

# **Advocating for Proprietary Rights of Cohabitees During Separation in Kenya**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore

University Law School

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[April 2025]

Word Count : (18,539)


**DECLARATION**

I, AKOTH WINNIE AMAKUTWA, 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 part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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## **ACKNOWLEDGEMENTS**

I would like to express my heartfelt gratitude to my supervisor, Dr. Jennifer Gitahi, for her invaluable guidance, unwavering support, and insightful feedback throughout the course of this research. Dr. Gitahi's expertise in the field has been instrumental in shaping this work, and her encouragement has motivated me to strive for excellence at every stage of my academic journey. Her ability to provide constructive criticism while fostering a supportive environment has made a significant difference in my research experience. I am also deeply indebted to my family for their unwavering love, support, and patience. Their sacrifices have allowed me to pursue my academic goals without hesitation. They have been my pillars of strength, providing emotional and moral support during challenging times. Their belief in my abilities has been a constant source of motivation, and I am truly grateful for the countless ways they have contributed to my success. Lastly, I would like to thank the Almighty God for guiding me through this study. His presence has given me the strength and resilience needed to overcome obstacles and stay focused on my objectives. I am thankful for the wisdom and clarity that have accompanied me throughout this research process.

## LIST OF CASES

1. *Hortensia Wanjiku v Public Trustee (1967)*
2. *WM v Muirigi (2008)*
3. *Mary Nyambura Kangara v. Paul Ogari Mayaka (2013)*
4. *L.L v C.H NO and Others (2023)*, South Gauteng High Court South Africa
5. *Butters v Mncora ( 2012)* South Gauteng High Court South Africa
6. *L .M v R.K ( 2022)* South Gauteng High Court South Africa

## LIST OF LEGAL INSTRUMENTS

1. *Constitution of Kenya (2010)*
2. *Laws of Succession Act (Act No. 26 of 2015 )*
3. *Marriage Act (Act No. 4 of 2014)*
4. *Matrimonial Property Act (Act No. 49 of 2013)*
5. *Married Women Property Act (1882)*
6. *The Judicature Act (1967)*
7. *Domestic Partnerships Bill (2008) South Africa*

## **LIST OF ABBREVIATIONS**

1. *EAC- East African Court*
2. *KNBS- Kenya National Bureau of Statistics.*
3. *MWPA—Married Women Property Act*
4. *ADR - Alternative Dispute Resolution*

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## ABSTRACT

*Cohabitation is increasingly becoming common in contemporary Kenyan society, yet the absence of a legal framework to protect the property rights of cohabitants presents significant challenges. The lack of clear legal stipulations leaves cohabiting couples vulnerable, particularly concerning proprietary rights at separation. Judicial actors are often forced to exercise discretion in these matters, relying on the common law doctrine of presumption of marriage and equitable remedies such as constructive trusts. However, this reliance on judicial discretion leads to inconsistencies and unpredictability in rulings, undermining the principle that law should be clear and certain. The presence of an unpredictable not only creates potential injustices but also marginalizes cohabiting couples who lack formal recognition and protection under the law. By analyzing primary and secondary sources through doctrinal research, this paper argues for a comprehensive legal framework that will safeguard the proprietary rights of cohabiting partners in Kenya. The theoretical framework guiding this analysis is John Locke's labour theory, which posits that individuals gain ownership rights through their investment of labour and resources. The paper concludes with a comparative analysis, drawing lessons from South Africa's legal culture and framework, which offers protections for cohabiting unions. Key findings highlight the need for statutory clarity, equitable property sharing mechanisms, and formal recognition of cohabitation. Recommendations include adopting legislation that explicitly defines cohabitation relationships, establishing equitable property division rules, and creating legal mechanisms for cohabitation agreements. These measures would enhance legal recognition and security for cohabiting partners in Kenya, fostering fairness and predictability.*

KEYWORDS: Cohabitation, Proprietary Rights, Universal Partnership, Cohabitation Agreement

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background

The institution of marriage is considered the cornerstone of many societies, traditionally seen as the fundamental unit and the foundation of a family.<sup>1</sup> However, the traditional concept of marriage has evolved and transformed into various modern forms. One of the most common of these modern variations is cohabitation, which has become popular in Kenyan society, even earning the colloquial term “come we stay.” There has been a growth in the number of couples in cohabitation unions in Kenya, as indicated by a study conducted by the Kenya National Bureau of Statistics (KNBS). The report highlighted the prevalence of cohabiting unions, showing that 2.1% of males and 4.1% of females were in such relationships. This data reflects the notable participation of both genders in informal unions. Another report carried out in 2014 showed the percentage of males cohabiting being 2.1% and the percentage of women increasing to 5.1%.<sup>2</sup> Scholars' justification for this trend is from an economic lens, whereby the process of instituting religious or traditional marriages may be financially taxing for these couples, and thus people who cohabit view this as a most suitable option.<sup>3</sup>

The phrase “cohabitation” lacks a distinct, universally accepted definition; however, it can be defined as the act of living together in the same residence, generally as man and wife, for an extended period.<sup>4</sup> Unlike formalised and recognised unions under Section 6 of the Marriage Act (2014), it offers more freedom and flexibility with fewer legal entanglements, such as registration.<sup>5</sup> Despite the Marriage Act 2014 being silent on the union and its regulation, the Act provides a definition under section 2 of the verb ‘cobahit’ to mean to live in an arrangement in which an

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<sup>1</sup> Amanto P, ‘Tension Between Institutional and Individual View of Marriage 66 (1)’, *Journal of Family and Marriage*, 2004, 4 —< <https://www.jstor.org/stable/3600169?seq=2>> on 15 July 2024.

<sup>2</sup> Khasakhala A, Bocquier P, ‘Factors Influencing Union Formation In Nairobi, Kenya’ *Journal of Biosocial Science* ,2009 ,—<[https://www.researchgate.net/publication/24145180\\_Factors\\_influencing\\_union\\_formation\\_in\\_Nairobi\\_Kenya](https://www.researchgate.net/publication/24145180_Factors_influencing_union_formation_in_Nairobi_Kenya)> 15 July 2024.

<sup>3</sup> Pike I, Mojola A, ‘Making Sense of Marriage: Gender and the Transition to Adulthood in Nairobi Kenya’ 80(5) *Journal of Family and Marriage*, 2018 —< <https://pmc.ncbi.nlm.nih.gov/articles/PMC6760660/> >

<sup>4</sup> Black’s Law Dictionary, 2<sup>nd</sup> ed.

<sup>5</sup> The Marriage Act 2014 only recognizes five unions namely, Christian marriage, Civil marriage, Hindu marriage, Islamic marriage, and customary marriages under section 6, the justification for these five in the act is believed to be as a result of the social composition of Kenya as a state and thus they are a mirror/representations of the union present

unmarried couple lives together in a long-term relationship that resembles a marriage.<sup>6</sup> The author believes that despite the lack of a legal framework that governs this union, there was consciousness and awareness of the existence of the practice within the larger society and in the minds of the marriage acts drafters, hence the provision that defines the practice.

Discussions on the definition of cohabitation in Kenya date back to 1968. The Commission on Law on Marriage and Divorce, established by President Jomo Kenyatta, recommended a two-fold conjunctive test to determine a cohabitation union.<sup>7</sup> The first requirement is that the couple must have cohabited for at least one year. Secondly, they must have acquired general repute as a married couple.<sup>8</sup> As a result of the law being silent within the Kenyan jurisdiction on the regulation and protection of these unions, judicial actors have been limited to applying the common law doctrine of presumption of marriage in solving disputes that arise.<sup>9</sup> This doctrine asserts that when two parties cohabit for a specified length of time and are reputed to present themselves as husband and wife, a marriage may be presumed.<sup>10</sup> The applicability of the doctrine arises from Kenya's colonial ties to Britain, which influenced the adoption of common law principles. Whereby, common law is recognized as a source of law under Section 3 of the Judicature Act.<sup>11</sup> The doctrine's first application in Kenya was in the case of *Hortensia Wanjiku v. Public Trustee (1967) in the East African Court (EAC)*, which set out the floor for the criteria at the time applied by the courts before presuming a marriage, namely long cohabitation and general repute.<sup>12</sup>

The courts have, however, shed light on this area of family law through precedence. Throughout the years, courts have refined the criteria applied and expanded the factors for consideration, for instance, the presence of children, the definition of general repute, and in the most recent jurisprudence in the *MNK v. POM (2023)* case, legal capacity and mutual consent. There has been a gradual transition to a more conjunctive test approach as opposed to a disjunctive one to satisfy

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<sup>6</sup> Section 2, *Marriage Act* (2014)

<sup>7</sup> Report of the Commission on The Law of Marriage and Divorce, *Final draft*, 1968, 233

<sup>8</sup> Report of the Commission on The Law of Marriage and Divorce, *Final draft*, 1968, 233.

<sup>9</sup> Maina P, 'Impact of Duration of Cohabitation on Succession in Cohabitation Marriages' *Journal of Public Policy & Governance*, 2024, 3

—<<https://www.stratfordjournal.org/journals/index.php/journal-of-public-policy-governance/article/view/229>> 22 August 2024

<sup>10</sup> Halsbury's Laws of England (London 2015), vol. 72.

<sup>11</sup> Section 3(1) *Judicature Act* (2010)

<sup>12</sup> *Hortensiah Wanjiku Yawe v Public Trustee* (1976)eKRL

for a marriage to be presumed.<sup>13</sup> Upon satisfaction, discretion, and a presumption of marriage has been proven, cohabitantes may be granted privileges similar to those of a recognized union, including proprietary rights. The most recent case is the Supreme Court case of *Mary Nyambura Kangara v. Paul Ogari Mayaka* (2013), which sets out an eight-part conjunctive test that has to be met before a marriage can be presumed.<sup>14</sup>

The reliance on criteria such as length of cohabitation, repute, customary practices, and the intention to cohabit fails to capture the complexity and diversity of informal unions. The absence of clear legal definitions, particularly regarding what constitutes "long cohabitation," allows for considerable judicial discretion, which contradicts the principle that the law should be clear and certain. As a result, individuals in non-traditional partnerships may find themselves disproportionately affected by these vague criteria, leading to potential injustices. The courts' discretionary approach can create unpredictability in judicial outcomes, undermining the legal certainty that individuals need to understand their rights and obligations. Consequently, this situation not only marginalizes those who do not fit conventional criteria but also violates the fundamental principle that law should provide a stable and predictable framework for all individuals, thereby reinforcing the urgent need for a comprehensive legal framework to protect cohabiting couples in Kenya.<sup>15</sup>

The area of law concerning proprietary rights after the separation of cohabiting couples, particularly from an African perspective, often reveals significant injustices. In cases involving cohabiting couples, rights are not automatically granted unless specific criteria are met. This gap in legal protection disproportionately affects women, who often struggle to provide sufficient evidence of their contributions to shared property. The lack of a clear legal framework governing cohabitation leaves courts to rely on vague criteria and judicial discretion, which undermines the principle that law should be clear and predictable. As a result, individuals in cohabiting unions face

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<sup>13</sup>Gichuru D, 'Presumption of a Marriage is The exemption rather than the rule, The question of presumption of Marriage in Kenya. Feb 2023

—<<https://cmadvocates.com/en/blog/presumption-of-a-marriage-is-the-exception-rather-than-the-rule-the-question-of-presumption-of-marriage-in-kenya>> on 22 August 2024.

<sup>14</sup>*Mary Nyambura Kangara v Paul Ogari Mayaka* (2013) eKLR

<sup>15</sup>Okana S, 'Legal nature of the principle of legal certainty as a component element of the rule of law, *Juridical Tribune*, 2023 —<<https://www.tribunajuridica.eu/arhiva/An13v1/2.%20Shcherbanyuk,%20Gordieiev,%20Bzova.pdf>>on 23 August 2024

significant challenges in asserting their property rights, highlighting the urgent need for legislative reform to ensure equitable treatment and protection for these partnerships.

This paper advocates for the protection of proprietary rights for individuals in cohabiting relationships upon separation by critically examining the existing legal framework in Kenya. It will analyze the extent to which Kenyan law recognizes and safeguards these rights, identifying gaps and challenges in the current legal regime. Additionally, the paper will undertake a comparative analysis of South Africa's legal framework, extracting key lessons that Kenya can adopt to enhance legal certainty and protection for cohabiting partners. Through this comparative approach, the paper will propose practical recommendations aimed at developing a more inclusive, coherent, and comprehensive legal framework that acknowledges and safeguards the evolving nature of intimate partnerships and familial arrangements in Kenya.

## **1.2 Problem Statement**

The current legal framework in Kenya does not recognize or protect cohabitation as a formal union under Section 6 of the Marriage Act, thereby leaving cohabiting partners without legal safeguards. Consequently, upon the dissolution of such relationships, individuals face considerable challenges in asserting proprietary rights over jointly acquired property. In resolving these disputes, courts often resort to the common law doctrine of presumption of marriage, which requires specific conditions to be met. However, the criteria for establishing "long cohabitation" remain ambiguous and are inconsistently interpreted, leading to legal uncertainty. The absence of a clear statutory framework governing the property rights of cohabiting partners results in judicial discretion playing a predominant role in determining outcomes, thereby undermining the predictability of the law an essential tenet of an adversarial legal system. This legal vacuum not only exacerbates the vulnerability of cohabiting partners but also underscores the urgent need for legislative intervention to provide clear and comprehensive protections for such unions in Kenya.

### **1.3 Research Objectives**

This study seeks to examine

1. To analyze the current legal framework in Kenya on property rights for cohabitees upon separation
2. To investigate the current legal framework in South Africa on proprietary rights for cohabitees upon separation.
3. To identify and analyze the lessons that Kenyan lawmakers can learn from South Africa's approach to protecting cohabitants' rights.
4. To propose recommendations based on the findings

### **1.4 Research Questions**

This study seeks to address the following:

1. What is the current legal standing on proprietary rights for Cohabitees upon separation within the Kenyan Jurisdiction ?
2. What is current legal standing of proprietary rights for Cohabitees upon separation within the South African jurisdiction?
3. What lessons can be drawn from the steps taken by South African legislation to protect the property rights of cohabitees?
4. What legal reforms can be proposed to enhance the protection of cohabitees' property rights in Kenya?

### **1.5 Hypothesis**

Kenya lacks explicit legal protection for cohabitees' property rights upon separation, relying on contribution-based claims. South Africa provides statutory recognition and protection. Adopting similar reforms in Kenya will ensure fairness and clarity for cohabitants.

## 1.6 Justification for the Study

The practice of cohabitation is not novel within Kenyan society.<sup>16</sup> It is one that has been on the rise in the current generation,<sup>17</sup> where the frequency of disputes in the courts can be used as prima facie evidence. Among the most disputed matters in relation to cohabiting couples are property rights. The lack of legal frameworks to protect the rights of cohabiting couples in Kenya is a significant issue that warrants in-depth study and attention. The legal procedure that occurs when judgment is being passed is that upon the discretion of the court presuming a marriage, the court gives guidance on how the property in question will be distributed.<sup>18</sup> However, the discretion of the courts lacks clarity, which is considered a key feature of the rule of law.<sup>19</sup> Thus the lack of legal clarity leaves cohabiting couples vulnerable to exploitation, discrimination, and unfair treatment, especially in situations where assets are jointly acquired or shared during the course of the relationship. This study seeks to provide recommendations from lessons drawn from South Africa that protect the rights of cohabiting couples with a focus placed on proprietary rights.

## 1.7 Theoretical Framework

The theory that would appropriately justify why people in cohabiting unions ought to have their rights to property is the labour theory. The labour theory, school of thought provides that once an individual has mixed their labour with a thing in nature for their benefit, they have the rights and interest in that thing; in this case, the individual ought to have the right to economically gain from

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<sup>16</sup>Isabel Pike, Sanyu A. Mojola and Caroline W Kabiru, 'Making Sense of Marriage: Gender and the Transition to Adulthood in Nairobi, Kenya' (2018) 80 Journal of Marriage and the family -<<https://pubmed.ncbi.nlm.nih.gov/31555013/>> 22 August 2024.

