged that burial in such a manner would be in keeping with Kikuyu customs. And she testified that the late **Joseph Njau Kairu** had given her lands at Mutomo in the Gatundu area which she is still farming and which both plaintiffs recognise as her lands; one of these parcels of land measures 2 ½ acres, while the other is a quarter of an acre. **Lucy** had farmed

the 2 ½ acre plot until the late *Njau* gave it to DW4, and *Lucy* had then been given a different plot. The quarter-acre plot had also been farmed by *Lucy Njoki* until *Njau* gave it to DW4. Although the two plots are still registered in the name of *Joseph Njau Kairu*, the plaintiffs have never raised any questions with the defendant concerning them. DW4 averred that the two plots of land tell a tale: “Had I been an outsider, would they not have called back the two plots?”

Learned counsel *Mr. Kimani* began his cross-examination on 22nd May, 2006, and on that occasion DW4 testified that her name is *Mary Wahito Njau*, even though her passport, which was taken in 1991, still shows her name as *Mary Wahito Ngariuku*; and when she renewed it in 2000 it is the old name which still appeared on her passport.

The witness testified that the date of her second marriage, which is stated in her affidavit of 9th February, 2005 to have been 1972, was incorrect, and that it should have been given as 1974; but she further testified that the formalisation of her marriage did not take place until 1979. DW4 testified that her marriage was by Kikuyu custom, and that bridewealth in that regard had been paid in 1979 – in the form of three goats, and money (Kshs.50,000/=). She averred that she was at her Nyeri natal home when bridewealth was paid, and that the person who handed over the money payment was a cousin of *Njau's*, by the name *Muthaba*; and accompanying *Muthaba* were others – one *Mzee Tom Mwaniki*, one *Banga wa Njeri*, and one *Kairuri* from *Njau's* side; and from DW4's own side, her brother *Mwangi Mugo*, her cousin *Mwangi Muriuki*, and her brother-in-law *Kiretai Wilson* had been present. DW4 averred that her cousin *Mwangi Kariuki* is the one who had, on that occasion, demanded the dowry; and that neighbours had also been present.

DW4 testified that she and *Joseph Njau Kairu* had started living together in 1974, at Makadara Estate in Nairobi. Did this cohabitation as from 1974 constitute “marriage”? So thought DW4; she averred: “The day we married each other we went to live at Madakara; and in 1979 we went to Nyeri to complete the process of marriage. From 1974 we were staying together; so all people who knew us, knew we were married. When we got married, the first to know was *Peter Nyaga*... The second was *Rose Wanjiru*. She came to see *Njau*, and she was brought to my office. I do not know how old *Rose* was, then.” In DW4's testimony, *Rose Wanjiru* at the time was reasonably mature and was a responsible witness to the relation between DW4 and *Joseph Njau Kairu*: “She could come to Nairobi on her own, from Gatundu...She was in school.” It was in 1974 that DW4 met “*Peter Nyaga* and *Rose* for the first time.”

DW4 testified that from her first marriage to *Patrick Ngariuku* in 1963 she had five children, and that she had two other children, *Ann Njeri* and *James Githaiga* with the late *Joseph Njau Kairu*. The first five children had been named in the Kikuyu tradition: *Lucy Wambui* was named after the late *Ngariuku's* mother; *Rose Muthoni* after DW4's mother; *John Maina* after *Ngariuku's* father; *Michael Wanjohi* after DW4's father; *Jackline Wanjiru* after *Ngariuku's* sister; *Ann* was named after DW4's sister and *James Githaiga* after DW4's brother.

DW4 testified that her husband *Patrick Ngariuku* had died in January, 1974; and that she came to know *Joseph Njau Kairu* only after *Ngariuku's* death. As soon as *Ngariuku* died, DW4 took charge of Haraka Body Builders, which had been *Ngariuku's* business on Kombo Munyiri Road, Gikomba. She had visited *Ngariuku* at his place of work, but during that time, DW4 did not know *Joseph Njau Kairu* and, she averred, “*Ngariuku* never introduced me to *Njau*”, nor to *Samuel Wainaina*. She did not remember seeing *Joseph Njau Kairu* or *Samuel Wainaina* at *Ngariuku's* funeral at Karatina, Nyeri in January, 1974.

On the question whether upon marrying DW4 *Joseph Njau Kairu* had returned the bridewealth which the late *Ngariuku* had paid, she testified that *Njau* had made a return of the same in 1979, save that “*Njau* [was] not the one to return the bridewealth [directly]; it was for [DW4's] parents to do it...Return was between my mother and the [elders]. I was told *Ngariuku's* bridewealth was returned.”

DW4 testified that *Njau's* elder brother (now deceased) *Muthaba* is the one who, in 1979 and in her presence and that of *Joseph Njau Kairu*, proposed her marriage to *Njau*; and, in her words: “My mother had no objection to my marriage to *Njau*.”

On the question as to the status of DW4's first child, **Lucy Wambui** who has not been identified with the **Njau** family, DW4 testified that when she came into her second marriage, **Lucy Wambui** had not only gone to stay with her grandmother, but had herself gone into marriage, in 1985.

Learned counsel **Mr. Kimani** continued with cross-examination on 23rd May, 2006 when DW4 further testified that after she married **Joseph Njau Kairu**, he voluntarily took responsibility for her children of the first marriage, and took it upon himself to secure for these children all identification papers bearing his surname. The witness averred that **Njau** himself had secured birth certificates for **John Maina**, **Michael Wanjohi** and **Ann Njeri** she testified that **Njau** had used the school documents of **Wahito's** children, as well as his own identify card, to support his applications for the issuance of birth certificates for those children. In the case of **James Githaiga** who obtained his birth certificate in 2000 after the death of **Njau** in 1999, he sought and obtained it himself, in the name of the late **Njau**. Of the use of the surname **Njau**, DW4 averred: "**Njau** gave to the children the **Njau** name. I didn't know he had to provide any special reasons to do as he did...He was going with the children [to the Registration of Persons offices] and with his own Identity Card, and he was getting the birth certificates..."

On the parentage of her daughter **Ann Njeri**, DW4 differed with the testimony of **Samuel Wainaina** (PW3), and averred that she had not been pregnant when **Ngariuku** died in 1974; she testified that **Ann Njeri** was born in 1975 during the period **Joseph Njau Kairu** was at the motor spare parts business at Gikomba; that **Njau** very well knew of the birth of **Ann Njeri**, as DW4 was then living with **Njau**. To the question why **Ann Njeri**, was not named according to usual customary practice, DW4 testified: "We were together, but we did not know we would marry. So I did not ask for a name from the **Njau** family-tree, for **Ann Njeri**... We had not yet decided to marry. We were just together. In 1975 **Njau** had not yet told me he had another woman. He later told me he had a wife, **Lucy Njoki**. I knew in 1975 that he had another woman, **Lucy Njoki**." What was DW4's reaction to the fact that **Lucy Njoki** was already married to **Njau**? In DW4's words: "We had been together for so long, I did not object to the presence in his life of **Lucy Njoki**. It was now too late. In 1974 I did not know that he had a wife." And when was **Lucy** married? DW4 averred: "**Njau** told me he had married **Lucy** in 1974." DW4, at that stage, had not accompanied **Njau** to Gatundu, in her words, "because he had not invited me there." So, was **Njau** deceiving? To this question DW4 responded: "Even if he deceived me, we had been together for so long; there is not much I could do about it."

On the names of her children, DW4 testified that since most of her children were somewhat grown-up by the time she married **Njau**, their original names could not easily change, and the only practical change was to give these children the **Njau** name. In the same way, DW4 averred, the late **Joseph Njau Kairu** did not attempt to change the original name of **Nduta, Esther Wanjiku's** child with whom the 1st plaintiff came into her marriage to **Njau**. DW4 acknowledged that in Kikuyu customary practice, **Ann Njeri** would have been **Njambi**; and **James Githaiga** would have been **Muiruri** or **Kairu**. But she averred that "calling a child by the name of [a particular person]..has no special significance..." **Njau** had been away at Nakuru, when **James Githaiga** was born in 1978, and he came only to find the child already named. At this point, in 1978, what was the status of **Wahito** in **Njau's** life? DW4 testified: "At the time [when **Githaiga** was born in 1978] I had been with **Njau** for four years, but we had not married. I knew **Lucy Njoki** was there – as **Njau's** wife. In the four years, there was no problem between us; but after he went to our home, I became willing to marry him."

