



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

**Civil Case 8 of 2004**

**CHRISTINE WAMBUI KAMAU..... PLAINTIFF**

**VERSUS**

**JULIUS KAGORI WAINAINA..... DEFENDANT**

**JUDGMENT**

The proceedings herein were initially filed by way of plaint in the High Court Central Registry, Nairobi on 19.08.03 under High Court Civil Case No.864 of 2003. However, they were subsequently transferred to the High Court Family Registry, Nairobi in 2004 and assigned the present High Court Civil Case No.8 of 2004. The parties and issues remain the same and are addressed as such under the present High Court number.

The proceedings were originally filed through Edward Muthoga Muriithi Advocates. Later the plaintiff gave notice of intention to act in person but she eventually engaged Wairagu and Wairagu Advocates to act for him.

There was delay in filing defence but eventually one was filed on 21.05.04 through Mbulo & Co. Advocates.

Vide the plaint filed on 19.08.03 the plaintiff prayed for judgment against the defendant for:-

- a) Damages for assault.
- b) Kshs.67,255/= being special damages.
- c) The sub-division of the matrimonial property in equal shares and transfer by the defendant to the plaintiff of ½ share of the said matrimonial property Tilte No. Kiganjo/Mundoro/1977.
- d) Costs of the suit.

The defence filed on 21.05.04 essentially denied the plaintiff's claims and also contends that the plaintiff's suit is defective.

The case came up for hearing before me on 03.03.06 whereat the plaintiff was represented by learned counsel, Mrs M.M. Wairagu. There was no appearance for the defendant. The plaintiff gave and concluded her evidence on that date. Further hearing was fixed for 25.05.06 but it did not take place and was fixed for 25.05.06 but it did not take place and was fixed for mention on 07.06.06.

During the mention on 07.06.06 Mrs J.A. Nyaga held brief for Mrs Wairagu for the plaintiff but there was no appearance for the defendant. Mrs Nyaga was not sure if the defendant was aware of that day's mention and the court fixed the case for mention on 20.06.06 and directed plaintiff's counsel to serve defendant with mention notice. On 20.06.06 Mrs Nyaga again held brief for Mrs Wairagu for the plaintiff and confirmed having served that day's mention notice on defendants advocates but there was no appearance for the defendant. The court fixed the case for further hearing on 13.07.06 and directed plaintiff's counsel to serve hearing notice on defence counsel.

At the resumed hearing on 13.07.06 Mrs Wairagu appeared for the plaintiff while Mr. N.N. Mbulo appeared for the defendant. Mr Mbulo confirmed having been served with mention notice for 20.06.06 and that he did not attend court for the mention because the defendant had kept out of touch with his advocates for over a year. Mr Mbulo sought leave to photocopy the proceedings which had taken place previously for perusal before deciding how to proceed. In essence Mr Mbulo sought adjournment. Mrs Wairagu for the plaintiff objected to the granting of adjournment arguing that it would be prejudicial to plaintiff in that the plaintiff had given and concluded her evidence on 30.03.06 when the defendant failed to attend court despite that date having been fixed by consent. Plaintiff's counsel added that what was coming up for hearing that day, i.e. 13.07.06, was the evidence of the only other plaintiff's witness; that she was ready to proceed with that witness' evidence; and that the defendant should not be allowed to benefit from mistakes of his own making.

Mr. Mbulo for the defendant submitted that there would be no prejudice to the plaintiff if adjournment was granted and that, on the contrary, it was the defendant, a tailor at Gatundu in Thika District, who would suffer prejudice if no adjournment was granted in that he would not be heard on account of the mistake he made in not attending court previously. Defendant's counsel said the defendant had told him that he did not keep in touch with his advocates for over a year because he could not make ends meet. Defendant's counsel added that matrimonial property was in issue and that if the adjournment sought was not granted, injustice would be occasioned to the defendant.

I noted that the defendant's place of tailoring business was at Gatundu in Thika, a district which is in the neighbourhood of Nairobi where the case was taking place and that if the defendant was serious about the case, he could have arranged to keep in touch with his advocates but that he did not. In the premise, I refused to grant the adjournment as well as the request to photocopy the handwritten court proceedings. Defendant's counsel applied for stay of the proceedings, ostensibly to enable him to appeal against the court ruling. Plaintiff's counsel urged the court to reject the oral application for stay of proceedings and that the defendant should make a formal application for stay. I refused the oral application for stay of the proceedings, whereupon defendant's counsel applied to leave the court to enable the defendant to take charge of his case. I granted defence counsel the leave he sought and he left.

