IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO.270 OF 2006

BETWEEN

ESTHER WANJIKU NJAU

LUCY NJOKI NJAU…….....……APPELLANTS

AND

MARY WAHITO.……RESPONDENT

(Appeal from the whole of the judgment and decree of the High Court of Kenya at Nairobi (Ojwang, J.), dated 29th September, 2006

in

H.C.C.C. No.303 of 2005)

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JUDGMENT OF THE COURT

The two appellants herein ***Esther Wanjiku Njau*** and ***Lucy Njoki Njau***, on 16th March, 2005 filed a suit in the High Court against the respondent pleading that the latter had taken out a newspaper advertisement to bury her son who had died in a road accident, claiming that the appellants were his step-mothers while the respondent was a co-wife by virtue of all three having been wives of the late ***Joseph Njau Kairu,*** hereinafter the deceased. It was further averred that without any colour of right, the respondent instructed grave diggers to move onto Plot ***No.Kiganjo/Kiganjo/395***, part of the estate of the deceased, to prepare a place to bury the respondent's son. The appellants pleaded that the respondent was never a wife to the deceased and had no beneficial right in his land which could enable her to bury her son on the suit plot.

Therefore the appellants prayed, *inter alia*, for

i. a declaration that the respondent was not entitled to bury her late son on Plot No.395 aforesaid or the other plot Kiganjo/Kiganjo/396; and

ii. a permanent injunction to issue against the respondent in regard to prayer (i) above.

Accompanying the plaint, the appellants filed an application seeking interim orders of injunction under the then ***OXXXIX rr 1, 2, 3, 9 of the Civil Procedure Rules***, in which the main prayer was that the respondent be restrained from burying her deceased son on either of the two plots aforesaid, or on/in any other property of the deceased. The appellants filed supporting affidavits which ***Ransley, J.*** considered on 16th March, 2005 and granted on temporary injunction.

The respondent filed a replying affidavit averring that she once married one ***Shadrack Ngariuki*** who died. She then met the deceased whom she married under customary law and the couple had two children - ***Ann Njeri*** and ***James Gitahiga Njau***, the subject of the burial dispute. The respondent added that the deceased, ***Joseph Njau Kairu***, was polygamous since the appellants were his wives. If we may leave out other disputes between the appellants and the respondent, we focus on the plea by the latter that she was anxious to have her late son buried on plot no.395, next to his father. In the meantime, the respondent's son's body lay in the mortuary.

Both learned counsel, ***Mr. Kimani*** for the appellants and ***Mr. Miller*** for the respondent, well aware that the burial dispute warranted quick disposition, agreed, proposed and the High Court (***Ojwang, J***., as he then was) granted leave to the effect that in the circumstances both sides adduce evidence because:

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

Mr. Miller for the respondent informed the Court that an application had been made before ***Osiemo, J***. under ***OXVIII r.2(1) of the Civil Procedure Rules*** that the affidavits filed constitute the evidence as such, but with an order of the court, the deponents could attend court for cross-examination. ***Ojwang, J*** acceded to that position and that is how the hearing proceeded with deponents taking the witness stand, being heard orally, the same followed with cross-examination.

Before court and from the outset, a burial dispute fell to be determined. The appellants outlined their case to the effect that they disputed the respondent's claim that she, too, was the widow of the deceased and therefore entitled to bury her late son on the deceased's plots no.395 and 396. She was never married to the deceased and her children did not belong to him.

The respondent on her part, set out to show that she was actually one of the widows of the deceased who adopted her children from the first marriage and also had children between them. All to the end that she and her children were entitled to share the estate of the late ***Joseph Njau Kairu***.

The appellants called four witnesses including themselves. The learned judge heard them through the lengthy examination-in-chief, cross-examination and re-examination. With equal patience, the judge heard the respondent with her four witnesses. Thereafter the learned judge gleaned from the pleadings and evidence the following issues:

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

Learned counsel were heard in their respective submissions and cited relevant cases including:

i. ***Veronicah Rwamba Mbogoh vs Margaret Rachel Muthoni & Another* Civil application No.311 of 2002**

ii. ***Hortensiah Wajiku Yahweh vs Public Trustee* C.A. 13 of 1976**

iii. ***Njoki vs Mutheru* [1985] KLR 874**

iv. ***Re Paplin-Watson vs Tate* [1973] 3 All ER, 105**

Counsel went over the evidence of the witnesses, addressed points of law, all of which the learned judge appreciated. While the appellants maintained that the respondent was never married to the deceased and therefore she and her children were not entitled to any part of his estate, including the burial place of the deceased ***James Githaiga Njau***, the latter asserted her claim that she was also the widow of the deceased ***Joseph Njau Kairu*** and so duly entitled to benefit.

In his determination of facts ***Ojwang, J*** started off with the issue of customary marriage. He said:

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

Ojwang, J. then added that from plenty of evidence (see PW1, PW2, PW3. DW1, DW2, DW3, DW4) he had found that the deceased in his lifetime had three wives (the appellants and the respondent) together with their children and members of the larger family all of which kept a close-knit family, each helping the other and that throughout the appellants and the respondent considered themselves co-wives. And other than providing for the other needs of the respondent's children, the deceased voluntarily educated them. After finding that there was no full customary marriage celebrated between the respondent and the deceased ***Joseph Njau Kairu***, the learned judge referring to the cases stated above, found on the principle of presumption of marriage and delivered himself in these words:

"I would hold that whether the defendant's marriage to *Joseph Njau Kairu* ***by Kikuyu customary law was complete or remained inchoate, or was simply a travesty of the applicable customary law, she had a*** *de facto* ***union with the deceased which must be pronounced to have been a valid marriage. As I have noted earlier on, such a marriage established by cohabitation and repute, which is evidence, has been proved in great abundance, in favour of the defendant. This is a common law principle which has been held applicable irrespective of the form of marriage which is recognized under law; and so it applies in every respect as regards polygamous marriages, as with monogamous ones."***

On the issue regarding beneficial interest in the deceased estate between the appellants, the respondent and their children, the High Court left that to be resolved in the ***Succession Cause* no.282 of 2005**, which we were told was still pending. The court, however, had:

> …
>
> ***"the limited task of determining whether*** *Joseph Njau's* ***landed estate must provide the respectable for the remains of*** *Mary*
>
> *Wahito's* ***and*** *Njau's* ***son,*** *James Githaiga Njau."*

After considering evidence that ***James Githaiga*** was born in 1978 in a *de facto* marriage between the deceased and the respondent since 1975, he was in law the son of the deceased. Further evidence had it that ***Joseph Njau Kairu*** assumed full responsibility of all the respondent's children as his own, all of which put together, led ***Ojwang' J***. to find the foregoing as appears in the judgment of the court:

"(1) It is hereby declared that *Mary Wahito* ***was indeed a wife of the late*** *Joseph Njau Kairu****;***

(2) I find that the deceased *James Githaiga Njau* ***was a son of the late*** *Joseph Njau Kairu****;***

(3) I find and hold that the defendant is entitled to bury the late *James Githaiga Njau* ***next to the grave of the late*** *Joseph Njau Kairu****;***

(4) I find and hold that the defendant is entitled to bury her late son *James Githaiga Njau* ***in the land of her late husband, namely LR No.Kiganjo/Kiganjo/395 and 396 at Ikuma Village, Kiganjo Location, Gatundu Division, Thika District.***

> ***(5) The local Officer Commanding Police Station (OCS) with authority over Ikuma village shall ensure security and peace, during the burial of the late*** *James Githaiga Njau* ***next to his late father's grave.***

(6) The temporary injunction issued earlier restraining the burial of *James Githaiga Njau* ***as now authorized, is hereby vacated;***

(7) The mortuary costs incurred in respect of the deceased *James Githaiga Njau* ***for the first four days following his death on 8th March, 2005 shall be borne by the estate of the late*** *Joseph Njau Kairu****; and all remaining mortuary costs to-date in respect of the said*** *James Githaiga Njau* ***shall be borne by the two plaintiffs herein;***

(8) Any such application as may be filed by any party in respect of the judgment and decree herein, shall be heard and disposed of before a judge in the Civil Division of the High Court;

(9) The costs of this suit and the consolidated application shall be borne by the plaintiffs and shall bear interest at court rate (sic) ***with effect from the date of filing suit."***

The appellants being dissatisfied with the foregoing High Court judgment, lodged this appeal containing twenty one grounds. Basically, and as it shall be seen from the submissions, the appellants faulted the learned judge's finding that the respondent was another wife of the deceased, ***Joseph Njau Kairu*** on the ground that the evidence adduced was full of discrepancies, doubtful or otherwise unreliable. The appellants impeached, in particular, the evidence of ***Peter Nyaga Kairu*** (DW1), ***Rose Wanjiru Kairu*** (DW2), ***Charles Muthigaki*** (DW3) and even the respondent herself (DW4). The other grounds pointed to discrepancies or doubt, for instance, whether an insurance proposal form referred to was filled and retained by DW2; the names of the respondent and whether she held a genuine identity card; whether the respondent allegedly married the deceased in 1972 or 1974. Further, the learned judge was faulted for finding that ***James Gitahiga Njau*** was the deceased's son and that by presumption of marriage, the respondent was the wife of the deceased. The naming of children as per Kikuyu customs was termed faulty and that the judge did not properly analyse a Kikuyu customary marriage; also that he ignored the appellants' submissions. And lastly, that the judge granted orders not pleaded and ordering the appellants to pay costs, was punitive.

Both sides filed written submissions. They did not wish to highlight them except for ***Mr. F. N. Kimani,*** learned counsel for the appellants, observing that the respondent's side had made reference to affidavits of three deponents – ***Rufus Kiratu Ngatia***, ***Charity Mumbi Mwaniki*** and ***Mary Wambui Kairu*** although these deponents did not testify orally in the High Court and their depositions were not subject of the submissions there, nor did they inform the learned judges' decision. ***Mr. Kimani's*** position was that that reference amounted to introducing new evidence on appeal to the detriment of the appellants and so he sought that we expunge those three affidavits from the record.