<sup>17</sup>Isabel Pike, Sanyu A. Mojola and Caroline W Kabiru, 'Making Sense of Marriage: Gender and the Transition to Adulthood in Nairobi, Kenya' (2018) 80 Journal of marriage and the family -<<https://pubmed.ncbi.nlm.nih.gov/31555013/>> 22 August 2024.

<sup>18</sup>Douglas G, Pearce, Cohabitants, Property and the Law: A Study on Injustice -<[https://www.jstor.org/stable/pdf/20533222.pdf?refreqid=fastly-default%3A1745f94680393246c1de0fbbac3d8654&ab\\_segments=&origin=&initiator=&acceptTC=1](https://www.jstor.org/stable/pdf/20533222.pdf?refreqid=fastly-default%3A1745f94680393246c1de0fbbac3d8654&ab_segments=&origin=&initiator=&acceptTC=1)> January 2009.

<sup>19</sup>Kodiyo K, The Judicial Approach to Cohabitation; A Comparative Study of the Laws of England and Wales and Kenya, (107) 2021-<[https://www.researchgate.net/publication/357805992\\_The\\_Judicial\\_Approach\\_to\\_Cohabitation\\_A\\_Comparative\\_Study\\_of\\_the\\_Law\\_of\\_England\\_and\\_Wales\\_and\\_Kenya](https://www.researchgate.net/publication/357805992_The_Judicial_Approach_to_Cohabitation_A_Comparative_Study_of_the_Law_of_England_and_Wales_and_Kenya)> on 22 August 2024

the said property.<sup>20</sup> According to John Locke, the main proponent of this theory, states that property is a natural right that is inherent to all men and cannot be stripped away unless consent has been given.<sup>21</sup> The theory can be explained in various ways. Lockes strongest view is justified ownership.<sup>22</sup> This view proposes that whoever puts labor into making or developing something has the rightful claim to its value or selling price.<sup>23</sup> Locke associated this idea with Karl Marx. However, there is a caveat. The labor must be continuous for someone to claim rights over the property.<sup>24</sup>

Essentially, in order for the rights over the property to accrue, there are four premises that ought to be present. Firstly, that property must be in person; it asserts that labor is the primary source of value. This means that the value of any good or service is fundamentally derived from the labor expended in its production. Without labor, raw materials and resources have no inherent value; it is the human effort and ingenuity that transform them into valuable products.<sup>25</sup>

Secondly, that property is found in the labour input. It posits that the amount of labor required to produce an item determines its value. This premise emphasizes the quantifiable aspect of labor: the more labor-intensive a product is, the higher its value. This measurement is typically based on the average amount of time and effort necessary to produce the item under normal conditions.<sup>26</sup>

Thirdly, the labor theory suggests that equitable ownership is tied to the labor input. According to this principle, individuals have a rightful claim to the products of their labor. When a person invests their effort and skills into creating or developing something, they are justifiably entitled to own it or benefit from its sale. This notion of rightful ownership aligns closely with Locke's views on property rights and the moral basis for ownership.<sup>27</sup> Lastly, the theory introduces the idea that continuous labor is essential for maintaining ownership rights. It is not enough to simply initiate the labor process; the effort must be ongoing to sustain the claim over the property. This continuous investment ensures that

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<sup>20</sup>Tuckness A, 'Locke's Political Philosophy' The Stanford Encyclopedia of Philosophy, 11 January 2016  
<<https://plato.stanford.edu/entries/locke-political/>> 24 August 2024

<sup>21</sup> Tully J, *A discourse on property*, Cambridge University Press, London, 1982, 116.

<sup>22</sup> Tully J, *A discourse on property*, Cambridge University Press, London, 1982, 116.

<sup>23</sup> Panesar S, 'Theories of Private Property in Modern Property Law', 123

<sup>24</sup> Kimball M, 'On John Locke's Labor Theory of Property' Confessions of a supply-side liberal, 10 September 2017  
<<https://blog.supplysideliberal.com/post/2017/9/10/on-john-lockes-labor-theory-of-property>> on 24 March 2020.

<sup>25</sup> Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2017, 33

<sup>26</sup> Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2017, 33

<sup>27</sup> Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2017, 33

the value is consistently being added and maintained, justifying the ongoing ownership and rights over the produced goods.<sup>28</sup>

In the context of cohabitation unions, both parties typically contribute to property acquisition, which, if recognized under formal marriage, would be classified as matrimonial property. Contributions can be categorized into monetary and non-monetary forms, encompassing both direct and indirect efforts towards property. Applying Locke's perspective to the determination of a cohabitation union suggests that cohabitantes should have rights to the property acquired during their partnership. However, a significant challenge arises in quantifying these contributions; while theoretically feasible, practical application proves difficult. This ambiguity complicates the determination of each partner's interest in the property they acquired together /jointly during the life of their union.. Ultimately, this theory supports the notion that cohabiting couples who acquire property together and contribute to its maintenance should possess an equitable interest in that property. The lack of a clear legal framework exacerbates these issues, leaving cohabiting partners vulnerable and without guaranteed rights to their shared assets.

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<sup>28</sup>Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2017, 33

## 1.1 Literature review

Various authors have highlighted the lack of a legal framework to protect cohabitation in Kenya, particularly regarding the proprietary rights of cohabitants. The literature emphasizes that, in the absence of statutory protections, cohabitants are often forced to seek recourse through the courts. While courts have occasionally invoked the presumption of marriage to provide some protection to cohabitants, they are often required to exercise judicial discretion in the absence of clear legal provisions. This reliance on discretion undermines the fundamental legal principle that the law should be predictable and consistent in its application. Therefore, this section will review key literature on this issue to identify the gaps in Kenya's legal framework and highlight the urgent need for reforms to protect cohabitants' proprietary rights.

According to the postmodernist theory, cohabitation is a social development that needs to be acknowledged.<sup>29</sup> The idea behind postmodernism is to show that human inquiry cannot reach reality. Postmodern theorists contend that contemporary society lacks predictable and orderly structures, instead entering a new, chaotic postmodern stage. Rachel Fischer, in her article, argues that in a postmodern society, family structures are varied, and individuals enjoy greater freedom of choice in aspects of their lives that were previously constrained.<sup>30</sup> This increased freedom is evident in their lifestyles, personal relationships, and family arrangements. Fischer identifies two key characteristics of postmodern society: diversity and fragmentation. The article suggests that postmodern theory can be used to highlight societal diversity, leading to the emergence of cohabitation as a form of union that warrants governance. Fischer's analysis implies that the fluidity and multiplicity of family forms necessitate a rethinking of social and legal frameworks. The postmodern perspective underscores that cohabitation, as one such emergent form of union, should be recognized and governed to ensure the rights and protections of individuals involved. Cohabitation represents a significant shift in how people choose to live together, often without formal marriage, reflecting broader changes in societal values and norms.

In their book "Bromley's Family Law," Lowe and Gillian extensively discuss the growth of extramarital cohabitation, particularly in Chapter 24, where they examine the factors contributing

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<sup>29</sup> Fischer RK and Graham A, 'Postmodernism' 54 Reference & User Services Quarterly 1, 2014, 29-33.

<sup>30</sup>Fischer RK and Graham A, 'Postmodernism' 54 Reference & User Services Quarterly 1, 2014, 29-33.

to this trend, especially among the younger generation. They highlight that there is no universal definition for cohabitation. However, the authors propose a definition they consider most appropriate for the Kenyan context. According to the book, a "qualifying cohabitant" should be defined as the survivor of a cohabiting relationship who, immediately before the deceased's death, was living in the same household as the deceased as his or her spouse.<sup>31</sup> This definition is significant because it aligns with various factors recognized by Kenyan courts. These factors include the necessity of living in the same household and maintaining the relationship for a prolonged period. By incorporating these elements, the definition provides a clear framework for understanding cohabitation in the Kenyan legal context. It ensures that the rights of individuals in long-term, cohabiting relationships are acknowledged and protected, particularly in matters of inheritance and legal recognition after the death of a partner.<sup>32</sup> Furthermore, Lowe and Gillian's discussion sheds light on the social and cultural shifts that have led to an increase in cohabitation. Factors such as changing attitudes towards marriage, economic considerations, and the desire for greater personal freedom contribute to the rise of cohabiting relationships. By examining these dynamics, the authors provide a comprehensive understanding of how cohabitation is evolving and its implications for family law

In the journal article "Law Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom," Kamau explores the intricate nature of family law in Kenya, arguing that the current legal framework creates a false dichotomy between formal law and custom. This bifurcation suggests that individuals must exclusively adhere to one legal system, either formal state law or traditional customary law.<sup>33</sup> However, the reality is much more complex, as people's lived experiences often transcend these rigid legal boundaries. The author posits that the practice of cohabitation in Kenya is deeply rooted in African customary law, where informal unions have long been recognized and respected within communities. Despite this, the Kenyan legal system predominantly acknowledges only the formal legal framework, neglecting the validity and significance of customary practices. This legal myopia leads to a failure to recognize and incorporate the intersecting legal orders that individuals navigate in their daily lives.

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<sup>31</sup>Bromley's Family Law, Lowe, Gillian

<sup>32</sup>Bromley's Family Law, Lowe, Gillian

<sup>33</sup>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

As a result of the current situation, when Kenyan courts adjudicate matters related to family law, they often overlook the nuanced realities of cohabiting relationships. This oversight is particularly detrimental to women, who may rely on customary practices for their social and economic security. For instance, women in long-term cohabiting relationships might face significant injustices regarding inheritance rights, property division, and child custody as the formal legal system does not adequately protect their interests. Kamaus critique highlights the need for a more integrative approach to family law in Kenya, one that acknowledges and respects the coexistence of formal and customary legal systems.<sup>34</sup> By doing so, the legal framework can better reflect the diverse and evolving nature of family structures and relationships. Recognizing cohabitation as a legitimate union within the Marriage Act would help mitigate injustices and ensure that women's rights are protected. <sup>35</sup>In conclusion, the Kamaus article calls for a reevaluation of the Kenyan legal system to move beyond the false dichotomy of formal law and custom. Embracing legal pluralism and acknowledging the interplay between different legal orders can lead to a more just and equitable system that truly reflects the lived experiences of all Kenyans, particularly those in cohabiting relationships.

Moses Muniu, in his paper, highlights that while Kenyan law acknowledges the existence of cohabitation unions under the Marriage Act (2014), it fails to provide clear procedures for the distribution or ownership of property acquired during and after cohabitation. The law also lacks provisions outlining the rights and obligations of cohabitants.<sup>36</sup> Muniu examines the role of cohabitation in Kenya and the legal framework governing property rights within cohabiting unions. Through a comparative study, he explores the jurisprudential frameworks in England and Scotland, which have established mechanisms to guarantee and protect the property rights of cohabitants.<sup>37</sup>

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<sup>34</sup>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

-<<http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/28013>>

<sup>35</sup>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-<<http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/28013>>

<sup>36</sup> Muniu MM, 'Property Rights in Cohabitation Unions in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018,

38-40.--<<https://su-plus.strathmore.edu/server/api/core/bitstreams/8f9ce624-a97b-431a-9991-66b6449e767c/content>>26 August 2024

<sup>37</sup>Muniu MM, 'Property Rights in Cohabitation Unions in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018,

38-40.--<<https://su-plus.strathmore.edu/server/api/core/bitstreams/8f9ce624-a97b-431a-9991-66b6449e767c/content>>26 August 2024

Muniu depicts how these jurisdictions have implemented laws that ensure cohabitants' rights are safeguarded, contrasting this with Kenya's current legal approach. He recommends amending Kenyan law to formally recognize cohabitation as a type of marriage, which would clarify the rights of cohabitees and eliminate confusion.<sup>38</sup> This confusion arises from the blanket rule under the Land Registration Act (2012), which presumes that property not explicitly addressed by law is jointly owned and should be divided equally. However, Muniu overlooks a critical legal gap: cohabitees who separate or seek inheritance through intestacy often struggle to claim a share of property not registered in their names if they cannot sufficiently establish a presumption of marriage. As a result, these individuals are left without adequate legal recourse, exposing a vulnerable group to potential loss of property rights.<sup>39</sup>

Taria Wafuala in her dissertation the property rights of cohabiting couples in Kenya, highlighting a significant gap in legal protection despite the constitutional guarantee of property ownership under Article 40. While the article affirms citizens' rights to acquire and own property, it does not extend these protections to cohabiting partners, leaving their property interests inadequately safeguarded. In cohabitation unions, both parties often contribute to the acquisition and maintenance of property, which, if recognized as a marital union, would be classified as matrimonial property. The paper argues that property acquired during cohabitation should be treated as jointly owned, particularly when both partners contribute to its improvement.<sup>40</sup> This perspective aligns with the principles of equity and justice, recognizing that contributions can be both monetary and non-monetary. To address these issues, the paper advocates for the establishment of cohabitation agreements that clearly delineate the rights and obligations of each partner. Such agreements would provide a legal basis for property claims, thereby reducing disputes during the dissolution of cohabiting unions.<sup>41</sup> By

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<sup>38</sup> Muniu MM, 'Property Rights in Cohabitation Unions in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018, 38-40.--<<https://su-plus.strathmore.edu/server/api/core/bitstreams/8f9ce624-a97b-431a-9991-66b6449e767c/content> >26 August 2024

<sup>39</sup> Muniu MM, 'Property Rights in Cohabitation Unions in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018, 38-40.--<<https://su-plus.strathmore.edu/server/api/core/bitstreams/8f9ce624-a97b-431a-9991-66b6449e767c/content> >26 August 2024

<sup>40</sup> Wafula T, 'Analysis of Succession of Property In Kenya in the case of Cohabitees' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018.--<<https://su-plus.strathmore.edu/server/api/core/bitstreams/a02bfc85-cb9b-46e1-acfb-1d6ac89c4ca8/content> > 27 August 2024

<sup>41</sup> Wafula T, 'Analysis of Succession of Property In Kenya in the case of Cohabitees' Unpublished LLB Dissertation, Strathmore University, Nairobi,

formalizing these arrangements, cohabiting couples can achieve greater legal certainty and protection for their shared assets, aligning with the constitutional mandate for equal rights in property ownership. This approach not only promotes fairness but also acknowledges the evolving nature of family structures in contemporary Kenyan society.