After defendants counsel left, the remaining plaintiff's witness John Kamau Gitau took the witness stand and gave his evidence on behalf of the plaintiff who is his daughter. At the conclusion of Gitau's evidence, plaintiff's counsel announced that to be the close of the plaintiff's case. Counsel asked to be allowed to put in written submissions and she was allowed to do so within 14 days. The case was fixed for mention on 27.07.06 whereat plaintiff's counsel handed in her written submissions and adopted them. Judgment was fixed for 21.09.06.

While perusing the file to write Judgment, I noted from the court file that Mbulo & Co. Advocates, whose Mr N.N. Mbulo had withdrawn from the proceedings on 13.07.06, had filed notice of their appointment as advocates for the defendant plus written submissions on the defendant's behalf on 27.07.06 when the case came up for mention after withdrawing from the proceedings. The said advocates did not, however, put in an appearance at the mention, nor did the defendant. The written submissions may be regarded as having been sneaked in. They were not served on the plaintiff's counsel. For those reasons, on 28.09.06 I drew plaintiff's counsel's attention to the said submissions and directed their service on the plaintiff's counsel and invited the said counsel's comments thereon. On 11.10.06 plaintiff's counsel informed the court through Mr S.N. Mwaniki who held her brief that she (plaintiff's counsel) had no objection to Mr Mbulo's filing of the written submissions, save that she (plaintiff's counsel) sought leave to file reply thereto and leave was duly granted.

Subsequently, plaintiff's counsel handed in her written submissions in reply to Mr Mbulo's submissions on 09.11.06. Essentially her response is that Order XXXVI cited by defendant's counsel specified the matters which ought to be brought by originating summons and that division of matrimonial property is not one of them. Plaintiff's counsel acknowledged, however, that the Married Women's Property Act, 1882 of England (section 17) prescribes originating summons as the procedure to be used in matters of matrimonial property by married women. However, she pointed out that the present case combines two causes of action in one suit, i.e. tortious issue and matrimonial issue. She took refuge in Order II rule 2 (1) which provides:

'2. (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.'

She submitted in essence that originating summons are restrictive in the matters they cover and that such procedure would not do justice to the present case and that proceedings by way of plaint as the plaintiff did was the correct thing.

As regards the status of the plaintiff *vis-a-vis* the defendant, defendant's counsel referred to evidence of cohabitation between the two, the birth of a child between them plus the fact that when the defendant was charged with the offence of assaulting the plaintiff in Gatundu Resident Magistrate's Court Criminal Case No. 723 of 2000, Republic -vs- Julius Kagori Wainaina, the defendant himself referred to the plaintiff as his wife.

Plaintiff's counsel urged this court to recognize the association between the plaintiff and defendant as a valid marriage and that the court should grant the prayers in the plaintiff's plaint, which prayers include a prayer for sub-division of the matrimonial property in equal shares.

As noted earlier, the defendant filed defence on 21.05.04 essentially denying any cohabitation or marriage between him and the plaintiff; he denied having established a matrimonial home with plaintiff; denied assaulting the plaintiff; and basically denied all allegations leveled against him by the plaintiff.

I have given due consideration to the averments contained in the plaintiff's plaint and the evidence she tendered before this court in support thereof.

As already recorded, the defendant did not appear at the hearing of this case on 30.3.06. The court record shows that the parties' representatives appeared at the Registry on 13.12.05 and took 30.03.06 for hearing of the case. As the defendant never appeared on 30.3.06, hearing commenced in defendant's absence. Subsequently, the case came up for further hearing on 13.07.06 whereat the plaintiff continued to be represented by Mrs M.M. Wairagu while Mr N.N. Mbulo appeared for the defendant. Mr Mbulo unsuccessfully applied for adjournment and withdrew from representing the defendant for the reasons already recorded. He eventually resurfaced and filed the written submissions alluded to earlier. The only evidence tendered in this case is, therefore, that of the plaintiff and her witness John Kamau Gitau.

I shall firstly address the procedural issue of whether the case is validly before this court. In this regard, I have considered the line of authorities examined by my learned brother Magara, J in Mombasa High Court Civil Suit No.14 of 2005, In the matter of the Kenya Football Federation and In the matter of the Societies Act, Cap.108: Gabriel Mghendi, Sayyid Mrera & Mohamed Omar -vs- The Registrar of Societies. Those authorities establish that the originating summons procedure:

"... is primarily designed for the summary and '*ad hoc*' determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees administrators, or the court's own executive officers...." [Per Windham, CJ of the then Kenya Supreme Court (Mombasa) in Mohamed -vs- Saldanha, Civil Case No.253 of 1953 [unreported.]

