

**ANALYSIS OF SUCCESSION OF PROPERTY IN KENYA IN THE CASE OF
COHABITEES.**

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DECLARATION

I, Wafula Taria Trixy, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Professor Santiago Legarre

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ABSTRACT

Bromley's Family law book¹ defines cohabitation as couples living together outside marriage. With the increase of cohabitation unions which are not recognized by the law, more marital problems seem to emerge. Succession laws in Kenya do not clearly provide the procedure of how cohabitating couples can inherit their property. Since this property cannot be termed as matrimonial property, the rights accrued to married people are different from the rights that are availed to cohabiting couples. The problem that this paper is addressing is that when one of the partners in a cohabiting union dies, the law does not clearly stipulate how the surviving partner will inherit the property that was acquired in that union.

¹ Lowe N and Gillian D, *Bromley's Family Law*, 11th Edition, Oxford University Press, Oxford, 2007, P6

LIST OF CASES

Benjawa Jembe v Priscilla Nyondo, 4 EALR [1992], 160

Burns v Burns [1984] Ch 317, 1 All ER, 244

Hortensia Wanjiku V Public Trustee [1976]

I v I [1971] EA 2786

In the Matter of the Estate of Isaac Gidraph Njuguna Mukururo (Deceased) [2013] eKLR

In the Matter of the Estate of Charles Muigai Ndung'u (deceased) of Karinde Kiambu [2002] eKLR

Irene Njeri Macharia v Margaret Wairimu Njomo and another [1994] eKLR

Kamore v Kimore [2000] eKLR

Marvin v Marvin [1976] Supreme Court of California

Milena Bora v Liana Tamburelli [2016] eKLR

Mary Njoki V. John Kinyanjui Muthuru & Others [1984]

Muigai vs. Muigai, [1998] EA 207

Re Kibiego [1977] E.A 129

LIST OF INSTRUMENTS

Kenya

Constitution of Kenya (2010)

East African Order-in-Council Act (Act No. 1 of 1950)

Marriage Act (Act No. 4 of 2014)

Matrimonial Property Act (Act No. 49 of 2013)

Married Women Property Act (1882)

Native Christian Marriage Ordinance Act (Act No. 51 of 1931)

Laws of Succession Act (Act No. 26 of 2015)

The Judicature Act (Act No. 11 of 2017)

Argentina

Código Civil y Comercial de la República Argentina (2015)

Australia

De Facto Relationships Act (No. 51 of 1996)

Family Act Australia (Act No. 116 of 2007)

Scotland

Family Law Scotland Act (2006)

Europe

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, Vol. 1249, 13

CHAPTER ONE

1.1 Background of the problem

Cohabitation in the colonial times was not recognized as a union and at that time the repealed Marriage Act of 1902 did not define what cohabitation was. With absence of the law that recognizes cohabitation, Kenyan Courts were led to rely on the English Common Law principle of presumption of marriage, where there has been cohabitation for a long period of time. Section 3(1) of the Judicature Act identifies common law as a source of law in Kenya.² The precedent that the courts have relied on, is the case of *Hortensia Wanjiku Yawe vs Public Trustee*,³ where it was held that parties seeking to rely on presumption of marriage must prove that there was prolonged cohabitation and that they were regarded as a couple by the public.

In the case of *Milena Bora v Liana Tamburelli*,⁴ The court used the case of *Hortensia Wanjiku* as precedence, to find that the quantitative and qualitative length of cohabitation between the applicant and the deceased was to be regarded as a presumption of marriage. Kenyan marriage law then progressed to define what cohabitating is in the Marriage Act of 2014⁵. It is an arrangement in which unmarried people live together in a long-term relationship that resembles a marriage. However, section 6 of the Marriage Act⁶ does not classify it as a type of marriage to be considered. The law only recognizes five systems of marriages listed in the Marriage Act and they include Civil, Christian, Hindu, Islamic and Customary marriage.

The nature of cohabitation relationships is the same as that of a marriage. There is a pool of combined economic resources, division of labour and responsibilities and sexual exclusivity between the partners. In certain circumstances, the cohabitation union can be in the form of a polygamous relationship, therefore the question of sexual exclusivity is between the three partners. The legal status for polygamous cohabitation unions is still the same, in that they are not recognized as a form of marriage. There is voluntary consent from the partners to cohabit and if

² Sec 3(1), *Judicature Act* (Act No. 11 of 2017)

³ [1976] eKLR

⁴ [2016] eKLR

⁵ Sec 2, *Marriage Act* (Act No. 4 of 2014)

⁶ Sec 6, *Marriage Act* (Act No. 4 of 2014)

one of the spouses is deserted they can refer the matter to a conciliatory body.⁷The problem arises when one of the partners dies and the surviving couple wants to transfer or inherit the property that they had acquired together during the union.

In certain circumstances, the deceased's family kick out the surviving spouse because of lack of *locus standi* in the succession matters. The surviving partner cannot be viewed as a spouse because the solution for inheritance matters with regard to cohabiting unions is not clear. In the case of *Mary Njoki V. John Kinyanjui Muthuru & Others*.⁸ The applicant sought a share of the deceased estate but this move was opposed by the deceased's brothers who argued that she was not a wife. The court held that the presumption of marriage could not be upheld here. The judges stressed the need for quantitative and qualitative cohabitation in that it should be long and having substance. They gave examples such as having children together, buying property together which would move a relationship from the realm of concubinage to marriage.

Moreover, in *Burns v Burns*,⁹ a UK chancery court case, Mrs. Burns who had changed her name, had two children with Mr. Burns and contributed in practical and financial terms to the household for 19 years. The couple had not been married but had only cohabited. At the breakdown of the marriage, she tried to bring a claim under the law of trusts since cohabitation was not recognized at that time. She claimed that she was a trustee of the property that had been acquired during the union. She received nothing, whereas had she been a wife, she would have received half or more of the value of the property or at least the rights to live in the property until the children were independent.

⁷ Sec 84, *Marriage Act* (Act No. 4 of 2014)

⁸ [1984]

⁹ [1984] Ch 317, [1984] 1 All ER 244)

1.2 Problem Statement

The status quo at the moment with regard to succession of the property is whether the property can be termed as matrimonial property or the property will be under trust. Under the Matrimonial Property Act¹⁰, matrimonial property means either the matrimonial home, household goods or effects in the matrimonial home, any movable or immovable property jointly owned and acquired during the marriage, trust property, including property held in trust under customary law, does not form part of matrimonial property.

The problem that this research is trying to address is that, when one of the partners in a cohabiting union dies, the law does not clearly stipulate how the surviving partner will inherit the property that was acquired in that union.

