THE PLACE OF COHABITATION UNIONS UNDER THE MARRIAGE ACT 2014 OF KENYA AND MARRIAGE ACT CAP 251 OF UGANDA

BY

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DECLARATION

I Faith Ndinda Kyali, declare that this dissertation is my original work and to the best of my knowledge it has not been presented elsewhere in any university or institution of learning for approval.

Sign.....Faith..... Date.....13/12/2016.....

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APPROVAL

I, undersigned certify that I have read and hereby recommend for acceptance by Kampala International University a dissertation titled, The Place of Cohabitation Unions under the Marriage Act 2014 of Kenya and the Marriage Act Cap 251 of Uganda.

Signed.....

(SUPERVISOR)

MUBARAK KALENGE

DEDICATION

I dedicate this piece of work to my lovely parents, Mr. Charles Kyali and Mrs. Peninah Kyali, my sister Gloria Kyali and my brother Ken Kyali.

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ABSTRACT

Cohabitation unions have been on the increase perhaps due to the recognition of family units, as a result of increased urbanization and increased isolation of young people from their family network. These unions have become common as the meaning of family continues to increasingly transform in the wake of the fast changing societal values. The proliferation of divorce, re-marriage, step families and single parenthood has liberalized the idea of family from the way it was traditionally understood. With these structural changes, attitude towards non-marital unions have become increasingly permissive.

This research therefore considers cohabitation in light of the future of marriage from a legal and cultural framework by examining the demographic context, legal structure and future speculation on the issue of unmarried individuals living together.

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CHAPTER ONE

1.0 Introduction

With the increasing trend of divorces and separation, most people now tend to opt for the easy way out as we tend to all have a common goal in life that is a family. The meaning of family continues to transform due to fast changing societal values.

The Black's Law Dictionary[1] defines cohabitation as the act of a man and a woman openly living together without being married to each other. They are fact arrangements that are not sanctioned by either civil, religious or customary law but where a man and woman decide to live as husband and wife.

Section 2 of the Marriage Act 2014 of Kenya defines to cohabit to mean to live in an arrangement in which an unmarried couple lives in a long term relationship that resembles a marriage. On the other hand, the Marriage Act Cap 251 of Uganda is silent on the definition of cohabitation and cohabitation in general. However, the Marriage and Divorce Bill[2] defines cohabitation to mean a man and a woman living together as husband and wife.

Section 6 of the Marriage Act of 2014 defines the types of marriages that may be registered under the act that is Christian, Islamic and customary marriages. Cohabitation unions are not listed.

The Kenyan Marriage Act only provides for the definition of cohabitation and stops at that. On the other hand, the Ugandan Marriage Act is silent about the cohabitation but the Marriage and Divorce Bill of 2009 tried to deal with the lacuna but due to various contentions of the bill, one being the cohabitation clause, the bill has not been passed by the Parliament.

[1] 8th edition page 277
[2] Of 2009 of Uganda

Cohabitation has a long history in our society and the world over. Despite the fact that these unions have faced religious condemnation, they appear to be now prevalent and more so among the youths.

Majority of the youths are cohabiting as people who have no means to carry out traditional or civil marriages have taken advantage of this state of affairs to engage in these unions to substitute a formal marriage hence necessity of the recognition of the law.

Courts in both jurisdictions have not recognized cohabitation but due to the trend, courts have developed the common law principles of presumed marriage and conferring some marital rights and duties on cohabiting couples meeting certain criteria as the court deems fit and varies depending on the circumstances. Such include the length of cohabitation, whether there are certain children and whether the man and woman consider themselves a husband and wife.

The laws governing the various matrimonial regimes in Uganda are the Marriage Act, the Customary Marriage (Registration) Act, the Hindu Marriage and Divorce Act, the Marriage and Divorce of Mohammedan Act and the Marriage of African Act. In addition, the Land Act, Mortgage Act and Succession Act provide for the impacts of spousal rights relating to property during the life of a marriage and to inherit property from a deceased spouse.

In Kenya, the laws are the Marriage Act which consolidated Kenya's various marriage laws in 2014 and sets the terms for civil, customary, Hindu and Christian marriage, the Matrimonial Property Act which governs the disposition of marital property, the Law of Succession Act which governs the rules of inheritance and the Children Act which is designed to give effect to and protect the rights of children.

The Marriage Act 2014 repealed the prior Marriage Act, The African Christian Marriage and Divorce Act, The Matrimonial Cause Act, The Subordinate Court (Separation and Maintenance Act), The Man Marriage

and Divorce Registration Act, The Mohammedan Marriage, Divorce and Succession Act and The Hindu Marriage and Divorce Act.

The case of Milka Githikia Kamau v Faith Wangeci Kamau[3] brings out the recognition of these unions in the Kenyan court system. The court held that the applicant could be presumed as the wife of the deceased as all the years between 1990 to 1999 the applicant had cohabited with the deceased and she must have held an expectation that she was the legitimate wife and therefore entitled to a share of the deceased's estate.

The above instance differs from the case of Burns v Burns[4] where Mrs. Burns who had changed her name by deep poll had two children with Mr. Burns and contributed in practical and financial terms to the household for 19 years received nothing on the breakdown of the relationship as she could not bring herself within the law of the trusts so as to do so, whereas, had she been a wife she would have received half or more of the value property or at least the rights to live in it until the children were independent.

The lack of security of these unions can only be confirmed to have attained the status of a marriage through a court declaration. In the interim, the status of cohabitees cannot be ascertained with clarity.

The assertion that cohabitation of itself involves a lesser commitment therefore less deserving of protection has been the subject of inquiry.

The Kenyan government planned to approve a law that will recognize cohabitation of more than six months as legal marriages and this policy had Christians up in arms over the controversial clause in the bill[5].

The registration however required mutual consent but will not discriminate between Christian, Islamic and Hindu marriages in order to provide for the

[3] (2008) e KLR
[4] (1984) Ch 317
[5] christianitytoday.com/gleanings/2012/november/kenya-will-declare-cohabiting-couples-married-after-six.html

legal protection for the rights of children and spouses. This did not come to see the light under the Marriage Act of 2014.

The Ugandan court system doesn't recognize cohabitation as realized above but due to the growing trend, it is clear that both jurisdictions should come up with clear criteria if they want to acknowledge them with the best interests of children if any in these unions.

The presumption is that once two parties, a man and a woman agree to live together it is assumed that they are in agreement and they intend to enjoy equal rights. Further, when parties start living together, certain obligations arise and each one of them has duties they perform as a family. They are a family because there is no distinction in definition of a family be it one founded by marriage or cohabitation. As a result, they do deserve protection under the law.

Under a legally recognized marriage, the spouses are also referred to as husband and wife. This directly infers that the rights of both parties in these types of relationships are equal for reasons that they have agreed to live together in a peaceful and harmonious manner[6].

Under the memorandum of the proposed bill, paragraph 3 states that in the report of the study that the bill emanated from, the commission made several recommendations which will result in a fair and achieves social justice, address the issues of poverty, protects the human rights of all members of the family, is enforceable and accessible to the Uganda population and is in line with the constitution and international legal obligations of Uganda.

It is therefore clear that families should be protected under the law despite their legality under the law and more reasons to do that are explained critically in the research.

[6] Uganda women's network-UWONET>>When there is no just cause for barriers_ why the Marriage and Divorce Bill No.19 of 2009 should be passed the way it is; an analysis of the property cohabitation and conjugal rights clause for Uganda..html

1.2 Statement of the problem

The lack of security in these unions is primarily realized when the relationship ceases to exist and therefore not eligible for certain privileges under the law in these jurisdictions.

Consequently, the benefits granted to marriage or rather recognized unions under the law are not available to cohabitees whose union is marred by legal uncertainties.

General acceptance of these unions is a kin to both good and bad sides. Our legal systems are trying hard to accommodate recognition of cohabitation into law while questions as to morals and religious aspects cannot be assumed. Furthermore, western influences into our today society making these unions to be seen as normal and obvious.

Considering the above, the question remains what criteria both court systems consider these unions legal or rather what happens to children, property as well as maintenance in instances of separation by the partners.

1.3 Objectives of the study

Based on the problem statement the research is conducted to realize the positive and negative impacts of cohabitation in our today society as well as examining whether recognition of such arrangements would be beneficial to our systems or rather encourage their existence.

1.3.1 Specific objectives

To examine the reason for the growing trend of cohabitation as well as the impact it has on our societal morals.

To analyze the personal and property consequences of cohabitation unions.

To propose and recommend measures and to deal with disputes in regard to cohabitation unions.

1.4 Scope of the study

The study encompasses a comparison of the two jurisdictions; Kenya and Uganda and recent evidence of the application of common and equity principles by the two court systems as well as other jurisdictions with regard to cohabitation. Further, the impact cohabitation unions have on the society and most importantly the law relating to marriage unions, conclusion and recommendations.

Some limitations have been confronted in the course of the study. Gathering information and case laws on the subject matter is challenging as both jurisdictions are new to this therefore relevant material is scarce.