The book "Gender Perspectives on Property and Inheritance Rights: Kenya," by Wambui Kanyi and Maina Ngunjiri, provides a comprehensive exploration of critical gender issues related to property and inheritance rights within the Kenyan context. It highlights significant gaps in the existing legal framework that often fails to adequately protect women's interests, particularly in cohabiting relationships where legal recognition is notably lacking. One of the central themes of the book is the inadequacy of Kenyan laws in recognizing the rights of women in cohabiting unions. Despite constitutional provisions aimed at promoting gender equality, the practical application of these laws frequently falls short, leaving women vulnerable to property disputes and inequitable treatment. The authors emphasize that cultural norms and societal attitudes further complicate this issue, as they often prioritize male inheritance and control over property. Such entrenched beliefs hinder women's ability to assert their rights to property acquired during cohabitation.<sup>42</sup> Kanyi and Ngunjiri advocate for urgent legal reforms that explicitly recognize cohabitation as a valid union, thereby affording partners equitable rights to property. They argue that acknowledging both monetary and non-monetary contributions is essential for ensuring fairness in property distribution. The authors call for a gender-sensitive approach to property law, one that considers the unique challenges faced by women in asserting their rights. This approach includes promoting awareness of women's rights and establishing mechanisms for legal recourse in cases of property disputes.<sup>43</sup>

The book offers valuable recommendations for policymakers, urging them to create a more inclusive legal framework that protects the property rights of cohabiting couples. This includes advocating for the establishment of cohabitation agreements that clarify rights and obligations, thereby reducing

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2018,--<<https://su-plus.strathmore.edu/server/api/core/bitstreams/a02bfc85-cb9b-46e1-acfb-1d6ac89c4ca8/content>> 27  
August 2024

<sup>42</sup>Women's Land and Property Rights in Kenya--<<https://land.igad.int/index.php/documents-1/countries/kenya/gender-3/625-women-s-land-and-property-rights-in-kenya/file>> on 16 January 2025

<sup>43</sup>Women's Land and Property Rights in Kenya--<<https://land.igad.int/index.php/documents-1/countries/kenya/gender-3/625-women-s-land-and-property-rights-in-kenya/file>> on 16 January 2025

potential conflicts during dissolution. Overall, "Gender Perspectives on Property and Inheritance Rights: Kenya" serves as an essential resource for understanding the intersection of gender, law, and property rights in Kenya, highlighting the need for reforms that enhance legal protections for women in cohabiting relationships.<sup>44</sup>

Kodiyo, in their paper explore the complexities of property rights for individuals in cohabiting unions, particularly within common law jurisdictions such as England and Kenya.<sup>45</sup> His paper highlights the distinction between cohabitation and marriage, noting that while cohabitants often share resources and acquire property together, disputes frequently arise when these relationships end. In Kenya, the Matrimonial Property Act of 2013 governs the division of property for couples whose cohabitation is deemed equivalent to marriage.<sup>46</sup> However, the absence of a comprehensive legal framework for cohabitation leaves many individuals vulnerable. Courts are compelled to rely on doctrines such as resulting trusts and presumptions of advancement to resolve property disputes. The core argument is for the establishment of a structured legal framework that explicitly recognizes cohabitation, aiming to ensure equitable treatment and protect the financial interests of the more vulnerable party—often women—while maintaining a balance between legal principles and pragmatic judicial outcomes.<sup>47</sup>

In the article "Shared Lives, Separate Laws: Understanding Cohabitation Without an Agreement," Mylies examines the legal implications of cohabiting without a formal agreement, particularly focusing on property ownership and the division of assets upon separation.<sup>48</sup> The article underscores

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<sup>44</sup>Women's Land and Property Rights in Kenya—<<https://land.igad.int/index.php/documents-1/countries/kenya/gender-3/625-women-s-land-and-property-rights-in-kenya/file>> on 16 January 2025

<sup>45</sup>Kodiyo K, The Judicial Approach to Cohabitation; A Comparative Study of the Laws of England and Wales and Kenya, (107) 2021—<[https://www.researchgate.net/publication/357805992\\_The\\_Judicial\\_Approach\\_to\\_Cohabitation\\_A\\_Comparative\\_Study\\_of\\_the\\_Law\\_of\\_England\\_and\\_Wales\\_and\\_Kenya](https://www.researchgate.net/publication/357805992_The_Judicial_Approach_to_Cohabitation_A_Comparative_Study_of_the_Law_of_England_and_Wales_and_Kenya)> on 22 August 2024

<sup>46</sup>Kodiyo K, The Judicial Approach to Cohabitation; A Comparative Study of the Laws of England and Wales and Kenya, (107) 2021—<[https://www.researchgate.net/publication/357805992\\_The\\_Judicial\\_Approach\\_to\\_Cohabitation\\_A\\_Comparative\\_Study\\_of\\_the\\_Law\\_of\\_England\\_and\\_Wales\\_and\\_Kenya](https://www.researchgate.net/publication/357805992_The_Judicial_Approach_to_Cohabitation_A_Comparative_Study_of_the_Law_of_England_and_Wales_and_Kenya)> on 22 August 2024

<sup>47</sup> Kodiyo K, The Judicial Approach to Cohabitation; A Comparative Study of the Laws of England and Wales and Kenya, (107) 2021—<[https://www.researchgate.net/publication/357805992\\_The\\_Judicial\\_Approach\\_to\\_Cohabitation\\_A\\_Comparative\\_Study\\_of\\_the\\_Law\\_of\\_England\\_and\\_Wales\\_and\\_Kenya](https://www.researchgate.net/publication/357805992_The_Judicial_Approach_to_Cohabitation_A_Comparative_Study_of_the_Law_of_England_and_Wales_and_Kenya)> on 22 August 2024

<sup>48</sup>Mylie D, 'Shared Lives, Separate Laws: Understanding Cohabitation Without an Agreement'—<<https://barnardinc.co.za/2024/02/13/shared-lives-separate-laws-understanding-cohabitation-without-an-agreement/>> on 16 January 2024

the challenges faced by cohabiting couples in South Africa, where legal recognition of cohabitation is significantly less robust than that afforded to marriage. A central theme of the article is that contributions to property can be claimed by a non-owner partner, even if only one partner is listed as the owner. This principle highlights the potential for claims based on contributions made during the relationship. However, it also emphasizes the complexities involved in proving such contributions. Without a formal agreement delineating each partner's rights and responsibilities, establishing ownership claims can become contentious and legally challenging.

Mylies stress the importance of clarity through formal agreements, such as cohabitation agreements, which serve as legally binding contracts that define property ownership and outline how assets will be divided in the event of separation. The absence of these agreements can lead to disputes that may result in emotional and financial strain for both parties. The article illustrates this point with real-life case studies where partners who contributed equally to household expenses or property acquisition found themselves at a disadvantage when one partner held legal title to the property. In these instances, having a documented agreement could have prevented disputes by clearly stating each partner's share and rights.<sup>49</sup> Ultimately, Mylies advocates for cohabiting couples to consider entering into cohabitation agreements to protect their interests. The article posits that while South African law does not automatically confer rights upon cohabiting partners as it does for married couples, proactive legal measures can help ensure fairness and clarity in property ownership and division. By establishing clear terms through formal agreements, couples can mitigate potential conflicts and safeguard their financial futures in the event of separation.<sup>50</sup>

Mundia, in her dissertation, highlights the evolving recognition of property rights for cohabitees, emphasizing the need for legal reforms to protect their contributions to shared property, even when not legally titled in their names.<sup>51</sup> Drawing on comparative studies from jurisdictions like the UK, they

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<sup>49</sup> Mylie D, 'Shared Lives, Separate Laws: Understanding Cohabitation Without an Agreement'--<<https://barnardinc.co.za/2024/02/13/shared-lives-separate-laws-understanding-cohabitation-without-an-agreement/>> on 16 January 2024

<sup>50</sup> Mylie D, 'Shared Lives, Separate Laws: Understanding Cohabitation Without an Agreement'--<<https://barnardinc.co.za/2024/02/13/shared-lives-separate-laws-understanding-cohabitation-without-an-agreement/>> on 16 January 2024

<sup>51</sup> Mundia S, 'Protecting cohabitees' right to property within the cohabitation union in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2021 --<<https://su-plus.strathmore.edu/server/api/core/bitstreams/7162e2d5-fa2e-4c9f-955d-b1e5d308fbb7/content>> on 16 January 2025

asserts that individuals who contribute to property development deserve economic benefits from it. The paper emphasizes the importance of societal acceptance and legal acknowledgement of cohabitation as a legitimate union, advocating for equitable property rights to ensure fair distribution upon separation or death.<sup>52</sup> Adding that this is a call for the laws of the state to mirror the societal representation.

## **1.8 Research Methodology**

This paper will adopt a doctrinal research methodology, focusing on the interpretation of existing legal principles, rules, and statutes related to cohabitation. The analysis will primarily rely on qualitative data from secondary sources, utilizing desktop research. The study will incorporate a review of publications, articles, journal articles, books, and other internet resources. Specifically, it will examine the current legal standing of proprietary rights for cohabiting unions in both Kenya and South Africa, with the aim of drawing lessons that Kenyan policymakers can adopt in the formulation of a legal framework.

South Africa is deemed the most suitable jurisdiction for comparison due to three key reasons. First, both Kenya and South Africa share legal systems rooted in common law, which influences the interpretation and application of legal principles in both jurisdictions. This common foundation provides a basis for meaningful comparison. Second, Kenya and South Africa have a shared historical background as former British colonies. This colonial legacy has significantly shaped their respective legal frameworks, leading to similarities in legal doctrines and statutory developments. Third, both countries operate mixed legal systems that incorporate elements of common law and customary law. This interplay between formal and informal legal structures makes South Africa a relevant jurisdiction from which Kenya can derive valuable lessons in regulating cohabitation. These similarities underscore the relevance of South Africa's legal approach in informing potential reforms to Kenya's cohabitation laws.

This comparative approach will highlight the strengths and weaknesses of each country's legal frameworks regarding cohabitation and property rights, ultimately providing recommendations for

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<sup>52</sup>Mundia S, 'Protecting cohabitants' right to property within the cohabitation union in Kenya, Unpublished LLB Dissertation, Strathmore University, Nairobi, 2021 —<  
<https://su-plus.strathmore.edu/server/api/core/bitstreams/7162e2d5-fa2e-4c9f-955d-b1e5d308fbb7/content> > on 16 January

reform in Kenya to better protect the rights of cohabiting partners. By understanding how South Africa addresses these issues, this study aims to contribute to the ongoing discourse on improving legal protections for cohabiting unions in Kenya

## **1.9 Limitations to the Study**

This study primarily adopts a desktop research methodology, relying on the analysis of statutes, case law, journal articles, and other secondary sources. The decision to forgo empirical data collection through interviews and questionnaires is largely influenced by financial constraints, as gathering and analyzing such data would require significant resources beyond the scope of this study. Furthermore, the research is constrained by the time limitations imposed on the completion of the LLB research paper, which restricts the feasibility of conducting extensive fieldwork. Given these limitations, the study focuses on a doctrinal legal analysis, enabling a thorough examination of existing legal frameworks, judicial interpretations, and comparative approaches to cohabitation laws.

## **2.0 Chapter Breakdown**

*Chapter One* will provide an introduction, outlining the objectives of the research and the research questions. It will highlight the gap in legal recognition for cohabitees' property rights during separation in Kenya, establishing the context and significance of the study.

*Chapter Two* will explore the existing legal frameworks regarding proprietary rights for individuals in cohabitation unions during separation in Kenya. This analysis will primarily focus on the Marriage Act (2014) and relevant precedents that shape this area of law.

*Chapter Three* will examine how South Africa legally recognizes the proprietary rights of individuals in cohabitation unions during separation. This chapter will delve into South Africa's legal framework, exploring how it addresses property rights for cohabiting partners and the implications of these laws.

*Chapter Four*, lessons will be drawn from South African legal culture to inform Kenyan legislators on how to emulate effective practices when drafting a legal framework to govern cohabitation unions and their associated rights. This comparative approach aims to identify best practices that could enhance the protection of cohabitees' rights in Kenya.

*Chapter Five* will conclude the research by summarizing the findings and presenting recommendations for policy reform. This chapter will synthesize insights from previous chapters, offering actionable suggestions for improving legal protections for cohabiting partners in Kenya, thereby addressing the identified gaps in the current legal framework

## CHAPTER TWO

### THE CURRENT LEGAL STANDING OF PROPERTY RIGHTS FOR COHABITATION UNION UPON SEPARATION IN KENYA

#### 2.1 Introduction

This chapter critically examines the legal regulation of cohabitation unions in Kenya, with a particular emphasis on the proprietary rights of parties upon separation. The primary objective is to demonstrate that the current legal framework does not adequately recognize or protect cohabitation unions, leaving parties in such relationships vulnerable, particularly in matters of property rights. This analysis will be conducted through an examination of relevant statutory provisions and judicial precedents, highlighting the absence of a clear legal framework governing cohabitation. The chapter argues that this legal lacuna necessitates the introduction of a comprehensive legislative framework to provide legal certainty, safeguard the proprietary rights of cohabiting partners, and ensure equitable outcomes upon dissolution of such unions. By identifying these gaps, this discussion lays the groundwork for advocating for legislative reform to afford cohabiting partners legal protection, particularly in the division of property, a highly contentious issue in the Kenyan legal landscape.

The analysis will follow a chronological order, beginning with the supreme law of the land: the Constitution of Kenya (2010). The Constitution serves as the foundational basis from which all related laws are derived, particularly those concerning individual rights.<sup>53</sup> Following this, we will examine the Marriage Act (2014), which provides a legal framework for marriage and indirectly impacts cohabitation by acknowledging its existence without offering explicit protections.<sup>54</sup> Subsequently, we will analyze the Land Act (2012) and the Land Registration Act, which govern property ownership and registration in Kenya. Finally, this chapter will explore how judicial actors have established precedents in matters related to cohabitation and property rights, specifically through landmark cases such as *Hortensiah Wanjiku Yawe v Public Trustee*, *Mary Njoki v. John Kinyanjui Muthuru*, *Mary Nyambura Kangara v. Paul Ogari Manyaka*. By examining these Acts of parliament and precedents, this chapter aims to provide a comprehensive explanation of how cohabitation unions

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<sup>53</sup> Holding N, 'The Fundamentals of a Constitution' International IDEA Constitution Brief, February 2017.--<  
<https://www.idea.int/sites/default/files/publications/the-fundamentals-of-a-constitution.pdf>> February 2025

<sup>54</sup>Preamble, *Marriage Act* (2014)

are currently regulated in Kenya and elucidate the underlying principles and rationale guiding these legal provisions.

## 2.2 The Constitution of Kenya

The family is considered the fundamental unit of society, with marriage being its genesis.<sup>55</sup> Recognizing this, the drafters of the Constitution ensured the protection and continuity of these units. Aristotle described the family as a "natural association" established to fulfil basic human needs, serving as the foundation upon which larger political structures are built.<sup>56</sup> This underscores the family's importance in maintaining societal stability and functioning.<sup>57</sup> The Constitution of Kenya acknowledges these principles under Article 45 (1).<sup>58</sup> Article 45(2) accords the constitutional right to marry, providing that "every adult has the right to marry a person of the opposite sex, based on the free consent of the parties."<sup>59</sup> Additionally, Article 45(3) also emphasizes the principle of equality by stating that "parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage, and at its dissolution."<sup>60</sup> This article reflects the state's commitment to upholding gender equality and protecting the rights of both parties in a marriage.

Article 40 of the Constitution of Kenya provides a fundamental right to property, affirming that every individual has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya.<sup>61</sup> This provision establishes that the state should not enact any legislation that would deprive an individual of their property rights. It advocates for laws that protect these rights, suggesting that it is reasonable to expect the state to enact legislation safeguarding cohabitantes' property rights, particularly in situations where the presumption of marriage cannot be established.

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<sup>55</sup>Jowett B, Politics by Aristotle Book 1, 350 B. C. E.  
-<<https://classics.mit.edu/Aristotle/politics.1.one.html>> on 16 January 2025.

<sup>56</sup>Jowett B, Politics by Aristotle Book 1, 350 B. C. E.  
-<<https://classics.mit.edu/Aristotle/politics.1.one.html>> on 16 January 2025.

<sup>57</sup>Jowett B, Politics by Aristotle Book 1, 350 B. C. E.  
-<<https://classics.mit.edu/Aristotle/politics.1.one.html>> on 16 January 2025.

<sup>58</sup>Article 45(1), *Constitution of Kenya* (2010)

<sup>59</sup>Article 45(2), *Constitution of Kenya* (2010)

<sup>60</sup> Article 45(3), *Constitution of Kenya* (2010)

<sup>61</sup> Article 40, *Constitution of Kenya* (2010)

Furthermore, Article 68 of the Constitution mandates Parliament to enact legislation regulating the recognition and protection of property acquired during the duration of the union, specifically addressing the home shared during the duration of their union and upon the termination of the union.<sup>62</sup> This provision underscores the expectation that legal frameworks should extend protections not only to formally recognized marriages but also to cohabiting unions, which often face legal ambiguities regarding property rights.

In light of these constitutional provisions, there is a compelling argument for the Kenyan government to develop comprehensive laws that explicitly protect the property rights of cohabitants. Such legislation would ensure that individuals in cohabiting relationships are afforded similar protections as those in formal marriages, thereby promoting equity and justice within the legal system.

### **2.3 The Place of Cohabitation under the Constitution**

The Constitution of Kenya (2010) does not explicitly recognize cohabitation unions as a form of marriage. Instead, Article 45 provides a framework for understanding marriages, emphasizing that marriage is a voluntary union between adults of the opposite sex, founded on the principles of equality.<sup>63</sup> This explicit focus on formal marriage has often led to the exclusion of cohabiting unions from legal recognition. However, a purposive and transformative interpretation of constitutional principles, particularly those relating to equality, autonomy, and personal freedom, suggests the need for legal recognition and protection of cohabiting partners, especially regarding property rights.