The authorities also establish that the originating summons procedure:

“... was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve serious question.”

(Per Sir Windham in *Kulsumbhai -vs- Abdulhussein* [1957] EA 699).

Also Spry, JA contributed to the same thinking in *Bhari-vs- Khan* [1965] EA 94 when he stated:

“... it is, to my mind, quite clear that the whole object of Order 36 is to provide a simple procedure by which certain minor matters can be disposed of without the formality or expense of an ordinary suit.”

In the present case, the plaintiff seeks remedy for the tort of assault she alleges the defendant committed against her; she also seeks damages both general and special; and she additionally seeks sub-division in equal shares of property she considers as matrimonial. The remedies sought arise from a combination of complex factors in human interaction and I find that proceeding by way of plaint was the correct procedure to invoke. Accordingly, I hold that the plaintiff is validly before this court.

I now advert to the substance of the suit.

The plaintiff testified before this court on her own behalf and also called her father, John Kamau Gitau to testify in support of her case.

According to the plaintiff, she got married to the defendant in 1993 under Kikuyu customary law. She made no reference to any customary marriage rites. Her own father, John Kamau Gitau (P.W.2) did not refer to such rites either. All he said in this regard was:

“He (referring to the defendant) joined and became one thing with my daughter the plaintiff. Julius (defendant) is the plaintiff’s husband.”

The plaintiff acknowledged that she already had a child (a daughter) with another man when she and the defendant started living together. It was the plaintiff’s evidence that she cohabited with the defendant from August, 1993 to June, 2000. According to plaintiff’s father (P.W.2), however, the cohabitation between the plaintiff and defendant, whose beginning he did not specify, ended in 2001.

The plaintiff told this court that she and the defendant purchased land parcel No. Kiganjo/Mundoro/1977 measuring approximately one acre from her father, John Kamau Gitau (P.W.2). It was plaintiff’s evidence that initially her father (P.W.2) wanted Kshs.200,000/= for the land but she persuaded him to reduce the price by Kshs.80,000/= and sold it to plaintiff and defendant for Kshs.120,000/= on account, no doubt, of the fact that his own daughter (plaintiff) was going to be a beneficiary. The plaintiff asked this court to deem the saving of Kshs.80,000/= in the purchase price to be her direct contribution towards the purchase of the land. She added that she and the defendant started living on the land in 1995 – after shifting from Mundoro shopping center where she and defendant had previously started living together doing business. P.W.2 confirmed selling the land to the defendant and plaintiff at the reduced price of Kshs.120,000/= instead of Kshs.200,000/= on account of the plaintiff being his daughter.

It was the plaintiff’s evidence that she and the defendant built a 3-bedroomed timber house on the suit land in 1995 and subsequently built a 2 – bedroomed house beside it. The two houses according to her cost a total of Kshs.60,000/= that the defendant was a tailor at the time while she worked as an infuser at Theta Tea Factory from where she took a loan of Kshs.36,000 and contributed Kshs.30,000/= of it towards construction of the two timber houses on the suit land. She produced a Chai Co-operative Savings and Credit Society Ltd Cash Payment Voucher dated 11.09.95 of Kshs.36,000 to herself plus Form C 10 dated 08.12.95 from Chai Co-operative Savings & Credit showing she was repaying the loan at Kshs.750/= per month and that interest on the loan was Kshs.245/=. The two documents are exhibit 6. The plaintiff also produced her payslip as Exhibit 7 showing that her net pay as at June, 1995 was Kshs.1,522/80. The plaintiff said she also paid for the food consumed by those who built the two houses.

It was the plaintiff's further evidence that she had no objection to the suit land being registered in the defendant's name and that it was so registered. She produced a Certificate of Official Search dated 23.07.01 showing that Julius Kagori Wainaina (defendant) was registered as proprietor of Title No. Kiganjo/Mundoro/1977 (suit land) measuring approximately 0.40 hectares on 24.10.95. On the issue of registration of land in the defendant's name, P.W.2 testified that both the defendant and plaintiff are Kikuyu by tribe and that it is common among the Kikuyu traditionally that even if both husband and wife buy land together, it is registered in the name of the husband.