1.3 Objectives of the Study

The study focuses on highlighting the inheritance procedures that are stipulated by Kenyan Law and in addition to that it does this through delving into the history of marriage laws, succession laws and matrimonial property laws. In addition to that it also discusses options that the couples choose so as to protect their interests. The report also illustrates a comparative study between Kenyan law on cohabitation and that two other countries with regards to succession of property acquired in a cohabitation union. In conclusion, the report suggests appropriate strategies that can be implemented to make sure that cohabitantes inherit property acquired during the union.

1.4 Research Questions

The questions that this study addresses are:

1. Whether the principles succession of property acquired in the cohabiting union is to be the same as that of marriage?
2. Whether cohabitation is recognized as a form of marriage?

¹⁰ Sec 2, *Matrimonial Property Act*, (Act No. 49 of 2013)

3. Who can inherit or transfer property acquired during the cohabiting union?
4. The other alternative procedures to succession of property in Kenya with regards to cohabitation.

1.5 Hypothesis

The following are the hypothesis that are related to the research:

- 1 Although cohabitation unions are on the rise, they are still not recognized.
- 2 There is no succession law that has been enacted for the purpose of cohabitation unions.
- 3 Many cohabitees have a problem when it comes to inheritance and transfer of property acquired during the union.
- 4 The property that is being transferred was acquired jointly during the cohabitation.

1.6 Research Methodology

The research done is be mostly qualitative in that it involves describing in detail the research problem using the desktop research. It also includes review of publications, articles, academic journals, books and other internet sources that touch on cohabitation and succession. Moreover, for the comprehensive comparative analysis, the knowledge and research used by the author is from her experience gained from working as a legal intern in Argentina.

1.7 Limitations

The research analysis is mostly centered on desktop research and not quantitative research such as interviews therefore limiting all the information gathered to studies and articles that are a conducted period of time, therefore being a snapshot dependent on the conditions that occurred during the research period.

1.8 Chapter Breakdown

Chapter one consists of the background, statement of the problem and objectives of the study. The main point of focus is discuss the status quo at the moment regarding the problem while explaining the objectives, and aims of the dissertation. It also indicates the problem the research is trying to solve and how it is analyzed. *Chapter two* then delves into the theoretical framework that the research is based and highlight the literature reviews that form part of findings of the desktop research. *Chapter three* is an introduction to the history of the laws related to the report such as succession laws, marriage laws and matrimonial property laws. *Chapter four* discusses the findings uncovered from the research and also sheds light on the inheritance procedure in Kenya. *Chapter five* is an extensive comparative study of the how the law of other countries treats cohabitation unions during succession and transfer of property. This is in comparison to our Kenyan law. *Chapter six* consists of the conclusion and recommendations. It is a summary of the dissertation, what it intended to achieve and the end result.

CHAPTER TWO

2.1 Theoretical Framework

The theory being used in this research paper gives a philosophical justification as to why couples in a cohabitation union should be allowed to inherit property in the event one of them dies.

Labour theory

John Locke on the Second Treatise on Government, stated that an individual has property rights to his/her property provided he had applied his own labour to that property.¹¹ He begins with a natural state with unlimited resources but without any governance or any currency.¹² His view was that man owned his body and thus his labour. Once this labour has been mixed with nature which is not owned by anyone it primarily becomes his property and he needs no one's consent on how to use it. He continued to state that if a person does not own any property but goes ahead to alter it in some improvement then he is entitled to derive benefits from it.¹³ Because the labour applied has improved the value of the property.

His example was:

He that is nourished by the Acorns he pickt up under an Oak, or the Apples he gathered from the Trees in the Wood, has certainly appropriated them to himself. No Body can deny but the nourishment is his. I ask then, when did they begin to be his? When he digested? Or when he eat? Or when he boiled? Or when he brought them home? Or when he pickt them up?¹⁴

In addition to this John Lock gave an example of picking an apple, he stated that the labour exerted in picking that apple is what makes it his property. Each person owns his or her own body, and all the labor that they perform with the body. When an individual adds their own labor, their own property, to a foreign object or good, that object becomes their own because they have added their

¹¹ John Locke and the Labour Theory of Value, Journal of libertarian Studies Vol 2 No.4, Pergamonn press, 1978

¹² Karl Wilderquist, Lockean Theories of Property: Justifications for Unilateral Appropriation, Georgetown University – Qatar, 2010

¹³ <https://www.libertarianism.org/columns/john-locke-justification-private-property> 31 August 2017

¹⁴ Locke John, *Locke's Two Theories of Civil Government*, Peter Laslett ed., 2nd ed. Cambridge, Cambridge University Press, 1967, Chapter V, P19

labor. However this right to property is limited by the law of subsistence, this states that one does not have the right to take more than they can use.

This theory when applied to the research supports the view that if a couple that is in a cohabitation unions acquire property together and both contribute to improving and maintaining the said property, then they are both entitled to its ownership. The property in question is one that has been acquired during their de facto union.

2.2 Literature Review

In the book **Family Law in Kenya**¹⁵ a section is dedicated to presumption of marriage which is also another name for cohabitation. The author is of the view that presumption of marriage covers these two aspects which are longevity and habit. Any marital rights can be accorded to cohabitants if they prove this two aspects. For these two aspects, the author settles on the fact the parties alleging a presumption of marriage should show the duration of the unions and the reputation coupled to it. This is if the public views the couple as married. He quotes the case of *WM V Muirigi*¹⁶, where the court stated that the burden of proof is on the couples to prove that they are married and that during that union, the couple was acting like a married couple.

In the article, **Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom**¹⁷ the author argues that the lack of family law reforms in Kenya or rather the lack of a legal framework regarding cohabitation in family law, stems from the traditional conceptualization of customary law. This conceptualization does not give any regard to the emerging trends in marriages. She discusses how many couples in cohabiting unions take part in practices such as marriage by affidavit so as to acquire the same benefits as married couples. What stands out from this article is that when cohabiting unions are not recognized; the couples have to

¹⁵ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, Law Africa Publishing, Kenya, 2016, 105-109

¹⁶ [2008] eKLR

¹⁷ Kamau W, 'Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom' *International Journal of law, policy and the family*, Oxford Journals, 2009.

go to greater lengths such as signing an affidavit so as to be able to transfer their property through intestate succession.¹⁸

Cohabitation on the Edge: Living Together Apart¹⁹ is a working paper that views cohabitation in three ways. As a precursor to marriage, an alternative to marriage and an alternative to being single.