Most materials used are books, newspapers and articles sourced from the internet but notwithstanding the study are worthwhile.

1.5 Justification of the study

Societal acceptance of cohabitation leads to a very crucial topic of discussion and research and a result, this study will help students, law makers and lecturers foremost have a background understanding of what cohabitation entails and further help to come up with measures and laws to deal with this subject matter.

1.6 Significance of the study

The study brings out the need to recognize these unions to some extent as well as the appraisal of common law and equity principles in both court

systems. The research is intended to show how disputes with regard to cohabitation unions when they arise are dealt with by our courts despite the lacuna in the two marriage acts. Comparison is also to be made to acknowledge how other states deal with the same matter.

Moreover, examine the reason for the growing trend and thereby the need for reforming our laws to cater for such instances even though its legality is highly questionable.

1.7 Literature review

The 2000 United States census sent a signal about marriage on its short form data survey. Marriage does not really matter enough to even ask about it. Marriage may or may not be an antiquated institution but it is undeniable that non-marital cohabitation has increased dramatically receiving much attention in sociological studies.[7]

J. Ermisch and M. Francesconi [8] state that whilst currently only a small portion of the overall number of cohabiting couples, more couples are cohabiting for the long term either as a positive alternative to marriage or for other reasons.

It is predicted that fewer people will marry during their lifetime in their future. For such couples, cohabitation may present a true alternative to marriage. The assertion that cohabitation of itself involves a lesser commitment therefore less deserving of protection has been the subject of inquiry.

The same assertion is presented in the research conducted by C Smart and P Stevens[9] which brings out the perception that with the passage of time, cohabitation had become marriage-like in terms of its economic

[7] Gene Edward Veith, New census consensus? Marriage doesn't matter, world, August 28, 1999 at 24
[8] Patterns of household and family formation,2000
[9] Cohabitation breakdown, 2000

implications for the partners, a protective regime which still does not carry all the same rights and duties as marriage appeared preferable.

In the United States, unmarried cohabitation has been on the rise since 1970. In 1996, there were 4 million cohabiting couples, an almost eight fold increase from 1970. In 1970 there was one cohabiting couple for every one hundred married couple households. Now there are eight couples living together for every married couple. These statistics suggest the likelihood that a majority of people will be in an unmarried domestic relationship before marriage[10].

The majority of American adults believe cohabitation is generally a good idea. Two thirds of adults (65%) either strongly or somewhat agree that it's a good idea to live with one's significant other before getting married, compared to one-third (35%) who either strongly or somewhat disagree[11].

Unsurprisingly, the most religious groups in America are the least likely to think cohabitation is a good idea. Most Christian teaching on pre-marital relationships encourages abstinence and other boundaries that tend to exclude cohabitation, and the data reflects these beliefs. Practicing Christians (41%) are highly unlikely to believe cohabitation is a good idea, and the stark contrast with those who identify as having no faith (88%) further demonstrates the acute impact of religious belief on views regarding cohabitation

Though it may seem as though cohabitation would be primarily a function of convenience and cost saving, almost all adults see it as a rite of passage in the path to marriage. The idea that living with one's significant other before getting married would be convenient (9%), or that it would save rent (5%) pale in comparison to the value of testing compatibility (84%) by playing house before tying the knot. By far, the reason cohabiting couples are shacking up is in order to test the waters before taking the plunge.

[10] Lynne Marie Kohm and Karen M. Groen, cohabitation and the future of marriage 2003
[11] https;||www.barna.com/research/majority-of-americans-now-believe-in-cohabitation

Though the debate has raged over whether cohabitation reduces or increases the pressure of marriage, it appears that among those who have actually done it, there was no major effect either way. The majority (62%) believes that living together did not affect the pressure to get married at all, and those who say it reduced (19%) or increased (18%) the pressure to get married were pretty evenly split.

Cohabitation is associated with lower levels of exclusivity, others argue that the benefits of marriage, and particularly those that derive from the pooling of resources as well as from economies of scale, may also attach to cohabiting, non-marital unions. Marriage, however, presumably confers enforceable trust that obtains from the public declaration of the relations.

In much of the developing world, and particularly, sub-Saharan Africa, even monogamous marriages remain potentially polygamous[12], a situation not unrelated to the nature of the marriage transaction through which men (but not women) gain exclusive sexual rights to their spouses. Marriage and cohabitation are often not easily distinguishable in sub-Saharan Africa, such that the frequent use of the "in union" category, which includes married as well as cohabiting persons can, at best, be considered tenuous attendant commitment of friends and relatives to the cohesion of the union.

More so, majority of couples studied by C. Lewis, A Papacosta and J. Warin [13] in their study had not made the conscious decision to move in together and most felt that cohabitation involves the same level of commitment as marriage.

Marriage is still considered as the surest foundation for raising children and remains the choice of the majority of the people. However, we should not forget that family is an important and fundamental unit of the society that must be protected by the state and society regardless of how it came into being.

[12] Pebley and Mbugua,1989
[13] Cohabitation, separation and fatherhood, 2002

Article 1 of the Convention on Elimination of Discrimination against Women prohibits distinctions based on marital status. Further, General Recommendation (GR) 21 [14]calls for equal protections in marriage and family relations. Uganda and Kenya are both parties to the convention and it is required of the states to recognize these families despite the question of their legality.

What ernerged from these findings is a strong lack of awareness of the legal position which cohabitants occupy compared to married people. As a result of this, people tend to enter into such arrangements without knowledge of the legal implications considered that it is marred by law.

In considering whether they should be included in our legislations remains a question of fact and law. If such arrangements are recognized by the law will the perception of marriage change or rather will more people opt for these arrangements?

In Uganda, the proposed Marriage and Divorce bill has thrust upon the general public the general public the need to closely examine and confront some time-tested marriage customs[15].

Key provisions in the proposed bill include prohibiting marriage before the age of 18 years, prohibiting same-sex marriages, banning widow inheritance without free consent of the widow and the most controversial about cohabitation with members of parliament jostling over whether cohabiting couples deserve recognition in relation to property rights[16].

The cohabitation clause presents an unambiguous question that is the false suggestion that cohabitation is a legally acceptable alternative to marriage in Uganda.

It is argued that if the Bill is passed, it would encourage an upward trend in cohabitation among young adults with more and more men choosing the

[14] Of the convention on elimination of discrimination against women
[15] Spooky News Uganda, The cohabitation clause; why proponents are probably on the wrong side of history
[16] Section 117 of the 2009 proposed bill

easy option in order to circumvent wedding meeting and or preconceived notions of expensive weddings ceremonies.

Moreover, the legal boundaries within which current cohabiting couples operate are certainly flexible which indicates the potential for on and off partnerships between the parents of children born in such relationships. As a result, children born to cohabiting couples are more likely to live in single-parent household given the inherent fluidity of cohabitation practices.

In Kenya, there are no statistics on cohabitants because they are not recognized by the state as there is no law legitimizing them. Religious groups have condemned this because it is novel to the African society and it is believed to be a practice that leads to moral decadence.

It would then follow that while children were valued be it that they were got in wedlock or outside wedlock, they were accepted as having an entitlement to the estate of their deceased father. A woman who also offered her life to bear children for that man is also entitled to this. Failure to acknowledge this would spot out injustice towards the woman[17].

In Kajubi v Kabala[18] court took judicial notice of the fact that getting children out of wedlock was so common and widespread that discrimination between legitimate and illegitimate children would be detrimental to a larger section of the community and thus contrary to natural justice.

Court of Appeal in Peter Hinga v Mary Wanjiku[19] was however of the view that there is no legal duty on the part of the unmarried father to maintain his illegitimate children.

Laslett P. Bustards in 'Illegitimacy in the 19th century'[20] stated that bastard children were seen as economic problem likely to drain on scarce communal resources. If the genitor of the bastard could be found, then he

[17] uwonet.or.ug/2013
[18] (1944) EACA 34,36
[19] (1977)H.C.C.A 94
[20] Volume 210 (London 1980) 1003-1004

was put under great pressure to accept responsibility and maintain the child.

In the Unites States, early 1970's a series of Supreme Court decisions abolished most, if not all of the common law disabilities of illegitimate children as being violations of the equal protection clause of the 14th amendment to the United States constitution.

In most natural jurisdictions, the status of a child as a legitimate or illegitimate heir could be changed in either direction under civil law.

Jenny T. and Samantha W. state under Cornell University Press 1986[21] view that by the final 3rd of the 20th century in United States, all the states had adopted uniform laws that codified the responsibility of both parents to provide support and care for the child regardless of the parents marital status and gave illegitimate as well as adopted persons the same rights to inherit their parents property as anyone else.

Article 7 of the United Convention on The rights of the Child[22] states that the child shall be registered immediately after birth to a name, the right to acquire nationality and as far as possible the right to know and be cared for by his or her parents.

