

**PROTECTING COHABITEES' RIGHT TO PROPERTY WITHIN THE
COHABITATION UNION IN KENYA**

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By

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Declaration

I, MUNDIA SHARON MICHELLE MUDENDE, 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 July 2021**

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

Signed:  13th October 2021

DR. JENNIFER GITAHI

Table of Contents

Declaration.....	ii
ACKNOWLEDGMENTS	v
LIST OF STATUTES.....	vi
LIST OF CASES.....	vi
LIST OF ABBREVIATIONS	vii
ABSTRACT.....	viii
CHAPTER ONE	1
INTRODUCTION AND BACKGROUND.....	1
STATEMENT OF THE PROBLEM.....	3
RATIONALE OF THE STUDY	3
SIGNIFICANCE OF THE STUDY.....	4
AIM.....	4
OBJECTIVES.....	5
RESEARCH QUESTIONS	5
HYPOTHESIS	5
THEORETICAL FRAMEWORK.....	5
RESEARCH METHODOLOGY.....	7
LITERATURE REVIEW	7
LIMITATIONS.....	13
CHAPTER BREAKDOWN	13
CHAPTER TWO	14
LEGAL STANDING OF PROPERTY RIGHTS OF COHABITING PARTNERS IN KENYA	14
PRE COLONIAL KENYA.....	14
COLONIAL KENYA.....	16
INDEPENDENCE KENYA	18

PRE 2010 INDEPENDENCE KENYA	18
POST 2010 INDEPENDENCE KENYA.....	19
JUSTIFICATION OF THE CURRENT LEGAL STANDING OF THE LAW ON PROPERTY RIGHTS OF COHABITING PARTNERS	23
CHAPTER THREE	25
PROPERTY RIGHTS OF COHABITING PARTNERS IN THE UNITED KINGDOM AS A BENCHMARK FOR KENYA.....	25
COHABITEES’ RIGHT TO LAY CLAIM ON PROPERTY AS IS IN THE UNITED KINGDOM	25
CASE LAW WITHIN THE UNITED KINGDOM ON COHABITEES’ RIGHT TO LAY CLAIM ON PROPERTY	31
CHAPTER FOUR.....	34
THE PROPOSED LEGAL FRAMEWORK FOR PROPERTY RIGHTS OF COHABITING PARTNERS IN KENYA.....	34
THE PROPOSED BASIS FOR KENYAN COHABITEES’ RIGHT TO LAY CLAIM ON PROPERTY CONTRIBUTED TO THROUGHOUT THE UNION	34
BENEFITS OF THE PROPOSED LAWS ON PROPERTY RIGHTS OF COHABITING PARTNERS TO BE ADOPTED FROM THE UNITED KINGDOM.....	36
SHORTCOMINGS OF THE PROPOSED LAWS ON PROPERTY RIGHTS OF COHABITING PARTNERS TO BE ADOPTED FROM THE UNITED KINGDOM.....	38
CHAPTER FIVE	40
FINDINGS, RECOMMENDATIONS AND CONCLUSION	40
FINDINGS	40
RECOMMENDATIONS.....	41
CONCLUSION.....	43
BIBLIOGRAPHY	44

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LIST OF STATUTES

Cohabitation Rights Bill [HL] – England
Constitution on Kenya (2010)
Family Law (Scotland) Act (2006)
Judicature Act (1967)
Land Act (2012)
Land Registration Act (2012)
Law of Succession Act (Act No. 26 of 2015)
Magistrate Courts Act (1967)
Marriage Act (2014)
Married Women’s Property Act (1882)
Matrimonial Property Act (2013)
Order in Council (1897)
The Native Christian Marriage Ordinance (1904)

LIST OF CASES

Burns v Burns (1984) 1 All ER 244
Eves v Eves (1975) EWCA Civ 3
Gow v Grant (2012) UKSC 29
Hortensiah Wanjiku Yawe v Public Trustee (Civil Appeal number 13 of 1976)
Marvin v Marvin (1976), The Supreme Court of California.
Mary Njoki v John Kinyanjui Muthuru and others (1985) eKLR
MNP v POM (Civil Application Sup. No. 4 of 2019) eKLR
Negus v Bahouse (2007) EWHC 2628
O K N v M P N (2017) eKLR
O’Brien v Seagrave and another (2007) EWHC 788
Oxley v Hiscock (2004) EWCA Civ 546

R v Amkeyo (1952) 19 E.A.C.A.

Re Ogolla 's Estate (1978) KLR 18 at 26

Re Ruenji 's Estate (1977) KLR 21

WM v Murigi (2008) eKLR

LIST OF ABBREVIATIONS

HL – House of Lords

UK – United Kingdom

ABSTRACT

As time goes by social trends arise. These social trends often affect the people of a nation thus they call for the development of laws. Cohabitation is a social trend defined as a union between a man and a woman who live together in a way resembling a marriage. This social trend calls for rights, duties and limitations of cohabiting partners to be defined. This dissertation speaks on protecting cohabittees' right to property within the cohabitation union in Kenya. Case analogy, study of common law laws, analysis of reports, journal articles, books, internet sources and a comparative study are the methodologies of research applied to obtain relevant information for this research.

The research begins by introducing the topic and giving a brief background of property rights of cohabiting partners in Kenya. Views of other writers on cohabittees' right to lay claim on property contributed to throughout the union but is in one party's name are outlined and the legal gap is highlighted. The research intends on availing for a Kenyan cohabitee the right to lay a claim on property they contributed to throughout the union but the property's title is not in their name and the presumption of marriage cannot be sufficiently proven. The research outlines what property rights cohabittees are entitled to and the development of Kenyan laws in view of that. The United Kingdom is used to benchmark by highlighting the steps that she has taken to protect property rights of cohabiting partners. The research outlines the benefits and shortcomings of the laws in the United Kingdom and why they are best suited for adoption in Kenya. The research outlines recommendations that will ensure that cohabiting partners, in the unfortunate scenario of separation or death without a will where the presumption of marriage cannot be sufficiently proven, can be able to a lay claim on property to which they have contributed to throughout the union but is not in their name. Application of the recommendations of the research will uphold Kenyan cohabittees' right to property and will protect the economic interest on property of cohabittees and their beneficiaries and dependant.

CHAPTER ONE

INTRODUCTION AND BACKGROUND

The *Marriage Act* (2014), which defines the term ‘cohabit’¹, is the only Kenyan statutory law that acknowledges the existence of cohabitation. In Section 2 of the aforementioned Act, the definition of cohabit is termed as ‘living in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage’. However, from reading through various legislations such as the *Marriage Act* (2014), *Law of Succession Act* (2015), *Matrimonial Property Act* (2013) and the *Land Act* (2012) it is clear that Kenyan laws do not expressly speak on the rights, duties and freedoms accorded to cohabiting partners. This poses a challenge as there is little doubt that cohabitation is a common choice among many couples yet there are no statutory laws to guide and protect these people.² Nevertheless, Kenya, through the *Judicature Act*, is said to subscribe to the doctrine of common law³ from which the doctrine of presumption of marriage arises from. This doctrine is said to be good law that can be used to protect cohabitants.⁴ It is by use of this doctrine and cases such as *Hortensiah Wanjiku Yawe v Public Trustee*⁵ that cohabitants can seek recourse with regards to recognition of their union as a legally recognised marriage in Kenya.

Presumption of marriage is a doctrine that covers the aspects of longevity of cohabitation and habit. This implies that the parties must have had the capacity to enter into a marriage and they did so in effect.⁶ In the case of *WM v Murigi*⁷, the High Court held that if a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a rebuttable presumption that they are legally married. It should be noted that the courts have not defined what would amount to long cohabitation thus this aspect is subject to discretionary interpretation by the court. Furthermore, in a situation where other people (third parties) are not in agreement with the holding of presumption of marriage only cogent evidence to the contrary could rebut such a presumption, with the burden of proof being on the person challenging the presumption.

¹ Section 2, *Marriage Act* (2014).

² Waggoner LW, ‘Marriage is on the Decline and Cohabitation is on the Rise: At What Point, if Ever, should Unmarried Partners Acquire Marital Rights?’ 50 *Family Law Quarterly* 2, 2016, 5-23.

³ Section 3(1), Chapter 8, *Judicature Act* (1967).

⁴ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica, Nairobi, 2019, 105.

⁵ *Hortensiah Wanjiku Yawe v Public Trustee* (Civil Appeal number 13 of 1976).

⁶ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 105.

⁷ *WM v Murigi* (2008) eKLR.

The doctrine of presumption of marriage is the law through which cohabitees in Kenya can be assumed to be ‘legally married’ people. This is said because there are no express laws that outline the rights, freedoms and limitations that those within a union of cohabitation are governed by. This is, however, a wrong assumption as cohabitees do not have access to a majority of rights that married couples as recognised in the *Marriage Act* (2014) have. Unlike parties in married unions, parties in cohabitation unions do not have any rights that arise from them owning property together. In fact, cohabiting partners are acquiring property together but should the relationship of the cohabitees hit the rocks the cohabitees have no right to a claim on property that is not in their name despite the contribution made, specifically where the presumption of marriage cannot be sufficiently proven.⁸ This thus gives rise to the question of how to divide the property acquired during the relationship in the event of separation or succession under intestacy, where the presumption of marriage cannot be sufficiently proven.

The *Matrimonial Property Act* (2013) protects spouses' rights to monetary and non-monetary contributions during marriage; The aforementioned Act defines a spouse as a wife or husband⁹, which is further emphasised in the *Marriage Act* (2014). Couples in married relationships are protected under the law as the wife or the husband can go to court and ask for what is due to them owing to the process of acquisition and maintenance of the property. This definition alone excludes cohabitees from laying claim on their ‘matrimonial property’ as according to the case *O K N v M P N*¹⁰ the Court of Appeal ruled that “benefits granted to a lawful marriage are not available to cohabitees who are deemed never to have been married at all”.

On the other hand, the *Law of Succession Act* (2015) when defining dependants does not list parties in cohabitation relationships as being able to inherit the property of their partners. This is specifically seen where the law of succession only takes into account parties who have been married especially with regards to matters of intestacy.¹¹ This then makes it impossible for women who were dependents of the men in such relationships or the men who were dependants of the women to inherit from them under intestacy. The relatives of the parties may further argue that they were not married and as such they are not entitled to a share of the property. This is further supported by the case of *Mary Njoki v John Kinyanjui Muthuru and others*.¹²

⁸ *MNP v POM* (Civil Application Sup. No. 4 of 2019) eKLR.

⁹ Section 2, *Matrimonial Property Act* (2013).

¹⁰ *O K N v M P N* (2017) eKLR.

¹¹ Section 29 and Part V, *Law of Succession Act* (2015).

¹² *Mary Njoki v John Kinyanjui Muthuru and others* (1985) eKLR.

STATEMENT OF THE PROBLEM

Ideally the laws of a country are to protect every person that dwells in the country and more so the citizens of the specific country. Every person should have equal access to and protection of their rights and freedoms with limitations to them as in the laws of the land.¹³ It would be ideal for reforms to be made to laws as time passes and social trends arise¹⁴; The social trend at hand being cohabitation. Cohabitation has become a popular union for couples but is not governed by any statutory laws in Kenya.¹⁵ In reality, the current laws - this further emphasised in the case *O K N v M P N*¹⁶ - treat married couples and cohabitants differently which is contrary to the *Constitution of Kenya* (2010) specifically *Article 27* on equality and freedom from discrimination.¹⁷ Moreover, those in cohabitation unions do not have access to rights that arise from them owning property together and the distribution of the same-where a partner lays claim of ownership of property in their spouse's name, to which they have made a contribution to-, which is contrary to the protection of their right to property.¹⁸ This study seeks to ensure that cohabiting partners, in the unfortunate scenario of separation or death without a will and where the presumption of marriage cannot be sufficiently proven, can be able to lay claim on any property that either party may have contributed to and is specifically not in one of the party's name.

