

PROPERTY RIGHTS IN COHABITATION UNIONS IN KENYA

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DECLARATION

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


Signed:
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This Research Proposal has been submitted for examination with my approval as University Supervisor.


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- Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene* [2003] eKLR.
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- Eve v Eve* [1975] 3 ALLER 697.
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ABSTRACT

Change is one thing in life that is inevitable. One of the changes the world has experienced in the late 20th century and early 21st century is the emergence of the cohabitation institution. The Kenyan Marriage Act takes notice of the change by recognizing the existence of cohabitation unions. This positive step is negated by the fact that the law goes silent in providing for how property ownership in this unions should be governed. It leads to a case where a cohabitant's right to own property as enshrined in the constitution is not realized by them.

The situation as explained above has been confirmed through the qualitative research carried out in this paper. The primary sources of data (the statute, books and cases) show that the law goes silent on the issues of property rights, and the cases prove that the cohabitees are affected in a detrimental way. The comparative study on the other hand, supports these papers view that it is possible to avail property rights to persons in cohabitation unions. Scotland has successfully codified these rights while England has drafted a bill set to cover these rights.

This paper goes on to identify the opportunities and challenges which Kenya will face in borrowing from the comparative study in formulating a legal framework protecting the property rights of cohabitants. The paper concludes that the solution to this problem will be the legislators drafting a law which helps the cohabitees realize their right to own property as provided by the constitution.

PROPERTY RIGHTS IN COHABITATION UNIONS IN KENYA

INTRODUCTION TO THE STUDY

1 Background to the problem

Cohabitation under the black's law dictionary is defined as the living together as husband and wife.¹ In Kenya, the law defines it as an arrangement in which unmarried couples live together in a long-term relationship that resembles a marriage.² There has been a growth in the number of couples in cohabitation unions in Kenya as indicated by a recent study conducted by the Kenya National Bureau of Statistics.³ The results presented a picture that there was an increase in the number of cohabitation unions. One report carried out between 2008 and 2009, showed that the percentage of males in these unions as being 2.1% and the female being 4.1%.⁴ Another report carried out in 2014, showed the percentage of males cohabiting being 2.1% and the percentage of women increasing to 5.1%.⁵

The increase can be attributed to the rural urban migration and high cost of living in urban areas, that make people to stay together to lower the living costs.⁶ Other factors include; the fact that some people are in the process of getting a divorce so they cannot marry, others drift to cohabitation as their relationships get intimate, while others find the costs associated with getting married being high and opt for cohabitation instead.⁷ As it stands in Kenya, persons in cohabiting relationships do not have their property rights protected by any legislation. This stems from, among other things, the fact that these unions are not recognized as forms of marriages,⁸ and do not get the protection

¹ <http://thelawdictionary.org/cohabitation/> on 21 January 2017.

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

³ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey*, 2008-2009 and 2014.

⁴ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey*, 2008-2009, 37.

⁵ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey*, 2014, 32.

⁶ Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 11 ed, Oxford University press, 20156-7.

⁷ Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 11 ed, Oxford University press, 20156-7.

⁸ Section 6, *Marriage Act* (Act No. 4 of 2014).

afforded to unions recognized marriages.⁹ Cohabitants are disadvantaged by the law going silent with regards to their right of property ownership which they cannot realize in their unions.

The study will focus on two types of cohabitation unions; the alternative to “marriage” where the parties in this case resent the traditional notion of marriage, and the premarital cohabitation¹⁰ where the parties live together but have an intention of getting married in the future. Reason being that this are the most stable and the parties in these unions have an intention to have a long-term relationship.

It is worth noting that cohabitation unions differ from the other types due to the intention of the parties, intensity of the relationship and the duration of such relationships. An example could be a scenario where in an alternative to marriage cohabitation, the parties want to be viewed to the outside world as husband and wife but resent the normative culture of getting married,¹¹ coupled by the fact that the parties go on to have children.

1.1 Statement of problem

The issue arises where the Kenyan law recognizes the existence of cohabitation unions but fails to provide procedures and ways in which property acquired during and after the cohabitation is to be distributed or owned. Since these unions are not recognized as forms of marriages in Kenya¹² thus the rules on matrimonial property do not apply to them.¹³

1.2 Statement of Objective(s)

The goals and objectives of this research are;

- a) To find out the place of cohabitation under the Kenyan law.
- b) To find out the laws that govern property rights in cohabitation unions.
- c) To highlight the gaps that exist in the law and recommend solutions to the problem.

⁹ *Matrimonial Property Act* (Act No. 49 of 2013).

¹⁰ McGinnis, Sandra L. ‘Cohabiting, Dating, and Perceived Costs of Marriage: A Model of Marriage Entry’ *Blackwell Publishing Ltd* (2003), volume 65 issue 1, 105-116.

¹¹ Nigel Lowe and Gillian Douglas, *Bromley’s Family Law*, 11 ed, Oxford University press, 2015, 6-7.

¹² Section 6, *Marriage Act* (Act No. 4 of 2014).

¹³ Section 6, *Matrimonial Property Act* (Act No. 49 of 2013).

1.2.1 Research Question (s)

To achieve the objectives above the study will seek to answer the following questions;

- a) What is the place of cohabitation under the Kenyan law?
- b) What laws govern property rights in cohabitation unions?
- c) What type of legislative framework should be put in place to govern property rights in cohabitation unions?

1.3 Theoretical Framework

John Rawls in his theory of justice argues that each person should have equal rights to the basic amenities and an inequality is only justified where it is to the least advantaged persons.¹⁴ He brings out the argument that it is discriminatory for the law to provide for property rights to unions recognized as forms of marriages and leave out cohabitation unions. This inequality as put out in the theory does not serve any advantage but rather serves to discriminate against couples in cohabitation unions. The same view can be found under formal equality, which promotes individual justice and relies upon the proposition that fairness requires equal treatment.¹⁵ This view was also held by Aristotle in his argument that equality means that “things that are alike should be treated alike.”¹⁶

Substantive justice, which is partially distributive suggests that measures should be taken to rectify past discrimination¹⁷ since failing to do this will leave the affected groups at different starting points. Even though the approach may seem like indirect discrimination, according to Rawls theory explained above, the inequality is justified. In essence, the remedy to this problem requires the law to restore equality. Going back to the old common law, we find that property rights were infringed by the mere fact that the courts then saw cohabitation as being immoral. The court in the case of *Diwell v Farness*,¹⁸ saw cohabitation as being immoral. Even if there existed a contract on how the

¹⁴ <http://www.ohio.edu/people/piccard/entropy/rawls.html> On 7 February 2017.

¹⁵ Ackrill, J. L. and Urmsom J. O. ‘3 Ethica Nicomachea’, 112-117, 1131a-1131b *Oxford University Press*, 1980.

¹⁶ Wesson, Murray. “Equality and social rights: an exploration in light of the South African Constitution”, *Public Law*, 2007, 751.

¹⁷ <http://thelawdictionary.org/substantive-law/> On 14 February 2017.

¹⁸ [1959] 2 ALLER 379 at 384(per Ormerod LJ) and 388(per Willmer LJ).

property was to be distributed, the courts refused to enforce those rights due to the fact that the contract was a creature of an illegality, but this view changed in the recent past.¹⁹

The theory of justice advanced by David Hume, talks about the 'is' and 'ought-to be' distinction.²⁰ He argues that there exists a gap between values and facts, and one cannot deduce what 'ought-to be' (values) from what 'is' (facts).²¹ What 'ought-to be' is set out in man's nature which is governed by morality, while what 'is' are the facts which exists but do not justify man taking them up as 'what ought to be'. In relation to cohabitation, what ought to be from a moral point of view is a marriage. This theory thus argue against the union of cohabitation.

Aristotle argues that justice has to do with the proportionate ratio of commensurable goods.²² In the sense that one gets what's proportionate to their input. For example, one gets a wage which is proportionate with their work output. This theory supports the view that there should be property rights in cohabitation unions. The proportionality idea dictates that a party should be able to get an output equivalent to their input. It essentially means that parties in a cohabitation union should be allowed property rights in relation to what they bring in to the union.

Nevertheless, the old perception has been changed. In the case of *Taylor v Polackwich*,²³ the courts exercised judicial activism where they used the rules of equity to resolve the dispute in the cohabitation union since the laws had provided nothing.²⁴ This approach of judicial activism clearly shows that there is a gap in law to be filled, with regards to property rights in cohabitation unions.²⁵ The only issue is that there is no codification of these rules thus making the situation

¹⁹ *Marvin v Marvin* [1976]134 Cal. Rptr. 815.

²⁰ Horacio Spector 'Hume's Theory of Justice' (2014), Volume 5, 48.

²¹ Horacio Spector 'Hume's Theory of Justice' (2014), Volume 5, 48.

²² Anton-Hermann Chroust & David L. Osborn 'Aristotle's Conception of justice' *Notre Dame Law review* (1942), 17 volume issue 2, page 130. Also available at <http://scholarship.law.nd.edu/ndlr/vol17/iss2/2>.

²³ (1983) Cal. App. 3d 1014, 194 Cal. Rptr. 8.

²⁴ Jeffrey S. Rosen, 'Taylor v. Polackwich: Property Rights of Unmarried Cohabitants - From Marvin to Equity' *Golden Gate University Law Review* (January 1984), volume 14, Article 14.