In 1979 **Njau** had intimated to DW4 that he wanted another child; but she was not prepared for that. **Njau** respected her position, without indicating that he would marry a *third* wife. But in 1980 **Njau** took a third wife, **Esther Wanjiku** (1st plaintiff), and he informed the defendant afterwards. DW4 was so informed one year after **Njau's** visit and payment of bredewealth at her natal home at Karatina in Nyeri. And this other marriage, as DW4 learned from **Njau**, was for the purpose of procreation: "I asked him why he had married; and he said he wanted many children." What was DW4's reaction: "I was unhappy; but there was nothing I could do. I was unhappy because he had not kept me in the picture. I don't know if he was generally cheating on me... There was not much I could do; I was together with him; the children's names had been changed to his name."

And **Esther** delivered for **Joseph Njau Kairu** six children: she came along with **Teresia Nduta**, and then

gave birth to **Jane Njambi; Veronica Wangui; James Muiruri; Michael Njoroge; Lucy Wanjiru;** and **Alex Muthaba**. The six were each named in the customary kikuyu mode. Is there any significance to this? DW4 averred: “My children are not named in the same way; but all of them are now named after **Njau** himself; **Ngariuku**’s name has no application.”

DW4 testified that **Njau** had given him land to cultivate in Gatundu, though this was not the family land where he had been buried. Since she had a house in Nairobi, and her children were learning in Nairobi, no house had been constructed for her at Gatundu. DW4’s sons had been given rooms in **Lucy Njoki**’s Gatundu house, and they used these rooms during school vacations. From 1997 **Njau**’s Gatundu house had been enlarged, to include more rooms which were not allocated to anyone specifically; and whenever DW4 was at Gatundu she slept in **Njau**’s room.

DW4 testified that after the death of **Ngariuku** in 1974, she and **Njau** had relocated to a different house at Makadara Estate in Nairobi, and they remained there until 1981, when **Njau** purchased for her a house, registered in her name at Umoja Estate; and later **Njau** helped her in the purchase of her Langata residence. She averred that she had not asked **Njau** for a house in Gatundu, even though she liked Gatundu and often went and stayed there even in **Njau**’s absence.

Why did the loan agreement for the purchase of the Langata residence refer to DW4 as **Mary Wahito Ngariuku**? DW4 testified that the mortgage loan, guaranteed by the late **Joseph Njau Kairu**, was taken in 1984 when the particulars on her Identity Card still showed the **Ngariuku** name. Besides, the witness averred, it was not allowed that a husband be the guarantor for his wife; and so **Njau** when he gave the guarantee, applied a ruse, and described DW4 as “friend.” **Njau** at the time had two Nairobi Post Office Box address – No. 11807 and 32358; and so on the mortgage guarantee documents, **Njau** himself used the second, while **Mary Wahito** used the first. In DW4’s words: “The two addresses were ours. I was owner; he was guarantor; we could not give the same address. The witness testified that she had taken an Identity Card in 1979, in the **Ngariuku** name just before she and **Njau** decided to marry; and it was only in 1997 that it was changed to the **Njau** name. Why did it take so long to change the Identity Card? In DW4’s words: “I had a loan. I could not change the Identity Card before completing the loan repayment.” She testified that it was **Njau** himself who provided the details used in the change of her Identity Card particulars, from **Ngariuku** to **Njau**, as by that time both her parents had died. She testified that her new Identity Card had been stolen in a burglary at her residence, in 2005, which had been reported to the police.

Learned counsel **Mr. Kimani** proceeded with cross-examination on 5th June, 2006. And DW4 gave testimony regarding **Joseph Njau Kairu**’s last days. She was at her work-place at Gikomba, in 1999 when **Njau**’s driver came along with **Esther Wanjiku** (1st plaintiff) to inform her that **Njau** had fallen ill and they had taken him to Aga Khan Hospital in the night. During his last days he had been staying at the Gatundu home, suffering from diabetes. DW4 would go to Gatundu now and again to see **Njau**, and would take him to hospital, subsequently returning him to Gatundu, or staying with him at Langata. Several times DW4 would find **Njau** indisposed and lying in bed at Gatundu, and would bring him to hospital in Nairobi. Sometimes she would find **Njau** lying on a couch at his business in Gatundu, and she would bring him to hospital in her car.

On his last day, **Njau** had been in the company of **Lucy Njoki** and **Esther Wanjiku**, and they brought him to hospital before informing DW4 early in the morning, whereupon DW4 went to the hospital and spoke to the doctor, in the company of **Esther Wanjiku** (1st plaintiff); **Njau** had had a stroke, and was on life-supporting machine at the intensive care unit. He did not regain consciousness and, several weeks later, died, on a Saturday. DW4 testified that he kept visiting comatose **Njau** over several weeks, and one evening she found that **Njau** had just died. It was in the night, and she did not have the use of her car, to enable her to go to Gatundu immediately; but she did the following morning. On that evening DW4 called **Peter Nyaga**, who had already received the information, and she passed the message to some other family members. When she arrived at Gatundu the following morning, the Gatundu family members (including the plaintiffs herein) already knew of **Njau**’s death. The Gatundu home was already in mourning. DW4 spoke to many of the mourners, and had friendly communications with both **Lucy Njoki** and **Esther Wanjiku**. She then went away, only to return in the evening to be met with frostiness on the part of the

plaintiffs. In DW4's words: "When I returned there...nobody wanted to talk to me - **Lucy, Esther** would not talk to me in the normal way. They kept quiet." Throughout the several weeks when **Njau** had remained in a comma, there was much communication between the plaintiffs and the defendant; but, DW4 averred: "Now when they came and found **Njau** dead, they would not tell me about it." That night, notwithstanding the coldness of the plaintiffs, DW4 spent the night at Gatundu. She went to work the following day, but returned to Gatundu in the afternoon, to find the same frostiness on the part of **Lucy Njoki** and **Esther Wanjiku**. Things got worse when one **Mzee Mugo**, an electrician who also had been working at Gikomba, intimated to DW4, in her words: "**Samuel Wainaina** said I should not return to Gatundu, as I could not benefit from the estates of two husbands, **Ngariuku** and **Njau**." DW4 testified that she had believed those were **Wainaina's** instructions – "since **Wainaina** did not even mention my name in the newspaper announcements of the death; even my children were not mentioned." The witness averred that she became scared; in her words: "I always feared **Samuel Wainaina**... He never spoke to me well. I never asked **Wainaina** for anything, for **Njau** was there. I never invited **Wainaina** as a guest at any fund-raising for my children... But his wife did once invite me as guest of honour, when they were raising money for their child's schooling. **Wainaina** did not invite me; he did not honour me, only his wife did. **Wainaina** and I do not agree – for a long time over the years."

DW4 showed in the eulogy for **Joseph Njau Kairu** (plaintiff's exhibit No.2) that her name as widow of the deceased, was not mentioned. Yet, in her words: "People who had known me for over 20 years were in the funeral congregation; so they would have known the lie." DW4 testified that her sisters, friends and children were present at the burial ceremony, but she herself was absent. While coming to the Gatundu home, following **Njau's** death, DW4 averred that she had met with hostility from many, but she did not complain, because "burial time was not the time for contests....I remained quiet over the burial misunderstanding; I did not wish to cause trouble".

DW4 testified that in the aftermath of **Njau's** death, the plaintiffs herein have taken the entire estate of the late **Joseph Njau Kairu** for themselves, and that the 1st plaintiff has already sold off some of the said estate, for her own benefit. DW4 averred that she had been away in the United States of America from 2002 to 2003, but after her return she has now filed in the High Court a challenge to the distribution of the late **Njau's** estate exclusively in the name of **Esther Wanjiku** and **Lucy Njoki**.