Starting from the premise that a right is a legally protected interest, the child's right to financial support is an interest of the child to have enough funds secured for him to meet his changing needs as he grows up to secure an adequate standard of life[23].

The status of childhood entails many disabilities that render the child vulnerable and dependent on the adult community and for this reason, they are entitled to special care and assistance.

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[21] Page 209
[22] Of 1992
[23] Article 16 of the 1992 UN convention

Child support is often arranged as part of a divorce, marital separation and dissolution of a civil union and may supplement alimony or spousal support arrangements, annulments and determination of parentage.

The 1992 United Nations convention is a binding convention signed by every member nation of the UN and formally ratified by all, declares that the upbringing and development of children and a standard of living adequate for the children development is a common responsibility of both parents and a fundamental human right for children and asserts that the primary responsibility of both parents and a fundamental human right for the children vests with their parents under Article 18.

Right to child maintenance as well as specific implementation and enforcement measures has been recognized by various other international entities including Council of Europe, the European Union and the Hague Conference.

Further in the research, consideration will be made to the Children's Act of 2002 of Kenya as well as the Children's Act of Uganda on what they provide about maintenance and how the law can be applied in relation to children conceived in cohabitation unions.

More so, Succession Acts of both jurisdictions will be stated to realize what the law provides about inheritance of such children as well as partners in case of the death of one.

A research carried out by Uganda Law Commission on the reviews of laws on succession in Uganda[24],when they asked the public on what percentage such a surviving cohabiting a partner should be entitled to varying responses were given with some proposing 15% similar to that of a spouse and others proposing ranges from 10% to 30%. Others proposed that the percentage should be equivalent to what he or she contributed to the deceased's estate.

[24] July 2013

The majority of the implementers were of the view that such a cohabiting partner should benefit in consideration to the partner's contribution to the deceased's estate and because he or she has to look after the children.

Cohabitation is common in many societies although not defined or recognized under our laws. The Succession Acts do not recognize such unions in cases of intestacy. It is the case that many unions are informal; therefore restricting the definition of a spouse to persons within formal unions would have the effect of excluding the majority from the ambit of available legal protections.

Most importantly, Bromley's Family Law[25] defines family as the basic social unit of society constituted by at least two people whose relationship may fall under one of these categories of; husband and wife, persons living together in a manner similar to that of spouses as recognized by English law or persons living together whether related by blood or marriage.

All in all, the sanctity of marriage should be preserved and the courts should create an impression that marriages sanctioned by civil, religious, and customary authority confers more privileges, rights and responsibilities than presumed marriages. Although freedom of living together should not be curtailed, parties to cohabitation should know the implications of their living together. Where children become the outcome of the cohabitation, the interest of the children should come first[26].

Although certain regulation has allowed cohabitation to come to look very much like marriage, marriage is still considered the preferred status both statutory and personally.

1.8 Research methodology

The study will be qualitative and dependent on published documents, secondary data, newspapers, textbooks and reports from the internet and libraries materials to realize the information in the research.

[25] 8th edition

[26] Kirui Kiprono Calvin, Family, Law and cohabitation and its legal implications, 2015

CHAPTER TWO

2.1 Introduction

This chapter explains how the law on the entry marriage has developed and what the current requirements for a valid marriage are. It contrasts these with cohabitation outside marriage.

Traditionally and historically, marriage was the only acceptable form in which intimate relationship could be given recognition. Later, people started entering into more diverse forms of relationships and attach legally enforceable consequences to them.

The current focus of attention is upon the extent to which relationships other than heterosexual and state-recognized marriages should be recognized.

The legal recognition of adult relationships has always occupied the minds of policy-makers over the extent of prohibitions on marriage between those who are distantly related either by blood or marriage and the problem of 'clandestine marriage' and loss thereby of their landed estates to the rogue seducers[27].

Marriage is declining in popularity although it is likely that most people will marry at some point in their lives. This has been so due to the growth in cohabitation outside marriage.

Marriage is enshrined in human rights law and may be seen as a fundamental part of the freedom of the individual to form personal relationships according to his or her own inclination[28].

Article 12 of the European Convention provides that men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right.

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[27] C Brooke, The Medieval Idea of Marriage(1986) ch 6

[28] Nigel Lowe and Gillian Douglas, Bromley's Family Law 10th Edition 2007

In the case of Sheffield and Horsham v United Kingdom[29] it was established that Article 12 of the European Convention provides only one right that is the right to marry and found a family and therefore no right to found a family outside marriage.

Marriage whether civil or religious is a contract formally entered into and confers on the parties the status of husband and wife, essence of the contract and to love one another to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations that are sharing common home, domestic life, enjoy each other's society, comfort and assistance[30].

2.2 Definition of Marriage

Marriage was defined in Hyde v Hyde[31] as the voluntary union for life of one man and one man to the exclusion of all others. The definition involves four conditions that is it must be voluntary, the union must be for life, be between heterosexuals and monogamous[32].

In R v Amkeyo[33] Justice Hamilton described marriage as the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to a considerate confusion of ideas. The elements of a so-called marriage by native custom differ so materially from the ordinary accepted idea of what constitutes a civilized form of marriage that's difficult to compare the two.

The Marriage Act 2014 defines marriage under section 3 as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act. Further, parties to the marriage have equal rights and obligations at the time of the marriage, during the marriage and at dissolution of the marriage.

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[29] (1999)27 EHRR 163
[30] This is as per Munby J in Re E(An alleged patient)(2005)1 FLR 965
[31] (1866)LR 1 P&D 130,133
[32] Bromley's Family Law 10th edition
[33] (1917)7 EALR 14

The Marriage Act of Uganda does not define what marriage is and this presents a lacuna in the law. The Marriage and Divorce Bill 2009 defines marriage as the union between a man and a woman for life or until it is dissolved in the manner accepted by that form of marriage and which is recognized under the Laws of Uganda.

The definitions from the two statutes however different bring out the conditions previously stated for a union to be considered as marriage.

Marriage can either be one conducted with the rites of Christian denomination, civil, customary, one in accordance with Hindu rites and one conducted under Islamic law[34].

These types of marriages were established to enable those in relationships to achieve a status functionally equivalent to marriage and thus give recognition to their partnership.

Entry into marriage has to be in accordance with the provisions of the law in other words the parties to the contract must have the capacity to enter into one.

The age provided under the law is 18 years to be entitled to enter into marriage under section 4 of the Marriage Act 2014. Marriage Act Cap 251 provides for 21 years but the 1995 Constitution of Uganda as amended makes reference to 18 years creating the presumption that a person who has attained that age can be considered as an adult.

The parties should be of different sexes that are male and female. In Corbett v Corbett[35] the respondent who was male at birth was not a woman and therefore the marriage was held to be void.

Issues of consanguity and affinity are also relevant as if the parties are in any way related by blood or marriage, the marriage can be regarded as void. In Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi[36] the father

[34] Section 6 of the Marriage Act 2014
[35] (1971)P 83
[36] 2006

of the respondent went to court to stop the wedding of the respondents from being celebrated because they were from the same Ndiga clan. The court granted the order sought by the appellant.

The grounds mentioned above regarding the capacity to enter into marriage are very essential as lack or adequacy of one of them can render the marriage void. This is reflected under section 11 of the Marriage Act 2014 and section 34 of Marriage Act Cap 251.

Other factors can render a marriage void for example if the marriage was celebrated in a manner which is not in accordance with the law as was in Gereis v Yagoub[37] where the parties went through a purported ceremony of marriage at a Coptic Orthodox Church not registered for marriages and the marriage was held to be void.

Consummation, lack of consent, mental disorder, venereal disease and pregnancy by another provide for grounds that a marriage can be voidable on the option of either party[38].

2.3 Presumption of Marriage

It has long been established that if a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married[39]. The parties are validly married albeit that there is lack of evidence to conclusively show this.

The phrase 'common law marriage' is frequently used erroneously to suggest that a couple who plainly never did enter into marriage have acquired the status through mere cohabitation[40].

If the marriage is challenged, the burden lies upon those challenging it to prove that there was in fact no marriage and not upon those alleging it to prove that it has been solemnized.

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[37] (1997)1 FLR 854
[38] Reference to be made to section 12 of the Marriage Act 2014
[39] Bromley's Family Law 2007 Page 64
[40] A Barlow 'Just a piece of paper' Marriage and Cohabitation (2001) page 45-6

This is one of the most significant developments in the recent decades with the growth in number of heterosexual couples living together outside marriage.

Baroness Hale of Richmond in 'Unmarried Coupled in Family Law'[41] states that there is a continuing and longstanding debate concerning how far such couples should be given recognized legal status, akin, If not equal, to marriage and this debate has prompted a variety of policy responses in different parts of the developed world.

It is important to note that section 76 of the Marriage Act 2014 provides that except as provided in this section a promise by a person to marry another person is not binding.

2.4 Definition of Cohabitation

Nigel Lowe and Gillian Douglas in Bromley's Family Law[42] define cohabitation in four ways. They make reference to the Domestic Violence and Matrimonial Proceedings Act[43] to come up with the four ways to describe cohabitation.