RATIONALE OF THE STUDY

This study is important as it addresses a social trend in Family Law and introduces features to Property Law. It will specifically point out the property rights that are owed to cohabiting partners and why it is important for them to access these rights. The study aims at availing to a partner in a cohabitation union in Kenya, the right to lay claim on property to which he or she has given monetary or non-monetary contribution in general and the property is not in his or her name. The study intends on giving a solution to such cohabitants at point of separation or succession under intestacy. It is from this study that a development to Matrimonial Property

¹³ Article 10(2), *Constitution of Kenya* (2010).

¹⁴ Wang Y, 'Unmarried Cohabitation: What Can We Learn From a Comparison Between the United States and China?' 41 *Family law quarterly* 1, 2007, 197.

¹⁵ Wanjiru JV, 'Reforms needed on Property Laws on Cohabitation' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2017, 5.

¹⁶ *O K N v M P N* (2017) eKLR.

¹⁷ Article 27, *Constitution of Kenya* (2010).

¹⁸ Article 40, *Constitution of Kenya* (2010).

Law will be brought to light as property rights for cohabitees touches on this topic. The information from this study once adopted and made into law can be used in Kenya and even borrowed by other countries to govern distribution and succession matters concerning property of cohabiting partners.

SIGNIFICANCE OF THE STUDY

The beneficiaries of this research are cohabiting couples, families arising from cohabitation and beneficiaries and dependants of the cohabitees. Cohabiting couples, as a result of the research will be able to freely acquire property together without fear that they will not be able to lay claim on the said property at point of separation or death. Cohabiting couples will also be able to rest assured that their contribution to a piece of property be it monetary or non-monetary counts, even where the property is not in their name, thus it allows them to be able to get a share of the property. Families arising from cohabitation, specifically dependants and beneficiaries will be able to inherit the property of the cohabitees with ease and they will be able to ensure continuity of property of the cohabitees as they can lay claim on ownership of the property for example in a scenario of survivorship.¹⁹

This study will also benefit Kenya and her citizens in general because the information obtained will introduce an all-inclusive approach to Matrimonial Property Law. The study will ensure that there is no discrimination of the different types of marriages and that cohabitees, who have a special type of union, will have access to property rights and claims to property contributed to together.

AIM

The aim of this study is to protect cohabitees' right to property within the cohabitation union in Kenya, especially where contribution has been made to the property by either partner during the union and the property's title is under the name of only one party and the presumption of marriage cannot be sufficiently proven.

¹⁹ Part VI, *Law of Succession Act* (2015).

OBJECTIVES

- To analyse the property rights that should arise from a cohabitation union for cohabitees where the presumption of marriage cannot be proven.
- To analyse what the United Kingdom as a country that has adopted property rights for cohabitees is doing as part of benchmarking.
- To assess reforms that can be put in place to help deceased or separated cohabiting partners lay claim on property to which they have made a contribution to but is not in their name.

RESEARCH QUESTIONS

- Where the presumption of marriage cannot be proven, how can cohabitees claim property rights within the union?
- What are the steps the United Kingdom is taking to protect the right to property of cohabitees?
- What is the importance of property rights in cohabitation unions at the point of death or separation, especially where contribution has been made to the property but the property is not in the name of the cohabitant laying the claim and presumption of marriage cannot be sufficiently proven?

HYPOTHESIS

The hypothesis is that cohabiting partners deserve property rights similar to those provided for in the *Matrimonial Property Act (2013)* as cohabitation is a special type of union between a man and a woman.

THEORETICAL FRAMEWORK

A theory will be used to explain the need for property rights to be granted to parties in cohabitation unions in Kenya. The rights that are being advocated for will protect the cohabitees' share in property contributed to but is in the name of one partner and the presumption of marriage cannot be proven. The theory that will adequately bring this out is the labour theory.

The labour theory ensures that once one puts in labour to a property, they deserve economic benefits from the property as they have vested their property rights on the property.²⁰ The main proponent of the labour theory was John Locke. He was of the view that property is a natural right. According to the theory, property is inherent in individuals and cannot be taken away unless with the consent of the individual. These property rights are governed by principles of natural justice.²¹ The theory assumes property does not arise from the prescriptive law of the state but from God; The state is however concerned with the protection of these rights.²² In natural law on the basis of everyone being free, everyone has a right to property. In the labour theory to gain private property, one has to expend his/her labour over the thing.

One does not exclusively acquire a right to property/a thing just because it is a right, one has to labour on or for the property/thing. This means that a person can only acquire private property rights over these common resources once they have expended their labour on the thing.²³ These property rights are a result of natural justice because labour was mixed with raw materials (at times unowned), and not simply because one was first in time.²⁴ The fruits of a person's labour are thus acquired through the natural, moral and rational conduct of the individuals.²⁵

The labour theory is divided into four stages. These four stages include assuming that man has a right to claim over his body, man has a right over his labour, one must work and that the labour enters the thing and the person claims right over the thing. With regards to property rights for cohabitants, in order to have a claim over property within the union the cohabitee must improve or maintain the property on his/her own account and use his/her own labour. Owing to this the particular cohabitee, as a labourer, deserves the fruits of his/her efforts, as the modified asset has his/her labour.²⁶ The improvements made to the property should be sufficient to create an equitable interest in the property thus allowing for a claim to be raised.

John Locke developed a theory of property that gave the relation between labour and economic benefits. He argued that if one puts in labour on a particular property, he had the right over that

²⁰ Tuckness A, 'Locke's Political Philosophy' The Stanford Encyclopedia of Philosophy, 11 January 2016 - <<https://plato.stanford.edu/entries/locke-political/>> on 26 March 2020.

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

²² Panesar S, 'Theories of Private Property in Modern Property Law' 15(1) Denning Law Journal, 2000, 124.

²³ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2017, 33.

²⁴ Sparkling JG, *Understanding property law*, 2ed, Matthew Bender, New Jersey, 2007, 15.

²⁵ Panesar S, 'Theories of Private Property in Modern Property Law', 124.

²⁶ Kariuki F et al, *Property Law*, 33.

property.²⁷ He argued that since one has property rights in their labour, by labouring on a property one's labour fuses with the existence of the property making the property theirs. Thus, even if one does not own the property but he did something to improve the property he should be able to get some benefits from it.²⁸ This theory shows why it is important for cohabitantes to have property rights as cohabitantes need to be able to claim economic benefits from property within the union that they have laboured on regardless of the property not being in their name; labour in this scenario being interpreted as both monetary and non-monetary contribution.

RESEARCH METHODOLOGY

The study will mainly use the doctrinal methodology of legal research. The doctrinal approach will involve the review of relevant primary and secondary sources. These include statutes, case law, books, journals, internet resources and a comparative study. The country of choice for the comparative study is the United Kingdom; Like Kenya, UK is a country governed by common law and Kenya has borrowed several legislations from the UK. These sources of information will be read and analysed to avail information relevant to the study. The socio-legal method of research will also be used as cohabitation is a social trend that requires development of the law.

LITERATURE REVIEW

The term cohabit is used to define an arrangement where an unmarried couple lives together in a long-term relationship that resembles marriage.²⁹ The term property on the other hand is used to define a vested or contingent right to or an interest in land, permanent fixtures on or improvements to land, goods, personal property, intellectual property and/or money.³⁰ These terms guide the literature review of this study. It is from the above defined terms that we have cohabitantes who we are trying to get rights for, to protect property which they have contributed to and it is not in their name.

²⁷ Kimball M, 'On John Locke's Labor Theory of Property' Confessions of a supply-side liberal, 10 September 2017 -<<https://blog.supplysideliber.com/post/2017/9/10/on-john-lockes-labor-theory-of-property>> on 24 March 2020.

²⁸ Tuckness A, 'Locke's Political Philosophy' The Stanford Encyclopedia of Philosophy, 11 January 2016 - <<https://plato.stanford.edu/entries/locke-political/>> on 24 March 2020.

²⁹ Section 2, *Marriage Act* (2014).

³⁰ Article 260, *Constitution of Kenya* (2010).

Cohabitation is a development in society that should be recognised according to the post modernism theory. Post modernism is a theory that seeks to portray that reality is inaccessible by human investigation. Post modernists argue that the current society is not one with predictable orderly structures. They argue that the society has entered a new, chaotic postmodern stage.³¹ Rachel Fischer through her journal article says that in a postmodern society, the family structures are viewed as to be varied and individuals have much more freedom of choice in aspects of their lives which would have been relatively constrained in the past. This would be seen in their lifestyles, personal relationships, and family arrangements. She says that the society has two key characteristics; it is diverse and fragmented. From Fischer's journal article, the postmodern theory can be used to show diversity of society thus the emergence of cohabitation which is a union that should be governed.

Property and property rights on the other hand are provided for by the labour theory. The labour theory which is the theoretical basis of the study ensures that once one puts in labour to a property, they deserve economic benefits from the property as they have vested their property rights on the property.³² Alex Tuckness in his blog spoke of how property rights should be given to someone who contributes to the development of a property whether the property is in their name or not. This scenario thus births the need for matrimonial property rights and specifically why cohabitantes deserve the protection of their right to property³³ especially where they have contributed to the property be it in a monetary or nonmonetary manner.

John Sparkling in his book '*Understanding Property Law*' speaks on the how cohabitation was previously not recognised. He speaks on how cohabitantes could not derive property rights from their status of being a couple but acknowledges that after the decision in the case of *Marvin v Marvin*³⁴ the belief that parties in cohabitation unions have property rights and that these rights arise from them being a couple has been carried forward in the United States.³⁵ The case *Marvin v Marvin*³⁶, heard in the Supreme Court of California, establishes that parties in cohabitation unions are able to have property rights. The parties in cohabitation unions thus expect the courts to fairly appropriate the property that accumulated through mutual efforts.

³¹ Fischer RK and Graham A, 'Postmodernism' 54 Reference & User Services Quarterly 1, 2014, 29-33.

³² Tuckness A, 'Locke's Political Philosophy' The Stanford Encyclopedia of Philosophy, 11 January 2016 - <<https://plato.stanford.edu/entries/locke-political/>> on 26 March 2020.

³³ Article 40, *Constitution of Kenya* (2010).

³⁴ *Marvin v Marvin* (1976), The Supreme Court of California.

³⁵ Sparkling JG, *Understanding Property Law*, 4th ed, LexisNexis, United States, 2012, 163.

³⁶ *Marvin v Marvin* (1976), The Supreme Court of California.

Within Kenya, Reem Gaafar acknowledges in an article that cohabitation are unions that are not legally recognised in Kenya thus people that cohabit have no property rights accorded to them as a couple.³⁷ The article focuses on how more often than not it is the women who suffer as a result of the property rights of cohabitants not being recognised. The article speaks on how at point of inheritance especially under intestacy where the partners were cohabitees their property rights can be easily violated especially where the presumption of marriage cannot be proven as was seen the case *Mary Njoki v John Kinyanjui Muthuru and others*.³⁸

Dr. Patricia Kameri-Mbote in a paper discusses the recognition of the presumption of marriage in Kenya.³⁹ She states that in many situations cohabitants may acquire property together or accumulate property that was acquired before the relationship. She recognizes that the management and control of the property in the cohabitation unions are closely related to that of the system in a marriage union. The paper states that regardless of the recognition of the presumption of marriage in Kenya cohabitees and mostly women are likely to lose the property to the husband's relatives in the case of intestate succession as they would argue that there was no valid marriage.

Patrick Kiage in his book '*Family Law in Kenya*' dedicates a section to the presumption of marriage.⁴⁰ Here he talks of how cohabitation is recognised in Kenya through the presumption of marriage whereby the aspect of longevity and habit are considered. Marital rights can be accorded to cohabitants if they prove these two aspects. For these two aspects, the author settles on the fact the parties alleging a presumption of marriage should show the duration of the union and the reputation coupled to it. Reputation involves the public viewing the couple as married. With failure to prove the presumption of marriage the cohabitees risk missing out on their rights including their property rights during distribution of property at separation or death.

In the book '*Property Law*' by Dr. Francis Kariuki, Smith Ouma and Raphael Ng'etich, the fact that persons in a marriage have equal rights extending to their ownership of property is brought forward.⁴¹ The authors speak on the distribution of matrimonial property and its

³⁷ Gaafar R, 'Women's Land and Property Rights in Kenya' Center for Women's Land Rights, 2014, 7 - <<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>> on 7 September 2020.

