



IN THE COURT OF APPEAL AT NAIROBI

(Coram: Madan , Kneller & Nyarangi JJA)

CIVIL APPEAL NO 71 OF 1984

Between

MARY NJOKIAPPELLANT

AND

JOHN KINYANJUI MUTHERU.....1ST RESPONDENT

GABRIEL KAIRA MUTHERU.....2ND RESPONDENT

MUMBI MUTHERU.....3RD RESPONDENT

WAMBUI MUTHERU.....4TH RESPONDENT

(Appeal from the High Court at Nairobi, Sachdeva J)

JUDGMENT

February 25, 1985, **Madan JA** delivered the following Judgment.

The first named four respondents (plaintiffs) filed a summons naming the appellant, Mary Njoki, and the fifth respondent the Public Trustee as defendants for orders to permit the intended administrator the Public Trustee to apply for grant of letters of administration alone to the estate of Peter Gachukia deceased who died intestate on January 2, 1974 to the exclusion of Mary Njoki named as the deceased's widow "and she be declared no beneficiary of the deceased's estate.

The deceased was an advocate by profession. He died in a motor car accident. The plaintiffs, John Kinyanjui Muthuru and Gabriel Kaira Muthuru deponed in two affidavits in support of the summons that they were both brothers of the deceased who left them surviving him together with his two stepmothers the third and fourth respondents Mumbi and Wambui Muthuru; that the Public Trustee erroneously included Mary Njoki (as beneficiary) as the deceased's widow she not being legally married to him either under customary law or under any statute, and she could not claim under his estate; that they were the only two persons entitled to inherit from the deceased's estate.

It was not in dispute that Mary Njoki was not married to the deceased in any recognized manner. She herself told the court that no marriage ceremony of any kind was performed between them. The issue before the court between Mary Njoki and the plaintiffs was whether Mary Njoki was entitled to a share in the deceased's estate as his widow by virtue of their long cohabitation, association and sexual intercourse

between her and the deceased as they lived together as husband and wife for six years from 1969 to 1975. She was saying to the court that a presumption of marriage arose from long cohabitation and reput that she was the deceased's wife, sometimes referred to "common law wife".

The Public Trustee took no part in the proceedings. The learned judge held that Mary Njoki was not wife of the deceased, and she was not entitled to inherit any part of his estate. Mary Njoki has appealed. Condensed the eight grounds of appeal urge that the learned trial judge erred in law and in fact in rejecting the evidence given on behalf of Mary Njoki which was corroborated, in particular the evidence of the independent witness Timan Ngugi; in believing that she was not married to the deceased or that the common law presumption of marriage did not apply in the circumstances of the case; in not holding that there was a marriage by repute due to the intention on the part of the deceased and Mary Njoki to marry, and long cohabitation. The *viva voce* evidence in the court below was to the following effect: John Kinyanjui Muthuru, Gabriel Kaira Muthuru agreeing with him, told the court that he came to know Mary Njoki through the Public Trustee after the death of his brother when she said she was married to the deceased; he was surprised to hear her claim.

The deceased lived in Lavington prior to his death. He and the deceased used to visit each other. Kinyanjui used to see him with many girl friends, including Mary Njoki. None of them lived with him. The deceased did not introduce him to her. If they were married he, his mothers and the family members would have known about it; they would also have been involved in any marriage negotiations but they never were. He was not aware that the deceased was living with a woman as his wife, nor was he living with Mary Njoki. He saw her once when they visited him at Eastleigh together with another girl. He was introduced to the two ladies by name.

He did not see Mary Njoki again. He did not see the deceased with her at Kiganjo. The deceased brought her to his home in 1974 after the death of their father. Mary Njoki did not have a child.

Gabriel was different. He said he did not know if Mary Njoki was married to the deceased though to his knowledge the deceased never married, that Mary Njoki was not staying with the deceased when he died.

Mumbi said the deceased considered her his mother as she brought him up when he was six years old. He would tell her everything. He told her he had not married, and Mary Njoki was never married to him.

Wambui agreed with the evidence given by John, Gabriel and Mumbi. She herself did not know where the deceased lived in Nairobi.

Mary Njoki testified. She said she knew the deceased before his death. She was staying with him as his wife. She came to know him in 1959 at Kiganjo. They were friends until 1969 when they started living together continuously until he died, first in New Pumwani from 1969 to April, 1972 in a one bed-sitting room house. The deceased then bought a house in Langata with his partner Mr. Timan Njugi. They all moved into that house, and stayed there until July, 1974. In August, 1974 she and the deceased moved into another house in Lavington which the deceased and Mr. Njugi also bought together. Mr. Njugi remained behind in the Langata house. They stayed in Lavington until the deceased died. Mary Njoki said she came to know the plaintiffs when she was living with the deceased since 1969. She and the deceased used to visit them at their home at Kiganjo. She came to know John in 1970. He had come to visit the deceased in New Pumwani. They used to visit him where he was staying. The deceased introduced her as his wife. She made the arrangements for John's wedding to Margaret Njoki at St Teresa's Church.

She attended the wedding with the deceased. She took photographs. John and his wife had two children one named Kimani. Margaret worked as a cateress at the Mater Hospital in South "B" Nairobi. John was working with Daly and Figgis, Advocates. He never visited their home at Langata.