First, the couple is living together. Once a partner had left the home because of the other's violence he or she was no longer 'living with' the other so as to come within the statute and claim its protection. Courts imply that the parties must have been living together at the time of the incident which led the applicant to leave the home.

Secondly, they are living in the same household. The provision of the Act required that for one to bring a claim under the Act they should be living together in the same household. In Adeoso v Adeoso[44] the couple lived together in a two-bedroomed flat but slept in separate rooms and communicated with notes. They continued sharing the expenses and court described this relationship as 'exactly comparable to a marriage which is in

[41] (2004) page 32
[42] Page 100
[43] 1976
[44] (1980) 1 WLR 1535,CA

the last stages of a break up. In practical terms you cannot live in a two bedroomed flat with another person without living in the same household. You have to share some things as the lavatory and it would be quite artificial to suggest that two people living at arm's length in such a situation are said to be living in separate households'.

Thirdly, the couple should be a man and a woman. The Act referred to a man and a woman living together. This can be reconciled with the definition of cohabitation under the Black Laws Dictionary. It defines cohabitation as the act of a man and a woman openly living together without being married to each other.

Lastly, the couple should be living as husband and wife. This implies some quality in the arrangement between the two, fact arrangements that are not sanctioned by either civil, religious or customary law but where a man and woman decide to live as husband and wife.

The case of Kimber v Kimber[45] gives a broad explanation of cohabitation where the couple is living as husband and wife. The ex-husband was required to pay maintenance to his former wife until she remarried or cohabited. He claimed that her fiancé was cohabiting with her and stopped payments. She then sued for arrears. The fiancé had been a lodger at the ex-wife's bed and breakfast establishment but he moved out and rented a flat elsewhere. However, he spent much of his time with her often staying the night and he helped her run the business.

In concluding that the couple was cohabiting the judge considered the following factors as material:

1. Living together in the same household
2. Sharing of daily life, living together inevitably involve a mutuality in the daily round of sharing of tasks and duties
3. Stability and degree of permanence in the relationship; that is not a temporary infatuation or passing relationship

[45] (2000)1 FLR 383

4. Finances
5. Sexual relationship
6. Children
7. Intention and motivation
8. The opinion of the reasonable person with normal perceptions

Further, in Butterworth v Supplementary Benefits Commission[46] the female applicant was refused welfare benefits on the basis that she was cohabiting. She was being cared for in her own home after a serious accident by her former partner. The court on appeal found that he was doing this out of loyalty and friendship. The court concluded that the couple was not living together as husband and wife because it was not their intention to do so.

In emphasizing this criterion, the court confronted the question of what is meant by the expression living 'as husband and wife' as distinct from 'as lovers'. It demonstrates that the statutory language in such provisions does indeed apply marriage-likeness or marriage-equivalence, as the key criterion for eligibility.

The above cases and explanations can be reconciled with the following East African cases.

The Kenyan courts have traditionally sought reliance on the English common law principle of presumption of marriage as a vehicle through which cohabitation unions may be legitimized as amounting to a marriage. Section 3(1) of the Judicature Act[47] identifies common law as a source of law in Kenya.

In Kisito Charles Machani v Rosemary Moraa[48] where the plaintiff sought various orders; inter alia, a declaration that the defendant is not the wife of the plaintiff. The defendant filed a defense in which she stated that the plaintiff's wife according to Kisii Customary Law and or by virtue of the

[46] (1981) FLR 264
[47] Cap 8 Laws of Kenya
[48] HCCC MISC NO.364 OF 1981 NAIROBI

common law, presumption of a valid marriage following a long period of cohabitation as husband and wife and acceptance by the community, they had sired three children. The brother of the plaintiff testified that no dowry and no formal marriage ceremony of any nature whether by law or custom or in church took place at any time.

The court stated that it had no hesitation in finding that whilst none of the formal ceremonies which would normally be expected to be performed in a Kisii Customary Marriage were in fact performed, nevertheless the intention in the relationship between the plaintiff and the defendant was to establish the relationship of man and wife and that both families knew so and accepted to.

The requirement of the need for quantitative and qualitative cohabitation was seen in the case of Mary Njoki v John Kinyanjui Mutheru and 8 others[49]. The appellant was a girlfriend of the deceased since her university days and his at the Kenya School of Law. He would save money from his pocket money to send her to campus. After their graduation they lived together at different places until the boyfriend died. The appellant claimed a share of the deceased's estate which was opposed by the deceased's brothers who argued that she was not the deceased's wife.

The court held that the presumption of marriage could be upheld in this circumstance. The judges stressed the need for quantitative cohabitation long and having substance. They gave examples of having children, buying property together which would move a relationship from the realm of concubinage to marriage.

The court in Hortensia Wanjiku Yawe v Public Trustee[50] provided that a party seeking to rely on presumption of marriage must prove two elements that is prolonged cohabitation and that they held themselves out to the general public as a married couple. Unfortunately, there is no fixed period that automatically gives a rise to the presumption.

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[49] 2014

[50] Succession cause 1385 of 2010

Further, in R v Fita s/o Mihayo[51] the accused cohabitated with a lady for between 4-8 months. The accused found the lady performing a sexual act with another man and promptly killed the man. In his defense on a charge of murder claimed that he was provoked.

The court then had had to consider whether the aforementioned period of cohabitation could be presumed marriage. The accused relied on customary law, which provides that a man can take a woman as a wife and cohabit with her even before payment of dowry. If the woman then involves herself with another man, that would amount to provocation. The court therefore held that the 4-8 months cohabitation constituted marriage and the charge against the accused was reduced to manslaughter.

The Judicature Act 1996 of Uganda provides under section 16 the laws applicable in Uganda which are statutory law, common law; doctrines of equity and customary law.

In Negulu Milly Eva v Dr. Serugga Solomon[52] the two parties were customarily married but they had not registered the marriage as required under the Customary Marriages (Registration) Act[53]thereby the rights and obligations arising therefrom cannot be enforced and the appeal arose from this.

The two parties had cohabited from 1996 up to 2006 when the relationship went sour the petitioner filed for divorce and other prayers arising therefrom. Therein he claimed that the petition was misconceived and unsustainable in its current form because the petitioner was relying on a customary marriage which never was since it has never been registered as required by the law.

Court established that there is no provision that renders a customary marriage illegal for failure to register and therefore making it illegal to enforce the obligations under the said marriage.

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[51] (1970) HCD 58
[52] Civil Appeal No.103 of 2013
[53] Cap 248 Laws of Uganda

The petitioner also had prayers especially as regards to property acquired jointly during her time of cohabiting with the respondent. The judge gave reference to Article 26(1) of the Constitution of Uganda 1995 as amended that a person is entitled to property even that acquired with association with other people. He further stated that the magistrate would have considered the period of cohabitation which is not denied and determined whether during the said cohabitation the petitioner jointly acquired property with the respondent with the respondent within the provisions of Article 26(1) of the Constitution. She was therefore entitled to a portion of the property.

If there is proof of joint ownership, at separation, the parties will divide their property accordingly. However, for a party to succeed in this action there must be proof that the property was owned or accumulated jointly. In essence, every contribution one makes however small must be documented or recorder in any form[54].

Uganda does not have any statute or law that provides for cohabitation and more so, the number of cases brought under this subject matter are scarce therefore not a lot of reference can be made to case laws in Uganda.

In conclusion, the above issues discussed demonstrate the sensitiveness and difficultness in arriving at a workable general definition of cohabitation for which a legal status might be arrived at. They indicate why the extension of legal protections has been ad hoc and why the definitions have not been uniform. Context is of paramount in this area of concentration.

Whether it would be possible or desirable to produce a uniform definition and status to apply to all contexts is a debatable point and not one which either the Government or Parliament seem keen to tackle in the near future.

[54] Observer.ug/viewpoint/45007-there-are-rights-in-cohabitation-though

CHAPTER THREE

3.1 Introduction

At common law the principal effect of marriage was that for many purposes it fused the legal personalities of husband and wife into one [55]. The very being or legal existence of the woman is suspended during the marriage or at least incorporated or consolidated to that of the husband. With this in mind, consideration needs to be made to cohabitants as to property and personal consequences relationships.

Thereby, this chapter basically examines the relationship consequences of cohabitants with regards to property before and after the commencement of the relationship.

The impact of cohabitation outside marriage upon the concept and development of property ownership has until recently been negligible. The incidence of cohabitation has steadily increased and can certainly no longer be regarded as being usual.

Pending thorough-going reform, property law is the determination of disputes between cohabitants although that law was essentially conceived and developed for married couples[56]. Property rights are still of the greatest importance on the death or insolvency of one spouse, because they alone will have to be applied to resolve any dispute between the spouse and the personal representatives or creditors.

3.2 Property acquired before the relationship

Property owned by the partners on entering the relationship either marriage, civil partnership, engaged couples or cohabitants will not affect the ownership of property vested in either at the time.