While cohabitation is not a marriage, the foundational principles underlying Article 45, particularly consent and equality, are equally present in cohabiting relationships. Article 45(2) affirms that adults have the right to marry based on free consent, but it does not explicitly exclude other forms of unions from constitutional protection.<sup>64</sup> As Okoth-Ogendo argues, African customary legal traditions often recognize unions that do not conform to rigid Western marriage formalities, yet they still embody essential elements of family relationships, including shared responsibilities and social recognition.<sup>65</sup> Similarly, legal scholar Flavia Agnes contends that the absence of formal legal recognition does not

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<sup>62</sup> Article 68, *Constitution of Kenya* (2010)

<sup>63</sup> Article 45, *Constitution of Kenya* (2010)

<sup>64</sup> Article 45 (2), *Constitution of Kenya* (2010)

<sup>65</sup> Ogendo O HWO, *The Nature of African Customary Law*, Strathmore University Press, Nairobi, 2015

necessarily negate the legitimacy of informal unions, particularly where societal practices acknowledge them.<sup>66</sup> (*Law and Gender Inequality: The Politics of Women's Rights in India*).

Further, the right to marry under Article 45(2) inherently includes the freedom to choose whether to enter into marriage at all. The principle of autonomy embedded in this provision aligns with John Rawls' (1971) theory of justice, which upholds the right of individuals to self-determination (*A Theory of Justice*). This perspective supports the argument that adults should have the freedom to cohabit without formal marriage and still receive legal protections, particularly regarding property rights. A transformative and open interpretation of the Constitution, as advanced by Karl Klare (1998) in his seminal work on constitutional interpretation (*Legal Culture and Transformative Constitutionalism*), calls for an approach that goes beyond rigid textual readings to consider evolving social realities. In this regard, Kenyan law should move towards a framework that recognizes cohabiting unions not as marriages but as distinct relationships deserving of legal protection, particularly in the division of jointly acquired property.

This argument does not seek to equate cohabitation with marriage but rather to emphasize that legal protection should not be limited to formal unions. By recognizing cohabitation within a transformative constitutional framework, Kenyan law can better align with principles of fairness and equality, ensuring that individuals who choose to cohabit are not left without legal recourse, particularly in matters of property division upon separation.

## **2.4 The Marriage Act (2014)**

The codification of the Marriage Act was long overdue in Kenya. Before its enactment, various laws governed marriages in the country. The main aim of the Act was to unify and harmonize these laws. To achieve this, a Commission of Marriage & Divorce was established in 1968 to address the issues and gaps present in the previous marriage and divorce laws.<sup>67</sup>

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<sup>66</sup> Flavia A, *Law and Gender Inequality: The Politics of Women's Rights in India*, Oxford University Press, New Delhi, 2011,

<sup>67</sup> Report of the Commission on the Law of Marriage and Divorce, 1968

Section 6 of the Marriage Act explicitly recognizes six types of marriages: Christian Marriage, Civil Marriages, African Customary Marriage, Hindu Marriage, and Islamic Marriage, acknowledging they all have equal standing.<sup>68</sup> However, cohabiting unions are not included among those who enjoy the rights and protection granted by the state.

Despite the law not recognizing cohabiting unions and not providing for it any further, there seems to be a legal awareness and acknowledgment of their existence and practice within society at large. This is evident in two distinct instances. The first instance is the definition provided under *Section 2 of the Marriage Act*, which describes cohabitation as "an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage."<sup>69</sup> This definition allows for legal interpretation by judicial actors and essentially creates a conjunctive test to determine whether parties qualify as being in a cohabiting union. This means that multiple elements must be satisfied before a conclusion is reached.<sup>70</sup> The second instance is evident in the discussions held by the members of the Commission of Inquiry on Marriage and Divorce, which led to the genesis of the act. Under Section 233, the commission members held that where people have lived together as husband and wife, there ought to be a general presumption of marriage.

They stated, "A reasonable basis would be cohabitation for at least a year in such circumstances, and the couple must have acquired the reputation of being man and wife."<sup>71</sup> This should not apply in proceedings based on alleged bigamy, adultery, or enticement." The commission indirectly upheld the common law doctrine of the presumption of marriage, emphasizing a time period of one year and the general reputation of the couple are factors that ought to be considered in any instance parties are claiming to be in a marriage.

In conclusion, the Marriage Act 2014 does not recognize cohabitation as a union under section 6, and thus trying to accommodate the conversation of property rights encounters a barrier. However, as demonstrated by the instances discussed above, it is clear that the drafters and legislators are aware of the existence and practice of cohabitation within society. Despite this, a fundamental principle upheld

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<sup>68</sup> Section 6, Marriage Act (2014)

<sup>69</sup> Section 2, Marriage Act (2014)

<sup>70</sup> Forms of Legal Reasoning, Stanford Law School.

<https://law.stanford.edu/wp-content/uploads/2018/04/ILEI-Forms-of-Legal-Reasoning-2014.pdf>

<sup>71</sup> Report of the Commission on the Law of Marriage and Divorce, 1968

in both the Marriage Act and the Constitution is the equality of spouses, encompassing their rights and obligations. This raises an important question: does the lack of legal recognition for cohabitation unions justify the injustices faced by those in such relationships?

## **2.5 The Land Act ( 2012) & Land Registration Act (2012)**

Both the Land Act (2012) and the Land Registration Act (2012) include provisions for the recognition and protection of property acquired by partners . The Land Act defines marriage as civil, customary, or religious and outlines matrimonial property as any property owned or leased by one or both spouses and occupied as their family home.<sup>72</sup> It mandates that transactions involving matrimonial property requires the consent of both spouses, safeguarding their property rights.<sup>73</sup> Additionally, the National Land Commission and public officers must adhere to principles like equitable access to land and the elimination of gender discrimination in land laws and practices.<sup>74</sup> In joint tenancy, if one spouse dies, the property is transferred to the surviving spouse.

The Land Registration Act states that any land acquired by a spouse and used by both is presumed and registered as joint property under the Matrimonial Property Act (2013).<sup>75</sup> If one spouse contributes to land registered in the other's name, they are considered owners in common with recognized interests. When dividing such property, the registrar must consider the dependents' interests. Although cohabittees' rights are not explicitly addressed in these Acts, they can be inferred when the presumption of marriage is established. The Matrimonial Property Act presumes that if an instrument of land transfer does not specify the rights of cohabittees, they hold the interest as tenants in common in equal shares.

## **2.6 Hortensiah Wanjiku Yawe v. The Public Trustee (Civil Appeal No. 13 of 1976)**

This case is considered the locus classicus as it was the first instance when the doctrine of presumption of marriage was applied in Kenya. In *Hortensiah Wanjiku Yawe v. The Public Trustee (Civil Appeal No. 13 of 1976)*, the Court of Appeal of Kenya set a significant precedent by

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<sup>72</sup>Section 2, *Land Act* (2012).

<sup>73</sup> Section 79, *Land Act* (2012).

<sup>74</sup> Section 4(2), *Land Act* (2012)

<sup>75</sup> Section 93(2), *Land Registration Act* (2012).

establishing it as a critical case for recognizing the rights of cohabiters.<sup>76</sup> This case arose following the death of a man who had lived with the appellant, Hortensiah Wanjiku Yawe, for an extended period without a formal marriage ceremony. The deceased passed away intestate, prompting the appellant to seek inheritance rights over his estate. The respondent, acting as the Public Trustee, challenged her claim, arguing that no valid marriage existed between the parties due to the absence of formalities required under the marriage laws of Kenya.<sup>77</sup> The Court of Appeal, led by Madan JA, applied the doctrine of presumption of marriage for the first time in Kenya<sup>78</sup>.

This case was foundational in advocating for the rights of cohabiters. It highlights that courts may prioritize substantive justice and social realities over procedural formalities, thereby protecting individuals who enter long-term, marriage-like relationships without formalizing their unions. By recognizing the elements of cohabitation and reputation as sufficient to presume marriage, the decision ensures equitable outcomes, particularly for women who may be vulnerable after the death of a partner or the dissolution of a relationship. The ruling in *Hortensiah Wanjiku Yawe* underscores the progressive role of the judiciary in adapting traditional legal principles to evolving societal norms, reinforcing that marriage is not solely defined by ceremony but also by conduct and community perception.

## **2.7 Mary Nyambura Kangara v. Paul Ogari Manyaka (2023)**

This case represented a pivotal moment in the legal landscape regarding the rights of cohabiters in Kenya. This Supreme Court ruling arose from a complex property dispute following a lengthy cohabitation of 25 years between the parties. The respondent, Paul Ogari Manyaka, sought to enforce his alleged property rights after being evicted from their shared home, claiming that he and Mary Nyambura Kangara were effectively married based on their long-term cohabitation.<sup>79</sup>

Initially, the High Court dismissed Manyaka's claim, ruling that he had failed to provide sufficient evidence to substantiate his assertion of marriage, particularly in light of Kangara's existing marital status with another individual. However, the Court of Appeal overturned this decision, presuming a

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<sup>76</sup>*Hortensiah Wanjiku Yawe v Public Trustee* (1976) eKLR

<sup>77</sup>*Hortensiah Wanjiku Yawe v Public Trustee* (1976) eKLR

<sup>78</sup>*Hortensiah Wanjiku Yawe v Public Trustee* (1976) eKLR

<sup>79</sup>*Mary Nyambura Kangara v Paul Ogari Manyaka* (2023) eKLR

marriage based on the duration of cohabitation and ordering an equal division of the property acquired during their time together.<sup>80</sup>

Upon further appeal to the Supreme Court, critical legal principles surrounding the presumption of marriage were examined. The Court affirmed the doctrine's existence but emphasized that it should be applied sparingly and only when compelling evidence supports it. To establish a presumption of marriage, the Court outlined a rigorous nine-step test that includes criteria such as long-term cohabitation, legal capacity to marry, mutual intent to marry, and public representation as a married couple. The onus of proof rests on the party claiming the presumption, with strong evidence required to rebut it.<sup>81</sup>

In addressing the division of property, the Supreme Court recognized that while Manyaka lacked legal capacity to marry Kangara due to her existing marriage, both parties had made significant contributions to the acquisition and development of their shared property. The Court invoked principles related to constructive trusts and unjust enrichment, determining that both parties had a common intention regarding their beneficial interest in the property despite the absence of a formal marriage. This recognition was crucial in ensuring that neither party would be unjustly enriched at the expense of the other.

Ultimately, the Supreme Court awarded Kangara a 70% share and Manyaka a 30% share of the property, reflecting their respective contributions. This ruling not only underscores the complexities surrounding property rights for cohabiting partners but also highlights an essential judicial acknowledgment of cohabitants' rights in Kenya.<sup>82</sup> By establishing a constructive trust based on contributions rather than formal marital status, this case advocates for equitable outcomes and emphasizes the urgent need for legislative reforms to provide clearer protections for individuals in non-marital relationships.<sup>83</sup> This decision is significant as it reinforces the judiciary's role in adapting traditional legal principles to contemporary societal norms and calls for comprehensive legal frameworks that recognize and protect the rights of cohabiting partners in Kenya.

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<sup>80</sup> *Mary Nyambura Kangara v Paul Ogari Mayaka* (2023) eKLR

<sup>81</sup> *Mary Nyambura Kangara v Paul Ogari Mayaka* (2023) eKLR

<sup>82</sup> *Mary Nyambura Kangara v Paul Ogari Mayaka* (2023) eKLR

<sup>83</sup> Omabai K, Division of Property Acquire During the Subsistence of Cohabitation in Kenya : An Analysis of *Mary Nyambura vs Paul Ogari Manyaka* -< <https://www.academia.edu/120903178> > January 2025

In conclusion, collectively, these cases illustrate an urgent need for a comprehensive legislative framework that explicitly addresses the rights and obligations of cohabiting partners, ensuring equitable treatment and legal clarity in property disputes arising from non-marital relationships.

## **2.8 The Historical Underpinning of Property Rights in a Marriage from a Kenyan Lens**

Traditionally within African societies, property was held communally, with the primary condition for having a right over the property being membership in the community.<sup>84</sup> However, the male head of the household governed the property under a patriarchal system. This meant that while all community members theoretically had access to communal property, inheritance was determined through the male lineage.

In this system, men were the primary heirs because they remained within the family unit, while married women moved to their husbands' homes, losing their claim to property in their family of origin. Consequently, this patrilineal system systematically disenfranchised women, both on the basis of their gender and marital status. Women faced significant barriers to inheriting property because inheritance was reserved for male descendants. For instance, a wife who did not have a son would struggle to inherit her husband's property, as the property would typically pass to the nearest male relative. This patriarchal inheritance system perpetuated gender inequality by limiting women's property rights and economic security, reinforcing their dependency on male family members for access to property and resources. This was additionally buttressed during British colonial rule, where the application of the doctrine of coverture. The doctrine is a legal principle in common law that significantly influenced women's legal status, especially in marriage. Originating from English common law, it essentially meant that upon marriage, a woman's legal rights and obligations were subsumed under those of her husband.

Under coverture, a married woman, or "femme covert," had no separate legal identity from her husband. She could not own property, enter into contracts, or earn wages independently. Any property a woman owned before marriage became her husband's upon marriage. Similarly, any income or assets she acquired during the marriage also belonged to him. This doctrine reflected and reinforced

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<sup>84</sup> Ogendo, O. The Tragic African Commons: A Century of Expropriation, Suppression, and Subversion." 2002  
<[https://www.academia.edu/35148233/The\\_Tragic\\_African\\_Commons\\_A\\_century\\_of\\_expropriation\\_suppression\\_and\\_subversion](https://www.academia.edu/35148233/The_Tragic_African_Commons_A_century_of_expropriation_suppression_and_subversion)> January 2025

the societal belief that a husband was the head of the household and responsible for his wife's welfare. As a result, women had limited autonomy and were largely dependent on their husbands for financial and legal matters.

In conclusion, the question begs that if women within traditional marriages face significant barriers to property inheritance due to a patriarchal mindset, the challenges are even greater for women in cohabiting unions. Without formal recognition or legal protections, cohabiting women are even more vulnerable to disenfranchisement, lacking both legal and societal support to claim property rights or economic security. The systemic gender inequality embedded in these practices underscores the urgent need for comprehensive legal reforms to protect the property rights of cohabiting couples.

## **2.9 Conclusion**

This chapter has provided a comprehensive analysis of the current legal standing of cohabitation unions in Kenya, with a particular focus on the proprietary rights of individuals in such relationships. By examining the constitutional framework, the Matrimonial Property Act (2013), the Marriage Act (2014), and the common law doctrine of the presumption of marriage, it is evident that the legal system in Kenya does not explicitly recognize or protect cohabitation unions. While the Constitution of Kenya 2010 enshrines the principles of equality, consent, and the right to property, these provisions have not been extended to cohabiting couples in a manner that ensures their rights are safeguarded. The Matrimonial Property Act and the Marriage Act, while progressive in their recognition of gender equality and the protection of matrimonial property, fail to address the unique challenges faced by cohabiting couples, leaving them vulnerable to legal and economic disenfranchisement. The analysis reveals a significant legal gap in the protection of cohabiting unions, particularly in relation to property rights. The absence of statutory recognition means that cohabiting couples must rely on judicial discretion and equitable principles, which often leads to inconsistent and unpredictable outcomes. The doctrine of the presumption of marriage, while providing some recourse, is not a sufficient substitute for explicit legal recognition. It requires cohabiting couples to meet stringent criteria, such as long-term cohabitation and public repute as a married couple, which may not always be feasible or fair.

Furthermore, the historical and cultural context of property rights in Kenya highlights the systemic

gender inequalities that persist, particularly for women in both traditional marriages and cohabiting unions. The patriarchal inheritance systems and the legacy of colonial laws, such as the doctrine of coverture, have historically disadvantaged women, and these challenges are exacerbated for women in cohabiting relationships who lack formal legal protections. The current legal framework in Kenya does not adequately address the realities of cohabitation unions, leaving individuals in such relationships without the same level of legal protection and recognition afforded to married couples. This legal gap underscores the need for legislative reform to ensure that the rights of cohabiting couples, particularly women, are protected. Such reforms should aim to provide clear statutory recognition of cohabitation unions, establish equitable property rights, and ensure that the principles of equality and non-discrimination enshrined in the Constitution are fully realized for all individuals, regardless of their marital status. Only through such comprehensive legal reforms can Kenya move towards a more inclusive and just legal system that reflects the evolving social realities of its citizens.