³⁸ *Mary Njoki v John Kinyanjui Muthuru and others* (Civil Appeal No. 21 of 1984).

³⁹ Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control' *Women & Law in East Africa*, Nairobi, 1995, 15-18.

⁴⁰ Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, 105-107.

⁴¹ Kariuki F et al, *Property law*, 275.

ownership specifically through joint ownership which is exclusive to legally recognised marriages in Kenya. They, however, do not address the issue of property rights of parties in cohabitation unions.

William Musyoka in his book '*Law of Succession*' mentions that cohabitees are allowed to object to distribution of property at point of intestacy but only if presumption of marriage can be proven. He states that there are people who have missed out on their property and inheritance rights because presumption of marriage, which is subject to the discretion of Kenyan courts to determine sufficient longevity, was not able to be proven.⁴²

Moses Muniu in his dissertation⁴³ points out that Kenyan law recognises the existence of cohabitation unions in the *Marriage Act* (2014)⁴⁴ but fails to provide procedures and ways in which property acquired during and after the cohabitation is to be distributed or owned or even the rights and obligations of cohabitees. He speaks of the place of cohabitation in Kenya and the laws that govern property rights in cohabitation unions. Through comparative study he brings out the jurisprudential framework that exists in England and Scotland with regards to the protection of cohabitees property rights. He shows how the two jurisdictions have put into place mechanisms by which the rights of cohabitants are guaranteed and protected. He recommends amendment of the law to include the recognition of cohabitation as a type of marriage in Kenya to avoid confusion with regards to the rights of cohabitees. The aforementioned confusion being the blanket rule on property rights and distribution of property owned throughout the union under the Land Registration Act that says "where the law does not specify the property shall be assumed to be owned in common and will be distributed equally."⁴⁵ He however does not address the legal gap that should be addressed when cohabitees who cannot prove presumption of marriage but separate or need to inherit, through intestacy, property not in their name can access their right to property.

In the case of *Burns v Burns*⁴⁶ heard in a UK Chancery Court case, the couple had not been married but had only cohabitated. Mrs. Burns had changed her name, had two children with Mr. Burns and contributed in practical terms to the household for 19 years and had also redecorated the house on her account. At the breakdown of the marriage, she tried to bring a

⁴² Musyoka W, *Law of Succession*, LawAfrica Publishing, Nairobi, 2018, 259.

⁴³ Muniu MM, 'Property Rights in Cohabitation Unions in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018, 38-40.

⁴⁴ Section 2, *Marriage Act* (2014).

⁴⁵ Section 93(3), *Land Registration Act* (2012).

⁴⁶ *Burns v Burns* (1984) 1 All ER 244.

claim under the law of trusts since cohabitation was not recognized at that time. She claimed that she was a trustee of the property that had been acquired during the union. She received nothing, whereas had she been a wife as emphasised by Taria Wafula in her dissertation, she would have received half or more of the value of the property or at least the rights to live in the property until the children were independent.⁴⁷ Furthermore, in this case it is noted that non-monetary contributions to the property were not considered. This case shows how cohabitees may miss out on their property rights at point of distribution of the property if the property is not in their name and their contribution is not sufficient for consideration in the monetary way.

As Sue Ellingham outlined in her article⁴⁸, while looking at couples within cohabitation unions at the point of distribution of property or inheritance, the property should be categorised into property owned in only one name of the partners and property owned in both names of the partners. Keen interest should be paid to when exactly the property was acquired – bringing into the picture ‘purchase time of the property’. This will help one depict whether the property was bought before cohabitation and either retained in the name of the purchaser owned solely by him/her, or the expenses for the property were shared but the ownership was not transferred. Situations where the expenses for the property were shared and ownership later is transferred to both names of the partners, or even another scenario where the property was bought after cohabitation began and is owned by one of the partners and there is no contribution whatsoever by the other partner should be considered. A situation where the property is owned by one partner but there is contribution to the service of expenses of the property, or another scenario where the property is owned in both names and is ideally contributed to by both partners should also be considered. These are several scenarios that, upon separation of the cohabitees or death, call for consideration during distribution of the property shared because of monetary and/or non-monetary contribution and the title names of the property.

The starting point is to emphasise that living together, for however long, does not give to a partner, who is not a joint owner of the property, an automatic right to share in the value of the property.⁴⁹ In the case of a man, Justice Martha Koome in *MNP v POM*⁵⁰ said that, “A man

⁴⁷ Wafula TT, ‘Analysis of Succession of Property in Kenya in the case of Cohabitees’ Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018, 4.

⁴⁸ Ellingham S, ‘Property Rights of Cohabitees’ Michelmores, 7 June 2019 - <<https://www.michelmores.com/news-views/news/property-rights-cohabitees>> on 25 March 2020.

⁴⁹ Ellingham S, ‘Property Rights of Cohabitees’ Michelmores, 7 June 2019 -<<https://www.michelmores.com/news-views/news/property-rights-cohabitees>> on 25 March 2020.

⁵⁰ *MNP v POM* (Civil Application Sup. No. 4 of 2019) eKLR.

who cohabits with a woman in a property held in the woman's name needs to prove contributions that he made because merely lounging in a woman's house while dominating the remote control for the television channels cannot entitle a man a share of the woman's property." This was said because men and women have different roles in a household that would amount to labour on property that is sufficient to lay claim.

The United Kingdom has been chosen as the country to benchmark with as there are several similarities between the UK and Kenya; for example, the fact that both countries are governed by common law and that the Constitution of Kenya has provisions borrowed from Constitutions of the UK. While looking at the hearing by the House of Lords in England it is important to notice the laws introduced and how they are introduced.⁵¹ Proper analysis of the laws in the UK, which is a country that has been working on creating laws for cohabitees and protecting the property rights of cohabitees, will help one understand the idea of property rights for cohabitees.⁵²

Catherine Fairbairn in her paper has outlined the different laws addressing cohabitation in the UK and their effect on the union. She recognises that parties in cohabitation unions have rights that should be accorded to them. Her paper outlines Law Commission's proposals on the reforms that should be made to the laws in the UK with regards to cohabitation and distribution of property acquired within the union. She also speaks on the financial consequences of the relationship breakdown between cohabitees and the inheritance of property for cohabitees under intestacy.⁵³

The above authors have outlined the evolution of property rights of cohabiting partners and how the laws in place have affected cohabitees. From the views of the authors, it is clear that cohabitees in Kenya are recognised by use of the doctrine of presumption of marriage but where this cannot be sufficiently proven the cohabitees risk losing out on certain claims such as their right to lay claim on property contributed to throughout the union but is not in their name. It is from this that the legal gap is derived whereby cohabitees when faced by separation or death without a will need to be able to lay claim on property within the union that they contributed

⁵¹ 'Cohabitation: The Financial Consequences of Relationship Breakdown' Law Commission United Kingdom, July 2007.

⁵² Cohabitation Rights Bill – Second Reading House of Lords on 15 March 2019 - <<https://www.theyworkforyou.com/lords/?id=2019-03-15a.1257.3>> on 19 July 2020.

⁵³ Fairbairn C, 'Common Law Marriage and Cohabitation' House of Commons Library, Briefing Paper number 03372, 2016, 8-11-<https://www.familylaw.co.uk/docs/pdf-files/Cohabitation_and_Common_Law_Marriage_briefing_paper_Feb_2016.pdf> on 7 September 2020.

to but is not in their name. The research will outline how this can be achieved thus acknowledging the labour a cohabitee put on a property within the union that gives rise to their claim on the property.

LIMITATIONS

This study is meant to cater for a group of people that are not legally recognised for various reasons such as, that it is still a social trend on the rise and potential moral issues as cohabitation is viewed as an immoral and socially unacceptable union. In general, most Family Law topics - this topic can be categorised under - are initially issues of social concern. This poses as a limitation as social issues are often heavily influenced by moral standing and public opinion thus if people do not morally support cohabitation, cohabitees risk not getting property rights for their cohabitation union as the public may strike out their request on the aforementioned grounds.

CHAPTER BREAKDOWN

Chapter 1: This chapter introduces the topic and gives a brief background.

Chapter 2: This chapter outlines the legal standing of property rights of cohabiting partners in Kenya and the possible policy behind the current standing of the law.

Chapter 3: This chapter outlines the steps the United Kingdom has taken to avail property rights for cohabitees as a way of drawing lessons.

Chapter 4: This chapter outlines the legal framework of cohabitees' right to lay claim on property contributed to throughout the union but is owned by one party as adopted from the comparative study.

Chapter 5: This chapter concludes the research and outlines the findings and recommendations.

CHAPTER TWO

LEGAL STANDING OF PROPERTY RIGHTS OF COHABITING PARTNERS IN KENYA

Within Kenya cohabitees have been acknowledged in different ways. This chapter will investigate the legal standing of property rights for cohabiting partners in Kenya from pre-colonial period to present time. It will further attempt to justify the policy behind the current standing of the law. This chapter will be an overview of the evolution of property laws that can be classified as those governing cohabiting partners.

Within the precolonial period an aspect of customary law used to govern marriages and communal ownership of land will be looked at. Within the colonial period the use of English laws that regulate ownership of land and which marriages are legally recognised that will be outlined. Regarding the post-colonial period we will look at the situation pre 2010 and post 2010. Pre-2010 is characterised by adoption of laws set up by the British and a further *Married Women's Property Act* (1882) and the *Law of Succession Act* (2015) which is applied. There is the use of the *Judicature Act* (1967) that recognises common law which provides for the presumption of marriage as a way of acknowledging cohabitation unions as marriages that will be spoken on. The Post-2010 period will cover up till the present time whereby provisions in the *Constitution of Kenya* (2010), *Land Act* (2012), *Land Registration Act* (2012), *Matrimonial Property Act* (2013) and *Marriage Act* (2014) that should govern cohabiting partners in Kenya and their property rights will be outlined. While looking at the laws on property rights for cohabiting partners in Kenya as is at the moment there will be an attempt to outline why the law is the way it is.

PRE COLONIAL KENYA

The pre-colonial period in this dissertation refers to a time within the 18th - 19th Century before the foreign rule was established in Kenya. Within pre-colonial Kenya, ownership of important resources, land included, was communal for most of the communities. Land law was traditional law and elders, sorcerers and even witchdoctors could settle disputes arising from the use of land. Eventually, with the introduction of Islam and Christianity to the region, converts resorted to religious leaders such as Imams and Pastors to resolve land issues among them. It should be noted that these pre-colonial land laws were different from one community to the

other because they were purely based on culture and specific social organizations.⁵⁴ On the other hand, marriage in pre-colonial Kenya was governed by customary law. These laws differed from community to community thus this meant different property rights, if any, for couples from different communities.⁵⁵ Marriages entered into in this period were not registered hence by the standards of present day and Section 55 and 59 of the *Marriage Act (2014)* which state that marriages contracted must be registered to be legal, these marriages were not legally recognised and could be reduced to cohabitation unions.

The important resources that were communally owned were used according to collective communal rules. No single source, region or sub-community controlled the resources. Access to the resources was limited to an identifiable community with set rules on the way the resources were to be managed. Collective arrangements that regulated how the resources would be accessed or used were made at the community level. The organisation of the community revolved around parties linked to each other by kinship or reciprocation - this being either the clan or the extended family. The community would regulate production of resources on cultivated land and the village (which consisted of several families) controlling the territory from which resources were hunted by all families. All members of the community had separate entitlements to the resources and no one user had the right to abuse or dispose of the property. Any dealing with the property was subject to the approval of others as it had to take into account the entitlement of others. The rights of use of the community members were based on the roles played by each member within the community and division of labour was on gender lines.⁵⁶ There was allocation of land according to specific needs of individuals and families whereby polygamous families attracted larger tracts of land than newly established monogamous families.⁵⁷

During the pre-colonial period family life among most of the communities in Kenya was organised along patriarchal lines where the head of the household was the male. Succession to the property was through the male lineage whose duty was to ensure that all the members of

⁵⁴ Wakoko VDB, 'The Evolution of Land Law in Kenya' Academia - https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA> on 8 October 2020.

⁵⁵ Muniu MM, 'Property Rights in Cohabitation Unions in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018, 12.

