



Declaration

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

Signed: 

Date: 28th May 2018

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

Signed: 

Dr. Peter Kwenjera. 28/ May 2018

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To my mother, Jane Kabura, thank you for keeping me company during those many sleepless nights and always being there for me.

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Abstract

The Marriage Act¹ does not provide for cohabitation as a legal union in Kenya. It only recognises Customary, Hindu, Islamic, Christian and Civil marriages.² The Marriage Act does however provide a definition for the word cohabit to mean, “To live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.”³

The statement of the problem of this dissertation is that, failure of the law to recognise cohabitation as a legal union subsequently results in the lack of a clear stipulation with regards to the status of cohabitants in Kenyan law and more so on the protections allowed under such a union.

The assumption is that parties in a cohabitation union are entitled to some of the rights and protection that parties in a legal union enjoy and that the parties are aware of these rights.

The courts have attempted to accord these rights to the said parties and recognise cohabitation unions by applying the common law principle of presumption of marriage. The application of this principle in the Kenyan legal system has consequently attempted to provide a better understanding of cohabitation. This is discussed in the land mark case of **Hortensiah Wanjiku Yawe v Public Trustee**⁴ which set out the factors that are now considered when determining if there is a presumption of marriage between two parties.

¹*Marriage Act* (No. 4 of 2014)

² Section 6, *Marriage Act* (No. 4 of 2014)

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

⁴*Hortensiah Wanjiku Yawe v Public Trustee Court of Appeal* [1976] East Africa Civil Appeal number 13

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CHAPTER 1: INTRODUCTION

1.1 Background of the Problem.

“Marriage and cohabitation are often not easily distinguishable in sub-Saharan Africa, such that the frequent use of the “in union” category, which includes married as well as cohabiting persons can, at best, be considered tenuous.”⁵

The law concerning cohabitation has been limited to the common law principle of a presumption of marriage and precedent based on this principle due to the lack of statutory law addressing cohabitation.

Before Kenya gained its independence from the British, the meaning of cohabitation was taken from British precedent which provided for cohabitation as a presumption of marriage. By virtue of the Judicature Act⁶, common law is provided as a source of law in Kenya; hence this presumption was also taken up by the Kenyan legal system.

This presumption has been seen from the case of **Hortensiah Wanjiku Yawe v Public Trustee**⁷, where the Kenyan legal system has consequently attempted to provide a better understanding of cohabitation. This case set out the factors that are now considered when determining if there is a presumption of marriage between two parties. The factors include: children fathered by the deceased, valuable property acquired jointly and performance of some ceremony of marriage⁸. Common law has also recognised the six signposts of cohabitation set

⁵Dodoo. F. Nii-Amoo and Klein Megan, “Cohabitation, Marriage, and 'Sexual Monogamy' in Nairobi.”

⁶ Section 3, *Judicature Act* (2016)

⁷*Hortensiah Wanjiku Yawe v Public Trustee Court of Appeal* [1976] East Africa Civil Appeal number 13

⁸ Musyoka W, *Law of Succession*, Law Africa Publishing, 2010, 204

out in **Kimber v Kimber**⁹. The test is most often applied within family proceedings. They are whether¹⁰: the parties are members of the same household; the relationship is stable; there is financial support; there is a sexual relationship; they have children; and there is public acknowledgement of the relationship.

However, with the promulgation of the Marriage Act in 2014, cohabitation was not provided as one of the legal forms of marriage. The Act only recognises Customary, Hindu, Islamic, Christian and Civil marriages.¹¹ The Act defines “cohabit” as follows: “To live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.”¹²

The courts have failed to provide a legal definition of the term cohabitation which adds to the limitations that cohabitants face in the Kenyan legal system. The courts have also failed to define what would amount to a long cohabitation which begs the question, what number of years is enough to consider that two parties are in a cohabiting union or more so to presume that they are married?

Other issues have risen due to lack of a definite law on matters of cohabitation in Kenya. For example with regard to property rights, parties in cohabitation unions do not have any rights that arise from them owning property together. Property rights in this case would be interest in a matrimonial property¹³ as defined in the Matrimonial Property Act of Kenya. Based on the definition of a spouse as provided in the Matrimonial Property Act as a husband or a wife, parties

⁹*Kimber v Kimber* [2000] 1 FLR 383

¹⁰[https://www.newLawjournal.co.uk/content/cohabitation-conundrum](https://www.newlawjournal.co.uk/content/cohabitation-conundrum) on 19 February 2017.

¹¹Section 6, *Marriage Act* (No. 4 of 2014)

¹²Section 2, *Marriage Act* (No. 4 of 2014)

¹³Section 6, *Matrimonial Property Act* (No.9 of 2013)

to a cohabitation union do not enjoy such proprietary rights since they are not recognized as spouses.

Subsequently, lack of the said proprietary rights leads to issues in inheritance when one of the parties die. This is mostly seen when a party dies intestate which makes it particularly difficult for the surviving party to inherit, as much as they were dependents in the relationship. The burden of proving dependency falls on the surviving party. He or she has to prove that the deceased was maintaining them immediately prior his or her demise.¹⁴

With the lack of proper guidance of what rights are attributed to cohabitants, there have been situations whereby the Kenyan courts have failed to recognise the presumption of marriage thus denying such parties rights that they would enjoy as parties in a cohabitating union. For example, in the case of **Kisito Charles Machani v Rosemary Morra (1981)**¹⁵, the presumption of marriage was not upheld.