Mr. C. M. Ngugi, learned counsel for the respondent, while conceding that he had made such references, nonetheless, urged us to appreciate that both sides having agreed in the High Court that all the filed affidavits be considered as pleadings in the case, none could be excluded from reference. He, then, said that in essence the contents of those 3 affidavits added nothing new or different from the evidence of the

other witnesses who testified orally and thus he could not see the concern of the appellants since they were not even prejudiced in any way, and the affidavits formed part of the record. We will revert to this issue in due course. For now we move to consider the submissions herein, albeit, in a condensed manner.

Mr. Kimani set out the background of the case in the High Court and then moved directly to the evidence tendered by some witnesses and why his clients thought that the evidence was not credible or impartial or it was doubtful, unreliable, contradictory and altogether irrelevant, as the case was.

Beginning with the evidence of ***Peter Nyaga*** (DW1), the younger brother of the deceased ***Joseph Njau Kairu***, we were told that in 2005 he sued the appellants in ***HCCC 162/05*** claiming land from them. In the same week the respondent filed a summons to revoke the grant earlier issued to the appellants. Therefore, the learned judge ought to have approached the evidence of DW1 with caution in that that witness was biased against the appellants. The evidence of ***Samuel Wainaina*** (PW3), the elder brother of the deceased, as impartial and credible yet the court did not give it due weight. The evidence of ***Lucy Njoki*** (PW2, the 2nd appellant and first wife of the deceased.) was also considered credible.

The evidence of ***John Kinyumu*** (PW4) showed that the serial number details of the Identity Card produced in court by the respondent changing names from ***Mary Wahito Ngariuku*** to ***Mary Wahito Njau,*** related a person called ***Tom Simiyu Barasa*** of Transnzoia – not the respondent, a matter the High Court did not consider. ***Peter Nyaga*** (DW1), was considered evasive and contradictory in his evidence regarding when the deceased married the 2nd appellant. Yet the learned judge laid emphasis on and accepted DW1's evidence to find that the respondent was the wife of ***Joseph Njau Kairu,*** married in 1974.

Nobody witnessed the occasion when the deceased paid dowry for the respondent – of which ***Peter Nyaga*** (DW1), ***Rose Wanjiru*** (DW2) and ***Charles Muthigani*** (DW3) only heard. The evidence of these two, DW1 and DW2 was said to have been untruthful. The evidence by ***Charles Muthigani*** (DW3) was that ***Joseph Njau Kairu***, the deceased adopted all the respondent's children was also considered not true. It was claimed that the birth certificates contained changes in names and places of birth – a thing the learned judge did not address and that ***Joseph Githaiga***, whose place of burial was under review, obtained his birth certificate in 2000 long after ***Joseph Njau*** had died, an anomaly and again ***Ojwang, J.*** did not comment on it. That all remained in doubt as to whether the deceased, in fact, adopted those children.

Submission then centered on the five insurance policy documents, which the deceased took, naming the beneficiaries. In the fifth cover he listed the appellants and the respondent as beneficiaries, which the learned judge relied on and overlooked the rest. Further that when in 1984 the respondent applied for a loan from East African Building Society, it was under the name ***Mrs. Mary Wahito Ngariuku***. The loan from Kenya Industrial Estates in 1993, was guaranteed by ***Njau*** only as a friend, not as a husband.

The appellant's position was that the respondent, who ran her own businesses and other affairs, acquired her own properties, used separate addresses, lived in her own residence, did not become the deceased's wife at any time. When ***Joseph Njau Kairu*** died, the respondent was not mentioned in the obituary or the eulogy; she did not attend ***Joseph Njau's*** funeral at all. The many photographs exhibited in court, did not show the respondent and the deceased on their own. Although she appeared in others taken at social gatherings, that alone could not make the respondent a wife of the deceased.

> ***Mr. Kimani*** went on to submit that:
>
> ***"…when the matter came up for hearing for the first time parties agreed to produce all exhibits in the affidavits without calling their makers."***

Yet, during the respondents' case two letters were produced which the appellants objected to. The letters showed that ***James Githaiga Njau*** and ***John Maina*** attended Thika High School and Karatina Secondary School respectively, passing as the children of ***John Njau Kairu***. It was submitted that the learned judge overruled the objection. Nonetheless, he arrived at a finding that the deceased took on himself the burden of educating the respondent's children. That finding was in error.

There was a very long delay in the respondent laying her claim that she was ***Joseph Njau's wife***. He died in 1999 and it was only in 2005 when she described herself as such in her application to revoke the grant issued to ***Esther Wanjiru Njau*** (1st appellant), in ***H.C. Succession Cause No.282 of 2005***.

Lastly, only eighteen pages in the long judgment contained critical analysis of the case. The appellants' submissions were ignored while the respondents' contradictory evidence carried the day. It was an error to order payment of the costs from the time the suit was filed and not when judgment was delivered. Interest was also similarly ordered to be paid, a thing the appellants found punitive.

On behalf of the respondent, ***Mr. Ngugi*** summed up the pleadings as contained in the plaint, the application for injunction, the replying affidavit by the respondent and the affidavits of other deponents. He included the affidavits of ***Rufus Kiretai Ngatia***, ***Charity Mumbi Mwaniki*** and ***Mary Wambui Kairu***, which as we saw earlier, the appellants' side objected to on the basis that these three deponents did not orally testify in the High Court and therefore their depositions should not be adverted to at this appeal stage.

And as we said earlier, we may as well rule on this point right away because it was not a ground agreed on by both sides as the basis of determining this appeal. The only point on this appeal is: Was the respondent the wife of the late ***Njau*** or not?

Mr. Ngugi's position was that ***Ojwang', J***. duly considered and analysed the evidence by affidavits and orally, and arrived at the proper findings.

However, we accept that the three foregoing affidavits having been filed and admitted by the court at the beginning of the hearing, along with the rest whose deponents testified orally, they formed part of the record. They constitute written evidence made on oath. They could stand as valid evidence on their own and did not require cross-examination, if their makers were not called to orally testify, as the case was here. But after hearing the appellant's submissions on the testimonies of the deponents who also testified orally in court, we do not think the contents of these three affidavits subtract or add anything more to the evidence that led to the decision herein. So alluding to them as the respondent's side did here is neither here nor there. But because the learned judge did not advert to them in deciding the case before him as we were told, and even as he could have validly done so, we do not propose to incorporate the evidence in those three affidavits at this appeal stage for the simple reason that their contents did not feature in the decision being appealed against. We will rely on the evidence of the other deponents who were heard orally. No prejudice befalls any party here by the stand we take not to take that evidence in determining this appeal.

Mr. Ngugi's stressed that his client testified that she married the deceased under Kikuyu customary law in 1974 and they had a daughter ***Anne Njeri*** in 1975 and a son ***James Githaiga*** in 1978. And ***Peter Nyagah*** (DW1), together with ***Rose Wanjiru*** (DW2), the siblings of the deceased, acknowledged that marriage, referring to the respondent as a sister-in-law. She had two children with the deceased whom they took to the Gatundu home and were introduced to the parents. The respondent was presented as the second wife.

The respondent's mother died and the deceased attended the funeral. The deceased ***Githaiga*** used to visit the Gatundu home during school holidays and stay with the family of the deceased, ***Njau***.

We heard that ***Rose Wairimu Kairu*** (DW2), told the court that the respondent whom she knew since 1975 at her place of work in Nairobi, was married to ***Njau*** and she accompanied DW2 to the customary occasion of initiation into womanhood. The respondent was accepted at their homestead as the wife of the deceased; she even attended family functions and ceremonies. The late ***Njau*** used to introduce the respondent as a wife. The two had two children whom the deceased paid school fees for together with the other children the respondent came with. That ***Charles Muthigani*** (DW3), a close friend of the deceased, knew the respondent as his wife in 1985; he had two other wives. The respondent's side held the view that the learned judge properly set out the issues for determination and determined them.

On this appeal we were asked to determine whether there was a valid customary marriage or other,

between the deceased and the respondent, in essence that limits us to that issue to the exclusion of the other grounds set out in the memorandum. The respondent urged us to consider decided cases, the Law of Succession Act, and the Constitution, and that the marriage of ***Njau*** and the respondent was by presumption.

It was submitted that the case ***Phyllis Njoki Karanja & Others vs Rose Mueni Karanja & Another*** ***Civil Application No.313/2001*** enunciated that to establish presumption of marriage, there must be proof of long cohabitation, general repute as husband and wife, crystallizing in a recognizable marriage.

And for this kind of marriage, it is not imperative that customary rites of marriage be first performed. We were told that long cohabitation of the respondent with the deceased started in 1975 up to the 1990's. There was evidence to that effect and even the 1st appellant had admitted that the two were married. They cohabited in same premises and even had children including a son, the deceased ***Githaiga***.

The relationship between the two was one of husband and wife and not mere friends as evidenced by general repute. The evidence recorded pointed to this. Visits were arranged and exchanged involving the 3 wives, their children and other family members and the respondent was introduced and accepted as a wife. To that end, ***Joseph Njau Kairu's*** family was a polygamous family with the appellants and the respondent as his wives. It was not imperative that certain customary marriage rites be performed for a marriage to be presumed (as per the ***Phyllis Njoki Karanja*** case (supra). Indeed, part of the rites were performed in 1979 at the respondent's home at Karatina, but that did not affect the validity of presumption of marriage, once long cohabitation and repute had been established by the evidence tendered. For the purpose of this appeal we leave out the issue whether ***Njau*** adopted the children the respondent brought in the relationship. We focus more on the respondent's evidence which centred on ***Njau*** having married her, taken on all her children and paid their school fees. They bore the name ***Njau*** as per the birth certificates produced. They had two children between them – ***Anne Njeri*** and ***James Githaiga*** and so it was not in doubt that the deceased and the respondent were husband and wife. To us the adoption of the name ***Njau*** has a bearing on whether these two were married.