⁵⁶ Kameri-Mbote P, 'Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' International Environmental Law Research Centre, IELRC Working Paper 2001 -1, 6 -< <http://www.ielrc.org/content/w0101.pdf>> on 8 October 2020.

⁵⁷ Wakoko VDB, 'The Evolution of Land Law in Kenya' Academia - https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA> on 8 October 2020.

the family had access to the property. This method of inheritance discriminated against women based on their gender and marital status as men were the successors because they stayed within the family while women who when married left their domiciles of origin and joined their husband's family were excluded.⁵⁸ This patrilineal system used for purposes of inheritance disenfranchised women. This system meant a wife(s) who did not have a son would have a hard time inheriting their husband's property.

During the pre-colonial period, some Kenyan communities were seen to view women as the property of the husband. This is seen through the communities such as the Luos that carried out levirate marriages which is a practice that involves the brother of a deceased man being obliged to marry his brother's widow.⁵⁹ This practice of wife inheritance was widely accepted by women because the culture and custom did not allow women to own or control any of the important resources (such as land and cattle).⁶⁰

COLONIAL KENYA

Colonial Kenya refers to the span of time where the British settlers came into Kenya and assumed/took over leadership. This period runs from 1920 to 1963 when Kenya (formerly part of the East Africa Protectorate) was a British Crown Colony. This regime was characterised by alienation of land by the British. Within colonial Kenya all the land was vested in the crown and no African was allowed to own land, they were merely squatters.⁶¹ This thus changed the property laws that would be accessible by Kenyans. The coming of the British settlers also marked a turning point in customary law in Kenya thus affecting the marriages contracted under these systems. The law required customary law to be applied only to the extent that it was not repugnant to justice or morality.⁶²

⁵⁸ Kameri-Mbote P, 'Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' International Environmental Law Research Centre, IELRC Working Paper 2001 -1, 7 -< <http://www.ielrc.org/content/w0101.pdf>> on 8 October 2020.

⁵⁹ Westreich A, 'Present-day posthumous reproduction and traditional levirate marriage: two types of interactions' 5(3) *Journal of Law and the Biosciences*, 2018, 759–760.

⁶⁰ Abong'o VN, 'Wife Inheritance" and the Fate of Widows in Luo Society in Kenya: A Philosophical Appraisal' 2(2) *African Journal of Education, Science and Technology*, 2015, 212.

⁶¹ Thuo ADM, 'Genealogy of Land Ownership, Use and Management Problems in Kenya During the Pre-August 2010 Constitution Period. A Review' 2(8) *International Journal of Engineering Research and Technology*, 2013, 1526.

⁶² Article 52, *Order in Council* (1897).

Kenyans (referred to as the natives by the British) did not have any rights to land during the colonial period. This thus meant that property rights and even succession could not arise during this period amongst the Kenyan communities. Kenyan communities had rights attached to land in the reserves but as squatters and not owners. The English Property Law which was adopted by the colony vested land ownership in individuals rather than in the community, a structure which differed from the customary land tenure system which was present before colonialism.⁶³ Title deeds were also issued but only to the settlers.⁶⁴ The presence of the British in Kenya put a halt to succession of property within communities.

Customary law was not recognised by the British thus Africans were either to contract Christian marriages or have their marriages disregarded by the British, thus being reduced to a cohabitation union as per the aforementioned present-day laws. Africans who decided to contract Christian marriages were governed by the Native Christian Marriage Ordinance⁶⁵ and were taken to have abandoned their Customary law. This was illustrated in the case of *R v Amkeyo*⁶⁶ whereby the court held that once a person contracted a marriage under statute, African Customary law stopped applying to them in matters such property rights on basis that such a marriage was a wife purchase and repugnant to law. The colonial government further revised the court system relating to the indigenous Africans with the lowest courts being a panel of elders from native law or area and whose decisions would be appealed at the Native Appeals Tribunal then the District Commissioner and lastly to the Provincial Commissioner. This judicial system created the legal framework which governed the customary marriages in colonial Kenya.⁶⁷

The Native Land Tenure Rules of 1956 helped with land consolidation, adjudication and registration of land for Africans when the British finally allowed the Africans to own land. Africans were not too keen on the process of registering their land as they did not believe ownership of land could be vested through a piece of paper. Kenyans communities still continued to look at registered land as family land and perceived the person registered as a trustee for the members of the family. Women's still remained discriminated against based on

⁶³ Thuo ADM, 'Genealogy of Land Ownership, Use and Management Problems in Kenya During the Pre-August 2010 Constitution Period,' 1526.

⁶⁴ *Registration of Titles Ordinance* (1920).

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

⁶⁶ *R v Amkeyo* (1952) 19 E.A.C.A.

⁶⁷ Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 3.

their gender and marital status as access to land would depend on the good will of the male members of the family. A woman's access to land had to be through the husband if she was married, the father if he was still alive and the brothers (to the husband) if she was divorced or widowed or her brothers if she was unmarried and her son if she was widowed.⁶⁸

INDEPENDENCE KENYA

PRE 2010 INDEPENDENCE KENYA

After independence, the *Judicature Act* (1967) was enacted; It recognized customary law as a source of law in Kenya, to the extent that it was applicable and not repugnant to justice and morality or inconsistent with any written law.⁶⁹ This Act also allowed for the recognition of cohabitation unions as legal marriages through the presumption of marriage which is provided for by common law. Common law through long cohabitation created a rebuttable presumption of law that there was the existence of marriage. The common law presumption was applied in the case of *Hortensiah Wanjiku Yawe v Public Trustee*⁷⁰ where the court held that long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant and only cogent evidence can rebut such a presumption. The decision was upheld in the case of *Mary Njoki v John Kinyanjui Muthuru and others*⁷¹ where the court held that "there has to be evidence that the long cohabitation is not a mere friendship between a man and a woman, that she is not a concubine but that it is presumed there is a marriage". The presumption of marriage helped secure the property rights of the persons in a cohabitation union specifically women, a thing that was not present before independence, as once proven the property was to be governed by the *Married Women's Property Act* (1882).

Kenya's court system also changed after independence with the enactment of the 1967 *Magistrate Courts Act* which converted the African Courts to Magistrate Courts.⁷² This broadened the jurisdiction of the courts from listening to matters governed solely by customary law to matters governed by statute. The *Judicature Act* and the *Magistrates Court Act* limited

⁶⁸ Kameri-Mbote P, 'Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' International Environmental Law Research Centre, IELRC Working Paper 2001 -1, 7 -< <http://www.ielrc.org/content/w0101.pdf>> on 12 October 2020.

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

⁷⁰ *Hortensiah Wanjiku Yawe v Public Trustee* (Civil Appeal number 13 of 1976).

⁷¹ *Mary Njoki v John Kinyanjui Muthuru and others* (1985) eKLR.

⁷² Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 4.

the application of Customary law to civil matters.⁷³ Common law and doctrines of equity were also cited as sources of law in Kenya.⁷⁴ This set base for the law being able to decide on distribution of property owned by cohabiting partners at point of separation where the presumption of marriage can be proven.

Persons married under the Repealed Marriage Act were prohibited from contracting any other form of marriage.⁷⁵ This was seen in the case of *Re Ogolla 's Estate*⁷⁶ where it was stated that ‘a man who is married under the *African Christian Marriage and Divorce Act* (Cap. 150) is barred from contracting any other marriages during the pendency of their statutory marriage. Any marriage so contracted is null and void, and the woman so married is not entitled to inherit in the intestacy of the deceased man.’ The court’s interpretation of the law made it clear that statutory marriages were to be monogamous. Additionally, in the case of *Re Ruenji 's Estate*⁷⁷ the judge stated that women married under customary law by a man who had previously married under statute are not wives and their children are not children for the purposes of succession, and they are not therefore entitled to share in the estate of the deceased at point of succession. The *Law of Succession Act* (2015) whose commencement date was 1 July 1981 and applies to date brought a solution to this injustice. Section 3(5) of the Act states that ‘Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless, a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.’⁷⁸ The *Law of Succession Act* (2015) does not however recognised a cohabitee as a spouse at point of inheritance through intestacy.

POST 2010 INDEPENDENCE KENYA

In August 2010, Kenya ushered in a Constitution which revised provisions relating to marriage and property rights thus the separation of the independence Kenya period into two. The laws which are going to be looked at are: The *Constitution of Kenya* (2010), which is the supreme law of the land. It provides for rights that govern citizens of Kenya and those within the

⁷³ Section 2, *Magistrate Courts Act* (1967).

⁷⁴ Section 3(1,c), *The Judicature Act* (1967).

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

⁷⁶ *Re Ogolla 's Estate* (1978) KLR 18 at 26.

⁷⁷ *Re Ruenji 's Estate* (1977) KLR 21.

⁷⁸ Section 3(5), *Law of Succession Act* (2015).

domicile; The *Land Act* (2012) and the *Land Registration Act* (2012) which provide ways in which one can realize their right to property in land and protection of the rights once they are acquired. The *Matrimonial Property Act* (2013) which is a regulation through which the right to property arising from a marriage in Kenya is protected; and the *Marriage Act* (2014) which specifies the legally recognised marriages in Kenya and is the only legislation that mentions the existence of cohabitation.

Constitution of Kenya (2010)

The *Constitution of Kenya* (2010) provides for the protection of right to property.⁷⁹ It acknowledges individual rights as well as rights in association with others to acquire and own property. Through this provision the state is prohibited from making legislations or through a state action from depriving a person of any interests in or rights over property (land). Article 40 of the *Constitution of Kenya* (2010) provides that the state enacts legislation to ensure protection of the right to property. There is therefore a legitimate expectation that the state would make laws to protect cohabitants' property rights specifically where the presumption of marriage cannot be proven. Furthermore, in Article 68 of the *Constitution of Kenya* (2010) parliament is expected to enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of the marriage.⁸⁰ These provisions outline the legitimate expectation present that is tackled in this research.

The *Constitution of Kenya* (2010) provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.⁸¹ This was a change from the previous marriage regime where equality was not expressed by the law through a statute and the society was patriarchal thus if a woman wanted to own property it had to be through a man. This article means that ideally everyone in a marriage and a cohabitation can lay claim to property they contributed to as there is equality being upheld.

The Land Act (2012) and the Land Registration Act (2012)

These two statutes have provisions touching on the recognition and protection of matrimonial property.⁸²

⁷⁹ Article 40, *Constitution of Kenya* (2010).

⁸⁰ Article 68(c)(iii), *Constitution of Kenya* (2010).

⁸¹ Article 45(3), *Constitution of Kenya* (2010).

⁸² Kariuki F et al, *Property law*, 282-283.

The *Land Act* (2012) defines marriages as civil, customary or religious and matrimonial property as any property owned or leased by one or both spouses and occupied by the spouses as their family home.⁸³ It provides that the National Land Commission and any state or public officer shall be guided by the values and principles that include and are not limited to equitable access to land and elimination of gender discrimination in land laws, customs and practices.⁸⁴ The Act also requires that the consent of both spouses be sought before transaction is carried out on matrimonial property.⁸⁵ This protects the property rights of both the spouses from being violated where one party to a marriage deals with matrimonial property without the consent of the other; this is further emphasised in the *Land Registration Act* (2012).⁸⁶ Furthermore, under joint tenancy upon the death of one of the joint tenants the property moves to the survivor through transmission thus they become the sole registered owner. This is done by the registrar deleting the name of the joint tenant who has died from the register by registering the death certificate.⁸⁷

The *Land Registration Act* (2012) on the other hand provides that any land obtained by a spouse to be co-owned and used by both or all spouses is presumed and registered as joint in line with the *Matrimonial Property Act* (2013).⁸⁸ The Act further provides that where the land is registered in the name of one spouse and the other makes a contribution, they are deemed to have become owners in common and their interest recognised as if they were registered. In the case of dividing property assumed as tenancy in common the Act requires the Registrar to have regard to factors such as whether the interests of the dependants of tenants in common who are spouses will be adequately catered for.⁸⁹

It is important to note that in both these Acts the rights of cohabitees are not directly addressed but can rather be construed when the presumption of marriage is proven. The *Matrimonial Property Act* (2013) provides that, 'Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.'⁹⁰ In relation to cohabitation unions, where an instrument of transfer of interest of

⁸³ Section 2, *Land Act* (2012).

