

Journal of Public Policy & Governance



Impact of Duration of Cohabitation on Succession in Cohabitation Marriages

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ISSN: 2616-8413

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How to cite this article: Maina, P., M. (2024). **Impact of Duration of Cohabitation on Succession in Cohabitation Marriages.** *Journal of Public Policy & Governance*, 8 (1), 53-69. <https://doi.org/10.53819/81018102t5327>

Abstract

The succession framework for cohabitation marriages in Kenya is unclear, necessitating research to address the knowledge gap regarding inheritance rights. This study investigated whether the duration of cohabitation influences succession outcomes in such unions. Using qualitative desktop research, the study examined the legal and societal implications of cohabitation in Kenya. The research finds that the Court of Appeal in Kenya emphasizes the importance of long cohabitation evidence and general repute in establishing a presumption of marriage. However, succession plans in cohabitation marriages only take effect after the union ends, and there is a lack of clear laws defining property inheritance for cohabiting couples. Women are particularly vulnerable to disinheritance, while men appear less affected. Courts do not directly address cohabitant rights, but cohabitees may be presumed to have equal shares as tenants in common. In conclusion, the law governing succession in cohabitation marriages is undefined, and courts play a significant role in determining succession plans. There is a lack of clear laws globally and regionally on addressing cohabitation issues such as inheritance and presumption of marriage. The common law principle of presumed marriage has been developed in Kenya, but amendments to the Law of Succession Act have not fully resolved the challenges faced by cohabitation marriages. Intestate succession lacks a clear framework for cohabitants, and their rights are not on par with those of married spouses. It is recommended that Courts should find a balance between preserving autonomy and safeguarding the disadvantaged in cohabitation marriages. Statutory provisions should be enacted to establish requirements for legal recognition of cohabitation marriages, including higher standards of proof based on duration of cohabitation, quantitative and qualitative factors, and the presence of children. Kenyan laws should recognize and incorporate cohabitation marriages, ensuring inheritance rights and treating properties acquired during cohabitation as matrimonial property. The rights of children and involvement of extended families should also be considered in property distribution. Overall, comprehensive legal frameworks are needed to protect the rights of cohabiting partners in succession, property distribution, and inheritance matters.

Keywords: *Duration, Cohabitation, marriages, Succession, Kenya*

<https://doi.org/10.53819/81018102t5327>

1.0 Introduction

Cohabitation, the act of living together in an intimate relationship without being legally married, has gained significant prominence in many societies in recent decades. It represents an alternative form of partnership and has become increasingly common as social norms and attitudes towards marriage and relationships have evolved¹. However, cohabitation often lacks legal recognition and protection, which can result in various challenges, including issues related to succession. Succession refers to the transfer of assets and property upon the death of a partner². The objective of this study was to investigate whether the duration of stay, or the length of time a couple has lived together, influences succession outcomes in cohabitation marriages.

Cohabitation marriages occupy a unique legal space, as they do not have the same legal framework as traditional marriages^{3,4}. Consequently, cohabiting partners may face uncertainties regarding their rights and entitlements, particularly in the context of succession⁵. Unlike married couples who typically have clear legal provisions for inheritance, pension benefits, and other succession-related matters, cohabiting partners may find themselves excluded or facing obstacles when it comes to these rights⁶. Exploring the potential influence of the duration of stay on succession outcomes can provide valuable insights into the legal implications of cohabitation and contribute to discussions around the recognition and protection of cohabiting partners.

¹ Chilambampani-Moathodi, T., & Ngwenya, B. N. (2017) Gender Dynamics in Household Property Inheritance among Rural Communities: The Case of BaKalanga Baka Nswazwi in North Eastern Botswana.

² Avogo, W. A., & Somefun, O. D. (2019). Early marriage, cohabitation, and childbearing in West Africa. *Journal of environmental and public health*, 4(2), 17-25

³ Pierce, H., & Heaton, T. B. (2020). Cohabitation or marriage? How relationship status and community context influence the well-being of children in developing nations. *Population Research and Policy Review*, 39(4), 719-737.

⁴ Abrahamsen, G. M. (2020). Do Unmarried Cohabitants Have Inheritance Rights (in Practice) in Denmark? In *Nordic Inheritance Law through the Ages* (pp. 349-363). Brill Nijhoff.