Neither statutes provide for this but section 125 of the proposed Marriage and Divorce Bill provides that any interest of any person in any immovable

[55] Bromley's Family Law (2007) Page 107
[56] Bromley's Family Law Page 127

or movable property acquired before the marriage shall not be affected except by implied or express agreement as constructed through conduct. This proves to be good law as each party gets to retain certain part of his or her portion especially in cohabitation relationships where the time spent by the partners together is not certain, it can come to an end at any time.

3.3 Income and investments

Income of either partner, whether from earnings or investments will prima facie remain his or her own property.

Where the partners pool their incomes and place them in a common fund, both acquire a joint interest in the whole fund. It seems clear that the principle of a joint interest in a common fund rests not upon the relationship between the contributors but upon the purpose for which the fund was founded and the use to which it is put.

In Jones v Maynard [57] the husband who was about to go abroad with the RAF, authorized his wife to draw on his bank account which was thereafter treated as a joint account. Into this account were paid dividends on both the husband's and wife's investments, the husband's pay and allowances, rent from their matrimonial home which was their joint property. The husband's contributions were greater than the wife's, the spouses had never agreed on what their rights in this fund were to be but they regarded it as their joint savings to be invested from time to time.

The husband withdrew money on a number of occasions and invested it in his own name and finally after the spouses had separated, he closed the account altogether. The marriage was later dissolved and the plaintiff sued her former husband for half share in the account as it stood on the day it was closed and in the investments which he had previously purchased out of it.

Vaisey J held that the claim must succeed. He stated that where there is a joint account between husband and wife, a common pool into which they

[57] (1951) Ch D 572

put all their resources, it is not consistent with the conception that the account should thereafter be picked apart and divided up proportionately to the respective contributions of husband and wife, the husband being credited with the whole of his earnings and the wife with the whole of her dividends. A husband's earnings or salary when the spouses have a common pool are earnings made on behalf of both; and the idea that years afterwards the contents of the pool can be dissected by taking an elaborate account as to how much was paid in by the husband or wife is quite inconsistent with the original fundamental idea of a joint common pool.

In instances of co-ownership of land, it may be by way of joint tenancy or tenancy in common. At law, the preference was in favor of joint tenancy since this has conveyance and feudal advantages.

Article 26 of the Constitution of Uganda gives connotations for the joint tenancy or co-ownership by guaranteeing ownership of property by all Ugandans individually or in association with others[58].

Section 56 of the Registration of Titles Cap 230 Act[59] provides the legal assumption as to the joint tenancy is stated as follows; two or more persons who are registered as joint proprietors of land shall be deemed to be joint tenants and in all cases where two or more persons are entitled tenants in common to undivided shares or in any land those persons shall in the absence of any evidence to the contrary be presumed to hold that land in equal shares.

If cohabitants enter into a joint lease, they will be jointly liable for the rent. Each of the cohabitants is only liable for his/her share of the rent. If the lease agreement states that they are both jointly and severally liable, then they each may be liable for the whole amount of the rent. Where the relationship is terminated before the lease has expired, the parties will have a deadlock if they cannot decide who is to remain in the home. In this event, they both have a right to remain in the home.

[58] Provision similar to Article 40 of the Constitution of Kenya of 2010
[59] Laws of Uganda

If they do decide, and the lease agreement creates joint and several liabilities, if the cohabitant who remains default on rent payments, the lessor will have a claim for full payment against both parties. Where the cohabitants decide between themselves that one partner will be indemnified from further liabilities to pay rent, such an agreement will only be valid and binding between the two of them. The lessor may still hold both of them liable for rent payment.

In cases where the lease agreement is signed by only one partner, the non-tenant partner has no legal rights and responsibilities, and is therefore not liable to pay rent. However, he/she also has no security of tenure and can be evicted by the tenant partner if the relationship fails. Where the lease agreement contains a clause prohibiting occupation of the premises by any person other than the tenant, the lessor has the right to terminate the lease if he/she discovers that the tenant is cohabiting.

3.4 Housekeeping allowance and Maintenance

If a husband supplied his wife with allowance outside of his own income, any balance and property bought with the allowance prima facie remained his property[60].

This could work an injustice for it took no account of the fact that any savings from the house keeping money were as much due to the wife's skill and economy as to her husband's earning capacity[61] .

This doesn't apply to all civil partners, cohabitants nor engaged couples, though consequently common law rules are still relevant to these and any unspent balance or property or investments purchased with it will belong to the provider for the housekeeping allowance. It is nevertheless open to the courts to infer an intention that the unspent balance should belong to the partners jointly[62].

[60] Blackwell v Blackwell (1943) 2 ALLER 579
[61] Rimmer v Rimmer (1953) 1 QB 63
[62] Bromley's page 136

The Kenyan and Ugandan statutes do not provide for any kind of maintenance to the cohabitants.

Part XII of the Marriage act of Kenya 2014 provides for maintenance for only spouses or former spouses. The cohabitants are nowhere mentioned in the provision.

On the other hand, the Marriage Act of Uganda is silent about maintenance of the neither spouses nor cohabitants but the Divorce Act Cap 249 provides for maintenance of the wife under sections 23 and 24 that is alimony pendent lite and permanent alimony. Cohabitants are as well excluded from this provision.

The Marriage and Divorce Bill under section 159 provides for maintenance from his or her former spouse but this ceases where the spouse is remarried.

Maintenance of children is also paramount whether there existed a valid marriage or not. Article 7 of the United Nation Convention on the Rights of a Child provide that the child shall be registered immediately after birth to a name, the right to acquire nationality and as far as possible the right to know and be cared for by his or her parents.

Starting from the premise that a right is a legally protected interest, the child's right to financial support is an interest of the child to have enough funds secured for him to meet his changing needs as he grows up to secure an adequate standard of life[63]. The status of childhood entails many disabilities that render the child vulnerable and dependent on the adult community. For this reason, they are entitled to special care and assistance.

Child support is often arranged as part of a divorce, marital separation and dissolution of a civil union and may supplement alimony as spousal support arrangements, annulments and determination of parentage.

[63] Article 16 of the aforementioned Convention

Article 18 of the Convention further provides that the upbringing and development of children and a standard of living adequate for the children's development is a common responsibility of both parents and a fundamental human right for children and asserts that the primary responsibility to provide for the children's development is a common responsibility of both parents and a fundamental human right for the children vests with their parents.

Article 31 of the African Charter on the Rights and Welfare of African Child provides that all actions concerning children whether undertaken by public or private welfare shall be of primary consideration.

In the case of Pulkeria Nakaggwa v Dominiko Kiggundu[64] Odoki CJ held that welfare in relation to custody and maintenance means that all the circumstances affecting the wellbeing and upbringing of the child have to be taken into consideration and the court has to do what a wise parent acting for the interest of the child has to do.

The mother, father or guardian of the child may bring an application for a maintenance order against the father or mother of the child as the case may be. Section 91 of the Children Act Cap 141 of Kenya provides for this as well as section 76 of the Children Act Cap 59 of the Laws of Uganda.

The application can be made during a subsisting marriage, separation, declaration of parentage and divorce before the child attains the age of 18 years[65]. This therefore implies that the application can be made whether there is a marriage or not as the welfare of the child is paramount[66].

The maintenance may be paid in periodic payments or as a lump sum payment as the court shall deem fit to the person in whose favor the order is made or to any person appointed by the court.

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[64] (1978) HCB 310
[65] Section 76(3,4) of Cap 59 and section 92 of Cap 141
[66] Section 90(d) of Cap 141

The case of Angelina Revenan Mutalemwa v Benedict Felix Mutalemwa[67] Mwesiumo J held that on application of maintenance based on an alleged marriage which has not taken place cannot be sustained. This case is bad law as the paramount consideration in such instances is the welfare of the child.

Sections 24 and 25 of the Children Act Cap 141 provides that for who has parental responsibility and acquisition of parental responsibility by the father for children born out of wedlock and the case of JGM V CNW[68]observed that such a law is discriminatory against children born out of wedlock and called for the legislature to consider amending the law. The best interests of the child are supreme and court called for parental responsibility even though it was cohabitation.

More so, the case of Machani v Vernoor[69] COA held that courts can presume existence of a marriage where there has been a ceremony of any form followed by cohabitation or under customary law and the respondent has to show their marriage fits in any of the laws.

The Affliction Act 142/1959 now repealed, required a man who fathered a child out of wedlock to support such a child as it took cognizance of the welfare of the child.

Further, in Irene Wayera Katua v James Mutonga Mulenge[70] the respondent refused to support his two children born from his cohabiting union with their mother. The substantial question was whether a father should during his lifetime be responsible for the maintenance of infant children (albeit illegitimate) and it was held that the children of a mistress should be maintained by their father during his lifetime and not to wait until his death before being protected by the Law of Succession Act.