⁸⁴ Section 4(2), *Land Act* (2012).

⁸⁵ Section 79, *Land Act* (2012).

⁸⁶ Section 93(4), *Land Registration Act* (2012).

⁸⁷ Section 49 and Section 91(4), *Land Act* (2012).

⁸⁸ Section 93(2), *Land Registration Act* (2012).

⁸⁹ Section 93(3), *Land Registration Act* (2012).

⁹⁰ Section 91(2), *Land Registration Act* (2012).

land exists which does not specify the nature of the cohabitees rights the presumption can be that the cohabitees hold the interest as tenants in common in equal shares.

Matrimonial Property Act (2013)

The *Matrimonial Property Act* which came into force in 2013 applies only to property in a marriage. The statute states, despite any other law, ‘a married woman has the same rights as a married man.’⁹¹ This further brings out the aspect of equality between the spouses which extends to the property that they own together as was stated in the *Marriage Act* (2014) and in the *Constitution of Kenya* (2010). The distribution upon divorce or separation is not equal per se but is dependent on the contribution of each spouse towards the acquisition and maintenance of the property.⁹² The Act defines monetary and non-monetary contribution and what constitutes the matrimonial property guiding the distribution of the property.⁹³

According to the *Matrimonial Property Act* (2013) Customary law shall be considered during the distribution of the property to the extent that it is not inconsistent with the *Constitution of Kenya* (2010).⁹⁴ The Act also provides that there is a rebuttable presumption that property acquired during marriage in the name of one spouse is held in trust for the other spouse and where the property acquired is held in their joint names then there is a rebuttable presumption that the property is held in equal shares.⁹⁵ The *Matrimonial Property Act* (2013) does not speak on distribution of property owned in a cohabitation union and the rights that arise from the ownership and possible distribution at the point of separation.

Marriage Act (2014)

The *Marriage Act* (2014) consolidated all the marriage laws in Kenya into one statute thus birthing a new regime in marriage laws and family law in general. The act acknowledged all types of marriages at an equal standing from Christian to Civil to Customary marriages to Hindu marriages and marriages under the Islamic law. The Act made changes to Customary marriages as a way of addressing the inequalities that were present; this being inequality in the rights of the parties based on gender, the non-recognition of the marriages as being polygamous and the lack of registration of customary marriages. This meant that marriages carried out under

⁹¹ Section 4, *Matrimonial Property Act* (2013).

⁹² Kariuki F, et al, *Property law*, 275-277.

⁹³ Section 2, *Matrimonial Property Act* (2013).

⁹⁴ Section 11, *Matrimonial Property Act* (2013).

⁹⁵ Section 14(a)(b), *Matrimonial Property Act* (2013).

Customary law were no longer considered as a form of cohabitation unlike the situation where they were initially not recognised as legal marriages because they were not registered marriages. This inclusion meant that all property acquired during the marriage could be distributed as per the *Matrimonial Property Act* (2013).

The *Marriage Act* (2014), just like the *Constitution of Kenya* (2010) upholds equality of spouses. The Act states that, 'Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.'⁹⁶ This ensures that if you can prove marriage then you have equal rights with your spouse.

The *Marriage Act* defines cohabitation as an arrangement where an unmarried couple lives together in a long-term relationship which resembles a marriage.⁹⁷ This is however as far as this Act goes to provide for cohabitation unions. Under the *Marriage Act* (2014) cohabitation is recognised but the law goes silent on provisions regarding property rights in these unions or even the regulation and protection of cohabitants' rights.

JUSTIFICATION OF THE CURRENT LEGAL STANDING OF THE LAW ON PROPERTY RIGHTS OF COHABITING PARTNERS

From the evolution outlined above and the current standing of the law it is evident that Kenyan statutes do not specify the rights and duties that arise from a cohabitation union. The statutes do not specifically talk on how property acquired during cohabitation and is in the name of one spouse or even in general can be distributed and this can be because of several reasons. The reason could be that recognising cohabitation and expressly providing rights and duties for the partners would foster irresponsibility in the society by encouraging adults to enter into long term relationships for all the wrong reasons, such as fear of commitment, and could lead to infidelity in marriages. Instead, the government may be aiming at encouraging people to enter into one of the legally recognised marriages in Kenya, live as a married couple and enjoy the rights that come with the union rather than suffer through a lot of the long and rigorous procedures that one has to go through in order to acquire some of the marital rights.⁹⁸

⁹⁶ Section 3(2), *Marriage Act* (2014).

⁹⁷ Section 2, *Marriage Act* (2014).

⁹⁸ Watiri SK, 'An Analysis of the Status of Cohabitants in Kenya Law and the Challenges they face' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018, 35.

In as much as the reason why statutes do not expressly outline laws governing cohabitation unions is just as outlined above it is unfortunately the women who mainly suffer from this lack of proper inclusion. This is said because as a woman cohabitee once you choose to leave the cohabitation union you risk losing everything as the laws do not protect your right to lay claim on property that is not in your name despite the contribution to it as part of ‘matrimonial property’ within the cohabitation union.⁹⁹ Furthermore, if you cannot satisfactorily prove presumption of marriage to the court or your presumption is rebutted with cogent evidence you lose all you had contributed to within the union if it is not in your name be it at point of succession through intestacy or separation. This injustice is something that needs to be addressed so as to protect cohabitees’ right to property and especially the female cohabitees who suffer more injustices because of the absence of protection by the law.

⁹⁹ Kameri-Mbote P, ‘Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women’s Experiences’ International Environmental Law Research Centre, IELRC Working Paper 2001 -1, 13 -<<http://www.ielrc.org/content/w0101.pdf>> on 16 October 2020.

CHAPTER THREE

PROPERTY RIGHTS OF COHABITING PARTNERS IN THE UNITED KINGDOM AS A BENCHMARK FOR KENYA

Various countries across the globe, such as South Africa, Argentina and the United Kingdom, have attempted to create laws to protect cohabitants as cohabitation is a rising trend and the people that subscribe to the union need to be protected. This chapter will outline the steps the United Kingdom (hereinafter UK) has taken to avail property rights for cohabitants as a way of drawing lessons. The chapter will briefly outline why the UK is the country of choice for benchmarking by showing the similarities the country has with Kenya. The chapter will also outline the laws that touch on cohabitants and their property rights within Scotland, England and Northern Ireland. Lastly the chapter will outline case law within the UK that speaks on cohabitants right to lay claim on property they have contributed to within the union.

COHABITANTS' RIGHT TO LAY CLAIM ON PROPERTY AS IS IN THE UNITED KINGDOM

The United Kingdom is an island country that is made up of Great Britain which includes England, Wales and Scotland and the northern part of the island named Ireland. It is a country governed by the common law legal system and a constitution just like Kenya. The UK and Kenya alike have a bicameral legislative branch of government and a judicial system with the superior most court being the Supreme Court and other superior and subordinate courts present.¹⁰⁰ The stated similarities in government between the UK and Kenya show why the UK is the best suited country to legally benchmark with. Notably, the United Kingdom's laws also recognise the civil-like union of people of the same sex under the *Marriage (Same Sex Couples) Act 2013*; this being the striking difference between the UK and Kenya. This difference will not affect the research as Kenya does not acknowledge same sex marriages thus will not need to acknowledge the unions under cohabitation as is the situation in Scotland.¹⁰¹

During the 19th Century, popularly known as the Victorian era, cohabitation was a union that was not legally recognised in the UK but was practised by the lower class of the economy because of convenience and affordability. Cohabitation was not common then compared to

¹⁰⁰ -< [Kenya and United Kingdom Compared: NationMaster.com](http://NationMaster.com) > on 2 December 2020.

¹⁰¹ Section 25, *Family Law (Scotland) Act* (2006).

how popular it is in present day thus it was rejected as it was regarded as being an immoral union.¹⁰² As stated in a study carried out by the Office for National Statistics (ONS) of the government of the United Kingdom the number of cohabiting couple families has been growing faster than married couple families, having gone up by 25.8% over the past decade.¹⁰³ This shows that cohabitation has become a more popular and accepted union in the UK with time thus the need for the laws that have been formulated and will be outlined below. This research will focus on laws created to protect cohabitees and property they contribute to throughout the union as introduced in Scotland, England and Northern Ireland. The information outlined will be key in assisting Kenya find out what she needs to implement and change so as to be able to protect cohabitees' right to property and right to lay claim on property they have contributed to within the union and is not in their name.

SCOTLAND

Scotland is the country that is generally more accepting of cohabitation of all the countries in the UK.¹⁰⁴ Cohabitees in Scotland are protected by the *Family Law (Scotland) Act* 2006 and just as is in Kenya, couples living together do not have the same rights as married couples and civil partners.¹⁰⁵ Subsequent paragraphs will outline what this Act envisions in view of cohabitees right to lay claim on property they contributed to within the union.

Within the aforementioned Act a cohabitee (termed as cohabitant in the Act) is defined as a couple consisting of a man and a woman who are (or were) living together as if they were husband and wife.¹⁰⁶ Proof of cohabitation is established based on the length of the period the partners have been living together (or lived together), the nature of their relationship during that period; and the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.¹⁰⁷

¹⁰² Frost G, Sharpe P, Abrams L, Beattie C and Summerfield P, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-century England*, Manchester University Press, United Kingdom, 2008, 123-147.

¹⁰³ Hill A, 'Cohabiting couples fastest-growing family type, says ONS; More opposite-sex couples are choosing not to marry, but same-sex marriages increasing' *The Guardian*, 7 August 2019 -< [Cohabiting couples fastest-growing family type, says ONS | Society | The Guardian](https://www.theguardian.com/society/2019/aug/07/cohabiting-couples-fastest-growing-family-type-says-ONS)> on 2 December 2020.

¹⁰⁴ *Gow v Grant* (2012) UKSC 29.

¹⁰⁵ Fairbairn C, 'Common Law Marriage and Cohabitation' House of Commons Library, Briefing Paper number 03372, 2016, 19 -<https://www.familylaw.co.uk/docs/pdf-files/Cohabitation_and_Common_Law_Marriage_briefing_paper_Feb_2016.pdf> on 5 December 2020.

¹⁰⁶ Section 25(1), *Family Law (Scotland) Act* (2006).

¹⁰⁷ Section 25(2), *Family Law (Scotland) Act* (2006).

The *Family Law (Scotland) Act* (2006) acknowledges rights of cohabitees in certain household goods and in certain money and property. With regards to the respective rights of ownership of cohabitees in any household goods there is a rebuttable presumption that each cohabitee has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.¹⁰⁸ Where a question arises (whether during or after the cohabitation) as to the right of a cohabitee to money derived from any allowance made by either cohabitee for their joint household expenses or for similar purposes or any property acquired out of such money, subject to any agreement between the cohabitees to the contrary, the money or property shall be treated as belonging to each cohabitee in equal shares.¹⁰⁹ These provisions show how the right to property of cohabitees is protected in Scotland.

Within Scotland the laws go ahead to specify the way forward where cohabitees separate or a party to the union dies intestate. Where cohabitees cease to cohabit otherwise than by reason of the death of one (or both) of them a cohabitee can apply, within a year after ceasing to cohabit, to court for financial provision based on whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant and whether the applicant has suffered economic disadvantage in the interests of the defender; or any relevant child.¹¹⁰ The appropriate court may, after having regard to the aforementioned matters either make an order requiring the other cohabitee (the “defender”) to pay a capital sum of an amount specified in the order to the applicant or make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents or make such interim order as it thinks fit.¹¹¹ The court, depending on the order made, shall consider the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of the applicant or any relevant child and the extent to which any economic disadvantage suffered by the applicant in the interests of the defender or any relevant child is offset by any economic advantage the applicant has derived from contributions made by the defender.¹¹² It should be noted that the law recognises contribution as being both indirect and non-financial

¹⁰⁸ Section 26, *Family Law (Scotland) Act* (2006).

¹⁰⁹ Section 27, *Family Law (Scotland) Act* (2006).

¹¹⁰ Section 28(3), *Family Law (Scotland) Act* (2006).