This is also seen in a U.K case, **Burns v Burns**¹⁶, in which the court found that ‘Mrs’ Burns was not entitled to any interest in the home that she had shared with Mr Burns for 17 years and where she had brought up their two children.¹⁷

It is clear then, that cohabitees may in some instances enjoy the appearance of a marriage but they do not enjoy the benefits like parties in a marital union. These benefits include having matrimonial property, provisions for intestate succession, legal protection etc.

¹⁴ Musyoka W, *Law of Succession*, Law Africa Publishing, 2010, 162

¹⁵ *Kisito Charles Machani v Rosemary Morra* [1981] Nairobi High Court Miscellaneous civil case number 464

¹⁶ *Burns v Burns* [1984] Ch 317

¹⁷ Probert R, ‘Cohabitation: Current Legal Solutions’, 317

1.2 Statement of the Problem.

Failure of the law to recognise cohabitation as a legal union subsequently results in the lack of a clear stipulation with regards to the status of cohabitants in Kenyan law and more so on the protections allowed under such a union.

1.3 Purpose of the Study.

The following are the objectives of this study.

1. Demonstrate where the law has upheld the presumption of marriage between cohabitants in Kenya.
2. Analyse case law to illustrate how Kenya has determined disputes between cohabitants.
3. Discuss the challenges that cohabitants face due to their status in the Kenyan legal system.
4. Provide a comparison with the provisions of the law in the United States of America and South Africa.
5. Make recommendations based on the findings.

1.4 Research Questions.

1. What is the definition of cohabitation?
2. What rights are granted for cohabitants in Kenya?
3. What challenges do cohabitants face in Kenya?
4. How has the South African legal system dealt with some of the challenges highlighted?
5. What is the legal position when children are born in a cohabitation union?
6. Does recognising cohabitation unions foster human dignity or does it foster irresponsibility?

1.5 Hypothesis.

Cohabitation has been recognised in some cases in the law but has not been recognised as a legal institution of marriage in Kenya. Cohabitants enjoy the union but do not enjoy the rights that should accompany the said presumption of marriage. With this lack of recognition as a legal

union, the parties to a cohabitation union suffer certain injustices, which are aggravated by the lack of a clear protection of cohabitants in the law.

1.6 Literature Review.

The study of the status of cohabitants in Kenya required a journey of reviewing published works by accredited scholars and researchers on the topic. Exploring the reviews provided is important in investigating the research problem further. The review will also help in delving deeper into the objectives of the study.

At independence, the overriding goal of the Kenyan government was to promote national unity in the face of ethnic, religious, racial and linguistic plurality.¹⁸ The government sought a uniform legal system and embarked on measures to integrate the dual structure of the legal system. Two of the most important measures were first, the dismantling of the native courts for the establishment of a unitary court system and second, the effort to harmonize the customary laws of the various groups with received law.

On the 6th of April 1967, two commissions were appointed, one on marriage and divorce and the other on succession. The two commissions were mandated with the drafting of uniform laws of marriage (and divorce) and succession respectively.

The Commission on the Law of Marriage and Divorce released *The 1968 Report of the Commission on the Law of Marriage and Divorce* which considered the laws that existed at that time¹⁹ relating to marriage and divorce. The report also made recommendations for a new law

¹⁸<https://www.theplatform.co.ke/?p=385> on 22 February 2018

¹⁹*The Native Christian Marriage Ordinance, 1904; Divorce Ordinance, 1904; Subordinate Courts (Separation and Maintenance) Ordinance, 1928; the Mohammedan Marriage & Divorce Registration Ordinance, 1906; Hindu Marriage Divorce and Succession Ordinance, 1946.*

providing a comprehensive and practicable, uniform law of marriage and divorce applicable to all persons in Kenya.²⁰

Considering the year that the report was published, it is an important notation in history, that the legal system recognised cohabitation as a reality in Kenya. The report answered the question of what cohabitation is and recommended that there should be a general presumption of marriage when people have lived together as husband and wife.²¹ It goes further to recommend a duration that would be considered applicable for determining whether people living together can be said to be in a cohabitation union. The report does this by stating, “A reasonable basis would be cohabitation for at least one year, in such circumstances as to have acquired the reputation of being husband and wife.”²²

Further, the following recommendations were provided based on the report, “That it be provided that where a man and a woman have cohabited for one year or upwards, in such circumstances as to have acquired the reputation of being husband and wife, it is to be presumed that they were married, unless the contrary is proved.”²³ The report further recommend that no such presumption should be drawn in criminal proceedings on a charge of bigamy and adultery. The same applies in civil proceedings for damages for adultery or enticement. However, the report failed to provide any recommendation for intestate succession between cohabitantes.

In the book, ‘*The Law of succession*’ by Justice William. M. Musyoka’, the author acknowledges that the principles for determining presumption of marriage from a prolonged cohabitation, are stated in the famous case of **Hortensiah Wanjiku Yawe v Public Trustee Court of Appeal**

²⁰ Report of the Commission on the Law of Marriage and Divorce, 1968, 2.

²¹ Report of the Commission on the Law of Marriage and Divorce, Recommendation No.87, 1968, 72.

²² Commission of the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, 1968, 72.

²³ Commission of the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, 1968, 73.

(1976).²⁴The author also acknowledges that the presumption of marriage is based on the reputation that parties to a cohabiting union attain by stating, “The presumption of marriage does not depend on any law or system. Rather, it is as an assumption based on the fact of a very long cohabitation that reputes the parties to be married.”²⁵ The author provides factors that should be considered when determining presumption on marriage. The said factors are namely: children fathered by the deceased, valuable property acquired jointly and performance of some ceremony of marriage.²⁶

Therefore, it is clear that this published work also provides a definition of what cohabitation is and goes further to give factors that aid in proving a presumption of marriage. Compared, to the report of 1968, we see that the author fails to recognise the one year duration as a factor necessary for cohabiting unions to be recognised a presumed marriage in the law.

In the dissertation, *Reforms Needed on Property Laws on Cohabitation by Wanjiru Joan Veronicah*, the author acknowledges the limitation of cohabitation to the common law principle of presumption of marriage, due to lack of statutory law addressing the matter.²⁷

The author discusses the history of the law of succession, land laws and matrimonial property but fails to discuss the history of marriage laws in Kenya. In doing so, majority of the dissertation discusses the right to property to parties in a cohabitation union.

On the law of succession, with regard to cohabitants, the author espoused that “Regardless of the recognition of the presumption of marriage in Kenya, the other party, mostly women would most

²⁴*Hortensiah Wanjiku Yawe v Public Trustee Court of Appeal* [1976] East Africa Civil Appeal number 13

²⁵ Musyoka W, *Law of Succession*, Law Africa Publishing, 2010, 204

²⁶ Musyoka W, *Law of Succession*, Law Africa Publishing, 2010, 204

²⁷ Wanjiru J, “Reforms Needed On Property Laws on Cohabitation” Unpublished LLB Dissertation, Strathmore University Law School, April 2017, 6.

likely lose the property to the husband's relatives in the case of intestate succession as they would argue that there was no valid marriage."²⁸

Based on the research conducted, the author suggests that parties in a cohabitation union should enter into a cohabitation agreement. This is a legal agreement, much like a prenuptial agreement, reached between couples who have chosen to live together.

The couple may be treated like a married couple; however this would be under special circumstances. Such circumstances may be when the couple wants to apply for a mortgage or working while they are out child support.²⁹ Cohabitation agreements are becoming common in developed countries such as the United States of America and in the European countries.

In the book, '*Bromley's Family Law by Nigel Lowe and Gillian Douglas*', the growth of extra-marital cohabitation is discussed at length in chapter 24.³⁰ This includes its definition, the legal provision for separating cohabitants and reform of the law. It was however, stated that, "A qualifying cohabitant should be defined as the survivor of a cohabiting relationship who was, immediately before the death of the deceased, living in the same household as the deceased as his or her spouse." This understanding of a cohabitant introduces the aspect of the parties living together in the same household. This however has not been expressed in the other literary works discussed.

The author discusses the presumption of marriage as general evidence of a marriage as it is stated that, "Evidence of public opinion considers the duration of a cohabiting relationship to be a significant factor in determining the level of entitlement that a survivor, since the longer the

²⁸Wanjiru J, "Reforms Needed On Property Laws on Cohabitation" Unpublished LLB Dissertation, Strathmore University Law School, April 2017, 12.

²⁹Wanjiru J, "Reforms Needed On Property Laws on Cohabitation" Unpublished LLB Dissertation, Strathmore University Law School, April 2017, 30.

³⁰Lowe N, Douglas G, *Bromley's Family Law*, Oxford University Press, 2007, Chapter 24

relationship, the more married-like it appears to be.”³¹ This simply shows that the society had to have seen the parties as a “married couple” for there to be an assumption of some level of commitment. The existence of children also seems to be an important factor in determining commitment in the relationship which concurs with the Kenyan context.

Intestacy succession between parties who had no children is also discussed in the book. It is stated that, “Where the parties had no children, it is required that the parties had to have lived together for more one year but less than five years.”³² This differs from the Kenyan context since there was no provision of a necessary duration for cohabitantes who did not have children.

This dissertation will discuss the history of the status of cohabitants within the Kenyan legal system and also whether or not recognising cohabitation as a legal union in Kenya fosters human dignity or irresponsibility.

1.7 Chapter Breakdown.

The first chapter of this dissertation is the introduction. This chapter contains the background of the problem, the statement of the problem, purposes of the study, research questions, hypothesis, literature review and the chapter breakdown.

The introduction will be followed by a chapter on the theoretical framework, which will be made up of a theory or set of theories that mainly provide a viewpoint through which to examine the problem.

The “History of the Legal Status of Cohabitation in Kenya” will be the third chapter. This chapter will provide an in depth study of the history of the legal status of cohabitation in Kenya, showing how the courts have determined issues related to cohabitation.

³¹Lowe N, Douglas G, *Bromley's Family Law*, Oxford University Press, 2007, 974

³² Lowe N, Douglas G, *Bromley's Family Law*, Oxford University Press, 2007, 974

A comparative study is provided in the fourth chapter. It is based on a comparison and analysis of the law of marriage and the status of the cohabittees in the United States of America and South Africa.

The fifth chapter will entail the findings of the study. The sixth and final chapter will consist of the recommendations and conclusion.

CHAPTER 2: THEORETICAL FRAMEWORK.

The theoretical framework includes two theories: the sociological theory of law and the theory of justice and equality. The purpose of these theories is to explain the need for a legitimate status of parties in a cohabitation union in the Kenyan legal system. This is with regard to rights that such parties ought to have as compared to parties in the marriages recognised in Kenya.

2.1 Sociological Theory of law.

The sociology of law refers to the sociological study of law and law-related phenomena, whereby law is typically conceived as the whole of legal norms in society as well as the practices and institutions that are associated with those norms.³³ This area takes an interdisciplinary as opposed to dual approach in analysing and understanding the relationship between law and society.³⁴

Sociological theories of law are today more diverse than ever before. Particularly influential in recent times has been the cross-fertilization of sociological theories of law with theories from other social sciences and the humanities.³⁵ Max Weber, a German Sociologist, defined the sociology of law as the external study of the empirical characteristics of law's role in society.³⁶ That is, being concerned with observation or experience rather than theory or pure logic.

³³<http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0056.xml> on 1st March 2018

³⁴<https://www.lawteacher.net/free-law-essays/english-legal-system/sociology-of-law.php> on 18 January 2018

³⁵Deflem, Mathieu. 2007. "Sociological Theories of Law." Pp. 1410-1413 in *Encyclopaedia of Law and Society: American and Global Perspectives*, edited by David S. Clark. Thousand Oaks, CA: Sage Publications.

³⁶Deflem, Mathieu. 2007. "Sociological Theories of Law." Pp. 1410-1413 in *Encyclopaedia of Law and Society: American and Global Perspectives*, edited by David S. Clark. Thousand Oaks, CA: Sage Publications.

Max Weber espoused that, “Rational adjudication on the basis of rigorously formal legal concepts is to be contrasted with a type of adjudication which is guided primarily by sacred traditions without finding therein a clear basis for the decision of concrete cases”.³⁷

Weber states that there are essentially different forms of justice or legal decisions that are ultimately influenced by traditions and social norms. He highlights that many legal systems are based on an irrational development of case law, based on precedent and administered by a highly developed yet limited field of lawyers and jurists. This conveys how intrinsically linked societal norms and values are to law.³⁸

According to Weber, modern law is formally rational, meaning that law is based on procedures requiring that it should apply equally and fairly to all. Besides being impartial, modern law is also codified (written down) and impersonal in its procedural reliance exclusively on the facts of the case.³⁹ This normative approach to maintaining the consistency of the legal system and moral perspectives of law is what seeks to ground or criticize law.

Talcott Parsons (1902-1979), the leading sociological theorist in the post-war era, developed the functionalist perspective of law. He emphasized that the role of the law was as an integrative mechanism of social control. The legal system was conceived as being in relative autonomy to society’s other specialized institutions: the polity, the economy, and the values system. In terms of law’s integrative function, the legal profession’s role was in mediating between the technical requisites of the legal system and the needs of everyday citizens to receive justice.⁴⁰

³⁷<https://www.lawteacher.net/free-law-essays/english-legal-system/sociology-of-law.php> on 18 January 2018

³⁸<https://www.lawteacher.net/free-law-essays/english-legal-system/sociology-of-law.php> on 18 January 2018

³⁹Deflem, Mathieu. 2007. "Sociological Theories of Law." Pp. 1410-1413 in *Encyclopaedia of Law and Society: American and Global Perspectives*, edited by David S. Clark. Thousand Oaks, CA: Sage Publications.

⁴⁰Deflem, Mathieu. 2007. "Sociological Theories of Law." Pp. 1410-1413 in *Encyclopaedia of Law and Society: American and Global Perspectives*, edited by David S. Clark. Thousand Oaks, CA: Sage Publications.

The failure of the law in only defining what to cohabit means on one hand, yet ignoring the reality of cohabitation unions being a societal norm in both rural and urban Kenya on the other hand, is clear departure from the intrinsic link between societal norms and the values of law.

The law should be informed by the societal values and norms in relation to adjudication of the people in society. Once the law fails to recognize the social discrepancies, it fails to mediate between the technical requisites of the legal system and the needs of everyday citizens to receive justice, thus consequently failing in its integrative function.

2.2 Justice and Equality Theory.

Aristotle discusses the theory of justice and equality in his book *Nicomachean Ethics*. For purposes of discussing justice, it is important to note that Aristotle failed to give a precise definition of justice. He begins by considering who is an unjust man and who is a just man.

Aristotle discusses that a just man is one who is seen to be lawful and fair, consequently, an unlawful or lawless person and an unfair person is said to be unjust. From the distinction he makes between a just person and unjust person, it is clear that he draws an analogy between law and justice. "Hence what is just will be both what is lawful and what is fair, and what is unjust will be both what is lawless and what is unfair."⁴¹

Since the lawless man was seen to be unjust and the law-abiding man just, in essence, all lawful acts are just acts. Lawful in the sense that they are acts laid down by a legislative art or body. The laws laid down for the people in the society are essentially intended to be a guide towards a moral, lawful and consequently just society. We call those acts that tend to produce and preserve happiness and its components for the political society just.⁴²

⁴¹ Solomon R, Murphy M, *What is Justice? Classic and Contemporary Readings*, Oxford University Press, 1990, 40.

⁴² Aristotle, *Nicomachean Ethics*, Book V.

Aristotle considered justice to be an integral part of a large community. Justice helps the people in the society to live harmoniously as individuals within a state. This was avowed by Robert Solomon and Mark Murphy in the following words, "...justice, in its most general sense was the essential virtue, the virtue most important for the 'social animals' that we are living together in the even-large communities, cities, and nation-states."⁴³

Justice is also viewed as complete virtue to the highest degree not only unconditionally but in relation to another. The person who has justice is able to exercise virtue in relation to another, not only in what concerns himself.⁴⁴ Aristotle acknowledges that it is difficult for many men to exercise virtue in their relations to their neighbour as opposed to virtue in their own affairs.

The relationship between justice and equality revolves around fairness for all similar people. By implementing the laws in the society in a state, justice is provided by making appropriations to all the people in the society, thus being fair. Consequently, since it is not for a specific group or kind of people but for all the people in the society, equality is achieved.

In the discussion of the status of cohabittees in the Kenyan legal system, there is a sense of discrimination for parties in cohabitation unions. The Marriage Act⁴⁵ recognizes civil, Christian, Hindu, Muslim and customary marriages, but only highlights what to cohabit⁴⁶ means. A simple definition only does not give light to the reality that a majority of people in the society are living and making families in cohabitation unions, neither does it provide for or offer any protection to members of such unions.

A simple definition does not inform the people in rural Kenya who are not aware of the realities of the difference in their "come we stay" marriage and a legal marriage. Those who are in such a

⁴³ Solomon R, Murphy M, *What is Justice? Classic and Contemporary Readings*, Oxford University Press, 1990, 3

⁴⁴ Solomon R, Murphy M, *What is Justice? Classic and Contemporary Readings*, Oxford University Press, 1990, 41

⁴⁵ Section 6, *Marriage Act 2014*

⁴⁶ Section 2, *Marriage Act 2014*

union in rural Kenya are not aware of procedures such a registration of marriages. Simply because, the law has not taken into account such realities in the society at large.

Through the law, the state provides an intermediary between the people and justice, that being the judge. For when people dispute over inequalities, they take refuge in the court judge, and to go to the judge is to go to justice. Aristotle espoused that the nature of the judge is to be sort of conscious justice and they seek the judge as an intermediate.⁴⁷

By virtue of the laws being written by a human person, who has different opinions from the next, there exists the fact that laws may not always be perfectly applicable. In particular circumstances in which the laws do not produce perfect justice, equity is necessary to mend the imbalance. Therefore, equity is superior to legal justice but inferior to absolute justice. This speaks to the nature of the equity as a correction of law specifically to where it is defective owing to its universality.⁴⁸

Aristotle espoused that amongst virtues, justice is thought to be for another persons' good. This is because it is related to our neighbours; therefore it does what is advantageous to another, whether is for a person in power or as a co-partner.

Implementing justice in our legal system by considering our neighbours, and in this case related specifically to parties in a cohabitation union, this virtue might go a long a way if practiced as a core value in our society, more so in growing to be more just. This starts from our basic unit of life, which is the family, "...is the natural and fundamental unit of society and the necessary basis of social order."⁴⁹

⁴⁷ Solomon R, Murphy M, *What is Justice? Classic and Contemporary Readings*, Oxford University Press, 1990, 41.

⁴⁸ Aristotle, *Nicomachean Ethics*, Book V, 88

⁴⁹ Article 45(1), *Constitution of Kenya* 2010

Aristotle concludes that equity's role is to prevent the law from adhering to rigidly to its own rules and principles when those rules and principles produce injustice. Hence equity permits judges to depart from legal principle in order to promote justice.⁵⁰

Justice and equality comes in to shed some light that just as we say that the law provides a sense of fairness and equality, the law needs to be informed by and consequently provide for the realities in the current society.

⁵⁰ Beever A, 'Aristotle on Equity, Law, and Justice' 10 Legal Theory 33

CHAPTER 3: THE HISTORY COHABITATION IN KENYAN LAWS.

3.1 Colonial Period.

Kenya was subject to British colonial rule from 1895 until 1963 when she gained political independence. Kenyans had their own systems of government before being, for example, amongst the forty two tribes in the country, the Meru were governed by the Njuri Ncheke who were their council of elders. The establishment of British colonial rule in Kenya brought about the receiving of common law over the people of Kenya.

Under the indirect rule policy, the British introduced a racially stratified dual legal system, with one system of law for Africans and another system for non-Africans. Thus Native Tribunals were established and run by ostensible traditional authorities, to apply “native law and custom” (or customary law) to Africans while English-type courts run by British magistrates and judges administered the received common law to govern non-Africans.⁵¹

The Kenyan legal system at the time also adopted some laws that governed marriage, divorce and succession matters, for all the racially different communities in Kenya at that time. For example:-The Native Christian Marriage Ordinance of 1904, Divorce Ordinance of 1904, Subordinate Courts (Separation and Maintenance) Ordinance of 1928, The Mohammedan Marriage & Divorce Registration Ordinance of 1906 and the Hindu Marriage Divorce and Succession Ordinance of 1946.

It should be noted that customary law was applied mostly in the area of personal relations, notably family law, land tenure and succession. The establishment of Native Tribunals meant that customary law was to be interpreted and applied by state courts.⁵²

⁵¹Dr. Kamau , “Customary Law and Women’s Rights in Kenya”

⁵²Dr. Kamau , “Customary Law and Women’s Rights in Kenya”

3.2 Post Independence.

In the year 1963 at independence, the overriding goal of the Kenyan government was to promote national unity in the face of ethnic, racial, religious and linguistic plurality.

In this period, there were significant developments in the law governing marriage, succession and also children. The new government embarked on measures to integrate the dual structure of a uniform legal system. In 1967 the native courts were dismantled and a unitary court system was established. The government also made concerted efforts to harmonize the customary laws of the various people groups with the received law.

Two commissions, one on marriage and the other on succession, were appointed in 1967, with the mandate of drafting uniform laws of marriage and divorce⁵³ and succession respectively. The different statutes that applied to the different people continued to be in force until the Marriage Act⁵⁴ was passed in 2014. The Report of the Commission on the Law of Succession⁵⁵ experienced greater success as it culminated in the passing of the Law of Succession Act⁵⁶, in the year 1981.

The common law principle of presumption of marriage, where parties who have lived together for many years, what was considered as a long cohabitation, were presumed to be married, was highlighted in the important cases of **Hortensiah Wanjiku Yawe v Public Trustee Court of Appeal**⁵⁷ and **Irene Njeri Macharia v Margaret Wairimu Njomo & another**.⁵⁸ The

⁵³Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, 1968.

⁵⁴*Marriage Act* (No. 4 of 2014)

⁵⁵Commission on the Law of Succession, *Report of the Commission on the Law of Succession*, 1968.

⁵⁶*Law of Succession Act* (CAP 160 of 1981)

⁵⁷*Hortensiah Wanjiku Yawe v Public Trustee Court of Appeal* [1976] East Africa Civil Appeal number 13

⁵⁸*Irene Njeri Macharia v Margaret Wairimu Njomo & another* [1996] eKLR

application of this principle to these cases set out factors that are now considered when determining if there is a presumption of marriage between two parties.

In this same period, there were significant changes in the Law of Succession Act No.10 of 1981, primarily to do with inheritance for a wife or wives from their deceased husband. Paragraph 5 of section 3 added by Act No. 10 of 1981 provided as follows: - “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.”

The purpose of this addition to the Law of Succession Act at the time was to cater for the women who entered into marriage contracts with individuals who were either separated or divorced from wives they married under statute, namely the African Christian Marriage and Divorce Act.⁵⁹

Prior to this addition, women who cohabited with their partners before their demise and even had children from the said relationship, were not provided with any form of inheritance. This is because, such a woman was not considered as the deceased’s wife.

This position is clearly seen in the case **Re Ruenji’s Estate**⁶⁰, where two ladies claimed to have been married to the deceased, under Kikuyu customary law subsequent to his marriage to another lady under the African Christian Marriage and Divorce Act. It was held that any such marriage was null and void and that the ladies were not entitled to any inheritance from the estate of the deceased.

⁵⁹ *African Christian Marriage and Divorce Act*(CAP 151 of 1931)

⁶⁰ *Re Ruenji’s Estate* [1977] Kenya LR 21.

The same position was taken in the case of **Re Ogola's Estate**⁶¹. In this case, the deceased, a Luo man died intestate. The deceased had married Gladys Anyango Ogola and during the subsistence of this marriage, she gave birth to four daughters. A claim to a share in the estate was also made by Bona Awino Ogola, on the ground of customary marriage to the deceased who also claimed on behalf of her daughter, whose father, she said was the deceased. It was held that Bona was not lawfully married to the deceased and neither she nor her daughter is entitled to a share in the estate and the lawful heirs to the estate to be Gladys Anyango Ogola and her four daughters.

Therefore, in both the case of **Re Ruenji's Estate** and **Re Ogola's Estate**, the wives who were said to be married under customary law, and their children, were not allowed a share of the respective deceased's property. This was on the account that legally, they were not married; therefore they were not legitimate wives to claim a share of the property.

The addition of Paragraph 5 in section 3 of the Law of Succession Act No. 10 of 1981, changes this whole view. Wives of such unions were allowed to claim a share of the deceased's property for their children as they were dependants under section 29 and section 40. This is well highlighted in the case of **In the Matter of the Estate of Reuben Nzioka Mutua** (unreported)⁶² to support the position, in a careful and detailed judgment, Lady Justice Joyce Aluoch held that Josephine was not a wife, in as much as she purported to being married under Kamba customary law, for the purposes of the Law of Succession Act and was therefore not entitled to receive anything from Mutua's estate. She held further that Josephine's three children were Mutua's dependants and were entitled to reasonable provision for their maintenance out of Mutua's estate.

This aspect of protecting the children whether or not they were born into a family where the parents are married or not, is also seen in the Children's Act with regard to parental

⁶¹In re Estate of Boaz Harrison Ogola (deceased) [1978] eKLR

⁶²*In the Matter of the Estate of Reuben Nzioka Mutua, P&A* [1986] Case No. 843

responsibility. The Children's Act⁶³ highlights that parental responsibility over a child whose parents are married or not is equal and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility. The children are protected irrespective of the marital status of the parents. This section provides parties to a cohabitation union with equal rights over their children.

3.3 Post 2010 Constitution of Kenya.

In The Final Report of the Constitution of Kenya Review Commission, it was recommended that on family and marriage, the constitution should recognise marriage under any tradition or system of religious, personal or family law.⁶⁴ Pursuant to this recommendation, Article 45(4) (a) of the Constitution of Kenya 2010 provides that Parliament shall enact legislation that recognises marriages concluded under any tradition, or system of religious, personal or family law, to the extent that any such marriages or systems of law are consistent with this Constitution. The 2010 Constitution fails to mention anything to the effect of cohabitation unions.

Prior to the Marriage Act of 2014, the Marriage Bill of 2007 provided that, "*Where it is proved that a man and woman having capacity to marry have lived together openly for at least two years in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*"⁶⁵ The 2007 Bill did not provide a definition for the word cohabit.

The 2012 Marriage Bill had a few changes from the Marriage Bill of 2007. It provided a definition for the word cohabit to mean, "*To live in an arrangement in which an unmarried*

⁶³ Section 24, *Children's Act* (No.8 of 2001)

⁶⁴ Commissioners of the Constitution of Kenya Review Commission, *the Final Report of the Constitution of Kenya Review Commission*, 10 Feb 2005, at 96.

⁶⁵ Section 7, *Marriage Bill*, 2007

couple lives together in a long-term relationship that resembles a marriage.”⁶⁶ However, it did not provide a section on the presumption of marriage highlighted in the 2007 Bill.

Pursuant to Article 45(4) (a) of the Constitution of Kenya 2010, the Marriage Act was promulgated in 2014. The 2014 Act recognised marriages concluded under any tradition, or system of religious, personal or family law, namely: Customary, Hindu, Islamic, Christian and Civil marriages.⁶⁷ However, the Act did not provide for cohabitation as a legal union in Kenya. The common law principle of presumption of marriage was also not provided for in the Act. The only indication to cohabitation unions provided was the definition of the term “cohabit” which is similar to that provided in the Marriage Bill of 2012.

The law has failed to regulate the relationship between parties in a cohabiting union yet it remains a constant reality throughout history. One would say that the legal system is being ambiguous. The Marriage Act does not expressly recognise cohabitation as a legitimate union, yet other laws such as the Law of Succession Act and the Children’s Act remain intact on their provisions and have not been amended. The place of common law has not been done away with in the hierarchy of laws, hence long cohabitation unions still remain to be presumed as marriages.

⁶⁶ Section 2, *Marriage Bill*, 2012

⁶⁷ Section 6, *Marriage Act* (No. 4 of 2014)

CHAPTER 4: COMPARATIVE STUDY.

This chapter focuses on a study of the advancements in the law in two countries, namely the United States of America and South Africa.

The South Africa legal system enables this study to appreciate the development in the law from a fellow African continent, more so from a country in which our own Constitution borrowed so heavily from. The United States of America brings a sense of diversity in the law due to how different the law is across the states within the USA.

4.1 South Africa.

In South Africa, cohabitation has become more common over the past few years and the number of cohabitants increases by almost 100 per cent each year.⁶⁸ South African law does not permit a cohabitant to have the right to rely on maintenance upon the death of a partner. The reason would be that they are not regarded as a spouse. The Intestate Succession Act⁶⁹ provides that, unlike marriage, where there are specific laws that aim to protect spouses, cohabitation relationships are not provided for in any of the laws. One would be able to see this where a party dies without a valid will, their partner has no right to inherit under the Intestate Succession Act.

The South African legal system has a draft Domestic Partnerships Bill that provides for what would amount to a contribution in the cohabitation relationship.⁷⁰ The bill gives options on how the property would be divided upon separation and also touches on the issue of a partner inheriting from the other partner upon the said partner's death in section 2.

⁶⁸ <http://www.divorcelaws.co.za/the-law-on-cohabitation.html> on 1st March 2018

⁶⁹ Intestate Succession Act (No. 81 of 1987)

⁷⁰ Section 1, draft Domestic Partnerships Bill 2008

Parties in cohabitation unions have no equal rights as their counterparts in a legal marriage union. Courts have assisted some of the couples by stating the existence of an express or implied universal partnership that exists between them.⁷¹

The concept of universal partnership was well supported by the courts in the case of **Butters v Minorca**⁷² where a man and a woman had lived together as husband and wife for nearly twenty years. It was held that the said couple had entered into a universal partnership and the court would rule in favor of the terms of the universal partnership.

4.2 United States of America.

The United States has a dual approach of the doctrine of common law marriage. The current status of parties in a cohabitation union is based on the law passed in the states as some of the states agree with the occurrence of cohabitation, while others are against it. The states that recognize cohabitation largely provide for the protection of parties' property rights.⁷³

The common law doctrine was espoused in the case of **Re Estate of Vargas**⁷⁴. Mr. Vargas, had a wife and children in one location. He then went through a marriage ceremony with another woman, who he set up at a separate household in another town and had children with her. The court held that the second wife was a presumed spouse and split the estate between the two women. She was treated as Mr. Vargas' widow although he was not her legal husband due to bigamy. The supposed spouse was viewed as a remedial doctrine employed by courts.

⁷¹ Wanjiru J, "Reforms Needed On Property Laws on Cohabitation" Unpublished LLB Dissertation, Strathmore University Law School, April 2017, 28.

⁷² *Butters v Minorca* [2012] (4) SA 1 (SCA)

⁷³ Wanjiru J, "Reforms Needed On Property Laws on Cohabitation" Unpublished LLB Dissertation, Strathmore University Law School, April 2017, 24.

⁷⁴ *Estate of Juan Able Vargas, Deceased Mildred Vargas v Josephine Vargas* [1974.] Civ. No. 41800

Pursuant to the statutory laws of the Illinois Marriage and Dissolution of Marriage Act, in the case **Hewitt v Hewitt**⁷⁵, two unmarried cohabitants lived together for over fifteen years. The woman was in reliance on the man's representations and had sacrificed a lot so that the man could establish his career. The man promised he would "share his life, his future, his earnings and his property" with the woman. It was held that the plaintiff's prayer to be entitled to half of the property amassed by the couple during their cohabitation, are unenforceable for the reason that they contravene the public policy. This was implicit in the law and it disfavored the grant of mutually enforceable property rights to knowingly unmarried cohabitants.⁷⁶

A cohabitation agreement is a form of legal agreement reached between couples who have chosen to live together. The couple may be treated like a married couple in some ways. This could either be when applying for a mortgage or working out child support.

The comparative study of the law on cohabitation in South Africa and United States vis á vis that of Kenya shows that, there is great development on ways in which cohabitation unions are protected under the law. This is mostly done by way of entering into agreements enforceable under the law. These agreements allow such couples to have a few of the rights that married couples have such owning property jointly.

⁷⁵*Hewitt v Hewitt* [1979] 394 NE 2d 1204

⁷⁶*Hewitt v Hewitt* [1979] 394 NE 2d 1204

CHAPTER 5: FINDINGS.

Throughout this study, the discussion about cohabitation has been seen after the fact, the fact being that one party is deceased and the surviving party is simply trying to look for a remedy in court for rights they thought they had.

This study began with the question, “What is the definition of cohabitation?” This question was very important due to the fact that our Marriage Laws have failed to give a conclusive definition of what exactly cohabitation is. As highlighted in the study, the Marriage Act only defines what to cohabit means.

Cohabitation is widely understood and accepted as a presumption of marriage under common law which dictates that parties must have been in a long cohabitation, which ideally means that they should have lived together for many years, for the union to be recognised as a marriage.

It was found that, if a long cohabitation was proved, a surviving party had a right to inheritance the deceased’s property. The most that the surviving party and his/her children would be awarded would be a share of the deceased’s property. At first, the said share of property was awarded to the children as they were seen as dependants of the deceased. Currently, both a wife from a long cohabitation and the children can claim dependency under section 29 and section 40 of the Law of Succession Act.

Parties in a long cohabitation do not necessarily get to enjoy the rights of being presumed married according to common law, when both parties are alive. Enough cases have indicated the benefit of acknowledgement of such a presumption once one party is deceased.

Another challenge that such parties face is the fact that there is a disconnect between what the law prescribes and the reality. The Marriage Act of 2014 does not provide for nor does it recognise cohabitation as form of marriage yet the Law of Succession Act 2014 remains unchanged in its provision for such parties and children born from the said union. Common law also remains constant in its provision for a long cohabitation as a presumption of marriage.

The law provides that it is not recognised yet it remains a reality that is adjudicated for in other laws and in practice. For example, the recognition of surviving parties in a cohabitation union as dependants, in matters to do with intestate succession. This makes the law quite ambiguous.

The Kenyan legal system and the South African legal system are similar in that, both legal systems do not recognise cohabitation as a type of marriage, but seek to protect parties in any such union through other provisions of the law. Parties in a cohabitation union have no rights as other parties in a legal marriage do. However, the children are taken care of equally by both parents. The South African legal system does however have a draft Bill from 2008, which currently is still a Bill that seeks to provide for what would amount to a contribution in the cohabitation relationship. The bill also gives options on how the property would be divided upon separation and also touches on the issue of inheritance from the deceased party.

It is important to note that, children are protected whether or not the parents are in a union or not. Parental responsibility is shared equally between both parents, none being the superior. This is as provided in article 53 of the Constitution of Kenya 2010. Children are also provided for under section 29 of the Law of Succession Act 2014 as dependants and are entitled to a share of the property upon the demise of either of the parents. This fact is also shared between the Kenya legal system and the South African legal system.

CHAPTER 6: CONCLUSION AND RECOMMENDATION.

6.1 Conclusion

Cohabitation unions are a reality in our society. More people find it easier to simply live together for a long period of time and subsequently think that they are “married”, when ideally, they are not.

The sanctity of a family as the fundamental unit of society and the necessary basis of social order⁷⁷ is protected when two parties of the opposite sex consent to enter into marriage and subsequently form a family if they wish. Protecting the family also fosters the respect and protection of the inherent dignity of every individual.

6.2 Recommendations

Cohabitation agreements do not make a family, according to Article 45 of the Constitution of Kenya. They are contracts that provide protection to parties once a conflict arises. It mostly covers the parties interests in property shared or owned jointly and other obligations such as debt and support. I would therefore recommend that such contracts should not apply in Kenya, in order to keep the sanctity of the family as the natural and fundamental unit of society and the necessary basis of social order.⁷⁸

It is my recommendation that the Kenyan legal system should not recognise cohabitation unions. Recognising cohabitation would foster irresponsibility in the society by encouraging adults to enter into long term relationships for all the wrong reasons and also in the society. Recognising cohabitation would also lead to infidelity in marriages.

⁷⁷ Article 45(1), Constitution of Kenya 2010

⁷⁸ Article 45(1), Constitution of Kenya 2010

It would be much simpler for parties in such a union to go through a civil marriage, live as a married couple and enjoy the rights they do not have rather than suffer through a lot of the long and rigorous procedures in order to acquire some of the rights.

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