The plaintiff further testified that the defendant left her and the child in 2000 and that on 30.05.2000 she registered a caution over the suit land; that this did not please the defendant; and that on 17.06.2000 the defendant assaulted her. She produced her application for registration of caution as Exhibit 8. She added that she reported the assault to the police leading to prosecution and conviction of the defendant for the offence of assault occasioning actual bodily harm, contrary to section 251 of the Penal Code (Cap.63) vide Gatundu Resident Magistrate's Court Criminal Case No.723 of 2000. She produced certified proceedings and judgment in that case as Exhibit 3. The judgment shows that the defendant herein was convicted and sentenced to serve 8 months imprisonment or fined Kshs.3,000/=. Apparently he had paid cash bail of Kshs.3,000/= and the said cash bail was treated as the fine. The court proceedings in the criminal case show that the defendant himself referred to the plaintiff as his wife; that on 17.06.2000 he had questioned her as to why she lodged a caution against the title to the suit land; that she made a lot of noise and he locked the house and she went to her home. The defendant acknowledged during the criminal proceedings against him that he bought the suit land from the plaintiff's father.

According to the plaintiff, the defendant stays at a shopping center called Kirangi, with another woman, and that it is his friend, Ngigi who stays on the suit land. P.W.2, however, said the defendant lives on the suit land with another woman. The two accounts are irreconcilable, but they seem peripheral.

In the plaint, the plaintiff, *inter alia*, claimed special damages amounting to Kshs.67,255/=. It is trite law that special damages must not only be pleaded but must also be specifically proved. The plaintiff said she had been able to find only some of the receipts for the items subject matter of her claim for special damages. The receipts amount to Kshs.8,810/=.

As recorded earlier, the defendant did not testify before this court. This leaves the evidence given by the plaintiff and her father uncontroverted.

Was the plaintiff a "wife" as understood in law? There is some discrepancy between the evidence of the plaintiff herself and that of her father as to the year when the plaintiff and defendant ceased cohabiting. The plaintiff said the cohabitation ceased in 2000 while her father (P.W.2) said the cohabitation ceased in 2001. I shall take the year 2000 as the year when cohabitation ceased. According to the plaintiff, the cohabitation between herself and the defendant lasted from August, 1993 to June, 2000. I accept the plaintiff's evidence on this point. This works out at a cohabitation period of approximately 6 years and 10 months. There is evidence, which I accept, that during the cohabitation a child, Pauline Kabura, was born to the cohabitantes - on 24.09.96. The plaintiff produced the child's birth certificate as Exhibit 1. The father of the child is given therein as Julius Kagori. The plaintiff told this court that the defendant Julius Kagori Wainaina is the father of the child. I accept the plaintiff's evidence and find the defendant to be indeed Pauline Kabura's father. The plaintiff told this court that her father (P.W.2) had wanted to sell the suit land for Kshs.200,000/= but she reminded him that she was his daughter and persuaded him to reduce the price by Kshs.80,000/=: thus the defendant and plaintiff were able to get the land at the reduced price of Kshs.120,000/= instead of the Kshs.200,000/= initially demanded. The plaintiff wants the fact that her lineage to P.W.2 which enabled the defendant and herself to get the land at such a drastically reduced price to be counted as her direct contribution towards the purchase price. That is not an unreasonable request and I grant it.

The celebrated author, P.M. Bromley of the book FAMILY LAW, Third Edition states as follows at page 50 of his said book regarding presumption of marriage:

**"It has long been established law that, if a man and woman cohabit and hold themselves out as**

**husband and wife, this in itself raises a presumption that they are legally married. Consequently, if the marriage is challenged, the burden lies upon those challenging it to prove that there was in fact no marriage and not upon those alleging it to prove that it had been such solemnised.”**

Such presumption makes sense and I am satisfied that the factors narrated to this court pertaining to the cohabitation of the plaintiff and defendant weigh heavily in favour of a presumption of marriage between the two and I so presume. The tort of assault pleaded by the plaintiff against the defendant was amply proved by the criminal conviction therefor entered against the defendant in Gatundu Resident Magistrate’s Court Criminal Case No.723 of 2000, Republic -vs- Julius Kagori Wainaina (defendant herein). The injuries were, however, relatively minor. The plaintiff succeeds in part and I make the following orders in her favour:-

1. Under prayer (a) for damages, by which the plaintiff is deemed to refer to general damages, the plaintiff is awarded damages of Kshs.30,000/=.
2. Under prayer (b) seeking special damages of Kshs.67,255/=, the plaintiff is awarded special damages of Kshs.8,810/= as established by the few receipts produced.
3. Prayer (c) seeking sub-division of the matrimonial property title No. Kiganjo/Mundoro/1977 in equal shares and transfer by the defendant to the plaintiff of ½ share of the said matrimonial property is granted as prayed.
4. The defendant shall bear the plaintiff’s costs of the suit.

Orders accordingly.

**Delivered at Nairobi this 13<sup>th</sup> day of December, 2006.**

**B.P. KUBO**

JUDGE