3.5 Personal property

[67] (1981) LR TN44
[68] (2008)1 e KLR 86
[69] (1985) CA 50 KLR 859
[70] (1998) NRB HCCC 3415

Any property purchased by one partner with his or her own money will presumptively belong exclusively to that purchaser.

A gift bought by one partner for the other will become the donee's. Hence, if a man buys clothes for his partner or gives her money to buy them herself, they become her property and the same rule will prima facie apply in any other case where goods are bought for the other's personal use. For example, in Windeler v Whitehall[71] a dressing table bought for unmarried cohabitant remained purchaser's property.

Property bought by one party but intended for both to enjoy may be subject to an express trust. In Rowe v Prance[72] a man bought a boat from the proceeds of sale of his former matrimonial house, telling his mistress that they would live together on it and sail round the world. She accordingly gave up her rented house and put her furniture in storage. The man told her that the title to the boat was in his name because on he only had an Ocean's Masters Certificate but that the boat was "ours". When the relationship ended, it was held that an express trust existed under which the couple had equal shares.

For cohabitants, property bought by one partner and put into the name of the other is presumptively held on a resulting trust by the latter for the purchaser.

More so, a loan by one partner to the other usually raises no presumption of a gift by way of advancement, so that the lender will be able to recover the sum lent in the absence of evidence that a gift was intended[73].

3.6 Matrimonial Home

Article 8(1) of the European Convention provides for right to respect for one's home and defines one's home as the place where (a person) and his

[71] (1990)2 FLR 505 at 517
[72] (1999)2 FLR 787
[73] Bromley's page 143

family are entitled to be left in peace free from interference by the state or agents of the state. It is an important aspect of his dignity as a human being and it is protected as such and not as an item of property.

Matrimonial home bought by one party and put into the name of the other is presumptively held on a resulting trust by the latter for the purchaser. In Walker v Hall[74] the proportions in which the parties hold the property in the resulting trust depend upon their contributions.

Proprietary estoppel in property was referred to in Lloyd's Bank Plc v Rosset[75], where it was stated that once an agreement to share property has been found the claimant must show that he or she acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.

Even though the primary purpose of the trust may have come to an end on the separation of the parties, the trust for land nevertheless remains and the property in effect becomes an investment. In Hall v Hall[76] CA held that in the case of unmarried cohabitants the home should be valued at the time of separation.

If the wife or partner consents to conveyance of mortgage, she cannot argue that any interest she may have in the property takes priority over the purchaser's or the mortgagee's. Mortgagee will take the property subject to any beneficial interest which the wife or partner has in the property.

Section 5 of the Mortgage Act 2009 of Uganda provides that for the mortgage of a matrimonial home there must be a written consent of the spouse(s) living together with the mortgagor in accordance with section 39 of the Land Act. Section 6 requires the mortgagor to disclose all the details of the mortgage to the spouse before consent is granted. Failure to do so

[74] (1984) FLR 126 at 133
[75] (1991) 1 AC 107 at 132
[76] (1981)3 FLR 379

may give a rise to a right of claim or appeal by the spouse especially where the possession and ownership of the matrimonial home is questioned.

In Kenya, section 12 of the Matrimonial Property Act[77] seeks to protect the interest of spouses in matrimonial property by restricting the sale, gift, lease, mortgage or otherwise during the subsistence of a monogamous marriage without the consent of both spouses. In polygamous marriages and cohabitation, consent may be necessary where property is owned jointly as the law seeks to treat the spouses equally considering the contribution of both parties to the home[78].

In Barclays Bank plc v O'Brien[79] where the court found that a husband had procured his wife as surety to a transaction by misrepresentation and Lord Brown Wilkinson held 'therefore in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of 2 factors that is the transaction is on its face not to the financial advantage of the wife and there is substantial risk that in procuring the wife to act as a surety the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction. It follows that unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights. In order to avoid being fixed with constructive notice, can reasonably be expected to take steps to bring home to the wife the risk she is running as standing surety and to advise her to take independent advice[80].

Section 31 of the Insolvency Act 2011[81] prohibits attachment of matrimonial home as part of the bankrupt's estate available to his or her creditors.

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[77] No. 49 of 2013 Laws of Kenya
[78] Jurisnooks.com/2015/09/11/property-disposal-spousal-consenttill-death-us-part
[79] (1994) 1 AC 180
[80] The judgment was stated in Nalima and 4 others v Sebyala and 4 others Misc. Application No. 396 of 2013
[81] Laws of Uganda

The question of absolute importance is whether the above also applies to a home belonging to cohabitants. In my opinion, cohabitants are as well entitled to protection of their home and in instances of sale or mortgage; consent of both partners is paramount as the value of contribution of each party is of relevance. Furthermore, if the partners are residing with their children, it would be unfair to deprive them of their shelter as in such instances the welfare of the children take priority.

In conclusion, as explained above, the cohabitants have right to property even though it is not expressly provided for under the laws of Kenya and Uganda. As a result, a partner in such a relationship may bring a claim against the property of the other partner where aggrieved and also in instances of succession as will be illustrated in the next chapter.

CHAPTER FOUR

4.1 Introduction

If one is married or in a civil relationship, this gives your surviving spouse or civil partner a legal right to a share of your property when one partner dies no matter what was specified or said in the will. This however does not apply to cohabiting couples.

There is, therefore, no law that regulates the rights of parties in a cohabitation relationship. Cohabitation generally refers to people who, regardless of gender, live together without being validly married to each other. In the past, these relationships were called extramarital cohabitation. Put simply, men and women living together do not have the rights and duties married couples have. Because their relationship is not recognized by the law as a marriage, the rights and duties that marriage confers do not apply. This is the case irrespective of the duration of the relationship.

Therefore contrary to popular belief, the assumption that if you stay with your partner for a certain amount of time a common law marriage comes into existence whereby you will obtain certain benefits is incorrect. In Kenya and Uganda, cohabitation has become more common over the past few years and the number of cohabitants increases by each year.

Unlike marriage, which is regulated by specific laws that protect the individuals in the relationship, cohabitation offers no such comfort. For example, when a cohabitant dies without a valid will, their partner has no right to inherit under the Succession Act of Kenya and Uganda.

The law as it stands is unsatisfactory, simply because it does not place cohabitants on the same footing as partners in a marriage or civil union.

The Marriage Act of Kenya only defines cohabitation and stops at that while the Marriage Act of Uganda does not mention anything about cohabitation but the Marriage and Divorce Bill tries to resolve this lacuna. However, the status of cohabitants in these jurisdictions will remain significantly different.

Although legally cohabitants do not have the same rights as partners in a marriage or civil union, the courts have on occasion come to the assistance of couples by deciding that an express or implied universal partnership exists between them. A universal partnership exists when parties act like partners in all material respects without explicitly entering into a partnership agreement.[82]

Universal partnerships aside, there is some instances that places cohabitation and marriage on an equal footing:

- Either partner in a cohabitation relationship may name the other as a beneficiary in a life-insurance policy. The nomination will, however, have to be clear, because a clause in an insurance policy that confers benefits on members of the insured's 'family' may cause problems. And if a policy, for instance a car insurance policy, covers/excludes passengers who are members of the insured's family, this provision does not operate to the benefit/detriment of the insured's partner.
- The law does not distinguish between married and unmarried parents in regard to the obligation to maintain children. Decisions regarding care and contact are based on what is in the best interests of the child. Children are protected if the couple is not married since both biological parents are responsible for the maintenance of their children. The father and mother are both still liable for maintenance if the couple splits up. This will not apply to same sex couples as both cannot share a biological link with the child.
- A domestic partner may receive pension fund benefits as a nominee. A domestic partner may also receive pension benefits as a factual dependent if he/she qualifies as such under the definition of

[82] The law on Cohabitation-Family law.html

'dependent' in the regulations or conditions of that particular fund. A domestic partner will, however, not be entitled to their partner's pension interest on termination of their relationship.

It's becoming more common for partners in a cohabitation relationship to draw up a contract. Such an agreement will usually contain regulations regarding finances during the existence of the cohabitation relationship and deal with the division of property, goods and assets upon its termination. Parties may even include an express provision for the payment of maintenance upon termination. If one partner refuses to follow the agreement, the other partner can approach a court for assistance. In most cases, a court will enforce the agreement.

A partner may apply to court for an order to divide the property of the other partner in a fair manner. The partner who applies for the order must be able to show that he/she contributed, directly or indirectly, to the maintenance or increase in the other partner's separate property during the relationship.

In the absence of a cohabitation agreement or a proven universal partnership, private property acquired by the cohabitants prior to their relationship belongs to the partner who originally acquired it and no community of property can be established as discussed in the previous chapter. It therefore follows that a cohabitant who is not the owner of the property has no special right to occupy the common home. Cohabitation per se does not give rise to automatic property rights, but the ordinary rules of the law of contract, property and unjustified enrichment might be invoked by cohabitants to enforce their rights.

Similarly, if there is no cohabitation agreement or proven universal partnership between the cohabitants, property bought during the relationship will belong to the purchaser thereof, unless it can be proven otherwise.