⁵ Wanjiru, J. V. (2017). *Reforms needed on property laws on cohabitation* (Doctoral dissertation, Strathmore University).

⁶ Gachuki, N. (2018). Is There a Conflict Between Section 3 (5) of the Law of Succession Act Cap 160 and Section 9 of the Marriage Act, Laws of Kenya? *Laws of Kenya*.

However, limited attention has been given to the specific issue of succession and its relationship to the duration of stay in cohabitation marriages⁷. Understanding whether the length of time a couple has lived together influences their succession outcomes is crucial for filling the gaps in knowledge and addressing the legal and societal implications of cohabitation. This study aims to bridge that gap and shed light on the factors that may shape succession patterns among cohabiting partners. The duration of stay in a cohabitation marriage may have significant implications for succession⁸. It is plausible that couples who have lived together for a longer period of time have established stronger financial and emotional ties, potentially influencing the expectations and intentions surrounding succession⁹ ¹⁰. Additionally, legal systems and societal attitudes towards cohabitation marriages vary across jurisdictions, which may affect the rights and protections afforded to cohabiting partners based on the duration of their relationship. By exploring these dynamics, this study seeks to uncover potential associations between the duration of stay and succession outcomes, contributing to a deeper understanding of the legal and social complexities surrounding cohabitation.

The findings of this study are expected to have significant implications for various stakeholders, including policymakers, legal practitioners, and individuals involved in cohabitation relationships. Understanding how the duration of stay influences succession in cohabitation marriages can inform discussions on legal reforms, social support systems, and the protection of cohabiting partners' rights. Moreover, recognizing the significance of duration may pave the way for more comprehensive legal frameworks that address the unique needs and challenges faced by cohabiting couples. Ultimately, this research aimed to contribute to a more equitable and inclusive legal environment for cohabiting couples. There exists no law or statute that determines how succession

⁷ Anindita, A., Sahadewo, G. A., Irhamni, M., & Kurniawan, R. (2021). The Untold Story of Cohabitation: Marital Choice and Education Investment. Available at SSRN 3955803.

⁸ Cahn, N., & Atwood, B. (2021). Nonmarital Cohabitants: The US Approach. *Houston Journal of International Law, Forthcoming, Virginia Public Law and Legal Theory Research Paper*, (2021-32).

⁹ Brown, S. L., & Wright, M. R. (2016). Older adults' attitudes toward cohabitation: Two decades of change. *Journals of Gerontology Series B: Psychological Sciences and Social Sciences*, 71(4), 755-764

¹⁰ Ulloa, E. C., Hammett, J. F., Meda, N. A., & Rubalcaba, S. J. (2017). Empathy and romantic relationship quality among cohabitating couples: An actor-partner interdependence model. *The Family Journal*, 25(3), 208-214.

should proceed in the case of divorce or death in cohabitation marriages. Currently, courts are used to settle such cases, highlighting a significant gap in the legal framework. As cohabitation marriages become increasingly common in Kenya, courts should be well prepared to tackle the challenges arising from these unions. The Kenyan courts must develop a coherent framework for dealing with the influx of cohabitation cases, as this form of relationship has taken center stage and, in many instances, replaced traditional marriages.

1.1 Statement of the Problem

The conducting of the current study on determining whether the duration of stay influences succession in cohabitation marriages is considered highly important. This study addresses a significant gap in existing research by specifically examining the relationship between the duration of stay and succession outcomes in cohabitation marriages. Muniu¹¹ indicates that Kenyan law recognizes the existence of cohabitation unions in the Marriage Act (2014) but fails to provide procedures and ways in which property acquired during and after the cohabitation is distributed or owned or even the rights and obligations of cohabitantes. In addition, Christine¹² indicates that regarding the customary heir, according to most Ugandan traditions, the customary heir (usually the eldest son of the deceased) receives the bulk of the estate in trust for other beneficiaries and assumes some of the responsibilities of the deceased. The position of a customary heir is fashioned to ensure cohesion and continuity within a clan. However, regarding cohabitation, the Succession Act does not make provision for instances of unmarried cohabiting unions, although a significant percentage of Ugandan Families live under cohabitation.