## CHAPTER THREE

### THE CURRENT LEGAL STANDING OF PROPERTY RIGHTS FOR COHABITATION UNIONS UPON SEPARATION IN SOUTH AFRICA

#### 3.1 Introduction

Cohabitation, as a form of intimate partnership, is experiencing a global increase in prevalence, with a growing number of couples choosing this arrangement over traditional forms of marriage, such as civil or religious ceremonies.<sup>85</sup> This rise in cohabitation has prompted legislative intervention in various jurisdictions, including South Africa, the United Kingdom, and Argentina, aimed at providing legal protections for cohabiting partners. This chapter will examine specifically South Africa's legal framework addressing the protection and provision of property rights within cohabiting unions, with the objective of drawing comparative lessons relevant to potential Kenyan legislative developments. South Africa has been selected as a comparative jurisdiction based on four key distinctive attributes: shared colonial history as British Colonies, its status as an African nation, common law as one of its legal systems,<sup>86</sup> and significant social and cultural similarities with Kenya. Based on the above, the author believes that it is the most suitable state to utilise as a benchmark on the basis that the probability of acceptability of the proposal would be higher.

#### 3.2. The History of Cohabitation in South Africa.

The history of cohabitation as a union in South Africa is marked by significant social changes and evolving legal frameworks that reflect the complexities of modern relationships. Traditionally, South African society has emphasized formal marriage, influenced by cultural, religious, and historical contexts. However, over the past few decades, cohabitation has gained prominence as an alternative to marriage, leading to discussions about the legal recognition and protection of cohabiting couples. Statistics indicate that cohabitation rates have increased significantly over recent decades. According to census data, approximately 8.6% of the South African population was involved in cohabiting relationships by 2011.<sup>87</sup> Metersfeld a South African scholar is of the belief that the intersection of the

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<sup>85</sup>Preller, B. "Unlocking the Legal Mysteries of Universal Partnerships: Navigating South Africa's Modern Relationship Landscape." January 2024 –<<https://familylaws.co.za/understanding-south-african-universal-partnerships/>>

<sup>86</sup>Boggs P, 'A Snapshot of the Legal System In South Africa' 15 January 2025 –<[https://larevue.squirepattonboggs.com/a-snapshot-of-the-legal-system-in-south-africa\\_a1902.html](https://larevue.squirepattonboggs.com/a-snapshot-of-the-legal-system-in-south-africa_a1902.html)> 19 January 2025

<sup>87</sup>Shepherd R, 'Cohabitation and Legal Recognition in South Africa', January 2025.

–<<https://schoemanlaw.co.za/common-law-marriage/>> 19 January 2025

formal apartheid accompanied with the economic and social survival, is the causal link for the increase of domestic partnerships.<sup>88</sup> Among its peers within the African region, South Africa considered the most progressive as it acknowledges the social changes with regard to marriage and formulates laws to reflect the above changes. The above was evident with the legalization of same-sex marriage.<sup>89</sup>

Cohabitation in South Africa can be traced back to the apartheid era when socio-economic conditions forced many men to migrate to urban areas for work.<sup>90</sup> During this time, married men often formed non-marital families while living away from their spouses. This phenomenon was partly driven by the high costs associated with formal marriage and the desire for companionship without the formalities of marriage.<sup>91</sup> As the society transitioned away from apartheid, the dynamics of relationships began to change. The rise of urbanization and changing attitudes towards marriage and family structures contributed to an increase in cohabitation. By the late 20th century, cohabitation had become a more accepted alternative to traditional marriage, particularly among younger generations who sought to avoid the formalities and financial burdens associated with marriage.<sup>92</sup>

Despite the increasing prevalence of cohabitation, South African law has historically been slow to recognize the rights of cohabiting couples. Unlike married couples, cohabitants do not automatically enjoy the same legal protections concerning property rights upon separation. This legal disparity has left many individuals in vulnerable positions, particularly when long-term cohabiting relationships come to an end. However, legislative and judicial developments have sought to mitigate these challenges and provide legal recourse for cohabitants. Three primary approaches have emerged in South African law concerning the protection of property rights for cohabiting couples: (1) the recognition and enforcement of cohabitation agreements; (2) the introduction of the Draft Domestic Partnerships Bill, and (3) the judicial recognition of express or implied partnerships.

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<sup>88</sup> Meyersfeld, B, "If You Can See, Look: Domestic Partnerships and the Law." Constitutional Court Review, —<<https://heinonline.org/HOL/P?h=hein.journals/conrev3&i=271> >February 2025

<sup>89</sup> LaFraniere, S, "South African Parliament Approves Gays Marriages," November 2006 <<https://www.nytimes.com/2006/11/14/world/africa/14cnd-safrica.htm> > March 2025

<sup>90</sup> Hosegood V, "Dispensing with marriage: Marital and partnership trends in rural KwaZulu-Natal, South Africa 2000-2006," Demogr Res. June 2009<<https://www.demographic-research.org/volumes/vol20/13/20-13.pdf> > March 2025

<sup>91</sup> Hosegood V, "Dispensing with marriage: Marital and partnership trends in rural KwaZulu-Natal, South Africa 2000-2006," Demogr Res. June 2009<<https://www.demographic-research.org/volumes/vol20/13/20-13.pdf> > March 2025

<sup>92</sup> Hosegood V, "Dispensing with marriage: Marital and partnership trends in rural KwaZulu-Natal, South Africa 2000-2006," Demogr Res. June 2009<<https://www.demographic-research.org/volumes/vol20/13/20-13.pdf> > March 2025

First, cohabitation agreements have been acknowledged as a means for cohabitants to regulate their financial and proprietary affairs.<sup>93</sup> These agreements, akin to contracts, allow couples to set out their respective rights and obligations concerning property ownership and financial contributions.<sup>94</sup> The enforcement of such agreements is subject to the general principles of contract law, provided they comply with public policy and legal formalities.

Secondly, the Draft Domestic Partnerships Bill was introduced as an attempt to create a formal legal framework for the regulation of domestic partnerships. While the Bill has yet to be enacted into law, its provisions seek to grant cohabiting partners certain legal protections similar to those afforded to married couples, particularly in matters of property division, maintenance, and inheritance rights<sup>95</sup>. The Bill proposes a registration system for domestic partnerships, which would enable cohabitants to access legal remedies upon dissolution of their relationship.<sup>96</sup>

Finally, South African courts have, in certain instances, recognized express or implied universal partnerships between cohabitants. A universal partnership exists where parties demonstrate a mutual intention to contribute to and share in the profits and losses of a joint venture, which may include a shared household or business.<sup>97</sup> Judicial recognition of such partnerships has provided some cohabitants with property rights where a legally enforceable agreement was absent. Courts have relied on the principles of partnership law to ensure equitable outcomes, particularly in cases where one partner has contributed significantly to the acquisition of property but lacks formal ownership rights.<sup>98</sup>

This chapter will critically examine these three approaches, analyzing their effectiveness and limitations in safeguarding the property rights of cohabiting couples. Furthermore, it will explore the extent to which these mechanisms align with constitutional principles of equality and dignity, as well as potential legislative reforms to strengthen the legal protection afforded to cohabitants in South

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<sup>93</sup>Wisenberg M, "Cohabitation and the law in South Africa –<<https://www.divorcelaws.co.za/the-law-on-cohabitation.html>>-.Februrary 2025

<sup>94</sup>Wisenberg M, 'Cohabitation and the law in South Africa –<<https://www.divorcelaws.co.za/the-law-on-cohabitation.html>>-. -Februrary 2025

<sup>95</sup> Shepherd R, ' Cohabitation and Legal Recognition in South Africa' June 2024 <<https://schoemanlaw.co.za/common-law-marriage/>> -.Februrary 2025

<sup>96</sup>Shepherd R, ' Cohabitation and Legal Recognition in South Africa' June 2024 <<https://schoemanlaw.co.za/common-law-marriage/>> -.Februrary 2025

<sup>97</sup>Preller B, 'Cohabitation and Living Together,' Copyright Bertus Preller, South Africa, 2021, 4.

<sup>98</sup>Preller B, 'Cohabitation and Living Together,' Copyright Bertus Preller, South Africa, 2021, 4.

Africa.

### 3.3 Cohabitation Agreements

A cohabitation agreement can be defined as a legally binding contract designed to protect the rights and interests of individuals in cohabiting relationships in South Africa, particularly regarding property ownership and financial arrangements.<sup>99</sup> Unlike marriage or civil unions, which are governed by statutes such as the Marriage Act 25 of 1961 and the Civil Union Act 17 of 2006, cohabitation does not automatically confer legal protections to partners.<sup>100</sup> This lack of recognition leaves cohabitants vulnerable, especially during separation, as South African law does not provide automatic rights to property for unmarried couples.<sup>101</sup> A cohabitation agreement serves as a vital legal instrument to fill this gap by defining the terms of the relationship and ensuring clarity on property rights and obligations.<sup>102</sup>

The primary purpose of a cohabitation agreement is to safeguard the property rights of cohabiting partners during separation. It achieves this by explicitly outlining the ownership and division of assets acquired before or during the relationship<sup>103</sup>. For example, the agreement can specify whether certain assets are owned individually or jointly and provide a framework for dividing these assets upon separation. Without such an agreement, property acquired during the relationship typically belongs to the individual who purchased it, where ideally the rules that would apply are those of property law. The agreement also addresses financial responsibilities, such as contributions toward shared expenses, debts, and liabilities, ensuring that both parties are aware of their obligations.<sup>104</sup>

The legal foundation for cohabitation agreements in South Africa lies in contract law. Courts have upheld these agreements as enforceable contracts provided they meet the general requirements of a

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<sup>99</sup> Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4

<sup>100</sup> Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4

<sup>101</sup> Cannon V, 'Why have a cohabitation Agreement

?' <<https://www.hughjames.com/blog/why-have-a-cohabitation-agreement/>> January 2025

<sup>102</sup> Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4

<sup>103</sup> Cannon V, 'Why have a cohabitation Agreement ?'

<<https://www.hughjames.com/blog/why-have-a-cohabitation-agreement/>> January 2025

<sup>104</sup> Cannon V, 'Why have a cohabitation Agreement

?' <<https://www.hughjames.com/blog/why-have-a-cohabitation-agreement/>> January 2025

valid contract: consensus between the parties, legality of purpose, capacity to contract, and compliance with public policy. For instance, in cases where disputes arise over property or financial contributions after separation, courts have often referred to existing cohabitation agreements to resolve conflicts. The agreements provide a clear record of each partner's intentions and contributions during the relationship, thereby reducing ambiguity.<sup>105</sup>

South African judicial actors have also acknowledged the importance of cohabitation agreements in protecting property rights. Courts have emphasized that without such agreements, disputes over property division can lead to protracted litigation.<sup>106</sup> For example, in cases where one partner claims a share in property registered solely in the other partner's name, courts have required evidence of direct or indirect contributions to justify such claims. A cohabitation agreement preempts these issues by explicitly stating how property will be divided and whether contributions will entitle one partner to a share of jointly used assets.

In the case of *L.L v C.H NO and Others (2023)*, the South Gauteng High Court recognized the importance of cohabitation agreements in establishing property rights for cohabiting partners.<sup>107</sup> The court emphasized that without such agreements, disputes over property division could lead to protracted litigation and inequitable outcomes.<sup>108</sup> The applicant, who had lived with the deceased for many years, sought to claim a share of the estate after the partner's death. The court noted that "the absence of a cohabitation agreement has significant implications for the parties involved, as it leaves one partner vulnerable and without recourse to the property accumulated during the relationship."

This case illustrates how judges advocate for the use of cohabitation agreements to clarify ownership and financial responsibilities, thereby reducing potential conflicts and ensuring that contributions made by both partners are recognized in legal proceedings. The court's ruling underscores that a well-drafted cohabitation agreement can serve as a critical tool in protecting the rights of individuals in non-marital unions, particularly when navigating complex issues surrounding property rights and inheritance. Typically, these agreements should include basic provisions. First, it contains a detailed

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<sup>105</sup> Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4

<sup>106</sup> Werner T, 'Using a Cohabitation Agreement to Determine Property Rights for Unmarried Couples' April 2023,--<<https://wernerlawca.com/using-a-cohabitation-agreement-to-determine-property-rights-for-unmarried-couples/#:~:text=A%20cohabitation%20agreement%20can%20be,in%20case%20of%20a%20separation> > March 2025

<sup>107</sup> *L.L. v. C.H. NO and Others* (2023) The South Gauteng High Court.

<sup>108</sup> *L.L. v. C.H NO and Others* (2023) The South Gauteng High Court.

list specifying which assets are owned individually by each partner and which are considered jointly owned.<sup>109</sup> This clarity is crucial in preventing disputes over property ownership, particularly in the event of separation. By explicitly identifying the ownership of assets, both partners can have a clear understanding of their rights and entitlements.<sup>110</sup> Secondly, the agreement outlines the terms for the division of property. It specifies how jointly owned assets will be divided upon separation providing a framework for equitable distribution. This provision is particularly important as it helps to mitigate potential conflicts that may arise when partners part ways, ensuring that both parties are aware of how their shared property will be handled.

Another critical aspect of a cohabitation agreement is the section detailing financial contributions. This part of the agreement outlines each partner's contributions toward shared expenses, such as rent or mortgage payments, utilities, and other liabilities. By documenting these contributions, the agreement helps establish a record of financial involvement that can be referenced in case of disputes. Lastly a well-drafted cohabitation agreement should incorporate dispute resolution mechanisms. These procedures outline how disputes arising from the agreement will be resolved, whether through mediation, arbitration, or court proceedings. By establishing clear pathways for conflict resolution upfront, partners can avoid lengthy and costly litigation should disagreements arise in the future.<sup>111</sup>

In conclusion, a cohabitation agreement is an essential tool for protecting the property rights of individuals in cohabitation relationships in South Africa. By clearly defining ownership structures, financial responsibilities, and obligations, these agreements provide clarity and security for both partners during separation or other significant life events. They also reduce reliance on contentious legal doctrines like unjust enrichment or universal partnerships by establishing clear terms upfront.<sup>112</sup> As South Africa continues to grapple with evolving family structures and relationships outside traditional marriage frameworks, cohabitation agreements remain one of the most reliable avenues for

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<sup>109</sup>Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4

<sup>110</sup> Werner T, 'Using a Cohabitation Agreement to Determine Property Rights for Unmarried Couples' April 2023,--<<https://wernerlawca.com/using-a-cohabitation-agreement-to-determine-property-rights-for-unmarried-couples/#:~:text=A%20cohabitation%20agreement%20can%20be,in%20case%20of%20a%20separation> > March 2025

<sup>111</sup> Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4

<sup>112</sup>Werner T, 'Using a Cohabitation Agreement to Determine Property Rights for Unmarried Couples' April 2023,--<<https://wernerlawca.com/using-a-cohabitation-agreement-to-determine-property-rights-for-unmarried-couples/#:~:text=A%20cohabitation%20agreement%20can%20be,in%20case%20of%20a%20separation> > March 2025

safeguarding fairness and equity within non-marital unions.<sup>113</sup>

### 3.4 . The Domestic Partnership Bill (2008)

The Domestic Partnerships Bill of 2008 represented a significant legislative effort to create a formal legal framework for the regulation of domestic partnerships in South Africa.<sup>114</sup> A Domestic partnership within this context can be understood as two person living together in an intimate relationship without entering the institution of marriage.<sup>115</sup> Although the bill has yet to be enacted into law, its provisions aim to grant cohabitation partners certain legal protections similar to those afforded to married couples, particularly concerning property division, maintenance, and inheritance rights.<sup>116</sup> The bill proposes a registration system for domestic partnerships, which would enable cohabitants to access legal remedies upon the dissolution of their relationship.<sup>117</sup> This framework is particularly important in a legal landscape where cohabiting couples often find themselves without automatic rights or protections, leaving them vulnerable during separation.

