

The Judicial Approach to Cohabitation: A Comparative Study of the Law of England and Wales and Kenya

Abstract

The article is a comparative, doctrinal study of how two common law jurisdictions, Kenya and England and Wales have recognized cohabitation as a presumption of marriage and any right extended to the partners and property and wealth among cohabitants are dealt with in case the relationship ends. The rules of the countries studied have been addressed in terms of how they govern unmarried persons living as a couple in this type of structure. The similarities in the two legal systems in dealing with cohabitants' rights have been examined. Finally, the paper has suggested a mechanism that Kenya's courts should establish for dealing with property conflicts between cohabitants, which attempts to meet both the criteria of theory and pragmatism.

Keyword: comparative study, England and Wales, Kenya, family law, cohabitation, judicial approach

Introduction

The matter that affects cohabitants and everyone the most regarding legal issues is the property, most so in land and housing.¹ Unmarried couples living together without formalising their status have sprung up in the Western world over the years; the trend of cohabitation

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¹ Lorna Fox O'Mahony, 'Property Governance through Resistance: Subversive Property Explores Progressive Potential for Property Outsiders to Re-Create Spaces of Belonging and Propriety Reviews' (2017) Jotwell: The Journal of Things We Like (Lots), 71–73. <<https://heinonline.org/HOL/P?h=hein.journals/jotwell2017&i=71>> accessed 25 May 2021.

began to gain momentum in England in 1970.² The trend of cohabitation relationships has sprung up in Kenya as well. What brings two heterosexuals together and the reason behind it varies;³ it is usually the period of courtship as the couple get ready to tie the knot but in some cases, the period could be extended and lead to procreation and raising children⁴. During this time, the couple could pool their resources together and purchase a home, which can be both a financial investment and family accommodation;⁵ this trend has been going on in Nairobi, Kenya; it has been the case in London as well. According to Kabebri and Dr. Ann, this is due to the increase in urbanisation and migration from rural to urban areas by young people and the Kenyan marriage laws' reorganisation of customary marriage, and the practice has been embraced by couples who want the benefits of marriage without having to go through the legal procedure of making their union legally recognised under either customary or civil law.⁶ However, in most cases, the cohabitant fails to deal with family home-ownership and with what happens if the relationship fails to arrive at marriage or some other formalisation of their union. Cohabitation is generally a starting point before the parties finally settle down as married couples; in other words, it is a pathway to marriage, it is considered as the period when the parties get to know each other well and develop feelings and attachment that leads to marriage;⁷ however, cases of cohabiting for a long time and having children are widespread.⁸

For married couples, the end of a relationship has laws that govern them. The courts have clear rules and laws to follow when dealing with the division of property. In matters of 'come-we-stay' or cohabitation, they usually lack a clear path on how the property acquired during the relationship is to be dealt with. The court usually has to intervene to protect the weaker party's financial interest, which in most cases is the woman.⁹

² Cynthia Grant Bowman, 'Social Science and Legal Policy: The Case of Heterosexual Cohabitation' (2007) 9 *Journal of Law & Family Studies*, 1. <<https://heinonline.org/HOL/P?h=hein.journals/jlft9&i=9>> accessed 25 May 2021.

³ Nicole Hiekel, Aart C Liefbroer and Anne-Rigt Poortman, 'Income Pooling Strategies among Cohabiting and Married Couples: A Comparative Perspective' (2014) 30 *Demographic Research*, 1527. <<https://www.demographic-research.org/volumes/vol30/55/default.htm>> accessed 28 May 2021.

⁴ Gerry McNeilly, 'The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions THE BOOKSHELF' (2002) 40 *Family Court Review*, 533. <<https://heinonline.org/HOL/P?h=hein.journals/fmlcr40&i=516>> accessed 29 May 2021.

⁵ Bruno Jeandrier, '[Commentaries]: Should There Be a System of Alimony for Unmarried Couples Who Separate?' (2016) 71 (3) *Population*, (English Edition, 2002) 494. <https://www.researchgate.net/publication/320487469_The_Fig_Leaf_of_Economic_Theory> accessed 1 June 2021.

⁶ Martin Chanock, 'Signposts or Tombstones: Reflections on Recent Works on the Anthropology of Law' (1983) 1 *Law in Context: A Socio-Legal Journal*, 107, 125. HeinOnline, <<https://heinonline.org/HOL/P?h=hein.journals/lwincntx1&i=113>> accessed 1 June 2021.

⁷ Jessica Cohen, Wendy Manning, 'The Relationship Context of Premarital Serial Cohabitation' (2010) 39 (5) *Social Science Research*, 766–776. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3874393/>> accessed 20 August 2021.

⁸ Wendy D Manning, Jessica A Cohen, 'Teenage Cohabitation, Marriage, and Childbearing' (2015) 34 *Population Research and Policy Review*, 161. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsam12%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/43671559&site=jstor>> accessed 1 June 2021.

⁹ Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *The Modern Law Review*, 24. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsam12%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/20533222&site=jstor>> accessed 1 June 2021.

I Principle and Pragmatism: A Jurisprudential Tension

The judiciary in the common law jurisdiction has heightened efforts in navigating the new trends by coming up with rules to regulate the right that the parties to the cohabitation should be accorded, and as Atiyah puts it, the function of the judicial process in dealing with the rights of cohabitants is twofold, that is either to discourage or encourage the trend of cohabitation and to be fair to both parties while dealing with the matter, and the function can be summarised as about pragmatism and principle. A judgment on principle is one in which the court emphasises the possible effect of its decision over doing right at the time. A pragmatic decision is when the court seeks to pursue individualised justice in a situation, regardless of the eventual impact.¹⁰ Interaction between people and the relationships that ensue must be governed by law. People should organise their lives in accordance with the laws in place; a decision of a court that is individualised has the potential to deny others justice, and it would be a usurpation of legislative authority by the judiciary which is to make laws, especially in matters which are not under the guidance of laws and the judges are left to use their wisdom in making decisions; at the same time, overzealous application of the law may result in a harsh judgment that fails to resolve the conflict fairly.¹¹

In principle, the judicial process should satisfy the need for pragmatism, mainly when dealing with a case involving land, as it is still seen as a measure of wealth in common law nations.¹² In England, the laws dealing with land are described as '*a closed scheme of logic*' in which 'perfection of pure rationality is most closely attainable'.¹³ Hayne J of the high court in Australia implored judges in the commonwealth to decide in accordance with the laws and, while doing so, they have to follow the established precedents.¹⁴ Matters of cohabitation should be dealt with in such a way that the autonomy of the parties is respected and the weaker party protected; the two parties who have decided not to tie the knot but have somehow subjected their relationships to matrimonial laws should be dealt with in accordance with the laws as it is.¹⁵

¹⁰ Patrick S. Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law Essay' (1979) 65 Iowa Law Review, 1249.

¹¹ Kenneth Hayne, 'Letting Justice Be Done without the Heavens Falling Address' (2001) 27 Monash University Law Review, 12. <<https://heinonline.org/HOL/P?h=hein.journals/monash27&i=18>> accessed 1 June 2021.

¹² Andrew R Rutten, 'Review of The Political Institution of Private Property' (1998) 60 The Journal of Politics, 1233. <<https://www.jstor.org/stable/i345538>> accessed 1 June 2021.