He came to Lavington once with his wife. They used to meet John often at his home in Kiganjo where she informed him of the deceased's accident on December 24, 1974. She met him at the hospital after Christmas, met him there very often – she, John and Mr. Njugi. They sent John home to call a step-brother also named Peter Gichukia to come and stay with her.

The step-brother stayed with her for a long time. John and his wife also used to visit her at Lavington and at Mr. Njugi's office after the deceased's death. John used to collect money from Mr. Njugi to pay school fees for the children.

Mary Njoki said she knew Gabriel since 1970. She used to meet him at home in Kiganjo where he was at school. He knew him all the time while she was living with the deceased.

Mary Njoki said she knew Mumbi and Wambui since 1969, having met them at the same time. She went with the deceased to visit them at Kiganjo.

The deceased introduced her to them. The deceased told her he considered Mumbi as his mother because she brought him up. They always visited them at Christmas. Sometimes they used to go together with Mr. Njugi and his wife.

The deceased used to go with her to visit her father's home at his farm every time he went to his home to meet her parents, brothers and sisters.

Her sister Margaret Waihihi and Nyambura, a step-sister of the plaintiffs stayed with them at their home in Lavington.

Mary Njoki said she had photographs to show that she attended the deceased's funeral who was buried at his farm at Kiganjo. Her parents, brothers and sisters also attended the funeral.

Mary Njoki said she did not undergo a marriage ceremony with the deceased although he told her he wished to formalize their marriage in the customary way. They did not solemnize any customary, religious or civil marriage. They wanted to do it but the deceased's father died. The deceased had told his father who told her father about it in March , 1974.

She based her claim upon long association and cohabitation with the deceased having lived with him continuously for six years from January, 1969 to January, 1975. He was living with her, not alone when he died.

Mary Njoki said she and the deceased used to write letters to each other when they were at school some of which she had. The deceased went to Uganda for secondary education. He was there for four years. They met only during the holidays but they used to write to each other.

The deceased left the Kenya School of Law in 1968. She was in Makerere until 1969 where she obtained a B Commerce degree. They had serious relationship in 1963. They used to have sexual intercourse. They were both Roman Catholics.

Mary Njoki said she wanted to formalize their marriage. They discussed it. He used to say he was getting ready. He wanted to formalize customarily in 1974. But the two families never met for any kind of ceremony owing to her brother's death. There was no *njurio*, nor *ruracio*. There was no settlement of dowry, and the clans never met for any kind of dowry. She used her maiden name throughout.

Three witnesses gave evidence on behalf of Mary Njoki. They were Wanjiku Njenga, Solomon Kahohi and Timan Ndere Njugi. Wanjiku Njenga said she had known Mary Njoki since 1967, and they were together at Makerere from 1969 to March, 1972 when they finished college and continued to be good friends; Mary Njoki lived with the deceased from 1972 in Pumwani Flat No B 22 Door 5 until August, 1972 when they moved over to Langata where they lived in a one-roomed guest house. She visited them many times.

They also visited her at Mangu many times where she was a teacher. In 1974 they moved to a house in Kingara Road in Lavington very close to where she lived. They also visited her. They lived together from 1972 until the deceased died.

Mary Njoki's father Solomon Kahohi said he came to know the deceased "very well" in 1969. The deceased used to come to his home with Njoki, Njugi and his wife. In 1969 Njoki introduced the deceased to him as her "husband because they were staying together at Pumwani in 1969. He used to visit them there.

The deceased told Solomon that he and Mary Njoki were living together, he would like to marry his daughter in the customary way, and not to worry about Mary Njoki as he would pay the dowry one day. As was the custom the deceased's father also came to discuss and told Solomon that they could know one another as his daughter was at his home, and to wait for him as he would come to see him. Solomon reminded the father about their discussion when he met him at a meeting at Kiganjo. The father died in 1974. Solomon said he visited the deceased's home with his people only during his father's funeral. When the deceased met with the accident he was living with Njoki in Nairobi. Solomon attended the deceased's funeral together with his wife and children.

Solomon pronounced that if his daughter and the deceased were staying together as they were, whether dowry was paid or not, they were regarded as husband and wife.

The third witness was Mr. Timan Ndere Njugi an advocate of the High Court of Kenya practicing at Nairobi. He said the deceased was a partner in his law firm up to the time of his death. He had known the deceased as a classmate in the Kenya School of Law since 1963. He also knew Mary Njoki with whom the deceased started associating in 1963. At that time she was at school. He knew that when she was at Makerere the deceased used to send her books and money. She used to work in Nairobi during vacation and live with the deceased as his wife. When she completed her college she actually went to stay with the deceased in Pumwani until 1972 when the three of them moved to Langata where he and deceased together bought a property there which had a guest house. The deceased and Mary Njoki lived in the guest house until they moved to Lavington where they bought another property together. The deceased and Mary Njoki stayed there until the deceased passed away.

There was no secret about the deceased and Mary staying together. Both families knew about their association. He, the deceased and Mary used to visit their respective homes now and then. The deceased's brothers and parents used to come and visit them both at Langata and Lavington. They all treated Mary as the deceased's wife, and they lived together as husband and wife during all that time. The deceased had told him to take care of Mary Njoki if anything happened to him.