Learned counsel **Mr. Githinji** cross-examined DW4 on 6th June, 2006 and, on the relations between the late **Joseph Njau Kairu** and **Wahito's** children, she testified that "**Njau** had not built a separate house for **Githaiga** at Gatundu; but **Njau** had a boys' house at the back of his house, and **Muiruri, Githaiga** and **Michael Wanjohi** would sleep there." Specifically of **Michael Wanjohi**, DW4 averred: "[He] stayed in that house for a whole year; he stayed with **Njau** at Gatundu and went to work with him at [his business on] Kenyatta Road."

DW4 testified that during her absence in the U.S.A. she had had occasion to speak to the late **James Githaiga Njau** while the young man was in the presence of **Esther Wanjiku** (1st plaintiff), and that during the said telephone communication, **Esther Wanjiku** did acknowledge that she indeed was in the company of **James Githaiga**; and one of the issues discussed on that occasion between **James Githaiga** and **Esther Wanjiku** was **Joseph Njau Kairu's** landed estate. DW4 testified that in her understanding, the owner of the whole of the said estate is, formally, the deceased, **Joseph Njau Kairu**. DW4 expressed her belief that even the spot where she desires to inter her late son, **James Githaiga Njau**, is the property of **Joseph Njau Kairu**. She averred that **Githaiga** being a young man, with no land of his own, was entitled to a burial place next to **Joseph Njau Kairu's** grave. She testified that **Githaiga** was a real son of **Njau** who had, besides, identified himself with the **Njau** family in every respect – including attendance at the funerals of **Njau** himself, **Njau's** father and **Njau's** mother.

Learned counsel **Mr. Miller** conducted his re-examination on 8th June, 2006 when DW4 averred that she has six children each of whose name ends with the surname **Njau**, and all their official documents of identification state their names, in each case, as **Njau**. She testified that throughout the period when she and the plaintiffs were in **Njau's** family life, both of them treated her in every respect as **Mrs. Njau**. She testified that she is the beneficial user of the plot of land in Gatundu, known as Ngenda/Mutomo/626 which is registered in the name of **Joseph Njau Kairu**.

DW4 sought to clarify a discrepancy appearing in her affidavit and in her oral evidence, on the chronology of events in her life with the late **Joseph Njau Kairu**. She averred that it was in January, 1974 that her husband **Ngariuku** had died; and it is towards the middle of 1974 that she became friends with **Joseph Njau Kairu**, who openly married her, by customary practices, in 1979.

DW4 testified that she had played her role in caring for **Joseph Njau Kairu** towards the end of his life when he became ill and lost his eyesight; for instance he had once taken **Njau** to Kikuyu Hospital, where he stayed overnight; and to Kenyatta National Hospital where, again, he stayed overnight. One day DW4 had found **Njau** ill at his place of work on Kenyatta Road, lying on a seat; and she took him for treatment, then later returned him to his Gatundu home.

DW4 testified that even though she was co-habiting with **Njau** in 1975, they had not at that time decided to get married, and marriage took place later, in 1979.

DW4 testified that **James Githaiga Njau** had no farm, but his late father, **Joseph Njau Kairu** had. She asked that Kikuyu custom, in this regard, be upheld, and **Githaiga** be buried where his father had been buried in August, 1999.

DW5, **Justus Gathiba Gaita** was sworn and gave his testimony on 16th June, 2006. He testified that over the last 24 years, he has been selling insurance policies for British American Insurance Company Ltd, and he showed his employment card to authenticate his testimony. The witness arranges for life insurance and for general insurance, on behalf of his employer; and he services policies which have been issued. It is in this context that DW5 came to know the late **Joseph Njau Kairu** – as a customer whose insurance policies he serviced. **Njau** was already a customer when DW5 joined the service of British American Insurance Company Ltd, and in the course of time he became a personal friend of DW5. One particular policy (Plaintiff's exhibit No.10) made him know **Joseph Njau Kairu**. In that policy **Njau** had given his beneficiaries as (i) **Lucy Njoki** (wife); and (ii) **Samuel Wainaina** (brother). DW5 would visit **Njau** for the purpose of collecting premium on that policy; and on such occasions the two would have lunch together. He would find **Njau** at Jasho Motors in Gikomba. In 1982 DW5 knew that **Njau** was married to **Lucy Njoki**; but in 1990 he came to know that **Njau** had other wives. While visiting **Njau** at Jasho Motors in 1982, he introduced to DW5 **Mary Wahito** (defendant) as another wife of his. Indeed, the first wife of **Njau**'s whom DW5 met physically was **Mary Wahito**; for **Lucy Njoki** was only on the insurance records. As DW5 continued to make visits for the collection of premium, he came to find that **Mary Wahito** had authority to make the payments; as **Njau** would now and again be absent, and it is **Wahito** who made the payment on his behalf. **Wahito** would pay from the same business premises of **Njau**'s, and she would pay for the same old policy even though she was herself **not** named as a beneficiary. And each time DW5 visited Jasho Motors, **Wahito** would be at the cash office. Not until May, 1990 did DW5 learn of yet another wife of **Joseph Njau Kairu** – **Esther Wanjiku**. At that time **Njau** wanted to take another insurance policy, with his three wives as beneficiaries – **Lucy, Mary** and **Esther**. So in 1990 DW5 prepared an application for a new policy, working with **Njau** himself. He produced the relevant form, in his own handwriting (defence exhibit No.5); and he showed his own signature, and **Njau**'s signature inscribed on that document. Names shown as beneficiaries were: **Lucy Njoki Njau; Mary Wahito Njau;** and **Esther Wanjiku Njau**. It was a personal accident policy, and the premium payable was Kshs.6558/50. DW5 and **Njau** did not discuss this matter with the beneficiaries; and DW5 asked no questions about **Njau**'s wives. It was a requirement that the insured do state the relationship to the beneficiaries; and the three wives were given as the beneficiaries. The implication was, in the words of DW5: "If [**Njau**] had died at that point in time, the three wives would all come to [our] office, and they would be paid; a single wife, or just two of them, would not be paid; that is the policy." The policy was duly issued on 1st May, 1990; and **Njau** paid up covering the period up to 1996. Thereafter, **Njau** had financial difficulties, and so he did not pay up; DW5 visited him several times, but he did not pay.

Njau and **Wahito** took another policy for one of **Wahito**'s sons: **John Maina Njau**. On that occasion, **Njau** in the presence of **Wahito** said he wanted to insure their son; and **John Maina Njau** who was at the business premises in Gikomba, did sign. The form was filled in by DW5 himself (defendant's exhibit No.27), and the beneficiary was stated as **Mary Wahito Njau**. **Njau** paid the premium, and later, an original policy document was issued.

On **Wahito's** status, DW5 thus testified: "The relationship between **Njau** and **Wahito**, and the documents we have, show that she was **Njau's** wife. As far as British American is concerned, the three were the wives of the late **Njau.**"

On cross-examination by learned counsel **Mr. Kimani** DW5 testified that when he first visited the late **Njau Kairu** at Jasho Motors in Gikomba, **Mary Wahito** was working there, together with him. In the words of DW5: "She and **Njau** were working together. **Njau** spoke: 'Meet my wife', and she was seated there." In the absence of both **Njau** and **Wahito**, there would be none among the Jasho Motors workers who would pay **Njau's** insurance premiums, and DW5 would have to make another visit. **Njau** and **Wahito**, in DW5's words, "were generally together at the shop", and he did not know that **Wahito** had any other business somewhere else. Although DW5 had seen Haraka Body-Builders on Kombo Munyiri Road, he had not known who was operating it.

9. SUBMISSIONS OF COUNSEL

(a) Was Defendant a Wife to the Intestate, and so can she claim for deceased son Burial place at Grave-side of the Intestate? - Submissions for Plaintiffs

Learned counsel **Mr. Githinji** and **Mr. Kimani** have raised as the issues emerging from the pleadings and the evidence, the following:

- (i) Was there a valid customary marriage between **Mary Wahito** and **Joseph Njau Kairu**?
- (ii) If yes, then, when did the marriage take place, and how did it take place?
- (iii) Was **James Githaiga** a son born of such a marriage, or was he a son of **Joseph Njau Kairu** in a different way?
- (iv) Should the late **James Githaiga** be buried next to **Joseph Njau Kairu's** grave?
- (v) Can the defendant herein be allowed to bury her son at the plaintiffs' parcel of land, the same having been transferred to the plaintiffs' names?