¹³ Kevin Gray, 'Human Property Rights: The Special Edition Property Law Conference' (2005) 16 Stellenbosch Law Review, 398. <<https://heinonline.org/HOL/P?h=hein.journals/stelblr16&i=492>> accessed 1 June 2021.

¹⁴ Douglas Payne, 'Hedley Byrne &(and) Co. Ltd. v. Heller &(and) Partners, Ltd.' (1963) 6 University of Western Australia Law Review, 467. <<https://heinonline.org/HOL/P?h=hein.journals/uwatlw6&i=525>> accessed 1 June 2021.

¹⁵ Alison Diduck, 'Autonomy and Family Justice' (2016) 28 Child and Family Law Quarterly, 133. <<https://heinonline.org/HOL/P?h=hein.journals/chilflq28&i=137>> accessed 1 June 2021.

This article is broken down into four sections:

- The first section is concerned with the introduction, methodology, scope, and approach of the study.
- The second part discusses the systems in England and Wales, including the judicial approaches to cohabitation. The study will delve into the development of judicial precedents in dealing with the property rights of cohabitants.
- The third part outlines the judicial approach to recognising cohabitation relationships in Kenya and the laws in place that deal with cohabitants.
- The final part will compare and contrast the judicial approach to cohabitation in the countries studied, and the conclusion will also cover the suggested that courts in Kenya can use to guide them in dealing with cohabitation.

II Scope and Approach of the Study

The study is about how two countries under common law deal with the financial and property cases of heterosexual couples who are cohabiting instead of becoming officially married; the countries covered are England (including Wales) and Kenya. The assessment has been carried out based on the idea of principle and pragmatism, and the common theme in these areas have been analysed and, based on the study, a proposal has been made for Kenyan courts to come up with a framework for solving disputes relating to the cases of cohabitation in a way that strikes a balance between principle and pragmatism.

The focus of the article is unmarried couples of the opposite sex but residing together as a married couple. The reason is that sometimes the disagreements between cohabitants are combined with other family members who have contributed to purchasing the property.¹⁶ Thus, the study is mostly concentrated on how the court has developed a mechanism to deal with cohabitants.

III England and Wales

1 Introduction

In the olden days in England, there was no definition of marriage or formalities to make a union legal.¹⁷ Before the 13th century, the canon laws of the church of England did not govern

¹⁶ Malcolm Merry, 'Family Arrangements, Constructive Trusts and the Home Ownership Scheme Analysis' (2014) 44 Hong Kong Law Journal, 391. <<https://heinonline.org/HOL/P?h=hein.journals/honkon44&i=393>> accessed 25 May 2021.

¹⁷ Alan MacFarlane, 'Review of The Family, Sex and Marriage in England 1500-1800' (1979) 18 History and Theory, 103. <<https://doi.org/10.2307/2504675>> or <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pt.ehu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/2504675&site=jstor>> accessed 25 May 2021.

marriages,¹⁸ and monogamous union was not fully practiced.¹⁹ Lord Hardwicke codified laws dealing with the legalisation of marriage in England in 1753, which required a clergyman to preside over the legalisation of marriages, making only church weddings legal.²⁰ This went on until 1836, when the Marriage Act became operational in England, permitting civil marriages.²¹ Although at the onset of the 20th century, a relationship without proper documentation was considered prostitution and stigmatised,²² over the years into the 20th century, the popularity of marriage has declined which, according to Freeman and Lyon²³ are consequences of divorce rates going up,²⁴ feminist movements and the expectations that come with marriages.²⁵ As a result, people became delusional about marriages but still needed companionship, and the only recourse is cohabitation, since it does not involve formalisation. In the 1970s, cohabitation became common in Britain; it was termed a '*classless phenomenon*'.²⁶ Extra-marital affairs and out-of-wedlock children became widespread; this was the time that common-law marriages originated, which is where cohabitation leads to marriage.²⁷

Nonetheless, cohabitation has skyrocketed across the Western world due to the transforming structure of marriage, the advancement of women's social status, and increased cultural recognition of premarital partnerships; this has primarily come at the expense of marriage as an institution.²⁸ Still, there is confusion in regards to the rights of the parties to cohabitation. Inequalities are

¹⁸ Mark Lunney, 'Marriage Disputes in Medieval England Book Reviews' (2001) 6 Ecclesiastical Law Journal, 406. <<https://heinonline.org/HOL/P?h=hein.journals/ecclej6&i=422>> accessed 25 May 2021.

¹⁹ Michael M Sheehan, 'Review of Marriage Litigation in Medieval England' (1977) 52 Speculum, 983. <<https://www.journals.uchicago.edu/doi/10.2307/2855421>> accessed 5 June 2021.

²⁰ John Bossy, 'The Counter-Reformation and the People of Catholic Europe' [1970] Past & Present, 51. <<https://academic.oup.com/past/article-abstract/47/1/51/1510831>> accessed 5 June 2021.

²¹ Dulcie Groves, 'Michael Freeman and Christina Lyon, Cohabitation Without Marriage: An Essay in Law and Social Policy, Gower, Aldershot, 1983. Vii + 228 Pp. £15.00.' (1985) 14 Journal of Social Policy, 581. <<https://bd.booksc.eu/book/41516881/589644>> accessed 5 June 2021.

²² Michael Freeman, 'Family Justice and Family Values in 1995 England' (1995) International Survey of Family, Law 141. <<https://heinonline.org/HOL/P?h=hein.journals/intsfal2&i=163>> accessed 5 June 2021.

²³ Groves (n 21).

²⁴ MDA Freeman, 'Marriage and Divorce in England Special Symposium on International Marriage and Divorce Regulation and Recognition' (1995) 29 Family Law Quarterly, 549. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pt.ehu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/25740042&site=jstor>> accessed 5 June 2021.

²⁵ William I Fine, 'Marriage in an Age of Possibility: Joseph Epstein's Divorced in America' (1974) 2 Iustitia, 90. <<https://www.repository.law.indiana.edu/iustitia/vol2/iss2/8/>> accessed 5 June 2021.

²⁶ Fae Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19 Edinburgh Law Review, 311. <<https://ore.exeter.ac.uk/repository/handle/10871/18601?show=full>> accessed 5 June 2021.

²⁷ Pascoe Pleasence, Nigel J Balmer, 'Ignorance in Bliss: Modelling Knowledge of Rights in Marriage and Cohabitation' (2012) 46 Law & Society Review, 297. <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1540-5893.2012.00490.x>> accessed 5 June 2021.