Photographs exhibited were taken at family and social functions, with the respondent featuring as co-wife of the appellants together with their children. We were told that the failure by the respondent to change her name was not fatal to her marital status and counsel quoted from the case ***Florence Wairimu Kanyora vs Njoroge Kinyanjui*** ***[2005] eKLR (Civil Suit No.11/02)***

in that:

> ***"…the change of name or failure to change a name cannot affect one's marital status. There is no law that requires a person to adopt the husband's name. Same way the change of name alone cannot confer one with status."***

We were told that that applied in the present case. Similarly, failure to attend ***Njau's*** funeral because there was bad blood between the respondent and ***Samuel Wainaina*** (PW3), who threatened the former not to appear at the funeral, we heard, did not matter. The children attended the burial. However, it was said that DW2 told the court that in 1997 the respondent had attended the funeral of ***Njau's*** father, at the time PW3 was in remand. That the insurance policies, clearly named the appellants and the respondent as wives to benefit. Any errors noted could best be seen merely as clerical, otherwise evidence was given that the late ***Joseph Njau Kairu*** took them out and named whoever he desired as beneficiaries.

The evidence of ***John Kinyumu*** (PW4), the Registrar of Persons then came into focus. Counsel submitted that PW4's evidence was so full of "*divergences*" as to be totally unreliable and inconclusive as regards the identity documents of the respondent. He did not have her record which probably existed in other records in the office. Thus, the trial court could not rely on such evidence. And if the National Registration Bureau issued identity cards to the respondent as well as to one ***Tom Simiyu Baraza,*** that could not be blamed on the respondent.

And whether the date of marriage was in 1972 or 1975 we were told that that could not matter at all, the

cumulative effect of all evidence having tended to the conclusion that in 1970's the respondent and ***Njau*** got married.

Finally the costs: ***Mr. Ngugi's*** position was that the trial court rightly dealt with it and this Court, similarly should order the appellants to bear the costs here together with interest.

In determining this appeal, we are cognizant and bound by the principle stated in ***Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] 123*** in that:

> ***"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."***

With that in mind, we now review the evidence as recorded and conclude whether it supports the findings of fact as arrived at by the trial judge or not.

In doing so we are alive to the fact at this stage we do not and cannot have the advantage of seeing and observing the demeanour of the witnesses as the trial court did. What we do is to go over the evidence as recorded.

As noted earlier, the hearing was based on the plaint filed by the appellants, their chamber summons for an injunction, the supporting and replying affidavits together with the affidavits of the respective deponents. These formed the pleadings and the court heard, in all, nine witnesses in oral testimonies beginning on 20th April, 2005.

Esther Wanjiku Njau (PW1, 1st appellant) began by telling the court that she was the late ***Njau's*** second wife. She married him in 1979 and they had seven children whose names she gave. Her co-appellant, ***Lucy Njuru Njau***, who was married in 1975 did not have any children, but did not object to the marriage of PW1 to the deceased. It was a Kikuyu customary law marriage.

The late ***Njau*** dealt in motor vehicle parts at Gikomba, Nairobi and he commuted daily from their Gatundu home. In 1983 PW1 met the respondent, who ran an adjacent spare parts shop. The deceased introduced the respondent as a friend called ***Mama Githaiga***. The two women became friends. Not only did PW1 visit the respondent at her place of work even in the absence of ***Njau,*** but they exchanged home visits at Gatundu (PW1) and Langata (respondent). The respondent became a friend of the whole family including ***Lucy Njoki Njau***, and over occasions like Christmas, they went visiting with their children. The deceased used to drive the Gatundu family to the respondent's residence at Langata. The witness knew and she named, the respondent's seven children, whom she claimed never bore names of ***Njau's*** mother or father according to Kikuyu customs. To PW1, the respondent was only a friend of ***Njau's*** and not a wife. That the respondent once married one ***Ngariuku*** of Nyeri whom she told PW1, died. PW1 denied that the respondent was the widow of the late ***Njau*** because she did not visit him when he was hospitalized or participate in his funeral when he died in 1999. When ***Njau*** was ailing, in 1996, PW1 took over the running of his spare parts business and her relationship with the respondent went down. Referring to ***Succession Cause No.282/05,*** PW1 told the court that the respondent stated in an application to revoke the grant there that she married the deceased in 1972 while in the on-going proceedings she spoke of 1974 as the year of marriage.

And that while she claimed that she had 6 children with the late ***Njau*** in the Succession Cause, she told the trial court that she had two children with the late ***Njau***, and five with the first husband. PW1 termed her claims, in the circumstances, as lies. PW1n continued that the respondent's two children she claimed she had with the late ***Njau***, ***James Githaiga*** and ***Anne Njeri***, did not bear ***Njau's*** parent's names – ***Kairu*** and ***Njambi***. When ***Njau*** died and an obituary appeared in a local newspaper, a cutting of which was produced, the respondent was not named as a widow. That exhibit was produced without objection as other documents produced in the proceedings. The court heard that the respondent did not appear in the funeral programme either, nor in the photograph taken before burial. The relevant photographs and others

were produced. PW1 produced a loan guarantee form dated 26th November, 1993 in which the late ***Njau*** appeared as guarantor to the respondent – just as a friend and not a husband. When ***Githaiga*** died, the respondent sent people to the home of PW1 to mark measurements on the ground and they began to dig near the grave of the late ***Njau***. On 11th March, 2005 in the ***Daily Nation*** publication, there appeared a death announcement of ***James Githaiga Njau***, as the son of the late ***Joseph Njau*** with the names of the appellants as all belonging to one family. The appellants were not consulted and that is how they rushed to court with the plaint and injunction application. The appellants approached the newspaper publisher to delete their names from the advertisement because they were not related to ***James Githaiga***. That was done and that is why they objected to the burial of the late ***Githaiga*** on late ***Njau's*** property. PW1 further testified that when the late ***Njau's*** parents died in 1997 and 2003 respectively, the respondent did not attend their funerals.

Reverting to the issue of the burial of ***James Githaiga***, PW1 testified that after the disputed newspaper obituary, the respondent and other people came to the appellants' home, desiring to be shown where to bury ***Githaiga***. They were directed to consult ***Samuel Wainaina*** (PW3), the brother of the late ***Njau*** first.

The agreed appointment did not materialize, but the respondent's party proceeded to place beacons on the ground to mark the grave spot.

In cross-examination, PW1 described how a full Kikuyu customary marriage was performed between her and the late ***Njau***. She was the second wife and she never heard that there was a third – the respondent. When ***Njau*** did not return home at Gatundu on some days, he would explain that he had been looking for motor vehicle parts from as far as Nakuru. He lived at home and did not rent a house in Nairobi. He could, however, be absent for three or four times a month from home. She did not know if ***Njau*** spent those days with the respondent but:

> ***"I sometimes suspected he had an affair with Wahito,…"***

In the 1990's, her investigations revealed that indeed, ***Njau*** had been spending many nights outside with the respondent. But when asked, the deceased could only say that he was merely friends with the respondent – not a wife, because of their similar type of business. Nonetheless, ***Njau*** insisted that the witness and the respondent visit each other. Despite the close relationship of ***Njau*** and the respondent, PW1 did not ask the latter about it. But when she with the co-wife (2nd appellant) who lived in the same house, asked ***Njau*** about it, he always told them that this was just a friendship with the respondent and that satisfied them.

As to visiting, only PW1 visited the respondent at Langata – not the 2nd appellant and when she did, she found the children, ***Njeri*** and ***Githaiga*** at home. PW1 denied in court that the late ***Njau*** was ***Githaiga's*** father. If he was, he could have been named after ***Njau's*** father or brothers. ***Githaiga*** and ***Njeri*** did not call ***Njau*** "*daddy*" but uncle. The witness could not tell if ***Njau*** assisted the respondent financially. Similarly she could not know if ***Njau*** went alone to pay the respondent's dowry but if it came to "*ruracio*" ceremony, the appellants could know.

Referring to an insurance policy taken out by the late ***Njau*** on 1st May, 1990, PW1 said that she, the co-appellant and the respondent were named there as wives. But the witness did not know of it. The 1st appellant told the court that if her brother-in-law ***Peter Nyaga Kairu*** ever came to testify that the respondent was ***Njau's*** wife, he could be lying. After all he had sued the appellants intending to take from them some land in Nairobi, which belonged to the late ***Njau*** – a thing he had been doing since 2001 – after ***Njau*** died. The 1st appellant also said that if ***Rufus Keretai Ngatia*** (whose affidavit we have excluded here) and ***Charles Muthigani,*** whom she used to meet at the respondent's house, came to tell the court that they witnessed a marriage ceremony between her and the deceased, they, too, could be lying. To PW1, the late ***Njau*** could not marry the respondent without her knowledge.

She then turned to the respondent's replying affidavit to which a charge document was annexed. The witness, though admitting that the late ***Njau*** signed it as a surety on 26th November, 1984, told the court

that she was not aware of this, or that the property in issue was the Langata plot. But she admitted that another annexed document signed by the deceased, named one ***Anne Njeri Njau*** as a daughter. She did not know of this document either, and she denied ***Njau's*** signature thereon. Then there was the KPE certificates of ***Rose Muthoni Njau*** and another for ***John Maina Njau***. This witness said that it was possible she could not know all things about the late ***Njau***. However, she said that whenever they visited each other photographs of all those present were taken. This led to production of photographs showing the respondent with the late ***Njau,*** another taken at JKIA showing, herself, the respondent, the second appellant, ***Mary Njeri*** and ***Peter Nyagah*** when ***Rose Muthoni*** was leaving for studies in the United States of America. But to her, all gathered at the airport only as friends.

A third photograph taken at ***Njau's*** funeral showed ***Rose Wanjiru Kairu***, the deceased's sister, standing near the coffin. PW1 however told the court that if ***Rose Wanjiru*** testified that the respondent and the deceased were married, she, too, could be lying. The other photograph taken at the respondent's house showed the late ***Njau***, ***James Githaiga***, ***John Maina*** and the respondent. There was yet another photograph with ***Lucy Njau***, the respondent and PW1 with several children which the witness said included those of the respondent and her own. Then more photographs were produced, some having the deceased and the respondent's son, ***John Maina***, one taken at the respondent's house with the deceased alone; yet another showing the respondent's family with the late ***Njau***.