Learned counsel for the plaintiffs submitted that the defendant herein, **Mary Wahito**, had not been a wife to the intestate, the late **Joseph Njau Kairu**; indeed, the plaintiffs clearly have assumed that to be the legal position – for they have entirely overlooked the existence of **Mary Wahito** and her six children and, between themselves, 1st and 2nd plaintiff have moved a Magistrate's Court to grant them letters of administration for the entire estate of the intestate, and then they have transferred the suit land which is part of that estate to themselves.

Witnesses for the plaintiffs have denied that the defendant was ever married to **Joseph Njau Kairu**, notwithstanding the detailed evidence of prolonged, intimate association between the defendant and the intestate which has come from the opposite side in this cause. What is the explanation? One: "if the late **Joseph Njau Kairu** had indeed married the defendant, the 2nd plaintiff, **Lucy Njoki Njau** would have been well aware." Yet, it is submitted, the 2nd plaintiff had not been part of the jubilation at the birth to the defendant, in 1975 and 1978 respectively, of a daughter, **Ann Njeri** and a son, **James Githaiga**. To the Court, I would say, it would not immediately be clear what *jubilation* as such, whatever the relevant evidence of it would be, imports in legal materiality, in relation to the existence or non-existence of marital status.

It is submitted for the plaintiffs that the defendant had not been a wife to the intestate also because this is demonstrated by the fact that she had had no mention in the *eulogy statement* on the intestate, read out at the burial ceremony which took place at Gatundu in August, 1999; by the fact that the defendant failed to attend that final ceremony; by the fact that a number of documents relating to her, such as her passport, and certain financial-loan documents had over the years referred to her by the **Ngariuku** name rather than the **Njau** name; by the fact that the late **Joseph Njau Kairu** while guaranteeing certain bank-loans for her,

had referred to her as “friend” rather than as “wife; by the fact that the defendant’s alleged marriage to the intestate did not comply with Kikuyu customs, in the same way as the marriages of the two plaintiffs; by the fact that all the evidence given by the defendant’s five witnesses is not perfectly consistent.

Counsel submit that the plaintiffs have been able to prove their case on a balance of probabilities. They submit that the alleged marriage between the defendant and the intestate, did not comply with the requirement of Kikuyu customary law. It is to be noted, however, that the plaintiffs did not attempt to prove the existence and the binding character of such customs. Although s.60 of the Evidence Act (Cap 80) would enable the Court to take judicial notice of specific customary law, this requires much care, as the details of such customary law may not be clear, or it may be in a process of fundamental adaptation and change which necessitates that any claim that a custom is operative, requires *proof*. Indeed, in *Earnest Kinyanjui Kimani v. Muiru Gikanga & Another* [1965] E.A 735 the East African Court of Appeal thus held (*Duffus, JA*, at p.738):

“The parties in this case are Africans and therefore the Court will take Judicial notice of such African customary laws as may be applicable ... The difficulty remains how are these customary laws to be established as fact before the Court? In some cases the Court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of a previous judicial decision or where the customary law is set out in a book or document of reference ..., but usually in the High Court or in a Magistrate’s Court, the relevant customary law will, as a matter of practice and of convenience, have to be proved by witnesses called by the party relying on that particular customary law in support of his case.”

Counsel for the plaintiffs chose to rely solely on *E. Cotran’s Restatement of African Law*, vol. I: *Law of Marriage and Divorce* (London: Sweet & Maxwell, 1968) as the basis for judging the quality of *Mary Wahito’s* claimed marriage to *Joseph Njau Kairu*, on the yardsticks of Kikuyu customary law. So counsel urged:

“It is our submission that the formation of a Kikuyu customary marriage involves not only the spouses but their parents and their entire family and [is] a very elaborate ceremony. The late *Njau’s* parents evidently participated in the customary marriage of their son to the 1st and 2nd plaintiffs but were notably not involved in the alleged marriage to the defendant. In fact, none of [*Njau’s*] brothers or sisters [was] involved in the alleged marriage and the evidence adduced by both DW1 and DW2 on [the solemnization of the defendant’s marriage] was merely hearsay.”

Counsel for the plaintiffs urged that the claimed marriage between the defendant and *Joseph Njau Kairu* had in fact not taken place, because the defendant had not proved the performance of “*ruracio*” ceremony.

Counsel also submitted that at the time of the birth of the late *James Githaiga Njau* in 1978, “no customary marriage was claimed to have been performed between the defendant and the late *Joseph Njau Kairu*”, and that, therefore, “the deceased was never a child of any such marriage”. To advance the argument, counsel contended that “ It is noteworthy ...that the defendant decided to name the deceased after her brother”. And counsel submitted, for greater effect, that when *James Githaiga Njau* was born in 1978 the defendant’s family “had not handed back the *ruracio* of her former husband ... to his family and was therefore technically not capable of contracting another customary marriage”.

Having thus dismissed the claim that the defendant had been customarily married to the late *Joseph Njau Kairu*, counsel turned to the legal concept that would uphold a *de facto* marriage. The case referred to here was the Court of Appeal decision in *Veronicah Rwamba Mbogoh v. Margaret Rachel Muthoni & Another*, Civil Appeal No. 311 of 2002. That case restated the well-settled common law principle that the relationship between a man and a woman, even if not ceremonially marked as a marriage, may in essence be a marriage, and in a proper case, will on a *prima facie* basis be recognised as such. The Court of Appeal indeed went further, in effect, and extended the application of the concept of *marriage by cohabitation and repute* from the monogamous setting associated with the old common law, to other

forms of marriage, be they monogamous or polygamous. To quote a passage in the judgment of the Court:

“For it matters not whether statutory or customary marriage requirements are strictly proved in a marriage. The Court must go further and consider whether, on the facts and circumstanceson record, the principle of presumption of marriage was applicable in the appellant’s favour.”

The ***Veronica Rwamba Mbogoh*** case was decided against the background of another Court of Appeal decision, in ***Hortensiah Wanjiku Yaweh v. Public Trustee***, Civil Appeal No. 13 of 1976, in which a judicial policy had, in effect, been stated in favour of presumption of the validity of a marriage, where a man and woman had conducted their lives together, in mutual interdependence such as can only be associated with intentions on their part to share their lives as married persons. In ***Hortensiah Wanjiku Yaweh***, and on that point, the judgment rendered by ***Mustafa, JA*** is particularly unequivocal; his Lordship thus pronounced himself.

(i) “Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption, see Re Taplin – Watson v. Tate [1973] 3 All E.R. 105 ... In considering whether there was a marriage the trial judge ought to have taken account of the presumption of marriage in the appellant’s favour. Such presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance in the appellant’s favour, the scale must tilt in that direction.”

(ii) “I can find nothing in the ‘Restatement of African Law’ to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view all marriages ...whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the applicant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view, is applicable to all marriages howsoever celebrated”.

The principle is equally-clearly stated in the judgment of ***Wambuzi, P:***

“...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 ... The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. It may be shown that the parties are not married after all but then the burden is on the party [who asserts] that there was no marriage ...”

From the evidence, the defendant has instances to demonstrate what appears as marriage by cohabitation and repute; and so learned counsel for the plaintiffs sought to make such interpretation of the evidence as would negative such a perception. The plaintiffs, in that regard, attached significance to: the existence of mortgage-loan documents in which ***Joseph Njau Kairu*** had described ***Mary Wahito*** as “friend”; the averment that the defendant ‘never named any of her children after [members of] the plaintiffs’ husband’s family’, the fact that the funeral committee for ***Joseph Njau Kairu*** had not named the defendant as a widow, in the eulogy; the fact that the defendant was absent during the burial ceremony for the deceased; the fact the defendant had not earlier claimed her rights in succession to the estate of ***Joseph Njau Kairu***; the averment that the deceased ***James Githaiga Njau*** had not, up to the time of his death in March, 2005 made a claim on the estate of ***Joseph Njau Kairu***; the averment that there was no evidence of joint-ownership of property between the defendant and ***Joseph Njau Kairu***; the fact that some of the defendant’s personal documents still bore the name of her first husband; the fact that the defendant did not call her children as witnesses at the hearing of this case.