One of the key features of the Draft Domestic Partnerships Bill is its recognition of both registered and unregistered domestic partnerships. Registered partnerships would require couples to formally register their relationship, thereby granting them legal status and access to various rights and protections.<sup>118</sup> This registration process not only formalizes the partnership but also provides a clear mechanism for resolving disputes related to property and financial matters.<sup>119</sup> For unregistered partnerships, the Bill outlines criteria that can be used to evaluate the status of the relationship,<sup>120</sup> ensuring that partners in long-term cohabiting relationships are not left without recourse simply because they have chosen not to formalize their union through registration.<sup>121</sup> Thus respecting the

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<sup>113</sup> Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4

<sup>114</sup> Naledi J, 'The New Marriage Bill and Its Implications in South Africa, September 2023  
-<<https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>> March 2025

<sup>115</sup> Meyersfeld, B, "If You Can See, Look: Domestic Partnerships and the Law." Constitutional Court Review, February 2025 -<<https://heinonline.org/HOL/P?h=hein.journals/conrev3&i=271> > March 2025

<sup>116</sup> Naledi J, 'The New Marriage Bill and Its Implications in South Africa, September 2023  
-<<https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>> March 2025

<sup>117</sup> Naledi J, 'The New Marriage Bill and Its Implications in South Africa, September 2023  
-<<https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>> March 2025

<sup>118</sup> Chapter 3, *Domestic Partnerships Bill (2008)* (South Africa)

<sup>119</sup> Discussion Paper 004, Domestic Partnerships, South African Law Reform Commission, December 2003-<<https://www.justice.gov.za/salrc/dpapers/dp104.pdf> > 19 March 2025

<sup>120</sup> Chapter 4, *Domestic Partnerships Bill (2008)* (South Africa)

<sup>121</sup> Discussion Paper 004, Domestic Partnerships, South African Law Reform Commission, December 2003-<<https://www.justice.gov.za/salrc/dpapers/dp104.pdf> > 19 March 2025

citizens choice not to enter into formal relationships.

The provisions concerning property division are particularly noteworthy. Clause 28 of the bill proposes that property acquired during the partnership should be treated as joint property unless otherwise specified in a cohabitation agreement.<sup>122</sup> This means that, upon separation or death, both partners would have equitable rights to jointly owned assets, thereby addressing a significant gap in current legislation where cohabitants lack automatic rights to shared property. By establishing clear guidelines for property division, the Bill aims to mitigate disputes that can arise when one partner claims ownership of assets registered solely in their name.

Despite these positive developments proposed in the Domestic Partnerships Bill, its prolonged status as a draft indicates legislative reluctance or complexity in implementing such protections. The lack of progress in enacting this Bill reflects broader societal attitudes towards cohabitation and non-marital relationships in South Africa.<sup>123</sup> While there is increasing recognition of diverse family structures, significant barriers remain in translating this recognition into effective legal protections. Moreover, critics argue that while the Bill represents a step forward, it may not fully address the needs of all cohabiting couples, particularly those in unregistered partnerships who may still face challenges in asserting their rights.<sup>124</sup> The requirement for registration could inadvertently exclude vulnerable groups who may be hesitant or unable to formalize their relationships due to various socio-economic factors. In conclusion, the Domestic Partnerships Bill of 2008 holds considerable promise for enhancing the legal protection of cohabiting partners in South Africa.<sup>125</sup> By establishing a framework for property division, it aims to provide equitable treatment for individuals in domestic partnerships akin to that enjoyed by married couples.

### **3.5 The South African Judicial Approach**

In South Africa, the concept of a universal partnership has gained significant recognition within the legal framework, particularly in cases involving cohabiting couples. A universal partnership is

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<sup>122</sup> Section 28, *Domestic Partnerships Bill* (2008) (South Africa).

<sup>123</sup> Naledi J, 'The New Marriage Bill and Its Implications in South Africa, 5 September 2024 —<<https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>>—on March 2025

<sup>124</sup> Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4

<sup>125</sup> Naledi J, 'The New Marriage Bill and Its Implications in South Africa, 5 September 2024 —<<https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>>—on March 2025

characterized by a relationship where both parties contribute to a common goal for mutual benefit, and it can be established even in the absence of a formal agreement.<sup>126</sup> This legal construct has profound implications for cohabiting couples, especially regarding property rights and financial obligations during separation or dissolution of the partnership. The recognition of universal partnerships provides a mechanism for cohabiting partners to assert their rights to property and financial support, which are often not automatically granted under existing laws governing non-marital relationships.

A universal partnership is defined as a partnership where both parties share a common intention to live together and unite their lives, contributing financially, emotionally, or in other significant ways.<sup>127</sup> The essential elements required for the establishment of a universal partnership include mutual intent to form the partnership, contributions from both partners toward a shared goal, and a degree of stability and permanence in the relationship.<sup>128</sup> Importantly, South African courts have recognized that such partnerships do not require an explicit written agreement; rather, they can be inferred from the conduct and intentions of the parties involved. This flexibility allows cohabiting couples to establish their rights based on their lived experiences rather than formal documentation.

The recognition of universal partnerships has significant implications for property rights among cohabiting couples. In cases where a relationship dissolves, partners may seek to claim a share of assets acquired during the partnership<sup>129</sup>. The courts have affirmed that contributions made by both parties, whether financial or non-financial, are relevant when determining property rights upon separation.<sup>130</sup> This legal recognition allows partners in a universal partnership to assert claims over shared property more effectively than if they were simply cohabitants without any formal acknowledgment of their relationship. For example, if one partner has invested significantly in renovations or maintenance of a property owned solely by the other partner, they may be able to claim compensation based on their contributions if it can be demonstrated that these efforts were intended to

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<sup>126</sup>Discussion Paper 004, Domestic Partnerships, South African Law Reform Commission, <[https://www.justice.gov.za/salrc/dpapers/dp104.pdf?utm\\_source=chatgpt.com](https://www.justice.gov.za/salrc/dpapers/dp104.pdf?utm_source=chatgpt.com)> - February 2025.

<sup>127</sup>Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 5.

<sup>128</sup>Werner T, 'Using a Cohabitation Agreement to Determine Property Rights for Unmarried Couples' April 2023, <<https://wernerlawca.com/using-a-cohabitation-agreement-to-determine-property-rights-for-unmarried-couples/#:~:text=A%20cohabitation%20agreement%20can%20be,in%20case%20of%20a%20separation>> — on 8 January 2025.

<sup>129</sup> Cannon V, 'Why have a cohabitation Agreement?' February 2025.

<<https://www.hughjames.com/blog/why-have-a-cohabitation-agreement/>> — 8 January 2025.

<sup>130</sup>Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021, 4.

benefit both parties. The following section will examine how the courts have recognised a universal partnership as an approach to equity and actualizing property rights.

### **i) Butters v Mncora (2012)**

The case of *Butters v Mncora* (2012) is a landmark decision in South African law that significantly advanced the recognition of universal partnerships among cohabiting couples, particularly in matters of property division upon separation. The case involved Mr. Andrew Butters and Ms. Nomsa Mncora, who had cohabited for nearly 20 years without formalizing their relationship through marriage. During this time, Mr. Butters amassed substantial wealth, while Ms. Mncora did not have significant financial resources of her own. When their relationship ended in 2008, Ms. Mncora sought a share of Mr. Butters' assets, claiming that their relationship constituted a universal partnership. The central legal issue in the case was whether a universal partnership existed between the two parties, entitling Ms. Mncora to a portion of the wealth accumulated during their time together. Mr. Butters denied the existence of such a partnership, arguing that there was no formal agreement to support her claim.<sup>131</sup> The Supreme Court of Appeal ruled in favor of Ms. Mncora, finding that a universal partnership did indeed exist. The court emphasized that such a partnership does not require an explicit agreement but can be inferred from the conduct and intentions of the parties involved. The court highlighted that contributions to a universal partnership need not be purely financial. It recognized that non-monetary contributions, such as domestic work and emotional support, are equally valid and can form the basis of a claim to shared assets. In this case, Ms. Mncora's contributions to their shared life were considered sufficient to establish her entitlement to a portion of Mr. Butters' wealth.<sup>132</sup>

The court ultimately awarded Ms. Mncora 30% of the net value of Mr. Butters' assets, affirming the principle of equitable distribution in cases involving universal partnerships. This decision underscored that property acquired during a cohabiting relationship may be subject to division if it can be shown that both parties contributed to its accumulation. The judgment in *Butters v Mncora* was significant because it recognized the realities of modern relationships where couples may choose to live together without marrying but still share lives and resources akin to those in a marital

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<sup>131</sup>*Butters v Mncora* (2012) South Africa —<<https://www.saflii.org/za/cases/ZASCA/2012/29.html>>— 7 March 2025.

<sup>132</sup>*Butters v Mncora* (2012) South Africa —<<https://www.saflii.org/za/cases/ZASCA/2012/29.html>>— 7 March 2025.

relationship.<sup>133</sup> It provided legal protection for individuals in such partnerships, ensuring that they are not left financially vulnerable upon separation. This case has since become a cornerstone in South African family law, setting an important precedent for recognizing universal partnerships and promoting fairness and equity in property division for cohabiting couples. It reflects an evolving approach by South African courts to adapt legal principles to contemporary social dynamics and protect the rights of individuals in non-marital relationships.

### **ii) L.L v C.H NO and Others (2023)**

The case marked a significant advancement in South African law concerning the recognition of universal partnerships, particularly in the context of cohabiting couples and their property rights.<sup>134</sup> The central issue in this case revolved around whether L.L could establish the existence of a universal partnership with the late EH, a claim that was contested by EH's daughter, CH, who sought to assert her rights as the executor of EH's estate. L.L and EH had a long-term romantic relationship that began in the 1980s, despite EH being married at the time. Over the years, their relationship deepened, and they acquired a property in Westcliff, Johannesburg, which was registered solely in EH's name. L.L made substantial financial contributions to this property, including renovations and ongoing maintenance, which demonstrated his commitment to their shared life. After EH's husband passed away, L.L and EH began living together and continued to share their lives until her death in July 2016.

Following EH's passing, L.L sought to claim half of her estate based on his assertion that a universal partnership existed between them. However, CH contested this claim, arguing that there was no valid partnership and that L.L had no right to inherit from her mother's estate. Initially, the South Gauteng High Court dismissed L.L's application for a declaration of universal partnership, citing significant factual disputes that it deemed unsuitable for resolution through motion proceedings. This prompted L.L to appeal the decision. During the appeal process, the court found that CH's denial of L.L's claims lacked substantive evidence to challenge L.L's version of events. The judges noted that CH had not presented credible facts to contradict L.L's assertions about their cohabitation and shared financial

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<sup>133</sup>*Butters v Mncora* (2012 ) South Africa —<<https://www.saflii.org/za/cases/ZASCA/2012/29.html> >—7 March 2025.

<sup>134</sup>*L.L v C.H NO and Others* (2023) South Africa.

goals.<sup>135</sup> Ultimately, the court concluded that L.L had sufficiently established the existence of a universal partnership based on his contributions and the nature of their relationship. In its ruling, the court recognized L.L's entitlement to inherit 50% of EH's estate. This decision affirmed that universal partnerships can exist outside formal marriage and underscore the principle of equitable distribution upon the death of one partner. The implications of this case are profound as it reinforces the legal recognition of non-marital relationships in South Africa. It acknowledges that cohabiting partners can have rights similar to those enjoyed by married couples when it comes to property division.<sup>136</sup>

### **iii) L.M v R.K (2022)**

This case represented a significant judicial development in South Africa regarding the recognition of universal partnerships, particularly in the context of long-term cohabiting relationships. In this instance, L.M sought a share of R.K's assets following the end of their relationship, which raised important questions about property ownership and equitable distribution. The backdrop of the case involved L.M and R.K living together for several years, during which they pooled their resources and contributed to their shared household. When their relationship came to an end, L.M claimed that a universal partnership existed between them, which would entitle her to a portion of R.K's assets. This claim was contested by R.K, who denied the existence of such a partnership. The High Court ultimately recognized the existence of a universal partnership based on the shared contributions and mutual benefits derived from their time together.<sup>137</sup>

The court emphasized that property acquired during cohabitation could indeed be subject to equitable distribution, even in the absence of formal agreements or written contracts. This ruling is particularly significant because it affirms that cohabiting partners can assert rights similar to those enjoyed by married couples when it comes to property division. This decision hinged on the understanding that a universal partnership can be established through tacit agreements inferred from the conduct of the parties involved.<sup>138</sup> This aligns with earlier precedents set of *Butters v Mncora*, where the Supreme Court of Appeal acknowledged that such partnerships do not require explicit agreements to be legally binding. Instead, they can arise from the shared intentions and actions of the individuals involved.

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<sup>135</sup> *L.L v C.H NO and Others (2023)* South Africa.

<sup>136</sup> *L.L v C.H NO and Others (2023)* South Africa.

<sup>137</sup> *L.M v R.K (2022)* South Africa.

<sup>138</sup> *L.M v R.K (2022)* South Africa .

L.M successfully demonstrated that her contributions both financial and non-financial were integral to the partnership's success. The court ruled that she was entitled to a 50% share of R.K's assets, reinforcing the principle that equitable distribution should apply in cases involving cohabiting partners.<sup>139</sup>The case emphasizes fair property division upon separation or dissolution of relationships, reflecting a broader societal shift towards recognizing diverse family structures and ensuring equitable treatment for all individuals, regardless of marital status.

These cases illustrate how South African courts have begun to recognize universal partnerships among cohabiting couples, providing them with legal protections traditionally reserved for married individuals. As societal norms continue to evolve regarding relationships and family structures, these judicial decisions pave the way for greater recognition and protection of cohabiting couples' property rights within the legal framework. The ongoing development of case law surrounding universal partnerships is crucial for ensuring equity and justice for individuals in non-marital relationships in South Africa.<sup>140</sup>

### 3.6 Conclusion

In conclusion, South Africa has made notable strides in recognizing and protecting the property rights of cohabiting couples, reflecting a shift in legal culture towards inclusivity and acknowledgment of diverse family structures.<sup>141</sup> The introduction of cohabitation agreements has emerged as a significant mechanism for couples to regulate their financial and proprietary affairs. These agreements function similarly to contracts, allowing partners to explicitly outline their respective rights and obligations concerning property ownership and financial contributions. By adhering to the general principles of contract law, provided they comply with public policy and legal formalities, such agreements can be enforced in courts, thereby offering cohabitants a level of security that was previously unavailable.<sup>142</sup>

Moreover, the Domestic Partnerships Bill represents a crucial legislative effort aimed at creating a formal legal framework for domestic partnerships. Although the bill has yet to be enacted into law, its provisions seek to grant cohabiting partners certain legal protections akin to those enjoyed by married

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<sup>139</sup>*L.M v R.K (2022)* South Africa.

<sup>140</sup>Bonthuys E, 'A Duty of Support for *All* South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the *Volks* Judgment' *Potchefstroom Electronic Law Journal*, 2018,—<<https://www.saflii.org/za/journals/PER/2018/60.html>>— on January 2025.

<sup>141</sup>Werner T, 'Using a Cohabitation Agreement to Determine Property Rights for Unmarried Couples' April 2023,—<<https://wernerlawca.com/using-a-cohabitation-agreement-to-determine-property-rights-for-unmarried-couples/#:~:text=A%20cohabitation%20agreement%20can%20be,in%20case%20of%20a%20separation>>—on January 2025.

<sup>142</sup>Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021,5.

couples. This includes matters related to property division. The proposed registration system for domestic partnerships would enable cohabitants to access legal remedies upon dissolution of their relationship, thereby addressing significant gaps in the current legal landscape where cohabiting couples often lack automatic rights. The prolonged status of the Bill as a draft indicates legislative reluctance or complexity in implementing such protections; however, its very existence reflects an increasing recognition of the need for legal reform to protect non-marital relationships.