Then turning to the affidavit of ***Samuel Wainaina***, the elder brother of the late ***Njau***, PW1 told the court that she did not know if he threatened the respondent in not attending the deceased's funeral. The respondent had nonetheless, been directed to ***Samuel Wainaina*** to seek authority if she could bury ***James Githaiga*** on the late ***Njau's*** land. When ***Njau*** fell sick and later lost sight, the respondent was nowhere to be seen either at home or at Aga Khan Hospital. So after his death, she with the co-wife (2nd appellant) applied for a grant to administer his estate to the exclusion of the respondent. She was not entitled and she was not known as ***Njau's*** wife. When ***Njau*** was ill it was she, PW1, who used to drive him around.

As to who paid school fees for ***John Maina Njau*** and ***Michael Wanjohi Njau***, said to be sons of the respondent, PW1 admitted that papers from Karatina Secondary School indicated that the late ***Njau*** paid the same but the appellant doubted it. Using ***Njau's*** name could be by arrangement and probably because he had "*kept*" the respondent. She was not married and accordingly shown to the family. Then the letter from Thika High School dated 15th May, 2005 signed by the Principal was tendered. It referred to ***James Githaiga Njau*** with ***Njau Kairu***, the deceased as the father. Again PW1 doubted that. Even as the deceased ***Githaiga's*** passport bore the names –

James Githaiga Njau, the witness maintained that without the name "***Kairu***", ***Githaiga*** was not the late ***Njau's*** son. The respondent's children were not presented to the appellants and introduced as the late ***Njau's*** children. They did not go to bury ***Njau*** as their father. Passports of ***Rose Muthoni Njau*** and ***Anne Njeri Njau*** were also exhibited, obtained as early as 1997 before ***Njau*** died, but still PW1 could hear none of it.

In re-examination PW1 repeated that she was married with full Kikuyu customary marriage rites observed and witnessed and all her children went by the name ***Njau***. The respondent did not tell PW1 that the late ***Njau*** was her husband and she was not so introduced to them. The same for her children.

Lucy Njoki Njau (PW2, 2nd appellant) testified next. She was married under Kikuyu customary Law in 1977 while the co-appellant, PW1, was similarly married in 1979, in the presence of PW2. The "*ruracio*" ceremonies were performed for both. PW2 did not have children and so she consented to ***Njau*** to marry PW1. The two wives lived and continue to live together. They know of no other wife. The late ***Njau*** did not have a home at Nairobi when he ran a business there. He usually came back home at Gatundu. PW2 then named PW1's children, traditionally after the parents of ***Njau*** and PW1.

PW2 met the respondent in 1983 when she visited ***Esther Wanjiku***,PW1, as a friend. Then when PW1's son ***James Muiruri***, was born, the respondent visited with other women and sometime in 1983, PW2 visited the respondent at her Langata house. Then other visits followed, though not regularly, but the visits were mostly over Easter and Christmas holidays. They were family visits and the late ***Njau*** used to

drive them about, all the time telling the appellants that the respondent was only a friend. PW2 came to know all the respondent's children whose names she gave to the court. But none of those names belonged to the late ***Njau's*** relatives. Much as PW2 knew the respondent, it was not as ***Njau's*** wife. Although in challenging the application for the grant of letters in respect of ***Njau's*** estate, the respondent claimed that she married him in 1972, that could not be so because PW2 was the deceased's first wife. The respondent never had children with ***Njau*** and so the respondent's children could not take his name. Even with the later statement in which the respondent said that she married ***Njau*** in 1974, that could not be and it was all lies. The respondent was older than ***Njau*** and so could not be his wife – only friends. She was never introduced by ***Njau*** as a wife and the witness never heard that ***Njau*** took *roracio* (also spelt as *ruracio*) to her home. If either ***Rose Wanjiru*** or ***Mary Wamboi*** (we excluded her affidavit from this appeal) said that the respondent was ***Njau's*** wife it would all be untruths. The court heard that when ***Njau's*** father died in 1997, the respondent did not attend his funeral. Similarly, when ***Njau*** himself died she did not attend the funeral nor did her children. She was not mentioned in the obituary advertised nor in the funeral programme – all without the respondent's or her children's objection. Even ***Njau's*** relatives, including ***Rose Wanjiru*** did not raise an objection. Only the appellants featured as widows, with the children of PW1. PW2 added, as PW1 said, that even funeral photographs did not feature the respondent or her children. Again as PW1 said, PW2 told the court that although she had met ***Rufus Keretai Ngatia*** and ***Charles Muthigani*** at the respondent's house, their claims that she was ***Njau's*** wife were lies. ***Samuel Wainaina Kairu***, the deceased's elder brother never disagreed with ***Njau***. She could not say what kind of disagreement existed between Samuel and the respondent. He or ***Rose Wanjiru*** did not demand anything from the late ***Njau*** and ***James Githaiga*** did not claim anything either or even say that he was the late ***Njau's*** son. He did not carry the ***Kairu*** name either. The respondent was only a friend of ***Njau's*** but not a wife. He never presented her to them.

Basically the evidence-in-chief of the 2nd appellant was the same as that of the co-appellant even in cross-examination and re-examination, except to repeat that the respondent was claiming to be ***Njau's*** wife a whole six years since his demise. Such a claim was not made during the funeral. And that ***Njau*** and the respondent were friends due to their businesses at Gikomba, Nairobi. Any suspicion by PW1 that ***Njau*** and the respondent were in a relationship was not believed by PW2 who preferred to hear from ***Njau*** himself – his answer was always in the negative. But they continued to exchange visits and ***Njau*** never drove them to any other home on such visits than to the respondent's. However if ***Njau*** was taking care of the respondent, he could also assist her in taking care of her domestic needs like buying clothes, paying school fees. Coming to buying a house for such a woman PW2 said:

> ***"A man cannot buy a house for a woman if they aren't married. A man can also be cheated to buy a house for a woman. A man with a family cannot buy a home for a woman outside – unless cheating has taken place."***

Lucy Njoki (PW2) maintained that ***Njau*** never adopted any child and she knew nothing about the insurance policy covers referred to above. But when shown one in which she, her co-appellant and the respondent were described as wives to benefit, she was surprised because ***Njau*** did not inform the two that the respondent was a co-wife. However, she did not know if ***Njau*** married the respondent. The examination moved to the charge to purchase a house by the respondent and as PW1 said, PW2 similarly knew nothing about ***Njau*** standing surety for her. If that was so, it all:

> ***"…shows he did some things in darkness with Mary Wahito without telling me."***

PW2 continued that she did not know the full names of the respondent's children – ***Maina*** and ***Wanjohi,*** who both used the name "***Njau***", for whom the late ***Njau*** used to pay fees. The witness could not tell why ***Njau*** used to help the respondent that way. He did not tell the appellants that she was a wife.

PW2 knew ***James Githaiga*** as the respondent's son but she did not know his father. She was surprised that he was using the ***Njau*** name. He was not their child. The respondent was not a co-wife but:

"If the court finds that *Wahito* ***was wife to*** *Njau****, I would not have a problem,"*** to bury ***Githaiga*** on ***Njau's*** land.

Then references were made to the children's school and birth certificates, passports and PW2 gave similar answers as PW1. This witness discounted the fees receipts and the insurance policy because, to her, they did not bear ***Njau's*** signatures.

As said earlier, answers at all stages of examination were similar to those of PW1.

Samuel Wainaina Kairu (PW3), the elder brother of the deceased ***Njau,*** told the court that he was a businessman in Nairobi and the appellants were his sisters-in-law, the widows of ***Njau***. He had good personal relations with ***Njau*** and the widows. PW3 and ***Njau*** opened Jasho Motor Spares at Gikomba, which he later left for ***Njau***. ***Njau*** married 2nd appellant in 1975 under Kikuyu customary law. ***Njau*** later married the 1st appellant, Esther in 1979 again under Kikuyu customary law, with all rites performed up to the "*Ngurario*" stage. The two brothers were very close. ***Njau*** took out several insurance policies with PW3 as a witness or beneficiary together with the appellants. Nobody else was mentioned.

PW3 first saw the respondent in 1974. He knew her very well from their adjacent spare parts businesses at Gikomba. Her names were Mary ***Wahito Ngariuku***. ***Ngariuku*** died and left a lucrative business for the respondent.

Njau came to Gikomba to join PW3 in 1975. The respondent was just a neighbour and a friend. She was not ***Njau's*** wife. ***Njau*** did not tell PW3 that.

They knew her home and she knew theirs. Friendly visits were exchanged. ***Njau*** was circumcised in 1972 and so he could not marry the respondent that year, with her five children. He could not have married her in 1975 either because that is when he married the 1st appellant. ***Njau*** did not tell PW3 that he had a child "*outside*" and if he did, that child could take the family name "***Kairu***". The respondent never married ***Njau*** and the two were never seen together. So any evidence from any family member that the two were married was not true. The sister and brother, ***Rose Wanjiru*** and ***Peter Nyaga*** had laid claims on ***Njau's*** land and to further that project, they called the respondent from USA to come and claim that she was ***Njau's*** wife. PW3 testified that when ***Njau*** died in 1999, the funeral programme and related activities did not include the respondent. No one complained of the exclusion. She did not attend the funeral either. PW3 and the respondent were on good terms and at some stage he attended her mother's funeral. There were no misunderstandings between them but the respondent never married ***Njau***. PW3, acting as trustee of his siblings in respect of their late father's properties, would divide them among them with the two appellants alone benefitting as ***Njau's*** widows. He was not there when dowry was sent to the respondent's home and no one else was involved. The respondent's husband, ***Ngariuku***, died. Therefore, if ***Njau*** married her, the Kikuyu custom demanded that he returns the dowry to ***Ngariuku's*** family. That never happened. ***Rose Wanjiru*** was too young in 1975 to claim that ***Njau*** and the respondent married. Although PW3 and ***Njau*** went to her house many times, the latter never told him that he adopted the respondent's children. They merely called ***Njau*** "*uncle*". PW3's family and the respondent used to exchange visits. Asked by the appellants whether ***James Githaiga*** could be buried on ***Njau's*** land, PW3 answered with a firm negative.