¹¹¹ Section 28(2), *Family Law (Scotland) Act* (2006).

¹¹² Section 28(5)-(6), *Family Law (Scotland) Act* (2006).

contributions (and, in particular, any such contribution made by looking after any relevant child or any house in which the partners cohabited).¹¹³

Where a cohabitee cohabiting with another cohabitee and immediately before their death they were domiciled in Scotland dies intestate, the surviving partner has rights to apply (within 6 months from the death of their partner) for inheritance and ownership of property contributed to.¹¹⁴ The court will have to consider any other matters it considers appropriate alongside the size and nature of the deceased's net intestate estate; any benefit received, or to be received, by the survivor on, or in consequence of, the deceased's death and from somewhere other than the deceased's net intestate estate; and the nature and extent of any other rights against, or claims on, the deceased's net intestate estate.¹¹⁵ Thereafter the court may make an order for payment to the survivor out of the deceased's net intestate estate of a capital sum of such amount as may be specified in the order or for transfer to the survivor of such property (whether heritable or moveable) from that estate as may be so specified or make such interim order as it thinks fit.¹¹⁶ These provisions clearly highlight how the right to lay claim on property contributed to throughout a cohabitation union by a cohabitee can be upheld and protected. Under the inheritance of a cohabitee through intestacy the distribution of the property is further governed by the *Succession (Scotland) Act 1964* (c. 41).

ENGLAND

In England, cohabitees were first recognised through the *Domestic Violence and Matrimonial Proceedings Act 1976*. Under Section 1(2) of the Act, applicants were allowed to obtain injunctions to control spouses behaviour and even to exclude them from the matrimonial home;¹¹⁷ This application was extended to 'a man and a woman who are living with each other in the same household as husband and wife' which is what cohabitees are described as.¹¹⁸ Cohabitees' property rights were further protected through Schedule 7 of the *Family Law Act 1996* where the court was granted powers to give orders to transfer tenancies of cohabitees to each other.¹¹⁹ When determining such an order, the court is to take into account, where only

¹¹³ Section 28(9), *Family Law (Scotland) Act* (2006).

¹¹⁴ Section 29, *Family Law (Scotland) Act* (2006).

¹¹⁵ Section 29(3), *Family Law (Scotland) Act* (2006).

¹¹⁶ Section 29(2), *Family Law (Scotland) Act* (2006).

¹¹⁷ Section 1(2), *Domestic Violence and Matrimonial Proceedings Act* (1976).

¹¹⁸ Lowe N and Douglas G, *Bromley's Family Law*, 11th ed, Oxford, New York, 2015, 939.

¹¹⁹ Lowe N and Douglas G, *Bromley's Family Law*, 950.

one cohabitee was entitled to occupy the premises; the nature of the parties' relationship , mainly looking at the level of commitment; the length of the cohabitation; whether there are children from the union, or parties have parental responsibility for any children; and the length of time since they ceased to cohabit.¹²⁰ The court is seen to have powers to adjust the cohabitees liabilities with respect to the tenancy and order for the party receiving the transfer to reimburse the transferring tenant. Former cohabitees through this Act are allowed to make an application even after getting married or beginning to cohabit with someone else; the court would however take either of these factors into consideration when making a determination.¹²¹ These are the only laws that protected cohabitees property rights and owing to them not being exhaustive it led to the recent drafting of the *Cohabitation Rights Bill* that aims at filling loopholes with regards to the rights of cohabitees.

The *Cohabitation Rights Bill* alluded to in the literature review is being discussed before the parliament in England where its second reading in the House of Lords was heard on 15 March 2019.¹²² If passed, this Bill will ideally be the first express law in England to protect the rights of cohabitees (termed as cohabitants in the Bill) and specifically their financial and property rights. The Bill has provisions on protection for cohabitees who have lived together for a minimum of three years or who have a child together or former cohabitees¹²³, the right for either cohabitee to apply to a court for a financial settlement order upon the breakdown of the relationship to redress a financial benefit or an economic disadvantage resulting from the period of cohabitation, the right for cohabitees to opt-out of the financial settlement provisions, if they both agreed¹²⁴ and the provision for cohabitees with the right to succeed to their partner's estate under the intestacy rules and the right to have an insurable interest in the life of their partner¹²⁵. With regards to protection of cohabitees right to lay claim on property they have contributed to but that is not in their name the financial settlement orders and the provisions on the succession of the estate of a cohabitee through intestacy will be applied.

The *Cohabitation Rights Bill* after commencement through its provision for financial settlement orders will allow former cohabitees to apply for a financial settlement order where

¹²⁰ Schedule 7, *Family Law Act* (1996).

¹²¹ Lowe N and Douglas G, *Bromley's Family Law*, 950.

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<https://www.thegazette.co.uk/all-notices/content/103501#:~:text=The%20purpose%20of%20the%20Cohabitation,who%20have%20a%20child%20together> on 6 December 2020.

¹²³ Clause 2, *Cohabitation Rights Bill*[HL].

¹²⁴ Part 2, *Cohabitation Rights Bill*[HL].

¹²⁵ Part 3, *Cohabitation Rights Bill*[HL].

they face economic disadvantage after the breakdown of the relationship. The court will consider the following discretionary factors:- the welfare of a minor (child under 18 years); the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future; the financial needs and obligations which each of the parties has or is likely to have in the foreseeable future; the welfare of any children who live with or might reasonably be expected to live with either party; the conduct of each party if it is of such a nature that it would be inequitable to disregard it and the circumstances in which the applicant made any qualifying contribution.¹²⁶ The financial settlement order may require either payment of a lump sum or transfer of property or property settlements or sale of property or pension sharing. The court may further include a provision under a financial settlement order which prohibits the other from applying, on the death of the applicant, for an order under Section 2 of the *Inheritance (Provision for Family and Dependants) Act 1975*, if it considers it just to do so – this protects the property rights of the dependants of the one who is granted the financial settlement order after their death.¹²⁷

Under succession through intestacy the *Cohabitation Rights Bill* proposes to amend Section 46 of the *Administration of Estates Act 1925* by including qualifying cohabittees as part of the classes of persons who have a right to the deceased's estate.¹²⁸ According to the Bill, a person is a qualifying cohabitee in relation to an intestate if the intestate was neither married nor in a civil partnership immediately before death, and if the person immediately before the death of the intestate was a cohabitee in a relationship with the intestate, satisfying the length of continuous cohabitation and having children, where applicable.¹²⁹ The Bill also proposes to amend Section 1 of the *Inheritance (Provision for Family and Dependants) Act 1975* to allow cohabittees to apply for financial provision from the deceased's estate.¹³⁰ While waiting for the passing of the *Cohabitation Rights Bill* cohabittees in England are advised to enter into Cohabitation Agreements so as to protect their interest in and contributions to property throughout the union and after its breakdown or upon the death of a partner under intestacy.¹³¹

¹²⁶ Clause 9, *Cohabitation Rights Bill*[HL].

¹²⁷ Clause 10, *Cohabitation Rights Bill*[HL].

¹²⁸ Clause 19, *Cohabitation Rights Bill*[HL].

¹²⁹ Clause 19(4A), *Cohabitation Rights Bill*[HL].

¹³⁰ Clause 21, *Cohabitation Rights Bill*[HL].

¹³¹ Fairbairn C, 'Common Law Marriage and Cohabitation' House of Commons Library, Briefing Paper number 03372, 2016, 15 -<https://www.familylaw.co.uk/docs/pdf-files/Cohabitation_and_Common_Law_Marriage_briefing_paper_Feb_2016.pdf> on 6 December 2020.

NORTHERN IRELAND

Unlike Scotland, Northern Ireland is yet to formulate written laws to protect cohabitants and unlike England the laws have not been drafted. Despite this, in Northern Ireland, cohabitants are given legal protection in several areas however, they and their families have significantly fewer rights and responsibilities than their counterparts who are married or who have formed a civil partnership.¹³² Northern Ireland, just as will be the case in Kenya, borrows legislation from England and Scotland and the United Kingdom in general to be able to govern over cohabitants. From the borrowing of similar Common law laws Northern Ireland is able to uphold cohabitants' right to lay claim on property either party may have contributed to throughout the union but is not in their name.

CASE LAW WITHIN THE UNITED KINGDOM ON COHABITANTS' RIGHT TO LAY CLAIM ON PROPERTY

There are several cases on property rights for cohabiting partners that have been heard within the judicial systems of the government of the United Kingdom and these cases are important because they have been used to decide subsequent cases. The paragraphs below will outline the main cases that form judicial precedence for cohabitants' right to lay claim on property they have contributed to within their union but is not in their name.

Initially courts applied the concept of equity while distributing property within a cohabitation union provided a beneficial interest could be proven. This was seen in the case of *Eves v Eves*¹³³ where the cohabitants at hand acquired a house which was registered in the defendant's name. The plaintiff made improvements to the property and maintained it, thus owing to this she claimed that she had a beneficial interest to the property. It was held that there existed a constructive trust in favour of the plaintiff. The court held that her contributions gave rise to a common intention to share in the home's equity; The contributions made were enough to give rise to a beneficial interest in favour of the plaintiff. A similar holding creating an assumption

¹³² Fairbairn C, 'Common Law Marriage and Cohabitation' House of Commons Library, Briefing Paper number 03372, 2016, 20 -<https://www.familylaw.co.uk/docs/pdf-files/Cohabitation_and_Common_Law_Marriage_briefing_paper_Feb_2016.pdf> on 6 December 2020.

¹³³ *Eves v Eves* (1975) EWCA Civ 3.

of equity was outlined in *Oxley v Hiscock* a case under the jurisdiction of England and Wales.¹³⁴ This case also informs the courts on matters of cohabitation when calculating beneficial interests in property where the legal title to the property is registered to one person in an unmarried couple and there is no express statement of how it is to be shared.

The case of *Gow v Grant*¹³⁵ is a famous Scottish case that after an appeal was finally decided in the Supreme Court. The case involved the plaintiff who at the age of 64 chose to cohabit with the defendant who was 59 years old in 2002 when the cohabitation began. The defendant convinced the plaintiff to sell an apartment she owned for ease of living together, which she did. The union eventually broke down in 2008. The plaintiff raised an action under Section 28 of the *Family Law (Scotland) Act* for a compensatory payment for the economic disadvantage she suffered as a result of the cohabitation. The appeal at the Supreme Court similar to the Sheriff's finding for the case was in favour of the plaintiff who was granted compensation in the sum of £39,500. The judge who decided the case stated that Section 28 promoted the principle of fairness and that the remedy was both practicable and fair, focusing on where parties were at the beginning of the relationship and where they are at the end. The said section did not impose upon unmarried couples the responsibilities of marriage but redresses the gains and losses flowing from their relationship. She further stated in her speech that there are lessons to be learned from this case in England and Wales as there is a need for some such remedy south of the border of the United Kingdom.¹³⁶ This case applied the current laws in Scotland and further demonstrated that cohabitation is not just about young, unmarried couples but also covers older couples.

The case of *Negus v Bahouse*¹³⁷ is a succession case heard under the jurisdiction of England and Wales. This case involved Mr Bahouse who was living together with Ms Negus as husband and wife before his death. Ms Negus claimed for financial provision to be made to her from the deceased's estate and his family contested the claim. The court held that Ms Negus had a reasonable basis for believing that her future financial needs would be met by Mr Bahouse thus she was awarded a lump sum and ownership of part of the deceased's estate. A similar holding was held at the appeal of the case of *O'Brien v Seagrave and another*¹³⁸ where the claimant, who had cohabited with the deceased and after his death applied for a grant of letters of

¹³⁴ *Oxley v Hiscock* (2004) EWCA Civ 546.

¹³⁵ *Gow v Grant* (2012) UKSC 29.

¹³⁶ *Gow v Grant* (2012) UKSC 29.

¹³⁷ *Negus v Bahouse* (2007) EWHC 2628.

¹³⁸ *O'Brien v Seagrave and another* (2007) EWHC 788.

administration in his estate, succeeded through the Inheritance (*Provision for Family and Dependants*) Act 1975.