*In the Matter of the Estate of Isaac Gidraph Njuguna Mukururo.*²⁰ The applicant who was the deceased's wife claimed that her name had not been included in the will of the deceased yet she had been cohabiting with the deceased. She wanted to inherit through intestacy. She also stated that aside from cohabiting, she was in fact a wife married under customary law. The courts in considering whether this cohabitation was in the realm of customary marriage, relied on the case of *Muigai v Muigai*.²¹ It was decided that the applicant's presumption of marriage was valid under kikuyu customary law. Since the applicant was now regarded as a wife she was entitled to inherit the property of the deceased. The courts upheld their judgement by referring to the case of *Irene Njeri Macharia v Margaret Wairimu Njomo and another*,²² if the applicant is found by the court to be a customary law wife, it follows that Section 3(5) of the Law of Succession Act²³ applies and she would be entitled to a share in the estate. This case provides for the instance where a cohabitee is denied succession and has to prove that the union was a form of marriage. In this case the applicant proved that she was a wife under customary law.

A report made by the **Ugandan Law Reform Commission**,²⁴ on reforms to the law of succession argues that since cohabitees are not provided for in the succession act they should make wills that are in favor of each other. In the event that one of the spouses in the union dies, they can inherit

¹⁸ Section 34, *Law of Succession Act*, (Act No. 26 of 2015)

¹⁹ Barnet C and Cherlin A, 'Cohabitation on The Edge: Living Together Apart', John Hopkins University, Working Paper 08-03, 2008, - http://web.jhu.edu/threecitystudy/Workshops/WP08_03CohabitingontheEdge.pdf on 3 September 2017

²⁰ [2010] eKLR

²¹ [1998] EA 207

²² [1994] eKLR

²³ Section 3(5), *Law of Succession Act* (Act No. 26 of 2015)

²⁴ Ugandan Law Reform Commission, *Study Report on The Review of Laws of Succession in Uganda*, July 2013, 4

the acquired property. In Ugandan law, there is no assumption that the surviving cohabitant should inherit any of their estate, no matter their contribution to the estate or how long they may have lived together.

In Scotland, the family law provides for a legal framework of cohabitants, in the **Family Law Scotland Act of 2006**.²⁵ Cohabitation is provided from section 26 to 29. The salient feature that is relevant to this study is section 29 that deals with succession of property after the death of one of the cohabitants. It states that the surviving spouse will be able to inherit all of the property that was acquired during the union if there was no will left behind. If a will was left behind by a deceased, then the property will be transferred in accordance to it.

In a working paper written by the **Queensland Law Reform Commission in 1992**²⁶, it states that disputes occur when discussing matters concerning property that was accumulated by the couples during their union. They set out two matters that the court should be concerned with when determining interest of the parties in a cohabitation union. These include financial and non-financial contributions of each party and homemaking and parental contributions made by each party. The commission when deciding on whether de facto unions should be treated as marriages due to their similarity considered two options. Option one being that, provided a de facto partner is eligible to make an application to adjust property rights under the proposed legislation, their entitlement should be the same as a married partner on the breakdown of the respective relationships. Option 2 on the other hand was that on the breakdown of a de facto relationship, a partner should be given a right to apply for adjustment of interests in property but this right should be on a limited scale than the right of a married person.

Arguments for option one include, the similarity of the nature of de facto and marriage relationships being that the nature, length and quality of each system is the same and that the injustices that would be faced during the breakdown of a marriage are the same injustices that will be faced in a cohabitation union. Another argument that was in support of option one was that failure to give de facto unions the same rights as marriage unions may lead to the breakdown of

²⁵ *Family Law Scotland Act, 2006*

²⁶ *De Facto Relationships*, Queensland Law Reform Commission, Working Paper No 40, 1992, 26 -

http://www qlrc.qld.gov.au/_data/assets/pdf_file/0003/372810/wp40.pdf 16 January 2018

de facto relationships, in addition to that if society has already accepted de facto unions as a form of marriage then they should be accorded the same rights as a married couple. Other arguments that were brought forward by the commission include; the trend of increasing de facto unions, religious reasons for distinguishing marriage and de facto unions should not impact the law, there is a perception that people in a long de fact relationship are presumed to be in a common law marriage and that the possible economic inequality of de facto partners may need reasonable legal protection.

On the other hand, the Commission also provided arguments that supported option 2. These include the fact that assigning rights to de facto unions will erode the institution of marriage; it will cause erosion of freedom of choice and autonomy in that if people choose not to marry then their relationship should not be eroded by equating it to marriage; there is a qualitative difference between the two relationships; the equation is not supported by the society; people should be responsible for their own actions and finally there are different kinds of de facto relationships.

CHAPTER THREE

History of Kenyan Laws

3.1 History of Succession Laws

The law of succession provides the procedure and rules by which property owned by a deceased moves from him or her to his dependents. This law seeks to make sure that the rightful claimants inherit the property left behind by the deceased.

African customary law applied to Africans in the 1897 Order-in-Council²⁷ as long as it was not repugnant to justice or morality. This was because at that time the land was still held at a communal level. However, the legislation did not apply to the westernized African who had converted to other religions, the converts felt it best that the English law should regulate their marriage and succession matters.²⁸ This came up in the case of *Benjawa Jembe v Priscilla Nyondo*²⁹ where the respondent, a *M'Giriama*, and her deceased husband, a *M'Duruma*, were married according to the rites of the Anglican Church. The Magistrate's Court held that the law applicable to distribution of the estate of the husband was English law.³⁰ On appeal which was allowed, Bath J held that succession to a deceased native Christian's estate follows the law of the tribe to which such Christian native belongs. That the fact that deceased married a wife according to the rules of the Anglican Church does not affect the succession of his property.³¹

So as to address these problems, the 1897 Native Courts Regulations, Article 64, was passed, which provided that the African Christians were governed by the law that governed Indian Christians. However, this legislation did not specify whether it was the Indian law of succession or the English Law of succession because both of these two laws applied to Christians in India. The position was then made clear in 1902 with the passing of the African Christian Marriage and Divorce Ordinance, section 39 of which provided that the English law of succession would apply to Christian Africans because after contracting a statutory marriage, the African was presumed to

²⁷ Article 52, *East African Order-in-Council*, (Act No. 1 of 1950)

²⁸ <http://www.kenyalawresourcecenter.org/2011/07/history-of-law-of-succession-in-kenya.html> 3 September 2017

²⁹ [1992] eKLR

³⁰ <http://kenyalaw.org/caselaw/cases/view/38809/> 3 September 2017

³¹ Musyoka W, *Law of Succession*, African Book Collective Publishers, Kenya, 2006, 4

have discarded the African way of life and thereby ceased being governed by African customary law.³²

Then in 1904, the Native Christian Marriage and Divorce Act Order No.9 was passed stating that the African Customary Law applied to all African irrespective of their religion.³³ In 1961 the African Wills Act was passed to enable Africans to make written wills. Testate succession was dealt with in the statute while intestate succession was still governed by the customary law of the deceased provided it is not repugnant to justice and morality. In *Re Kibiego*³⁴ the dispute was between the deceased's widows and his brothers. The brothers stated that according to African Customary Law, women have no right of administration and inheritance of the estate. It was held that the customary law of denying women rights to administer the property of the deceased husband was repugnant to justice and morality and that the Probate and Administration Act was to apply.

