



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 751 OF 1977

1. ANNA MUNINI

2. BEATRICE MUSANGI.....PLAINTIFFS

VERSUS

MARGARET NZAMBI.....DEFENDANT

JUDGMENT

John Kunga Kituu (Kituu), died of cancer of the liver in the Pandya Memorial Clinic, Mombasa, on April 14, 1977. At one time in his life he drove an Arab butcher's vehicle but later left that employment and became a butcher on his own account near Mombasa. He had a Swahili type house near the Drive in Cinema at Changamwe, a restaurant which was attached to one of his butcheries, three other butcheries, a grocery shop and an interest (with the then District commissioner, Mr Mwangi, and others) in another restaurant called the First and Last all around the seaport of Mombasa. Add to that a farm in the Shimba Hill near Kwale and land at Mulango, in Kitui District, and it would seem that he was a man of means.

His corpse was conveyed to Mulango where it was buried with those of his forefathers. Among the mourners were his first wife, Ann Munini (Munini) and his second wife, Beatrice Musangi (Musangi), and a lady called Margaret Nzambi (Nzambi). Munini lived at Mulango on Kituu's land, Musangi with her parents in another place and Nzambi in Kituu's homestead at Changamwe.

Kituu died intestate and the Assistant Public Trustee in Mombasa applied to the High Court in Mombasa for letters of administration to the estate on June 10, 1977 (see GN 5538 of 1977) which he was granted. Nzambi handed her Mombasa advocate, Mr Master, two cheques together worth Kshs 42,000 from Franco Vituli, a builder, made out to Kituu which became the subject of an application by the Assistant Public Trustee. The assets of the estate were said to be worth Kshs 393,204.90 and the liabilities Kshs 427,191.70 at one stage in all this litigation, so why there is any jostling to inherit from Kituu is not clear.

When the Assistant Public Trustee told Munini and Musangi he would include Nzambi as a third wife when he came to distribute the assets they briefed Mr Mututo to file and serve this claim against Nzambi for three declarations, an account, damages, and costs. The declarations sought are that Nzambi is not the lawful wife of Kituu, his heir or entitled to any share of his estate. Nzambi consulted Mr Kiambo and he entered appearance for her and filed her defence asking the court to dismiss this action with costs because she was Kituu's (third) wife.

The issues in the suit were :-

(i) whether or not Nzambi was married to Kituu according to customary law

(ii) if not had she unlawfully intermeddled with the estate?

(iii) And if so, what loss the estate suffered?

And on whom did the burden of proof lie for these issues? Whether or not she was married according to customary law to Kituu was a matter which was especially within their knowledge so under sections 107, 108 and 112 of the Evidence Act (cap 80) the burden of proving the facts which so qualified their union was upon Nzambi. Mr Mututo, on the other hand, submitted Munini and Musangi had to prove Nzambi was not married to Kituu under customary law and Mr Kiambo was not at pains to dispute or qualify this. Certainly if no evidence at all were given on either side Munini and Musangi would fail in this suit so, according to section 108 of this Act, the burden of proof was on them. It is possible to go around these sections and then be too dizzy, so to speak, to be able to resolve which party must prove what facts but, in the circumstances of this very action, Mr Mututo was correct, Munini and Musangi had to prove Nzambi was not married to Kituu, according to Kamba customary law, and if so, that she had unlawfully intermeddled with his estate and what loss, if any, the estate suffered. And all by the standard usual in civil actions, which is on the balance of probabilities. Fraud was not pleaded and the evidence does not support it. Munini and Musangi were not saying Nzambi tried to defraud them of their inheritance but that she had no right to a share in Kituu's estate.

Kituu was and these three ladies are *Wakamba* from Kitui district. Munini, Musangi and Nzambi do not claim they were married to Kituu according to statute law but by the customary law of the *Wakamba*. Munini and Musangi aver that Nzambi was Kituu's maid servant, or at the most, lover, and Nzambi swears she was his wife by customary law.