²⁵ Jeffrey S. Rosen, 'Taylor v. Polackwich: Property Rights of Unmarried Cohabitants - From Marvin to Equity' *Golden Gate University Law Review* (January 1984), volume 14, Article 14.

uncertain and leaving most couples at the mercy of the court. In the case of *Cook v Head*,²⁶ the court held that property rights should be settled as if the cohabitants were married if they intended to. In the case of *Eve v Eve*,²⁷ Lord Denning was of the opinion that the efforts taken by the woman to improve the cohabiter's house was enough to create a beneficial interest in her favor, essentially creating a constructive trust without necessarily establishing the intentions of the parties.

In Kenya, the situation is more or less the same. In the case of *Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene*,²⁸ the court in its judgment showed a progressive nature by borrowing reference to two progressive English cases.²⁹ In Netherlands for example, cohabitation is granted the same status as marriage and the parties to it enjoy all the rights and freedoms of married couples.³⁰

1.4 Literature Review

The literature will be reviewed thematically, the themes being; property rights and the role of courts in cohabitation unions.

1.4.1 Property rights in cohabitation unions.

In the journal article 'Property Rights Between Unmarried Cohabitants'³¹ the author brings out the aspect of the existence of property rights in a cohabitation union. He states that the problem arises when the couples are splitting up and trying to distribute the property, especially if they did not have a contract. The journal article fails to provide a solution to the problem it puts out. This study will address the problem contextualizing it to Kenya. It will also go ahead and offer an answer to this problem.

²⁶ [1972] 2 ALLER 38.

²⁷ [1975] 3 ALLER 697.

²⁸ [2003] eKLR.

²⁹ *Eve v Eve* [1975] 3 ALLER 697 and *Cook v Head* [1972] 2 ALLER 38.

³⁰ <https://www.government.nl/topics/family-law/contents/marriage-registered-partnership-and-cohabitationagreements> On 6 December 2016.

³¹ Robert C. Angermeier, 'Property Rights Between Unmarried Cohabitants' *Indiana Law Journal*. (Winter 1975), Article 14.

In the book, Bromley's Family law, the author focuses on cohabitation in the United Kingdom and how the laws and jurisprudence has changed to accommodate these unions.³² The overriding theme of the book with regards to cohabitation is that change is inevitable and the society should appreciate this change by drafting laws regulating these unions on matters like property rights an approach currently being undertaken in the United Kingdom. The study will address the situation in Kenya with regards to cohabitation unions, looking at specifically at what the laws say about property rights of parties in this union.

In the book, Property law,³³ the authors put forward the fact that persons in a marriage have equal rights extending to their ownership of property.³⁴ This aspect is instrumental in informing how property rights in cohabitation unions should be viewed, a fact addressed in this study. The authors fail to talk about the issue property rights of parties in cohabitation unions. This study will however address the right to property ownership in cohabitation unions comprehensively.

The recognition of property rights in cohabitation unions, will more or less give them the same status quo with marriage. This view is criticized in the journal article 'Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?'³⁵ The authors focus is on whether cohabitation should be given the same status as marriage. They in the end come to a conclusion that it should not be granted the same status since this will break the whole essence of a marriage which is the basic family unit. This study will prove that this view advanced by the journal to be un true, by showing that this two unions are mutually exclusive. The recognition of property rights in cohabitation unions as it's the case in marriages does not in any way affect the institution of marriage.

1.4.2 The role of the courts with regards to property rights of cohabitants.

The courts have taken a much progressive view in dealing with property rights in cohabitation unions. This can be seen through its jurisprudence. In the journal article 'Property Rights of

³² Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 11ed, Oxford University press, 2015.

³³ Francis Kariuki, Smith Ouma and Raphael Ng'etich, *Property law*, Strathmore University Press,2016.

³⁴ Francis Kariuki, Smith Ouma and Raphael Ng'etich, *Property law*, Strathmore University Press,2016,275.

³⁵ Brinig, Margaret F. and Nock, Steven L., 'Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?' *Scholarly Works* (2004), paper 633.

Unmarried Cohabitants — Nothing New under the Sun³⁶ the author focuses on the approach the courts in America have taken towards cohabitation unions. He uses the case of *Marvin v Marvin*,³⁷ where the courts vacate the view that cohabitation unions are immoral and appreciate their societal acceptance and change. He concludes that a change like cohabitation should be appreciated and laws should be drafted in relation to property rights in this unions.

In the case of *Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene*,³⁸ the courts appreciated the change in the ownership of property rights by cohabitantes. It quoted two English cases which had adopted a more progressive attitude to this matter, where the courts were of the view that property holding between the parties who were cohabitantes was similar to property holding marriage.³⁹ In the other, case the court held the opinion that a resulting trust can exist in a cohabitation relationship,⁴⁰ appreciating that times have changed and it is time for property rights in cohabitation unions to be realized.

In the journal article '*Taylor v Polackwich: Property Rights of Unmarried Cohabitants - From Marvin to Equity*',⁴¹ the author stresses the point that the statutory law does not provide viable remedies in instances where there is a dispute on property rights in a cohabitation. His views are that courts should provide equitable remedies as they did in the case of *Taylor v Polackwich*.⁴²

1.5 Limitations

- a) There exists limited legal documentation in Kenya in relation to matters pertaining property rights in cohabitation.

³⁶ Alexander C. Morey and Dixie Grossman, 'Property Rights of Unmarried Cohabitants — Nothing New under the Sun' (2012), volume 25.

³⁷ [1976]134 Cal. Rptr. 815.

³⁸ [2003] eKLR.

³⁹ *Cook v Head* [1972] 2 ALLER 38.

⁴⁰ *Eve v Eve* [1975] 3 ALLER 697.

⁴¹ Jeffrey S. Rosen, 'Taylor v. Polackwich: Property Rights of Unmarried Cohabitants - From Marvin to Equity' *Golden Gate University Law Review* (January 1984), volume 14, Article 14.

⁴² [1983] Cal. App. 3d 1014, 194 Cal. Rptr. 8.

1.6 Hypothesis

The lack of laws recognizing and protecting property rights in cohabitation unions, works to the disadvantage of the cohabitants.

1.7 Justification of the study

Under common law, cohabitation unions were seen to be immoral. In the case of *Diwell v Farness*,⁴³ the court held that a woman cannot claim interest in property held together with a man she has been living with, by spelling out an agreement that they should buy it as a joint venture.

The contract was doomed to fail due to the fact that it was unenforceable since it was founded on an immoral consideration, which was the woman being the man's mistress.⁴⁴

In the case of *Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene*,⁴⁵ the presiding judge was of the opinion that: the attitude by the courts was based on the old common law position that extra marital cohabitation was considered wrong and therefore no legal rights would accrue to them;⁴⁶ it is a reflection on the attitude of the society in seeing the only stable forms of relationships being marriage;⁴⁷ the court felt that in giving rights that exists only in marriage, then the institution of marriage would be weakened.⁴⁸

Courts have vacated the view held in *Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene*.⁴⁹ This is evident as seen in the new jurisprudence (which tries to protect cohabitants property rights), arising from the judge's judicial activism. A good example would be cases where judges use the principles of equity to resolve issues arising in cohabitation not covered by the statutory law.⁴⁹ The approach taken by the court in the case of *Taylor v Polackwich*⁵⁰ clearly shows

⁴³ [1959] 2 ALL. ER 379 at 384(per Ormerod LJ) and 388(per Willmer LJ).

⁴⁴ Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 11ed, Oxford University press, 2015,6-7.

⁴⁵ [2003] eKLR.

⁴⁶ *Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene* [2003] eKLR.

⁴⁷ *Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene* [2003] eKLR. ⁴⁸

Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene [2003] eKLR.

⁴⁸ [2003] eKLR.

⁴⁹ *Taylor v Polackwich* (1983) Cal. App. 3d 1014, 194 Cal. Rptr. 8.

⁵⁰ Cal. App. 3d 1014, 194 Cal. Rptr. 8.

that there is a gap in law to be filled, with regards to protecting property rights of parties in cohabitation unions.⁵¹ This view has since been vacated by English courts, which have now adopted a liberal approach in developing property rights for cohabitants. It can be seen in the case of *Cook v Head*,⁵² where the court held that property rights should be settled as if the cohabitants were married if they intended to.⁵³

In another case, the judge was of the opinion that the efforts taken by the woman to improve the cohabiter's house was enough to create a beneficial interest in her favor.⁵⁴ Thus in essence creating a constructive trust without necessarily establishing the intentions of the parties. Currently Scotland has a legal framework protecting cohabitants property rights.⁵⁵ In England, on the other hand there is a Cohabitation Rights bill. If the bill is passed into law, it will provide a legal framework for the protection of the cohabitants property rights.⁵⁶

The approach taken in Scotland and England to protect the property rights of cohabitants clearly shows that there was a problem at first in not protecting them. This problem sadly is still in existence in Kenya where the law is silent on these rights. This makes a compelling case for our courts and law makers to develop mechanisms to protect the property rights of cohabitants.

1.8 Research design & Methodology

A qualitative research will be used to look into the matter of property rights in cohabitation unions.