Githaiga was not their child (***Njau's***). Then like with PW1 and PW2 before, a lengthy cross-examination ensued. It ranged from the distribution of his late father's estate to all the heirs, to some point where PW3 was put in remand on account of a certain murder he did not know the victim, to being good to his siblings in whose trust he held the properties, left by his father and mother, the same to be distributed later when due grants of administration issue. PW3 made more reference to the insurance policies ***Njau*** took out including the one in which the appellants and the respondent were described as wives, to benefit.

However, he could not accept that there were three wives. PW3 doubted that ***Njau*** took out a policy or policies referring to 3 wives as beneficiaries. The witness knew the respondent before she gave birth to ***Githaiga*** whom he did not know very well. The name ***"Githaiga"*** did not exist in their family. Neither did ***Anne Njeri***. Asked about the respondent's Identity Card bearing the name ***Mary Wahito Njau***, PW3 called it false. He knew her as ***Mary Wahito Ngaruiku***.

Part of the forgoing incorporates the re-examination of PW3 after which he stepped out of the witness box

and in came ***John Kinyumu*** (PW4), Registrar of persons (Grade 1). Based at the National Registration of Persons Headquarters, PW4 presented a computer print-out from their records. In it featured identity card no. 4854215, holder ***Mary Wahito Ngariuku***. Then a photocopy of identity card no. 212872124. PW4 told the court that the two documents bore a common factor of identity card. The first identity card belonged to what the witness called a second generation – serial number 211307576 produced at Kariokor on 17th February, 1997 in the name of ***Mary Wahito Ngariuku***. The identity card was reportedly lost and the holder applied for a duplicate – serial number 218241582 at Kibera Centre. It was issued on 21st February, 2005. From this state of things, PW4 could not find and produce the record showing the identity card bearing the name ***Mary Wahito Njau***. The witness testified that the serial number 212672124 had been used to produce identity card no. 22148798 on 1st December, 1999 at Saboti for one ***Tom Simiyu Baraza***. To him, the photocopy identity card was not produced by PW4's office, a thing he was not quite sure of, unless the original identity card was shown to him. And even as PW4 appeared to doubt the origin of the photocopy of the identity card in the name of ***Mary Wahito Njau***, he observed that the signature on the respondent's replying affidavit before court and that on the computer print-out exhibited, looked similar.

In cross examination PW4 went over the process of producing identity cards and the two generations they have lived through and said that:

> ***"Attached photocopy of MARY WAHITO NJAU – requesting evidence and indications that forgery is suspected. I was not led in the direction of forgery."***

He added that the photographs (images) appearing differed because the cameras used were different. PW4 could only say that the signatures he referred to were <u>similar</u> but not <u>identical</u>, speaking as an administrator and not a professional handwriting expert. The witness then said:

> ***"Signature on identity card and signature on our computerized sheet – 1 saw*** (sic) ***are different. Underlining in one – but not the other."***

After noting other differing features PW4 told the court that:

> ***"It is allowed (Cap. 107) a person allowed*** (sic) ***to change name …. Change can be due to marriage or other reason. Supportive evidence brought – marriage or divorce."***

PW4 then said that a manual register of persons existed but he had only brought the computerized print-out. Referring to the respondent, whom PW4 learnt had been married twice, he said:

> ***"If she has made an application for change in registration her record will be in four places. I carried one location which incorporates all others."***

The witness added:

> ***"The computer picture is an extract; it is not complete, it cannot have all the information. Certain details need to be covered in the original records. They cannot be captured on computers."***

Perhaps it is prudent to note at this juncture that PW4's evidence appears to confuse because as he testified, if the respondent who married twice made an application for change of registration, her records could be found in 4 places which were captured in the location he was producing in court, the computer extract, how come at the same time the exhibit was not complete as the computer could not have all the information? Even as we are not asked to determine whether the copy of the identity card the respondent produced in court was a forgery or not, we are still, nonetheless, left grappling with the aspect as to whether PW4 produced a complete record regarding that identity card, when he told the court that certain details need to be covered in the original records since they cannot be captured on computers. Would one be tempted to opine that PW4's evidence was not conclusive? Very likely.

Back to the evidence of PW4, he acknowledged that an error was made in their entries with the name ***Ngariuku*** appearing as ***Ngariuki***. He did not attribute that to the respondent. The names in the copy of the identity card attached to the replying affidavit aside, *vis a vis* that in the computer print-out, there was another vital feature the PW4 could not conclusively comment on – the finger prints in both exhibits, since he was not a finger-print expert. But he maintained that serial numbers could only attach to one person and could not be duplicated as in the present case, between the respondent and ***Tom Simiyu Baraza***. The witness still maintained that:

> ***"So I say it was a forgery,"***

because the one the respondent used at Kibera could only attach to ***Tom Simiyu Baraza*** in the computerized process of identity cards production. In re-examination PW4 told the court that whatever the fate of the respondent's copy of the identity card:

> ***"If we had the original identity card we could use our Optical Character Reader to determine the genuineness."***

And,

> ***"If I had been asked I would go to the restricted premises to get further information. Like any application for alteration of name from*** *Ngariuki* ***to*** *Njau****. Also if I would have a fresh set finger prints of*** *Mary Wahito Njau****."***

To us, this witness appears to be saying that he did not have the requisite opportunity to employ all the equipment and material at the disposal of the National Bureau of Registrations of Persons to certainly and conclusively resolve the puzzle surrounding the respondent's identity. Anyway, as noted elsewhere, this point is not the basis of determining the appeal. That closed the appellant's evidence and now we move to the respondent's, which began with ***Peter Nyaga*** (also spelled as ***Nyagah***) ***Kairu*** (DW1), the younger brother of the deceased ***Njau***.

According to DW1, they were 2 sisters and 5 brothers, the deceased ***Njau*** being one of them. He had three wives – the 2 appellants and the respondent.

Njau married the 2nd appellant, Lucy, about the year 1973/74 while the 1st appellant, ***Esther***, was married about 1975. ***Samuel Wainaina*** (PW3), ran a spare parts shop at Gikomba with the late ***Njau***. The respondent operated a similar business nearby. In 1976, DW1 realized that ***Njau*** and the respondent were in a relationship. ***Njau*** would drive the respondent's car and they would go for tea together. The former would also send the witness to deliver things to the latter at a house at Umoja where ***Njau*** would spend some nights. He told

DW1 this. The two could then visit DW1's rural home together. ***Njau*** took the respondent (***Mama John***) to their Gatundu home and he introduced her to their mother and father, as the 2nd wife. ***Njau*** similarly introduced the respondent to their other elder brother ***Peter Muthaba***. Then in company of DW1, the late ***Njau*** and the respondent went to the house of the 2nd appellant. A goat was slaughtered and the 2nd appellant was very happy. Then:

> ***"From that day,*** *Wahito* ***was recognized as one of us. It was after*** *Githaiga* ***was born."***

There the late ***Njau*** told his wife, Lucy (2nd appellant), that ***Githaiga*** was his son. The respondent came with five children all of whom were introduced to ***Njau's*** family as his children. ***Njau*** had two children with the respondent – ***Githaiga*** and ***Njeri***. The 2nd appellant and the respondent exchanged visits – including overnight stays at Gatundu and Lang'ata. ***Njau*** would spend nights at Lang'ata. The 2nd appellant developed good relations with the children of the respondent and on many occasions during holidays, ***Githaiga*** would stay with the 2nd appellant at Gatundu. When ***Njau*** introduced the respondent at home ***Samuel Wainaina*** was not present but later he came to know that the two were husband and

wife. The respondent attended all family functions and she related well with ***Samuel Wainaina*** (PW3). On one occasion ***Samuel*** was a guest of honour at Lang'ata for the benefit of the sister-in-law's (respondent) child. They used informal names especially among the children who referred to "*baba*" (father) and mother as the case was. ***Samuel Wainaina*** treated the deceased ***Githaiga*** as ***Njau's*** son. The children of the ***Kairu*** brothers grew up together and attended schools together. Then the 1st appellant was married – a thing DW1 only heard of. ***Ngurario*** was performed for her in 2004 after ***Njau*** died. To DW1 who did not attend the ceremony, it did not accord with Kikuyu customs. ***Njau*** had 3 wives and DW1 knew this, he had also told DW1 that ***Githaiga*** was his son.

Referring to a photograph of his wedding in 1989, the appellants and the respondent had attended as ***Njau's*** wives. The witness had invited them. Therein also was ***Peter Muchaba***, PW3's wife, their sister ***Rose*** and other family members and neighbours. All recognized the respondent as ***Njau's*** wife. DW1 produced another photograph taken at Karatina during the funeral of the respondent's mother. He told the court that family members, their mother (***Njambi***), the appellants, PW3, his wife (***Teresia***), ***Rose Wanjiru*** (sister),

Muthaba (brother) and DW1 himself attended. All attended because the respondent was ***Njau's*** wife.

In another photograph, DW1 recognized ***Rose Muthoni Njau***, the child of ***Njau*** and the respondent; ***John Maina Njau***, the son of the two. DW1 told the court that the late ***Njau*** told him that he was paying school fees for all the children the respondent came with and the others. Accordingly, ***James Githaiga*** was ***Njau's*** son, without dispute.

In cross-examination, DW1 said that he ended school at about year 1976; he could remember all the events that took place at that time, even with some difficulty regarding specific dates. He initially lived in Nairobi, went back to the village at Gikuma and then returned in 1974 to Nairobi to begin learning a mechanic's course at the business of his brothers - PW3 and the deceased, ***Njau.*** The respondent operated her nearby business where DW1 used to fetch water to wash cars.