Mr. Njugi continued that the deceased's funeral was arranged by him, John and Mary Njoki. The three of them featured very prominently in the ceremonies at the deceased's home. Mary Njoki's family were also present at the funeral. Mr. Njugi produced six photographs. Mary Njoki appears in four of them. The deceased's family members also appear in the photographs. Mary used to benefit from the deceased more than any other member of the family. She started living with him in Pumwani from March, 1972. They stayed together continuously until the deceased died. Mary was not just a girl friend of the deceased. She associated with him as his wife. They never had any children.

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide. *Watt v Thomas*, [1947] AC 484.

Sir Kenneth O'Connor, P said in *Peters v Sunday Post* (1958) EA 424 at p 429 that he took as a guide the opinions expressed in *Watt v Thomas*. It was held in *Peters* that if there is documentary and other evidence which either tends strongly to confirm the appellant's evidence or, alternatively, to show that the respondent's principal witnesses were unworthy of credit, the full significance of which the trial judge had apparently not appreciated, this was a case where the appellate court ought not to allow the conclusions reached by the trial judge to stand.

The concept of presumption of marriage is not new in Kenya. It was recognized and accepted by the

former Court of Appeal in *Hortensiah Wanjiku Yawe v Public Trustee* in Civil Appeal No 13 of 1976, and by this court in *Mbithi Mulu and Another v Mitwa Mutunga* in Civil Application No NAI 17 of 1983.

In *Yawe* Mustafa JA delivering the leading judgment of the court said that there is nothing in Kikuyu customary law opposed to the concept of presumption of marriage. Wambuzi P said (*ibid*) the presumption is nothing more than an assumption that the parties must be married irrespective of the nature of the marriage actually contracted. I would add also irrespective of marriage if one is not actually contracted.

It is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the “husband”, or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased “husband”.

It is a concept which is beneficial to the union of marriage, to the status of the parties and to the issue of their union. *Yawe (supra)*.

One reason for the learned judge’s decision was his evaluation of the credit worthiness of the evidence of the plaintiffs when measured against the evidence of Mary Njoki and her witnesses.

The learned judge said he was conscious of the fact that the plaintiffs could equally tell lies to keep Mary Njoki out of a share lawfully due to her; that the plaintiffs, especially the two mothers, had impressed him as simple and truthful witnesses; that the deceased had told Wambui that he would only marry after the children had been properly brought up; that it was also admitted by Mr. Njugi that the deceased was always conscious of his responsibility towards his family. The learned judge said he accepted the plaintiffs’ evidence that the deceased had many girl friends, including perhaps’ Mary Njoki, but he had no intention of marrying any of them.

With respect, the two mothers had no worthwhile evidence to tell. The deceased never told them that he was married to Mary Njoki. That was correct. He was not. What was in issue was not an actual marriage but a presumption of marriage arising from long cohabitation and repute between the deceased and Mary Njoki. Mr. Njugi was one of the two independent witnesses at the trial. The other was Wanjiku Njenga.

When the learned judge reached the evidence of Mr. Njugi he said:

“I must confess the evidence of Mr. Njugi, an advocate of this court and a part of Peter, not only in his law firm but also in ownership of property, has caused me good deal of anxiety. I have the highest regard for Mr. Njugi as an advocate whom I have known for a considerable length of time, but in this particular case, I am satisfied after reflection, that Mr. Njugi has been less than truthful.”

In view of the foregoing appraisal of Mr. Njugi, there was no calling, indeed it was totally inconsistent and unjustified, for the learned judge to say that Mr. Njugi appeared to be “bending backwards trying to get Mary Njoki some share in Peter’s estate,” that it seemed hardly likely that the deceased would send money and books to Mary Njoki when he himself was in Law School on a small pittance and a small allowance which he received while chambering. Well, why not! First there was no evidence before the judge about the deceased’s financial resources, and people in love perform amorous acts of all kinds, some of which appear incredible to others. Love operates from a myriad of levels. Mr. Njugi, also Wanjiku Njenga, had nothing to gain personally if Mary got a share in the deceased’s estate.

The learned judge was also not justified in rejecting Mr. Njugi’s evidence that the deceased asked him to look after Mary Njoki if anything happened to him; or, telling him only after the accident to take care of Mary Njoki and the other members of the family if anything should happen to him and later falling into a coma from which he never recovered.

Again, why not! What Mr. Njugi related is the normal kind of stuff of which human conversation is made up when one is living with a woman, and meets with an accident. Fortunately most human beings are not amoral. The deceased did not fall into a coma voluntarily.

The learned judge continued that Mr. Njugi produced a set of photographs showing that Mary Njoki attended the deceased's funeral but so did a lot of other people, and it was not positive evidence in support of their alleged relationship of husband and wife. The lot of other people who attended the funeral had nothing to do with the matter. It was evidence which corroborated Mary Njoki's evidence, in particular it established her connection with the deceased. It was the kind of documentary evidence accepted by the former Court of Appeal in *Peters v Sunday Post Limited (supra)*.

Mr. Njugi was the advocate for the estate of the deceased's father who pre-deceased him six months earlier. The learned judge said Mr. Njugi did not lodge a claim on behalf of Mary Njoki who would inherit as the deceased's wife because Mr. Njugi held that she was single.