Counsel relied on the Court of appeal decision, ***Njoki v. Muthuru*** [1985] KLR 874 in which the following

passage appears in the judgment of *Nyarangi, JA* (pp.896-897):

“The presumption does not depend on the law of systems of marriage.

“The presumption is an assumption based on very long cohabitation and repute that the parties are husband and wife.

“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still, children, so that the man could not be heard to say ... he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it up, there has to be evidence that the long cohabitation is not [mere] close friendship between a man and a woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume ...there is a marriage... To my mind, presumption of marriage, being an assumption does not require proof of an attempt to go through a form of marriage known to law.”

Counsel urged that *Mary Wahito’s* relationship with *Joseph Njau Kairu* would not meet the tests laid down in *Njoki v. Mutheru*. Counsel contended: “The defendant’s family members never met the members of the deceased’s immediate family and hence no kind or form of marriage ceremony was performed ...” The relevance of this particular point, however, was not clear, in the light of the fundamental principle in *Njoki v. Mutheru*; namely that presumption of marriage is only an inference, founded on the manner in which a man and a woman have lived their lives; it is independent of rites or celebrations such as would customarily bring together kith-and kin, at marriage time.

(b) Defendant was customarily married to and had some Children with Intestate who assumed Parental Responsibility for all her children; so Defendant’s Deceased Son be buried at Grave-side of Intestate – submissions for the Defendant

(i) Points of evidence

Learned Counsel *Mr. Miller* began his submissions by setting out the crucial issues emerging from the pleadings and the evidence as follows:

(i) did the defendant prove that she was by no means a stranger to the plaintiffs and their relatives, more particularly, PW3? (ii) did the defendant prove on a balance of probabilities that she had been a wife of the late *Joseph Njau Kairu* under customary law? (iii) did the defendant show that she had children in common with the late *Joseph Njau Kairu*? (iv) did the defendant prove that *Joseph Njau Kairu* had adopted and taken parental responsibility over the defendant’s children who were the issue of her first marriage? (v) was the defendant and the late *Joseph Njau Kairu* perceived generally as man and wife?

From the evidence, counsel urged, all the above questions were to be answered in the affirmative. It was submitted that the defendant, apart from herself, had brought to Court four witnesses to the fact of her having been the wife of the late *Joseph Njau Kairu*; whereas the two plaintiffs brought only one witness apart from themselves, namely PW3, who testified on the defendant’s marital status after the death of her first husband in the early 1970s. The plaintiffs and PW3 averred that the defendant was indeed well known to them; and the plaintiffs knew the first two names of all the defendant’s children; however, they denied knowing that the last name of each of those children was *Njau*. P.W1 had not expressed surprise that the defendant’s penultimate child, *Ann Njeri* was formally known as *Ann Njeri Njau*; and counsel urged that this fact contradicted PW1’s overall testimony that both *Ann Njeri Njau* and her follower, *James Githaiga Njau* were the children of a man other than *Joseph Njau Kairu*.

Mr. Miller noted that the defendant's witnesses had mainly been family members of the late **Joseph Njau Kairu** – DW1 being **Njau's** brother and DW2 being **Njau's** sister. The two testified that the defendant was personally known to them, and that the defendant had been, up-to **Njau's** death in 1999, the wife of **Joseph Njau Kairu**, and that they had known her for years, as such.

Learned counsel noted from the evidence on record, that the defendant had told the Court she had married **Joseph Njau Kairu** under Kikuyu customary law – and that as part of traditional celebration, the ceremonies of *guracio* and *ngurario* had been performed, and that only one last ceremony in the marriage process, namely *gutinia kiande*, remained still outstanding by the time **Joseph Njau Kairu** died in 1999.

Of the unaccomplished *gutinia kiande* ceremony in the defendant's marriage, **Mr. Miller** submitted that it was “not a necessity in a Kikuyu customary marriage ceremony, neither is it needed to validate a marriage”.

Learned counsel remarked the acknowledgement on the plaintiffs' side, which confirmed accounts of the many common occasions observed over the years between the defendant's Langata household and their Gatundu household: “PW1, PW2, PW3 ... confirmed that there were various family functions attended by the parties herein. The defendant adduced evidence, exhibits 8, 9 and 10 that showed Christmas and Easter holiday visits. These exhibits were photographic images”. From that scenario learned counsel submitted: “It is indeed preposterous for the plaintiffs to state [otherwise, or] deny that the defendant was ... known to them and, more so, as a family member ...”

Learned counsel remarked the defendant's evidence regarding the several matrimonial homes which she and the late **Joseph Njau Kairu** had occupied, at Umoja Estate and later at Langata; and the fact that this testimony was corroborated by DW1, DW2 and DW3. DW3 had testified that he and his family had on many occasions visited the said Langata home and passed their time with the defendant and the late **Joseph Njau Kairu** who had made all the necessary family introductions indicating that the defendant was one of his three wives. DW1 had himself driven the late **Joseph Njau Kairu** to the Langata home where he repeatedly stayed overnight with the defendant; and DW1's evidence which corroborated the defendant's own testimony, was that the defendant and the late **Joseph Njau Kairu** had lived together in their homes, as wife and husband. Apart from participating in family gatherings with the defendant and **Joseph Njau Kairu** at the Langata home, and providing chauffeur service for him as he commuted between that home and his Jasho Motors business at Gikomba, DW1 had been requested by **Joseph Njau Kairu** on many occasions to deliver foodstuff at the Langata residence.

Mr. Miller submitted from the evidence on record, that the plaintiffs and their witnesses while bluntly denying any knowledge of a marriage between the defendant and **Joseph Njau Kairu**, had adduced no evidence to contradict the claim that such a marriage did, indeed, exist. All they did was to refute even the mere *possibility* that a marriage had taken place between the defendant and the deceased; and of PW3 learned counsel submitted: “PW3 [**Samuel Wainaina**] even stated that if there was a marriage between the defendant and **Joseph Njau Kairu** that could be proved, he would not agree. PW3 appears [not] to have approved the marriage between the defendant and **Joseph Njau Kairu**. More so, he was not involved in the *ngurario* and *guracio* ceremonies”

Learned counsel remarked what appeared as an insincerity in the plaintiffs' testimony; while averring that they knew of no marriage between the defendant and the deceased, they testified that they had “suspected” a special relationship between the two – mainly because of the numerous visits which the two households exchanged over the years; and also because of the special arrangements which **Joseph Njau Kairu** had made for purchase-on-mortgage of the defendant's Langata residence.

Learned counsel submitted that there had been a marriage between the defendant and **Joseph Njau Kairu** which brought issue in **Ann Njeri Njau** in 1975 and **James Githaiga Njau** in 1978. Counsel submitted from the exhibits produced by the defendant (including national identity cards, birth certificates and passports), that **Ann Njeri Njau** and **James Githaiga Njau** were biological children of the late **Joseph Njau Kairu**; and that DW1, DW2 and DW3 had confirmed the same.

With regard to the other children of the defendant's, counsel submitted from the evidence, that they had been adopted by the late **Joseph Njau Kairu** as his children: "To this end, **Joseph Njau Kairu** effected a change of names for all the children of the defendant apart from the first daughter ... who lived with the mother of her first husband..." Evidence of such adoption was brought forth through exhibits in the form of identification cards, passports, school-fee statements, correspondence, insurance policies, and affidavits sworn by the deceased acknowledging his parenthood in relation to the defendant's children from her first marriage. DW1 and DW2 had testified that the late **Joseph Njau Kairu** did take the defendant's children as his own, and throughout the remainder of his lifetime, he treated these children as such. And DW3 testified that he had known the late **Joseph Njau Kairu's** family as *one* happy family.