The witness testified that when ***Njau*** married the respondent about the year 1974, she had children of her own, some of them studying abroad at the time of the trial. He was not involved in the marriage arrangements/ceremonies of the two but others went and:

> ***"…several steps in the marriage of Wahito,"***

were accomplished. DW1 did not know if his mother, father and the sister (***Rose***) went to Karatina for the ceremony. But on ***Njau's*** instructions, DW1 together with a driver and turnboy, took some farm produce to the respondent's home in connection with the marriage ceremony. The three did not stay to witness the rest of the ceremony. But ***Njau*** and the respondent were there together with relatives from both sides. DW1 could remember a holiday visit ***Njau*** and the respondent made to Karatina, the latter's home.

There was also the trip to attend the funeral of the respondent's mother. The witness then stated:

> ***"I can say Mary was married. I used to stay with my brother; they did anything together. I can confirm that*** *Lucy, Mary, Esther* ***were all wives of*** *Joseph Njau Kairu****."***

After the 1st appellant married ***Njau***, the two appellants stayed and do stay together. The 1st appellant and ***Njau*** got six children duly named after the Kikuyu custom of the parents of the husband and wife. The witness testified that none of the respondent's children, who later acquired ***Njau's*** name, for instance, ***Githaiga*** becoming ***Githaiga Njau,*** took on the family name ***"Kairu."***

When ***Njau*** died in 1999, a eulogy was prepared. DW1 did not check it. The respondent did not attend the funeral but all their children did. The witness did not see her at his mother's funeral either. At this point DW1 emphasized that his own case – ***HCCC 162/05*** against the appellants involving land, was in no way connected with the respondent's application to revoke a grant issued to the appellants. He did not tell her

to so apply. But he had sworn an affidavit to the effect that the appellants had obtained a grant of letters of administration without informing him or others.

This witness did not attend the marriage ceremony of ***Njau*** and the respondent, but an animal was slaughtered on that occasion with other family members present. DW1 knew that the respondent was once married to ***Ngariuku*** but he could not know if ***Njau*** returned half of ***Ngariuku's*** dowry when he married her. However, slaughtering (an animal?) was done at ***Njau's*** home – built a distance from her parents, with both parents, siblings and relatives in attendance. After brief re-examination, DW1 left the witness stand.

Rose Wanjiru Kairu (DW2), the deceased ***Njau's*** younger sister, told the trial court that she met the respondent in 1975 at Gikomba. She had a spare parts shop opposite that of her brothers (***Wainaina*** and ***Njau***). There ***Njau*** introduced the two. In that year ***Njau*** told DW2 that the respondent was his wife:

> ***"From then on*** *Mary* ***was coming home regularly with her children even when*** *Joseph Njau* ***was not there."***

On one such a visit, the deceased ***Njau***, the respondent with the children, first went to the 2nd appellant's house. Then ***Njau*** led them to his parents' house and introduced them – all in the presence of DW2:

> ***"He told my mother that*** *Mary* ***was his wife."***

The respondent then later visited that home many times and DW2's mother welcomed her. Their father stayed in a separate home but they would go there.

The children in the group during the introduction visit were ***Rose Muthoni, John Maina, Michael Wanjohi, Jackline Wanjiru, Anne Njeri*** and ***James Githaiga***. When ***Njau*** particularly put forth ***Githaiga*** as his son, his parents were very happy because there could be no need for the 2nd appellant to adopt a child as she had indicated since she was childless. The parents had refused the intended adoption. On that visit, DW2 continued, ***Njau*** reported that also ***Anne Njeri*** was his child and he told the parents that:

> ***"He had adopted all the other children."***

From then on, the respondent attended all family functions, and activities including *harambees* as ***Njau's*** wife. Her children, too, were involved.

DW2 continued that:

> ***"Lucy saw Mary as a wife. How they visited each other; how they related to each other. They had no mutual difficulties at any time. Many times Lucy treated Mary as a co-wife. Many times she spoke of Mary as "Muiru" – meaning co-wife,"***

And the respondent also considered the 2nd appellant as a co-wife. The respondent's children used to visit and stay with the 2nd appellant for even up to a month. Then the late ***Njau*** and some elders and his two brothers, visited the respondent's home in Nyeri. It was the occasion for "*roracio*" (taking bride wealth). ***Njau's*** mother had been informed. Thereafter ***Njau*** married the 1st appellant (***Esther***) whom DW2 knew very well. She gave birth to a child ***(Njambi)*** who was then presented to the 1st appellant. ***Njau*** had 3 wives. DW2 then referred to the photograph taken at DW1's wedding, which DW1 had produced earlier. In it, DW2 stood near the respondent; she attended as ***Njau's*** wife. There were also other family members and neighbours. That was a family photograph. The witness moved to ***Njau's*** funeral and told the learned judge that she drafted the obituary on instructions of ***Samuel Wainaina*** (PW3). He directed that she should not mention the wives. But she mentioned only the appellants and other family members. Shown other funeral advertisements DW2 did identify therein ***James Githaiga Njau*** as the deceased ***Njau's*** son. When ***Githaiga*** died and the respondent filed an obituary to the effect that he could be buried at Gatundu on the late ***Njau's*** land, the appellants purchased other obituaries countering that. Maintaining

that ***Githaiga*** was born in 1978, long after ***Stephen Ngariuku***, the respondent's first husband died in 1973, DW2 was firm that ***Githaiga*** was ***Njau's*** son. Shown more photographs, the witness recognised family members in them as well as the respondent appearing as ***Njau's*** wife. In the burial programme for ***Njau***, only the 2 appellants featured and DW2 did not know why the respondent was excluded. She did not attend the burial. To her, ***Samuel Wainaina*** (PW3), their elder brother, directed all affairs relating to ***Njau's*** funeral. The respondent had told DW2 that PW3 directed her not to attend the funeral.

Evidence then shifted to the insurance policies taken out by the deceased ***Njau***. The one taken from British American Company in 1990 had the appellants and the respondent as wives to benefit. It was signed in the presence of DW2. She kept the document up to the hearing of the suit when she produced it. The witness acknowledged that the signatures on the documents produced, belonged to ***Njau***. She knew it well after witnessing it for more than ten years as he signed cheques and other documents.

The court heard that the respondent came with her children with ***Ngariuku*** in the marriage and ***Njau*** accepted them. He did all things that parents do for their children including paying school fees**.** When ***Njau*** took the children that the respondent came with, PW3 objected but their mother retorted:

> ***"…in Kikuyu if you have a cow you take the tether too."***

The respondent attended DW2 father's funeral in 1997 as ***Njau's*** wife. She did not attend DW2's mother's funeral because she was in the U.S.A.

According to DW2, PW3 and the deceased ***Njau*** were not good friends and she narrated four incidents to attest to that.

Rose Wanjiru (DW2) did not understand why PW3 and the appellants were against the respondent, when they had been friends before, even exchanging home visits and participating together in fund-raising and other activities. She was a co-wife of the appellants; she lived in a house at Langata which the late ***Njau*** paid for. ***James Githaiga*** was their son who deserved to be buried on ***Njau's*** property.

In cross-examination Rose repeated much of what she had stated in examination-in-chief but said so, with emphasis in some parts. On her initiation into womanhood, the respondent was DW2's counsellor (*Mutiiri*). She maintained that the respondent attended many family gatherings/functions like funerals, although she could have missed some.

As to the naming of the children and especially ***Anne Njeri,*** DW2 told the learned judge:

> ***"1979*** *Njeri* ***could have been 4 – 5 years old…It was not necessary to name*** *Njeri* ***after our mother. Father and mother name children as they want. In tradition,*** *Njeri* ***would have been*** *Njambi.* ***But this is between the two. In our family there is no*** *Githaiga.* ***He would have been*** *Kairu* ***in tradition. Custom in naming did not apply in usual manner but that was for*** *Njau* ***and*** *Wahito.***"**

Regarding the obituary and the eulogy in which only the 2 appellants appeared as wives, DW2 noted that but did not raise queries as to why the respondent was excluded. The witness appeared to be telling the trial judge that PW3 (***Samuel***) inclined to deny them benefit of their parents' assets and that caused friction. For her, she had her own plots to develop even as she lived in rented premises.

Touching on the respondent's marriage to ***Njau***, DW2 said:

> ***"Several visits were made in respect of*** *Wahito's* ***marriage.*** *Njau* ***was following his own methods of conducting the marriage activities. Not many people knew what was going on. He went with elders to*** *Wahito's* ***place many times."***

She added that ***Njau*** gave the respondent land which was in his name at Mutomo, Gatundu which she had vastly exploited. A short re-examination followed and the court proceeded to hear the next witness.

Charles Muthigani (DW3), told the court that he first met the respondent at her house at Akiba Estate Lang'ata and then later he came to know the deceased ***Njau*** at the very home in 1985 after Rose the daughter of ***Njau*** and the respondent, introduced him. DW3 did not attend the wedding of ***Njau*** and the respondent but he knew them well and long enough as a family.

Njau and the respondent told him that they were husband and wife and so they were married. They were very close; they arranged family functions to which they invited DW3 and, ***Njau*** spent nights at the Lang'ata house. The witness knew that ***Njau*** had other wives:

> ***"To me and my wife,*** *Njau* ***introduced those other wives."***

He introduced them at a family function and so DW3 knew that ***Njau*** had three wives – the appellants and the respondent. The witness referred to them by their names and in the order they were married – Lucy, the respondent and Esther. Present at that function were the children of the respondent, DW2 (Peter) with his wife, their children as well as the children of ***Esther*** (1st appellant). The 2nd appellant had no children, so ***Njau*** told the witness. The respondent had ***Njau's*** children including ***Githaiga*** who, was his biological son:

> ***"He took all of*** *Wahito's* ***children as his children. Biological or not wasn't important to him."***

To DW3, the respondent was ***Njau's*** wife. Shown Exh.D6 – a photograph of a family gathering, the witness recognised the 1st appellant therein happily serving meals to ***Njau*** and the respondent. It was at the latter's home and DW3 was present. In other two photograph, also present was PW3's wife and 2nd appellant ***(Lucy).*** DW3 who was invited to most of the ***Njau*** family functions said that:

> ***"I saw signs of a happy family."***

He met the ***Njau*** family at many other functions and was able to identify them in the many photographs that were produced in court. Not only were there ***Njau's*** siblings and their wives but also DW3's children. DW3 seemed to know well the names of ***Njau's*** children and he recounted them to the trial judge.