The learned judge said he underlined the word single. Mr. Njugi offered a reasonable explanation. He said Mary Njoki did need maintenance like the family of 14 children and two wives of the deceased father. In any event it was an irrelevant factor as far as the issue of the presumption of marriage was concerned.

The learned judge said that the circumstances militated against.

“presumption of marriage on a balance of probabilities, even if a presumption of marriage arose from cohabitation between Peter and Mary, and that, in any event there was no real co-habitation between them.”

In my view the learned judge erred in holding that the circumstances militated against a presumption of marriage for the force of the evidence dictated otherwise, in particular the evidence of Mr. Njugi. That must be so as the judge accepted that “even if a presumption of marriage arose from cohabitation.” Having so found he was bound to give effect to it because it arose on the basis of long cohabitation and repute. It could not be nullified by saying that there was no “real – cohabitation.” The difference between “cohabitation” and “real cohabitation” is nought. A perfect example of verbal semantics leading to contradictory thinking.

In my view the evidence of Mr. Njugi and Wanjiku Njenga was unfairly rejected. As also the evidence of Mary Njoki's father for trivial reasons like discrepancies about dates which carried no significance. The father does not give the impression of concocting the statement of the deceased's father that the two of them could know each other as Mary Njoki was at the deceased father's home. It is just the kind of thing the father of a son who has taken home a girl would say to the father of the girl.

The learned judge said:

“The instant case, I think, is clearly distinguishable from Hortensia because, firstly, I have found it as a fact that there was no real cohabitation between Peter and Mary Njoki otherwise it would have come to the knowledge of at least John and Gabriel and, secondly, at no time did Peter evidence any intention of marrying Mary Njoki; and, thirdly, upon Mary Njoki's own evince they never underwent any form of marriage.”

The reasons which the learned judge gave for saying that *Yawe* was distinguishable were wrong. He had himself said there had been cohabitation, though not real cohabitation.

It was in the interest of John and Gabriel not to admit the association between Mary Njoki and the deceased. The second and third reasons given by the judge were not required to be proved for a presumption of marriage to arise. For a presumption of marriage to arise it was not necessary for the deceased to evince any form of marriage with the deceased. To repeat the words of Wambuzi P in *Yawe (supra)*, the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary. With respect the fallacy burdening the learned judge's reasoning

was that manifestation of an intention to marry, or an actual marriage ceremony were indispensable requisites for a presumption of marriage to arise. If an expressed intention to marry, or if there had been an actual marriage ceremony, these proceedings would have been taken entirely differently, even in the case of these two incidents themselves.

The learned judge also said that Mary Njoki invited the court to assume that she and the deceased were married because of their long cohabitation, and because the deceased had promised to marry her in the customary manner. With respect, the learned judge misdirected himself. Mary Njoki was not asking the court that a presumption arose because the deceased had promised to marry her in the customary manner. Such a promise was not required to make the presumption, nor was the performance of any customary ceremonies, or any meeting between the clans for any kind of ceremony required to take place. That is why the deceased's family members were not involved in any marriage negotiations.

Another reason for not making the presumption of marriage by the learned judge was that Mary Njoki and the deceased, both Roman Catholics, were spinster and bachelor respectively. The judge said if the deceased had really intended to marry her there was really no impediment preventing him from doing so. He could have married her at any time since 1968 when he started his legal practice. This was another irrelevant argument introduced into the judgment.

Another reason was that Mary Njoki did not like living in sin. What she said was that she realized they were living in sin but he (the deceased) wanted to formalize in the customary way, and she agreed. It is not an unknown way of life. It happens all over the world. This couple were not the only man and woman living together as husband and wife without being actually married. We are an advanced people. We do not want to become pedantic and futile by ignoring the realities of life. Another irrelevant approach. Mary Njoki was not on trial for her morals.

Another reason for not making the presumption of marriage was that Mary Njoki claimed to have lived with and had sexual intercourse with the deceased for six years but she admitted never having a child by the deceased, that there was no evidence that there was any physical impairment on the part of either of them to having children. The learned judge's conclusion was a *non-sequitur*. Evidence to that effect was not required to be adduced, nor did the absence of such evidence establish fertility to procreate. If they were both fertile they may have decided not have a child for any number of reasons. Although a child or children would be an important factor in giving rise to a presumption of marriage, it is not a must in order to give rise to it.

As far as the evidence of Mary Njoki herself was concerned she spoke in great detail about her early association and life with the deceased, about their three places of residence in Pumwani, Langata and Lavington where they lived together, about the two houses which the deceased bought in partnership, one of them from the National Housing Corporation, about the amount of accommodation therein, about the respondent's step-sister Nyambura who stayed with them at their home in Lavington, about the deceased's visits with her to her parents' home and he knew all her family, about her knowledge of all the deceased's family well because the deceased used to take her home every Saturday to meet them, about their visits at Christmas time, about the various members of the deceased's family, the grown ups and the children, about the time when she assisted at the church wedding of the first respondent John at St Teresa's Church where they got married, the name of John's wife and the two children born to them, about the photographs she took at the wedding, about the deceased's stepbrother also named Peter who stayed with her for a long time after the deceased's death, about the deceased's funeral which she and her family members attended.