Additionally, South African courts have begun to recognize express or implied universal partnerships between cohabiting couples. A universal partnership exists when parties demonstrate a mutual intention to contribute to and share in the profits and losses of a joint venture, which may include a shared household or business. Judicial recognition of such partnerships has provided cohabitants with property rights where legally enforceable agreements were absent. Courts have relied on principles of partnership law to ensure equitable outcomes, particularly in cases where one partner has contributed significantly to the acquisition of property but lacks formal ownership rights. This judicial acknowledgment is critical in affirming that contributions whether financial or otherwise made by both partners during their relationship are valid grounds for asserting property claims. The cumulative effect of these developments signifies a substantial shift in South Africa's legal culture regarding cohabitation.

By providing mechanisms for cohabiting partners to define their property rights through agreements, proposing legislative frameworks that recognize domestic partnerships, and allowing for judicial recognition of universal partnerships, South African law has and is evolving to better accommodate the realities of modern relationships. This evolution not only enhances the legal standing of cohabiting couples but also promotes fairness and equity within non-marital unions.<sup>143</sup> As society continues to embrace diverse family structures, it is imperative that South African law keeps pace with these changes by enacting comprehensive reforms that explicitly protect the rights of cohabiting partners.<sup>144</sup> Such reforms would not only provide clarity and security for individuals in non-marital relationships but also reflect broader societal values that recognize commitment and partnership beyond the confines of traditional marriage. Ultimately, these steps towards protecting the property

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<sup>143</sup> Preller B, 'Cohabitation and Living Together' Copyright Bertus Preller, South Africa, 2021,5.

<sup>144</sup> Bonthuys E, 'A Duty of Support for *All* South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the *Volks* Judgment' *Potchefstroom Electronic Law Journal*, 2018,--<<https://www.saflii.org/za/journals/PER/2018/60.html>> on March 2025.

rights of cohabiting couples represent a progressive move toward inclusivity and justice within South Africa's evolving legal landscape.<sup>145</sup>

## CHAPTER FOUR

### LESSONS FROM SOUTH AFRICA'S LEGAL CULTURE ON PROTECTING COHABITING COUPLES PROPERTY RIGHTS IN KENYA

#### 4.1 Introduction

The legal recognition of property rights for cohabiting couples at the point of separation remains a critical area of reform in Kenya. Unlike formal marriages, cohabitation relationships lack statutory recognition, leaving partners vulnerable to property disputes and financial insecurity upon separation. This gap is particularly concerning given the growing prevalence of cohabitation as a family structure. In contrast, South Africa has developed mechanisms such as cohabitation agreements, the Domestic Partnerships Bill, and judicial recognition of universal partnerships to safeguard the property rights of cohabiting couples. Kenyan legal culture can draw valuable lessons from these measures to ensure equitable treatment for individuals in long-term, committed relationships outside formal marriage. South Africa's legal culture provides clarity and protection through cohabitation agreements, which allow couples to outline their property rights and financial obligations. The Domestic Partnerships Bill (2009) further formalizes protections by creating a legal framework for domestic partnerships, offering cohabiting partners rights akin to those of married couples. Lastly, South African courts have recognized universal partnerships based on mutual contributions toward shared economic goals, ensuring fair property division even without formal agreements.

To address these issues in Kenya, lawmakers should consider enacting legislation to recognize and enforce cohabitation agreements, introducing a Domestic Partnerships Bill modeled on South Africa's framework, and empowering courts to recognize universal partnerships. Public awareness initiatives and civic education are also essential to educating citizens about their rights and options in cohabitation arrangements. The reason why the above is advocated for is that while promoting

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<sup>145</sup> Bonthuys E, 'A Duty of Support for *All* South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the *Volks* Judgment' *Potchefstroom Electronic Law Journal*, 2018, —<<https://www.saflii.org/za/journals/PER/2018/60.html>>— on January 2025.

marriage may strengthen legal protections for couples who transition into formal unions, it risks neglecting those who remain unmarried due to personal, cultural, or socioeconomic factors, leaving them vulnerable during separation. Additionally, the success would potentially reduce disputes through predefined marital rights, as seen in Kenya which prioritizes marriage-centric frameworks. However, the challenge would include resistance from couples who view cohabitation as a deliberate choice, the persistence of the "common-law marriage" myth (where couples falsely assume legal protections without formalizing unions), and the ethical dilemma of prioritizing marriage over equitable legal reforms for all relationship types. This approach may also perpetuate inequalities, particularly for low-income or marginalized groups less able to formalize unions, underscoring the need for complementary reforms addressing cohabitation-specific right. This chapter will then seek to analyse how Kenya can benefit significantly from adopting South Africa's approach to protecting the property rights of cohabiting couples. These reforms would ensure fairness and equity for individuals in non-marital relationships while reflecting the realities of modern family structures.

#### **4.2. Lesson One :Recognition and Enforceability of Cohabitation Agreements**

The pressing need to legislate the enforceability of cohabitation agreements in Kenya cannot be overstated. This can be achieved by amending the existing Marriage Act (2014) or enacting a dedicated Cohabitation Agreements Act. This legislative intervention would provide a legal framework that allows cohabiting partners to enter into binding agreements, significantly reducing uncertainty in property disputes. Currently, the absence of formal recognition of these agreements leaves many partners vulnerable during separation, often resulting in protracted legal battles over property rights.

Establishing statutory guidelines to regulate the formation, execution, and enforceability of cohabitation agreements is crucial.<sup>146</sup> These guidelines should incorporate principles of voluntary consent, full financial disclosure, and fairness to ensure that both parties have a clear understanding of their rights and obligations. Implementing these measures would help mitigate potential disputes arising from misunderstandings or unequal bargaining power, fostering an environment where both partners feel secure in their commitments.

Furthermore, to enhance legal certainty and accessibility, a system for the registration of cohabitation

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<sup>146</sup> Burton F, "Formalised Cohabitation: A critical and comparative study of an element of English Law in a normative regime"—<[https://researchonline.ljmu.ac.uk/id/eprint/4446/1/158301\\_burtonphd.pdf](https://researchonline.ljmu.ac.uk/id/eprint/4446/1/158301_burtonphd.pdf)>— on 19 March 2025.

agreements should be established with a designated governmental body, such as the Office of the Attorney General or the Land Registry.<sup>147</sup> Registration would not only provide evidence of the agreement but also assist in resolving disputes by offering a clear record of the terms agreed upon by both parties. This step is particularly important given that courts have historically struggled with cases involving cohabiting partners due to the lack of formalized agreements.

Ensuring judicial training on the interpretation and enforcement of cohabitation agreements is also vital. Such training would help prevent inconsistencies in judicial rulings and foster a uniform approach to cohabitation related disputes across different courts.<sup>148</sup> In cases of confusion or ambiguity, courts could revert to established principles of contract law for interpretation, ensuring that decisions are grounded in sound legal reasoning. Enacting legislation to recognize and enforce cohabitation agreements is essential for protecting the property rights of cohabiting partners in Kenya. By providing a clear legal framework, establishing registration systems, and ensuring judicial consistency, lawmakers can significantly reduce the vulnerabilities faced by individuals in non-marital relationships and promote equitable treatment in property rights upon separation.

#### **4.3. Lesson Two : Enactment of a Domestic Partnerships Bill**

The introduction of a Domestic Partnerships Bill, modeled after South Africa's legislation, would represent a significant step forward in providing legal recognition and protections for cohabiting couples. A key feature of the proposed legislation should be the establishment of a formal registration system for domestic partnerships. This system would allow couples to officially recognize their relationships, thereby granting them access to legal remedies in the event of separation. By formalizing these relationships, the law would provide clarity and security for both parties, ensuring that their rights and obligations are clearly defined.

To ensure the integrity of this framework, clear eligibility criteria for recognition as domestic partners

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<sup>147</sup>Burton F, *Formalised cohabitation: A critical and comparative study of an element of English law in a normative regime*, December 2015, 45 —<[https://researchonline.ljmu.ac.uk/id/eprint/4446/1/158301\\_burtonphd.pdf](https://researchonline.ljmu.ac.uk/id/eprint/4446/1/158301_burtonphd.pdf) —> on 19 March 2025.

<sup>148</sup> Kodiyo K, *The judicial approach to cohabitation: A comparative study of the laws of England and Wales and Kenya*, 2021, 107 —<[https://www.researchgate.net/publication/357805992\\_The\\_Judicial\\_Approach\\_to\\_Cohabitation\\_A\\_Comparative\\_Study\\_of\\_the\\_Law\\_of\\_England\\_and\\_Wales\\_and\\_Kenya](https://www.researchgate.net/publication/357805992_The_Judicial_Approach_to_Cohabitation_A_Comparative_Study_of_the_Law_of_England_and_Wales_and_Kenya) —> on 22 August 2024.

must be outlined. These criteria could include a minimum duration of cohabitation, evidence of financial interdependence, and proof of shared responsibilities such as raising children or managing household duties.<sup>149</sup> By setting these standards, the law would ensure that only committed and genuine relationships receive this legal recognition, thereby preventing potential misuse of the framework. Another critical aspect of the proposed bill is the statutory recognition of property rights for domestic partners. Many cohabiting couples currently face significant financial vulnerabilities when their relationships end, often due to the lack of legal mechanisms to safeguard their interests.<sup>150</sup> By explicitly recognizing property rights, the legislation would provide a safety net for individuals who have invested time, resources, and effort into building a shared life with their partner. This would ensure equitable treatment upon separation and promote fairness in resolving financial disputes.

In addition to these provisions, the bill should establish a structured dispute resolution mechanism to address conflicts that may arise between domestic partners. This mechanism could include mediation or arbitration as alternative dispute resolution methods before resorting to litigation.<sup>151</sup> Such an approach aligns with global best practices in family law by promoting efficiency and encouraging amicable resolutions while reducing the burden on already overburdened courts.<sup>152</sup> The inclusion of Alternative Dispute Resolution (ADR) is appropriate as given that the Kenyan constitution endorses its under article 159.<sup>153</sup> Public awareness initiatives and civic education should also form an integral part of this reform.

Educating citizens about the benefits of formalizing cohabitation arrangements is crucial to ensuring widespread adoption of the framework. These initiatives should focus on informing individuals about their rights and obligations under domestic partnerships as well as the potential legal implications of entering into such arrangements. By raising awareness, lawmakers can empower citizens to make

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<sup>149</sup> Discussion Paper 004, Domestic Partnerships, South African Law Reform Commission, December 2003—<<https://www.justice.gov.za/salrc/dpapers/dp104.pdf>> 19 March 2025.

<sup>150</sup> Russell B, ‘ONS report highlights concerns over cohabiting couples and their lack of financial and legal protection—analysis from legal expert’

—<<https://ifamagazine.com/ons-report-highlights-concerns-over-cohabiting-couples-and-their-lack-of-financial-and-legal-protection-analysis-from-legal-expert/>> 20 February 2025.

<sup>151</sup> Hasan I, “The Development Of Alternative Dispute Resolution In Family Court Of Bangladesh: Challenges and Prospects” *International Journal of Law, Humanities and Social Sciences. Volume 5, Issue 2 (May 2021)*, —<<https://ijlhss.com/wp-content/uploads/2023/03/IJLHSS-05-21-16.pdf>> on 19 March 2025.

<sup>152</sup> Hasan I, “The Development Of Alternative Dispute Resolution In Family Court Of Bangladesh: Challenges and Prospects” *International Journal of Law, Humanities and Social Sciences. Volume 5, Issue 2 (May 2021)*, —<<https://ijlhss.com/wp-content/uploads/2023/03/IJLHSS-05-21-16.pdf>> on 19 March 2025.

<sup>153</sup> Article 159, *Constitution of Kenya* (2010).

informed decisions about their relationships and encourage them to seek legal protections.

In conclusion it is important to mention there has been a prolonged delay of the bill being passed and enacted into law, the delay can be attributed to two main factors: the prioritization of other legal reforms and economic/resource constraints. South Africa has focused on significant legal challenges, such as recognizing same-sex marriages and addressing customary marriages. The Civil Union Act of 2006, for example, ensured equality for LGBTQ+ individuals, while efforts to regulate customary marriages have also consumed legislative resources. This focus on other reforms has diverted attention away from domestic partnerships. The courts have highlighted the need for legislative action on domestic partnerships, but implementation remains pending.<sup>154</sup>

Economic and resource constraints also play a role. Implementing the Domestic Partnerships Bill requires substantial financial resources to establish administrative systems and educate the public. Given South Africa's socio-economic challenges, such as poverty and healthcare, family law reforms like domestic partnerships may not receive immediate attention or funding. The allocation of resources often prioritizes more pressing national issues, leaving less urgent legal reforms to wait. As a result, domestic partnerships remain without the legal clarity and protection they need.<sup>155</sup>

#### **4.4 Lesson Three : Judicial Recognition of Universal Partnerships**

Beyond legislative reforms, the judicial recognition of universal partnerships can serve as an effective means of ensuring equitable property division for cohabiting partners in Kenya. For clarity, a universal partnership is characterized by a relationship where both parties contribute to a common goal for mutual benefit, and it can be established even in the absence of a formal agreement.<sup>156</sup> Currently, the legal landscape offers limited protection for individuals in non-marital relationships, often leaving them vulnerable to disputes over property rights upon separation.

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<sup>154</sup> Manthwa T, 'Recognition of Domestic Partnerships in South African Law,' LLM University of South Africa 2015—<<https://core.ac.uk/download/pdf/43178031.pdf>>— 19 March 2025.

<sup>155</sup> Manthwa T, 'Recognition of Domestic Partnerships in South African Law,' LLM University of South Africa 2015—<<https://core.ac.uk/download/pdf/43178031.pdf>>— 19 March 2025.

<sup>156</sup> Discussion Paper 004, Domestic Partnerships, South African Law Reform Commission,—<[https://www.justice.gov.za/salrc/dpapers/dp104.pdf?utm\\_source=chatgpt.com](https://www.justice.gov.za/salrc/dpapers/dp104.pdf?utm_source=chatgpt.com)>— February 2025.

Establishing clear judicial guidelines to determine the existence of universal partnerships will provide clarity in adjudicating such claims. Factors such as the duration of cohabitation, financial and non-financial contributions, joint ownership of assets, and the intention to share resources should be considered. These criteria will help courts assess the legitimacy of claims and ensure that individuals receive equitable treatment based on their contributions to the partnership. It is arguable that Kenyan judicial actors have employed a comparable approach through the application of the common law doctrine of presumption of marriage; however, the criteria utilized by the courts to establish such a presumption for the purpose of property division remain largely discretionary, which creates room for inconsistencies.<sup>157</sup> This necessitates the establishment of a codified framework to ensure just, predictable, and equitable outcomes in property disputes.

Furthermore, training judges and legal practitioners on the principles of universal partnerships is vital for ensuring consistency and fairness in court rulings.<sup>158</sup> By equipping the judiciary with the necessary knowledge and understanding of these principles, we can mitigate disparities in judicial outcomes and promote a uniform approach to cohabitation-related disputes across different courts.<sup>159</sup> This training should also emphasize the importance of recognizing non-monetary contributions, such as domestic labor and caregiving, which are often overlooked but play a crucial role in sustaining relationships. Utilizing comparative jurisprudence by referring to South African case law will provide valuable insights into recognizing and adjudicating universal partnership claims effectively. South Africa's legal framework has successfully addressed similar issues by allowing courts to recognize tacit agreements between cohabiting partners based on their mutual contributions. By examining these precedents, Kenyan courts can develop a more comprehensive understanding of how to approach universal partnerships within their jurisdiction.

In conclusion, judicial recognition of universal partnerships would be essential for protecting the rights of cohabiting partners in Kenya. By implementing legislative reforms, establishing clear

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<sup>157</sup> Gichuru D, 'Presumption of a Marriage is The exemption rather than the rule, The question of presumption of Marriage in Kenya. Feb 2023

—<<https://cmadvocates.com/en/blog/presumption-of-a-marriage-is-the-exception-rather-than-the-rule-the-question-of-presumption-of-marriage-in-kenya>>— on 19 February 2025 .