CHAPTER FOUR

THE PROPOSED LEGAL FRAMEWORK FOR PROPERTY RIGHTS OF COHABITING PARTNERS IN KENYA

This chapter will look at the proposed basis for Kenyan cohabitees' right to lay claim on property contributed to throughout the union but is owned by one party. The chapter will focus on the laws governing cohabitees in the United Kingdom and how these laws can be used to protect cohabitees in Kenya and their property rights within the union. The chapter will conclude by outlining the benefits and shortcomings of the proposed laws to be borrowed from the United Kingdom.

THE PROPOSED BASIS FOR KENYAN COHABITEES' RIGHT TO LAY CLAIM ON PROPERTY CONTRIBUTED TO THROUGHOUT THE UNION

When drafting new laws for cohabitees in Kenya or even amending current marriage, property and inheritance laws certain aspects from the United Kingdom laws should be adopted. Subsequent paragraphs will outline what laws from Scotland and England can be adopted to protect cohabitees' right to lay claim on property contributed to throughout the union but is in one party's name. Similar to the way of settling of similar cases in Northern Ireland, Kenya will borrow laws from jurisdictions that provide for similar common law laws that do not go contrary to the laws of the *Constitution of Kenya* (2010). Cohabitees in Kenya will stand as recognised through common law¹³⁹ by use of the doctrine of presumption of marriage.

After the breakdown of a cohabitation union former cohabitees should be able to lay claim on any property they contributed to throughout the union. The issue with right to lay claim on property within a cohabitation union comes when the property is under the name of only one party. Amendments to current laws in Kenya or codification of new laws in Kenya should include protection of cohabitees' rights to certain household goods, certain money and property and compensation for economic disadvantage as a result of the union. New laws or amendments to laws should also be made to include a way a cohabitee to a deceased who died intestate can be able to inherit from the estate and claim for what the surviving partner contributed to.

¹³⁹ Section 3(1), Chapter 8, *Judicature Act* (1967).

In respect of the rights of ownership of cohabittees in any household goods or the right of a cohabitee to money derived from any allowance made by either cohabitee for their joint household expenses or for similar purposes or any property acquired out of such money, each cohabitee should have their right to an equitable share at point of separation. The *Family Law (Scotland) Act* (2006) speaks of equal share¹⁴⁰ but this would disadvantage a cohabitee who may have contributed more than the other thus the proposed division of the property equitably. All that can be borrowed from the laws in Scotland that would benefit the cohabittees in a fair manner is recognition of contribution made to property throughout the union as being both indirect and non-financial contributions.¹⁴¹ The Scottish case of *Gow v Grant*¹⁴² should be used as judicial precedence in Kenya to ensure equitable distribution of cohabittees' property at the point of separation.

The proposed laws in England would be best suited as the adopted laws to protect cohabittees' right to lay claim on property contributed to throughout the union but is one party's name at the point of separation. A provision that will allow former cohabittees to apply for a financial settlement order where they face economic disadvantage after the breakdown of the relationship should be made.¹⁴³ When deciding the court should consider welfare of any children present; the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future; the financial needs and obligations which each of the parties has or is likely to have in the foreseeable future; the conduct of each party if it is of such a nature that it would be inequitable to disregard it and the circumstances in which the applicant made any qualifying contribution in case there was duress.¹⁴⁴ Borrowing from the *Cohabitation Rights Bill* the financial settlement order should require either payment of a lump sum or transfer of property or property settlements or sale of property or pension sharing or a combination of the choices, whichever best suits the case. Where there are dependants to the applicant the legislation should give the courts permission to include a provision under a financial settlement order which prohibits the other from applying, on the death of the applicant, for an order to inherit what is left.¹⁴⁵

¹⁴⁰ Section 26-27, *Family Law (Scotland) Act* (2006).

¹⁴¹ Section 28(9), *Family Law (Scotland) Act* (2006).

¹⁴² *Gow v Grant* (2012) UKSC 29.

¹⁴³ Clause 7, *Cohabitation Rights Bill*[HL].

¹⁴⁴ Clause 9, *Cohabitation Rights Bill*[HL].

¹⁴⁵ Clause 10, *Cohabitation Rights Bill*[HL].

To protect a cohabitee's inheritance rights where their partner died intestate a requirement for a minimum of two years of cohabitation prior to the death of the deceased should be borrowed from the English case of *Negus v Bahouse*.¹⁴⁶ A caveat for application such as rights to apply within 6 months from the death of their partner for inheritance and ownership of property contributed to should be put in place.¹⁴⁷ Borrowing from the laws in Scotland the court, before decision making, should consider the size and nature of the deceased's net intestate estate; any benefit received, or to be received, by the survivor on, or in consequence of, the deceased's death and from somewhere other than the deceased's net intestate estate; and the nature and extent of any other rights against, or claims on, the deceased's net intestate estate.¹⁴⁸ The court can then make an order for payment to the survivor out of the deceased's net intestate estate of a capital sum of such amount as may be specified in the order or for transfer to the survivor of such property (whether heritable or moveable) from that estate as may be so specified or make such interim order as it thinks fit.¹⁴⁹ The laws of Scotland do not speak on the court considering the specific contribution made by the a partner to the union but this is essential for complete justice especially where the property is one party's name.

To generally protect cohabitees' right to lay claim on property they contributed to throughout the union but is in one party's name, Kenyan laws should adopt the concept of cohabitation agreements from the UK. The cohabitation agreement will have express statements of what the two cohabitees will want to happen if the relationship ends or either party dies intestate. Lawyers will play a role in advising the cohabitees on the effect of any proposed agreement.

150

BENEFITS OF THE PROPOSED LAWS ON PROPERTY RIGHTS OF COHABITING PARTNERS TO BE ADOPTED FROM THE UNITED KINGDOM

The proposed laws on property rights for cohabiting partners to be adopted in Kenya will have several benefits for cohabitees and families of cohabitees in Kenya. The proposed laws will also develop the laws in Kenya. Cases decided using the proposed laws will be able to be used

¹⁴⁶ *Negus v Bahouse* (2007) EWHC 2628.

¹⁴⁷ Section 29, *Family Law (Scotland) Act* (2006).

¹⁴⁸ Section 29(3), *Family Law (Scotland) Act* (2006).

¹⁴⁹ Section 29(2), *Family Law (Scotland) Act* (2006).

¹⁵⁰ Fairbairn C, 'Common Law Marriage and Cohabitation' House of Commons Library, Briefing Paper number 03372, 2016, 15 -<https://www.familylaw.co.uk/docs/pdf-files/Cohabitation_and_Common_Law_Marriage_briefing_paper_Feb_2016.pdf> on 12 December 2020.

as precedence not only in Kenya but also by other African countries that subscribe to common law.

By generally providing for property rights specifically for cohabittees the proposed laws address the current discriminatory nature that the current Kenyan laws are. The current laws are seen to discriminate cohabittees based on their type of marriage which is contrary to the Constitution of Kenya.¹⁵¹ This is said because cohabittees are treated different from married couples¹⁵² illustrated by cases where cohabittees have no solutions for distribution of property at point of separation or when a party dies intestate provided for them in law but married couples do. This will no longer be an issue with the proposed laws as in as much as in the United Kingdom cohabittees are treated different from married couples, parties in both categories of unions have laws expressly providing for protection of their rights and more so their property rights. Thus, not only will the proposed laws uphold the notion that marriage unions and cohabitation unions are not the same but it will provide for protection of those in cohabitation unions while acknowledging what is present for those in marriage unions.

By enacting or amending laws to include cohabittees' right to lay claim on property contributed to within the union but is not in one party's name the laws of Kenya will uphold cohabittees right to property as provided for in the Constitution of Kenya.¹⁵³ The proposed laws will ensure that cohabittees get a chance to claim what they have contributed to and get what is rightfully theirs further applying John Locke's labour theory.¹⁵⁴ The proposed laws by factoring in the economic disadvantage suffered as a result of the union, future financial burdens on either party and any children present and how they will be cared for when distributing the property is being conclusive and fair and is protecting cohabittees and their dependants.

The phrasing of the proposed laws will help mitigate the financial consequences of the relationship breakdown of a cohabitation.¹⁵⁵ Without the proposed laws cohabittees who contribute in a monetary or non-monetary way to property that is not in their name risk losing their share in the property. It is stated that it is mostly women cohabittees who lose out on what they contributed to at the point of separation or inheritance where the deceased died intestate

¹⁵¹ Article 27, *Constitution of Kenya* (2010).

¹⁵² *O K N v M P N* (2017) eKLR.

¹⁵³ Article 40, *Constitution of Kenya* (2010).

¹⁵⁴ Tuckness A, 'Locke's Political Philosophy' The Stanford Encyclopedia of Philosophy, 11 January 2016 - <<https://plato.stanford.edu/entries/locke-political/>> on 17 December 2020.

¹⁵⁵ 'Cohabitation: The Financial Consequences of Relationship Breakdown' Law Commission United Kingdom, July 2007.

because of the lack of protection by law where the property is in the male partner's name.¹⁵⁶ The proposed laws will ensure that women property rights within a cohabitation are protected, this mitigating the financial consequence of having to start afresh because of losing what the woman contributed to. The proposed laws will also mitigate a cohabitee's financial consequence of losing his or her inheritance or not getting financial provision from a deceased who died intestate.

The proposed laws will not only protect what a person contributed to but ensure that one does not reap where they did not sow. The proposed laws follow the principle of equity¹⁵⁷ thus they will not merely divide the property equally when one cohabitee may have contributed more than the other or a cohabitee did not contribute anything at all. These laws will complement the judgement in the case *MNP v POM*¹⁵⁸ whereby it was stated that cohabitation without contribution does not amount to inheritance or a claim on a share of the property at the point of separation.

SHORTCOMINGS OF THE PROPOSED LAWS ON PROPERTY RIGHTS OF COHABITING PARTNERS TO BE ADOPTED FROM THE UNITED KINGDOM

Shortcomings of the proposed laws arise from situations where the laws to be introduced may not entirely be inclusive and/or conclusive. The shortcomings also arise from the fact that these are different jurisdictions and they have different ways of deciding cases. Cohabitation being a social trend the proposed laws may be faced with scrutiny from the society posing social issues that will concern the property rights of cohabitees.

In Kenya, cohabitation is recognised by common law under the doctrine of presumption of marriage. To prove cohabitation, one has to show long cohabitation and habit, however the definition of long cohabitation is at the court's discretion.¹⁵⁹ The proposed laws include borrowing of mainly property rights and not changing the laws that are present in Kenya. Owing to this, the adoption of the proposed laws with regards to distribution of cohabitees' property at the point of separation may not be able to protect a cohabitee who cannot prove that

¹⁵⁶ Kameri-Mbote P, 'Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' International Environmental Law Research Centre, IELRC Working Paper 2001 -1, 13 <<http://www.ielrc.org/content/w0101.pdf>> on 17 December 2020.

¹⁵⁷ *Oxley v Hiscock* (2004) EWCA Civ 546.

¹⁵⁸ *MNP v POM* (Civil Application Sup. No. 4 of 2019) eKLR.

¹⁵⁹ *WM v Murigi* (2008) eKLR.

he/she was one. This means that despite monetary or non-monetary contributions made to the property during the cohabitation union if the property is in the other party's name and the court is not satisfied by your proof of cohabitation the proposed laws will not protect your property rights.

Within the United Kingdom there is use of cohabitation agreements but it is stated that although courts are showing more willingness to take account of such agreements there is still no certainty that they would enforce one.¹⁶⁰ This means that where Kenya adopts these agreements they may have challenges applying them because they are not properly in force in the United Kingdom. A solution to this may be disregarding cohabitation agreements or Kenya borrowing the use of cohabitation agreements from a country that has them well formulated and provided for in law.

Besides the shortcomings presented it would be reasonable to say that the proposed laws have more pros than cons. The proposed laws based on the benefits outlined seem befitting as a solution to Kenya's legal gap surrounding the lack of well outlined property rights for cohabitees. The proposed laws will be able to avail for cohabitees in Kenya a right to lay claim on property contributed to within the union but is not in their name. The proposed laws will also be able to protect the interests of dependants of cohabitees. Through the proposed laws cohabitees will have the property distributed in a just and equitable manner after a number of surrounding factors are considered. The proposed laws to be borrowed from the United Kingdom would thus be termed as most ideal to solve the problem this research is addressing.