If partners who are separate homeowners decide to live together, usually one will sell his/her home and move in with the other. If one partner gives up his/her property and over the years pays the proceeds of the sale towards the other partner's property or the new family, or invests in the

new joint household in any way, when they split up, the other partner will be entitled to keep the house and, in the absence of an agreement, the non-property owning partner may be left with no home. A partner may claim against the other on the basis of unjustified enrichment if he/she made a genuine financial contribution, for example where both contributed jointly to the purchase of a house but it was registered in only one of their names. Unjustified enrichment is the general principle that one person should not be able to benefit unfairly at the expense of another.

4.2 Cohabitation and inheritance

There is no right of intestate succession (when someone dies without a will) between domestic partners, no matter how long they have lived together. A partner is not automatically regarded as an heir or dependent. The rules of intestate succession as set out in the two Succession Acts are clear. In the event of there being no valid will, the beneficiaries are, in the first instance, a spouse or descendants or both. In the event of there being no spouse or descendants, the estate devolves upon other more distant members of the bloodline.

If the surviving partner is not named in a will, he/she will be faced with the monstrous task of having to prove his/her specific contribution to the joint estate before entitlement will be forthcoming. Proving actual contribution is often extremely difficult, especially when a partner has died. Litigation is usually lengthy, costly and unwelcome, particularly at a time already fraught with emotional trauma. This problem is exacerbated if the deceased had not divorced a previous spouse. In law, the first spouse clearly has the leverage to proceed and claim the entire estate.

There is no obstacle to making specific provision for a domestic partner in a will. A person is entitled to leave his/her estate to a partner even to the exclusion of his/her spouse.

Intestacy occurs where a person dies without having made a will or the person's attempt to die testate fails upon the invalidation of his will or the person revokes his will and subsequently dies without having made another will[83].

[83] Section 34 of the Law of Succession Act of Kenya

Intestacy may be a total or partial. It is total where the intestate has left no valid will. It is partial where a person fails to include all his property in his otherwise valid will or part of the will is declared invalid or a part of the will is revoked or a person acquires property subsequent to the making of the will that is not ambulatory. The property not covered by the will is governed by the intestacy provisions or is subject to intestate succession.

Provisions relating to intestacy are contained in Part V that is sections 32 to 42 of the Law of Succession Act of Kenya and Section 24 and 25 of the Succession Act of Uganda Cap 162. The intestacy rules only benefit people who also have a direct blood link with the intestate that is apart from spouses. It does not confer benefit on such categories as unmarried partners and parents-in-law. To benefit such persons the deceased has to make a will. In the absence of blood relatives, the estate passes to the state bona vacantia.

In the Matter of the Estate of Beatrice Amalemba[84] the deceased had been predeceased by her husband and the dispute was between her mother and her father in law and brother in law. It was held that her mother by virtue of blood relation was entitled to the estate and not the in-laws. To benefit persons outside the family circle you need to have a will.

Any one claiming to be a relative or a person beneficially entitled who considers that the rules of intestacy do not make reasonable provision for them may make a claim under the family provisions in section 26 of the Law of Succession Act, and the rules of intestacy may be varied by the court to make adequate provision for the person.

The rules of intestacy only apply to property that is capable of being disposed of by a will. They do not apply to joint property, which passes by survivorship, or to nominations, life policies written in trust, or the subject of a donation.

Both Succession Acts makes provision for both monogamous and polygamous situations and the nature of devolution of the property upon

[84] 2014

intestacy dependents on whether the deceased was polygamous or monogamous.

4.2.1 Rights of a Surviving Spouse under Intestacy compared to cohabitants

This applies to both the widow and widower. For the purposes of intestacy, a surviving spouse includes a judicially separated spouse but excludes a divorced spouse and cohabitants. This applies to all legal marriages whether contracted under statute or customary law. Under section 3(1) of the Law of Succession Act a separated wife is considered a wife for succession purposes while a divorcee is not[85]. The divorced spouse may make a claim under the family provisions in section 26 of the Act of Kenya for reasonable provision from the estate. The definition in section 29 of a dependent for the purpose of section 26 includes a former wife or former wives. Intestacy covers a wife recognized under section 3(5) of LSA of Kenya and section 2(u) of Cap 162 Laws of Uganda but not a cohabitee or a person claiming to be a wife under a presumption of marriage as it is not enforceable under the Marriage Act.

4.2.2 Intestate leaves spouse and child or children

This is dealt with in sections 35 and 37 of the Act of Kenya and section 26 of Cap 162 of Uganda. In such situations, the surviving spouse is entitled to the personal and household effects of the deceased absolutely and a life interest on the whole of the residue of the net intestate estate. Personal and household effects are defined in section 3(1) of the Act of Kenya to mean clothing, articles of personal use, furniture, utensils, appliances, pictures, ornaments, food drink and all other articles of household use and decoration normally associated with a matrimonial home, but it does not include anything connected with the business or profession of the deceased. A surviving spouse includes a wife married under the customary law arrangement of woman-to -woman marriage.

Under this provision, the surviving spouse only gets the chattels absolutely, and is only entitled to a life interest on the rest.

[85] Section 30(1) of Succession Act Cap 162

The ultimate destination of the property the subject of the life interest is to the children in the event of the demise of the surviving spouse section 35(5) of the Laws of Kenya.

A proviso to section 35(1) of LSA of Kenya and section 30 of Cap 162 states that if the surviving spouse is a widow the life interest determines upon her remarriage. In the Matter of the Estate of Charles Muigai Ndung'u (deceased) of Karinde Kiambu District[86] (Koome J), the woman who had been cohabiting with the deceased was held by the court to be a wife arising from a prolonged cohabitation. The court, however, found that she was not entitled to a life interest as she remarried after the demise of the deceased, but her child with the deceased was found to be the sole heir to the estate of the deceased. This provision does not apply to widowers and is thus discriminatory.

Section 37 of LSA of Kenya allows the surviving spouse during life interest, subject to the consent of all the co-trustees and all the adult children or the consent of the court, to sell any of the property the subject of the life interest for their own maintenance. Where the subject property is immovable, the consent of the court is mandatory.

The surviving spouse holds the property during life interest as a trustee and stands in a fiduciary position with relation to the property. The property does not pass to the surviving spouse absolutely. Where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she only enjoys a life interest and holds the same in trust for the children and other heirs (In the Matter of the Estate of Basen Chepkwony (deceased)[87] Koome J).

4.3 Rights of Children

The children of the deceased are the next category of next of kin of an intestate to benefit from an estate after any surviving spouse and unmarried partners. Where the intestate leaves a surviving spouse, the children are not entitled absolutely to property, but the surviving spouse holds the estate in trust for the children. The whole residue of the net

[86] HCP&A NO. 2398 OF 2002
[87] HCSC NO. 842 OF 1991

intestate estate, that is the portion subject to the life interest, devolves upon the surviving child, or if more than one, to the children.

A surviving spouse has the power of appointment that is the power to dispose of the capital of the intestate by way of gift taking effect immediately among the surviving child or children. The power cannot be exercised by way of will or to take effect at a future date.

It would appear that the division of the property between the children should be in equal shares[88]. In the Matter of the Estate of Kinyuru Karanja (deceased), Waweru J held that a proposal by a woman to share out the estate of her deceased husband among their sons in a manner which would have resulted in one of them getting a larger share was wrong. He directed that the estate be divided equally between the sons.

Omolo JA in Mary Rono vs. Jane Rono and another[89] where he expressed the opinion that section 40 does not provide that each child must receive the same or equal portion. In his opinion, this would work an injustice, particularly in the case of a young child who is still to be maintained, educated and generally seen through life.

Where the intestate has left a surviving child or children but no spouse the net intestate estate devolves upon the child or children. In Dorcas Njeri Kithuku[90] the deceased was survived by one child, a married daughter. It was held that as the sole survivor, she was entitled to the estate under section 38 of LSA of Kenya. The deceased was her mother, a wife in polygamous situation. The step kids of the deceased had applied and obtained the grant claiming their step-sister had no claim. It was held that the step-sons of the deceased had no superior claim to that of the deceased's own married daughter. Sons and daughter take equally, there is no discrimination.

[88] Section 33 of Cap 162
[89] CACA NO. 66 OF 2002
[90] 2013

In the Matter of the Estate of Mary Wanjiru Thairu (deceased)[91] a son and six daughters survived a single parent. The son attempted to inherit the entire estate. This application was rejected.

Reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters. In Peter Kiiru Gathemba and others vs. Margaret Wanjiku and another[92] Amin J stated that the LSA does not make a distinction between married and unmarried children in matters of intestate succession.

Unfortunately, some of the male members of the High Court bench still apply customary law in determining questions of distribution of estates as between male and female children. In the Matter of the Estate of Mutio Ikonyo (deceased)[93] the deceased had died in 1988, and the court held that a married daughter of the deceased was not entitled to a share of the estate. According to Mwera J the married daughter, being a Mkamba, ought to have known that under Kamba customary law only unmarried daughters or those divorced (and dowry returned) can claim to inherit.