Mr. Miller recalled the defendant's evidence regarding the continued appearance of her first husband's name on some of her identification papers, and her testimony that certain guarantees for loans had earlier been made for her in that name, by the deceased. On this point, learned counsel submitted: "...this in no way invalidates her marriage.... From the evidence on record, it is quite clear that **Joseph Njau Kairu** had every intention of changing the defendant's names to reflect his own. To this end, the late **Joseph Njau Kairu** directed DW5 to strike out in the [insurance] policy the name **Ngariuku** from **Mary Wahito Ngariuku** and replace it with **Njau** ... It was only then that the late **Joseph Njau Kairu** was satisfied with the changes [and] he signed the insurance policy."

Learned counsel submitted that the form in which statements read at **Njau's** funeral in 1999 had been couched, excluding any reference to the defendant as one of the widows, could not "invalidate the defendant's marriage". It had been the defendant's evidence that although she had attended early funeral gatherings for **Njau** at Gatundu, "she could not attend her husband's [burial] because she had been threatened by PW3, **Samuel Wainaina**"; and PW3 went by the nickname "**Kagia**" which implied that he was a trouble-maker. Counsel noted that it was the same PW3 who was in charge of the burial arrangements for **Joseph Njau Kairu**, and he had so orchestrated the burial announcements and the timing of disposal of the body as to exclude any possibility of a correction to his information sheets being initiated by anyone. The death announcements had been so choreographed that the early ones betrayed no intentions, by making mention of no woman in **Joseph Njau Kairu's** life, but then the final announcement which coincided with burial time, now carried mention of the two women-plaintiffs but excluded the defendant; and, in learned counsel's submission, "this was a scheme well thought-out by PW3".

The defendant testified, as counsel noted, that "the main reason PW3 did not approve of the marriage between her and **Joseph Njau Kairu** ... was [that] she had children that were not **Joseph Njau's** children". And at PW3's complaint on that issue, his own mother had affirmed: "*If you love a cow you take the tether too*"; counsel now urged that the implication is that "The defendant's children of the first marriage were adopted by not only the late **Joseph Njau Kairu**, but also by the family of **Joseph Njau Kairu**."

On the same question of adoption by **Njau** of the defendant's children from her first marriage, learned counsel viewed as significant the fact that the deceased had taken out a special insurance policy to cover **John Maina Njau**, a child from the first marriage. To **John Maina**, the deceased was acting as a *father* in every sense. And counsel noted, from the evidence on record: "As a father, [**Joseph Njau Kairu**] also paid school fees for all the children, both of the first marriage and his biological children." This position had been confirmed by DW1, DW2 and DW3.

(ii) Points of Law

Mr. Miller submitted that it was beyond doubt, from the evidence, that the late **Joseph Njau Kairu** had, and indeed gave expression to, the intention to adopt children of his *wives* not sired by himself, and that in this spirit he also adopted **Teresia Nduta**, a child of **Esther Wanjiku** (1st plaintiff) who was born well before **Esther Wanjiku** married him. PW2 had confirmed that **Teresia Nduta Njau** was brought into the **Njau** family when she had almost attained kindergarten age. Learned counsel urged that if **Teresia Nduta Njau** is rightly regarded as an adopted child, then the plaintiffs are *estopped* from denying that the defendant's children of the first marriage are also children of the late **Joseph Njau Kairu**.

Mr. Miller submitted that the plaintiffs' case ought to fail, as they had not proved it on a balance of probability.

Learned counsel doubted the significance, in terms of the validity of marriage, of the number of kith-and-kin of the parties participating – contrary to the contentions made for the plaintiffs. It was urged that the formation of a Kikuyu customary marriage does not necessarily involve the spouses' parents and the entire family – especially with regard to subsequent marriage, for only in the case of a son's first marriage does the father pay bridewealth, and as regards additional marriages, "the son has to provide his own dowry." It is my understanding of counsel's submission that where the groom's father has no obligation to provide bridewealth for his son, there will be no basis for any substantial involvement of kith-and-kin, as the son, by his own resources, undertakes and celebrates his own additional marriages. Such is a valid argument in my view, for the patriarch's family resources not being engaged, it is not to be expected that all, or most members of his household will be involved when one of his sons takes on a second or subsequent wife.

But supposing it was held that no valid customary marriage had brought the defendant and **Joseph Njau Kairu** together as wife and husband, would there be still a further basis in law, to accord such matrimonial partnership validity? Yes, according to a number of judicial decisions, some of them of binding character in this instance. I have already considered the Court of Appeal decisions in **Hortensiah Wanjiku Yawe v. Public Trustee**, Civil appeal No.13 of 1976 and **Njoki v. Muthuru** [1985] KLR 874. The principle in those decisions is that an overriding presumption may cut across all formal processes of marriage, whether they be statutory, ecclesiastical or customary; and by this principle a marriage existing **de facto**, whereby a man and a woman simply live their lives and conduct their affairs as if matrimonially they truly belong together, will be held to prevail over any ceremonial requirements for the creation of marriage-validity. The *reality* of cohabitation, in such a case, overrides the requirements of *forms*, as is clearly stated in the English case **Re Taplin – Watson v. Tate** [1973] 3 All ER 105 (**Simonds, J**):

"...this presumption is not to be disturbed except by evidence of the most cogent kind. Here it [was] sought to displace the presumption in two ways. First of all, because the parties pinned themselves to a marriage on a certain date and the records contain no entry of such a marriage. Whatever the compulsory nature of the administration, this cannot, in my view, displace the presumption of marriage. The absence of a record is always a possibility. The presumption rests mainly upon the notorious fact of their living together, which has been fully proved"

Learned counsel **Mr. Miller** submitted that, the test applied to rebut evidence of presumption of marriage is set at a high level, and in his assessment, "The plaintiffs failed to rebut the evidence adduced that supports the common law presumption of marriage." He urged that the defendant had proved that she had lived together with the deceased, and therefore it should be inferred that "the defendant was the wife of the late **Joseph Njau Kairu** and the defendant's children are the lawful children of the deceased and the defendant."

Counsel submitted that, from the evidence, the defendant had lived with the late **Joseph Njau Kairu** for more than two decades and had had two children with him.

Counsel urged that the late **Joseph Njau Kairu**, in upholding Kikuyu customs, would have wanted his son buried in his own land. And in pursuance of this principle, learned counsel prayed for:

- (i) a declaration that the defendant **Mary Wahito** was indeed a wife of the late **Joseph Njau Kairu**;
- (ii) a finding that the deceased **James Githaiga Njau** was a son of the late **Joseph Njau Kairu**;
- (iii) a finding that the defendant is entitled to bury the late **James Githaiga Njau** next to the grave of his father;
- (iv) a finding that the defendant's children of the first marriage were adopted by conduct and by Kikuyu customs, by the deceased who treated them as his own children;

(v) a finding that the defendant is entitled to bury her late son in the land of her late husband, L.R. No.Kiganjo/Kiganjo/395 and 396 at Ikuma village, Kiganjo Location, Gatundu Division, Thika District;

(vi) an order that the Local Police O.C.S do provide security and ensure peace is kept, during the burial of the late **James Githaiga Njau** next to his late father's grave;

(vii) a lifting of the temporary injunction in force against the defendant;

(viii) a dismissal of the plaintiffs' suit with costs to the defendant;

(ix) such orders as the Court may deem fit.

10. FURTHER ANALYSIS

It was perhaps unavoidable that in this protracted trial extending over some 40 days of substantive hearing, there would have been on both sides a certain amount of conflicting evidence – particulars of which learned counsel have attempted to identify. However, I have considered all evidence in a detailed manner, training my sight on the main picture emerging. On that basis I have evaluated the evidence, and determined as valid certain factual positions which, therefore, will shape in vital respects the outcome, and the Court's decree.