Most of these acts remained in force and were incorporated in the Law of Succession Act in 1981. The Law of Succession Act was passed with an intention of consolidating the four systems of law succession for the different socio-ethnic groups of people.³⁵ Section 2(1) of the Succession Act states that the Act constitutes the Law of Kenya and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act.

Even though section 5(2) states that a female person, whether married or unmarried, has the same capacity to make a will as does a male person, this shall not protect the surviving spouse of a deceased cohabitee. This is because they are not viewed as dependants. Section 29 of the Act³⁶ defines a dependant as the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

³² Musyoka, *Law of Succession*, 4

³³ Musyoka, *Law of Succession*, 5

³⁴ (1977) E.A 129

³⁵ Musyoka, *Law of Succession*, 9

³⁶ Sec 29, *Law of Succession Act*, (Act No. 26 of 2015)

3.2 History of Marriage Laws

When colonialism came into Kenya, marriages were governed by African Customary Laws. Each community had its ethnic laws. In 1902 the E.A. Order in Council clarified that customary laws are applied in all cases whether civil or criminal in which natives were parties. The courts would be guided by native law in so far as it was applicable and not repugnant to justice and morality or inconsistent with any law made in the protectorate. Under the 1902 Order in Council the commissioner was given power to make laws in the protectorate. One of these laws was the 1902 Marriage Ordinance. The Marriage Ordinance of 1902, applied to all residents in the protectorate and basically provided a Christian form of marriage which was strictly monogamous and made it an offence for a person married under customary law to contract a marriage under the Ordinance or vice versa. In addition to that converted natives were allowed to contract the Christian type of marriage and also settlers.

The Native Christian Marriage Ordinance,³⁷ applied only to the marriage of African Christians. Its purpose was to supplement the marriage ordinance and relieve the natives of formalities laid down in the marriage ordinance. However, this ordinance only applied to Africans who were Christians and practiced monogamy. In addition, the ordinance offered protection to widows in the sense that widows who had been married under the ordinance were protected from being inherited as was the case in customary law.

The Marriage Act of 2014 amends and consolidates the various laws relating to marriage and divorce. It provides for polygamous marriage and expressly states the equality of members of the marriage union. However as stated above the marriage act does not provide for cohabitation even though it defines to cohabit.

³⁷ Native Christian Marriage Ordinance, (Act No. 51 of 1931)

3.2 History of Matrimonial Property Laws in Kenya

Under common law both husband and wife were regarded as one entity while under customary laws the land was owned communally. Section 17 of the Married Women Property Act³⁸ provides that the courts can decide on interest in the property and grant appropriate remedies.

In *I v I*³⁹, the husband in this case had acquired property in England and this was jointly owned by the spouses. The house was sold and the husband used most of the proceeds to acquire property in Kenya in his own name. Upon divorce the husband applied for a determination of the wife's interest in the property. The matter was if the Married Women's Property Act applied in Kenya. The court held that the MWPA was a statute of general application in England and therefore it would apply to Kenya and its inhabitants. In *Kamore v Kimore*⁴⁰ the court held that: "where property is acquired during the course of coverture and is registered in the joint names of both spouses, the court in normal circumstances must take it that such property, being a family asset is acquired in equal shares."

The constitution also provides for equality in marriage. Article 45⁴¹ states that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. In addition to that Article 68(c) (iii) of the constitution⁴² provides that Parliament shall enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of the marriage. Section 4 of the Matrimonial Property Act⁴³, giving equal rights to both spouses in the marriage.

With these in mind it is clear to note that marital rights are accorded to married couples during life, death and termination of the marriage, while the parties in a cohabitation union are not recognized as form of marriage and there cannot enjoy the said marital rights.

³⁸ Sec17, *Married Women's Property Act* 1882

³⁹ [1971] EA 2786

⁴⁰ [2000] eKLR

⁴¹ Art 45, *Constitution of Kenya* 2010

⁴² Sec 68, *Constitution of Kenya* 2010

⁴³ Sec 4, *Matrimonial Property Act*, [Act No 49 of 2013]

CHAPTER FOUR

Findings and Discussion

4.1 Inheritance procedures in Kenya

Ideally when a person dies their property can be distributed according to a will and if there is no presence of a will then the property will be distributed according to the Law of Succession Act in Kenya. One is deemed to have died testate where there is presence of a will and intestate where there is no will.

Testate Succession

Under the Law of Succession Act, a will can be either written or oral⁴⁴ and under section 5 of the Act every person has testamentary freedom to will away all his or her property to whomever he or she felt like without necessarily leaving anything for his dependants. For a will to be valid it has to be attested by witnesses and signed by the testator.⁴⁵ For the purposes of making a will, the Act has defined who is a dependant under section 29. A dependant includes: the wife or wives, or former wife or wives, and the children of the deceased, the deceased's immediate family members including his grandparents, step siblings and step children and where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death. This clear stipulation of dependants is what raises the problem of inheritance in succession because couples in a cohabitation agreement cannot be seen as husband and wife. In the case of cohabiting couples their recourse is under section 26,⁴⁶ which states that if a person dies and he has omitted the name of a dependant from the will, the court under their discretion will include that person as a dependant. When a testator leaves out a dependant they are going against their testamentary freedom.

Therefore for testate succession if a couple in a cohabitation union want to make sure that their surviving spouse has the right to inherit property then they should include them in their will and address them as their spouse due to their prolonged stay together.