The share of the estate to which children, who are below age, are entitled is held on statutory trust, the terms of which are set out in the Acts. In the Matter of the Estate of Loice Njeri Ngige[94] the court directed the administrators to open bank accounts on account of the minor survivor. It was further directed that the administrators' trusteeship was to terminate upon the minor survivor coming of age when all the property held in trust for her should revert to her.

If the intestate is survived by a spouse and child or children, then no other relative of the intestate will benefit. Other relatives can only access the estate through section 26 of the Law of Succession Act and sections 19 to 23 of Cap 162 for reasonable provision if they can show that they were dependent on the intestate immediately prior to his death.

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[91] HCSC NO.1403 OF 2002
[92] HCCA NO. 167 OF 1994
[93] HCP&A NO. 203 OF 1996
[94] HCP&A NO. 113 OF 1994

In the Matter of the Estate of Fatuma binti Mwanzi Umri (deceased)[95] the deceased was survived by her son and a brother. It was held that the son was the sole heir in intestacy and the brother could only access the estate through section 26 of the Act of Kenya.

4.4 Where the intestate leaves no surviving spouse or children

Section 39 of Law of Succession Act of Kenya and Part III of the Succession Act Cap 162 applies The net intestate estate should devolve upon the kindred of the intestate, that is blood relatives, in the following order: father, or if dead; mother, or if dead; brothers and sisters and any child or children of the deceased's brothers and sisters, in the equal shares, or if none; half-brothers and half-sisters and any child or children of the deceased's half-brothers and half-sisters in equal shares, or if none; the relatives who are in the nearest degree of consanguinity (blood relation) up to and including the sixth degree in equal shares; and if there are no such relatives the net intestate estate devolves upon the state bona vacantia. The estate is liquidated and the proceeds paid into the Consolidated Fund.

In the Matter of the Estate of Beatrice Amalemba[96] (Koome J), the deceased, a married woman, had been pre-deceased by her husband and died without children. A dispute erupted between her father and her in-laws on who was entitled to inherit and administer her estate. In determining the matter the court followed section 39 of the Act and held that the father of the deceased had priority in law to be issued with the grant of letters of administration for the administration of the estate of his deceased daughter, the fact of marriage notwithstanding.

In conclusion, as clearly seen partners are only entitled to certain property not all and the children are entitled to a part of the estate of the deceased regardless whether the union of the parents was legal or not.

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[95] HCP&A No.21 OF 1994
[96] HCSC No. 2610 0f 2000

CHAPTER FIVE

5.1_Introduction

It is important to examine why cohabitation has become widely spread among people especially the youth. Mostly, this is attributed to the western influences leading to social and moral degradation.

5.2 Conclusion of the study

This cultural and moral weakening is evident in the current state of family breakdown. To explain these changes, conservatives emphasize the breakdown of individual and cultural commitment to marriage .They understand both trends to be the result of greater emphasis on the short-term gratification and on adults; personal desires rather than on what is good for children. A climate of selfishness and individuality has apparently led to the present moral decline[97].

Cohabitation is a direct result of our national individuality. It is indeed well represented in the present state of our culture. Yet even in the midst of that moral decline, individuals who cohabit still desire to marry at some point in the future, possibly because the benefits of one over the other are intrinsically apparent to all.

Secondly, observation that most marriages have serious marital problems and the rising cases of divorce and separation make young people question the importance of marriage. Furthermore, they are less complicated to dissolve than marriages.

More, increased intimacy opportunity to share sexual and emotional intimacy without getting married and without being seen as a promiscuous. It offers more freedom than marriage since the partners are not legally bond. They can break up the commitment at whatever time they need; they do not have to visit courts to get separated legally.

[97] Janet Z. Giele, Decline of the Family: Conservative, Liberal and Feminist Views, 1996 at 19-20

The moral implications of cohabitation are however varied. There are positive and negative implications[98].

Some of the positive implications are social recognition and availability of safe or protected sex, cohabitation strengthens the marriage later between the couple, couples who cohabit before marriage are more prepared and confident about marriage and the risk of divorce is much higher for couples who lived together before they got married than for couples who did not cohabit.

The negative implications are: recognition of cohabitation in the law gives the impression that it is permissible and therefore a necessity to attempt to diminish the possibility of marital unhappiness and the long process of divorce, some of the struggles that arise from cohabiting is the vaguiety defined role of the cohabiting partner and it is apparently believed that men and women who cohabit are more likely to experience partner abuse and infidelity.

Cohabitation not only affects the partners but the children as well. Susan L. Brown in Centre for Family and Demographic Research[99] gives impacts of cohabitation on children. First, children born to cohabiting parents are more likely to experience parental break up and secondly, they are likely to initiate sex at an early age and are more likely to have teenage births than children born to married parents.

In conclusion, legal recognition of presumed marriages brought about by cohabitation should be handled with great care. The courts should be extra careful when deciding on cases of this nature so as to set a clear standard and factors that need to be proved in order to sustain a presumed marriage. This is because consistent precedents need to made clear in order to make the law predictable.

[98] Kirui Kiprono, Family Law, Cohabitation and Its Legal Implications 2015
[99] 2004, page 20-24

The courts should set a higher standard that couples need to meet in order to be presumed married. The sanctity of marriage should be preserved and the courts should create an impression that marriage should be sanctioned by civil, religious and customary authority to confer more privileges, rights and responsibilities than presumed marriages.

Where children become outcome of the cohabitation, the interest of the children should come first. Statutory provision of cohabitation should be enacted to provide for the requirements to be met by cohabiting couples to be legally recognized as married.

5.3 Recommendations

Ugandan statutes do not provide for cohabitation rights but the legislators tried to deal with this lacuna by introducing the Marriage and Divorce Bill 2009.

The Marriage and Divorce Bill 2009 defines matrimonial property, provides for equitable distribution of property in case of divorce and recognizes some property rights for partners that cohabit.

Some of the main advances also constitute the main points of contention:
- The ownership and division of property: The law defines marital property and the rules applying to the ownership of property acquired during marriage, including the notion of spousal contribution towards improvement of matrimonial property. These provisions are aimed at entitling women to their fair share of property in marriage and upon divorce. They have been criticized by some opponents to the bill, including some parliamentarians and religious leaders, as "unbalanced, favouring women", and "encouraging women to be hostile towards men and accumulate wealth".
- Cohabitation: Through this provision, the draft law aims to provide some protection to couples who cohabit without being married, representing the

majority of Ugandan couples. The draft law provides for the possibility to enter into an oral or written agreement relating to property. This provision only relates to cohabitation and does not apply to married couples.

However, this point is unclear to many, including within the NGO community. The law is perceived by many, including some faith-based leaders, to be promoting cohabitation versus marriage, or as recognizing cohabitation as a form of marriage[100].

The legislators should therefore consider accepting the bill subject to various amendments so that children and partners who may be vulnerable and misused are protected under the law.

5.2.1 Cohabitation by way of affidavit

The fact that cohabitation unions are invalid under our laws and courts have to first presume a marriage, cohabiting couples have as a form of coping mechanism had to rely on affidavits to legalize their unions.

Originally couples swore affidavits to prove the existence of a marriage performed under customary law. The reason being that under marriage laws a marriage certificate is not issued for a marriage performed under customary law. Thus whenever in official dealings or any transactions, a couple married under customary law is required to produce documentary proof of their marriage they swear an affidavit under Oaths and Statutory Declarations Act (cap. 19)[101] to that effect.

The swearing of such an affidavit ought not to present any problems when it comes to proving that the marriage did in fact exist especially if it was originally celebrated under customary law. This presumes that they have compiled with their community's essentials of a marriage which may include marriage payments and agreements between the two families.

[100] Women's Rights in Uganda: Gaps Between Policy and Practice by FIDH
[101] Laws of Kenya

Unfortunately, a number of couples have resorted to living together without formalizing their unions and thereafter swear affidavits to prove their unions.

In the absence of a court declaration, where the court invokes the presumption of marriage to declare the parties married, this union is not officially recognized, nor is there an official record of it. Thus, when for a particular purpose, the couple wants to have their union treated as a marriage, they resort to swearing an affidavit to that effect.

In most cases couples swear affidavits where the wife seeks to change her identity card to bear the name of the husband; or for including the wife's names for purposes of filing income tax returns, health insurance cover or payment of pension, or application for a joint passport. The effect of this is that couples have to constantly swear affidavits to prove their unions for the required purposes.

Further, both statutes have tried to accommodate children in instances of succession and maintenance which is a positive aspect as the welfare of the children is paramount. Protecting the partners would however encourage the vice than dealing with it but it aspects of property distribution; they should be entitled to a portion of it as some contributions cannot be assumed.

There is a lot to be done by the two countries on the statutes governing marriages and family law but the progress cannot be assumed. Courts and legislatures have a big role to play in this as it is a crucial topic that can no longer be assumed.