Some of the photographs which he himself took, included his own children. He was a close friend of ***Njau's*** and when he fell sick and lost his sight, DW3 would at times take him to hospital. He attended ***Njau's*** funeral and noticed that the respondent was not there. There must have been splits in the family, so DW3 thought. But her children attended – ***Githaiga***, ***John, Michael*** and others. When ***Githaiga*** died, DW3 chaired the funeral committee which the appellants declined to attend. Neither did ***Samuel Wainaina*** (PW3). The committee decided that ***Githaiga*** be buried at Ikuma, the late ***Njau's*** place, but the appellants objected by obtaining a court order to stop it. The body remained at the mortuary, even as the proceedings were going on.

DW3 testified that the respondent's children took on ***Njau's*** name and he went about procuring identity cards for them. When ***Rose Muthoni Njau*** was proceeding for studies in the USA, DW3 assisted in getting her documents processed. On her day of departure, ***Samuel*** (PW3), Peter (DW1), ***Njau's*** wives together with DW3 with his wife, saw ***Rose*** off. ***Njau*** had signed ***Rose's*** foreign currency forms as the father in the presence of DW3. The witness did help in other ways for instance by taking ***Githaiga*** to Thika High School after his father died. During ***Njau's*** life time the 3 wives were close and so the witness could not understand why all that changed when ***Githaiga*** died.

In cross-examination, DW3 said that he knew ***Njau*** and the respondent as husband and wife for more than 20 years having been a neighbour in Rubia Estate close to Akiba Estate where ***Njau*** and the respondent lived. He did not know how that Akiba house was acquired. But when he visited it, he met ***Njau***, the respondent and all their children. He told the witness that he married the respondent and adopted her children:

"We did not discuss how when he married *Wahito****… I did not ask how dowry was paid,"*** and the witness never visited her home.

In cross-examination DW3 told the court that ***Njau*** respected Kikuyu traditions. The witness:

> ***"…was not concerned about his manner of getting married…I do not know how he was naming his children. I know*** *Githaiga* ***was his biological son. That is what he told me. Other children of*** *Wahito, Njau* ***adopted them."***

And although ***Charles Muthigani*** (DW3) hailed from Karatina, as did the respondent, he was firm that the respondent did not tell him what to say in court. Besides the testimony that ***Njau*** signed foreign exchange forms for ***Rose*** when she was about to go to college in USA, he did the same for ***John Maina Njau*** when he was proceeding to the same college. ***Njau*** signed as a father and DW3 witnessed all that. There was no re-examination and the respondent (DW4) testified next.

Born in 1948, DW4 married ***Stephen Ngariuku*** in 1963 and they had 5 children whose names she gave. They lived at Makadara Nairobi. ***Ngariuku*** ran a motor vehicle body-building shop at Gikomba. When he died in 1974, the respondent took over the business. The late ***Njau*** used to visit her premises from their neigbouring shop. The two became friends in 1974 moved to live together at Umoja Estate where ***Njau*** bought the house; they lived there with her children. Then they moved to a house at Akiba Estate, Langata, and the late ***Njau*** bought the house in the respondent's name in 1984. Their friendship grew and in 1979 after several other visits they went to the respondent's home in Nyeri. ***Njau*** told her parents that he wanted the respondent for a wife. ***Njau,*** in company of some elders delivered some goats and money. The respondent called that occasion as *"Ku-racia."*. Her mother who was alive, agreed to ***Njau's*** proposal. A goat was slaughtered. No other rite was performed.

Njau had 3 wives, the appellants and the respondent; the two had two children together – ***Anne Njeri*** (born 1975) and ***James Githaiga*** (born 1978).

In 1979 the two took all the children to ***Njau's*** home at Gatundu and first entered the house of the 2nd appellant. Present were ***Njau's*** brothers, his mother and their wives together with some other relatives. And before all assembled ***Njau*** announced, regarding the respondent:

> ***"…this is my wife; when you ask where I am with her in Nairobi …my name was given as*** *Mama John* ***(i.e.*** *John Maina****.)"***

Njau added that he was marrying the respondent with all the children. His mother cooked a meal and welcomed them. The 2nd appellant acknowledged that the respondent was her co-wife *(Muiru)* and she too, cooked a meal for her. From there they proceeded to ***Njau's*** mother's house and ***Njau's*** father, then blind, was brought and again introductions were repeated. He, too, welcomed the respondent as ***Njau's*** wife.

In December, 1974 ***Njau's*** mother, 2nd appellant and others visited the respondent's house at Umoja. The 2nd appellant loved ***Githaiga,*** who on occasions, would go and stay with her at Gatundu. But after ***Njau*** died the 2nd appellant took the position that the respondent was a stranger. She went to America; she returned and ***Githaiga*** died but the 2nd appellant could not allow his burial on ***Njau's*** land.

The respondent met ***Esther Wanjiku Njau*** (1st appellant) at Gatundu in 1980 when the latter had a child. ***Njau*** had told the respondent that he had a new wife. There she met her co-wives (the appellants) and other relatives. All ate together celebrating Esther's child called ***Njambi***. ***Njau*** repeated that the three were co-wives, the respondent always delivered foodstuffs to them. The respondent gave the names of the seven children of the 1st appellant with ***Njau***.

They referred to her as *"auntie."* They could go visiting with the respondent at Langata and stay for 2 days. All their children were good friends. When she went to the USA in 1991, the 1st appellant went to Lang'ata to stay with her 2 children on instructions of ***Njau***. On many occasions the respondent with her children visited ***Njau's*** Gatundu home and all would stay together in the big house. So she could not say why her relationship with the appellants deteriorated after ***Njau*** died. And particularly after ***Githaiga*** died

the respondent approached the appellants but they did not want to talk. They referred her to ***Samuel Wainaina*** (PW3). ***James Githaiga*** was their son with ***Njau***, named after the respondent's brother. The name ***Njau*** was given to ***Githaiga*** by the deceased himself.

Apparently when the respondent and ***Njau*** started their relationship at Gikomba in 1974, PW3 was not happy because the former had children. ***Njau*** knew of the bad relationship between the two. However, they would attend functions together with other family members, the respondent as ***Njau's*** wife.

When the appellants referred the respondent to PW3 to talk to him after ***Githaiga's*** death, the latter declined to meet her. The order to bar the burial of ***Githaiga*** on ***Njau's*** land was obtained. ***Githaiga's*** newspaper advertisement referred to him as ***James Githaiga Njau*** but the appellants paid for another advertisement reading ***James Githaiga Ngariuku***. The same was done with all the names of the children of the respondent. The advertisement of ***Njau's*** death did not include the respondent as a wife. Only the appellants featured with the 1st appellant's ***(Esther)*** children. The same was repeated in ***Njau's*** funeral programme.

The respondent referred to all the photographs and documents produced by the witnesses repeating more or less what they had told the court, identifying those in the photograph and the documents including the insurance policies and all. In particular the respondent repeated that the late ***Njau*** guaranteed her loan with East African Building Society – in 1984 with which the Akiba Estate house was bought. The respondent similarly repeated the evidence by way of school letters and certificates showing that her children carried ***Njau's*** name and he paid fees for them. Some of the school letters were objected to by the appellant's side but the learned judge admitted them on account of the parties' consent to produce their respective bundles of documents. Further references were made to the documents of the children who had gone to study in the USA, with the name ***Njau***. After lengthy evidence-in-chief the respondent prayed that ***Githaiga*** be buried at Gatundu where his father was buried.
In cross-examination, the respondent like the other witnesses before her, went over her evidence, but with emphasis here and there. As for her marriage to ***Njau***, the respondent repeated:

> ***"I was married in 1974 …it was a Kikuyu Customary Marriage. Njau paid dowry (goats and money) in 1979."***

She was present and ***Muthaba***, ***Njau's*** cousin handed over the bridewealth to her brother and cousins in presence of neighbours and other relatives. The two then lived together:

"…so all people who knew us knew we were married" Ngariuku's dowry was returned in 1979 by her mother with some elders, (Sh.600/=) to ***Ngariuku's*** mother. The respondent was so told by her mother.

After answering questions about her children, their dates of birth and the certificates issued, the respondent said that although her children with ***Njau*** took on ***Njau's*** name, they did not carry any other name from the family tree. She was cultivating ***Njau's*** land at Mutomo, Gatundu. When ***Njau*** fells sick, he lived with the two appellants at Gatundu and the respondent who used to visits him at times could take him to hospital and then home at Lang'ata.

When he died he was taken to Gatundu and the following day the respondent went there; she talked to the appellants but thereafter they stopped talking to her. Her name and those of her children were omitted from the eulogy. She did not attend the burial but the children did. In 2005, she filed a summons to challenge the grant issued to the appellants. However, all in all, the respondent maintained that she and ***Njau*** were married; he adopted all the children she came with and added two of his own. They all bore his name.

After a short re-examination the last witness ***Justus Gathiba Gaita*** (DW5) was heard.

DW5, an employee of British American Insurance, took the witness box in connection with one of the insurance policy covers alluded to earlier. The witness knew the deceased ***Njau*** personally; he was his client. DW5 knew the appellants as ***Njau's*** wives and in 1980 he was introduced to the respondent as his

other wife. This was at the business premises at Gikomba. On some occasions she paid premiums for the earlier policy where she did not feature, on behalf of ***Njau***. Then ***Njau*** took out the subject policy in 1990 (Exh.D5) with the names of the appellants, and the respondent as wives to benefit.