The law on this is in *Hortensiah Wanjiku Yawe v The Public Trustee* Court of Appeal Civil Appeal 13 of 1976 Nairobi August 6 1976 in which the former Court of Appeal for East Africa (Wambuzi P, Mustafa VP and Musoke JA) held :-

- i. The onus of proving customary law marriage is generally on the party who claims it;
- ii. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities';
- iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard: (cf *Mwagiru v Mumbi*, [1967] EA 639, 642)
- iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
- v. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson v Tate*, [1937] 3 All ER 105)
- vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage (*Sastry Veliader Aronegary v Sembecutty Vaigalie* (1880-1) 6 AC 364; *Shepherd George v Thye*, [1904] 1 Ch 456)

So far as the presumption in favour of marriage rather than concubinage if there has been long cohabitation is concerned *Yawe* has been faithfully applied by Mr Justice Muli on January 29, 1979 in Nairobi Civil Suit 1460 of 1970, *Duncan Gachrini Ngare v Joseck, Susan Kaniana and Rose Ngina Nyakio* which was consolidated with Nairobi Civil Suit 2602 of 1977 *In the matter of the Estate of Jonah Gachiani* and *In the Matter of the Registered Land Act* (cap 300), by Platt J on February 8 1983 in Nairobi Civil Suit 4093 of 1982 *Frances Jacinta Chesire v Reuben Kiplangat Chesire* and by Porter J. October 3, 1983 in Nairobi Miscellaneous Civil Cause 364 of 1981 *Kisito Charles Macharia v Rosemary Moraa* and maybe other causes which have not been brought to my notice.

When Mr Kiambo had cited these formidable authorities, Mr Mututo submitted that the question :-

“Was the decision of the former Court of Appeal for East Africa in *Hortensiah Wanjiku Yawe v The Public Trustee* unconstitutional?”

Should be referred by this court to the full bench of the High Court under section 67 of the Constitution of the Republic of Kenya because it fell foul of the provisions of section 3(2) of the Judicature Act, (cap 8).

I decline to do so because although section 3(2) of the Judicature Act, in effect, makes it mandatory for all courts to be guided by African Customary law in civil cases where one or more of the parties is subject to it or affected by it, or so far as it is applicable and [it] is not repugnant to justice or morality or inconsistent with any written law, the Court of Appeal for East Africa’s decision in *Yawe*, in my respectful view, is not repugnant or inconsistent. Furthermore, even if it were, it would not be a question as to the interpretation of the Constitution let alone one arising in proceedings in a subordinate court which is what section 67(1) of the Constitution of Kenya covers.

Evidence was recorded for the plaintiffs from Munini and Musangi, Mutonga, the father of Munini, Kyalo, the 73 year old cousin of Kituu, the deceased, Ruth Gatongu, Kituu’s mother, Kitchuthuku, a railway porter at Mombasa station and friend of Kituu and Iluve, a nephew of Kituu, whom he employed at one of his butcheries in Mombasa from 1967 to 1975 but who is now employed by the provincial Administration, Mombasa, as a driver. The defendant, Nzambi, testified and called Muli, her father, who lives in Mikindau village, above the new container harbor at Changamwe, and works for the Mombasa Cargo and Tally Organization, Keyuthiya, a shop keeper at Port Reitz, a friend and partner in business of Kituu since 1964 and Ivuke, a Freight and Shipping Company employee and also a friend of Kituu’s and the manager of the First and Last from 1975 to 1978.

The usual steps taken for a marriage between a Kamba man and a Kamba woman according to their customs were not dealt with in much detail in the evidence. Nzambi’s father Muli said they included these :-

“..... the man has to ask the woman to marry him and if she agrees they begin living together. An elder of the man’s clan goes to the parents of the girl and says they are married. There are two types of marriage. First, where it is the first time she is married or secondly it is not the first time. Her parents must know if she is to be married on any occasion but the first. She will have returned from the previous marriage to the home of her parents. On the first occasion the parents will not know she is married until the man sends a messenger to tell them their daughter is with him, married to him.

The man’s father prepares African liquor. He takes it to the father of the woman. He tells the girl’s father his son has married the girl. The fathers then meet when the man’s father brings the girl’s father 7 goats. The seventh is eaten. The father of the man then pays the agreed dowry. The standard rate is plenty of African liquor prepared by the boy’s father, the amount the elders on each side fix as the dowry, say 8 head of cattle, 46 goats, Kshs 5,000 (or Kshs 4,000 or Kshs 3,000) cash.”

The others who spoke about them each added further ones but they were by no means unanimous about them. Thus, between them, they listed these. Each party must consent to the marriage. The bride-price or dowry must be paid by the man’s father, or, if he is dead, his guardian, in the presence of some elders. The mother of the groom must discuss the proposed marriage of her son with the father of the girl (and, presumably inspect her?) If it is a second or third marriage then the man must tell his wife or wives he is marrying again so they may go and see the woman and attend the ceremonies. (Munini and Musangi were adamant that if this were omitted, why then the union was no marriage).