²⁸ Kathleen Kiernan, 'Unmarried Cohabitation and Parenthood in Britain and Europe Special Issue on Family Law and Policy: Cohabitation and Marriage Promotion' (2004) 26 Law & Policy, 33. <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.0265-8240.2004.00162.x>> accessed 5 June 2021.

increasingly introduced into intimate domestic relationships, mainly where children are involved. Inherent disadvantages, such as weakened economic positions and domestic violence, cannot be expected ahead of time. As a result, there should be solutions available to meet the needs of these situations as they occur.²⁹

Of all aspects of law, property, especially as it pertains to housing and home, has the most constant and direct impact on individuals. In modern days, cohabiting couples tend to pool their resources together and purchase a family home, which is considered a place for family residence and as capital for business in England.³⁰ Houses are mainly purchased on a mortgage and, according to the statistics of the Law Commission in England, in 2007, a large percentage (70%) of homes were owned by more than one person, and cohabitation relationships and shared properties have become very common in England as well.³¹ A survey conducted by Slater and Gordon showed that a substantial percentage of young cohabitants show love and commitment to each other by purchasing a house together, and that one in five of those asked showed their willingness to purchase a house together within a year of first dating.³²

The International Social Survey Programme, undertaken between 1994 and 2002, indicated that most people cohabit for a maximum of three years, then the relationship either becomes legalised or dissolves, during the period in which the partners have children, which is the main deciding point for either continuing a relationship or ending it.³³

Matters relating to family home-ownership in England and Wales are governed by *common intention constructive trust*. However, following the court's decision in *Jones v Kernott* (Leung, 2019) and *Stack v Dowden* (Qc et al., n.d.), the law dealing with family properties is not straightforward. The courts have left the issue to the government, which is reluctant to develop a proper law to govern cohabitation.

²⁹ Anne Barlow, 'Cohabitation Law Reform – Messages From Research' (2006) 14 *Feminist Legal Studies*, 167. <<https://core.ac.uk/download/pdf/43093609.pdf>> accessed 5 June 2021.

³⁰ Joanna Miles, 'Property Law v. Family Law: Resolving the Problems of Family Property' (2003) 23 *Legal Studies*, 624. <<https://www.cambridge.org/core/journals/legal-studies/article/abs/property-law-v-family-law-resolving-the-problems-of-family-property/153FD4DBB1F3ACF40563846AE70E4B75>> accessed 5 June 2021.

³¹ Anne Sanders, 'Cohabitants In Private Law: Trust, Frustration and Unjust Enrichment In England, Germany And Canada' (2013) 62 *The International and Comparative Law Quarterly*, 629. <<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/cohabitants-in-private-law-trust-frustration-and-unjust-enrichment-in-england-germany-and-canada/11FB2F968804A253D9F142292FA18718>> accessed 5 June 2021.

³² Jackie M Burkhardt, 'The Perils of Cohabitation: The Unmarried Father's Struggle for Rights in Ireland Note' (2010) 9 *Washington University Global Studies Law Review*, 535.

³³ Wolfgang Ludwig-Mayerhofer and others, 'The Power of Money in Dual-Earner Couples: A Comparative Study' (2011) 54 *Acta Sociological*, 367. <<https://journals.sagepub.com/doi/abs/10.1177/0001699311422091> or <https://doi.org/10.1177/0001699311422091>> accessed 5 June 2021.

2 The Laws

a) Presumptions of resulting trust and advancement

As the government is yet to come up with laws to deal with the property rights of cohabitants against each other, the courts have developed the presumption of resulting trust and advancement, which means that a trust is formed when one person distributes property to another without receiving anything in return. When a person transfers property to a child or spouse, the property is assumed to constitute a gift through advancement.

In the *Stack v Dowden* case,³⁴ the parties were cohabitantes who jointly purchased a house but failed to declare their beneficial interest in the property; Ms. Dowden paid the majority part in the acquisition of the house but, upon separation, Mr. Stack brought a suit for an equal share of the benefits from the sale of the house, the court allowed Ms. Dowden a 65% share of the property.³⁵

*Jones (Appellant) v Kernott (Respondent)*³⁶ were cohabitantes as well; they contributed their money and purchased a house and had two children, they separated, and Ms. Jones was left to take care of the bills for running the house. However, when the house's value increased, Mr. Kernott claimed his beneficial interest in the house: the court held that it was upon itself to infer or impute an intention of the parties as to the share of beneficial interest of the house, and a decision was made that Mr. Kernott was entitled to just 10% of the proceeds of the sale of the house.³⁷ In *Jones and Stack*, most jury members disagreed with the presumption of trust in dealing with the family residential home.³⁸ Because of the presumption of human purpose, which is insufficient to determine beneficial interest in a domestic case,³⁹ the lower courts in England have however embraced this assertion and, as pointed out by Pearce, '*resulting trust*' can work along with '*constructive trust*' in dealing with cohabitant properties.⁴⁰ Furthermore, the English doctrine was used to establish the presumptions of resulting trust and development in Kenya. It therefore makes sense to discuss the English '*resulting trust*' here.

A *presumed resulting trust*⁴¹ occurs in circumstances in which it is presumed under the law that a contributor to the purchase of a property, or if they transfer it to another person's

³⁴ [2007] 2 AC 432 House of Lords.

³⁵ 'Stack v Dowden' <<https://e-lawresources.co.uk/Land/Stack-v-Dowden.php>> accessed 21 August 2021.

³⁶ [2011] UKSC 53 On appeal from the Court of Appeal [2010] EWCA Civ 578.

³⁷ The Supreme Court, 'Jones (Appellant) v Kernott (Respondent) – The Supreme Court' <<https://www.supremecourt.uk/cases/uksc-2010-0130.html>> accessed 21 August 2021.

³⁸ Sanders (n 31).

³⁹ Yee Ching Leung, 'Rethinking the Common Intention Constructive Trusts in Stack v Dowden and Jones v Kernott – Should the Resulting Trusts Be Preferred?' (2019) 6 IALS Student Law Review, 26. <<https://doi.org/10.14296/islr.v6i1.4962>> accessed 5 June 2021.

⁴⁰ Douglas, Pearce and Woodward (n 9).

⁴¹ J.E. Penner, 'Purposes and Rights in the Common Law of Trusts Colloquie Du Centre Paul-Andre Crepeau de McGill Portant Reflexions Sur l'Affectation' (2012) 48 Revue Juridique Themis, 579. <<https://heinonline.org/HOL/P?h=hein.journals/revjurns48&i=605>> accessed 6 June 2021.

name, never had an intention to get rid of their whole ownership interest in that property;⁴² it is also assumed that the share of the beneficial interest is equal to the contribution made in the purchase of the property and the amount includes the price of the property, the legal costs that ensued and the discount, if any, based on the status of the buyer.⁴³ For example, suppose a person takes out a loan or, through a mortgage, acquires property and pays back the loan; in that case, he is also considered to have contributed to the purchase of the property and receives a beneficial interest in the property to the extent of his ability to repay the loan. On the other hand, a settlement of mortgage instalments under no obligation, unless it is just a reduction in accumulated monetary debt, is insufficient to indicate a direct contribution. Contributions to ordinary home or relocation expenses, on the other hand, are insufficient.⁴⁴

Moreover, a presumption of gift occurs when the transferee intended the transferor to have it as a gift without the transferee retaining any interest that is of benefit to him in the property; this can also be referred to as ‘a presumption of advancement’, and it can arise in the following cases.⁴⁵

- a) A father transferring or purchasing a property to benefit his child, and a parent in this scenario can be anybody, including those in *loco parentis*; that is, when a third party accepts to be obligated in providing for a child as a parent of that child would: this can still be presumed when the child concerned reaches majority age.⁴⁶
- b) A transfer or donation made by a husband to support his wife. This also applies to cohabiting couples.⁴⁷

Other than *loco parentis*, a transfer made by a mother to her child⁴⁸ does not come under the ‘*presumption of advancement*’, and the same is not considered when a man transfers property to his mistress.⁴⁹ It suffices to note that section 199 of the English Equality Act 2010,

⁴² Robert Chambers, ‘Westdeutsche Landesbank Girozentrale v. Islington LBC Case Note’ (1995) 20 Melbourne University Law Review, 1192. <<http://www.alastairhudson.com/trustslaw/westdeutsche.pdf>> accessed 6 June 2021.