Furthermore, Kodiyo¹³ indicates that jurisdictions of Law in England and Wales recognizes cohabitants as lovers and not business partners. The challenges of succession under cohabitation marriages are a concern that needs critical evaluation. It is evidenced that dealing with succession under cohabitation marriages is problematic. Hence, conducting of the current study was worthy. Section 3(5) tries to cure the challenges of marriages that are not presented formally and the same problem is being solved in section 29(2). The new amendment under section 29(2) does not give

¹¹ Muniu, M. M. (2018). *Property rights in cohabitation unions in Kenya* (Doctoral dissertation, Strathmore University).

¹² Christine, A. (2018). *An analysis of the laws on intestate succession and the human rights aspects on cohabitation in Uganda*. (Thesis, Kampala International University).

any meaningful guidance as to the purpose and the amount of the rewards that should be shared between the family of the deceased and cohabitated couple. The women who find themselves in these circumstances sometimes find it challenging to inherit anything from the family members, especially if the deceased had children known to the Public¹⁴. Thus, a study is need and this formed the basis of the current study.

1.2 Research Objective

To determine whether duration of stay influence the succession under cohabitation marriages

2.0 Literature Review

The succession plan under cohabitation marriages does not begin until the marriage is over. Cohabitation can be permanent, resulting in interdependence between the partners¹⁵. This implies that cohabiting partners, like married couples, can use mutual support to acquire property. If one partner dies and the other inherits the family's property, the inability of the other partner to inherit a portion of that property may have serious economic consequences. Although their relationship may be similar to that of spouses, limitation periods are not unique to cohabitants¹⁶.

The existence of a special, personal relationship between the spouses refrains any of the couple from seeking redress during the course of spousal cohabitation. Because of the similarities between cohabitation and marriage, provisions limiting the limitation period to cohabitation may be applied by analogy. Nonetheless, these two relationships are fundamentally different, and case law does not extend the rules of succession of property between spouses and cohabitants¹⁷. Thus, this chapter, the study took an in-depth analysis to examine the succession duration under cohabitation marriages. Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having

¹⁴ Mundia, S. M. M. (2021). Protecting cohabitees' right to property within the cohabitation union in Kenya. (Thesis, Strathmore University).

¹⁵ Ulloa, E. C., Hammett, J. F., Meda, N. A., & Rubalcaba, S. J. (2017). Empathy and romantic relationship quality among cohabitating couples: An actor-partner interdependence model. *The Family Journal*, 25(3), 208-214.

¹⁶ Wafula, T. T. (2018). Analysis of succession of property in Kenya in the case of cohabitees.

¹⁷ Stepien-Sporek, A., & Ryznar, M. (2019). Cohabitation Worldwide Today.

<https://doi.org/10.53819/81018102t5327>

taken place and the presumption can only be rebutted only by strong and weighty evidence to the contrary.¹⁸

In the case of *Toplin Watson vs Tate*,¹⁹ (1937) 3 ALL ER 105. The circumstances here were that the man lived in Rockhampton, in Australia, from 1860 to 1870 with a certain lady; they held themselves out to be husband and wife, and they and their children were received in local society, which would not have been the case had there been any suggestion of irregularity. The birth certificates of the children recorded the marriage of the parents as having taken place at Ballan, Victoria, on 10 January 1860, but no such marriage was registered there, although registration had there been compulsory for some years. In 1873, man's father, who lived in England, executed a deed covenanting to make certain payments to the children or their mother and this deed contained these words: "the following reputed children of his deceased son," T B, "which children are now in England with their mother EM, otherwise EB." It was held that the absence of any entry in the register of marriages was not sufficient to rebut the presumption of marriage of the couple and that the words in the deed of 1873 were insufficient to rebut the presumption. That the presumption of marriage can be rebutted only by evidence of the most cogent kind, and the children in question ought to be declared to be the lawful children of the man and his wife.

In the case of *Mahadervan v Mahadervan*²⁰ Sir Jocelyn Simon P. held that, in his view, where a ceremony of marriage is proved, followed by cohabitation as man and wife, a presumption is raised which cannot be rebutted by evidence which merely goes to show on a balance of probabilities that there was no valid marriage: it must be evidence which satisfied beyond reasonable doubt that there was no valid marriage. In other words, the presumption in favour of marriage in such circumstances is of the same weight as the presumption of innocence in criminal and matrimonial causes²¹. A jury would have to be directed that to displace the presumption, the husband must prove his case in such a way that they can feel sure that there was no marriage. Justice A.I Hayanga in delivering his judgement stated that, "he would hold that Court should subject cohabitation disputes to the married state. Using the principle of presumption of marriage which should in such

¹⁸ Halsbury's laws of England 3rd edition vol. 19 par 1323

¹⁹ *Toplin Watson vs Tate* (1937) 3 ALL ER 105

²⁰ *Mahadervan v Mahadervan*²⁰ [1962] 3 All ER 1108

²¹ Waggoner, L. W. (2016). Marriage is on the decline and cohabitation is on the rise: At what point, if ever, should unmarried partners acquire marital rights. *Fam. LQ*, 50, 215.

<https://doi.org/10.53819/81018102t5327>

a case be more easily presumed. Hence if in the case, the two only cohabited without intention to marry then depending on the period taken the notoriety of their lifestyle and commitment they should be regarded as married, hence presumption of marriage”. . . .On these arguments, he held that the two were man and wife.²²

In the case of Hortensiah Wanjiku,²³ where the appellant had testified that she was married to the deceased, and the deceased in an application in 1966 had stated that the appellant was his wife. By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died and during that time the appellant bore him four children Mustafa J.A stated that; long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant only cogent evidence to the contrary can rebut such a presumption. He further stated that such a presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance into the appellant’s favour the scale must tilt in the direction, even if the proper ceremonial rituals were not carried out that would not invalidate the marriage. In the case of GOODMAN V GOODMAN.²⁴ A Jewish man cohabited with a Christian woman for 28 years, there was general reputation that they were married and their children were baptized as Christians of both “husband”, and “wife”. The husband’s relatives declined to recognize the marriage the Court held that there was a presumption of marriage and the onus was on the person denying it.

In the case of BCC v JMG,²⁵ it involved the burial dispute of the deceased who died on 10th June, 2017. The respondent claimed that he was the husband of the deceased and the appellant was the mother of the deceased. The issue being who was entitled to bury her. He deponed that he started cohabiting with the deceased in May 2011. They committed in writing that they were married since the place of her work did not allow officers of different sexes to live together. They were allowed to live together by being allocated a house. Before their cohabitation, the deceased had a daughter and when they started living together, they were blessed with two children. The respondent went on further to say that he and the deceased attended the funeral of the uncle of the deceased where

²² Christopher Nderi Gathambo & Samuel Muthui Munene.. Vs Samuel Muthui Munene[2003] eKLR

²³ Hortensiah Wanjiku Yahwe V Public Trustees Eaca C.A. No. 13 Of 1976 (UR)

²⁴ GOODMAN V GOODMAN (1859) 28 LJ CH. 742.

²⁵ [2018]eKLR

his mother, his elder brother's wife, his sister and uncle were recognized as in laws and, that they were given an opportunity to address the mourners.

He also testified that during the lifetime of the deceased, she took out insurance policies which included the Dependants Funeral Cover and Nomination Beneficiary Form from Pioneer Insurance Company which stated the respondent and their daughters as dependants. The respondent also produced his Dependants Funeral Cover and Nomination of Beneficiary Form which named the deceased as one of the beneficiaries including his daughters and a letter which showed that the deceased named him as her husband. The court held that there was sufficient evidence to show that the respondent and the deceased cohabited to the extent that a marriage could be presumed.

In the case of *Rosemary Aoko v Noel Namenya Munjal*,²⁶ the dispute was between the applicant and the respondent over the estate of the deceased who died on 28th December 2007. The Respondent claimed to be the wife of the deceased and a beneficiary of the estate. She further started to cohabit with the deceased in 2002 and they later formalized their marriage in 2006. She was aware that there was a statutory marriage between the applicant and the deceased at the time they were cohabiting with the deceased; and they were blessed with four children. The deceased and the Respondent stayed together in the house of the Applicant.

The deceased and Respondent began to develop a plot and moved there when the ground floor was complete. The deceased died while staying in that plot. The deceased constructed a house for her on the land belonging to her father-in-law. The court found out that the Respondent was reputed and acknowledged as the second wife of the deceased. In addition to that, the family of the deceased together with Rosemary allowed the body of the deceased to make a stop over at the house of Noel. They also allowed Noel to take care of the deceased when he was hospitalized as if she were here his wife. Apart from that, the deceased and Respondent swore a joint affidavit as proof that the two were married. The court held that there was a presumption of marriage between the deceased and Noel. The court took consideration of the fact that there was a long cohabitation and that their relationship was of general repute

Kenya's Members of Parliament passed legislation prohibiting cohabiting partners from inheriting the property of one lover when the other dies. When the Law of Succession (Amendment) Bill,

²⁶ *Rosemary Aoko v Noel Namenya Munjal* (2015) eKLR
<https://doi.org/10.53819/81018102t5327>

2019, was passed, male lawmakers ganged together and rejected an amendment that would have allowed a cohabiting spouse to inherit their lovers' property after death²⁷. As a result, a cohabitant right to own property, as guaranteed by the constitution, is not realized²⁸. Kenyan succession laws do not clearly define how cohabiting couples can inherit their property. Because this property is not considered matrimonial property, the rights granted to married people differ from those granted to cohabiting couples²⁹. This raises the question of how to divide property acquired during the relationship in the event of divorce or death, where the presumption of marriage cannot be proven sufficiently. When the relationship ends during both cohabitants' lives, because there are no statutory or judicial rules defining cohabitants rights and obligations to each other while cohabiting.

The courts provide some relief to cohabitants who have had their expectations of support and property rights shattered as a result of their relationships dissolution³⁰. In the situations the law disinherits a cohabitant from intestate succession, women are more vulnerable to hardship and deprivation³¹. The fact that men are less likely than women to appear in court as cohabitants attempting to gain access to intestate properties is physical evidence that they are less affected by their partners deaths without a will or that they have cultural advantages in gaining access to necessary property for survival. Women losses in household property reflect gender differences in individual property that existed prior to the dissolution³².

In the case of *RLA V FO & another*⁴³, the plaintiff claimed that his wife died after a short illness. The family of the deceased led by the defendants began making burial arrangements and they did not involve the plaintiff. He had been married to the deceased for five years and a son was born out of their relationship. He deponed that the deceased family did not involve him in the burial arrangement and at the same time they took items from the house as well as his son. He sought a

²⁷ Muniu, M. M. (2018). *Property rights in cohabitation unions in Kenya* (Doctoral dissertation, Strathmore University).

²⁸ See 53 above

²⁹ Wafula, T. T. (2018). Analysis of succession of property in Kenya in the case of cohabitants.

³⁰ McCaffrey, C. S. (2018). The property rights of unmarried cohabitants in the USA. *Trusts & Trustees*, 24(1), 97-109.

³¹ Sassler, S., & Lichter, D. T. (2020). Cohabitation and marriage: Complexity and diversity in union-formation patterns. *Journal of Marriage and Family*, 82(1), 35-61.

³² Ulloa, E. C., Hammett, J. F., Meda, N. A., & Rubalcaba, S. J. (2017). Empathy and romantic relationship quality among cohabitating couples: An actor-partner interdependence model. *The Family Journal*, 25(3), 208-214.

<https://doi.org/10.53819/81018102t5327>

declaration that the deceased was his wife, an order that he be allowed to bury the remains of his wife at his rural home and that the items that were taken by the defendants from his house to be returned together with the child. However, our bone of contention would be whether there was a presumed in this case.

The plaintiff deponed that he met the deceased in 2010 and they developed a relationship that led to the deceased moving into his house at Umoja from Buruburu. The family later knew of their staying together and did not object it. The plaintiff deposed that he took the deceased to his rural home in 2011 and introduced her to his family and they carried themselves as husband and wife. He claimed that when their first child was born, the family of the deceased visited them at their place of residence. He testified that the 1st defendant attended the pre-wedding and the wedding of the plaintiff's sister at Bungoma. He also said that he made an introductory visit to the home of the deceased and he had with him his father and his other relative. Apart from that, he said that the deceased had put his name in her medical card as being the beneficiary of her employer's medical scheme. He also said that at the time when she fell ill, he visited her while in hospital. One of the issues in this case was whether there was a marriage between the plaintiff and the deceased. Although the evidence of the plaintiff showed closeness, the court held that the deceased and the plaintiff were close friends.

The learned judge Mabeya in his judgment stated "For a marriage to be presumed between a couple, the two must have cohabited; the cohabitation must be long and uninterrupted, and the couple must have carried themselves as man and wife not only to their close friends but also relatives and other acquaintances. Their actions and lifestyle should leave no doubt in their minds of those who know them and even strangers that the couple must be in a marriage relationship and not necessarily a relationship of convenience. In African set up, he (Judge) took judicial notice that such couples will occasionally visit their rural homes (both the man's and woman's) and they will in such occasions carry themselves as such. In a marriage relationship, the couple is expected to take care of and be responsible for and protect each other. They are expected to be not only the closet but to be there for each other at all times."

The judiciary defined the length of cohabitation in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another*,³³ 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. Court further stated that, 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. Court believe that since the presumption is an expectation, such ceremonial rites are not required to be performed.

A cohabitant's agreement can be entered into by cohabitants to govern their property, including assets and financial obligations to one another³⁴. To be valid, the cohabitant's agreement should be in writing and signed by both cohabitants. Both parties must have obtained legal counsel before entering into the agreement. Each cohabitant should have sought independent legal counsel. A cohabitation agreement may state that neither party may use the redress scheme. The court does not directly address cohabitant rights, but they can be construed. Except as otherwise provided in any written law, where the instrument of transfer of an interest in land to two or more persons does not specify the nature of their rights, there is a presumption that they hold the interest as tenants in common in equal shares, the statute states. In the case of cohabiting unions, where a land transfer instrument exists but does not specify the nature of the cohabitee's rights. The cohabitees will be presumed to have an equal share of the interest as tenants in common³⁵.

In other regions, the law on succession in Uganda Law Reforms Commission urges cohabitees to make wills that benefit each of them because cohabitees are not provided for in the succession act. Laws relating to marriage and coupledness in Uganda have for the most part pertained to individuals in traditional marriages, which are mostly religious unions under the Christian or Islamic faith. Although a variety of different ceremonies and customs are now recognized as formal unions under

³³ See 48

³⁴ Gómez-Casillas, A., Ajenjo, M., & Solsona, M. (2022). In the Case of Union Dissolution of Couples with Children. Who Decides to Avoid the Courts and Why?. *Journal of Family Issues*, 43(5), 1288-1307.

³⁵ Muniu, M. M. (2018). *Property rights in cohabitation unions in Kenya* (Doctoral dissertation, Strathmore University).

the marriage law, legal marriage remains a necessary condition for women who wish to receive any portion of what has been acquired by the couple or the man during the relationship. Ugandan laws do not recognize cohabitants as owning shared assets and there are no laws pertaining to cohabitation. This creates a legal vacuum for women in cohabiting relationships who are not able to fight for their rights as partners or exercise entitlement over their homes, land and other assets acquired during the relationship. In the case that a man dies and leaves behind children and a female partner, women risk being evicted from their deceased partner's land due to inheritance laws which only recognize blood relatives and marriages. If one of the spouses in the union dies, the acquired property can be passed down to them³⁶.

Cohabitees do not inherit each other's property under the Danish Inheritance Act. As a result, in order to inherit from one another, cohabitants must create a will. However, under Danish law, various rules may result in an unmarried cohabitant inheriting assets upon the death of the other cohabitant³⁷. In Botswana, there is no absolute legal protection for cohabiting partners as opposed to married couples, regardless of the number of years of cohabitation. Cases may be brought to court if one party wishes to contest the disinheritance of assets for which they worked³⁸. In Zimbabwe, cohabitants do not have the right to intestate succession. In contrast to spouses in a formal marriage, cohabitants can only benefit from a deceased partners estate through testate succession. In intestate succession, the laws of cohabitants are not taken into account. If a partner dies without a valid will, there is no inheritance³⁹. Thus, the duration under cohabitation marriages varies between regions and based on the verdicts from the courts of law and cohabitating parties' agreement.

3.0 Research Methodology

The research done was primarily qualitative in that it involved describing in detail the research problem using desktop research. It also included a review of publications, articles, academic

³⁶ Mujuzi, J. D. (2020). Presumption of Marriage in Uganda. *International Journal of Law, Policy and the Family*, 34(3), 247-271.

³⁷ Abrahamsen, G. M. (2020). Do Unmarried Cohabitants Have Inheritance Rights (in Practice) in Denmark?. In *Nordic Inheritance Law through the Ages* (pp. 349-363). Brill Nijhoff.

³⁸ Chilambampani-Moathodi, T., & Ngwenya, B. N. (2017) Gender Dynamics in Household Property Inheritance among Rural Communities: The Case of BaKalanga Baka Nswazwi in North Eastern Botswana.

³⁹ Madzikatire, B. C., & Rutsate, E. (2019). An interrogation of the law relating to cohabitation in Zimbabwe and the need for law reform.

journals, books and other internet sources on cohabitation and succession. Moreover, the study used scholarly works when making the inferences. The inferences of the study thus depended on the findings from the previous studies.

4.0 Findings

In the case of *VRM v MRM & another*⁴⁰, where the Court of Appeal emphasized the need for the evidence of long cohabitation and general repute. “The court of Appeal reiterated that the evidence of long cohabitation and general repute can form basis for a presumption of marriage. Once such a presumption is made the onus is on the person alleging that there was no such marriage to prove otherwise. It has been revealed that a succession plan under cohabitation marriages does not begin until the marriage is over. Kenyan succession laws do not define how cohabiting couples can inherit their property. The courts provide some relief to cohabitants who have had their expectations of support and property rights shattered due to the dissolution of their relationship. In situations where the law disinherits a cohabitant from intestate succession, women are more vulnerable to hardship and deprivation. The fact that men are less likely than women to appear in court as cohabitants attempting to gain access to intestate properties is evidence that they are less affected by their partners' deaths without a will or that they have cultural advantages in gaining access to the necessary property for survival. Women's losses in household property reflect gender differences in individual property that existed before the dissolution. The court does not directly address cohabitant rights, but they can be construed. The cohabitees will be presumed to have an equal share of the interest as tenants in common.

5.0 Conclusion

The study concludes that the law governing succession in cohabitation marriages is undefined, and courts determine the succession plan in such cases. There is a lack of clear defined laws globally and regionally on how cohabitation issues, including inheritance and presumption of marriage, should be addressed. Courts in Kenya have developed the common law principle of presumed marriage for cohabitation marriages, granting certain marital rights and duties to cohabiting couples who meet specific criteria. The courts require evidence of a long cohabitation period, the presence of children, the couple's self-perception as husband and wife, and the quantitative and

⁴⁰ *VRM v MRM & another*41(2006)eKLR

<https://doi.org/10.53819/81018102t5327>

qualitative nature of the cohabitation. Amendments to the Kenyan Law of Succession have been made to address the issue of presumption of marriages in cohabitation. However, these amendments have not provided a complete solution to the problems faced by cohabitation marriages.

Section 29 of the Law of Succession Act, 2021 allows for the recognition of other dependants in cohabitation marriages. However, individuals seeking recognition as dependants must prove that they were maintained by the deceased for a period of two years prior to the death, and it is not automatic for them to be recognized. Intestate succession in cohabitation marriages lacks a clear framework, and cohabitants do not have the same rights as spouses. Cohabitation separations are not treated the same way as divorces in a court of law. The common law principle of presumed marriage has been established for cohabitation marriages, but there is a need for clearer laws and frameworks to address inheritance rights, property distribution, and the rights and obligations of cohabitants. Failure to establish the presumption of marriage exposes cohabiting partners to the risk of losing their rights, including property rights. Legislation recognizing cohabitation unions and providing rights and responsibilities for cohabiting parties has been enacted but still requires further development. Cohabiting partners are encouraged to enter into cohabitant agreements to govern their property and asset distribution, as well as clarify their rights and obligations.

6.0 Recommendations

It is recommended that courts should strike a balance between preserving autonomy and safeguarding the disadvantaged in cohabitation marriages. Cohabitants' common understanding within legal boundaries should be considered, and cohabitation agreements should be recognized. Statutory provisions should be enacted to establish requirements for legal recognition of cohabitation marriages, with higher standards of proof such as a longer duration of cohabitation, quantitative and qualitative factors, and the presence of children. Kenyan laws should recognize and incorporate cohabitation marriages, ensuring inheritance rights, and treating properties acquired during cohabitation as matrimonial property. The laws should also consider the rights of children from cohabitation marriages and the involvement of extended families in property distribution. Overall, there is a need for comprehensive legal frameworks that recognize and protect the rights of cohabiting partners in matters of succession, property distribution, and inheritance, providing clarity and fairness for individuals involved in cohabitation marriages.

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