The learned judge said that none of the details regarding the alleged contacts between Mary Njoki and the deceased's family were ever put to the respondents under cross-examination. The learned judge failed to appreciate that Mary Njoki's detailed evidence raised an indefectible probability that her evidence was true. It was corroborated by the evidence of the brother John the deceased visited him with Mary Njoki in Eastleigh, and John used to see him with her. John admitted knowing that Mary Njoki did not have a child. In the words of Wambuzi, P in *Yawe (supra)* Mary Njoki had shown long cohabitation and repute so as to give rise to a presumption in her favour that she was married to the deceased.

For these reasons I would set aside the decree of the High Court and substitute therefore a declaration that there was a presumption in favour of Mary Njoki that she was the deceased's wife and entitled to share in his estate. I would affirm her share of the estate at thirty per centum as fixed by the Public Trustee. It is a reasonable portion. I would also award Mary Njoki the costs of the suit in the High Court and this appeal.

As Kneller and Nyarangi JJA are of the contrary opinion the appeal is dismissed with costs.

Kneller JA. John Kinyanjui Muthuru and Gabriel Kaira Muthuru, the brothers of the Nairobi advocate, Peter Gachukia, and Mumbi Muthuru and Wambui Muthuru, the stepmothers of Peter, claimed they were entitled to inherit a portion of the estate of Peter who died on January 2, 1974 as a result of a car accident. He died intestate.

These all spring from Gatundu division in Kiambu District and the District officer, a Mr. Waithaka, told the Kiambu District Commissioner on December 6, 1976 the deceased's estate should be divided equally between the brothers.

They in turn, told the Public Trustee the stepmothers should have 12% and 8% of the estate respectively before the balance was divided equally between the brothers. The deceased had been the only support the stepmothers and their children had while he was alive.

Miss Mary Njoki had made her claim by February 1977 as the deceased's widow which the brothers and step-mothers resisted and the Public Trustee asked the District Commissioner to investigate this and tell him the result, and, if she were his widow, what if anything, the deceased's brothers should inherit under the Kikuyu customary laws of intestate succession.

The District Officer, the same one, I think, told the District Commissioner that the Chief of Kiganjo location had told him that the lady worked for the National Christian Council of Kenya and was never married to the deceased so she could not receive anything from his estate under their customary law but the stepmothers should have their agreed percentages and the rest should be divided between the brothers for they were the only close relatives of the deceased.

The Public Trustee passed this on to the Land Registrar in Kiambu to deal with the question of who should inherit the deceased's parcel of land Kiganjo Kiamworia T106 under the relevant provisions of the Registered Land Act. This was in early March 1977.

By early May the same year, the Public Trustee had decided, despite the information from the Kiambu District Commissioner and relatives of the deceased, she had been married to the deceased and that he would divide the estate thus:-

Mary Njoki widow	- 30%
John Muthuru, brother	- 25%
Gabriel Muthuru, brother	- 25%
Mumbi, Stepmother	- 12%
Wambui, Stepmother	- 8%

100%

and he gave the brothers five days from May 6, 1977 to apply to the High Court under Order XXXVI to determine who the heirs were if they were unhappy with this but to leave him out of it, for he was not prepared to be dragged into it. He cited the decision of the former Court of Appeal for East Africa in *Hortensia Wanjiku Yawe v The Public Trustees*, Civil Appeal 13 of August 6, 1976 (Wambuzi, P Mustafa V-P and Musoke, JA) as authority for what he proposed to do.

The brother and stepmothers were dissatisfied so they filed a summons in chambers in the High Court on July 4, 1977 as “surviving beneficiaries” of the deceased naming Mary and the Public Trustee as “the defendant” and they asked for orders that:

- 1) That Public Trustee, the intended administrator should apply for letter of administration to the estate “to the exclusion of Mary Njoki who is named as the deceased (sic) widow.”
- 2) Mary Njoki be declared no beneficiary of the deceased’s estate.
- 3) The cost of the application be provided for.

The brothers united to swear an affidavit and a supplementary one in support of that summons and from it more relevant facts emerged. The estate was likely to be worth Kshs 541,295.45. Mary was never married to the deceased under customary law or statute. They annexed the correspondence of the Public Trustee, District Commissioner and District Officer about this. There was no affidavit in reply.

The summons came before Mr. Justice Simpson (as he then was) with an advocate for the brothers and stepmothers, one for Miss Njoki and one for the Public Trustee. Mr. Muite for Mary submitted the application was misconceived and should be dismissed with costs because the issues were such that the litigation should be by suit. Mr. Kithyoma for the Public Trustee agreed and added that the Public Trustee should not have been made a party since leave of the court was not required for the Public Trustee to apply for letter alone or with anyone else. He also explained that there was a caveat lodged by the brothers and stepmothers that he should not be appointed. Mr. Kinuthia, for the relatives, stressed the absence of any replying affidavit. Finally, Mr. Muite explained this was because no directions had been obtained in this matter.

Mr. Justice Simpson in his ruling dismissed this preliminary objection and reserved its costs. The issue was simple and clear cut. Was Mary married to the deceased in accordance with Kikuyu custom? This was within the ambit of Order XXXVI rule 1.