1.8.1 Source of data

The research data will be sourced from primary and secondary sources of data. The primary sources of data being the municipal laws the constitution being the highest of those laws, the Acts of the national assembly, books and Kenyan cases. The secondary sources data will be obtained from the internet, reports and cases from other jurisdictions.

⁵¹ Jeffrey S. Rosen. 'Taylor v. Polackwich: Property Rights of Unmarried Cohabitants - From Marvin to Equity' *Golden Gate University Law Review* (January 1984), volume 14, Article 14.

⁵² [1972] 2 ALLER 38.

⁵³ *Cook v Head* [1972] 2 ALLER 38.

⁵⁴ *Cook v Head* [1972] 2 ALLER 38.

⁵⁵ *Family Law* (Scotland) Act (2006).

⁵⁶ Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, Oxford 11 edition, 2015, 6-7.

The research will also conduct a comparative study, which will look at the legal framework set up in Scotland and England to protect cohabitants' property rights.

1.8.2 Data collection

This will involve accessing the library to get reading materials which form part of the primary sources of data. It will also include desktop research, accessing the internet to access my secondary sources of data.

1.8.3 Data analysis

The analysis of the collected data is going to be contextualized to the situation in Kenya, and limited to matters of property rights in cohabitation unions. This mode is convenient for any legal research study as most of the material is contained in literature and as such the researcher undertakes the research based on that information.

1.9 Chapter Breakdown

The dissertation will have five chapters.

Chapter one: Introduction to the study

It is the research proposal which comprises of: the background to the problem; the research question; the theoretical framework; the literature review; the limitations; the hypothesis; the justification of the study, and the research methodology to be used.

Chapter two: Regulation of property rights in cohabitation unions in Kenya

Will focus on the legal framework surrounding the property rights of cohabitants in Kenya.

Chapter three: Comparative study on property rights in cohabitation unions in England and Scotland

Will deal with the comparative study, which will look at the legal framework which exists in England and Scotland to protect the property rights of cohabitants. It is going to be between the laws of Kenya, England and Scotland. This comparative study seeks to show lessons which Kenya can learn from the two jurisdictions which have dealt with the issue of property rights in cohabitations.

Chapter four: Lessons learnt from the comparative study

Will look at the opportunities presented from the comparative study which Kenya can emulate and borrow. Also, it will look at the challenges that Kenya will face in borrowing from these laws.

Chapter five: Conclusion, Findings and Recommendations

This is going to be the final chapter of the dissertation, which is going to provide a conclusion which will be in summary an answer to the problem question. Also, it will have policy considerations borrowed from legal frameworks of England and Scotland. It will be recommendations to the Kenyan legislators to take into account in formulating the relevant laws which will facilitate the recognition of property rights in cohabitation unions.

CHAPTER 2

REGULATION OF PROPERTY RIGHTS IN COHABITATION UNIONS IN KENYA

2 Introduction

This chapter interrogates the regulation of property rights in cohabitation unions in Kenya by looking at what the laws provide for with regards to this unions. The laws which are going to be looked at are: The Constitution of Kenya 2010, which is the supreme law of the land. It provides a basis from which laws in relation to the rights it affords are created. In relation to this research the right to marry provides a basis for the enactment of laws which governs the union; the Marriage Act 2014, provides a legal framework which helps in the realization of the right to marriage; the Matrimonial Property Act 2013, provides a regulation by which the right to property arising from the right to marriage is protected in these unions.; the Land Registration Act 2012, provides ways in which one can realize their right to property in land and goes on to protect the rights once they are acquired.

2.1 Laws dealing with property rights in marriages in Kenya

This part of the dissertation looks at the laws governing property rights marriages specifically customary marriages in three phases; pre-colonial period, colonial period and independence period. Reason being that there exist other forms of marriages in Kenya⁵⁷(Muslim, Hindu, Christian and Civil marriages) and due to time constraints, the study will not be able to address all of them.

2.1.1 Pre-colonial Kenya

Marriage in pre-colonial Kenya was governed by customary law.⁵⁸ These laws differed from community to community, and as a result this meant different property rights for the married couples.⁵⁹ The uniting factor of the African communities was their patriarchal nature which was

⁵⁷ Section 6, *Marriage Act* (Act No. 4 of 2014).

⁵⁸ <https://www.theplatform.co.ke/?p=385> Accessed on 30/1/2018.

⁵⁹ <https://www.theplatform.co.ke/?p=385> Accessed on 30/1/2018.

chauvinistic favoring men over women.⁶⁰ This patriarchal nature was reflected in the distribution of property rights in marriages, where men had an upper hand compared to women. In addition to that, women were viewed as property of the husband. For example, in levirate marriages the wife(s) of the deceased husband were inherited by their brother.⁶¹ In Kenya, the levirate marriages were practiced among the Luo community. The practice of wife inheritance was widely accepted by women because the culture and custom did not allow women to own or control any resources (such as land and cattle).⁶²

The patrilineal descent system used for purposes of inheritance disfranchised women. This system meant a wife(s) who did not have a son would have a hard time inheriting their husband's property.⁶³ To conclude it is quite clear that customary law which governed marriage in the precolonial period was to a large extent discriminatory and promoting gender inequality, to the detriment of women in the marriages.

2.1.2 Colonial Kenya

The coming of the European settlers marked a turning point in the customary law in Kenya which in turn affected the marriages contracted under these systems. To start with, the British settlers enacted the Order in Council which under section 52. The law required customary law to be applied only to the extent that it was not repugnant to justice or morality.⁶⁴ Africans who decided to contract Christian marriages were governed by the Native Christian Marriage Ordinance,⁶⁵ and were taken to have abandoned the traditional ways. This was seen in the case of *Cole v Cole*,^{66,67} and

⁶⁰ Kenda Mutongi, 'Worries of the Heart Widows, Family, and Community in Kenya' *Chicago: University of Chicago Press* (2007),66.

⁶¹ Kenda Mutongi, 'Worries of the Heart Widows, Family, and Community in Kenya' *Chicago: University of Chicago Press* (2007),66.

⁶² Claire Hildebrand and Jessica Lewi, 'Wife Inheritance Kenya', (2013), page 2.

⁶³ Edwins Laban Moogi Gwako, 'Widow Inheritance among the Maragoli of Western Kenya' *Journal of Anthropological Research* (1998), 173.

⁶⁴ Article 52, *Order in council* (1897).

⁶⁵ *The Native Christian Marriage Ordinance* (1904).

⁶⁶ I.N.L.R-15 (1898).

⁶⁷ E.A.R.L. 14.

R v Amkeyo.¹¹ In these two cases, the courts held that once a person contracted a marriage under statute, customary law stopped applying to them in matters such property rights.

The colonial government went ahead to revise the court system relating to the indigenous Africans with the lowest courts being a panel of elders from native law or area and whose decisions would be appealed at the Native Appeals Tribunal, the District Commissioner and lastly to the Provincial Commissioner.⁶⁸ This created the legal framework which governed the customary marriages in colonial Kenya.

2.1.3 Independence Kenya (1963-2014)

After independence, the Judicature Act was enacted which recognized customary law as a source of law in Kenya, to the extent that it was applicable and not repugnant to justice and morality or inconsistent with any written law.⁶⁹ Kenya's court system changed after independence with the enactment of the 1967 Magistrate Courts Act which converted the African Courts to Magistrate Courts.⁷⁰ This broadened the jurisdiction of the courts from listening to matters governed by customary law only to matters governed by statute. The Judicature Act and the Magistrates Court Act limited the application of customary law to civil matters and only to the extent that it was in line with the law.⁷¹ Common law and doctrines of equity were also cited as sources of law in Kenya.⁷²

At common law, long cohabitation created a rebuttable presumption of law that there was the existence of marriage. The common law presumption was applied in the case of *Hotensia Wanjiku Yawe v. Public Trustee the Court of Appeal for Eastern Africa*.⁷³ In that case, the court held that long cohabitation as man and wife gives rise to a presumption of marriage in favor of the appellant and only cogent evidence can rebut such a presumption. The decision was upheld in the case of

⁶⁸ Francis Kariuki, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' page 3.

⁶⁹ Section 3(2), *The Judicature Act* (1967).

⁷⁰ Francis Kariuki, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems'.

⁷¹ Section 3(2), *The Judicature Act* (1967) and Section 2, *Magistrate Courts Act* (1967).

⁷² Section 3(1, c), *The Judicature Act* (1967).

⁷³ Civil Appeal No. 13 of 1976.

Mary Njoki v. John Kinyanjui Muthuru and others,⁷⁴ where the court held that “there has to be evidence that the long cohabitation is not a mere friendship between a man and a woman, that she is not a concubine but that it is presumed there is a marriage”. Among other things, the presumption of marriage helped secure the property rights of the persons in that union. It can be explained by the fact that one’s the union was presumed to be a marriage; the property was to be governed by the Married Women’s Property Act (1882).

Persons married under the Repealed Marriage Act were prohibited from contracting any other form of marriage.⁷⁵ This view of the law was seen in the case of *Re Ruenji’s Estate*,⁷⁶ where the judge reasoned that women married under customary law by a man who had previously married under statute are not wives and their children are not children for the purposes of succession, and they are not therefore entitled to share in the estate of the deceased.