⁴³ Simone Wong, ‘The Iniquity of Equity: A Home-Sharer’s Tale’ (2008) Singapore Journal of Legal Studies, 326. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/24870267&site=jstor>> accessed 6 June 2021.

⁴⁴ Andrew Hayward, ‘Family Values in the Home: Fowler v Barron Case Commentary’ (2009) 21 Child and Family Law Quarterly, 242. <<https://heinonline.org/HOL/P?h=hein.journals/chilflq21&i=242>> accessed 6 June 2021.

⁴⁵ Juliet Chevalier-Watts, ‘The Presumption of Advancement: Is It Time to Relegate This Doctrine to the Annals of History’ (2016) 2 Lakehead Law Journal, 15. <<https://heinonline.org/HOL/P?h=hein.journals/lkdj2&i=17>> accessed 6 June 2021.

⁴⁶ ‘Family Law Week: Laskar v Laskar [2008] EWCA Civ 347’ <<https://www.familylawweek.co.uk/site.aspx?i=ed1279>> accessed 9 May 2021.

⁴⁷ Jody Freeman, ‘Defining Family in Mossop v. DSS: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation’ (1994) 44 The University of Toronto Law Journal, 41. <<https://heinonline.org/HOL/P?h=hein.journals/utlj44&i=47>> accessed 6 June 2021.

⁴⁸ William H Jr Robinson, ‘Hiram Pits Bennet’ (1932) 10 Dicta, 356. <<https://heinonline.org/HOL/P?h=hein.journals/denlr10&i=380>> accessed 6 June 2021.

⁴⁹ ‘Issue 22’ (1959) 103 Solicitors’ Journal, 417. <<https://heinonline.org/HOL/P?h=hein.journals/monash26&i=80>> accessed 6 June 2021.

got rid of the doctrine of 'presumption of advancement'. It is also worth noting that these two doctrines were used in cases where there was no credible witness, and they could easily be refuted or ignored if evidence to the contrary existed.⁵⁰

b) Common intention constructive trust

This strengthens the premise that the parties have a shared desire for the property to be beneficially divided equally among them; the parameters for dealing with the *common intention* was formulated in the case of *Stack v. Jones*, in which the cohabitants were the legally recognised owners of the properties and the disagreement was on the calculation of the benefits of each party to the agreement.⁵¹ The following were laid down as the guiding principles of *common intention constructive trust*;

- a) The principle of equity follows the law; it is assumed in cases of cohabitants that, when they agreed to pool their resources together, they accepted to share the benefits as joint owners of the property equally so, in the event of separation, they should receive equal benefits in the division of the property. Still, if just one person is the legally registered owner, it would be assumed that the other cohabitant does not have any beneficial interest in the property.⁵²
- b) It is then left to the court to decide whether the parties involved had a different *common intention* regarding the shared benefits from the property beyond the legal interest recognised by the law in the title deed and whether it was at the time of buying the property or after. In joint ownership, the presumption of *common intention constructive trust* is dispensed with if it can be shown that the cohabitants had the intention to have a share of the property in a such way that does not entail it being done equally. In contrast, in the case of a sole name on the title deed, the other party must prove that they have a beneficial interest in the property. The intention would be based on the evidence adduced by the party alleging *common intention constructive trust*.⁵³ Identifying whether the parties intended for their beneficial interest to differ from the legal interest requires cohabitants to keep their finances separate from one another, as happened in the *Stack* case and, beyond the financial contribution, the side alleging a shared purpose must also show a negative dependence on it, which is usually easy to do.⁵⁴
- c) When the mutual purpose is shown, the court calculates each party's beneficial interest in the property; however, if the beneficial interest cannot be assessed, the

⁵⁰ 'Lavelle v Lavelle & Ors [2004] EWCA Civ 223' <<https://familylawhub.co.uk/default.aspx?i=ch3424>> accessed 9 May 2021.

⁵¹ Brian Sloan, 'Keeping up with the Jones Case: Establishing Constructive Trusts in Sole Legal Owner Scenarios' (2015) 35 *Legal Studies*, 226. <<https://heinonline.org/HOL/P?h=hein.journals/legstd35&i=230>> accessed 6 June 2021.

⁵² Leung (n 39).

⁵³ Sanders (n 31).

⁵⁴ 'Curran v Collins [2015] EWCA Civ 404 (29 April 2015)' (Practical Law) <[http://uk.practicallaw.thomsonreuters.com/D-0325892?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](http://uk.practicallaw.thomsonreuters.com/D-0325892?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 10 May 2021.

court may ascribe to the parties a purpose that they did not have, to be equal to all parties concerned.⁵⁵

There are difficulties involved in determining the common intention; the assumption that, for parties to have ‘*common intention*’ at the time of buying properties, they must have had an agreement of the minds which must have involved a lot of back and forth discussion before making a decision as cohabitants to own property jointly,⁵⁶ even though cohabitation is usually based on love and a focus on the future: the thought of separation at any time is not seriously entertained when investing into a family house, so they rarely discuss the rights and contribution of the parties in the acquisition of the property for fear of irking each other.⁵⁷ In a study conducted by *Slater and Gordon*, ninety percent of respondents said they had not discussed the possibility of separation and how they would divide their property, should it come to that.⁵⁸ However, even though cohabitants might have different intentions on how the property should be dealt with in separation, *their common intention* must be part of it.⁵⁹

In practice, to ensure that everyone gets a fair share of the property in accordance with their contribution to its acquisition, judges in the U.K. tend sometimes to dispense with the ‘*common intention*’; however, where there are excuses for omitting a partner’s name from the title deed, the judges apply the doctrine in order to be fair to the weaker party, as happened in the cases of *Grant v Edwards* [1986] 3 WLR 114 and *Eves v Eves* [1975] 1 WLR 1338., where the person whose name appeared as the legal owner gave excuses as to why the other parties name were not on the document: the judge applied the doctrine of ‘*common intention*’ and stated that the ‘*excuse*’ showed that the other party had an interest as well. However, as Gardner pointed out, not all excuses lead to applying the doctrine of ‘*common intention*’. He states that, instead of courts coming up with the doctrine, the court should decide based on proprietary estoppel.⁶⁰

⁵⁵ Sloan (n 51).

⁵⁶ John Mee, ‘Joint Ownership, Subjective Intention and the Common Intention Constructive Trust’ (Social Science Research Network 2007) SSRN Scholarly Paper ID 2833359 <<https://papers.ssrn.com/abstract=2833359>> accessed 10 May 2021.

⁵⁷ Susan L Brown, Alan Booth, ‘Cohabitation versus Marriage: A Comparison of Relationship Quality’ (1996) 58 *Journal of Marriage and Family*, 668. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsam1%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/353727&site=jstor>> accessed 10 May 2021.