Now after July 1, 1981, the administration of the deceased’s estate had to proceed in accordance with the Law of Succession Act (cap 160); section 2 (*ibid*). The law applicable to distribution on intestacy of agricultural land and livestock from that case was the law of the deceased’s community or tribe. His other property had to be divided according to the provisions of section 35 to 42 (*ibid*). So was it important to know whether Mary was his “widow” but neither “widow” nor “spouse” nor “wife” is defined in the Act, the Interpretation and General Provisions Act (cap 2), the Marriage Act (Cap 150), the African Christian Marriage and Divorce Act (cap 151), the Matrimonial Causes Act (cap 152), the Mohammedan Marriage and Divorce Registration Act (cap 155), the Mohammedan Marriage Divorce and Succession Act (cap 156), and the Hindu Marriage and Divorce Act (cap 157) etc.

The summons came before Mr. Justice Sachdeva on November 19 and 22, 1982 and he adjourned the summons into open court it seems, and recorded evidence from John, Gabriel, Mumbi and Wambui, the brothers and stepmothers, and then Mary, her friend Wanjiku Njenga, her father Solomon Kahimi, and the deceased’s law partner, Timan Njugi. He delivered judgment the next day. He gave it in favour of the relatives.

They swore during the trial they knew of no relationship between the deceased and Mary. John had been to Peter’s home at Lavington and found him with different girls and once Mary and another girl accompanied Peter and John’s house in Eastleigh.

Gabriel was a school boy whom Peter supported and he visited Peter’s place often but never met Mary with him. Peter told him he would not marry until all his step-brothers and step-sisters were adults. Mumbi heard him say the same and she spoke as one who brought him up from the age of 6, his own mother having died before Mumbi married his father. Every Saturday he returned to Kiganjo and he usually brought a girl friend but not Mary. Wambui lives there too and she met these girls but she had not set eyes on Mary until she saw her in court. None of these relatives had met Mary’s relatives who all live

in the same location.

Mary, her father, her friend Wanjiku and the deceased's partner and friend Mr. Njugi had a very different account of Peter's and Mary's relationship. They met at Kiganjo in 1959 when she was a primary school pupil and they kept in touch during their secondary and university education. Then from 1963 their friendship was replaced by their living together on and off until 1969 when they moved to a guest house. They lived there for five years as man and wife. She was well known to the relatives of the deceased whom she often visited with him.

But there had been no marriage ceremony of any sort and they had no children. The deceased had preferred to wait and marry according to their customary law though they were both Roman Catholics by baptism and could have married in *facie ecclesiae* and saved us all from this litigation.

Peter's father, according to Peter had approached Mary's father about this in March 1974 but he died before any progress had been made. His father said this had happened before March 1972. Mary and Wanjiku disagreed over the date they graduated from Makerere; said it was 1969 and Wanjiku maintained it was in 1972 and Mary's father agreed with Wanjiku it was 1972.

Timan Njugi, the deceased's partner and friend since their days together at the Law School and university when Peter was at the law school and a pupil spoke of Peter's help with Mary's fees at her school and university. Peter had told him to look after Mary and Mary's family should anything happen to him and he had done so letting Mary occupy the guest house rent free for 5 years and organizing a second hand car for her. He had photographs of Mary at Peter's funeral.

The learned judge pointed out that there was no impediment to Peter marrying Mary at any time between, say, 1969 and, 1974 in a church, registry office or according to their custom at Kiganjo.

No friend, not even Timan Njugi, had been sent to Mary's father to negotiate a marriage. There had been no children during their alleged cohabitation which made him doubt there had been any 'real' cohabitation. Her attendance at his funeral was not necessarily an indication that they had been married. Mr. Njugi did not include her as a claimant to any share in the estate of Peter's father who died in June 1974 because there were 2 widows and 14 children who survived the father and, in Mr. Njugi's words, Mary was single. There was no reference by her or to her in any correspondence as "Mrs Gichukia." On the other hand, when she worked at the Treasury from 1969 to 1975 she did not claim house allowance which she could have done.

The learned judge set out all this material. He realized the relatives would do better out of Peter's estate if Mary were excluded from any share in it and she would profit greatly to their loss if she were declared to be his widow and all this might taint the evidence of the relatives and Mary.

The step-mothers he found to be simple and truthful witnesses, especially Mumbi, the one who nurtured him from the age of six. All the evidence including that of Mr. Njugi, underlined the fact that Peter was determined to discharge his responsibilities to his younger brothers and sister before he married anyone.

He did not believe Mary, her father, Wanjiku or Timan Njugi on what they said and their demeanour which he thought was partisan. So he found that there was no 'real' cohabitation between Peter and Mary or else his brothers would have known of it, Peter never intended to marry her and there had been no attempt to by them to marry one another. So he held Mary was not Peter's wife and she was not entitled to any share in his estate.

Mary's evidence in the High Court included this statement this:-

"In view of my long association and cohabitation with the deceased, I ask the court to assume that I was married to the deceased and that I should be declared to be the deceased widow and entitled to share in his estate."