⁴⁴ Sec 8, *Law of Succession Act* (Act No. 26 of 2015)

⁴⁵ Sec 11, *Law of Succession Act* (Act No. 26 of 2015)

⁴⁶ Sec 26, *Law of Succession Act* (Act No. 26 of 2015)

Intestate Succession

This occurs when a person dies without having written a will. ⁴⁷The disadvantage with intestacy for a cohabitating couple is that the couple is not directly provided for because under the succession rules they do not qualify as dependants. Intestacy can be total or partial. Total if the deceased has left no valid will and partial if the deceased left out some of his or her property in their otherwise valid will or if part of the will is declared invalid or a part is revoked or where the person acquired more property after making of the will which was to be referred to as ambulatory. Whatever has been left out will be governed by intestate provisions.⁴⁸ In Kenya intestacy rules only benefit people who have a direct blood link to the deceased apart from the spouses. However, another upside for cohabitants is that in intestacy the only property that is being passed is the one owned by the deceased other than that joint property can pass under survivorship or nominations. Section 26 also applies in these situations in that where a party deems that they have been left out unfairly by the intestacy rules and yet they were a beneficiary when the deceased was alive.

- **Intestate leaving spouse and no children**

Where the deceased has left a spouse but no children, the surviving spouse is entitled to personal and household effects of the net estate, the first 10,000 Kenya Shillings out of the residue estate or 20% of the residue whichever is greater and a life interest in the whole of the remainder.⁴⁹ In the event this spouse remarries he or she loses the life interest. To the remaining 80% of the property it is assumed that the property will devolve back to the deceased's surviving relatives who are set out in section 39 of the Act.

In the Matter of the Estate of Charles Muigai Ndung'u (deceased) of Karinde Kiambu District, the court recognized the woman who had been cohabitating with the deceased as a wife due to their prolonged cohabitation. However due to the fact that she remarried she was not entitled to the life interest of the estate and her child was found to be the sole beneficiary of the estate.⁵⁰

⁴⁷ Section 34, *Law of Succession Act* (Act No. 26 of 2015)

⁴⁸ Musyoka W, *Law of Succession*, African Book Collective Publishers, Kenya, 2006, 57

⁴⁹ Section 36, *Law of Succession Act* (Act No. 26 of 2015)

⁵⁰ [2002] eKLR

- **Intestate leaving spouse and children**

When an intestate leaves a surviving spouse and children then the property will not absolutely devolve to the children, the surviving spouse will hold it in trust for them. According to Section 35, the surviving spouse left with the children will be entitled to personal and household effects of the estate and a life interest in the net estate and residue estate.⁵¹ Section 37 of the Act, defines the powers of a life interest establishing that they do not have any possession of the estate but rather to use the estate for their maintenance and if need be they can sell the property with consent from the trustees and the children who are of age. Regarding the children, the net intestate estate will be divided equally among them.⁵²

- **Intestate leaves children and no spouse**

According to Section 38 of the Act, if there is no surviving spouse then the net estate will devolve wholly to the children and if they are more than one it will be divided equally amongst them. If the children are under age then according to section 41, the property will be held in trust for them until they become of age. Children are always provided for whether or not they are born into a cohabitation union or a marriage.⁵³ Under section 29 of the Act they are regarded as dependants and therefore if something happens to one of their parents they are still titled to the inheritance.

4.2 Matrimonial Property

Under Article 40 of the Constitution of Kenya, everyone has a right to acquire and own property. In the cohabitation union, both spouses have the right to own and inherit property that they have acquired during the marriage.⁵⁴ This is a right that has been instilled by the constitution of Kenya. Since cohabitation resembles a marriage union, the property that has accrued in their union can or may be termed as matrimonial property. Section 6 of the Matrimonial Property Act of Kenya, defines matrimonial property as the matrimonial home or homes including household goods and effects in the matrimonial home or homes and any other immovable and movable property jointly

⁵¹ Section 35, *Law of Succession Act*, (Act No. 26 of 2015)

⁵² Section 35(5), *Law of Succession Act*, (Act No. 26 of 2015)

⁵³ Musyoka W, *Law of Succession*, 67

⁵⁴ Article 40, *Constitution of Kenya*, 2010

owned and acquired during the subsistence of the marriage.⁵⁵ Property acquired in cohabitation unions can also be classified as matrimonial property due to the significant similarities. Article 4 of the Matrimonial Property Act goes ahead to give spouses an equal status when it comes to matrimonial property. It states that despite any other law, a married woman has the same rights as a married man to acquire, administer, hold, control, use and dispose of property whether movable or immovable, to enter into a contract and to sue and be sued in her own name.⁵⁶

4.3 Joint Tenancy in cohabitation

Joint tenancy is a form of owning property where two or more people share an interest in the same property and they are referred as joint tenants. These joint tenants share equal ownership and no one has a larger ownership than the other.⁵⁷ The Land Act defines joint-tenancy as a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner is transferred to the surviving owner or owners.⁵⁸ Section 49 of the Land Act, provides for the process of transmission when a joint tenant dies.⁵⁹

This is a practice that has been used by couples in cohabitation unions because it guarantees the surviving couple a right to inherit the property. This right is referred to as the principle of survivorship whereby in the event a co-owner of a property dies then their interest will automatically pass to the surviving joint tenant on their death by virtue of this principle. This right of survivorship will take place regardless of whatever has been prescribed in the deceased's will. This principle operates to exclude jointly owned property from the law of succession so that in the case of matrimonial property acquired as a joint tenancy, the deceased's interest passes to the surviving spouse and does not form part of the deceased estate.⁶⁰

⁵⁵ Section 6, *Matrimonial Property Act*, (Act No 49 of 2013)

⁵⁶ Section 4, *Matrimonial Property Act*, (Act No 49 of 2013)

⁵⁷ Slater Gordon Lawyers, *Cohabitation*, 2013 Available at:

<https://www.slatergordon.co.uk/media/388153/cohabitation.pdf> on 16 January 2018

⁵⁸ Section 2, *Land Act*, No 6 of 2012

⁵⁹ Section 49, *Land Act*, No 6 of 2012

⁶⁰ <http://www.kenyalawresourcecenter.org/2011/07/ways-of-passing-property-on-death-other.html> 16 January 2018

For the purposes of determining who dies first when both spouses die simultaneously, Section 43 of the Law and Succession Act provides for the presumption of survivorship. It states that where the death of two people has occurred simultaneously then it will be deemed that the deaths occurred in order of their seniority. In the case of spouses the property shall pass to their children or relatives, regardless of who died first.⁶¹

4.4 Cohabitation Agreements

This is a contract between persons in an intimate relationship, who are not married to each other and intend to stay unmarried indefinitely, which covers financial and related matters during the relationship or in the event of death or separation.⁶² In the case of *Marvin v Marvin*⁶³, a cohabitating couple who had an oral agreement that once they had separated they should share all their accumulated property equally and when they separated the plaintiff bought a suit to enforce the agreement. The plaintiff and defendant had lived together for seven years without any intention to marry. The plaintiff had agreed to give up her career so as to be provided for by the defendant, a role which he had readily taken up after compelling her to leave her household. The defendants had made an oral agreement where the parties would combine their efforts and earning and share all the property that will be accumulated due to their efforts. In November 1971, the defendant refused to provide further support. During the seven years they were together the defendant had accumulated more than one million in property, therefore upon their separation, the plaintiff sued for her share of the property. The court held that parties cannot be denied remedy due to the fact that they were not married and accepted the plaintiff's claim that there was an express contract between them.