At the end Mr Mututo brought in Dr Cotran’s summary of the essentials of a valid marriage in kamba customary in *Kenya: I Marriage and Divorce*, 1st edn, (1968) 28 which is :-

(a) Capacity

(b) Consent

(c) Slaughter of a billy goat

(d) Marriage consideration

(e) Cohabitation

Dr Cotran deals with each, save for cohabitation, in greater detail beforehand (see pp 23 and 24) and I set out some of these details.

At one time the male and female had to be circumcised to marry (p 23). The female may still not marry before she has had her first menstrual period. The man may enter into any number of marriages provided each subsequent one is valid. A woman may not do so while her husband is alive. Consanguinity, affinity, a blood brotherhood relationship or the fact that the intended parties were breast fed by the same woman are bars to marriage among the Wakamba.

Dr Cotran has the same steps in the formation of the marriage as those in the evidence though he has it that the mother of the man visits the mother of the woman to see that she is satisfied, though which mother is meant to be satisfied is not clear. At any rate it is not the man's father she visits, as Ruth Gatongu would have it. Then there are visits with presents of goats and beer made by the man's father or relatives to the woman's father (and during one of those the dowry is fixed) and a return visit by the man's father and some of his elders to see what sort of family his daughter is joining. Later, the girl is collected by her future husband and escorted to his house. He is accompanied by one male and two female relatives. The bride's neck is smeared with ghee by her mother-in-law on arrival. The marriage is not consummated that night but on the next. The bride is visited by her friends on the third day with presents and they wail with regret because she has left the ranks of the unmarried (and what the husband's reaction to that, if he hears it, is not revealed).

Dr Cotran includes one that was not touched upon in the evidence. One of the billy goats (which he calls a ram) belonging to the man's father or guardian must be slaughtered by the woman's father and its blood allowed to seep into the ground.

So some of the conditions are in the evidence and some in the book and some in both. It all depends, of course, on what questions the witnesses in this trial and members of the special law panels, made up of persons having special knowledge of the Kamba law, were asked. They were not the same and they were more numerous for the panel.

I will test the alleged marriage by the conditions in the evidence and the book, but not necessarily in that order, and where possible declare if what is said to be a condition was met and if not what effect the failure has.

The wives, relatives, friends (especially if they were of the same age group) and Nzambi knew if Kituu was circumcised before he married Munini, Musangi or Nzambi but none of them was questioned about it. Nzambi and Muli her father would be able to say if she were circumcised before she cohabited with Kituu but again neither was asked to deal with this and maybe it is not seemly for a daughter and father to do so publicly or in one another's presence or at all. It is not important, however, because by October 1972, which is when Kituu and Nzambi cohabited it was no longer forbidden for uncircumcised Wakamba to marry one another.

Nzambi was born in 1952, went to Kathivo Primary School where a fellow pupil, Mwikya, seduced her and they had a daughter, Mona, in 1968. They lived together until 1969 when Mwikya returned Nzambi to her parent's home. Mwikya and his father or guardian had paid Muli no dowry so Nzambi was never married to Mwikya. The relevance of all this is that Nzambi had obviously had her first menstrual period before she met Kituu.

And Nzambi still had the capacity to marry Kituu because even if Mwikya was alive in October, 1972 she had not been married to him or anyone else before she joined Kituu. Kituu had married Munini and

Musangi before she joined Kituu. Kituu had married Munini and Musangi before that date and he was free to marry Nzambi and although Munini and Musangi swear he never told them he had married Nzambi, let alone consult them about doing so, this is not a condition precedent though it may indicate a ungallant Bluebeardish approach to such an important step in all their lives.

There was no suggestion any woman breastfed Kituu and Nzambi at the same time and their ages were too disparate for that to have occurred unless Kituu was weaned remarkably late in life for which again there was no evidence. Nor were their fathers or any other relatives alleged to be bloodbrothers. There was no hint of consanguinity or affinity to bar their marriage.