It was also seen in *Re Ogola’s Estate*,⁷⁷ that a man who is married under the African Christian Marriage and Divorce Act is barred from contracting any other marriages during the pendency of their statutory marriage. Any marriage so contracted is null and void, and the woman so married is not entitled to inherit in the intestacy of the deceased man. The courts interpretation of the law made it clear that statutory marriages were to be monogamous.

The two cases above show that women in unions which were void had no rights accruing from such unions. In 1981, parliament added section 3(5) to the Law of Succession Act, which stated that ‘Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless, a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.’ Under the Act, the second woman who for the purposes of this statute⁷⁸ is considered a wife and has a right to claim as a dependent of the husband’s estate. If there were children

⁷⁴ Civil Appeal No. 71 of 1984.

⁷⁵ Section 37, Repealed *Marriage Act* (1962).

⁷⁶ (1977) KLR 21.

⁷⁷ (1978) KLR 18.

⁷⁸ *Law of Succession Act* (Act No. 26 of 2015).

between the second woman and the deceased man. The children will have right to be included in the testator's will, they do not need to prove that they were dependents of the testator.⁷⁹

Arguably, this was a silver lining to women in unions where the man had already contracted a marriage under the Marriage Act,⁸⁰ this meant their marriage was void by operation of the law. At the very least, their property rights when the husband died were protected. In the case of *Irene Macharia v. Margaret Wairimu Njomo and another*,⁸¹ Justices Omolo, Tunoi and Bosire held that the function of section 3(5) of the Law of Succession Act was to protect women who marry men under customary law, who are already married or who subsequently marry other women under statute. The woman married under customary law is regarded as a wife for succession purposes.

When a woman is recognized as a wife under the Law of Succession Act they automatically fall in the definition of a dependent as provided in section 29 of the same statute. As a dependent, the spouse can approach the court to enforce their right to a reasonable provision from the estate of the deceased husband. In the instance that the husband dies intestate, the woman has a right to object a grant application and protest its confirmation.⁸² In addition to that they have a right to apply for a grant of letters of administration.⁸³

2.1.4 Post 2010

In August 2010, Kenya ushered in a Constitution which had provisions relating to marriage. It provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.⁸⁴ This was a change from the previous marriage regime where equality was not expressed by the law through a statute but rather developed by judges in their jurisprudence.⁸⁵

⁷⁹ Section 26 & 29, *Law of Succession Act* (Act No. 26 of 2015).

⁸⁰ Marriage Act (Cap 150 1962).

⁸¹ Nairobi Appeal No. 139 of 1994.

⁸² Rule 15, *The Probate and Administration Rules* (1980).

⁸³ Section 66, *Law of Succession Act* (Act No. 26 of 2015).

⁸⁴ Article 45(1), *Constitution of Kenya* (2010).

⁸⁵ *Kivuitu v. Kivuitu* (1991) 2 K. L. R. 241 & *Tabitha Wangechi Nderitu v. Simon Nderitu Kariuki* (1998) eKLR.

2.1.5 Matrimonial Property Act (2013)

The Matrimonial Property Act came into force in 2013, it applies only to property in a marriage. The statute states, despite any other law, a married woman has the same rights as a married man.⁸⁶ This brings out the aspect of equality between the spouses which extends to the property that they own together.⁸⁷ The distribution upon divorce is not equal *per se* but dependent on what each spouse contributes towards the acquisition of the property.⁸⁸ Customary law shall be considered during the distribution of the property to the extent that it is not inconsistent with the constitution.⁸⁹ The statute provides that there is a rebuttable presumption that property acquired during marriage in the name of one spouse is held in trust for the other spouse.⁹⁰ Where the property acquired is held in their joint names then there is a rebuttable presumption that the property is held in equal shares.⁹¹

2.1.6 Marriage Act (2014)

2014 marked an epoch in the marriage regime with the enactment of the Marriage Act. The law consolidated all the marriage laws into one statute. The act made changes to customary marriages to try and cure the mischiefs which were in existence; inequality in the rights of the parties, the non-recognition of the marriages as being polygamous, and the lack of registration of customary marriages.

The first one is equality in Marriages. As discussed earlier in this chapter, customary law was detrimental towards women on the issue of property rights.⁹² The society based on a patrilineal descent system of inheritance, excluded women from inheriting their husband's property if they died. In the Marriage Act of 2014, equality has been underscored.³⁷ It states that, 'Parties to a

⁸⁶ Section 4, *Matrimonial Property Act* (Act No. 49 of 2013).

⁸⁷ Francis Kariuki, Smith Ouma and Raphael Ng'etich, *Property law*, Strathmore University Press, 2016, 275 and Section 4(a), *Matrimonial Property Act* (Act No. 49 of 2013).

⁸⁸ Francis Kariuki, Smith Ouma and Raphael Ng'etich, *Property law*, Strathmore University Press, 2016, 275.

⁸⁹ Section 11, *Matrimonial Property Act* (Act No. 49 of 2013).

⁹⁰ Section 14(a), *Matrimonial Property Act* (Act No. 49 of 2013).

⁹¹ Section 14(b), *Matrimonial Property Act* (Act No. 49 of 2013).

⁹² Claire Hildebrand and Jessie Lewi, 'Wife Inheritance Kenya', (2013) page 2. ³⁷

Section 3(2), *Marriage Act* (Act No. 4 of 2014).

marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.⁹³ This equality extends to spouses in a customary marriage.

Secondly, the Act recognizes customary marriages to be potentially polygamous.⁹³ Thirdly, under the Act customary marriages are required to be registered.⁹⁴ Registration is required for the purposes of proving the existence of the marriage in the first place. This feature did not exist in the previous marriage regime. Customary marriages celebrated in the former regime are still required to be registered in line with the Marriage Act 2014. The statute requires that customary marriages not registered under the old marriage regime, shall apply to the Registrar or County Registrar to assistant Registrar for the registration of that marriage under the Act within three years of the coming to force of the Act.⁹⁵

The requirement of registration was emphasized by the Kenya's Attorney General Githu Muigai's gazette notice.⁹⁶ It essentially stated that all customary marriages should be registered by August 1, 2017. This brings the question what will happen to the customary marriages which will not be registered in line with the timelines given in the gazette notice. A marriage the Marriage Act is voidable if it is not registered.⁹⁷ The statute goes on and provides the requirement for the registration of a customary marriages.⁹⁸ Lack of registration of these unions does not render them invalid because the law prescribes that, a marriage may be proven in Kenya if it was celebrated in a public place of worship but its registration was not required, by an entry in any register maintained at that public place of worship or a certified copy of such an entry.⁹⁹

The Marriage Act goes on to define cohabitation as an arrangement where an unmarried couple lives together in a long-term relationship which resembles a marriage.¹⁰⁰ There is no ambiguity in

⁹³ Section 6(3), *Marriage Act* (Act No. 4 of 2014).

⁹⁴ Section 6, *Marriage Act* (Act No. 4 of 2014).

⁹⁵ Section 96, *Marriage Act* (Act No. 4 of 2014).

⁹⁶ Gazette Notice Number 5345 dated 9th June 2017.

⁹⁷ Section 12(e), *Marriage Act* (Act No. 4 of 2014).

⁹⁸ Section 55, *Marriage Act* (Act No. 4 of 2014).

⁹⁹ Section 59, *Marriage Act* (Act No. 4 of 2014).

¹⁰⁰ Section 2, *Marriage Act* (Act No. 4 of 2014).

the law between what a cohabitation union is and what a marriage is. Under the law cohabitation is recognized but the law goes silent on provisions regarding property rights in these unions.

2.2 Property rights in cohabitation unions in Kenya

Courts have tried to develop jurisprudence with regards to property rights in cohabitation unions. At first common law viewed cohabitation as seen in the case of *Hyde v Hyde*.¹⁰¹ In this case, the court held that a marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. The court viewed unions such as cohabitation as living in sin and strongly disapproved them.

This view changed with time as reflected in the jurisprudence the courts went on to create. In the case of *Eve v Eve*,¹⁰² Lord Denning was of the opinion that the efforts taken by the woman to improve the cohabiter's house was enough to create a beneficial interest in her favor, in essence creating a constructive trust. A similar form of judicial activism was found in the case of *Taylor v Polackwich*,¹⁰³ where the court used the rules of equity to resolve the dispute in the cohabitation union since the laws did not provide for anything.¹⁰⁴

Jurisprudence in Kenya on property rights in cohabitation unions can be seen in the cases of *Hotensia Wanjiku Yawe v. Public Trustee the Court of Appeal for Eastern Africa*¹⁰⁵ and *Mary Njoki v. John Kinyanjui Muthuru and others*.¹⁰⁶ It was established in these two cases that there is a presumption of marriage from a long cohabitation. This study constructively construes that, the presumption of marriage allows the parties in the union which was at best a cohabitation, to be governed by the Married Women Property Act¹⁰⁷ which protect their property rights. To bring it into perspective, this was a positive step towards protecting cohabitees property rights. Reason being the law did not provide for property rights in cohabitation unions and the presumption of

¹⁰¹ [L.R.] 1 P. & D. 130 (1886).

¹⁰² [1975] 3 ALLER 697.

¹⁰³ (1983) Cal. App. 3d 1014, 194 Cal. Rptr. 8.