These agreements can be express contracts, implied-in-fact contracts, implied in law and implied trust. An express contract is where the terms of the contract are explicitly stated by the parties and can be either oral or written. An implied contract is one that is not created by the parties but inferred

⁶¹ Section 43, *Law of Succession Act*, (Act No. 26 of 2015)

⁶² Stasky W, 'Premarital, Postnuptial and Cohabitation Agreements', *Family Law*, 6th Ed, Delmar Cengage Learning, Clifton Park New York, 2013, 104

⁶³ [1976], Supreme Court of California

as a matter of reason and justice from their conduct and surrounding circumstances. The contract exists when the parties have an understanding that they are bound by the contract even though the terms were not discussed. On the other hand and implied- in- law contract is an obligation created by the court to prevent unjust enrichment. It occurs when one receives a benefit in form of goods or services from another person and in fairness and equity they should provide restitution or compensation to the giver even though there is no implication or promise made to do so. ⁶⁴

Cohabitation agreements have been seen to help avoid future litigation between de facto unions and if litigation occurs they offer a guidance on how to divide the property. Having a written agreement clarifies the intent of both parties from the beginning of the relationship. Should the intent of the parties change during the relationship, the cohabitation agreement can be modified at a later date.⁶⁵ This agreement will clarify the rights and obligations of each party to both jointly and separated property and specify their intent as to properties acquired during the union.

These contracts should be clear and state precisely what each party wants. They should also be fair, have a purpose and not create resentment in the relationship but rather strengthen it. ⁶⁶

In other countries, cohabitation agreements are expressly provided for by the law, in that the law gives requirements and offers a standard form of how cohabitation agreements should be. For example in Northern Australia, under part 3 of the De Facto Relationships Act it outlines a guideline on cohabitation and separation agreements. i.e section 44 outlines the validity of such agreements.⁶⁷

⁶⁴ Statsky W, ' Premarital, Postnuptial and Cohabitation Agreements', *Family Law*, 6th Ed, Delmar Cengage Learning, Clifton Park New York, 2013, 133

⁶⁵ <http://www.jensen-leiberan.com/News-Articles/Do-Unmarried-Couples-Need-a-Cohabitation-Agreement.shtml>
16 January 2018

⁶⁶ Cochrane M, *Do We Need a Cohabitation Agreement: Understanding How a Legal Contract Can Strengthen Your Life Together*, J Willey & Sons, Toronto Canada, 2010, 143

⁶⁷ Section 44, *De Facto Relationships Act*, (1991)

CHAPTER FIVE

Comparative Study

The comparative study that was carried out for purpose of this research was done in a way that highlights the laws of Argentina which is a civil law country with a very comprehensive legal framework with regards to cohabitation and to add on to that the author had done some research on the marriage laws in Argentina. While also including Australia which is a common law country that has overtime developed laws to protect cohabittees and their property.

5.1 Argentina

Argentina as a civil law country draws its rules and regulations from statutes such as the Civil Procedure Code. Their marriage laws are included in their civil and commercial code under section two.⁶⁸ Before the new civil code, there was no legal regulatory framework that gave cohabiting couples any legal effect and thus they could not enjoy marital rights accorded to married people. With the current civil code, there is a legal framework that serves as a guideline to matters regarding civil unions.

Article 509 of the Argentine Civil Code refers to cohabitation as the union based on affective relations of a singular, public, notorious, stable and permanent nature of two persons who coexist and share a common life project, whether of the same or different sex.⁶⁹ The marriage act of Kenya, on the other hand, refers to cohabiting as living in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.

Since cohabitation unions are recognized as a form of marriage in Argentina, the same requirement that apply to marriages also apply to these de facto unions. In order for the coexisting union to have the legal effects granted by the new code, article 510 establishes that the following requirements must be fulfilled:⁷⁰

- The two members are of legal age;

⁶⁸Artículo 1, Libro Segundo, Código Civil y Comercial de la República Argentina, 2015

⁶⁹ Article 509, Título III, Capítulo I, Código Civil y Comercial de la República Argentina, 2015

⁷⁰ Article 510, Título III, Capítulo I, Código Civil y Comercial de la República Argentina, 2015

- Are not bound by kinship bonds in a straight line in all grades, or collateral up to the second degree;
- They are not bound by kinship bonds by affinity in a straight line;
- Do not have impediment of ligament nor is registered another coexistence simultaneously;
- Maintain coexistence for a period of not less than two years.

Only for purposes of evidence, it is established that the existence of the coexisting union, its extinction and the pacts that the members of the couple have celebrated, are inscribed in the register that corresponds to the local jurisdiction. This means that it is not necessary for the union to be registered in the register in order for it to have legal effects, but registration sufficiently proves its existence and makes it enforceable against third parties. If not registered, the code admits any other means of proof. It is not necessary to re-register a joint venture without the previous cancellation of the pre-existing one in the registry. It also provides that the registration of the existence of the joint venture must be requested by both members.

Cohabitation Covenants⁷¹

The code admits that "coexistence covenants" be signed between cohabitants, which must be made in writing and can regulate the contribution to the burdens of the household during the life in common and the attribution of the common household, in case of rupture. This covenant should not go against public order, the equality of the coexisting, and not imply to affect the fundamental rights of any of the members of the union. The covenant can be modified and rescinded by agreement of both. If coexistence ceases, the covenant subscribes the process in detail.

They are effective against third parties provided they are registered in the register created for this purpose. The covenants cannot render ineffective the duty of assistance, the duty of both coexisting to contribute to the domestic expenses of the household, the solidarity of the cohabitants for the debts contracted by one of them with third parties to meet the ordinary necessities of the home or

⁷¹ Capítulo 2, Título III, Código Civil y Comercial de la República Argentina, 2015

the maintenance And the education of the children, and the duty of the domestic protection cohabitants. This covenant governs the relations between the couples. However in the absence of this, each member of the union freely exercises the faculties of administration and disposition of the property owned by them, with the regulated restriction for the protection of the family dwelling and the indispensable furniture found therein.

Duties of the couples⁷²

The code goes ahead to assign the following duties to the cohabitating couples under Capitulo 7 of the Argentine Civil Code.