¹⁶⁰ Fairbairn C, 'Common Law Marriage and Cohabitation' House of Commons Library, Briefing Paper number 03372, 2016, 15 -<https://www.familylaw.co.uk/docs/pdf-files/Cohabitation_and_Common_Law_Marriage_briefing_paper_Feb_2016.pdf> on 18 December 2020.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSION

This chapter will outline the findings of the research based on the information in the previous chapters. Recommendations to solving the problem the research seeks to address will be outlined. Lastly, the chapter will conclude the research on protecting cohabittees' right to property within the cohabitation union in Kenya.

FINDINGS

During the course of the research several findings were made. These findings are what guided the research. These findings, which will also guide the recommendations to solving the research problem, will be outlined below.

The *Marriage Act* (2014) acknowledges the existence of cohabitation by defining the union.¹⁶¹ This definition was found to be the only express legal recognition of cohabittees, as the rights, duties and limitation to rights of cohabittees are not stated in Kenyan laws. It was found that cohabittees are treated different from married couples not only in Kenya¹⁶² but also in the United Kingdom. The different treatment as found in the research is only an issue because cohabittees have no express laws protecting their property rights, specifically their right to lay claim on property they have contributed to but is in one person's name. Thus, if cohabittees rights are provided for in law the different treatment is not a factor as both types of unions will have their own separate rights and duties.

It was found that prior to the proposed laws cohabittees had protection of their property provided for in the *Land Registration Act* (2012). Within the Act in relation to cohabitation unions, where an instrument of transfer of interest of land exists which does not specify the nature of the cohabittees rights the presumption can be that the cohabittees hold the interest as tenants in common in equal shares.¹⁶³ This was found to be good law but may pose to be an unfair provision if one party contributed more than the other to the property or one party made no contribution at all in monetary or non-monetary form. Distribution of property in cohabitation unions equally was found not to consider things such the children within the union and who

¹⁶¹ Section 2, *Marriage Act* (2014).

¹⁶² *O K N v M P N* (2017) eKLR.

¹⁶³ Section 91(2), *Land Registration Act* (2012).

will take care of them, the contribution of each partner to the said property and the economic advantage or disadvantage suffered as a result of the union.

Judicial precedence was found to have a key role in cases involving cohabitees. It is through the case of *Hortensiah Wanjiku Yawe v Public Trustee*¹⁶⁴ that most cohabitation unions in Kenya are either recognised as a marriage or not for purposes of distribution of property within the union. Several cases concerning cohabitees' property rights have been decided in Kenyan courts and have helped decision-making for subsequent cases. It was found that how the judges decide these cases has a heavy influence on future judgements and rulings thus it is key for judges to always be fair and consider all facts, future occurrences after the separation and any dependants before giving a verdict.

By using the United Kingdom as a benchmark for Kenya and a guide for laws that can be borrowed it was found that it is possible to set a legal framework by which the property rights of cohabitees can be guaranteed and protected. The United Kingdom being a common law country just like Kenya was found to categorise cohabitees and married couples separately. The laws in Scotland and the proposed Bill in England laid a good basis for cohabitees' right to lay claim on property they contributed to but is not in their name. It was found that in deciding cases on distribution of property within a cohabitation union at point of separation or succession through intestacy there are certain things that need to be considered for equitable distribution of the property. The benchmark outlined laws and case law in the United Kingdom that seem best suited to solve the research problem at hand.

The findings outlined above bring out the research problem and a possible solution to the legal gap present. From the findings it is evident that cohabitees' property rights were initially not adequately and conclusively provided for and by use of the laws in the United Kingdom this can be solved.

RECOMMENDATIONS

Different groups of people have a duty to play to ensure cohabitees have their rights as provided for in the Constitution of Kenya¹⁶⁵, this including and is not limited to cohabitee's right to property, is protected and upheld. The recommendations to solve the research question will be

¹⁶⁴ *Hortensiah Wanjiku Yawe v Public Trustee* (Civil Appeal number 13 of 1976).

¹⁶⁵ Chapter 4, *Constitution of Kenya* (2010).

given based on different categories of people and their duty to ensure property rights for Kenyan cohabiting partners is protected. The recommendations will state how the groups of people can assist in ensuring cohabittees get their right to lay claim on property they contributed to but is not in their name. The recommendations will be based on the findings outlined above.

Legislators in Kenya have a duty to make laws that protect the citizens of Kenya and cater for their needs. With regards to the issue at hand, legislators have a duty to make laws to guarantee the property rights of cohabiting partners in Kenya are protected. The laws should speak on cohabittees' right to lay claim on property contributed to and is not in their name. The laws made should include provisions on how the cohabittees' property should be distributed at the point of separation or succession through intestacy. The proposed laws should also have provisions on factors to be considered before distribution as provided for in the *Family Law (Scotland) Act (2006)* and the *Cohabitation Rights Bill [HL]*.

The judiciary in Kenya has a duty to interpret laws made by the legislature. The judiciary is also to ensure that the implementation is carried out in a just manner. In this case the judiciary should ensure that while deciding cases judges distribute the property equitably and consider contributing factors. The judiciary should also ensure justice is upheld as the decision in different cases forms judicial precedence thus if there is injustice in the ruling this may be passed on. The judiciary is free to use cases decided in common law countries, for example *Gow v Grant*¹⁶⁶, to settle such cases; The judiciary should use this judicial precedence and others as they wait for amendment of the current laws or drafting of new laws to include property rights for cohabittees.

Lawyers have a duty to defend and advise their clients. Lawyers also have a duty to work to complement the duty of the judiciary. With regards to property rights for cohabiting partners in Kenya, lawyers have a duty to advise those entering into cohabitation unions to enter into cohabitation agreements that will assist to settle distribution of property within the union. The lawyers should also advise cohabittees to enter into marriages recognised by the *Marriage Act (2014)*, where possible, or register property under the names of both parties establishing a tenancy in common all this for purposes of protecting their right to property in case the parties are not able to satisfy the presumption of marriage thus cannot prove the presence of cohabitation. Lawyers also have a key duty and role to play in defending their client in court where a suit is lodged. Lawyers should present their client's case and cite judicial precedence

¹⁶⁶ *Gow v Grant* (2012) UKSC 29.

to ensure that cohabitees are able to lay claim on property within the union that they contributed to even if it is not in their name.

The community at large has a duty of collective responsibility to ensure that everyone gets to have their rights adhered to and respected. The community also has a duty to appreciate change and adapt to accommodate the changes in society. In this case the development at hand is the social trend of cohabitation that the community should embrace. The community should not discriminate the parties that subscribe to cohabitation unions. By embracing cohabitation unions, the community will be able to appeal for laws to be made to protect cohabiting partners' right to property.

From the above paragraphs it is clear that providing property rights for cohabiting partners in Kenya is something that needs the effort of several groups of people. If each group performs their duty cohabitees will be able to enjoy not only their property rights but will be well accommodated in society.

CONCLUSION

It would be true to say that cohabitation is a social trend in society that many opt into instead of marriage. Choosing to cohabit can be for many reasons and the people that do so need to be guided and protected by the laws of the land. In Kenya, express laws governing cohabitation unions are not present thus cohabitees in the country risk losing out on many things, property they contributed to within the union being one of the things. It is important for the Kenyan legislature to formulate laws that will protect cohabitees' right to property as provided for in Article 40 of the *Constitution of Kenya* (2010). The laws should be specific and clear and should include provisions on a cohabitee's right to lay claim on property he or she contributed to throughout the union but is not in his or her name, specifically where the presumption of marriage cannot be proven. Formulation of these laws could involve adaptation of laws from the United Kingdom who already have laws to protect the property rights of those in cohabitation unions. These laws are important as they will cater for the property rights of increasing cohabiting partners and dependants of the specific partners where property needs to be distributed at the point of separation or intestate succession.

BIBLIOGRAPHY

Books

Frost G, Sharpe P, Abrams L, Beattie C and Summerfield P, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-century England*, Manchester University Press, United Kingdom, 2008.

Kameri-Mbote P, 'The Law of Succession in Kenya: Gender perspectives in Property Management and Control' *Women & Law in East Africa*, Nairobi, 1995.

Kariuki F, Ouma S and Ng'etich R, *Property law*, Strathmore University Press, Nairobi, 2016.

Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica, Nairobi, 2019.

Lowe N and Douglas G, *Bromley's Family Law*, 11th ed, Oxford, New York, 2015.

Musyoka W, *Law of Succession*, LawAfrica Publishing, Nairobi, 2018.

Sparkling JG, *Understanding Property Law*, 4th ed, LexisNexis, United States, 2012.

Tully J, *A discourse on property*, Cambridge University Press, London, 1982.

Wood H, Cook J, Eames J, Harrop M, Murray A and Salter D, *Cohabitation Law, Practice and Precedents*, 7th ed, LexisNexis, London, 2017.

Dissertations

Muniu MM , 'Property Rights in Cohabitation Unions in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018.

Wafula TT, 'Analysis of Succession of Property in Kenya in the case of Cohabitees' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018.

Wanjiru JV, 'Reforms needed on property laws on cohabitation' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2017.

Watiri SK, 'An Analysis of the Status of Cohabitants in Kenya Law and the Challenges they face' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2018.

Journal Articles

Abong'o VN, 'Wife Inheritance' and the Fate of Widows in Luo Society in Kenya: A Philosophical Appraisal' 2(2) *African Journal of Education, Science and Technology*, 2015.

Dr. Janet Kabeberi-Macharia J and Nyamu C, 'Marriage by Affidavit: Developing Alternative Laws on Cohabitation in Kenya' University of Nairobi, 14 *Zimbabwe Law Review*, 1997.

Fischer RK and Graham A, 'Postmodernism' 54 *Reference & User Services Quarterly* 1, 2014.

Grossbard S and Vernon V, 'Common law marriage and couple formation' *IZA Journal of Labor Economics*, 2014.

Panesar S, 'Theories of Private Property in Modern Property Law' 15(1) *Denning Law Journal*, 2000.

Thuo ADM, 'Genealogy of Land Ownership, Use and Management Problems in Kenya During the Pre-August 2010 Constitution Period. A Review' 2(8) *International Journal of Engineering Research and Technology*, 2013.

Waggoner LW, 'Marriage is on the Decline and Cohabitation is on the Rise: At What Point, if Ever, should Unmarried Partners Acquire Marital Rights?' 50 *Family Law Quarterly* 2, 2016.

Wang Y, 'Unmarried Cohabitation: What Can We Learn From a Comparison Between the United States and China?' 41 *Family law quarterly* 1, 2007.

Westreich A, 'Present-day Posthumous Reproduction and Traditional Levirate Marriage: two types of interactions' 5(3) *Journal of Law and the Biosciences*, 2018.

Other Internet Resources

Cohabitation Rights Bill – Second Reading House of Lords on 15 March 2019 -<<https://www.theyworkforyou.com/lords/?id=2019-03-15a.1257.3>>

Ellingham S, 'Property Rights of Cohabitees' *Michelmores*, 7 June 2019 -<<https://www.michelmores.com/news-views/news/property-rights-cohabitees>>

Hill A, 'Cohabiting couples fastest-growing family type, says ONS; More opposite-sex couples are choosing not to marry, but same-sex marriages increasing' *The Guardian*, 7 August 2019 -<[Cohabiting couples fastest-growing family type, says ONS | Society | The Guardian](https://www.theguardian.com/society/2019/aug/07/cohabiting-couples-fastest-growing-family-type-says-ons)>

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

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

Wakoko VDB, 'The Evolution of Land Law in Kenya' Academia - <https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA>

Reports

'Cohabitation: The Financial Consequences of Relationship Breakdown' Law Commission United Kingdom, July 2007.

Fairbairn C, 'Common Law Marriage and Cohabitation' House of Commons Library, Briefing Paper number 03372, 2016.

Working Papers and Research Papers

Gaafar R, 'Women's Land and Property Rights in Kenya' Center for Women's Land Rights, 2014.

Kameri-Mbote P, 'Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' International Environmental Law Research Centre, IELRC Working Paper 2001 -1.

Self-Published Articles

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