Did Nzambi's father kill a billy goat sent by Kituu's father or guardian and let its blood drench the ground? There was no evidence one way or the other about this because, again, it was not put to any one who testified at the trial or even that it is essential for a customary law marriage for the Wakamba. It is so, according to Dr Cotran on page 28 of the *Restatement* but earlier on page 24 he declares the sacrifice of this beast, the *nthenge ya kwita mbui nthakane nthi*, is a ceremony which solemnizes the betrothal of the couple which, unless I have misread or misunderstood this matter, would not be an essential condition of a marriage in the sense of proving one has occurred because to betroth is to bind with a promise to marry and a promise can be set aside by consent, death, marriage to a different party or some other event or even broken.

Muli, the father of Nzambi, asserted that he had received twenty bottles of beer from Kituu and Kshs 3,300 in all from Kituu between September 1972 and June 1975 which he appears to have treated quite happily as installments of the dowry and there was no one to gainsay it. Part of the negotiation for this marriage had been conducted between him and Kituu in the presence of someone called Kilonzo whom Kituu introduced as an elder to him. Kilonzo has since died.

Returning to Dr Cotran's last 'essential' (of a valid Kamba customary law marriage), which he terms 'commencement of cohabitation' there was no suggestion by anyone that Kituu and Nzambi did not share the same bed for some years and "cohabitation", as I understand the term, is usually used of a couple who are not married living together, especially as husband and wife.

Nzambi swore she and Kituu agreed to marry one another and there is only her word for it and can only be her word for it because Kituu is dead. She and her father, Muli, claimed both families agreed to the union and Muli had met Kituu's mother Ruth Gatongu and Kituu's sister in-law during their tour of inspection when they saw Nzambi and Muli's place and evident prosperity in Mombasa where he has now lived and worked for twenty years. Ruth Gatongu vehemently denied this but Kituu's sister in-law did not testify. Munini and Musangi join Ruth Gatongu in this general complaint (which in some ways was Munini's and Musangi's chosen battle ground) that Nzambi could not be Kituu's wife because they were never told by Kituu he was, she had no homestead in Kituu's land in his home village, Itolaka, in Kitui district, she had never visited them or their families there, they had not met her parents or seen where they lived and they had not been present at any of the marriage negotiations or ceremonies. When they came down to see Kituu they did not see Nzambi in his bed or at his board. She was never pregnant and no children were introduced or named as hers or those of Kituu by her. None of those children, if there were any, had ever made a pilgrimage to Kituu's home. A girl said to be theirs, also called Ruth Gatongu or Kitongu had been buried at Port Reitz instead of Itolaka. Nzambi, they said, toiled in the nearby butchery or as a housemaid (the visiting ladies were not in unison on this point for some said a youth did the housework) and she retired to a room for the servants in the house. She was a menial when they were around and she attended the interment at their home in Kitui and did not linger which was entirely proper for a mere employee. The others who testified for either Munini and Musangi or Nzambi maintained that each was particularly in the confidence of Kituu when he was alive and then divided into those who said Kituu did or did not tell them Nzambi was his wife and treat her accordingly.

Nzambi explained that her daughter by Kituu was called Ruth Kitongu after Kituu's mother and was buried at Port Reitz because she died after Kituu had died and his business empire had soon collapsed so there was insufficient money to pay for the transport of her coffin to Itolaka and it was not contrary to custom these days to bury the corpse of a child away from the original home of the father.

Besides Ruth Kitongu, she had borne Kituu two sons, called after Kituu's father and hers in turn, and in 1981, since Kituu's death, she had had another girl, Teresia, by a man she refused to name. She had collected birth certificates for the boys which named Kituu as their father but had not done so for Mona and Teresia who were girls and not the children of Kituu. She applied for and collected the certificates after Kituu's death. Her driving licence was in the name of Mrs Kituu because she had applied for it in that name and she had signed it as Nzambi because that was also her name. Kituu had paid for her driving lessons with the Automobile Association so she could help as his wife in their businesses by driving their van and delivering meat to their butcheries and the restaurants which she did and for which she was never paid because she was never his employee.

These matters were of her own doing. The next was not but that of Kituu, it seems and so of more weight. She was referred to as Kituu's wife in a letter [Exhibit 1] to Muli dated April 3, 1977 dictated by Kituu to Joshua Elpas Njogu, the accounts clerk at the First and Last, who did not give evidence, and signed by Kituu all in the presence of another partner, Keyuthiya the M'Kikuyu. Muli was to bring twenty five cattle from Mzee Lasha to Kituu's wife at the butchery. It does not name the wife or say the lady is Muli's daughter. Muli was at Garsen and so was mzee Lasha, a cattle dealer who had the animals for Kituu's butcheries and was not called. Why Muli should keep it for seven years was not investigated. Nevertheless, it was shown, in my estimate, to be probably genuine and dictated and written when Kituu was off to hospital.