(b) Fact as Determined

1. In 1974, **Joseph Njau Kairu**, a young man in his twenties, joined his elder brother, **Samuel Wainaina** at a motor spare- parts business, going by the name Jasho Motor Spare Parts, on Kombo Munyiri Road, Gikomba in Nairobi. Early that same year, one **Shadrack Ngariuku** who was the proprietor of a motor vehicle body-building business known as Haraka Body Builders, across the said road, died in a motor accident, and soon thereafter his widow, **Mary Wahito Ngariuku** (the defendant herein) took charge of his enterprise. In the course of the dealings between the two motor enterprises, and also due to their location in the same neighbourhood, **Joseph Njau Kairu** came to know and to befriend **Mary Wahito Ngariuku**.

2. Later in the course of 1974, **Mary** had relocated from the house which she had occupied with her late husband at Makadara, and moved in the company of **Joseph Njau Kairu** to another rented house in that same estate. **Peter Nyaga Kairu** (DW1) who joined the two elder brothers at Gikomba in 1975, came to realise in the course of 1976 that there was a special relationship between **Joseph Njau Kairu** and **Mary Wahito**; the former would drive the latter's car; the two would go out together; DW1 would be sent with other workers to deliver foodstuff and domestic supplies at **Mary Wahito's** new residence purchased by **Joseph Njau Kairu** at Umoja Estate in 1979; DW1 would see the two in the morning and in the evening at the new residence; **Joseph Njau Kairu** and **Mary Wahito** would take one car to work; and he would stay overnight in the residence of **Mary Wahito** whom he referred to fondly as **Mama John**.

3. The cohabitation between the defendant and **Joseph Njau Kairu**, it was testified by the defendant herself, and by DW2 (**Rose Wanjiru Kairu**), led to the birth of two children, namely **Ann Njeri Njau** in 1975, and **James Githaiga Njau** in 1978.

4. By the evidence of the defendant which is corroborated by that of DW1 and DW2, there was no customary celebration of a marriage between the defendant and **Joseph Njau Kairu** before 1979; but these witnesses as well as the defendant testified that the deceased, in 1979, performed the customary rites of marriage, entailing the *ruracio* ceremony at the defendant's natal home at Karatina, Nyeri District in 1979. The defendant, DW1 and DW2 testified that in that year **Joseph Njau Kairu** had formally introduced her as his wife, to his whole family at the Gatundu home, which included his parents and his first wife, **Lucy Njoki Njau**.

5. It was the defendant's evidence, corroborated by that of DW1 and DW2 that before her formal introduction as **Njau's** wife in 1979, **Njau** had no more than one other wife, **Lucy Njoki Njau** (2nd plaintiff) who had started cohabiting with him in 1974 and was subsequently ceremonially married; but owing to **Njau's** anxiety to beget more children than, he had in 1980 married a third wife, **Esther Wanjiku Njau** (1st plaintiff). I considered **Esther Wanjiku Njau's** demeanour when she averred that she first met the defendant in 1983, even as the defendant testified she first met the 1st plaintiff at Gatundu in 1980; and I concluded that the 1st plaintiff's evidence lacked veracity. From this I have to conclude that **Mary Wahito** was introduced at the Gatundu home in 1979, whereas **Esther Wanjiku** was introduced with her four-year-old daughter (**Teresia Nduta Njau**) and a new-born baby (**Jane Njambi Njau**) in 1980.

6. There is plenty of evidence (from PW1, PW2, PW3, DW1, DW2, DW3, DW4) which I hold to represent the true fact; that in the lifetime of **Joseph Njau Kairu** the three women in his life (the plaintiffs and the defendant) and all the children of the 1st plaintiff and of the defendant, together with members of the larger family including **Joseph Njau Kairu's** siblings and their offspring, basically kept a close-knit family set-up, in which the 1st plaintiff readily helped out in minding the defendant's children and vice versa, and in which the defendant's children, during school holidays, would happily live at the Gatundu home at the joint residence of the plaintiffs.

7. Evidence was given by DW1 and by DW3 that the defendant's status as a wife was publicly declared several times by the late **Joseph Njau Kairu**, and that, so unequivocal was he on this matter, that the plaintiffs and the defendant herein, throughout his lifetime, regarded one another as *muiru*, or co-wife; and the defendant testified without contest, that **Njau's** house at Gatundu provided space for each of the three women and their children, and that when she stayed the nights at the Gatundu home, she would sleep in the special bedroom earmarked for the late **Joseph Njau Kairu** himself. When DW3 came to know and to make friends with the **Njau** family he and his family had been invited to the defendant's Langata residence; in his words:

*"We were invited – I don't remember on what date. He [Njau] was close with the three wives. He introduced to us the first wife, who stood up; he said this was his first wife, **Lucy**; then the second wife, **Mary Wahito**, was introduced; and then **Esther Wanjiku** was introduced as the third wife."*

8. In 1984 **Joseph Njau Kairu** made financial arrangements for the purchase in the name of the defendant, of her current Langata residence. DW2 testified that for mortgage repayments, she had been responsible for preparing cheques which the deceased had been signing for due dispatch, while the defendant was out of the country.

9. Although counsel for the plaintiffs had disputed schooling documents for six of the defendant's children, showing that the deceased did carry the burden of all their school fees, the evidence is, in my view, overwhelming, that **Joseph Njau Kairu** had voluntarily assumed the stupendous burden of properly educating the defendant's children.

10. All children of the defendants including those from the first marriage (save for one) carry all their identification documents in the name of **Joseph Njau Kairu**; and I will here take judicial notice that these children could not have been given such documentation and registration without authentication on the basis of the personal documents of the deceased himself. I must conclude, therefore, that **Mary Wahito's** six children were, for legal purposes at any rate, the children of the late **Joseph Njau Kairu**.

11. **Mary Wahito** (defendant) was known within the whole **Njau** family as a wife. There is evidence that even **Samuel Wainaina Muiruri** who, as is clear from his testimony, takes a hard line against the defendant and her children, was wont to refer to the defendant as "**Njau's** wife" during public occasions. And besides, it is on the basis that she was a wife, that the defendant was able to join the inner **Njau** family financial arrangements entailing savings-and-credit co-operative society membership, known as **Mbari ya Muthaba**.

12. Not only did **Joseph Njau Kairu** take financial measures to *settle the defendant in real property as her residence* in Nairobi, he also allowed her the *use of rural land*, in the form of two parcels of land, in Gatundu itself, which the defendant farms to-date.

13. There is cogent evidence (of PW3 and DW5) that **Joseph Njau Kairu** had taken an insurance policy in 1990 in which the plaintiffs and the defendant had all been named as *wives* of the insured; and there is further evidence that the deceased had taken a dedicated insurance policy for a son of **Mary Wahito** from her first marriage.

I find and hold that the foregoing facts are inconsistent with a bare relationship of *friendship* as between the defendant and the deceased, as contended for the plaintiffs. I must now consider the law as it would apply to such facts.

(c) Applying the Law

(i) Presumption of Marriage

From the case law, notably *Re Taplin – Watson v. Tate* [1973] 3 All ER 105; *Hortensiah Wanjiku Yawe v. Public Trustee*, Civil Appeal No.13 of 1976; *Njoki v. Mutheru* [1985] KLR 874, I would hold that, whether the defendant's marriage to **Joseph Njau Kairu** by *Kikuyu customary law* was complete or remained inchoate, or was simply a travesty of the applicable customary law, she had a *de facto* union with the deceased which must be pronounced to have been a valid marriage. As I have noted earlier on, such a marriage is established by *cohabitation and repute*, which, in the evidence, has been proved in great abundance, in favour of the defendant. This is a *common law principle* which has been held to be applicable irrespective of the form of marriage which is recognised under law; and so it applies in every respect as regards polygamous marriages, as with monogamous ones.

(ii) Has the defendant a beneficial interest in the intestate's estate?