¹⁰⁴ Jeffrey S. Rosen, 'Taylor v. Polackwich: Property Rights of Unmarried Cohabitants - From Marvin to Equity' *Golden Gate University Law Review* (January 1984), volume 14, Article 14.

¹⁰⁵ Civil Appeal No. 13 of 1976.

¹⁰⁶ Civil Appeal No. 71 of 1984.

¹⁰⁷ *Married Women Property Act* (1882).

marriage meant the property was to be treated as matrimonial property and thus governed by the Married Women Property Act.

In the cases of *Re Ruenji's Estate*¹⁰⁸ and *Re Ogola's Estate*¹⁰⁹ where it was held that a man lacks the capacity to enter into a customary marriage if he has contracted a marriage under statute.¹¹⁰ In these two cases the second marriages were declared null and void with no rights accruing from them.

These women would at best be considered to be in a cohabitation union since what they had with the husband was not a marriage. It is worth noting that under common law, cohabitation was between a man and a woman, but this chapter for argument's sake will consider the women to be in cohabitation despite the fact that the men were already married.

Women in cohabitation were left out in the cold since with these unions the law went silent with regards to protection of the spouses' property rights. Parliament added a section to the Law of Succession Act,¹¹¹ which now protected the women by considering them as wife(s) for succession purposes. Arguably this was a positive step towards safeguarding the property rights of the women who were left out before. Courts interpreted that the aim of this provision was to protect women who marry men under customary law, who are already married to or who subsequently marry another woman under statute. The woman married under customary law is regarded as a wife for succession purposes.¹¹²

2.2.1 Legal framework on cohabitation unions in Kenya

2.2.1.1 The Land Registration Act

Rights of cohabitants are not directly addressed by this statute but can rather be construed. The statute provides that, 'Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights

¹⁰⁸ (1977) KLR 21.

¹⁰⁹ (1978) KLR 18.

¹¹⁰ Section 37, *Repealed Marriage Act* (1962).

¹¹¹ section 3(5), *Law of Succession* (Act No. 26 of 2015).

¹¹² *Irene Macharia v. Margaret Wairimu Njomo and another* Nairobi Appeal No. 139 of 1994.

there shall be a presumption that they hold the interest as tenants in common in equal shares.¹¹³ In relation to cohabitation unions, where an instrument of transfer of interest of land exists which does not specify the nature of the cohabitees rights. The presumption will be that the cohabitees hold the interest as tenants in common in equal shares.

The presumption of joint tenancy brings with it obligations and duties placed on the parties. Under the statute if land is occupied jointly, no tenant is entitled to any separate share in the land and consequently; dispositions may be made only by all the joint tenants, on the death of a joint tenant, that tenant's interest vests in the surviving tenant, and lastly each joint tenant may transfer their interest *inter vivos* to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.¹¹⁴ Upon the death of one of the joint tenants the property moves to the survivor through transmission,. This is done by the registrar deleting the name of the joint tenant who has died from the register by registering the death certificate.¹¹⁵ It creates a protection of property rights in land for cohabitees who have been presumed to be joint tenants.

The changes made to law and jurisprudence created by courts show a progressive approach by Kenyan society with regards to appreciating that persons in cohabitation unions have property rights which need to be protected. There is still more room left to be filled since, a lacuna exists in law where the rights are not codified.

¹¹³ Section 91(2), *Land Registration Act* (Act No. 3 of 2012).

¹¹⁴ Section 91(4), *Land Registration Act* (Act No. 3 of 2012).

¹¹⁵ Section 60, *Land Registration Act* (Act No. 3 of 2012).

CHAPTER 3

COMPARATIVE STUDY ON PROPERTY RIGHTS IN COHABITATION

UNIONS BETWEEN KENYA, ENGLAND AND SCOTLAND

3 Introduction

In this chapter, the issue of property rights in cohabitation unions will be discussed by looking at how it has been addressed in Scotland and England. The two jurisdictions have a rich jurisprudence established by the courts concerning matters of property rights in cohabitation unions. In Scotland, there exist a law which specifically looks at the rights of cohabitants.¹¹⁶ Currently in England, there is a Cohabitation Bill before parliament which provides a good legal framework for the protection of cohabitants property rights.

3.1 England and Scotland

3.2 History

Cohabitation in England and Scotland can be traced back to the 19th and 20th century as documented in history.¹¹⁷ Cohabitation was practiced for economic convenience and was prevalent among the poor during the Victorian era.¹¹⁸ During this period, persons in cohabitation unions were considered to be living in sin, as seen in the case of *Hyde v Hyde*¹¹⁹ which was decided during the Victorian era. The court held that a marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. The court viewed unions such as cohabitation as living in sin and strongly disapproved of them since they painted a wrong picture of what a marriage ought to be. This view advanced by the courts and society at large was instrumental in leading to the disenfranchisement of couples in the unions.

¹¹⁶ *Family Law* (Scotland) Act (2006).

¹¹⁷ <http://www.historyextra.com/article/bbc-history-magazine/living-sin-common-law-marriage-unmarriedrelationships-victorian-britain> Accessed on 26/09/2017.

¹¹⁸ <http://www.historyextra.com/article/bbc-history-magazine/living-sin-common-law-marriage-unmarriedrelationships-victorian-britain> Accessed on 26/09/2017.

¹¹⁹ [L.R.] 1 P. & D. 130 (1886).

Significant changes have taken place since the Victorian era, and the number of cohabitation unions have gone up.¹²⁰ Statistics show that between 1996 and 2016, families in cohabitation unions doubled in number from 1.5 million to 3.3 million.¹²¹ Following the increase of cohabitation unions the government through legislations and courts through jurisprudence have tried to create mechanisms that tackle property rights of cohabiting persons.

3.3 England

In England, the first real recognition of cohabitants as a class for whom legal provisions could be made for, was seen through the enactment of the Domestic Violence and Matrimonial Proceedings Act 1976. Under section 1(2) of the Act, applicants were allowed to obtain injunctions to control spouses behavior and even to exclude them from the matrimonial home, the application was extended to ‘a man and a woman who are living with each other in the same household as husband and wife(cohabitees)’.¹²²

Parliament in 1996, made a symbolic step in trying to improve the position of parties in a cohabitation union by enacting schedule 7 to the Family Law Act of 1996. The schedule granted cohabitants powers to transfer tenancies to each other.¹²³ The court under the schedule is given powers to make an order to transfer the tenancy of the dwelling-house in which the couple cohabited in.¹²⁴ When determining such an order, the court takes into account, where only one cohabitant was entitled to occupy the premises;¹²⁵ the nature of the parties’ relationship, mainly looking at the level of commitment. The length of the cohabitation. Where there are children from

¹²⁰

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2016> Accessed on 26/9/2017.

¹²¹

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2016> Accessed on 26/9/2017.

¹²² Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, Oxford 11 edition, 2015, 939.

¹²³ Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, Oxford 11 edition, 2015, 950.

¹²⁴ Paragraph 3(2),4(b), *Schedule 7*.

¹²⁵ Section 36(6), *Family Law Act* (1996).

the union, or have parental responsibility for any children. The length of time since they ceased to cohabit.

The court also has leeway to exercise powers to adjust the cohabitants liabilities with respect to the tenancy, and order for the party receiving the transfer to reimburse the transferring tenant.¹²⁶

Former cohabitants can make an application even after they have gotten married or started cohabiting with someone else, although the court is going to take this factor into consideration when making a determination.¹²⁷ The Act¹²⁸ led to the drafting of the Cohabitation Rights bill which seeks to address the issue of cohabitants right to own property.

3.3.1 Cohabitation Rights bill

Currently in England there is a Cohabitation Rights bill before parliament. The bill has already gone through the first reading. It provides a legal framework for the creation and protection of cohabitation unions. A cohabitant is defined as; any two persons either heterosexual or same sex, who live together as a couple, it goes on to provide a set of conditions that these two people should fulfil,¹²⁹ the two persons are each treated in law as being mother, father or parent of the same minor child,¹³⁰ they are the natural parents of a child *en ventre sa mere* at the date when they cease to live together as a couple,¹³¹ and they should have lived together as a couple for a continuous period of three years or more. Persons who are married to each other or are in the prohibited degrees of consanguinity lack capacity to form a cohabitation union.¹³² The law defines a former cohabitant as a person who was in a cohabitation union which ceased to exist.¹³³

¹²⁶ Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, Oxford 11 edition, 2015, 950.

¹²⁷ Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, Oxford 11 edition, 2015, 950.

¹²⁸ *Family Law Act* (1996).

¹²⁹ Clause 2(1), *Cohabitation Rights bill*.

¹³⁰ Clause 2(2), *Cohabitation Rights bill*.

¹³¹ Clause 2(2), *Cohabitation Rights bill*.

¹³² Clause 2(3), *Cohabitation Rights bill*.

¹³³ Clause 3, *Cohabitation Rights bill*.