Documents were processed by DW5 and then duly signed. The policy failed when ***Njau*** did not remit premiums.

This witness was cross-examined, re-examined and that closed the hearing. The parties filed written submissions and the learned judge proceeded to pen the judgment, subject of this appeal, whose extracts we have reproduced earlier. The hearing which had commenced on 20th April, 2005 ended on 31st July, 2005, covering 341 typed pages. The judgment covered 188 pages and from all that we have endeavoured to craft this judgment.

At the outset, we should state that the burial of ***James Githaiga*** took place a day after the judgment was delivered, on the late ***Njau's*** land. Then despite the grounds stated in the memorandum of appeal and the submissions for or against, ranging over those grounds or more, at the hearing of this appeal, counsel were agreed that the issue for us to determine is:

> ***"Whether the respondent was a wife."***

Counsel then added that the rest of the issues on the distribution of the estate could be decided in the Succession Cause pending in the High Court. In that cause the same issue of whether the respondent was the late ***Njau's*** wife appears but the parties opted to have it decided on this appeal. Accordingly, from the long submissions covering aspects including the affidavits to be included/excluded, whether the late ***Njau*** adopted the children of the respondent, her identity card and all, will not be the focus in our determination.

In addressing that single issue it is not in doubt that the marriage under review here was not a statutory one. The evidence which the High Court appreciated and we have reviewed is whether there was a Kikuyu customary marriage, or one by presumption or there was none. The learned judge did not find that a Kikuyu customary marriage was celebrated between ***Njau*** and the respondent. He found that theirs was one of presumption, based on cohabitation and repute.

Beginning with the celebration of a valid Kikuyu customary marriage, we learn that many steps and rites are performed involving the families of the intending couples and themselves. We have many cases of this Court and those below on this subject. On our part, we put focus on the case of ***Mwagiru vs Mumbi [1967] EA 639 (HCCC 268/1966)***. In that case the plaintiff, ***Mwagiru***, sought a declaration in the High Court that there was a valid and subsisting Kikuyu customary marriage between him and the defendant (***Mumbi***). Both being Kikuyus, the defendant alleged that no such marriage existed or had been celebrated. ***Miller J,*** as he then was, took the evidence from both sides tending to some celebration or function in connection with the marriage in the homes of both parties. The plaintiff claimed that on the way to marry the defendant, he began by taking what is called "*Njurio"* – a Kikuyu token - to the father of the defendant in the form of beer. That ceremony is said to be performed in the presence of the relatives from both sides together with the intending bride and groom. There the bride gives permission that the rest of the rites be performed towards celebration of a valid Kikuyu customary marriage. The plaintiff further told the court that he paid dowry *"ruracio"* in terms of goats and money. Before that he had delivered honey, beer and a ram to be eaten and all these fell in the chain of requisite ceremonies. The learned judge then said:

> ***"In particular, the plaintiff was supported in his allegation that the respondent was present and in fact gave consent to the two most important items in the chain of rites of Kikuyu Customary Marriage i.e. <u>the first and the fourth stages</u>. The first may conveniently be called – the declaration of mutual interest with a view to setting up marital relationship, the accent being on the signifying of consent on the part of the woman and approval by the parents; and the forth the slaughter of the sacrificial ram after which it appears from the evidence, the parties are deemed to be married…"***

(underlining supplied.)

In essence, ***Mwagiru's*** case acknowledges a series of rites and ceremonies to be performed leading to a valid Kikuyu customary marriage and lays stress to the first and fourth stages. In the result, ***Miller, J.*** considering that the evidence given by either side did not point to complete performance of rites and ceremonies leading to a valid Kikuyu customary marriage, decided that the plaintiff had not proved his case and the suit was dismissed.

In the present case, there has been scanty evidence on the full performance of due rites and ceremonies to show that ***Njau*** and the respondent contracted a Kikuyu customary marriage. Without evidence from any person who was present when ***Njau*** visited the respondent's home, and what ceremonies were performed, we, like the learned judge above, have come to the conclusion that the claims of a customary marriage appearing in the respondent's evidence are not sufficiently supported to point to a celebration of a valid Kikuyu customary marriage. ***Njau*** may have visited her home bearing gifts of whatever nature and even those assembled drank beer or ate slaughtered goats, by whatever terms, these functions were described, but in the end, there was no evidence by any of the witnesses that the functions or ceremonies constituted landmarks towards celebrating a Kikuyu customary marriage. But no doubt those activities could point to part celebration, if we consider the terms attributed to some as "*ruracio*" and all that. Therefore from the evidence on record, our answer to the question whether there was a valid customary law marriage between ***Njau*** and the respondent, is in the negative.

As stated earlier, the other aspect of marriage that falls to be considered is whether by presumption, ***Njau*** and the respondent were indeed husband and wife. We gave due attention to the evidence from the respondent's side - (DW1, DW2, DW3 herself, DW4 and DW5) relatives, neighbours and the insurance agent to the effect that ***Njau*** and the respondent knew each other from 1974 or thereabout. They lived in the same house at Umoja. The respondent told the court that ***Njau*** bought it. Thereafter they moved to the house at Akiba Estate, bought by a mortgage guaranteed by ***Njau***. To the respondent, ***Njau*** in fact bought that house. ***Njau*** had earlier married the 2nd appellant then, to whom she was introduced as a co-wife *(Muiru)*. She was similarly introduced to ***Njau's*** parents and later to the 1st appellant when she was married.

We have recapped evidence above of many exchanged visits and functions attended by the respondent, the appellants, their children and other relatives. Also there is evidence we have accepted from the photographs tendered, all manner of documents – loan certificates, letters and more, that put two together Njau and the respondent as husband and wife. It was a long association until ***Njau*** died in 1999 which pointed to the two having conducted themselves and were considered by relatives, friends, neighbours and others as husband and wife. The appellants at every stage of their testimonies claimed that if any family member or witness (***Peter Nyaga*** DW1, ***Rose Wanjiru*** DW2 or ***Charles Muthigani*** DW3) came to court to say that they knew or were told by ***Njau*** himself that the respondent was his wife, they could be lying.

However, there was no evidence or demonstration that those witnesses lied to the court. ***Peter Nyaga*** (DW2) told the court that his case in the High Court against the appellants, did not have anything to do with the respondent's application to revoke the grant of succession issued to the appellants. That stand was not shaken in cross-examination. ***Charles Muthigani*** (DW3), a neighbour at Akiba, who knew ***Njau*** and the respondent as husband and wife said that they used to invite him to their functions, that he had not been couched by the latter in the way to testify.

It was not proved to us that ***Njeri*** and ***Githaiga*** were not born during the subsistence of ***Njau*** and the respondent. It is no matter that the two did not bear the ***Kairu*** family name. According to DW2, that was the business of ***Njau*** and his wife. Having the two children, and we also accepted that ***Njau*** took on the other children the respondent came with and gave them his name as well as minding them, is further evidence in the holding that these two were husband and wife. To us long cohabitation was claimed and established by evidence. The length of cohabitation may vary from case to case according to the evidence but to us, cohabitation since 1974 or thereabout was sufficient.

Repute in a marriage of this kind is important. What do those in the social and family circles think of the two? Their conduct must point to nothing but a relationship of husband and wife – not mere friendship. And here there was that evidence and even the appellants themselves admitted knowing the respondent, with her children, exchanging visits and taking part in family functions. In this connection we have taken time to read the relevant cases of ***Hortensiah Wanjiku Yaweh*** (supra) and ***Njoki vs Mutheru***, (supra). We defer with deep respect to the learned judgments therein. For instance in

Hortensiah Wanjiku Yaweh case it was said, *inter alia*, that:

> ***"Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such presumption (as per Mustafa, JA)."***

We had no evidence to rebut the overwhelming cogent and strong evidence that ***Njau*** and the respondent had long cohabitation during which they conducted themselves and others took them as husband and wife. We, as the learned judge found, presume that indeed ***Njau*** and the respondent were man and wife. Presumption of marriage is a common law principle not displaced by customary marriage or even by statute. It is beneficial to the institution of marriage and if we may add, society as a whole.

> And as ***Nyarangi, JA*** said in the ***Njoki*** case;
>
> ***"The presumption does not depend on the law of systems of marriages.***
>
> ***The presumption is an assumption based on very long affiliation and repute that the parties are husband and wife."***

The learned judge went on to give examples of what may demonstrate long cohabitation by stating that a couple having a child or children together is good enough. And here we have accepted evidence that ***Njau*** and the respondent had ***Njeri*** and ***Githaiga*** during their cohabitation. Then we have the unrebutted evidence that ***Njau*** bought the houses or guaranteed the loan for the Umoja and Akiba houses where the two lived. In sum, the relationship between the two crystallized into a marriage which did not require attempts or going through a form of marriage known to law i.e. customary or statutory.

And so we hold. By presumption of marriage ***Njau*** and the respondent were husband and wife.

Moving to the question of the costs, the appellants submitted that the learned judge ought not have ordered that the same be paid with interest running from the date the suit was filed and not when judgment was delivered. The order was thus punitive. The respondent countered that ***Ojwang, J.*** (as he then was) properly directed on this subject and so his orders should not be disturbed.

We appreciate that not much was said in the submissions as to why the order of costs was punitive. The judge's discretion under ***section 27 of the Civil Procedure Act*** is clearly stated – to order them and even to direct who should pay the costs. Although we appreciate that such a discretion like any other should be exercised judicially, otherwise we intervene, it has not been demonstrated here that the learned judge improperly exercised his discretion in this matter. Therefore, we will not interfere with his order on costs.

In the result, we uphold the High Court decision together with the order on costs. Consequently, the appeal herein is dismissed. The appellants are hereby ordered to pay costs to the respondent.

Dated and delivered at Nairobi this 3rd day of July, 2015.

J. W. MWERA

…….....

JUDGE OF APPEAL

F. SICHALE

…….....

JUDGE OF APPEAL

J. MOHAMMED

…….....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR