

A Comparative study assessing the need for a legal framework governing cohabitation in Kenya in light of New Zealand's experience.

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School.

By

Martin Maina Kariuki.

145999

Prepared under the Supervision of:

Eva Nyambura Maina.

February 2025.

Word Count: 10579 words.

TABLE OF CONTENTS

ACKNOWLEDGEMENT.....	IV
DECLARATION.....	V
ABSTRACT.....	VI
List of legal instruments.....	VII
List of abbreviations.....	VIII
Chapter One:.....	1
1.1: Background of the Research.....	1
1.2: Statement of the problem.....	3
1.3: Research Objectives.....	4
1.4: Research Questions.....	4
1.5: Hypothesis.....	4
1.6: Justification of the Study.....	5
1.7: Theoretical Framework.....	5
a. Sociological Theory of Law.....	5
b. Labour Theory.....	6
1.8: Literature Review.....	6
1.9: Research Methodology.....	9
1.10: Limitations of the Study.....	9
1.11: Chapter Breakdown.....	10
Chapter Two:.....	11
Legal Framework Governing Cohabitation in Kenya.....	11
2.1: Introduction.....	11
2.2: The status of cohabitation in Kenya.....	11
2.2.1: Concept of trusts in cohabitation matters.....	11
2.2.2: Case laws on Cohabitation.....	12
2.2.3: Statutory Provisions on Cohabitation.....	14
2.3: Conclusion.....	15
Chapter 3:.....	16
Comparative Study on the Best Practices in New Zealand’s Legal Framework Governing Cohabitation with the Kenyan Legal Framework.....	16
3.1: Introduction.....	16
3.2: Legal Framework Governing de facto relationships in New Zealand.....	16
3.2.1: Property (Relationships) Act 1976.....	17
3.2.2: Adoption Act 1955.....	18
3.2.3: Wills Act 2007.....	18
3.2.4: Family Proceedings Act 1980.....	18
3.2.5: Domestic Violence Act 1995.....	19
3.2.6: Human Rights Act 1993.....	19

3.2.7: Interpretation Act 1999.....	19
3.2.8: Status of Children Act 1969.....	20
3.2.9: Court’s Interpretation of the Legal Framework.....	20
3.3: Successes of the Legal Framework governing de facto relationships in New Zealand..	22
3.4: Comparison between New Zealand and Kenya.....	22
3.5: Lessons Kenya can draw from New Zealand.....	23
3.6: Conclusion.....	23
Chapter 4:.....	25
Assessing the viability of applying a well-drafted Comprehensive Legal Framework governing the concept of Cohabitation in Kenya.....	25
4.1: Introduction.....	25
4.2: Possibility of having a well-drafted Legal Framework in Kenya.....	25
4.3: Benefits of having a comprehensive newly drafted legal framework governing cohabitation in Kenya.....	26
4.5: Conclusion.....	26
CHAPTER 5:.....	28
FINDINGS, RECOMMENDATIONS AND CONCLUSIONS.....	28
5.1: Introduction.....	28
5.2: Findings.....	28
5.2.1: Status of Cohabitation in Kenya.....	28
5.2.2: Application of a well-drafted legal framework governing cohabitation.....	28
5.2.3: Possibility of Kenyan parliament and Courts applying a well-drafted legal framework governing cohabitation.....	28
5.3: Recommendations.....	29
5.3.1: The Need for Well-Drafted Legal Framework Governing Cohabitation in Kenya.....	29
5.4: Conclusion.....	29
BIBLIOGRAPHY.....	31
a. Books.....	31
b. Dissertation and thesis.....	31
c. Hard Copy Journal.....	31
d. Online Journal.....	32
e. Internet Sources.....	32

ACKNOWLEDGEMENT.

I am really grateful to God, my family, relatives and friends for their insights, support and encouragement during this research process. Moreover, this dissertation would not have been possible without the guidance of my supervisor and lecturer, Madam Eva Nyambura Maina. Finally, I would like to appreciate everyone for providing a conducive environment for me to undertake good research and write this dissertation.

DECLARATION

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

Signed:M.K.....

Date:17/02/2025.....

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

Signed:*Maina*.....

Date:17th February 2025.....

Madam Eva Nyambura Maina

ABSTRACT.

*Cohabitation is a vastly adopted phenomenon in the 21st Century gaining traction as an alternative to marriage deserving of **sui generis protection** due to its unique trait positing a great deal for care and recognition of such parties in law. However, there has been little emphasis on how Kenyan law conceives cohabitation as a union concerning legal rights such as the division of property acquired among cohabitees upon separation, an attribute addressed by the Supreme Court of Kenya in the case of *Mary Nyambura Kang'ara v Paul Ogari Mayaka*.*

The legal framework governing cohabitation in Kenya is premised on the doctrine of the presumption of marriage and relies heavily on judicial precedents. However, what is of great essence to this research is that Kenyan courts' reliance on judicial precedents and the common law principle alone doesn't provide the required clarity and certainty on how to go about certain aspects of a union in cohabitation, such as property division, maintenance, and inheritance. This study aims to assess the feasibility of Kenyan courts applying a well-drafted comprehensive legal framework governing cohabitation for clarity.

This study will apply doctrinal research in assessing the extent of the law in recognizing cohabitation as a union in Kenya and legal rights and remedies conferred to cohabitees by analysing scholarly works, case law, statutes, and regulations to prescribe its current legal and regulatory framework in Kenya. Furthermore, it recognises best practices in its comparative analysis between New Zealand and Kenya underlying the essence of having a well-drafted comprehensive legal framework governing cohabitation for the Court's interpretation when deciding such disputes.

Based on the findings, this study will make recommendations to address the due technicalities that arise during the division of jointly acquired property among cohabitees upon their separation. This provides the lawmakers with insights to advance legal clarity on this matter to address the due technicalities that arise when safeguarding rights and remedies among cohabitees during the union and upon their separation.

List of cases.

B v F (2010) NZFLR.

Hottensiah Wanjiku Yawe v Public Trustee.

Joseph Gitau Githongo v Victoria Mwihaki (2014) eKLR.

Mary Njoki v John Kinyanjui Muthuru and 3 others (1984) eKLR.

Mary Nyambura Kang'ara v Paul Ogari Mayaka (2021) eKLR.

Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another (2009) eKLR.

Sutton v Bell (2023) NZSC.

List of legal instruments.

Adoption Act 1955 New Zealand.

Constitution of Kenya (2010).

Domestic Violence Act 1995 New Zealand.

Family Proceedings Act 1980 New Zealand.

Human Rights Act 1993 New Zealand.

Interpretation Act 1999 New Zealand.

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

Marriage Bill 2007.

Marriage Bill 2012.

Matrimonial Property Act 2013.

Property (Relationships) Act 1976 New Zealand.

Status of Children Act 1969 New Zealand.

Wills Act 2007 New Zealand

List of abbreviations.

HCK- High Court of Kenya.

MPA- Matrimonial Property Act.

MA- Marriage Act.

MNK- Mary Nyambura Kang'ara.

MWPA- Married Women's Property Act.

POM- Paul Ogari Mayaka.

PRA- Property(Relationships) Act.

Chapter One:

1.1: Background of the Research

Cohabitation can be defined as ‘the co-residence of unmarried partners who live like husband and wife with or without children that serves either as an alternative to marriage or a stepping stone to marriage.’¹ In this study, the meaning that will describe cohabitation will include people of the opposite sex aligning with the Constitution of Kenya,² and unmarried persons who have been cohabiting for three or more years.

This phenomenon of cohabitation, and specifically the recognition of cohabitation as a form of marriage is not unique to Kenya. Marriage by cohabitation has been adopted as a cultural occurrence globally with its increasing prevalence varied in percentages in countries such as Colombia at (13.5%), Peru (20.9%), Guatemala (29.7%), Venezuela (44.4%), Dominican Republic (34.2%) and El Salvador (34.2%) already having high levels of cohabitation.³ Countries such as Canada have expanded the regulation of family relationships to extend the same to unmarried couples in its statutory provisions like the Modernization of Benefits and Obligations Act that appreciates the current societal norms and the prevalence of cohabitation in the family framework.⁴

Furthermore, New Zealand provides strong protection for cohabitation by equating cohabitants also called de facto, with spouses in a marriage as long as they satisfy an eligibility criteria of partners who are required to be of majority age and should have lived together for three years or more to address the needs of such vulnerable couples in the changing world.⁵ Under the de facto relationships that include those in cohabitation, New Zealand has statutory provisions that seek to advance legal rights such as its recognition in law, property rights, protection from discrimination, parental rights, and separation matters.⁶

¹ Odimegwu C, Ndagurwa P, Singini M, ‘Cohabitation in Sub-Saharan Africa: A Regional Analysis’ 18(1), *Southern African Journal of Demography*, 2018, 112.

² Article 45, *Constitution of Kenya* (2010).

³ Odimegwu C, Ndagurwa P, Singini M, ‘Cohabitation in Sub- saharan Africa: A Regional Analysis’ 18(1) *Southern African Journal of Demography*, 2018, 115.

⁴ Bailey M, ‘Regulation of Cohabitation and Marriage in Canada’ 26(1), *Law and Policy*, 2004, 154.

⁵ House of Commons Women & Equalities Committee, Report on the rights of cohabiting partners, 19 July 2022,15.

⁶ Atkin W, ‘De facto relationship in New Zealand- A largely unified Law’ 50(2) *Family Law Quarterly*, 2016, 305.

In the early decades of the twentieth century, there was a prevalent retraction of the common law marriage prompting the courts to recognize it as a form of marriage, '*long-term, domestic unions*' resembling marriages.⁷ Countries like Canada have gone ahead to reduce restrictions on marriage and divorce to pave the way for the uprising concept of cohabitation appreciating the changes in society due to its prevalence.⁸ Therefore, the decline in marriage popularity since the early 20th century can be attributed to the increasing divorce rates, marriage expectations, and the feminist movement through the empowerment of women.⁹

In Africa, *Central Africa* leads in cohabitation followed by *East Africa*, with *West Africa* having the lowest popularity.¹⁰ Nevertheless, despite its historical association with societal taboos, the status of cohabitation is evolving into a largely accepted conventional behaviour in society.¹¹ In the Sub-Saharan region, its growing predominance can be attributed to factors such as *one's education, religion, wealth status, age, and place of residence*.¹² However, Kenyan laws, particularly the Matrimonial Property Act 2013 only address property division in solemnised marriages, leaving cohabitation unaddressed while the Marriage Act 2014 is silent on cohabitation as a form of marriage.¹³

Ronald Rindfuss in his article emphasises the need to address issues such as *partner support, inheritance and property rights, and social security benefits* if cohabitation is considered a form of marriage.¹⁴ Marriage and cohabitation are often not easily discernible in sub-Saharan Africa, with the use of the "in union" category, which includes married along with cohabiting persons hence considered difficult.¹⁵ Subsequently, recognising cohabitation as a form of union would create a new legal status for cohabitants to enhance legal rights and remedies in case of separation.¹⁶

⁷ Dubler A, 'Wifely Behaviour: A legal History of acting married' 100(4), *Columbia Law Review*, 2000, 961.

⁸ Bailey M, 'Regulation of Cohabitation and Marriage in Canada' 26(1), *Law and Policy*, 2004, 155.

⁹ Kodiyo K, 'Judicial approach to Cohabitation: A comparative study of the Law of England & Wales and Kenya' *Elte Law Journal*, 2021, 111.

¹⁰ Odimegwu C, Ndagurwa P, Singini M, 'Cohabitation in Sub-Saharan Africa: A Regional Analysis' 18(1), *Southern African Journal of Demography*, 2018, 160.

¹¹ O'Donovan K, 'Legal Marriage. Who Needs It?' 47(1), *The Modern Law Review*, 1984, 114.

¹² Odimegwu C, Ndagurwa P, Singini M, 'Cohabitation in Sub-Saharan Africa: A Regional Analysis' 18(1), *Southern African Journal of Demography*, 2018, 113.

¹³ Section 6, *Marriage Act* 2014.

¹⁴ Rindfuss. R and VandenHeuvel A, 'Cohabitation: A Precursor to Marriage or an Alternative to Being Single?' 16(4), *Population and Development Review*, 1990, 704.

¹⁵ F. Nii-Amoo D and Megan K, 'Cohabitation, Marriage, and Sexual Monogamy' in Nairobi's slums, 2007.

¹⁶ Fergus Ryan, 'Out of the shadow of the Constitution: Civil partnership, Cohabitation and the Constitutional family' 48(1), *Irish Jurist*, 2012, 229.

The case of MNK v POK involved two cohabiting partners, Mary Kang'ara and Paul Ogari who sought the Court's interpretation regarding the nature of their union and entitlement to property that had been jointly acquired during their cohabitation by both parties but had only been registered in Mary Nyambura's name.

In the High Court, the respondent, Mary Nyambura, instituted a suit through an originating summons against the appellant, which was rejected by the court on the basis that despite their long cohabitation, Mary Kangara, the respondent, was already married to another, KM. Hence, the property could not be considered matrimonial property since the cohabitation between Mary Kangara and Paul Ogari was not a marriage.

Paul Ogari appealed the decision in the Court of Appeal in Kenya whereby, it was identified that the High Court had erred in refusing to presume marriage despite the fact of long cohabitation citing that the existence of the other person, KM was not proved by the respondent.

Thus, aggrieved with the decision, the appellant, Mary Nyambura appealed to the Supreme Court to determine the matters which in its elaborate analysis of identifying what amounts to a valid cohabitation provided for elements to be discussed in this study, the court held that the cohabitation between the appellant and the respondent failed to meet the provided elements however the beneficial interests in the property accruing to the parties were awarded to the relevant party.¹⁷

Therefore, this study will interrogate the extent to which the law in Kenya recognises cohabitation as a union affiliated with the conditions set out in the case of Mary Nyambura Kang'ara v Paul Ogari Mayaka. It will provide the need for clarity in the law in respect to the legal rights and remedies that should accrue to cohabitees such as the property division and maintenance upon separation.

1.2: Statement of the problem.

In the case of *Paul Ogari Mayaka v Mary Nyambura Kang'ara (2021)*, the Supreme Court in addressing the issue of what amounts to cohabitation pointed out that the lack of a comprehensive legal framework governing "what a valid cohabitation should entail" necessitates the courts to apply contract law and the concepts of constructive and resulting trusts to these cases which are intrinsically technical. The challenge with this is that it has not

¹⁷ Mary Nyambura Kang'ara v Paul Ogari Mayaka (2021) eKLR.

been explicitly stated in law and in most cases, the courts are the ones required to discern such an arrangement on a case-by-case basis. This insufficiency creates uncertainty for the parties and the courts when deciding such matters hence the need for clarity through legal statute.

1.3: Research Objectives.

1. To determine the current legal and regulatory framework governing cohabitation in Kenya.
2. To examine the approach adopted by New Zealand in granting sui generis protection to cohabitation unions.
3. To examine the possibility of a legal comprehensive framework for cohabitation to govern its regulation by the courts in Kenya's Jurisprudence.
4. To determine the recommendations that can be made based on the findings in addressing the gap regarding the inclusion of cohabitation in a comprehensive legal framework.

1.4: Research Questions.

1. What is the Current Legal and Regulatory Framework governing cohabitation in Kenya?
2. What lessons can be derived from New Zealand's approach in granting sui generis protection to cohabitation unions?
3. What is the possibility of the Kenyan courts applying a comprehensive legal statute governing cohabitation in administering its regulation in the Kenyan jurisprudence?
4. What recommendations can be made to the lawmakers to address the gap in the law concerning cohabitation inclusivity in Kenya?

1.5: Hypothesis.

In this research, it is hypothesised that there is a significant gap in Kenyan law regarding the treatment of cohabitation as a union in advocating for adequate protection and consideration of the legal rights and remedies that should accrue to cohabitees during their union and upon separation including division of property and matters of maintenance.

1.6: Justification of the Study.

This study is important as it will allow lawmakers to engage in informed discussions to get insights on the need for sui generis protection for cohabitation and draft a relevant legal statute. Numerous scholars have focused on discussing the advancement and adoption of cohabitation as a union from the onset of the 20th century to the 21st century terming it as a social reality. Where there has been litigation on cohabitation matters, the courts have applied common law principles, case precedents, and concepts of trust to solve disputes emanating from cohabitation often citing the technical nature of such an approach. This inadvertently highlights the lack of a statutory framework that would provide much clarity to the courts and parties on what cohabitation should entail and its reliance enabling easier resolution of such disputes without the need for frequent appeals to higher courts.

1.7: Theoretical Framework.

a. Sociological Theory of Law.

The sociology of law is premised on the empirical study of law as a set of social practices and experiences drawing attention to phenomena such as traditions, practices, and methods, associated with the sociological inquiry.¹⁸ Thus, sociological theory invokes an interdisciplinary approach in seeking to explore the existing harmonisation of the law and societal reality.¹⁹

The nature of this theory has been discussed by notable scholars such as Max Weber and Talcott Parsons who have diligently contributed to the theoretical study of law offering accounts of the changing role of statutes in transforming societal systems and norms.²⁰ Max Weber under classical sociology stipulates that modern law that is rational should be based on procedures that ensure it is applied impartially to all and codified.²¹ Thus, he emphasises the need to have codified laws that address the societal phenomena affecting all people rationally.

Moreover, Talcott Parsons under contemporary sociology speaks of the law being an integrative mechanism of social control in mediating the complex necessity of the law and the

¹⁸ Deflem M, 'Sociological theories of Law' *Encyclopaedia of Law and Society: American and Global Perspectives*, 2007, 1410.

¹⁹ Deflem M, 'Sociological theories of Law' *Encyclopaedia of Law and Society: American and Global Perspectives*, 2007, 1411.

²⁰ Deflem M, 'Sociological theories of Law' *Encyclopaedia of Law and Society: American and Global Perspectives*, 2007, 1411.

²¹ Deflem M, 'Sociological theories of Law' *Encyclopaedia of Law and Society: American and Global Perspectives*, 2007, 1412.

needs of everyone in the society to receive justice.²² Therefore, the law should be autonomous and harmonious with the reality of society in trying to address the issues affecting society to restore social order and actualize justice.

This study addresses the issue of cohabitation that is adopted and accepted in our society.²³ However, the inadequacy of a legal framework to govern the concept of cohabitation concerning property rights during and at separation serves as a failure by the law to recognize the reality of society due to the changes experienced over time. The law is meant to serve as a tool for ensuring control and clarity is achieved by providing a mechanism to ensure that justice for cohabitees in their union is actualized in addressing their rights and remedies.

b. Labour Theory.

This theory is proposed by John Locke who brings up the relationship between labour and the resource whereby he stipulates that private property was established in a state of nature by natural law and thus any labour asserted by an individual towards the acquisition of the private property in nature should be granted proprietary interest due to their input in mixing their labour with the resource.²⁴ Thus, labour in this theory is considered an important source of value.²⁵

Therefore, this theory relates to the concept of division of property acquired by cohabitees during the union in the instance of separation by providing a cornerstone in understanding the distribution of property acquired in an equitable manner considering the labour input contribution of each cohabitee towards advancing impartiality hence upholding their legal rights and remedies to property. Labour as value should be considered in terms of contribution. Thus, a legal framework protecting the labour in the form of contributions of the cohabitees during and at the separation of the union should be promulgated.

1.8: Literature Review.

Fergus Ryan in his article analyses the model of family from a broad perspective, outside the traditional legal, cultural, and societal norms involved in marriage to determine how families

²²Deflem M, 'Sociological theories of Law' *Encyclopaedia of Law and Society: American and Global Perspectives*, 2007, 1411.

²³ R Fergus, 'Out of the shadow of the Constitution: Civil partnership, Cohabitation and the Constitutional Family' 48(1), *Irish Jurist*, 2012, 247.

²⁴ Vaughn K, 'John Locke and the Labor theory of value' 4(2), *Journal of Libertarian Studies*, 1978, 312

²⁵ Vaughn K, 'John Locke and the Labor theory of value' 4(2), *Journal of Libertarian Studies*, 1978, 313.

can be defined by collective standards, goals, and commitment, rather than the rigid constitutional basis of marriage. In addition, he has addressed the issue of marriage from a constitutional basis and the issue of cohabitation, as a highly adopted concept that has been recognized in law, to confer cohabitantes with rights and remedies like those in marriages.²⁶

Therefore, his work provides a comprehensive analysis of the legal and cultural challenges that non-marital unions face, hence the need for a legal framework to confer protection. However, Ryan Fergus fails to conduct empirical data due to heavy reliance on legal theory and analysis, disregarding the real-world experiences of non-traditional families.

This article is imperative to this research as it provides insight towards understanding the concept of family beyond marriage and appreciating cohabitation as an alternative through which legal rights and remedies can be conferred to cohabitantes as those conferred to couples in marriages.

Furthermore, R J Probert's article reviews the proposals made by the Law Commission for England and Wales to provide a clear understanding of the financial consequences of cohabitation, its dissolution, and the probable impact it would have on cohabiting individuals.

Moreover, he goes through a proposed scheme that alludes to legal principles such as the proposal for eligible cohabitantes to be able to apply to a court for financial relief upon separation with a claim sufficing if the applicant can prove economic disadvantage, or if the other party had retained a benefit because of contributions made by the applicant.²⁷

Thus, he recommends that the proposed scheme by the Commission should be part of a broader range of options for couples, embracing the possibility of opting into an alternative to marriage hence proposing the need for a legal framework that addresses the needs of cohabiting relationships in case of a separation.

His recommendation is relevant to this study as the approach used in his article will be like the one used in this paper in trying to propose the need for a legal framework that recognizes the needs, rights, and remedies of cohabitantes in their cohabitation in the eventuality of its dissolution with regards to a consequence, division of acquired property and also the case of maintenance in the Kenyan Context.

²⁶ R Fergus, 'Out of the shadow of the Constitution: Civil partnership, Cohabitation and the Constitutional Family' 48(1), *Irish Jurist*, 2012, 247.

²⁷ R. Probert, 'A Review of Cohabitation: The Financial Consequences of Relationship 41(3)' *Family Law Quarterly*, 2007,523.

In addition, Lawrence W. Waggoner, in his article, advocates for the re-evaluation of the legal rights, duties, and protections of unmarried partners considering the increasing trends in cohabitation and a subsequent decline in marriage, to address the disparities in legal recognition and benefits accrued between married and unmarried persons emphasising on the essence of equality in law for all types of relationships.²⁸

The article provides a comparative analysis of the legal relevance of addressing the prevalent issue concerning legal rights and remedies of unmarried persons giving insights into the challenges faced by cohabitants. Moreover, he advocates for the adoption of equality and social justice in addressing this challenge. However, his work lacks adequate experiential data to support his argument and provide relevant real-life examples of the impact of the current legal framework on unmarried partners.

Furthermore, his focus is limited to pointing out challenges faced by unmarried partners in their legal treatment and overlooking the perspectives of those who prefer not to formalise their relationships through marriage or any legal agreements.

Therefore, this article is crucial to this research as it advocates for the need for a legal framework that recognizes the legal rights and remedies of cohabitants upon the dissolution of the unmarried partnerships through the creation of guidelines for dividing property, determining financial support, and addressing custody issues for couples who choose to separate.

Paul Maina in his article speaks about the legal and societal implications of cohabitation in Kenya highlighting an existing gap in the law concerning the legal right of property inheritance for cohabiting partners in the instance of succession once the union ends.²⁹ In addition, he brings up the social reality of how women are vulnerable and are more prone to be disinherited in cases of separation.³⁰

In his recommendations, he provides for consideration of cohabitants' common understanding and agreements within the legal framework in addressing this social reality. This article is important to this research as it brings to light the current Kenyan context, an act

²⁸ Waggoner L, 'With Marriage on the Decline and Cohabitation on the Rise, What about Marital Rights for Unmarried Partners?' *Law and Economics Working Papers*, 2015, 2.

²⁹ Mwambi P, 'Impact of duration of Cohabitation on Succession in Cohabitation Marriages' 8(1), *Journal of Public policy and governance*, 2024, 53.

³⁰ Mwambi P, 'Impact of Duration of Cohabitation on Succession in Cohabitation Marriages' 8(1), *Journal of Public Policy and Governance*, 2024, 55.

that this paper seeks to do from a realistic point of view. His article fails to provide clarity on the recommendations for the implementation of the legal reforms provided in it, hence vague.

Kenneth Kodiyo in his article speaks on how come we stay as a new form of arrangement has infiltrated into Kenyan society highlighting reasons why people opt for this, the need for a substantive legal framework to govern such unions and appreciate this social reality in law by protecting its participants.³¹

This article is imperative to this study as it will provide insights into the cohabitation status in Kenya and why there is a need to recognise its existence in legislation in upholding legal rights and obligations that should accrue once a valid cohabitation has been established preferably after its dissolution. However, this study fails to outrightly provide the statistical data to substantiate the prevalence of cohabitation unions not only in Kenya but also in Wales.

From the above literature review, it is evident that scholars have generally emphasised the recognition of cohabitation as an alternative to marriage, opting for a societal shift from a rigid family context based on marriage to a broader aspect of the family incorporating cohabitation as an alternative to marriage. In addition, they propose the need for a legal framework in trying to address the needs of the cohabitee, during and at the dissolution of the cohabitation.

1.9: Research Methodology.

This research will be undertaken through doctrinal legal research encompassing primary and secondary sources. It will utilise primary and secondary sources. The primary sources include statutes, case laws, and the Constitution of Kenya. The study will appraise a comparative study of New Zealand which has over the years made amendments to its laws to provide for de facto relationships. The secondary sources for this research will involve scholarly writings, written dissertations, and journal articles. The materials will document the opinions of scholars on what they think about cohabitation.

1.10: Limitations of the Study.

The limitations of this study include:

³¹ Kodiyo K, 'Judicial approach to Cohabitation: A comparative study of the law of England & Wales and Kenya' *Elte Law Journal*, 2021, 127.

- a. Inadequate data on the issue of cohabitation arrangements and entitlement to legal rights and remedies upon separation in Kenya hence difficult to formulate an accurate statistic on its prevalence.
- b. Constraints of time in undertaking this study due to limitation of time.
- c. Societal biases that the concept of cohabitation poses a threat to the sanctity of marriage as a form of union advancing moral evils that emanate from not being a legally recognized union.

1.11: Chapter Breakdown.

Chapter One: Introduces the topic of this research. It outlines the background of the research and statement of the problem, the study's research objectives, questions, hypothesis, justification, and preliminary literature review.

Chapter Two: It analyses the current legal and regulatory framework for cohabitation in Kenya. It will also contain a logical structure that identifies key legal concepts and the relationship between them and the research topic. It will assess the interpretation of the Kenyan Courts' legal framework including the case of *Mary Nyambura Kang'ara v Paul Ogari Mayaka*.

Chapter Three: It analyses the approach adopted by New Zealand in advancing sui generis protection of cohabiting unions and the lessons that Kenya can learn in addressing its legal framework. It will rely on scholarly works, statutory provisions, and case laws from New Zealand.

Chapter Four: Interrogates and analyses the possibility of the court's applying a newly drafted comprehensive legal framework governing cohabitation in Kenya. It will examine the importance such a law would have not only for the court's interpretation but also for the parties involved.

Chapter Five: It will provide the recommendations and findings based on this study by answering the research questions and identifying the existing gap in the law concerning cohabitation.

Chapter Two:

Legal Framework Governing Cohabitation in Kenya.

2.1: Introduction.

Upon establishing the prevalence of cohabitation in the 21st Century in Chapter One, this chapter will address the current legal and regulatory framework governing cohabitation in Kenya. It will rely on case laws, statutory provisions, and scholarly work to pinpoint the framework of cohabitation in Kenya.

2.2: The status of cohabitation in Kenya.

The concept of cohabitation is prevalently governed by the doctrine of common law marriage based on legal precedents. Cohabitation in Kenya has not been expressly recognized as having a formal legal status in society due to its exclusion from the Marriage Act 2014 which neither defines nor provides for it as a form of union or alternative to marriage³² or any other statutory provisions and laws.

2.2.1: Concept of trusts in cohabitation matters.

The vivid description of trusts involves a duty of obligations that rests upon a person described as a trustee whose responsibility is in relation to the property held in trust for the beneficiaries.³³ This concept has been applied by Kenyan court's when determining relationship property division among cohabitants upon their separation.

In *Mary Nyambura Kang'ara v Paul Ogari Mayaka*, the court argued that the lack of law regulating property among cohabitants made it apply the laws relating to property and trust which proved to be technical.³⁴ The court applied the concept of constructive trusts on whether there was common intention, any financial contributions towards the purchase of the property and if the purchase had been purchased in the sole name of one of the cohabitants.³⁵

Therefore, in satisfying these requirements, it established that both parties to the suit had a beneficial interest in the property, dividing it on 70 percent to Mary and 30 percent to Paul.³⁶

³² Section 6, *Marriage Act*, (2014).

³³ Moffat G, 'Trusts Law' in Dr Bean G, Professor Dewar J (ed), 4th ed, Cambridge University Press, UK, 2005, 3.

³⁴ *Mary Nyambura Kang'ara v Paul Ogari Mayaka* (2021) eKLR.

³⁵ *Mary Nyambura Kang'ara v Paul Ogari Mayaka* (2021) eKLR.

³⁶ *Mary Nyambura Kang'ara v Paul Ogari Mayaka* (2021) eKLR.

However, during this process, it stated that applying this concept was technical and it would have been made easy if there was a comprehensive legal framework governing cohabitation in Kenya.³⁷

Furthermore, studies funded by the Universities of Cardiff and Bristol on application of trust laws in addressing property division matters concluded that trust law was a complex field to deal with with practitioners struggling to explain how it operates to their clients in relation to property division.³⁸

2.2.2: Case laws on Cohabitation.

The Kenyan courts in solving cohabitation cases relied on the English common law system establishing judicial precedents due to a lack of clear laws governing cohabitation.³⁹

In Kenya, the case of *Hottensiah Wanjiku Yawe v Public Trustee*, litigated in the Court of Appeal for East Africa is considered a watershed case for the common law principle of the presumption of marriage. It involved Hottensiah Wanjiku, the appellant who claimed to be the wife of the deceased, Paul Makumbi Yawe who had died in a road accident, with whom she had cohabited for nine years having four children.⁴⁰ In this case, the holding was that long cohabitation may give rise to a presumption of marriage in favour of the party asserting it. The presumption for long cohabitation even arises under customary law.⁴¹

The length of cohabitation was presented for interpretation in *Milka Githikia Kamau v Faith Wangechi Kamau* 2008)eKLR, where the court presumed the applicant to be the deceased's wife. While making this decision, the court stated that it would be unreasonable to conclude that the claimant was just a forger out to benefit herself. During the applicant's cohabitation with the deceased from 1990 to 1999, she may have believed she was the deceased's rightful wife and therefore entitled to a portion of the deceased's estate.

The case of *Milka Githikia Kamau v Faith Wangechi Kamau* provided for the interpretation of the length of cohabitation where the Court presumed the applicant to be the deceased's wife having lived together for nine years entitling her to a portion of the deceased's property.

³⁷ Mary Nyambura Kang'ara v Paul Ogari Mayaka (2021) eKLR.

³⁸ University of Bristol, 'Dealing with property issues on Cohabitation breakdown' <<https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/execsum.pdf>>- 2004, 2.

³⁹ Kodiyo K, 'Judicial approach to Cohabitation: A comparative study of the law of England & Wales and Kenya' *Elte Law Journal*, 2021, 121.

⁴⁰ *Hottensiah Wanjiku Yawe v Public Trustee* (1976), Court of Appeal for East Africa.

⁴¹ *Hottensiah Wanjiku Yawe v Public Trustee* (1976), Court of Appeal for East Africa.

In addition, the Court of Appeal elaborated further on the rule of presumption of marriage in the case of *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another* whereby it considered acts of general repute in determining the existence of cohabitation so that it is not merely a friendship or woman being a concubine but a stay that had crystallized into a marriage.⁴² This was a major step in distinguishing the common law principle of cohabitation from the idea of come we stay.

In the case of *Joseph Gitau Githongo v Victoria Mwihaki*, the Court argued that the law being subject to requisite proof upon establishing a presumption of marriage, bestows a woman in such a union, 'wife' status in succession to enable her to qualify for maintenance or a share in the estate of the deceased.⁴³ This is in line with appreciating the social reality of life that gives rise to this presumption aimed at safeguarding the legal rights of the woman through inheritance upon the demise of the cohabiting partner. In addition, the Court relied on the evidence providing for the presumption of marriage as a question of fact, as something likely to have happened as a common cause of human conduct and natural event.⁴⁴

Unfortunately, the discussed cases failed to provide an elaborate guide on what to look for in determining a valid cohabitation, mostly emphasizing the long cohabitation tenent.

However, in the case of *Mary Nyambura Kangara v Paul Ogari Mayaka*, the Supreme Court elaborated on a list of eight elements that should be considered when determining a valid cohabitation, hence introducing a stricter approach to the presumption of marriage as not merely based on long cohabitation.

The elements include: a long cohabitation, the parties being free to marry, an intention to marry, consent by the party to contract into a cohabiting union, a general act of repute, the onus on the one asserting existence, the need for a shred of strong, distinct, and conclusive evidence and standard of proof being on a balance of probabilities.⁴⁵ The consent to contract into a cohabiting union can be well supported by incorporating cohabitation agreements contracts.

The elements are to be applied conjunctively in actualizing the desired result. However, despite providing stricter parameters, the court failed to specify the number of years that

⁴² *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another* (2009) eKLR.

⁴³ *Joseph Gitau Githongo v Victoria Mwihaki* (2014) eKLR.

⁴⁴ Section 119, Evidence Act (Act No. 3 of 1963).

⁴⁵ *Mary Nyambura Kang'ara v Paul Ogari Mayaka* (2021) eKLR.

qualified as a valid cohabitation or the metric through which we can determine an intention to marry or even the capacity to contract into a cohabitation union.

The above cases demonstrate a restrictive interpretation of cohabitation in Kenya by the Courts through its heavy reliance on judicial precedents.

2.2.3: Statutory Provisions on Cohabitation.

In Kenya, statutory provisions have not been clear on what cohabitation should entail thus only providing for other forms of marriage unions by safeguarding the rights, duties, and remedies that accrue from such unions.⁴⁶

It should be noted that the Marriage Bill of 2007 provided for the following clause without defining what to cohabit means, *‘where it is proved that a man and a woman having the 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.’*⁴⁷

This marked the initial efforts in a bid to recognise cohabitation unions for couples who had openly lived together for a minimum of at least two(2) years.⁴⁸ Thereafter the Marriage Bill 2012 made changes to the 2007 bill by defining cohabit to mean, *‘to live in an arrangement where an unmarried couple lives together in a long-term relationship that resembles a marriage.’*⁴⁹

The 2012 bill paved the way for the initiative titled *‘A change to marriage laws’* which was approved by the Cabinet at the time that wanted to recognise cohabitation lasting over six (6) months as legal marriage.⁵⁰ Moreover, the initiative would give powers to the chief to formalise such unions registering them as marriages with the bill further outlining provisions for the maintenance of spouses and children in cases of separation.⁵¹ However, despite the

⁴⁶ Sheriaplex, ‘What are the Legal Implications of Cohabitation in Kenya’, [-<https://www.sheriaplex.com/forum/86-what-are-the-legal-implications-of-cohabitation-in-kenya>](https://www.sheriaplex.com/forum/86-what-are-the-legal-implications-of-cohabitation-in-kenya)- on January 2025.

⁴⁷ Section 7, *Marriage Bill* 2007.

⁴⁸ Ogeto J, ‘Cohabitation and Presumption of Marriage’, *The Accountant*, 26 April 2024 [-<https://accountantjournal.com/cohabitation-and-presumption-of-marriage/>](https://accountantjournal.com/cohabitation-and-presumption-of-marriage/)- on 26 April 2024.

⁴⁹ Section 3, *Marriage Bill* 2012.

⁵⁰ Ogeto J, ‘Cohabitation and Presumption of Marriage’ *The Accountant*, 26 April 2024 [-<https://accountantjournal.com/cohabitation-and-presumption-of-marriage/>](https://accountantjournal.com/cohabitation-and-presumption-of-marriage/)- on 26 April 2024.

⁵¹ Ogeto J, ‘Cohabitation and Presumptions of Marriage’ *The Accountant*, 26 April 2024 [-<https://accountantjournal.com/cohabitation-and-presumption-of-marriage/>](https://accountantjournal.com/cohabitation-and-presumption-of-marriage/)- on 26 April 2024.

efforts to recognise such unions in law, the proposals were ultimately abandoned by the parliament.⁵²

According to Article 45(4) of the Constitution of Kenya, the Marriage Act was promulgated.⁵³ It provides for different types of marriages including civil, customary, Hindu, Christian, and Islamic whereby cohabitation was not provided for and thus not recognised as a form of marriage. In line with the concept of marriage, the law only provides for the recognition of heterosexual relationships.⁵⁴

Therefore, we can deduce that the common law presumption of marriage has yet to be expressly provided for in this statutory provision despite it being proposed in its subsequent bills. This provides for the non-recognition of cohabitation which is currently a societal reality leading to the technicality of trying to safeguard the interests of cohabiting couples during and upon the dissolution of the union. The absence of a substantive legislative framework has necessitated the courts to apply the concept of trusts which is marred with inconsistencies on a case-to-case basis.

2.3: Conclusion.

This chapter has addressed the legal framework governing cohabitation in Kenya relying mostly on judicial precedents. From the above, the issue of cohabitation has been raised a lot in Kenyan courts with various decisions being given to those seeking justice. However, in the recent *Mary Nyambura Kang'ara v Paul Ogari Mayaka* case, the Supreme Court argued that there was indeed the need for a comprehensive legal framework governing cohabitation to safeguard certain rights including issues of property division due to the technicality of trusts which has proved a challenge when interpreting such cases. The following chapter will discuss the legal framework governing cohabitation in New Zealand to compare the two legal systems on cohabitation matters.

⁵² Ogeto J, 'Cohabitation and Presumption of Marriage' *The Accountant*, 26 April 2024
-<<https://accountantjournal.com/cohabitation-and-presumption-of-marriage/>>- on 26 April 2024.

⁵³ Karimi S, 'An Analysis of the status of cohabitants in Kenya' LLB Published, Strathmore University, Nairobi, 2018, 28.

⁵⁴ Article 45, *Constitution of Kenya* (2010).

Chapter 3:

Comparative Study on the Best Practices in New Zealand's Legal Framework Governing Cohabitation with the Kenyan Legal Framework.

3.1: Introduction.

This chapter will execute a comparative analysis of the application of the legal framework governing the concept of cohabitation in New Zealand and Kenya. The legal system of New Zealand is almost identical to that of Kenya because both states are common law jurisdictions having been colonized by the British. This is the main reason why the study has chosen New Zealand as the suitable comparator.

The concept of cohabitation in New Zealand is intriguing to study since unlike Kenya, the country has a comprehensive legal framework governing the idea of cohabitation, one referred to as *de facto relationships* hence conferring it a unique protection in safeguarding the interests of the cohabitants and being alive to the social reality of its prevalence in the contemporary world.⁵⁵ Subsequent amendments were made to the provisions by the New Zealand legislation to reflect the reality of *de facto* relationships in its society.⁵⁶ Therefore, this chapter will discuss the legal provisions in New Zealand that provide for cohabitation protection.

3.2: Legal Framework Governing *de facto* relationships in New Zealand.

This section will address the various statutory provisions that aim to protect and regulate *de facto* relationships in New Zealand. They include the Property (Relationships) Act, Adoption Act, Wills Act, Family Proceedings Act, Domestic Violence Act, Human Rights Act, Interpretation Act, and Status of Children Act.

3.2.1: Property (Relationships) Act 1976.

It deals with the subject of property division not only between married couples but also cohabitation unions herein referred to as a *de facto* relationship. It defines *de facto* relationships as, “a relationship between two persons (whether a man and woman, a woman and a woman, or a man and a man) who are both aged 18 years and above, live together as a

⁵⁵ Atkins W, ‘De Facto Relationships in New Zealand- A largely Unified Law’ 50(2), *Family Law Quarterly*, 2016, 305.

⁵⁶ Atkins B, ‘The Legal World of Unmarried Couples: Reflections on De Facto Relationships’ 39(4) *Victorian University of Wellington Law Review*, 2008, 794.

couple, and are not married to or in a civil union with one another.”⁵⁷ Consequently, the act applies to the existing and future de facto relationships⁵⁸ and to relationships that end in separation or death where both de facto partners are alive or when one of the de facto partners is dead.⁵⁹

In recognising the validity of a de facto relationship, the act lays out several requirements that are looked at including the duration of the relationship, common residency among the partners, the existence of a sexual relationship, general reputation, the performance of household duties, care and support of children conceived during the union, property acquisition and its ownership and degree of financial independence.⁶⁰ On the issue of duration, the act provides for a three-year term, coining periods of less than three years as short-duration unions.⁶¹ Therefore, de facto partners who have been together for at least three years are protected by the act while those who have lived for less than three years are not covered.⁶²

With regards to property division, the act addresses the nature of both the relationship property and separate property. It explains relationship property to mean all owned immediately before a marriage, civil union, or a de facto relationship has begun if acquired where there was a contemplation of the union or with the intention of common use and benefit.⁶³ This further enshrines the need for property rights to be safeguarded in de facto relationships.

Moreover, the Act discusses the issue of relationship property with creditors, the ability to easily contract your piece of property to other people, safeguards on the issue of maintenance and child support applying to de facto relationships,⁶⁴ and finally the issue of how to go about the division of this relationship property in the instance of death of one of the spouses or a partner.

⁵⁷ Section 2D, Property (Relationships) Act (Act No. 166 of 1976) New Zealand.

⁵⁸ Section 4C, Property (Relationships) Act (Act No. 166 of 1976) New Zealand.

⁵⁹ Section 4D, Property (Relationships) Act (Act No. 166 of 1976) New Zealand.

⁶⁰ Section 2D, Property (Relationships) Act (Act No. 166 of 1976) New Zealand.

⁶¹ Section 2E, Property (Relationships) Act (Act No. 166 of 1976) New Zealand.

⁶² Section 2E, Property (Relationships) Act (Act No. 166 of 1976) New Zealand.

⁶³ Section 9, Property (Relationships) Act (Act No. 166 of 1976) New Zealand.

⁶⁴ Section 32, Property (Relationships) Act (Act No. 166 of 1976) New Zealand.

3.2.2: Adoption Act 1955.

This Act deals with adoption matters relating to children. The act provides that “an adoption order can be made on the application of two(2) spouses jointly in respect of a child.”⁶⁵ The mention of the word ‘spouse’ was thought to refer only to married people but there have been different interpretations by the courts in New Zealand that have included de facto partners within the definition of a spouse.⁶⁶

The case of *Re application by AMM and KJO* involved the adoption of an eleven-year-old boy who had been conceived by a sperm donor project and the high court held that two persons of the opposite sex who were in a de facto relationship could be viable to adopt the child considering the de factos as spouses.⁶⁷ Therefore, this Act's least restrictive interpretation allows the de facto partners to adopt a child.

3.2.3: Wills Act 2007.

This Act deals with certain law provisions that recognize de facto relationships when it comes to inheritance.

Under Part 2, the Act provides for the making, changing, revoking, and reviving of wills as long as you are 18 years and above, and in the instance, you are this age, you should either be married, in a civil union, or a de facto relationship.⁶⁸ This provision provides for the involvement of de facto partners in the will-making process to ensure that the idea of inheritance from one partner to the other is seamless.

3.2.4: Family Proceedings Act 1980.

This Act deals with issues relating to family like the maintenance of spouses and de facto partners, the children, and dispute resolution mechanisms.

Under Part 6, the act provides for the maintenance of a partner after the de facto relationship comes to an end highlighting that at a time whereby they cease to live together, the de facto partner is liable to maintain the other partner to the extent that such maintenance is necessary for reasonable needs to be met or where the other partner cannot meet their needs due to

⁶⁵ Section 3, Adoption Act (Act No. 93 of 1955) of New Zealand.

⁶⁶ AtkinsW, ‘De Facto relationships in New Zealand- A largely unified Law’ 50(2) *Family Law Quarterly*, 2016, 307.

⁶⁷ *Re Application of AMM and KJO* (2010), The High Court of New Zealand.

⁶⁸ Section 9, Wills Act (Act No. 36 of 2007) New Zealand.

certain circumstances.⁶⁹ This ensures that the partner's well-being is taken care of as a legal obligation by the cohabiting partner.

3.2.5: Domestic Violence Act 1995.

This Act protects those in marriages, civil unions, and de facto relationships from domestic violence incidents diligently laying out procedures and outlines that ought to be adhered to by the partner. The term 'Partner' is defined to include "a person's civil union partner, de facto partner, or persons who are biological parents of the same person."⁷⁰

3.2.6: Human Rights Act 1993.

This Act concerning de facto relationships alias cohabitation unions strives to guard against forms of discrimination based on sex, religious beliefs, ethnicity, race, ethical beliefs, colour, disability, age, and various statuses like marital.⁷¹ It provides for prohibited grounds of discrimination based on marital status to include a surviving partner in a de facto relationship or a party to a de facto relationship that has been dissolved.⁷²

3.2.7: Interpretation Act 1999.

This is an Act that applies to an enactment that is part of the New Zealand law.⁷³ The Act is crucial to de facto relationships as it provides for a definition to mean the relationship between two people who live together, are not married, and are of the age of 16 years and above with the relationship of 16 or 17 years not being considered as a de facto relationship unless consent is obtained under section 46A of the Care of the Children Act of 2004.⁷⁴ This provision is usually contrasted with the definition of de facto relationship in the Property(Relationships) Act.⁷⁵ Nonetheless, it is instrumental as it recognises the existence of a de facto relationship providing for its definition.

3.2.8: Status of Children Act 1969.

This Act addresses the status of children in New Zealand born out of cohabiting unions as having equal rights to those of married unions. Under this Act, all children conceived in a

⁶⁹ Section 64, Family Proceedings Act (Act No. 94 of 1980) New Zealand.

⁷⁰ Section 2, Domestic Violence Act (Act No. 86 of 1995) New Zealand.

⁷¹ Section 21, Human Rights Act (Act No. 82 of 1993) New Zealand.

⁷² Section 21, Human Rights Act (Act No. 82 of 1993) New Zealand.

⁷³ Section 3, Interpretation Act (Act. No 85 of 1999) New Zealand.

⁷⁴ Section 29A, Interpretation Act (Act. No 85 of 1999) New Zealand.

⁷⁵ Atkins W, 'De facto Relationships in New Zealand- Largely Unified Law' 50(2) *Family Law Quarterly*, 2016, 313.

marriage union or any other relationship are considered to be of equal status before the law thus removing the legal disabilities that are occasioned as a result of children being born out of wedlock.⁷⁶ Therefore, under this Act, any child is entitled to the distribution of estates and property that is held upon trust through the grant of a letter of administration with the recognition of children born from unmarried unions in this distribution.⁷⁷

3.2.9: Court's Interpretation of the Legal Framework.

The courts have inadvertently applied the above-discussed provisions when addressing the concept of a de facto relationship. The following are cases that have demonstrated the application of the above provisions by Courts.

The case of *Sutton v Bell* involved Sutton and Bell getting into a de facto relationship around the year 2005 with Mr. Sutton owning a house before this relationship and nine years down the line the relationship came to an end.⁷⁸ This brought about the issue of relationship property division because the parties had not contracted out of an equal sharing regime as addressed in section 21 of the PRA enabling Ms Bell to acquire half of the share of the property.⁷⁹ This case compelled the Supreme Court to allow individuals in a de facto relationship to ensure that they are cognizant of relationship property implications during the initial stages of the relationship and come up with a contractual agreement as to how they would want their property to be divided in line with the PRA.⁸⁰ This case highlighted the importance of contracting out in the instance of de facto so that you can mutually decide the assets that you would not like to share in the event of separation.

Moreover, the case of *B v F* highlighted uncertainties when it came to the application of the requirements to determine the existence of a de facto relationship between decisions made by the Family Court and the High Court.⁸¹ During the period between 1994 and 2004, Mr. F spent evenings at Ms. B's house but ended up sleeping at his parent's house where he did everything with this habit of meeting every evening creating the presumption of a couple in the eyes of society.⁸² In addition, Mr. F provided financial support to Ms. B and her children

⁷⁶ Section 3, Status of Children Act (Act No. 18 of 1969) New Zealand.

⁷⁷Section 5A, Status of Children Act (Act No. 18 of 1969) New Zealand.

⁷⁸ *Sutton v Bell* (2023), Supreme Court of New Zealand.

⁷⁹ *Sutton v Bell* (2023), Supreme Court of New Zealand.

⁸⁰ MinterEllisonRuddWatts, 'Supreme Court warning for de facto relationships' 1

<<https://minterellison-co-nz/insights/supreme-court-warning-de-facto-relationship>>- on 7 June 2023.

⁸¹ Liao Z, 'Finding Certainty in determining whether "a de facto relationship" exists: An Important task' 20(5) *Canterbury Law Review*, 2015, 115.

⁸² *B v F* (2010), The Family Court of New Zealand.

despite not having a joint bank account. Once the case was brought before the Family Court, it was decided that there was no de facto relationship since the parties did not live together.⁸³ However, on appeal, the high court reversed the Family Court citing that it had focused more on the common residency requirement with itself focusing on the general repute requirement.⁸⁴ This case specifically highlighted the flexibility of interpreting Section 2D of the PRA on the definition of a de facto relationship for a certain circumstance necessitating the courts to apply a certain test when it came to interrogating the section to best serve the required certainty in the instance where a case provides for contradicting requirements.⁸⁵

Therefore, in trying to address the uncertainty created by the unfettered discretion in the requirements of de facto relationships under the PRA, the court came up with some guidelines to arrive at the best decision possible as seen in the case of *Scragg v Scott*. Under this case, the high court in establishing whether a de facto relationship existed emphasised the evidence of an emotional connection guideline in substantiating a special bond necessary for a genuine relationship.⁸⁶

Moreover, another guideline that has been invoked by the courts is the degree of mutual commitment to a shared life whereby in the case of *L v P*, the court held that the relationship did not amount to that of a de facto due to the insufficiency in the mutual commitment. The case involved L and P who had an association for 15 years and with a child sharing accommodation from 1998 to 2006 with the fact that the woman had been a prostitute and a lesbian defeating the whole idea of such a woman wanting to commit herself to a mutually shared relationship hence the decision of no de facto by the High Court.⁸⁷

Therefore, from the above, we can deduce that courts have diligently relied on the statutory provisions governing de facto unions in New Zealand and in trying to solve uncertainties emanating from the unfettered discretion postulated by the definition come up with plausible guidelines to better enable better decision making by the Courts. This translates to a more liberal interpretation of de facto relationships.

⁸³ *B v F* (2010), The Family Court of New Zealand.

⁸⁴ Liao Z, 'Finding Certainty in determining whether "a de facto relationship" exists: An Important task' 20(5) *Canterbury Law Review*, 2015, 116.

⁸⁵ Liao Z, 'Finding Certainty in determining whether "a de facto relationship" exists: An Important task', 116.

⁸⁶ Liao Z, 'Finding Certainty in determining whether "a de facto relationship" exists: An Important task', 117.

⁸⁷ *L v P*(2008), The High Court of New Zealand.

3.3: Successes of the Legal Framework governing de facto relationships in New Zealand.

New Zealand has recognized the *sui generis nature* of the de facto relationship by providing protection and regulation in a comprehensive legal framework in line with its global prevalence. In this recognition, certain advantages have been actualized.

First and foremost, it has provided vital clarity and guidance for the courts to decide cases relating to de facto relationships with ease hence advancing justice. Moreover, this fact enables the courts to develop guidelines to actualize better decision-making and a consistent approach to such disputes by judges and magistrates.⁸⁸

Secondly, having ready-made laws has made it easier to safeguard the rights and interests of cohabitants in de facto unions by outlining how the division of property accruing to such relationships should be divided upon separation, maintenance and child support, adoption of children by de facto partners and matters of inheritance upon the demise of one of the de facto partners.⁸⁹

Finally, the incorporation of a law has instilled confidence in de facto partners in their protection and recognition thus encouraging more stable relationships. It enables individuals to have the know-how as to what they are contracting into and the implications that ensue out of such relationships.

3.4: Comparison between New Zealand and Kenya.

Although both New Zealand and Kenya are common law jurisdictions, this chapter has shown how the courts in New Zealand have addressed the concept of *de facto* relationships by relying on subsequent statutory provisions addressing various arenas associated with the realm of family-like relationship property. Despite a mere recognition through the definition of the term "to cohabit",⁹⁰ this alone does not address pertinent matters affecting such individuals.

However, despite an elaborate provision of requirements for de facto relationships in the New Zealand Statutory provisions, certain requirements such as the intention to marry have been mentioned in the Kenyan case law⁹¹ which has not been explicitly mentioned in the New Zealand statutory laws.

⁸⁸ Liao Z, 'Finding Certainty in determining whether "a de facto relationship" exists: An Important task', 118.

⁸⁹ Liao Z, 'Finding Certainty in determining whether "a de facto relationship" exists; An Important task', 112.

⁹⁰ Section 2, Marriage Act, (Act No. 4 of 2014).

⁹¹ Mary Nyambura Kang'ara v Paul Ogari Mayaka (2021) eKLR.

This chapter has demonstrated the willingness and easiness of the courts in deciding matters of *de facto* relationships with clarity through interpreting provisions of its robust legal framework. This is unlike Kenya whereby, in solving matters of cohabitation, it relies on judicial precedents and concepts of trust which some courts have considered to be intrinsically technical to apply as it is the only way to look at these relationships without a statutory legal framework.⁹²

3.5: Lessons Kenya can draw from New Zealand.

The Kenyan legislative arm of the government can emulate the idea of having a comprehensive legal framework governing cohabitation as evidenced in New Zealand. New Zealand has structured cohabitation as a *de facto* relationship by recognising it in law while safeguarding the rights and interests that accrue from a genuine committed relationship such as relationship property division, maintenance and support, and inheritance matters.

Furthermore, having a comprehensive legal framework by courts in New Zealand has provided certainty through the clarity of the requirements such as the period that should be met for a *de facto* relationship to be valid and existent.

However, despite the unfettering discretion in the provision of requirements to be met, the courts have highlighted plausible guidelines that should be adhered to to ensure that justice and fairness are advanced in matters affecting *de facto* relationships.⁹³ This would solve intricacies faced by Kenyan courts due to the absence of statutory provisions safeguarding *de facto* relationships resulting in applying concepts of trusts that are intrinsically technical.⁹⁴

3.6: Conclusion.

The above comparative study has provided some insights on how having a comprehensive legal framework aside from reliance on just judicial precedents has best addressed the definition of a *de facto* relationship, the elements that ought to be achieved, and rights and remedies that accrue from such relationships. Furthermore, it provides for a commendable

⁹² Mary Nyambura Kang'ara v Paul Ogari Mayaka (2021) eKLR.

⁹³ Liao Z, 'Finding Certainty in determining whether "a *de facto* relationship" exists: An Important task', 117.

⁹⁴ Mary Nyambura Kang'ara v Paul Ogari Mayaka (2021) eKLR.

legal framework that best serves the interests of de facto relationships which is easily interpreted by the courts.

Chapter 4:

Assessing the viability of applying a well-drafted Comprehensive Legal Framework governing the concept of Cohabitation in Kenya.

4.1: Introduction

This chapter will seek to assess the possibility of Kenya adopting a comprehensive legal framework governing cohabitation to address the needs of such relationships. It analyses the benefits that would ensue through having comprehensive statutory guidance to recognise de facto relationships. This will be conducted by determining the possibility of courts relying on a statutory provision to decide cases of such nature.

4.2: Possibility of having a well-drafted Legal Framework in Kenya.

4.2.1: Relying on a well drafted legal framework.

The comparative study as adduced in Chapter 3 has shown how courts in New Zealand have heavily relied on statutory provisions governing de facto relationships in ensuring that their rights and remedies are not violated with justice being served to the discontented partners in such relationships on myriads of issues.

Kenyan courts have been deciding matters of cohabitation unions through deep reliance on case precedents. A case that is usually relied upon is the *Hottensiah Wanjiku v Public Trustee*, which is considered the landmark case that provided for an existent cohabitation in the union based on the couple having cohabited for many years.⁹⁵ Since then, the country has noticed an evolving metric in the interpretation of such matters oftenly providing for further elements that need to be met for a valid cohabitation as evidenced in the case of *Mary Nyambura Kang'ara v Paul Ogari Mayaka*. The case provided for eight elements that need to be fulfilled as cited in Chapter two for a valid cohabitation to be met.⁹⁶

⁹⁵ *Hottensiah Wanjiku Yawe v Public Trustee* (1976), Court of Appeal for East Africa.

⁹⁶ *Mary Nyambura Kang'ara v Paul Ogari Mayaka* (2021) eKLR.

4.3:Benefits of having a comprehensive newly drafted legal framework governing cohabitation in Kenya.

In Kenya, cohabitation is usually recognized by the common law principles under the doctrine of presumption of marriage.⁹⁷ The Marriage Act has only provided a brief definition of what to cohabit means without delving into the subject matter that relates to unions such as property division, maintenance, and inheritance matters. The following are some of the benefits that would accrue from having well-drafted laws providing for cohabitation relationships.

First and foremost, it provides clarity and certainty to the court's on how to go about making decisions. The case of *Mary Nyambura Kang'ara v Paul Ogari Mayaka* started off in the high court level and appeals were made regarding it until it reached the apex court, Supreme Court of Kenya. In deciding the issue of property division and determining whether there was a cohabitation union between the parties involved, the court in applying case precedents and concepts of trusts which it admitted in its judgment were intrinsically complex citing the need for a statutory legal framework that could be relied upon to provide certainty.⁹⁸

Secondly, having an already established law would work toward recognising the rights, duties and interests that arise out of cohabitation as encompasses a family setting. The constitution of Kenya recognises the right to family as vital by considering it as the social unit of the society.⁹⁹

4.5:Conclusion

This chapter has addressed the viability and possibility of Kenya adopting a comprehensive legal framework governing cohabiting unions as seen in New Zealand.

The parameter in this chapter is on the possibility of Kenyan courts relying on a well drafted legal framework governing cohabitation unions. The chapter has shown how the courts have been relying on case precedents which may pose uncertainties and confusion when deciding a complex matter as that of cohabitation. It has provided for the benefits that would ensue as a result of applying a well drafted legal framework as it provides clarity in outlining issues

⁹⁷Mundia S, 'Protecting Cohabitees' Right to Property within the Cohabitation union in Kenya' LLB Published, Strathmore University, Nairobi, 2021, 38.

⁹⁸ *Mary Nyambura Kang'ara v Paul Ogari Mayaka* (2021) eKLR.

⁹⁹ Article 45, Constitution of Kenya (2010).

underlying cohabitation similar to how we have a statutory framework governing marriage in Kenya.

Therefore, bearing in mind the nature of cohabitation, similar to that of a family setting governed under the constitution, it proves a case for it deserving of sui generis protection in a legal comprehensive framework.

CHAPTER 5:

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS.

5.1: Introduction.

This chapter will provide the study's findings, recommendations, and conclusions ascertaining whether the research objectives and questions have been adequately fulfilled.

5.2: Findings.

5.2.1: Status of Cohabitation in Kenya.

The legal framework in Kenya does not explicitly provide for cohabitation unions in its statutory provisions. The Kenyan courts have over the years applied the common law doctrine of presumption of marriage heavily relying on judicial precedents. Prior attempts had been made through the Marriage Bill 2012 to recognise cohabitation unions but they never saw the light.

The supreme court case of *Mary Nyambura v Paul Ogari* stipulated that it was time to have a well-drafted legal framework governing cohabitation to avert the uncertainty and inconsistencies accrued in the decisions made by the court hence advancing the justice owed to the parties involved.

5.2.2: Application of a well-drafted legal framework governing cohabitation.

The case of New Zealand which has a comprehensive legal framework governing cohabitation otherwise referred to as de facto relationships has proved to be a great success in addressing matters of property division upon separation, maintenance of spouse and the children, and inheritance upon the demise of one of the de facto partners. In addition, the comprehensive legal framework through statutory provisions has made it easier for the New Zealand courts to assert their judicial interpretation diligently through a broad interpretation of such matters.

5.2.3: Possibility of Kenyan parliament and Courts applying a well-drafted legal framework governing cohabitation.

The thorough assessment in Chapter Four affirms the possibility of Kenyan Courts needing a well-drafted law to decide Cohabitation matters. This is owing to the social reality of

cohabitation through its increasing adoption rates by the Kenyan citizens thus the need for its elaborate recognition in law.

5.3: Recommendations.

5.3.1: The Need for Well-Drafted Legal Framework Governing Cohabitation in Kenya.

The study has elaborately demonstrated the Kenyan Court's heavy reliance on judicial precedents often citing the case of *Hottensiah Wanjiku Yawe v Public Trustee* which serves as the landmark case for cohabitation. This is together with applying the common law principles of presumption of marriage.

In addition, it has diligently demonstrated the success actualized by New Zealand in applying its subsequent statutory provisions addressing each aspect that arises out of a union to provide the needed clarity for the courts to determine matters arising out of cohabitation unions. Moreover, the New Zealand comparison has shed some light on how seamless the decision making process of the courts would be if they relied on an already established statutory provision that explicitly addresses all aspects of a union namely; adoption, inheritance, maintenance, relationship property division among cohabitants.

Therefore, my recommendation is for the lawmakers to draft a statutory provision that provides for specific regulation of cohabitation.

5.4: Conclusion.

Finally, this part will seek to determine whether the objectives underlying this study have been achieved or not and they include:

- a. *To determine the current legal and regulatory framework governing cohabitation in Kenya.*

This objective has been addressed under Chapter Two of this study. The study has elaborated on cohabitation status in Kenya concerning the case laws and provisions that have directly or indirectly analyzed the concept.

- b. *To examine the approach adopted by New Zealand in granting sui generis protection to cohabitation unions.*

This objective has been addressed under Chapter 3 of this study. It has undertaken a comparative study of New Zealand which has adopted a *sui generis* protection of de facto

relationships alias cohabitation in its subsequent statutory provisions addressed herein. In addition, it has provided the Court's approach in deciding such matters through applying the legal framework which has been a great success for the sake of justice and clarity to the parties on their legal rights and duties. Therefore, this objective has been achieved.

c. To examine the possibility of a legal comprehensive framework for cohabitation to govern its regulation by the courts in Kenya's Jurisprudence.

The study addressing this objective has conducted a critical analysis of the

d. To determine the recommendations that can be made based on the findings in addressing the gap regarding the inclusion of cohabitation in a comprehensive legal framework.

This study has provided its recommendations based on the findings actualized upon noting the existent gap in the law. Therefore, the objectives have been addressed.

Furthermore, the hypothesis of this study has been proven upon the elaborate comparative analysis of New Zealand and the best practices Kenya can derive in sorting the significant gaps in law relating to Cohabitation unions.

BIBLIOGRAPHY.

a. Books.

Moffat G, 'Trusts Law' in Dr Bean G, Professor Dewar J (ed), 4th ed, Cambridge University Press, UK, 2005.

b. Dissertation and thesis.

Karimi S, 'An analysis of the status of cohabitants in Kenya' LLB Published, Strathmore University, Nairobi, 2018.

Mundia S, 'Protecting Cohabitees' Right to Property within the cohabitation union in Kenya' LLB Published, Strathmore University, Nairobi, 2021.

c. Hard Copy Journal.

Atkins B, 'The Legal World of Unmarried Couples: Reflections on De Facto Relationships' 39(4) Victoria University of Wellington Law Review, 2008.

Atkins W, 'De Facto Relationships in New Zealand- A Largely Unified Law' 50(2) Family Law Quarterly, 2016.

Bankston C, 'Social Justice and Cultural Origins of a Perspective and a Theory' 15 (2), *The Independent Review*, 2010.

Deflem M, 'Sociological theories of Law' *Encyclopaedia of Law and Society: American and Global Perspectives*, 2007.

Dubler A, 'Wifely Behaviour: A Legal History of Acting Married' 100(4), *Columbia Law Review*, 2000.

Fergus Ryan, 'Out of the shadow of the Constitution: Civil partnership, Cohabitation and the Constitutional family' 48(1), *Irish Jurist*, 2012.

F. Nii-Amoo D and Megan K, 'Cohabitation, Marriage, and Sexual Monogamy' in Nairobi's slums, 2007.

House of Commons Women & Equalities Committee, Report on the rights of cohabiting partners, 19 July 2022.

Kodiyo K, 'Judicial approach to Cohabitation: A comparative study of the law of England & Wales and Kenya, *Elte Law Journal*, 2021.

Liao X, 'Finding certainty in determining whether "a de facto relationship" exists: An Important task' 20(5) *Canterbury Law Review*, 2015.

Mwambi P, 'Impact of Duration of Cohabitation on Succession in Cohabitation Marriages' 8(1), *Journal of Public Policy and Governance*, 2024.

Odimegwu C, Ndagurwa P, Singini M, 'Cohabitation in Sub-Saharan Africa: A Regional Analysis' 18(1), *Southern African Journal of Demography*, 2018.

O'Donovan K, 'Legal Marriage. Who Needs It?' 47(1), *The Modern Law Review*, 1984.

Rindfuss. R and VandenHeuvel A, 'Cohabitation: A Precursor to Marriage or an Alternative to Being Single?' 16(4), *Population and Development Review*, 1990.

R. Probert, 'A Review of "Cohabitation: The Financial Consequences of Relationship Breakdown," Law Com. No. 307 (HMSO 2007)' 41(3), *Family Law Quarterly*, 2007.

Waggoner L, 'With Marriage on the Decline and Cohabitation on the Rise, What about Marital Rights for Unmarried Partners?' *Law and Economics Working Papers*, 2015.

Vaughn K, 'John Locke and the Labour theory of value' 4(2), *Journal of Libertarian Studies*, 1978.

d. Online Journal

University of Bristol, 'Dealing with property issues on Cohabitation breakdown' -<<https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/execsum.pdf>>- 2004.

e. Internet Sources.

Ogeto J, 'Cohabitation and Presumption of Marriage' *The Accountant*, 26 April 2024 -<<https://accountantjournal.com/cohabitation-and-presumption-of-marriage/>>- on 26 April 2024.

Sheriaplex, 'What are the Legal Implication of Cohabitation in Kenya', -<<https://www.sheriaplex.com/forum/86-what-are-the-legal-implications-of-cohabitation-in-kenya>>- on January 2025

'Supreme Court warning for de facto relationships' Minterellison, 7 June 2023-<<https://minterellison-co-nz/insights/supreme-court-warning-for-de-facto-relationships>>-on 7 June 2023.