- Assistance is required during coexistence;
- They have an obligation to contribute both living together to domestic household expenses;
- They are jointly and severally liable for debts contracted by one of them with third parties to meet the ordinary needs of the household or the support and education of the children;
- Protection of the family home: If the coexisting union has been registered, none of the partners can, without the assent of the other, have the rights to the family home, or the essential furniture of this, or transport them outside the home. However, the judge may authorize the disposition of the property if it is dispensable and the family interest is not compromised. If this judicial authorization does not apply, the one who has not given his assent can demand the nullity of the act within the period of expiration of six months of having known it, and provided that the coexistence continues. The family dwelling cannot be executed for debts contracted after the inscription of the coexisting union, unless they have been contracted by both coexisting or by one of them with the consent of the other.
- The spouse or partner of a parent must cooperate in the upbringing and education of the children of the other; perform the daily activities related to their training in the domestic sphere and make decisions in situations of urgency.

⁷² Capitulo 7, Titulo III, Código Civil y Comercial de la República Argentina, 2015

Before this code, Argentines had no way of instituting legal action so as to protect property acquired in the union in case one wanted to alienate or donate them. This code has provided special protection to the family home that is the object of living together.

Termination of the cohabitation

Article 523 lists the causes by which the convivial union can end and they include;⁷³

- By the death of one of the couple;
- By the final sentence of absence with presumption of death of one of the couple;
- By marriage or new cohabitation of one of its members;
- By the marriage of the coexisting ones;
- By mutual agreement;
- By unilateral will of one of the couples notified reliably to the other;
- By the cessation of the coexistence maintained. The interruption of the coexistence does not imply its cessation if it obeys labor or similar reasons, as long as the will of life remains in common.

Economic relations during the Union

Article 513 of the civil code regulates the possibility of making coexistence pacts intended to govern issues related to the union. One of the issues that can be agreed upon is the economic relations in the union. Hence, cohabitants have the possibility of designing their own legal status, with all its advantages and disadvantages, and with certain limitations legally imposed. These covenants enable the cohabiting couple to design aspects of the common life project that they have decided to carry out, in full manifestation of their personal autonomy and their individual choices. In addition to that they get to decide how to govern their property during and after the union ends,

⁷³ Título III, Código Civil y Comercial de la República Argentina, 2015

and contemplating the aspects personal and patrimonial assets of the union that are connected with parental responsibility, mutual assistance, protection of housing, patrimonial regime, responsibility towards third parties, among other issues.

In the making of the covenant, there are several provisions that cannot be derived from. These provisions are the minimum floor of protection which is stipulated from article 519 to 522. This minimum floor of protection implies a legal restriction to the autonomy of the will and comes from the compulsory imposition of certain legal effects that are unavailable to the cohabitantes, thus offering them protection that alludes to human or fundamental rights. The doctrine is that the covenants of those who live in fact without being married should include certain rights of a basically care nature, where the coexistence has been prolonged in time and especially if there are minor children.

The floor or minimum regulation to be respected by the members of the union is composed of:

- The reciprocal assistance from both of the cohabitantes that is due during the coexistence. This is derived from the essential right of living together.
- The contribution to the expenses of the household, as an emerging principle of the solidarity directed to the protection of the family.
- The liability for debts with third parties, whereby the partners are jointly and severally liable for the debts that one of them has contracted with third parties.
- The protection of family housing, which is only appropriate in cases of registered unions. None of the cohabitantes can, without the assent of the other, have the rights to the family home, or the essential furniture of it, nor to transport them outside the house.

Economic Relations after Termination of the Union

Once coexistence ceases, the code under Article 523,⁷⁴ provides for the possibility of an economic compensation for the cohabitant who suffers a manifest imbalance that means a worsening of his or her economic situation with adequate cause in the coexistence and in its rupture. The compensation may consist of a single benefit or a rent for a certain time that cannot be greater than the term that lasted the living union.

It can be paid with money, with the addition of certain goods or in any other way that the parties agree or if the judge decides otherwise. In the latter case, in order to determine the economic compensation, the judge may base the following circumstances, among others:

1. The patrimonial status of each of the partners at the beginning and the end of the union;
2. The dedication that each partner gave to the family and the upbringing and education of the children and the one that must be provided after the cessation;
3. The age and health status of the cohabitees and the children;
4. The job training and the possibility of accessing a job of the cohabitant requesting the economic compensation;
5. The collaboration given to the mercantile, industrial or professional activities of the other partner;
6. The attribution of the family home.

The action to claim compensation expires six months after the end of the coexistence.

Attribution of the use of the family home⁷⁵

In the event that one of the members of the couple is responsible for the care of minor children with restricted or disabled capacity or, if the extreme necessity of a home is proved and the impossibility of obtaining it immediately, the judge may attribute a certain time -which cannot

⁷⁴ Artículo 523, Capítulo IV, Título III, Código Civil y Comercial de la República Argentina, 2015

⁷⁵ Artículo 527, Capítulo IV, Título III, Código Civil y Comercial de la República Argentina, 2015

exceed two years from the end of the coexistence – for the use of the building that was used during the union.

Likewise, at the request of a party, the judge may establish a compensatory rent for the use of the property in favor of the person who is not attributed the dwelling, that the property is not alienated for a term without the express agreement of both and that the property in condominium of the couple is not liquidated. The decision has an effect on third parties if it is registered in the same way as the covenant.

If it is a rented property, the non-tenant resident has the right to continue in the lease until the contract expires, maintaining the obligation to the payment and the guarantees that were originally constituted in the contract. The attribution of the dwelling ceases by the fulfillment of the term fixed by the judge, by the change of circumstances that were taken into account for its fixation and by the causes of indignity foreseen in matter of succession.

Distribution of goods

Upon the termination of the coexisting union, the distribution of the assets will be effected as established by the couple in their covenant. In the absence of this, Article 528 of the code provides that property acquired during coexistence is maintained in the patrimony to which they entered, without prejudice to the application of general principles relating to unjust enrichment, interposition of persons and others that may correspond. The fact that the code does not provide a novel form for the distribution of goods upon rupture is what brings problems. It is not known whether the property should be treated as matrimonial property or not.

A Comparative Analysis of Marriage and Cohabitation under the Argentine Civil Code⁷⁶

It is usual as a matter of dispute in doctrine and jurisprudence, the mode of regulation of marriage and cohabitation be decided upon. It has been debated whether the regulation of both family forms should be differentiated, equated or resembled. We are then able to note the differences and similarities in the various regulated aspects for both institutions.