A relevant child in a cohabitation union is defined as any minor who the cohabitants are treated as mother and father under the law.¹³⁴ Parties who are within the prohibited degrees of consanguinity lack capacity to form cohabitation unions.¹³⁵ The bill allows parties to a cohabitation union to apply to the courts for financial settlement orders,¹³⁶ the application is extended also to the former cohabitants.¹³⁷

Courts derive their jurisdiction from clause 8,¹³⁸ which gives it the power to make financial settlement orders. In making such an order the court considers the following factors,¹³⁹ that the parties have seized to be in a relationship, its satisfied that the defendant retained a benefit or the applicant suffered an economic disadvantage, the court having regard to discretionary factors determines that it is just and equitable. Discretionary factors which the court considers provided for in the bill are; the welfare of a minor(child under 18 years), the financial needs and obligations which each of the parties has, or is likely to have in the foreseeable future, the welfare of any children who live with or might reasonably be expected to live with either party, the conduct of each party if, but only if, it is of such a nature that it would be inequitable to disregard it , and the income, earning capacity, property and other financial resources which each of the parties has, or is likely to have in the foreseeable future.

The bill allows for a cohabitant to have an insurable interest in the life of the other cohabitant.¹⁴⁰ On the issue of succession in cases of an intestate estate the bill proposes to amend Section 46 of the Administration of Estates Act 1925, by including cohabitants as part of the classes of persons who have a right to the deceased estate. A cohabitant needs not to have been married before the death of the spouse and should have been cohabiting with the deceased before their death.¹⁴¹ The

¹³⁴ Clause 4, *cohabitation Rights bill*

¹³⁵ Clause 5, *Cohabitation Rights bill*.

¹³⁶ Clause 7, *Cohabitation Rights bill*.

¹³⁷ Clause 8, *Cohabitation Rights bill*.

¹³⁸ *Cohabitation Rights bill*.

¹³⁹ Clause 9, *Cohabitation Rights bill*.

¹⁴⁰ Clause 16, *Cohabitation Rights bill*.

¹⁴¹ Clause 19, *Cohabitation Rights bill*

new bill provides hope that the inequality in terms of property rights of cohabittees will soon be over.

3.4 Scotland

Scotland has a well-defined legal framework with regards to laws concerning the property rights of cohabittees, found in the Family Law (Scotland) Act (2006).¹⁴² The law defines a cohabitant as a man and a woman who are (or were) living together as if they were husband and wife.¹⁴³ In determining whether a person is a cohabitant for the purposes of the Act, the court considers; the length of the period during which A and B have been living together (or lived together), the nature of their relationship during that period, and the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.¹⁴⁴ The statute provides that it shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.¹⁴⁵ This presumption can be rebutted by cogent evidence to the contrary.¹⁴⁶ In defining household goods, the Act gives what is not considered to form household goods which is money, securities, motor vehicle or any domestic animal.¹⁴⁷

Where there is uncertainty regarding the right of either cohabitant to money gotten from any allowance made by either of them, to meet their joint household expenses or for similar purpose or any property is acquired with that money.¹⁴⁸ Subject to the existence of an agreement to the contrary between the cohabitants, the money and property gotten from the said allowance shall be treated as belonging to the cohabittees in equal shares.¹⁴⁹

¹⁴² *Family Law (Scotland) Act (2006)*.

¹⁴³ Section 25(1), *Family Law (Scotland) Act (2006)*.

¹⁴⁴ Section 25(2), *Family Law (Scotland) Act (2006)*.

¹⁴⁵ Section 26(2), *Family Law (Scotland) Act (2006)*.

¹⁴⁶ Section 26(3), *Family Law (Scotland) Act (2006)*.

¹⁴⁷ Section 26(4), *Family Law (Scotland) Act (2006)*.

¹⁴⁸ Section 27(1), *Family Law (Scotland) Act (2006)*.

¹⁴⁹ Section 27(2), *Family Law (Scotland) Act (2006)*.

The Act goes on to provide that either party in a cohabitation union can apply to the court for financial provision where the union ends otherwise than by death.¹⁵⁰ In bringing such an application the applicant has to show that the defender has derived economic advantage from contributions made by them.¹⁵¹ Two, the applicant has suffered economic disadvantage in the interests of the defender or any relevant child,¹⁵² for the purpose of this law a child is defined as persons under 16 years old.¹⁵³ The child then becomes relevant if the cohabitees are the parents or they have accepted to be the child of the family.¹⁵⁴ After considering these factors, the court may order the defendant to pay a capital sum to the applicant, pay such amounts as specified in its orders in respect to the burden of caring for a child whom the cohabitees are parents, and lastly give any interim orders they find fit.¹⁵⁵ A caveat is placed by the statute where it requires that all applications made under this section be made not later than one year after the day on which the cohabitants cease to cohabit.¹⁵⁶

Where the cohabitee dies intestate, the surviving spouse can apply to the court for provision from the estate of the deceased.¹⁵⁷ In looking at the application, the court considers: the size and nature of the deceased's net intestate estate;¹⁵⁸ any benefit received or to be received by the survivor;¹⁵⁹ the nature and extent of any other rights against or claims on the deceased's net intestate estate;¹⁶⁰ and any other matter the court considers appropriate.¹⁶¹ After considering this matters the court can order for payment to the survivor out of the deceased's net intestate estate of a capital sum of such amount as may be specified in the order for transfer to the survivor of such property from that

¹⁵⁰ Section 28, *Family Law (Scotland) Act (2006)*.

¹⁵¹ Section 28(3), *Family Law (Scotland) Act (2006)*.

¹⁵² Section 28(3), *Family Law (Scotland) Act (2006)*.

¹⁵³ Section 28(9), *Family Law (Scotland) Act (2006)*.

¹⁵⁴ Section 28(10), *Family Law (Scotland) Act (2006)*.

¹⁵⁵ Section 28(2), *Family Law (Scotland) Act (2006)*.

¹⁵⁶ Section 28(8), *Family Law (Scotland) Act (2006)*.

¹⁵⁷ Section 29, *Family Law (Scotland) Act (2006)*.

¹⁵⁸ Section 29(a), *Family Law (Scotland) Act (2006)*.

¹⁵⁹ Section 29(b), *Family Law (Scotland) Act (2006)*.

¹⁶⁰ Section 29(c), *Family Law (Scotland) Act (2006)*.

¹⁶¹ Section 29(d), *Family Law (Scotland) Act (2006)*.

estate as may be so specified and make such interim order as it thinks fit.¹⁶²The ensuing section of the study now looks at how courts in both jurisdictions have interpreted the laws in relation to cohabitants property rights.

3.5 Jurisprudential growth for the protection of property rights in cohabitation unions in England and Scotland

Section 28 of the Family Law (Scotland) Act has received judicial interpretation in the case of *Gow v Grant*.¹⁶³ The plaintiff was convinced by the defendant to sell her house and move in with him, a request that she honored. Some of the proceeds from the sale of her house were used for their living expenses while they were together. After just over five years, the couple separated and the plaintiff moved out. The plaintiff raised an action under section 28 of the Family Law (Scotland) Act for a compensatory payment for the economic disadvantage she suffered as a result of the cohabitation.

The court ruled in favor of the plaintiff by awarding her € 39 500, to account for what her house would have been worth if she had kept it and other contributions she made. The defendant appealed to the Court of Session which set aside the order arguing that the law regarding cohabitants' rights was to be applied narrowly.¹⁶⁴ Meaning that it¹⁶⁵ should be restricted to consideration of economic imbalances resulting from the cohabitation, rather than any wider issues that might have arisen between the parties. The plaintiff went ahead to appeal to the Supreme Court of United Kingdom, which reinstated her award and ruled that section 28 should be interpreted broadly,¹⁶⁶ so as to provide what is *fair* and *reasonable* even for cohabiting couples. The court was of the opinion that the law simply intended to help the court to correct any clear and quantifiable economic imbalance resulting from the cohabitation.¹⁶⁷

¹⁶² Section 29(2), *Family Law (Scotland) Act* (2006).

¹⁶³ [2012] UKSC 29.

¹⁶⁴ <http://www.brodies.com/binformed/legal-updates/gow-v-grant-supreme-fairness> Accessed on 28/9/2017.

¹⁶⁵ Section 28, *Family Law (Scotland) Act* (2006).

¹⁶⁶ *Family Law (Scotland) Act* (2006).

¹⁶⁷ <http://www.brodies.com/binformed/legal-updates/gow-v-grant-supreme-fairness> Accessed on 28/9/2017.

Courts also through judicial activism have developed jurisprudence by way of precedence to try and remedy the gap in law with regards to the lack of protection of cohabitants property rights. At first the courts approached the cases by employing principles of equity in resolving issues of property rights in cohabitation unions. This was seen in the case of *Eves v Eves*,¹⁶⁸ the cohabitants acquired a house which was registered in one party's name. The plaintiff went on to make improvements to the property and maintain it, and it's for this reason she argued that she had a beneficial interest to the property. It was held that there existed a constructive trust in favor of the plaintiff. The court found her contributions as giving rise to a common intention to share in the home's equity. Contributions made were enough to give rise to a beneficial interest in favor of the plaintiff.

Cohabitants property interests were protected if they could prove they had beneficial interest in the said property. The courts went on to attempt to give a clear definition of what could give rise to a beneficial interest. In its attempt it went on to give a definition which went against the one it gave in *Eves v Eves*.¹⁶⁹ The new interpretation omitted maintenance and decorations as being enough to give rise to a beneficial interest. This approach was seen in *Lloyds Bank v Rosset*,¹⁷⁰ where the wife had not consented to the husband taking of a mortgage of their house. She argued that through decorations and improvements to the house she had acquired a proprietary interest. This meant that her claims would rank first¹⁷¹ before the banks who wanted to take possession after the husband defaulted on a loan. It was held by the court that the decorations and improvements on the home were not enough to create a beneficial interest. The parties were married but the case was instrumental, since the same interpretation of beneficial interest was applied to cohabitation unions.