⁵⁸ Ann Berrington, Brienna Perelli-Harris and Paulina Trevena, ‘Commitment and the Changing Sequence of Cohabitation, Childbearing, and Marriage: Insights from Qualitative Research in the UK’ (2015) 33 *Demographic Research*, 327. <<https://www.demographic-research.org/volumes/vol33/12/33-12.pdf>> accessed 10 May 2021.

⁵⁹ Wong (n 43).

⁶⁰ R. J. Probert, ‘A Review of “Cohabitation: The Financial Consequences of Relationship Breakdown,” *Law Com. No. 307* (HMSO 2007)’ (2007) 41 *Family Law Quarterly*, 521. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsam1%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/25740625&site=jstor>> accessed 10 May 2021.

Since the articulated or expressed intention is not always documented, the behaviour of the parties may reveal the parties' common intention, and this is done when a party shows a contribution made towards the acquisition of a property.⁶¹ In the cases of *Morris v Morris*, 1 [2008] EWCA Civ 257., and *James v Thomas* [2007] EWCA Civ 1212., the court entirely relied on the conduct of the parties in relation to the acquisition of the property to decide on the common beneficial intention.⁶² The parties' discussion that contributed to the financial commitment and exchange of ideas toward the purchase of the property guided the court in reaching a judgment with the *parties' common intention*. This is highly dependent on the witnesses' integrity.⁶³

Academicians have criticised the doctrine of common intention and dubbed it a myth⁶⁴ that can lead to making the wrong judgment by the court as to the division of the property by the cohabitants. However, in order to settle a disagreement between cohabitants reasonably, the court relaxes the standards for, or even invents, a common intention from the evidence, which shows the disparity in the application of the law and the way the law is stated. Thus, the use of fiction avoids the 'coherent construction of the law in conformity with the theory' and can impair the court's didactic role.⁶⁵

3 Evaluation

a) Development inconsistent with precedents

The development of the doctrine of common intention in England has been argued to be indifferent to the land and trust laws. The courts in England have argued that it is duty-bound to look for the common intention in the parties' case and action and give the intention an effect.⁶⁶ The court's role is to declare constructive trust from the facts presented before it without any discretion.⁶⁷ Even though citation can be utilised at the quantification phase, it is only employed when the court is required to provide a remedy after the trust has developed.

⁶¹ Sloan (n 51).

⁶² Mark J Bennett, 'Harvey v Beveridge: Common Intention Constructive Trusts in New Zealand' (2015) 46 Victoria University of Wellington Law Review, 959. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2914721> accessed 10 May 2021

⁶³ Zhuang-Hui Wu, 'The Search To Ascertain The Parties' Imputed Intentions: Kernott v. Jones' [2010] Singapore Journal of Legal Studies, 571. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/24870512&site=jstor>> accessed 10 May 2021.

⁶⁴ Nicola Glover, Paul Todd, 'The Myth of Common Intention' (1996) 16 Legal Studies, 325. <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1748-121X.1996.tb00533.x>> accessed 20 May 2021.

⁶⁵ Terence Ehterton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67 Cambridge Law Journal, 265. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/25166406&site=jstor>> accessed 20 May 2021.

⁶⁶ Sloan (n 51).

⁶⁷ Ehterton (n 65).

As a result, common purpose constructive trust is compatible with the conventional view that constructive trusts, as institutional trusts, focus on vindicating a pre-existing property interest.⁶⁸ Instead of simply giving effect to the claimant's fundamental property rights, common intention constructive trust becomes a discretionary remedy, depending on the court's judgment of fairness. Indeed, Etherton contended that the Stack judgment might be viewed as a corrective constructive trust, in which the court grants discretionary proprietary remedy for unjust enrichment.⁶⁹

b) Pragmatism

ba) Failure to consider the reality of family life

In the case of *Stack*, the parties (cohabitants) jointly owned the family residential home and, since the parties separated their finances, the court concluded that they never intended to share equal ownership of the family home.⁷⁰ However, the court's assumption has been criticised, in that the parties could have separated their finances for other reasons, which has nothing to do with their relationship.⁷¹ According to Rebecca Probert, while criticising the decision of the court, the partners can have separate bank accounts while at the same time equally contributing to their joint life.⁷² It has been furthered argued that having children together is not always a reliable indicator of intention of commitment, most so if the pregnancy was not planned.⁷³

c) Uncertainty causing injustice

Uncertainty and partiality in the implementation of *common intention positive* trust often contribute to discrimination in particular situations. Because of the intricacies of family life and the broad number of non-exhaustive elements that the court might examine in *Stack*, judges can reach very different conclusions from the same reality. Many judges are unable

⁶⁸ David Wright, *The Remedial Constructive Trust* (Butterworths 1998, Sydney) 3–4.

⁶⁹ Terence Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67 *The Cambridge Law Journal* 265, 279. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsam12%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/25166406&site=jstor>> accessed 20 May 2021.

⁷⁰ Leung (n 39).

⁷¹ Thomas Leung Yu Hang, 'Property Rights of Cohabitants: A Comparison of Four Jurisdictions' (2018) 48 *Hong Kong Law Journal*, 837. <<https://heinonline.org/HOL/P?h=hein.journals/honkon48&i=841>> accessed 11 May 2021; *Sharing Lives, Dividing Assets/ An Inter-Disciplinary Study* (Hart Publishing 2009) <<http://www.bloomsburycollections.com/book/sharing-lives-dividing-assets-an-inter-disciplinary-study>> accessed 11 May 2021.

⁷² Rebecca Probert, 'Cohabitation in Twentieth Century England and Wales: Law and Policy Special Issue on Family Law and Policy: Cohabitation and Marriage Promotion' (2004) 26 *Law & Policy*, 13. <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.0265-8240.2004.00161.x>> accessed 11 May 2021.

⁷³ Douglas, Pearce and Woodward (n 9).

to embrace Stack's obiter that the law has progressed since Rosset and that non-financial contributions should be used to conclude collective purpose in single-name situations.⁷⁴

To summarize, *common intention constructive trust* is vulnerable to criticisms from a variety of perspectives. In general, *common intention* cannot be detected in the majority of cases. Judges may be obliged to rely on flimsy fact-finding and erroneous legal reasoning to achieve a conclusion that the court finds logical. As a consequence, the doctrine of *common intention constructive trust* is made spurious and contradictory to precedents. In terms of pragmatism, the court exaggerates some facets of family life to infer advantageous control of the family house, resulting in unfairness. Uncertainty over the results of a civil procedure often discourages litigation, stopping the court from pursuing individualised justice.

III Kenya

1 Introduction

Cohabitation has a long tradition in our culture and around the world. Despite religious condemnation, these unions have become more common in recent times, especially among young people, from the 1980s to date. The current state of affairs has also been the accepted standard. Most young Kenyan couples cohabit,⁷⁵ and the situation cannot be overlooked or ignored any longer. Furthermore, those who do not have the financial means to enroll in traditional or civil partnerships⁷⁶ have taken advantage of the circumstances to enter these relationships to replace a formal marriage. As a result of the prevalence of cohabitation, the rule has been recognised. There is a held belief among Kenyans that cohabitation for an extended period leads to an automatic marriage governed by the common laws;⁷⁷ because of this, there is the belief that couples do not have to go through the formalization of their union. However, this is not the case and this section deal with cohabitation rights in Kenya.⁷⁸

⁷⁴ Probert (n 60).