Credibility is something that ought to be dealt with at this point in this judgment. Demeanour is not basis in this trial for deciding which party or witness spoke the whole truth or something near it. The interest and the evidence each gave must be the measure for making some assessment of what these eleven people said.

Munini and Musangi were the wives who had been left at home in the countryside and Nzambi was the town lady. The first two were married round about the time the third went to live with their husband. They never had the education and the opportunities of Nzambi. They were, in all, rural housewives and almost forgotten whereas Nzambi was beside Kituu, at work with him and far from neglected.

Mutonga, Kyalo and Ruth Gatongu are of an even older generation and, again, still living in their villages in the Kitui district and recall, no doubt, when customary marriages were local, formal and everyone around knew all about each one. Kitchuthuku and Iluve, by contrast, were Mombasa men, acquainted with the ways of their fellow Wakamba who have lived and worked there for some time. Muli, the father of Nzambi is younger than Mutonga, Kyalo and Ruth Gatongu, a Kitui man but now almost permanently settled in Mombasa along with Kithchuthuku and Iluve.

Ruth Gatongu, the mother of Kituu, might think she will get more from the estate if the Assistant Public Trustee excludes Nzambi and the two sons and if she is not to share in it in any event then she might prefer to see some of the assets brought back to Kitui by Munini and Musangi where she can persuade them to help her. Kyalo and Iluve might have similar thoughts too. Mutonga and Muli, the fathers, would naturally wish their daughters to benefit as much as possible.

It should not matter one way or the other to Kitchuthuku, Keyuthia and Ivuke whether Nzambi is treated as the third wife of Kituu for they are unrelated to Kituu or any of the three women and Keyuthiya is not even an Mkamba but an Mkikuyu. All this presupposes that none of them was paid and or rehearsed for their testimony, and it was never suggested to any of them that that had happened.

So much for their interest in the outcome of the case. Turning to what they said, it was clear to me that the parties and their relatives were shrill and extreme in what they said about the status of Nzambi in the house of Kituu. Muli, the father of Nzambi, was, however, convincing in his detailed account of the instalments of the cash part of the dowry Kituu paid him before he died for it is not often that a witness will admit he made notes of such payments not contemporaneously but for the purpose of giving evidence, though it is the obvious thing to do, and it was significant that Mr Mututo did not object to muli using those notes. Keyuthia was not a member of the same group as the other ten witnesses and his evidence about Nzambi's role in Kituu's life was relevant and reading it again it seems he was fair and

restrained just as Ivuke was. This cannot be said for that of Kitchuthuku.

Bearing those matters of credibility in mind I now make some necessary findings. Kituu and Nzambi cohabited as man and wife from just after September 1972 to just before Kituu died in mid April 1977 which is about 4 ½ years. The period of cohabitation in the other cases were 9 for *Yawe*, 6 in *Cheshire*, and 5 in *Moraa* which were all held to be long periods. And, in my view, in the circumstances of this case it was a long period of cohabitation for those days in Mombasa. There is no cogent significant evidence to rebut this. Some ceremonies and rituals for Wakamba customary marriages had not been fulfilled before Kituu died. None of them affected the presumption or indeed the validity of such a marriage. I gained the impression, especially from Muli, that he and Kituu would have progressed in amity to negotiate with the elders the amount of cattle Kituu would provide as dowry or that part of the dowry had this cancer not struck down Kituu. There was no call to hurry these matters for Muli could see Kituu was treating Nzambi well as a wife and better than some wives are treated and Muli was doing well out of the marriage.

Many of the formalities for such a marriage which were required in 1972 were performed. Consent, capacity, lack of any bar to it, cohabitation and so on were adhered to satisfactorily. The rest of the instalments of the bride-price, the sacrifice of the goat and the return visit of Muli and Kituu to the parents, mother, wives and family village lay ahead. The presumption and the matters I have set out lead me to find that on the balance of probabilities Kituu and Nzambi were man and wife before he died according to their customary law.

Arising out of the evidence on that point was the question of whether or not Mzee Kituu and Martin Muli Kituu were legitimate or illegitimate? The evidence was all one way. They were born to Nzambi and Kituu after they were married, Mr Mututo submitted that the dates of their birth had not been proved and the dates they were said to have been born meant that they were conceived and born within a year of one another which was impossible. The M'Kikuyu, Keyuthia, supported him. It may be that it is taboo for a man to have intercourse with his wife for some months after she has given birth to a child and it is unlikely to occur when a man has more than one resident wife but as a matter of judicial knowledge it is not impossible. The complaints of those who are worried about population problems and the advice of those who try to persuade couples to space on their children is that the consequence of every year a new child is far from ideal. I accept the evidence of Nzambi about the dates of the births of Mzee Kituu and of Martin Muli and find they were the legitimate children of Kituu and Nzambi.

This means that the other issues no longer arise but I may be wrong on the first so in accordance with practice I now turn to the second which was whether or not Munini and Musangi proved on the balance of probabilities that Nzambi had unlawfully meddled with the estate of Kituu after his death? This was not pleaded in the plaint or the body of it and there were no particulars provided or even provided or even asked for but there is some suggestion that she did in the last prayer in the plaint and somehow it became an issue and had better be answered for the sake of the parties, their advocates and the Assistant Public Trustee. The evidence for this was meagre. Munini thought the household goods of Kituu were still in the house at Changamwe but she did not really know where they were. Musangi checked the house for them and found that a wardrobe, small cupboard, one small bed, air conditioner and 22 bedsheets were missing after Kituu's death. Nzambi swore that all the personal and household effects of Kituu were cleared by his relatives after his death and so far she and her children had not had any benefit from his estate or his businesses which collapsed soon after his death. None of the other witnesses gave evidence about this. Munini and Musangi do not have the same version of what happened to the estate of Kituu after his death. The advocates did not put the case for their parties or party on this to the others in detail or at all. Nzambi was not cross-examined on the issue. The 22 bedsheets seemed to be either a telling detail or a matter of fantasy whereas the removal of the household and personal effects by the vulturine relatives smacked of what often happens even in the best regulated families the world over. Munini and Musangi did not prove on the balance of probabilities Nzambi unlawfully meddled with the estate after the death of Kituu and that is the answer I give to this issue.

And, again, if I am wrong on the second issue I will for the same reasons answer the third issue which is whether or not Munini and Musangi proved what loss the estate suffered by Nzambi's meddling? The

onus of proof was on Munini and Musangi and the standard of proof was that of 'on the balance of probabilities'. Musangi said she could not value the things that she said were missing from the estate when she checked it. No-one else was asked any question about this. Each party was blessed with an advocate and it would not be right for the court to do more than give a nominal sum for the loss which will be the usual one of Kshs 100.

The matter of the costs of this litigation is the last one. The costs of all suits are in the discretion of the court which has the power to determine by whom and out of what property and to what extent such costs are to be paid provided that they shall follow the event unless the court shall for good reason otherwise order. Munini and Musangi have lost this action and Nzambi triumphed. The costs of the Public Trustee in *Yawe* in the High Court were ordered to be paid out of the estate in the High Court and those of the rival claimants were to be paid by themselves. This was not disturbed by the Court of Appeal but so far as that appeal was concerned the order was that the costs of the appellant and of the Public Trustee were to be paid out of the estate and the costs of the respondent were to be met by themselves. Each party paid its own costs in the *Ngare* trial, costs were not dealt with in the *Chesire* order laid before me and in the *Moraa* one the unsuccessful plaintiff paid them.

The Assistant Public Trustee was not a party in this action and did not petition the court about the matter as he did in *Yawe*. The answer he gave Munini, Musangi and Nzambi has been vindicated. Munini and Musangi persuaded their advocates to challenge it and they did not succeed. Nzambi should not be made to pay the costs because she was the victor. She should not be made to pay her own costs for the same reason. I do not see that the estate should suffer or be reduced because the first two wives in this case chose to challenge the status of Nzambi any more than it ought to have done if Nzambi had lost. It might have been different if the Assistant Public Trustee had not investigated the claim and given the advice he did. In the exercise of my discretion I now award the costs of the suit to the defendant Nzambi against the plaintiffs Munini and Musangi.

So, in the end, the suit of Munini and Musangi is dismissed with costs to Nzambi.

Dated and Delivered at Mombasa this 14th day of May 1984.

A.A.KNELLER

JUDGE