In *Oxley v Hiscock*¹⁷², a case involving cohabitant's the court applied the interpretation set in

¹⁶⁸ [1975] EWCA Civ 3.

¹⁶⁹ [1975] EWCA Civ 3.

¹⁷⁰ [1989] Ch 350.

¹⁷¹ Section 70(1, g), Land Registration Act (1925).

¹⁷² [2004] EWCA Civ 546.

Lloyds Bank v Rosset.¹⁷³ In this case the property was held solely in one cohabitant's name. The plaintiff wanted the court to find that she had beneficial interest in the property held by the defendant, thus requesting the property divided in equal shares. Both parties had contributed different amounts to the purchase and maintenance of the premises. The court concluded that the plaintiff would get 40% of the total share. In the ratio decidendi Lord Bridge's in his obiter dictum said,

"I pause to observe that neither a common intention by spouses that a house is to be renovated as a 'joint venture' nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property."

Beneficial interest arises when there is express evidence of shared intention as to proportions, and where there is no evidence the court is going to distribute the property in a manner it considers fair and just.^{174,175}

As seen above couples whose only contribution was the maintenance and decoration of the premises had a hard time proving their beneficial interest. This disadvantaged parties who made such contributions since their interest in the property hanged on a weighing scale which was only tipped by evidence showing that the intention of the parties was to own property jointly.

In *Stack v Dowden*,⁶⁰ the court went one step further to provide instances which could give rise to a beneficial interest. It stated that a presumption of beneficial interest could be arrived at where property is registered under joint ownership, the presumption is rebuttable if evidence is adduced to show this was not parties intention. This case involved two cohabitees who wanted the court to determine their property rights. The Supreme court dismissed the appeal and upheld the court of appeals decision to split the property with regards to what each party owned. The rationale was a presumption of beneficial interest being held jointly may be arrived at where the legal title was held jointly. This may be displaced where there is evidence that this was not their intention. Also, where the beneficial interests are not declared, the presumption is that equity follows the law and

¹⁷³ [1989] Ch 350.

¹⁷⁴ <http://www.familylawweek.co.uk/site.aspx?i=ed1498> Accessed on 26/9/2017.

¹⁷⁵ AC 432 House of Lords (2007).

the beneficial interests reflect the legal interests in the property.¹⁷⁶ The jurisprudence coming from this case was that having joint ownership of property in cohabitation unions does not give rise to a beneficial interest in cases where this presumption is rebutted. Where the presumption is rebutted the court is left with the obligation to divide the property in fair manner.

In *Kernott v Jones*,¹⁷⁷ the plaintiff and the defendant who were cohabitants owned their house jointly when they got it. The plaintiff wanted the court to split the property held with the defendant equally since it was held in their joint names. The plaintiff at first lived with the defendant but later¹⁷⁸ moved out and went to live by himself and made no contributions to the upkeep of the house. The request to split the property equally was made after being absent for 13 years from the house. The county court and the high court ruled in favor of the defendant splitting the property in unequal shares of 90% and 10%. In the court of appeal this ruling was overturned in favor of the plaintiff and the property was split in equal shares. The ratio decidendi of the court was based on *Stack v Dowden*,⁶³ where the court held that beneficial interest being held jointly may be arrived at where the legal title was held jointly, this presumption is only rebutted if there is credible evidence to the contrary which the court in this case stated the defendant did not furnish. The Defendant appealed to the supreme court which overturned the court of appeals decision and divided the property in the share of 90% and 10% in favor of the defendant. In the courts ratio decidendi it found that in this case the presumption of beneficial interest in the joint ownership was displaced by the intentions of the plaintiff.

Currently the holding in *Kernott v Jones*,¹⁷⁹ informs the courts on matters of cohabitation in the sense that courts are construing beneficial interest from a cohabitation through the contributions to the maintenance of the house, this extends in instances where the house is registered to one person.¹⁸⁰

¹⁷⁶ <http://www.familylawweek.co.uk/site.aspx?i=ed642> Accessed on 27/9/207.

¹⁷⁷ UKSC 53 (2011).

¹⁷⁸ AC 432 House of Lords (2007).

¹⁷⁹ UKSC 53 (2011).

¹⁸⁰ *Oxley v Hiscock* [2004] EWCA Civ 546.

This section of the study brings shows that it is possible to have a legal frame work which protects cohabitees property rights.

CHAPTER FOUR

REGULATION OF PROPERTY RIGHTS IN COHABITATION UNIONS

4 Challenges that Kenya will face in reconciling the borrowed laws with its laws.

This chapter will discuss how the comparative study can be used as a benchmark by which Kenyan legislators can formulate its legal framework on cohabitation property rights. In trying to reconcile the laws from Scotland and England to fit into a legislation tailored for use in Kenyan context an issue of compatibility arises, in instances where such laws are not applicable. The incompatibility stems from the fact that there exist a different social and political ideologies between Kenya and these countries. Differences seen in the following aspects:

Firstly, the law in Kenya recognizes the existence of cohabitation unions but goes silent in providing procedures and ways in which property acquired during and after the cohabitation is to be distributed or owned.¹⁸¹ This creates a problem where the property rights of persons in a cohabitation union are not guaranteed by the law.¹⁸² It is an injustice to persons in such unions since their right to property as guaranteed in the constitution¹⁸³ is not protected by the law.¹⁸⁴

Secondly, in defining cohabitation the Cohabitation Rights bill of England allows persons of the same sex to form this unions.¹⁸⁵ In Kenya, the constitution defines a marriage as a union between a man and a woman, while in the Marriage Act cohabitation is a union between a man and a woman resembling a marriage.¹⁸⁶ These two laws clearly show Kenya's position in relation to same sex relationships, hence meaning this definition cannot be borrowed to the new legislation.

In Kenya, the law defines a cohabitation as a union between a man and a woman that resembles a marriage.¹⁸⁷ The definition from England involving same sex couples cannot be adopted since it goes against the Constitution of Kenya which states that a marriage

¹⁸¹ Section 6, *Marriage Act* (Act No. 4 of 2014).

¹⁸² Section 6, *Marriage Act* (Act No. 4 of 2014).

¹⁸³ Article 40, *Constitution of Kenya* (2010).

¹⁸⁴ Section 6, *Marriage Act* (Act No. 4 of 2014).

¹⁸⁵ Clause 2(1), *Cohabitation Rights bill*.

¹⁸⁶ Article 45, *Constitution of Kenya* (2010) and section 2, *Marriage Act* (Act No. 4 of 2014).

¹⁸⁷ Article 45, *Constitution of Kenya* (2010) and section 2, *Marriage Act* (Act No. 4 of 2014).

Thirdly, the social-political aspect of the society in Kenya is mainly guided by conservative notions of marriage which are informed by the different religious and traditional beliefs. This approach at the very least can be characterized as being conservative. The society has an obligation to adopt a progressive approach in appreciating change which in this case is the existence of a cohabitation union. The legislators in drafting a new law should tackle this challenge by recognizing cohabitation and property rights of the parties in it.

4.1 Opportunities

In drafting a new law to fill the gap the legislators should adopt the following aspects as found in the laws of Scotland and the Cohabitation Rights bill of England. The law should highlight the prohibited degrees of relationships and persons who are not qualified to be in a cohabitation union.¹⁸⁸

These relationships include situations where one is the other's parent, grandparent, sister, brother, aunt or uncle.¹⁸⁹

Conditions giving rise to a presumption of a cohabitation union must be captured in the new legislation. These include the length of the period the parties have lived together, the nature of their relationship during that period, and the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.¹⁹⁰ A relevant child in relation to a cohabitation union should be defined by the law. This definition is paramount because the existence of a child affects how the property is shared, the amount of financial provisions a spouse can receive, and the obligations which each of the spouses have over the child. A relevant child is any minor who the cohabitants are treated as mother and father of under the law,¹⁹¹ in the Kenyan context a child is regarded as one who has not attained the age of 18 years.¹⁹²

Property rights to certain household goods with regards to cohabittees should be protected. The new statute should codify the presumption that, each cohabitant has a right to an equal share in

¹⁸⁸ Clause 5, *Cohabitation Rights bill*.

¹⁸⁹ Clause 5, *Cohabitation Rights bill*.

¹⁹⁰ Section 25(2), *Family Law (Scotland) Act (2006)*.

¹⁹¹ Section 28(10), *Family Law (Scotland) Act (2006)*, Clause 4, *cohabitation Rights bill*.