⁷⁵ Isabel Pike, Sanyu A. Mojola and Caroline W Kabiru, 'Making Sense of Marriage: Gender and the Transition to Adulthood in Nairobi, Kenya' (2018) 80 *Journal of marriage and the family*, 1298. <<https://onlinelibrary.wiley.com/doi/full/10.1111/jomf.12525>> accessed 11 May 2021.

⁷⁶ Traditional marriage involves the payment of a bride price by the groom to the mother of the bride; civil partnerships is a legal relationship entered into by a couple which is registered and provides them with similar legal rights to married couples. There are a variety of reasons why couples choose not to marry; for example, those who have been married before may have personal or religious beliefs for not repeating the process, whereas others object to the patriarchal or religious associations of a traditional marriage and marriage ceremony.

⁷⁷ 'Presumption Of Marriage Under Kenyan Law – Begi's Law' (31 July 2020) <<https://www.begislaw.com/presumption-of-marriage-under-kenyan-law/>> accessed 18 August 2021.

⁷⁸ Joshua Nyawa, 'Presumption of Marriage in Kenya; Contribution of English Law into Kenya's Family Law' <https://www.academia.edu/30218609/presumption_of_marriage_in_kenya_contribution_of_english_law_into_kenyas_family_law> accessed 18 August 2021.

2 Presumption of Marriage

In Kenya, there are no statistics related to cohabitation; the Marriage Act does not recognise cohabitation as marriage; it recognizes five categories of the marriage ceremony;⁷⁹ as follows; *Civil Marriages, Christian Marriages, Customary Marriages, Islamic Marriages, and Hindu marriages*.⁸⁰

Section 3 of the Marriage Act defines marriage thus: 'Marriage is defined as the consensual union of a man and a woman, whether monogamous or polygamous, that is registered under this Act.' Therefore, it suffices to state that a relationship not registered under the Marriage Act is not considered marriage. However, section 2 of the Marriage Act refers to; '...an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage'. This shows that a marriage cannot be presumed under the Act; it must go through one of the statutory procedures.⁸¹

Cohabitation is similar to marriage because the partners, in most cases, pool their resources together, divide their household responsibilities and have sexual exclusivity. The partners in this kind of relationship have usually consented to it. In the event of desertion by one partner, mainly when they have invested together and have children, one partner can refer the matter to the conciliatory body⁸². Due to lack of recognition of any cohabitation type of union, there is no right extended to them in Kenya; they do not have obligations towards each other as with married partners, the matter was decided in *Winderler v Whitehall* (1990)2 FLR 505.⁸³

In *Hortensiah Wanjiku Yaweh versus Public Trustee* (Civil Appeal 13 of 1976),⁸⁴ the court of appeal for East Africa determined that cohabitation extended for a long time must be established before a marriage can be presumed. The court stated the following: 'The presumption is not based on the statute or a marital system. The presumption is simply an assertion dependent on the parties' long cohabitation and reputation as husband and wife.'

In 2014, the matter came up for decision, in *Joseph Gitau Githongo versus Victoria Mwihaki* (2014) eKLR, and the decision of the court was 'It (presumption of marriage) is a phrase that arose from an awareness of the necessities of life's reality when a man and woman cohabit for a long length of time without solemnizing that union by going through a recognized marriage procedure, therefore a presumption of marriage occurs.' If the lady is abandoned by her 'husband' or dies as a result of his desertion, the statute, according to the

⁷⁹ 'The Marriage_Act 2014.' s. 6(1) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf> accessed 23 May 2021.

⁸⁰ See *ibid* sec. 6.

⁸¹ 'The Marriage_Act 2014.' (n 79).

⁸² *Ibid*, 84(2).

⁸³ 'Winderler v Whitehall; [1990] 1 FCR 268' (BPRO) <https://www.bloomsburyprofessionalonline.com/view/family_court_reports/ID1990_1_FCR_0268.xml> accessed 23 May 2021.

⁸⁴ 'Hortensia Wanjiku Yawe v Public Trustee Summary.Docx – Hortensia Wanjiku Yawe v Public Trustee Court of Appeal for East Africa Civil Appeal Number 13 of 1976, Course Hero' <<https://www.coursehero.com/file/68186127/Hortensia-Wanjiku-Yawe-v-Public-Trustee-Summarydocx/>> accessed 18 August 2021.

necessary evidence, bestows the status of ‘wife’ on her for her to petition for maintenance or a piece of her late ‘husband’s’ inheritance.’ In the preceding examples, the underlying premise is a presumption of marriage, which is frequently an issue of fact and evidence that a person must demonstrate.

3 Statutory and Judiciary Interpretation of Cohabitation

a) Statutory Recognition of Cohabitation in Kenya

The Judicature Act in Kenya recognises common law,⁸⁵ which in turn acknowledges cohabitation as marriage. The Judicature Act accepts common laws as part of the prevailing laws in Kenya; this essentially includes cohabitation through the backdoor as a form of marriage in Kenya, even though it is not recognized under Marriage Act 2014, Section 3(6). The Evidence Act, in Kenya, which is the basis for the presumption of marriage, states that

The court may presume the occurrence of any fact that it believes is likely to have occurred, taking into account the usual course of natural events, human behaviour, and public and private business in connection to the circumstances of the particular case.⁸⁶

Therefore, when the courts are presented with cohabitation cases in Kenya, they usually consider the length of the cohabitation and the parties’ reputation.

The Children’s Act recognises cohabitation in its definition, which declares,

Where a child’s father and mother were not married at the time of his birth but cohabited for a period or periods totaling at least twelve months after his birth, Alternatively, if the father has recognized paternity of the kid or has maintained the kid, he has gained parental responsibility for the kid, regardless of whether a parental duty exists.⁸⁷

This has the effect of safeguarding the parentage of children born from a cohabitation relationship.

b) Judicial Recognition of Cohabitation

Kenyan laws are not clear on cohabitation; marriage must comply with the Marriage Act of 2014 to be considered legal under the laws of Kenya. The judiciary has therefore taken

⁸⁵ ‘JudicatureAct_Cap8. 1967’ s 3(1) (c) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/JudicatureAct_Cap8.pdf> accessed 23 May 2021.

⁸⁶ ‘Evidence Act. 2008’ s 119 <https://www.tanzania.go.tz/egov_uploads/documents/EVIDENCE%20ACT.pdf> accessed 23 May 2021.