<sup>158</sup> UNODC, "Judicial Conduct and Ethics," 2017 –

<[https://www.unodc.org/documents/ji/training/selfdirected\\_1403\\_print.pdf](https://www.unodc.org/documents/ji/training/selfdirected_1403_print.pdf)>— on 25 February 2025.

<sup>159</sup> UNODC, "Judicial Conduct and Ethics," 2017

<[https://www.unodc.org/documents/ji/training/selfdirected\\_1403\\_print.pdf](https://www.unodc.org/documents/ji/training/selfdirected_1403_print.pdf)> —on 25 February 2025.

guidelines, providing judicial training, and drawing from comparative jurisprudence, we can create a more equitable legal environment that acknowledges the contributions of individuals in non-marital relationships.

#### **4.5 Lesson Four : Public Legal Awareness and Civic Education**

The effectiveness of proposed legal reforms to protect the property rights of cohabiting partners in Kenya hinges significantly on robust public awareness and education initiatives.<sup>160</sup> It is imperative that Kenyan lawmakers prioritize efforts to educate the public about cohabitation rights and obligations, emphasizing the importance of formalizing relationships through coh or domestic partnership registration. Without widespread understanding of these rights, individuals remain vulnerable to exploitation and legal ambiguities that can arise during separation of their unions. Priority in this context would include setting aside a fund by the state and researching the most appropriate means to reach the expected target audience.

Encouraging legal literacy programs in collaboration with legal aid organizations is essential for providing affordable legal advice to cohabiting partners who may not fully understand their rights or how to protect them.<sup>161</sup> Many individuals enter cohabiting relationships without a clear understanding of the legal implications, which can lead to significant financial and emotional distress when disputes arise.<sup>162</sup> By equipping individuals with knowledge about their rights and available legal protections, we can empower them to make informed decisions regarding their relationships. Engaging media outlets, community organizations, and religious institutions will further disseminate information about the legal protections available for cohabiting couples. These entities play a crucial role in shaping public perception and understanding of cohabitation as a legitimate family structure deserving of legal recognition. By fostering a dialogue around cohabitation rights, it can help

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<sup>160</sup> Mundia S, ‘Protecting cohabitants’ right to property within the cohabitation union in Unpublished LLB Dissertation, Strathmore University, Nairobi, 2021 –< <https://su-plus.strathmore.edu/server/api/core/bitstreams/7162e2d5-fa2e-4c9f-955d-b1e5d308fbb7/content> > on February 2025

<sup>161</sup> The Importance of Civic Education. –< <https://civicsforlife.org/the-importance-of-civic-education/>> on 19 March 2025

<sup>162</sup> Russell B, ‘ONS report highlights concerns over cohabiting couples and their lack of financial and legal protection – analysis from legal expert’ –< <https://ifamagazine.com/ons-report-highlights-concerns-over-cohabiting-couples-and-their-lack-of-financial-and-legal-protection-analysis-from-legal-expert/> > 20 February 2025

normalize discussions about legal protections and encourage individuals to seek formal agreements that safeguard their interests.

Addressing the legal vulnerabilities faced by cohabiting partners in Kenya requires comprehensive legislative reforms alongside effective public awareness initiatives. By recognizing cohabitation agreements as binding contracts and establishing a formal framework for domestic partnerships, Kenyan lawmakers can significantly enhance the protection afforded to individuals in non-marital relationships. Additionally, judicial recognition of universal partnerships will ensure equitable property division upon separation. Collectively, these measures will foster a more inclusive legal environment that reflects contemporary social dynamics while protecting the rights of all individuals involved in cohabiting relationships.

#### **4.6. Observation of jurisprudential behavior regarding Property Rights in both South Africa and Kenya**

The cases of *L.L v C.H NO and Others (2023)*, *Butters v Mncora (2012)*, and *Mary Nyambura Kangara v Paul Ogari Mayaka (2023) eKLR* provide critical insights into the evolving legal recognition of property rights within cohabiting relationships in South Africa and Kenya. Despite the absence of formal marriage, these cases illustrate judicial efforts to ensure equitable distribution of assets based on principles of partnership, trust, and joint contribution.

In *L.L v C.H NO and Others (2023)*, the South African court recognized the existence of a universal partnership between L.L and the deceased, E.H, who had cohabited and accumulated assets together over several decades. The court concluded that their shared financial contributions and mutual intent to establish a life together were sufficient to justify L.L's claim to a portion of E.H's estate. Similarly, in *Butters v Mncora (2012)*, the Supreme Court of Appeal of South Africa reaffirmed the applicability of the universal partnership doctrine, emphasizing that cohabiting partners who engage in joint economic activities may have enforceable rights to property, despite the absence of a formal marital contract.

Conversely, the Kenyan case of *Mary Nyambura Kangara v Paul Ogari Mayaka (2023) eKLR* took a different approach. Here, the Supreme Court of Kenya rejected the presumption of marriage due to the petitioner's existing marital status at the time of cohabitation with the respondent. However, the

court acknowledged the principle of constructive trust, holding that since both parties had made financial contributions towards property acquisition and development, they were entitled to a proportional share of the assets. Unlike the South African courts, which relied on the doctrine of universal partnership, the Kenyan judiciary focused on the equitable distribution of property based on actual financial contributions rather than an implied partnership.

While all three cases underscore the judiciary's commitment to protecting the financial interests of cohabiting partners, the primary distinction lies in the legal frameworks employed. The South African courts have progressively embraced the concept of universal partnerships, recognizing cohabitation as a legally cognizable economic arrangement. In contrast, Kenyan jurisprudence remains tethered to principles of constructive trust and direct financial contribution, with a more restrained approach to implied marital rights. These divergent approaches reflect broader legal and cultural attitudes towards cohabitation and the necessity of formal marital recognition in determining property rights.

#### **4.7. Shortcomings of the Proposed South African Laws on Property Rights of Cohabitation**

While South Africa's legal mechanisms for protecting cohabitantes' proprietary rights—namely, domestic partnership bills, cohabitation agreements, and universal partnerships—offer valuable insights, their direct transposition to the Kenyan context presents significant challenges. First, the socio-cultural landscape differs markedly. Kenya's plural legal system recognizes customary laws that often govern marriage, divorce, and inheritance, particularly in rural communities. These customary norms, which frequently prioritize communal or familial property ownership over individual rights, may clash with the individualistic, contract-based approach inherent in cohabitation agreements. For instance, certain communities may not recognize a cohabiting partner's claim to property accumulated during the relationship, regardless of a written agreement, potentially leading to conflicts and undermining the intended protections.

Secondly the constitutional and legislative framework in Kenya, particularly concerning family law and property rights, may require substantial amendment to accommodate a comprehensive domestic partnership regime. Article 45 of the Kenyan Constitution recognizes the family as the fundamental unit of society and affords protection to marriage, but it remains silent on the rights of cohabiting couples. Introducing a domestic partnership bill could necessitate a constitutional amendment to avoid potential conflicts and ensure its compatibility with existing legal principles. Furthermore,

amendments to existing property laws, such as the Land Act and the Matrimonial Property Act, may be necessary to clarify the proprietary rights of cohabitants and prevent discrimination. These legislative reforms could face significant political and social resistance, particularly from religious groups and conservative elements within society, who may view the formal recognition of cohabitation as undermining the institution of marriage.

#### **4.8 Conclusion**

In conclusion, as societal norms surrounding family structures continue to evolve. To adequately address the realities of contemporary relationships, it is imperative for Kenya to take proactive steps to recognize and protect the rights of cohabiting couples. By drawing lessons from established legal frameworks, such as South Africa's, Kenya can implement several key reforms that will ensure equitable treatment and legal certainty for individuals in non-marital unions.

One of the primary reforms should be the implementation of enforceable cohabitation agreements. These agreements provide a contractual basis for defining the rights and responsibilities of cohabiting partners. For such agreements to be enforceable, they must be in writing and entered into with both parties having received independent legal advice. It is essential that these agreements clearly outline financial arrangements, property division, and any provisions for child custody and support if applicable.

Additionally, Kenya should introduce a Domestic Partnerships Bill modeled after South Africa's legislation. This bill would establish a formal legal framework governing domestic partnerships and should include several critical components. First, it should create a registration system that allows couples to formalize their relationships and access legal remedies upon dissolution. Second, clear eligibility criteria must be defined—such as minimum cohabitation duration, financial interdependence, and shared responsibilities—to ensure that only committed relationships receive legal recognition. Third, the bill should provide statutory recognition of property rights and maintenance obligations, thereby offering a safety net for individuals who have invested time and resources into a shared life. Furthermore, it is crucial for Kenyan courts to recognize universal partnerships in judicial proceedings. This recognition would allow courts to equitably distribute assets accumulated during the relationship, regardless of formal marital status. The Supreme Court of Kenya has already called upon Parliament to formulate and enact a statute addressing cohabitants in

long-term relationships, highlighting the existing gaps in the legal framework.

The effectiveness of these legal reforms will significantly depend on robust public awareness and education initiatives. Legal literacy programs, developed in collaboration with legal aid organizations, are essential for providing affordable legal advice to cohabiting partners who may not fully understand their rights or how to protect them. By enhancing public understanding of these issues, individuals will be better equipped to navigate their rights within the context of cohabitation. Moreover, establishing structured dispute resolution mechanisms—such as mediation and arbitration—can provide efficient and amicable avenues for resolving financial or property disputes. This approach would help reduce the burden on the courts while promoting constructive dialogue between disputing parties.

## **CHAPTER FIVE**

### **FINDINGS, RECOMMENDATIONS AND CONCLUSION**

#### **5.1 FINDINGS**

The research undertaken in this dissertation has yielded several critical findings regarding the legal standing of property rights for cohabiting couples in Kenya, particularly during separation. The first chapter gave an introduction to the study by outlining its background and problem statement. It highlighted the gap in legal recognition for cohabitants' property rights upon separation in Kenya, underscoring the need for legislative reform. The second chapter then critically examined the existing legal framework in Kenya concerning property rights for cohabiting partners upon separation. It evaluated key statutes and judicial precedents that have influenced this area of law and portrayed the inconsistent application of the presumption of marriage doctrine. The third chapter explored the South African legal framework governing property rights for cohabitants. It discussed statutory provisions such as the Domestic Partnerships Bill and the role of judicial recognition of universal partnerships and how this approach provides a structured means of recognizing property rights through cohabitation agreements. Finally, the fourth chapter drew lessons from South African legal culture that could inform Kenyan legal reforms. The following were the key findings:

**5.1.1. Absence of a Legal Framework for Cohabitation:** The Kenyan legal system does not explicitly recognize cohabitation as a formal union under the Marriage Act (2014). This omission leaves cohabiting couples without legal protection, particularly concerning property rights upon separation. Courts are compelled to rely on the common law doctrine of presumption of marriage, which is inconsistently applied and lacks clarity, leading to unpredictable outcomes. The Marriage Act (2014) recognizes five types of marriages—Christian, civil, Hindu, Islamic, and customary but fails to provide any legal framework for cohabitation, despite its increasing prevalence in Kenyan society.

**5.1.2 Judicial Discretion and Inconsistency:** The reliance on judicial discretion in determining property rights for cohabiting couples has resulted in inconsistent and unpredictable rulings. The criteria for presuming a marriage, such as long cohabitation and general repute, are vague and subject to judicial interpretation, which undermines the principle of legal certainty. This

lack of clarity disproportionately affects women, who often struggle to provide sufficient evidence of their contributions to shared property.

**5.1.3. Comparative Insights from South Africa:** South Africa has made significant progress in recognizing and protecting the property rights of cohabiting couples through mechanisms such as cohabitation agreements, the Domestic Partnerships Bill, and the judicial recognition of universal partnerships. These measures provide a more equitable and predictable legal framework for cohabiting couples, offering valuable lessons for Kenya. South Africa's approach, particularly the recognition of universal partnerships in cases like *Butters v. Mncora* (2012) and *L.L v. C.H NO and Others* (2023), demonstrates how courts can equitably distribute property based on mutual contributions, even in the absence of formal agreements.

**5.1.4. Lack of Public Awareness:** There is a significant lack of public awareness regarding the legal rights and obligations of cohabiting couples. Many individuals enter cohabiting relationships without understanding the legal implications, leaving them vulnerable to disputes over property rights upon separation. Civic Education initiatives are essential to ensure that individuals in cohabiting relationships understand their rights and the legal mechanisms available to protect their interests. The lack of awareness is particularly pronounced in rural areas, where traditional norms often overshadow legal rights.

## **5.2 RECOMMENDATIONS**

Based on the findings, the following recommendations are proposed to address the legal gaps and improve the protection of property rights for cohabiting couples during in Kenya several legislative and judicial reforms are necessary. First, the Marriage Act (2014) should be amended to explicitly recognize and enforce cohabitation agreements. These agreements should be legally binding, requiring full financial disclosure, mutual consent, and independent legal advice to ensure fairness and voluntariness. Additionally, a registration system for cohabitation agreements should be established under the Office of the Attorney General or the Land Registry. This system would provide an official record of the agreements, enhance enforceability in court, and allow for online registration via the e-Citizen platform for accessibility.

Kenya should also enact a Domestic Partnerships Bill, modelled after South Africa's framework, to provide legal recognition for domestic partnerships. This bill should define domestic partnerships, establish a registration system, and outline eligibility criteria such as a minimum duration of cohabitation, financial interdependence, and shared responsibilities. It should also set out clear provisions for property division and spousal support upon dissolution.

Furthermore, legislative amendments should be introduced to recognize universal partnerships, ensuring that courts can equitably distribute assets acquired during cohabitation, regardless of formal marital status. The law should define universal partnerships and clarify what constitutes valid contributions, including financial investments, domestic labor, and caregiving. To promote consistency, judicial guidelines should be developed to assess cohabitation claims based on factors such as duration, joint ownership, and shared economic goals. Additionally, judges and legal practitioners should receive specialized training on universal partnerships, drawing on comparative jurisprudence from South Africa to ensure fair and informed rulings.

Public awareness is also important. Legal literacy programs should be developed in collaboration with legal aid organizations to educate cohabiting partners on their rights and legal protections. Public campaigns, media engagement, and community outreach should be utilized to encourage the formalization of cohabitation arrangements. Community leaders, religious institutions, and social media platforms should play a role in disseminating this information.

Finally, structured dispute resolution mechanisms, such as mediation and arbitration, should be established to provide accessible and cost-effective alternatives to litigation in property disputes. Encouraging mediation as the primary method of dispute resolution would ease the burden on the courts while fostering amicable settlements. These mechanisms should be widely available, with provisions for legal aid to ensure accessibility for all individuals, regardless of their financial means.

By implementing these reforms, Kenya can develop a comprehensive legal framework that provides cohabiting partners with legal certainty, protects their property rights, and ensures fair outcomes in the event of separation.

### 5.3 CONCLUSION

The research conducted in this dissertation highlights the pressing need for legislative and judicial reforms in Kenya to address the legal vulnerabilities faced by cohabiting couples, particularly concerning property rights upon separation. This study successfully achieved its objectives and effectively addressed the research questions regarding the proprietary rights of cohabiting partners in Kenya. A critical analysis of the current legal framework has demonstrated that cohabitees remain largely unprotected due to the absence of specific statutory recognition. The judiciary's reliance on the presumption of marriage doctrine has led to inconsistent rulings, creating legal uncertainty and disproportionately disadvantaging cohabiting partners, particularly women.

The comparative analysis of South Africa's legal framework has provided valuable insights into a structured approach that Kenya can adopt. The recognition of universal partnerships, the enforceability of cohabitation agreements, and legislative intervention through a Domestic Partnerships Bill offer viable mechanisms for safeguarding the proprietary rights of cohabiting partners. These legal frameworks ensure predictability and fairness in property distribution upon separation, thereby fostering equitable treatment.

To bridge the legal gap in Kenya, this study recommends statutory reforms to explicitly define and protect cohabitation unions. The enactment of clear legislative provisions would not only enhance legal certainty but also align the law with the evolving social realities of modern relationships. By adopting these reforms, Kenya can establish a more just and equitable legal framework that upholds the rights of all individuals, regardless of the formalization of their unions.

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