¹⁹² Section 2, *Children Act (Act NO. 8 OF 2001)*.

household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.¹⁹³ This presumption can be rebutted by evidence to the contrary.¹⁹⁴ “House hold goods” will be defined as any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes.¹⁹⁵ It will not include money, securities, any motor car or any domestic animal.¹⁹⁶

When drafting a legislation on protecting the property rights of cohabitees, legislators need to capture the rights in certain monies and properties as seen under the Scottish law.¹⁹⁷ When any question comes up, during or after the cohabitation on the issue of the right of a party to money coming from any allowance made by either party for their joint household expenses or for similar purposes or any property acquired out of such money.¹⁹⁸ Subject to any understanding to the contrary the money or property should be presumed to be owned by each cohabitant in equal shares.¹⁹

Following the jurisprudence set out by the courts, the law should also capture the issue of beneficial interest.¹⁹⁹ In considering the presumption of beneficial interest in relation to the ownership of properties, the court has mainly pegged its opinion on what the intentions of the parties was and what it considers just and fair.²⁰⁰ In Kenya, the Land Registration Act can be construed to allude to the existence of a beneficial interest where cohabitees property have been registered

¹⁹³ Section 26(2), *Family Law (Scotland) Act* (2006).

¹⁹⁴ Section 26(3), *Family Law (Scotland) Act* (2006).

¹⁹⁵ Section 26(4), *Family Law (Scotland) Act* (2006).

¹⁹⁶ Section 26(4), *Family Law (Scotland) Act* (2006).

¹⁹⁷ Section 27, *Family Law (Scotland) Act* (2006).

¹⁹⁸ Section 27(1), *Family Law (Scotland) Act* (2006).

¹⁹ Section 27(2), *Family Law (Scotland) Act* (2006).

¹⁹⁹ *Eves v Eves*, [1975] EWCA Civ 3; *Stack v Dowden*, 2 AC 432 House of Lords (2007) and *Kernott v Jones*, UKSC 53 (2011).

²⁰⁰ *Eves v Eves*, [1975] EWCA Civ 3; *Stack v Dowden*, 2 AC 432 House of Lords (2007) and *Kernott v Jones*, UKSC 53 (2011).

jointly.²⁰¹The new legislation should set out conditions which give rise to a beneficial interest in relation to the property owned by the cohabitants.

Still on the jurisprudence, the new law should use the rules of equity and come up with conditions which give rise to the creation of a constructive trust. One of the main guiding points is the existence of a beneficial interest.²⁰² The law should have provisions which allow for the creation or presumption of a constructive trust in cases where there is an unjust distribution of the property between the cohabitants. Cohabitants under the new legislation should be allowed to have insurable interest in the life of their spouses, the same can be seen in the Cohabitation Rights bill of England.²⁰³

The new legislation should provide for financial provisions for cohabitants where their unions end by other ways other than death. This will enable the spouse applying for such provisions to maintain the standard of lifestyle they had during the union, with regards to their ownership of property or sources of funds. Qualifications needed to apply for the provision above can be borrowed from the Scottish law; an applicant has to show that the defendant derived economic advantage from contributions made by them.²⁰⁴ Two, the applicant has suffered economic disadvantage in the interests of the defendant or any relevant child.²⁰⁵

Limitations to filing such an application should be; where the application is made 24 months after the cohabitants have stopped living as spouses,²⁰⁶ and where the applicant is making more than one application to the same respondent.²⁰⁷ The new statute should guide the court in terms of what considerations it should take in making its judgments. Borrowing from the English Cohabitation Rights bill the court will consider; the existence of a child in the union (which will be the main consideration), the financial needs and obligations the parties have to each other and the conduct

²⁰¹ Section 91(2), *Land Registration Act* (Act No. 3 of 2012).

²⁰² *Eves v Eves*, [1975] EWCA Civ 3.

²⁰³ Clause 6, *Cohabitation Rights bill*.

²⁰⁴ Section 28(3), *Family Law (Scotland) Act* (2006).

²⁰⁵ Section 28(3), *Family Law (Scotland) Act* (2006).

²⁰⁶ Clause 7(3), *Cohabitation Rights bill*.

²⁰⁷ Clause 7(4), *Cohabitation Rights bill*.

of the parties.²⁰⁸ The law should go on and guide the court on the awards it should make. These awards may include; ordering the defendant to pay a capital sum to the applicant, pay such amounts as specified in its orders in respect to the burden of caring for a child whom the cohabittees are parents, and lastly give any interim orders they find fit.²⁰⁹

Division of property in intestacy as provided by the current laws leaves out cohabittees, the law fails to recognize cohabitants in the hierarchy it provides for persons who can claim the property of the deceased.²¹⁰ The new legislation should borrow from the Cohabitation bill and include cohabittees as part of the persons who are allowed to claim the deceased estate in intestacy. The only requirement of this rule is that the former cohabitant need not to have been married prior to the deceased death.²¹¹

²⁰⁸ Clause 9, *Cohabitation Rights bill*.

²⁰⁹ Section 28(2), *Family Law (Scotland) Act (2006)*.

²¹⁰ Section 39, *Law of Succession Act (Act No. 26 of 2015)*.

²¹¹ Clause 19, *Cohabitation Rights bill*.

CHAPTER FIVE

CONCLUSION, FINDINGS AND RECCOMENDATIONS

5 Introduction

This chapter sums up the findings of this study and explains how the research question has been answered. It will also provide recommendations which will help in tackling the problem.

5.1 Summary of the research problem and answer to the problem

The law recognizes the existence of cohabitation unions but goes silent on property rights of the parties in that union.²¹² Non-recognition of the cohabitees property rights disenfranchises them from property ownership as provided in the Constitution.²¹³ This creates uncertainty with regards to how the parties hold their property during and after cohabitation. The remedy to this lacuna is for the legislators to draft new laws which take into account the property rights of cohabitees and protect those rights.

The comparative study brings out the rich jurisprudential framework which exists in England and Scotland with regards to the protection of cohabitees property rights. It shows how the two jurisdictions have put into place mechanisms by which the rights of cohabitants are guaranteed and protected. This provides an opportunity for Kenya to learn and borrow ideas from these two jurisdiction which will inform the drafting of a legal framework in Kenya.

5.2 Findings

In the course of the study the following findings were made;

- a) The Marriage Act recognizes the existence of a cohabitation not as a form of marriage but as union resembling a marriage.²¹⁴ In not recognizing it as a form of marriage, property rights in cohabitation unions cannot be protected by the Matrimonial Property Act.²¹⁵ This essentially means the Marriage Act takes notice of the existence of cohabitation unions but goes silent with regards to property rights of cohabitees. It creates a problem when it comes to the

²¹² Section 2, *Marriage Act* (Act No. 4 of 2014).

²¹³ Article 40, *Constitution of Kenya* (2010).

²¹⁴ Section 2, *Marriage Act* (Act No. 4 of 2014).

²¹⁵ Section 6, *Matrimonial Property Act* (Act No. 49 of 2013).

distribution of the cohabitees property when; they separate, one of them dies interstate, the are children present in that union and where there is money involved.

- b) The Land Registration Act provides some reprieve to cohabitants by providing 'Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares'.²¹⁶ In relation to cohabitation unions, where an instrument of transfer of interest of land exists which does not specify the nature of the cohabitees rights. The presumption will be that the cohabitees hold the interest as tenants in common in equal shares.
- c) Courts in Kenya have through judicial activism played a positive role in developing jurisprudence which provides for mechanisms by which cohabitees property rights are protected.
- d) The comparative study shows that it is possible to set a legal framework by which the property rights of cohabitees can be guaranteed and protected.

5.3 Recommendations.

- a) **The revision of the Marriage Act;** Kenyan legislators should also review the Marriage Act,²¹⁷ so as to add provisions which will guarantee the protection of cohabitees property rights.
- b) **Implementation of laws;** the constitution of Kenya guarantees the right to ownership of property to all persons.²¹⁸ This means in addition to the Legislators reviewing the Marriage Act they should also draft new laws which allow cohabitants to realize their right to property.
- c) **Role of the courts;** in the courts have a role to play in interpreting the laws which the legislators will make with regards to cohabitees property rights. In an event where the legislators do not review the laws to ensure the protection of cohabitees property rights. The court should go ahead through judicial activism to create jurisprudence which fills the gaps in the law.

²¹⁶ Section 91(2), *Land Registration Act* (Act No. 3 of 2012).

²¹⁷ *Marriage Act* (Act No. 4 of 2014).

²¹⁸ Article 40, *Constitution of Kenya* (2010).

d) **Role of community;** the community has an obligation to adopt a progressive approach in appreciating change which in this case is the existence of a cohabitation unions. This is by changing its perspective towards cohabitation unions and taking a much more accommodative approach. Such a move will aid in the removal of negative connotations placed on the unions which leads to cohabitants being stigmatized.

5.4 Conclusion

The study has addressed the research problem, which was the non-recognition of cohabitants property rights. The solutions to the problem have been outlined as policy considerations which parliament should use when drafting laws with regards to cohabitants. Objectives of the study have been achieved in the following ways;

- a) The study found out that the law only recognizes the existence of cohabitation unions but goes silent with regards to property rights in this unions.
- b) The study found out there exists an anchor law in the constitution requiring the protection of the cohabitants property right law governing property rights in cohabitation unions.
- c) The study has highlighted the non-existence of laws protecting cohabitants property rights and has recommended solution the problem.

The hypothesis was tested by looking at caselaw, where we find cohabitants relying on the courts to determine their property rights arising from the cohabitation. Reason being the law is silent on the issue of their property rights. This study concludes that the right to ownership of property which is enshrined in the Kenyan constitution²¹⁹ should be availed to persons in cohabitation unions.

²¹⁹ Article 40, *Constitution of Kenya* (2010).

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