⁸⁷ ‘ChildrenAct_No8of2001.’ s 25 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ChildrenAct_No8of2001.pdf> accessed 23 May 2021.

centre stage in cohabitation matters and looked to the English common-law system to help decide on cohabitation cases. The courts have ruled that anyone wishing to prevail with a petition for the presumption of marriage must demonstrate that the couple cohabited for a lengthy period of time and acted in such a way that marriage might be inferred. The following section is about judicial decisions regarding cohabitation.

ba) The duration of the cohabitation

The judiciary defined the length of cohabitation in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another Civil Appeal No. 313 of 2001[2009]eKLR*. The Court of Appeal stated that cohabitation must be extended and there must be a general reputation for presumed marriage in Kenya. It should not be just friendship or a concubine relationship. The court's statement was as follows

Long cohabitation may give rise to the assumption of marriage. Before a marriage can be presumed, a party must sustain protracted cohabitation and deeds of general repute; that the extended cohabitation is more than just fondness or that the lady is more than just a concubine, but that the long cohabitation has crystallized into a marriage and that the presence of marriage may be assumed. We believe that since the presumption is an expectation, such ceremonial rites are not required to be performed.⁸⁸

The length of cohabitation was presented for interpretation in *Milka Githikia Kamau v Faith Wangechi Kamau 2008)eKLR*, where the court presumed the applicant to be the deceased's wife. While making this decision, the court stated that

It would be unreasonable to conclude that the claimant was just a forger out to benefit herself. During the applicant's cohabitation with the deceased from 1990 to 1999, she may have believed she was the deceased's rightful wife and therefore entitled to a portion of the deceased's estate.⁸⁹

In Tanzania, Bramble J. dispensed with the length of the cohabitation while deciding, in *In R vs. Fita s/o Mihayo Crim. Sass. 173-Shinyanga-69, 8/10/69*, Bramble J. In this case, the suspect had killed a man he caught sleeping with his lady: he and the lady had cohabited for between four and eight months, the accused defended himself by saying that the action of the other man provoked him and that, because he had cohabited with the lady, it could be presumed to be marriage. The court, in considering if the relationship of the lady and the accused could be regarded as marriage, the two having cohabited for just between four and eight months,

⁸⁸ 'Civil Appeal 313 of 2001 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/53980>> accessed 24 May 2021.

⁸⁹ Paul Musyimi, 'Lawyer-Kenya: Presumption Of Marriage By Cohabitation' (Lawyer-Kenya, 30 May 2008) <<http://lawyer-kenya.blogspot.com/2008/05/presumption-of-marriage-by-cohabitation.html>> accessed 23 May 2021.

held in a surprising judgment that it could be considered as a presumption of marriage, even though the period was very short.⁹⁰

bb) Desire to establish a man-wife relationship

In the matter of *Kisito Charles Machani vs. Rosemary Moraa HCCC MISC. NO. 364 OF 1981 NAIROBI*, a plaintiff sought court help in nullifying a claim of marriage with the defendant because he had not paid dowry or performed any customary rites as required by his Kisii tribe in Kenya, even though he had cohabited with the lady (defendant) for several years and they had three children together. The court, while deciding on this matter, stated that

Although none of the formal rituals that would usually be supposed to be conducted in a Kisii Customary Marriage were performed, the purpose in the plaintiff and defendant's relationship was to create the relationship of man and woman, and both families understood and acknowledged this.⁹¹

bc) Need for quantitative and qualitative cohabitation

In the matter of *Mary Njoki v John Kinyanjui Mutheru & others CA71 of 194*, the applicant and the deceased dated during school days and even after graduation but never cohabited: nevertheless, upon the death, Ms. Njoki sought to be included as a dependent of the deceased, arguing that they were cohabiting in a manner that could lead to the assumption of marriage. However, after examining the testimony of witnesses, the court found that marriage could not be assumed. The judge based his opinion on the lack of a qualitative and quantitative cohabitation partnership; that is, the couples never lived together, pooled their money to purchase a home or any property, or had a child.⁹²

In the matter of *B.C.C. vs. J.M.G. [2018]eKLR*, the dispute was about the burial of one L.C. who died on June 10 2017; the deceased's mother and the respondent, who claimed to be the deceased's husband, were quarrelling on who was to bury the remains of the deceased. The respondent and the deceased had cohabited since 2011 and had written in a love letter that they were married (without legalising their union); they had two children. The deceased and the respondent had lived together as a married couple, and everyone who knew them, including the respondents' relatives, recognized them as a couple. The court relied on the facts and evidence presented to decide that the two cohabited to presume a marriage.⁹³

When the judiciary was again petitioned to decide on cohabitation in *Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010]eKLR*, the following statements were made to pronounce the recognition of cohabitation in Kenya

⁹⁰ 'R vs. Fita s/o Mihayo Crim. Sass. 173-Shinyanga-69, 8/10/691970 HCD 204 <<http://elibrary.judiciary.go.tz/cgi-bin/koha/opac-retrieve-file.pl?id=07ed825f4ca0fb0255926cf910a9c26d>> accessed 23 May 2021.

⁹¹ 'Kenya Family Law: Come We Stay Marriage' <<https://kenyalawsonline.blogspot.com/2013/06/kenya-family-law-come-we-stay-marriage.html>> accessed 23 May 2021.

⁹² 'Civil Appeal 71 of 1984 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/8531>> accessed 23 May 2021.

⁹³ 'Civil Appeal 10 of 2018 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/155630/>> accessed 24 May 2021.

The existence or non-existence of a marriage is a matter of fact. Similarly, whether a marriage can be believed is a matter of fact. It is not reliant on any legal scheme, except as expressly prohibited by written statute. For example, by law, a marriage cannot be inferred in favour of either party in a relationship in which one of them is married. However, in situations where the partners can marry, a marriage will be presumed if the facts and conditions prove that the parties, by long cohabitation or other circumstances, manifested a desire to live together as husband and wife.⁹⁴

The judiciary again cemented the presumption of the marriage decision in the case of *Rosemary Aoko v Noel Namenya Munjal* [2015]eKLR. The dispute concerned the estate of Chrispin Munjal Ndege, the deceased in the case. Noel, who had cohabited with him and they eventually married to him, even though he was still married to Rosemary, claimed the estate of Chrispin, and Rosemary claimed the property too, as the deceased's wife. Noel and the deceased had stayed together for over 6 years and were blessed with four children. Because of the separation of the deceased and Rosemary, the deceased moved his then cohabitant (Noel) to his house and lived together as a married couple without legalising their union. The court determined that the deceased and Noel had a presumption of the marriage. The court took into account that they had been cohabiting for a long time and that their relationship was well-known by the relatives of both partners.⁹⁵

In the matter of *S.W.G V H.M.K* [2015]eKLR, the presumption of marriage based on long cohabitation came up for decision before the court. The lady alleged that she had cohabited with the man and oversaw the construction of the man's house, participated in buying the family car, and contributed by giving the man moral support and supervising his house while he was out of the country on military duties. On the other hand, the man claimed that he never dated the woman; they had a brief relationship and went their separate ways; the woman did not help him acquire the properties or supervise his house while he was away. The court held that, due to failure on the part of the woman to prove long cohabitation of general reputation, the marriage could not be presumed. While making the decision, the court made the following statements.

Where a marriage fails to meet the relevant formalities outlined in the Marriage Act or by common law, it can be saved by the assumption of marriage by cohabitation. The inference may be made when a man and woman have cohabited for a long enough period of time, and under such situations, they have earned the distinction of becoming man and wife. However, a legitimate union between them can be believed to have occurred in the absence of any positive proof of such a marriage, and this assumption can be rebutted only through clear and weighty evidence...⁹⁶

⁹⁴ 'Probate & Administration Cause 244 of 2002 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/119374>> accessed 24 May 2021.

⁹⁵ 'Succession Cause 4 of 2008 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/109603>> accessed 24 May 2021.

⁹⁶ Stephen Cretney, 'The Family and the Law – Status or Contract Special Issue: Seminar at All Souls College, Oxford 30 June 2003' (2003) 15 Child and Family Law Quarterly, 403. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030915> accessed 25 May 2021.

The court emphasised the considerations that the courts would weigh in determining whether or not there is cohabitation.

A marriage could be assumed if the evidence and conditions prove that the parties evinced a desire to live together as husband and wife by long cohabitation or other circumstances.⁹⁷

In summary, in Kenya, once cohabitation has been established to meet the criteria for it to be presumed as marriage, the division of property is governed by the Matrimonial Property Act 2013. Where a property acquired during the marriage is presumed to belong to both of them and both monetary and non-monetary contributions in the acquisition of the property are recognised.⁹⁸

IV Comparison and Contrast

Based on the above analysis, it is clear that the two jurisdictions find it a challenge to deal with cohabitants and their property rights if the relationship fails to formalise into marriage. The courts in the two jurisdictions have developed rules to guide the presumption of cohabitation as marriage and have acknowledged the unique domestic sense of a cohabiting partnership. Cohabitants are lovers, not business partners.⁹⁹ In terms of pragmatism, courts must reach a fair judgment in individual instances by balancing the need to respect autonomy with the necessity to protect the weak. Concerning the contradiction between principle and practicality, the courts must provide personalised justice without jeopardising the coherence of the law. The courts analyse a wide range of intellectual choices, and various themes may be found.

Neither the English and Kenyan laws nor judicial decisions dealing with cohabitation are harmonious. The power given to the judiciary in dealing with the matter is enormous; it is a direct usurpation of the legislative power of law-making. Nevertheless, people adapted creatively to everyday issues in circumstances where 'previous cultural and institutional limitations have lost their sting.'¹⁰⁰ As analysed in the above discussion, the increase in cohabitation is not without criticism; it is perceived as a perversion of marriage. Furthermore, current case laws dealing with cohabitation are confusing, with a tendency toward injustice, compared to plain regulations dealing with married spouses in the event of marital break-up. Furthermore, most cohabiting couples have suffered at the hands of the law, not because

⁹⁷ 'Civil Case 13 of 2010 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/112551>> accessed 24 May 2021.

⁹⁸ Marital Property Act 2013 (Kenya ss 13 & 14 <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97351/115471/F-540095358/KEN97351.pdf>> accessed 31 May 2021.

⁹⁹ Laura Weinrib, 'Reconstructing Family: Constructive Trust at Relational Dissolution Note' (2002) 37 *Harvard Civil Rights – Civil Liberties Law Review*, 207. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=10209&context=journal_articles> accessed 24 May 2021.

¹⁰⁰ H Jay Folberg and William P Buren, 'Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families' (1975) 12 *Willamette Law Journal*, 453. <<https://heinonline.org/HOL/P?h=hein.journals/willr12&i=459>>

they intentionally attempt to avoid it, but because they believe they are subject to it, as is the pervasive common-law marriage myth.

The courts in both England and Kenya have developed a system that can be replicated in dealing with cohabitants; in Kenya, it is the length of cohabitation and the reputation of the cohabitants, while in England it is the common intention of resulting trust, but the difference is that in England the cohabitants are treated as so and not presumed as married. However, upon fulfilling the threshold in Kenya, the cohabitants are presumed to be married and then brought under the matrimonial property that deals with them in the same way married couples are treated.

V Proposed Framework for Kenya

Kenyan courts have to prepare to deal with the influx of cohabitation cases, as it has taken centre stage in relationships and replaced marriages. However, society is still largely opposed to the ‘come we stay’ relationship, making it unlikely for legislation on this issue.¹⁰¹ Furthermore, as illustrated by the failure of a comparable legislative reform in England and Wales, there are several practical obstacles in defining the scope and power of the Act.¹⁰²

A legal framework that includes several legal doctrines might be the solution needed to deal with financial and property rights amongst cohabitants. By including good legal ideas in clearly defined connections, the framework attempts to compromise principle and practicality. In general, a framework regulating rights between cohabitants should be based on set principles and should not allow undue judicial discretion; clarity and consistency are critical in property law.¹⁰³ To guarantee that the judgments determined under the framework may be deduced logically or analogically from the precedents, broad discretion should be avoided.¹⁰⁴

To be pragmatic, the court must find a balance between preserving autonomy and safeguarding the disadvantaged. Cohabitation is not the same as marriage. Cohabitants are best positioned to define their rights in a partnership. This can be accomplished by the court maintaining cohabitants’ common understanding within the legal boundaries. However, if the parties have failed to make arrangements, the court should step in to give a just remedy.¹⁰⁵

The court should give regard to the parties’ living arrangements if they have formalised them. A cohabitation agreement, where the parties clarify their separate rights against one other, should be recognised. If a *common intention constructive* trust can be formed at this

¹⁰¹ F Nii-Amoo Dodoo and Megan Klein, ‘Cohabitation, Marriage, and “Sexual Monogamy” in Nairobi’ (2007) 64 *Social science & medicine*, (1982) 1067. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1866302/>> accessed 24 May 2021.

¹⁰² Joanna Miles, ‘Property Law v. Family Law: Resolving the Problems of Family Property’ (2003) 23 *Legal Studies*, 624, 57.; *Lc278.Pdf* 57–61 <<http://www.lawcom.gov.uk/app/uploads/2015/04/lc278.pdf>> accessed 31 May 2021.

¹⁰³ O’Mahony (n 1) 420.

¹⁰⁴ Hayne (n 11) 20.

¹⁰⁵ See Probert (n 60) 295 for a similar view.

point, the court should firmly infer that the parties have provided for themselves, since it represents the parties' understanding of how beneficial ownership of the family property should be shared between them.

The presence of vitiating elements, such as fraud and undue influence invalidates, the cohabitation agreement (or prevents finding a common intention in such an analysis). Therefore, the doctrines of the length of cohabitation and reputation of the cohabitants should be retained in Kenya. At the same time, the Kenyan courts should embrace the common intention of a constructive trust in dealing with cohabitants' property rights, especially in cases where the relationships have not met the threshold for the presumption of marriage.

If no genuine cohabitation agreement or common intention constructive trust can be identified, the court should step in to provide the parties with a remedy. At this point, the court has three options: unjust enrichment, presumptions of consequent trust and advancement, and proprietary estoppel.

Conclusion

'Come we stay' marriages are a new form of arrangement which has infiltrated Kenyan society. Many reasons have been outlined in this document as to why couples prefer to remain in unions similar to marriage without formalisation. In the African traditional society, cohabitations were not allowed due to the majority's strict adherence to societal values. However, society is dynamic, and this family arrangement has been embraced in various parts of this country. In addition to that, common law also recognises this type of marriage, and courts have developed and applied a test to decide whether a certain arrangement can be presumed that marriage exists. This is evident in the court cases mentioned in this document. Come we stay marriages are here to stay, and therefore courts should be reluctant to ignore them. Courts in Kenya need to take judicial notice of their existence, and they should also be included as a form of marriage in the Marriage Act 2014.