Since I have held that **Mary Wahito** is a widow of the late **Joseph Njau Kairu** who died intestate, it must follow that in that capacity she has a *beneficial interest* in the estate of the deceased. This point, however, becomes relevant in this Court only because it is apparent that the defendant sees the burial question as one related to *the landed estate, as a place of interment*; whether or not the late **Joseph Njau Kairu's** estate should be the subject of more inclusive devolution, is already set to be resolved within the framework of the defendant's *Succession Cause No. 282 of 2005*. That cause will certainly seek the application of the principles of devolution of estates as provided for in the *Succession Act (Cap 160)*. But in this case the Court has only the limited task of determining whether **Joseph Njau Kairu's** landed estate must provide the *receptacle* for the remains of **Mary Wahito's** and **Njau's** son, **James Githaiga Njau**.

(iii) The late James Githaiga Njau – born of valid marriage

Even as the defendant waits to stake her claim to **Njau's** estate, I have in this instance to determine the claims that may be made in respect of the body of **James Githaiga Njau** which, as a matter of *public policy*, ought now, after being preserved for more than one-and-a-half years, to be decently interred.

Although the plaintiff's position is, firstly that **James Githaiga Njau** was not the biological son of the deceased, and secondly, that he was in any case born in 1978, when no valid customary marriage existed between **Mary Wahito** and **Joseph Njau Kairu**, their position, with respect, lacks evidence in support, and does not rest on any legal principle. As I have already held that the relationship between the defendant and **Joseph Njau Kairu** was that of *marriage by cohabitation and repute*, it follows that when **James Githaiga Njau** was born in 1978, a valid, *de facto* marriage stretching back to 1975 was in existence; and therefore **James Githaiga Njau** was a young man born during the marriage of his parents, and was in law the son of **Joseph Njau Kairu**. That means, of course, that if **Joseph Njau Kairu** were alive today *he* would arrange for the burial of **James Githaiga Njau**.

(iii) The late James Githaiga Njau – and the question of dependancy

Besides, there is uncontroverted evidence (of the defendant, as corroborated by DW1, DW2, DW3 and DW5) that the late **Joseph Njau Kairu** had *assumed full responsibility* for the defendant's children as his own children. The probate-and-administration aspect of that point stands to resolved in the **succession cause**; but for the purpose of this matter, I have to determine whether **Joseph Njau Kairu's** assumption of responsibility as indicated, entitles **James Githaiga Njau** to be buried on his L.R. No.Kiganjo/Kiganjo/395 and 396 at Ikuma in Gatundu.

(iv) How would the law of burial affect the deceased, James Githaiga Njau?

The *disposal of the body of the dead* is not, as a matter of law, inseparably attached to the estate that belongs to, or that would have devolved upon the deceased: save that disposal of the dead entails **costs** and thus, is a charge upon assets; and it is a practical consideration that the proper resource for meeting those costs is the pertinent *estate*. It follows from this principle that, the disposal of the body of **James Githaiga Njau** ought to be borne, in a normal situation, by that part of **Joseph Njau Kairu's** estate which would have devolved upon him. At this moment there is a dispute about the *mode of distribution of the said estate*; yet, as already noted, the deceased *ought* to be interred; and all that the widow of the intestate craves, is that he be interred next to the grave of **Joseph Njau Kairu**. It is clear from the findings in this Judgment that the estate should be treated as *still available* for a rearrangement of administration and distribution, so as to provide for the entire family of **Joseph Njau Kairu**.

Whereas the plaintiffs and their brother-in-law **Samuel Wainaina Muiruri (PW3)** have testified that it is their objections which have so far held up the burial of **James Githaiga Njau**, I now hold that they have *no such right*, and PW3 is a *stranger* to the probate-and-administration interests touching on the estate of the late **Joseph Njau Kairu**; only the widows of **Joseph Njau Kairu** and their children have a valid interest in the distribution and use of that estate.

It emerges, therefore, that the instant suit has *no basis in law*, and it has unnecessarily compromised the valid claims of the defendant, in relation to a requisite place of burial for **James Githaiga Njau**. The defendant wishes to have her son buried next to his own father's grave; and there is uncontroverted evidence from **Rose Wanjiru Kairu (DW2)** that **Joseph Njau Kairu** had been so disturbed when **Samuel Wainaina Muiruri (PW3)** had planned to bury his own daughter, **Joyce Wanjiru**, at a public cemetery that he even offered his own land, as burial place for his elder brother's daughter. This suggests, I think, that had **James Githaiga Njau** predeceased his father, **Joseph Njau Kairu** would have been anxious to have his son buried at his Gatundu home.

In my perception, the plaintiffs' suit has not been brought in *good faith*, and probably was set in motion by influences external to the **Njau** home, and, I am afraid, by ends of sheer cupidity.

(v) Given the nature of the pleadings, what orders may be made?

As already noted, this case had its special circumstances which led to the Court making certain **consent orders** regarding the pleadings. That position is clearly described in the plaintiffs' written submissions dated 12th July, 2006 and signed by M/s. Githinji, Kimamo & Co. Advocates and M/s. F.N. Kimani & Co. Advocates (p.3):

“When this matter came up for [the] hearing of the application the parties herein agreed that all the affidavits sworn herein in the matter as well as those filed by the plaintiffs ... be treated as pleadings, and the matter ... proceed [to] full hearing due to its urgent nature. The defendant therefore filed no defence but affidavits sworn in support of her case were treated as pleadings.”

Now owing to that consent recorded in Court, it is logically the position that the defendant filed no formal statement of defence. Considering, as I believe to be the case, that if the defendant had desired to make a normal counterclaim a formal statement of defence would have been necessary, in the circumstances of this case the claims of both sides in the suit may be regarded as clear enough, to dispense with the necessity for the filing of a **counterclaim**. Consequently I would not agree with the contention of learned

counsel **Mr. Githinji** that the Court is unable to grant the defendant's prayers in their present form, in the absence of a counterclaim. I have considered the defendant's prayers as summarized by counsel in the written and oral submissions, and I have come to the conclusion that granting the defendant's prayers, if considered meet, would not in any way be harmful to the mode of pleadings adopted.

11. DECREE

My consideration of the claims set out in the pleadings; of the very detailed evidence adduced on both sides; of the analysis of the same and the pertinent submissions by counsel, leads me to **dismiss** the plaintiffs' suit as consolidated with their application, and to find in favour of the defendant – which decision occasions a decree in the following terms:

- (1) It is hereby declared that the defendant Mary Wahito was indeed a wife of the late Joseph Njau Kairu;***
- (2) I find and hold that the deceased James Githaiga Njau was a son of the late Joseph Njau Kairu.***
- (3) I find and hold that the defendant is entitled to bury the late James Githaiga Njau next to the grave of the late Joseph Njau Kairu.***
- (4) I find and hold that the defendant is entitled to bury her late son James Githaiga Njau in the land of her late husband, namely, L.R.No.Kiganjo/Kiganjo/395 and 396 at Ikuma Village Kiganjo Location, Gatundu Division, Thika District.***
- (5) The local Officer Commanding the Police Station (OCS) with authority over Ikuma Village shall ensure security and peace, during the burial of the late James Githaiga Njau next his late father's grave.***
- (6) The temporary injunction issued earlier restraining the burial of James Githaiga Njau as now authorized, is hereby vacated.***
- (7) The mortuary costs incurred in respect of the deceased James Githaiga Njau for the first four days following his death on 8th March, 2005 shall be borne by the estate of the late Joseph Njau Kairu; and all the remaining mortuary costs to-date in respect of the said James Githaiga Njau shall be borne by the two plaintiffs herein.***
- (8) Any such application as may be filed by any party in respect of the judgment and decree herein, shall be heard and disposed of before a Judge in the Civil Division of the High Court.***
- (9) The costs of this suit and the consolidated application shall be borne by the plaintiffs and shall bear interest at Court rate with effect from the date of filing suit.***

Finally, I should like to acknowledge the exceptional industry and dedication shown by all counsel in the conduct of this unique case.

DATED and **DELIVERED** at Nairobi this 29th day of September, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiffs:

(i) Mr. Githinji, instructed by M/s. Githinji, Kimamo & Co., Advocates;

(ii) Mr. Kimani, instructed by M/s. F.N. Kimani & Co. Advocates.

For the Defendant: *Mr. Miller*, instructed by M/s. Miller & Co. Advocates