1. The principles in the regulation of the families

In spite of the different views of both unions, what stands out is the normative statute of the basic family value in both systems. To equate cohabitation to marriage would be an inadequate intrusion in the private life of the cohabitants because this is more or less invasion of the freedom to decide to get married or not. However, the juridical treatment given to the marriage and cohabitation must be differentiated and these guidelines are demarcated in the new Civil and Commercial Code of the Nation. As a matter of guaranteeing equality these differences must not be unreasonable or discriminatory.

This means that different treatment given to cohabiting unions should not neglect the fundamental rights of those who have not married, simply because they live outside of marriage. There does not appear to be any reasonableness that can support any discrimination because it belongs to a family status other than the conjugal status.

Freedom of the person or of the people to choose a different way to constitute a family, as it is the living union, cannot establish a family territory in the absence of solidarity and responsibility. Solidarity meaning the common interest to be involved with one's partner and responsibility includes matters such as contribution to burden of the household and acquiring of property together. Therefore the cohabitation union and the marital family sit in a space presided over by freedom, solidarity and responsibility.

2. Equality

In both cohabitation and marriage, the principle of equality is indubitable. Its members can be people of the same or different sex with equal rights at all times.

⁷⁶ Lloveras N, Orlandi O, Faraoni F, *Uniones Convivenciales*, First Edition 2015, Rubinzal-Culzoni Editors, P 473

3. Autonomy

The fundamental premise that marks the greatest difference with the institution of marriage is respect for personal autonomy to agree on the consequences of life in common, which fully recognizes the spontaneous and liberal origin of the cohabiting union. The distinction is given by the possibility of the cohabiting unions to enter into agreements that create pacts of existence. Here we see a radical difference with marriage, in which the cohabitees can only celebrate their conventions in circumstances that include inventory and appraisal; the enunciation of debts; the prenuptial donations and the option for the patrimonial regime of marriage. The rest of the agreements are expressly prohibited under article 447, Civil and Commercial Code of the Nation. These conventions will only be allowed if the cohabitees are planning on becoming future spouses.

5.2 Australia

Australia is one of the countries that had made an effort to advance their cohabitation laws and make sure that they are accorded the same rights as married couples. The country established the De Facto Relationships Act in 1996⁷⁷ and it defines a de facto relationship as a relationship between a man and a woman, who although not legally married to each other, live together on a genuine domestic basis as husband and wife.⁷⁸ Part 2 of the Act goes into detail about cohabitation agreements with section 5 laying out what it should include and its requirements. It states that de facto partners may make an agreement about the division of property on the termination of the de facto relationship or other financial matters related to the de facto relationship. The agreement must be in writing and signed by the de facto partners.⁷⁹ Section 6 of the act states that the agreement is enforceable under law of contracts and part three of the Act deals with adjustment of property interests.

In present times Western Australia passed a newly updated Act in 2008 called Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008. This Act accords marital rights to couples in de facto relationships provided that the relationship was registered, there was

⁷⁷ *De Facto Relationships Act Australia*, (No. 51 of 1996)

⁷⁸ Section 3, *De Facto Relationships Act Australia*, 1996 No. 51 of 1996

⁷⁹ Section 5, *De Facto Relationships Act Australia*, 1996 No. 51 of 1996

a child born into that relationship and the relationship has lasted more than two years.⁸⁰ Section 4AA of their Family Act⁸¹ states that a person is in a de facto relationship if the persons are not legally married to each other; the persons are not related by family and having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

The courts when determining if there is a de facto union will look at; the duration of the relationship, the nature and extent of their common residence, whether a sexual relationship exists, the degree of financial dependence or interdependence and any arrangements for financial support between them, the ownership, use and acquisition of their property, the degree of mutual commitment to a shared life, whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship, the care and support of children and the reputation and public aspects of the relationship.

One notable thing about the act is that Section 4AA (5), states that for the purposes of the Act, a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.⁸² Shifting our attention to Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008, schedule 1 and 2, it discuss amendments relating to de facto arrangements and consequential agreements relating to de facto financial arrangements. This is so as to protect the parties' economic interests. Northern Australia on the other hand has their own De Facto Relationships Act established in September 2011. The Act is a reflection of the Family Act used by Western Australia but it is more exhaustive.

In conclusion, the laws in the two countries show that cohabitation unions do not necessarily need to be treated as marriages so as to get marital rights and that they can also be provided for if they had specific rules and regulations that applied to their situation.

⁸⁰ <http://www.marilynstowe.co.uk/2010/06/30/cohabitation-what-has-australia-got-that-england-hasn%E2%80%99t-jennifer-hollyer/> 16 January 2018

⁸¹ Section 4AA, *Family Act Australia*, 1975

⁸² Section 4AA (5), *Family Act Australia*, 1975

CHAPTER 6

Conclusions and Recommendations

6.1 Recommendations

My recommendations to the current situation in Kenya would be to change its Marriage laws so as to accommodate cohabitation agreements. These laws should define what a de facto union is, and what the requirements that will make these unions recognizable are. Without these clear stipulations, it is hard for spouses to divide property during separation or inherit property in the event of death of one spouse. As a country we can borrow a leaf from the Argentine Laws concerning cohabitation because not only do they recognize cohabitation as a form of marriage. They also go into details about duties of the couples, requirements of the union i.e. registration and even distribution of property before, during and after the union ceases to exist.

To the couples, I venture to recommend they invest in cohabitation agreements either oral or written so as to look out for their interest. If the law does not come through for you, you look out for yourself. With these agreements in hand, the courts can be able to easily solve dispute that occur during the union thus saving the, time and money.

6.2 Conclusion

Article 40 of the Constitution of Kenya states that every citizen has a right to own and acquire property and the only way the government can limit this right is if there is need for compulsory acquisition of land for public interest.⁸³ The laws of Kenya lacking sufficient provision for distribution of property in cohabitation unions are limiting the couples right to property. Article 1 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) prohibits discrimination of women based on their marital status.⁸⁴

The research has gone above and beyond to show that firstly, cohabitation is not regarded as a form of marriage in Kenya, secondly that succession procedures only provide for wives and in some circumstances cohabitees can seek refuge through section 26 of the succession Act, last but

⁸³ Article 40, *Constitution of Kenya*, 2010

⁸⁴ Article 1, Convention on the Elimination of All Forms of Discrimination against Women, 1981

not least, the use of joint tenancy and cohabitation agreements has paved a way for couples in a cohabiting relationship to inherit property.

In summary, cohabitation laws in Kenya need to be improved so as to cater to the needs of the increasing cohabiting couples. These laws need to be put in place so as to make sure that individuals who make it their personal choice to enter into such unions do not suffer injustices such as not inheriting property or not exercising their property or marital rights.

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