Long association and cohabitation: these were, I presume, what her advocate at the trial, Mr. Njugi, and her the Public Trustee thought were the bases of the decision in *Hortensia Wanjiku Yawe v The Public Trustee* (*ibid*) which has been faithfully applied by Mr. Justice Muli on January 29, 1979 in Nairobi Civil Suit 1460 of 1970. *Duncan Gachiani Ngare v Joseck, Susan Kaniana and Rose Nyakio* which was consolidated with Nairobi Civil Suit 2602 of 1977. *In the matter of the Estate of John 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 Jacinto Chesire v Reuben Kiplangat Chesire* and Porter J, on October 3, 1983 in Nairobi Miscellaneous Civil Cause 364 of 1981, *Kisito Charles Macharia v Rosemary Moraa, and Anna Munini and Another v Margaret Nzambi*, Mombasa High Court Civil Suit 751 of 1977 by Kneller, J, on February 1, 1985 and maybe other causes which have not been brought to my notice.

A reading of all the judgments in Yawe's appeal leads me to believe that it was held that:-

- 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, one the balance of probabilities;
- iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard; (of *Mwagiru v Mumbi* (1967) EA 639, 642 (K));
- iv) Long cohabitation as man and 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 (*Taplin, Watson v Tate*, (1937) 3 All ER 105) (Ch Div);
- vi) If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage (*Sastry Velaidar Aronegary v Sembecutty Vaigalie* (1880-1) AC 364 (PC); *Shepherd, George v Thyer*, (1904) 1 on 456. And see also *Re Taylor*, (1961) 1 All ER 557 (CA)

Whether or not the presumption arose and became more than that or whether it was rebutted was a question of fact for Mr. Justice Sachdeva.

The authorities did not, to my understanding of them, go so far as to say that cohabitation and repute constitute a marriage. They can be part of a mode of proving one in that they are substituted for some missing element or elements. One of the earliest put it this way. Cohabitation, with habit and repute, in the absence of countervailing proof to the contrary, establish a marriage on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract that relationship.

“The missing element was the consent to matrimony given at the beginning of the cohabitation because the parties went through a form of marriage in a church when the husband could not do so lawfully and so could not consent to the second one, since the time for appealing from his decree for divorce was not yet over. *Captain de Thoren v AG* (1876), 1 App case 686 (HL).

And later ones, some of which were cited in Yawe, stipulate there must be evidence of an intention to marry and some claim that one or other form of marriage was in fact undertaken but would not be proved satisfactorily.

Thus the claim was that it was a (Kikuyu) customary one in Yawe (and all those High Court actions in which it was applied) a Tamil customary one in *Sastry Velaidar Aronegary v Sembecutty Vaigailie* (1881), 6 App cas (PC), a church one in *Captain de Thoren* (*ibid*), a French registry office one in *In re Shepherd, George v Thyer*, (1904) 1 Ch 456, 463, either church or registry office one in Australia in *Re Taplin, Watson v Tate*, (1937) 3 All ER 105 (Ch Div) and probably a church one in *Re Taylor* (1961) 1 All ER 55 (though this is not clear).

The cohabitation and repute were over thirty years in the French registry office case and ten or nine in the others, save for the Tamil one which was eight.

The number of children the couple had had during their cohabitation in each of these cases was at least four though it was nine in the French registry office one and only one for in the Tamil one.

Now here, if Mary and Peter were cohabiting, it was for five years and they had had no children in these years.

The learned judge distinguished Mary's claim for *Yawes* by pointing out that Peter and Mary did not attempt to carry out any ceremony or ritual required for any marriage or by their customary law as Hortensia Wanjiku claimed she and Yawe had, anyway, there had been no long cohabitation between Peter and Mary so the presumption in favour of a marriage rather than concubinage did not arise.

Now my readings of the recorded evidence and the advocates' submissions in the trial do not lead me to differ from the trial judge's analysis of them, his assessment of the credibility of the parties and witnesses, his findings of fact and his application of the law cited to him.

Then Mary briefed a different advocate, Mr. Kirundi for her appeal. He submitted the learned judge erred in law and in fact in his assessment for credibility and finding of fact but I have indicated that, in my view, he did not do so.

Mr. Kirundi submitted next that the learned judge should have found Mary had proved on the balance of probabilities she was Peter's 'common law wife'. This phrase 'common law wife' was not to be found in the affidavits or anyone's testimony in the High Court. This is a novel point and so not covered by local authority.

A common law wife is one who is married by union which though informal was recognized as valid by the common law according to Strouds' Judicial Dictionary and Words and Phrases, 4th edition, 1974 page 3014. The authority for this is said to be *Blanchett v Hanzel*, (1943) 3 WWR 175 which is not available here. I cannot find it cited in any other book.

It was not an issue that was canvassed in the High Court. Consequently, there was no evidence, law or submission about it before the judge. Mr. Kirundi argued that, nevertheless, the judge should have found that there is what Mary had been to Peter, his common law wife. It was something that was known to the Wakikuyu. If Mr. Kirundi is saying a common law marriage is recognized by the customary law of the Wakikuyu it is neither notorious nor documented and by a majority of the former Court of Appeal for Eastern Africa (Newhold VP & Duffus JA Crabbe JA dissenting) in *Kimani v Gikanga & Another*, (1965) EA 735 it was held that it must be established for the court's guidance by the party intending to rely on it.

This Mary Njoki failed to do.

But Mr. Kirundi was really saying, I believe, was that it was part of the law of Kenya since "it was within the substance of the common law in England on August 12, 1897; section 3 The Judicature Act (cap 8).

And as long ago as the twelfth century a promise of present marriage (*sponsalia per verba ae praesenti*) was, by the common law of England, a recognised marriage and a promise of future marriage (*sponsalia per verba ae futuro*) became an effective one when sexual intercourse took place. Jowitt's Dictionary of English Law, 2nd edition, 1977, page 1150, though later English canon law and statute law completely excluded the notion of a common law marriage.

Assuming, however, it was part of the common law of England not only in the twelfth century and 1943 but also on August 12, 1897 there is nothing in the evidence before the learned judge on which he could also find that the circumstances of Kenya and its inhabitants permitted it to be applied here today and if the circumstances rendered it necessary to qualify it today (assuming he had found Peter and Mary had been married by an informal union).

When the learned judge answered the issue in the summons a marriage in Kenya could be contracted:

- (a) in civil form; or**
- (b) according to customary law ceremonies where the parties followed their customary law; or**
- (c) in Islamic form if the husband is a Muslim; or**
- (d) in Hindu form if the husband is a Hindu; or**
- (e) in a church in the form of any recognized religion; or**
- (f) in Christian form if the parties are Christians; or**
- (g) in civil form and one of the others.**

Those are, I apprehend, enough for all the peoples of this country.

For these reasons, with profound respect to the view of Madan JA, I have to disagree and so I would dismiss this appeal with costs.

Nyarangi JA. The facts relating to this appeal are set out in the judgment of Madan JA and in the judgment of Kneller JA, so I shall only recapitulate those facts in support of my reasoning.

Mr. Kirundi for the appellant argued grounds 2,3,5,6, and 7 together and submitted that the judge had erred by putting wrong emphasis on customary law which was not the issue, and thereby starting the case on a wrong footing. Mr. Kirundi conceded that there was no customary, statutory or ecclesiastical marriage between the appellant and Peter Gichukia, the deceased but that the appellant's unchallenged evidence of the long cohabitation, which evidence had graphic details which only a wife could provide, together with an offer by the deceased's "very old grandmother" to share her land with the appellant gives rise to presumption of marriage.

Mr. Kirundi criticized the judge for rejecting the evidence of Timan Ndere Njugi, DW 4, and the evidence of Wanjiku Njenga, a close friend of the appellant.

Mr. Njau, for the respondents, asked us to hold and accept that the judgment of the High Court contains valid and supportable reasons for the findings therein, that the evidence of Njugi DW 4; was properly rejected and that there was no mention of common law marriage in the High Court. On the crucial issue of cohabitation, Mr. Njau invited us to disbelieve that the appellant started living with the deceased in 1969, that on the evidence, the deceased wasn't committed and that a presumption of marriage should spring only from provable facts. The concept of presumption of marriage is with us, having been recognized and approved by this court's predecessor in *Hortensia Wanjiku Yawe v Public Trustee*; Civil Appeal No 13 of 1976.

This court did not although not expressly recognize and accept the concept of presumption of marriage in *Mbiti, Mulu and Another v Miwa Mutunga*, Civil Application No NAI 17 of 1983.

In *Yawe*, the deceased had declared to another that the appellant was his wife by general repute, there had been long cohabitation as man and wife, there was evidence of performance of marriage ceremonies and during the period of cohabitation the appellant bore the deceased man four children. In *Mbiti* (Civil Application No NAI 17 of 1983) the deceased woman had borne the respondent one child and there had been a marriage ceremony.

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

The presumption simply 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 that 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, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the *Yawe* and in *Mbiti (supra)*. 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.

It is common ground that there was no marriage between the appellant and the deceased. The fact that the appellant and the deceased together visited the deceased father's home or that she attended the funeral of the deceased's father is not material. The appellant was a friend of the deceased and she accompanied him to the funeral in that capacity. That is how friends treat one another. And on account of the cohabitation the appellant could not help meeting and knowing and even assisting the relatives of the deceased including the respondents. The appellant's own evidence proved that there had been no meeting between her family members and those of the deceased, and that there had been no marriage ceremony of any kind or form and that there was no meeting of mind between the father and the deceased and the appellant's father. This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married, that was the cogent evidence that an essential element required for a valid Kikuyu marriage had not been satisfied. The effect of all this is to rebut a presumption of marriage.

Mr. Kirundi introduced a new and novel aspect in his contention that the trial judge should have held that the appellant had proved as required of her that she was the deceased's "common law wife".

Mr. Kirundi said the Kikuyu recognize a 'common law wife' and referred the court to section 3 (c) of the Judicature Act (cap 8), thus implying that because the concept of the common law marriage was part of the common law in England by August 12, 1897, it now forms part of the law of Kenya.

However, as Kneller JA sates, there was no evidence that the Kikuyu know about and practice common law marriage and further that the conditions in Kenya and its various groups would accommodate a common law marriage.

All in all I would say that on the evidence before the trial judge, this suit is sharply distinguishable from *Yawe* and *Mbiti*.

I would on the evidence have reached the same conclusion as the judge did but, as I have endeavoured to demonstrate, by a different route.

I would dismiss the appeal with costs.

Dated and delivered at Nairobi this 25th day of February, 1985.

C.B MADAN

.....

JUDGE OF APPEAL

A.A KNELLER

.....

JUDGE OF APPEAL

J.O NYARANGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR