

PRESUMPTION OF MARRIAGE AND ITS LEGAL CHALLENGES: AN OVERVIEW OF KENYAN LEGISLATION

INTRODUCTION

It is common for two consenting adults to live together for long durations without the existence of a contract of marriage between the two of them. During such periods, such parties acquire assets and liabilities, have children and generally undertake other acts that would create an understanding between themselves and/or the public that they are married.

The challenge arises when the relationship deteriorates and the parties decide to go their separate ways. The Marriage Act 2014 recognizes 5 types of marriage being Christian, Civil, Islamic, Hindu and Customary marriages. In which category does cohabitation fall into? Do such cohabitees have protection under the Marriage Act 2014 and the Matrimonial Property Act 2013?

This is where the common law principle of Presumption of Marriage arises.

PRESUMPTION OF MARRIAGE

It is a common law principle that long cohabitation of a man and woman with general reputation as husband and wife raises a presumption that the parties have contracted marriage. The Evidence Act, Cap 80 Laws of Kenya summarizes the same as below;

> *"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case..."*

Such presumption can be rebutted or denied with evidence to the contrary.

More often than not, parties seek for the court to presume the existence of a marriage because either of the parties has;

1. Denied that the nature of their cohabitation was that of a married couple.
2. Brought into play 3rd parties whom they allege are their spouses, sometimes there is an existence of marriage certificates.
3. Infer that while they intended to get married, they did not proceed with finality as they did not conduct the requisite customary rites.
4. Denied that they had the capacity to marry for reasons such as previous marriage, lack of consent or denial of the knowledge that they held out the other party as their spouse. Terms such as roommate has been used in the past.

The question on whether long cohabitation of parties and alleged repute of being husband and wife raises a presumption of marriage comes into play.

Section 109 of the Evidence Act of Kenya provides as follows;

> *"...The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of such fact shall lie on any particular person..."*

A marriage is therefore presumed on the strength of the evidence adduced by either party. The one alleging that their cohabitation should be deemed a marriage and the one asserting that their cohabitation was purely that and no marital relationship was or can be deemed to have been created.

In the case of ***MNK v POM (Petition 9 of 2021) [2023]*** the Supreme Court of Kenya agreed with the Appellant that a presumption of marriage did not arise as there was uncontroverted evidence that she had been married to a different man at the time the Respondent alleged that their cohabitation arose a presumption of marriage.

The Supreme Court of Kenya proceeded to lay out what it termed as strict parameters within which a presumption of marriage can be made. They are as follows;

1. The parties must have lived together for a long period of time.
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both parties.
5. The parties must have held themselves out to the outside world as being a married couple.
6. The onus of proving the presumption is on the party who alleges it.
7. The evidence to rebut the presumption had to be strong, distinct, satisfactory, and conclusive.
8. The standard of proof was on a balance of probabilities.

Of keen interest is the Courts Obiter Dicta as follows;

> *"...the above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, such presumption should only be used sparingly where there is cogent evidence to buttress it..."*

> *"...it is becoming increasingly common for two consenting adults to live together for long durations where these two adults have neither the desire, wish nor intention to be within the confines of matrimony. This court recognizes that their exists relationships where couples cohabit with no intention whatsoever of contracting a marriage. In such contexts, such couples may choose to have an interdependent relationship outside marriage. While some may find this amoral or incredible, it is the reality of the times we live in today...*

> *...where such situation is evident and there is no intention whatsoever of contracting a marriage, the presumption of marriage must never be made where this intention does not exist. It must always be remembered that marriage is a voluntary union. As such courts should shy away from imposing "marriage" on unwilling persons..."*

Succinct is the Supreme Court's assertion that ***"... perhaps it is time for the National Assembly and the Senate in collaboration with the Attorney General to formulate and enact Statute Law that deals with cohabitees in long term-relationships; their rights and obligations..."***

Some challenges parties cohabiting parties face within the Kenyan judicial systems are as follows;

1. **Lack of formal recognition of non-married partnerships.** Some of these parties have no desire for their union to be recognized as a marriage but due to lack of recognition of their union, some try to fit the union into the mound known and recognized as a marriage to the angst of their partner which spirals and springs up several issues to resolve their disputes.

2. **Long litigation.** When disputes on the nature of the relationship have to be determined before the parties' rights and obligations can be determined, such disputes have the tendency of being in court for long, several applications and appeal after appeal filed before a conclusion is eventually reached on a balance of probabilities.

The instant case was instituted in 2012 and Judgment on whether the Respondent was entitled to a share in the suit property was only concluded in 2023, 11 years later.

3. **Lack of specific legislation governing such relations.** This forces parties to such unions to try and confine the nature of their relationship to that of a marriage which may not have been their intention from the beginning, thus making a prayer before the court for a presumption of marriage to arise.

4. **Disputes from such relations are determined by applying ordinary legal rules applicable to strangers.** A good example is in the above stated case, while the court found that no presumption of marriage arose, on the facts of this case, the court noted that, ***"...it was crucial to make a finding on the parties' proprietary rights, whatever the nature of the relationship..."***

These proprietary rights arose out of a constructive trust, defined by The Black's Law Dictionary 9th Edition at Page 1649 as ***"the right, enforceable solely in equity, to the beneficial enjoyment of property which another person holds the legal title..."***

Would the principle of non-monetary contribution towards acquisition of such asset have the same weight as it would where a married couple have divorced and have to separate assets acquired during the subsistence of the marriage?

The Supreme Court addressed this as follows;

> ***"...Kenya, just like many other countries, does not have laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation... while we acknowledge the difficulties of resolving such disputes, a laissez fair approach can result in injustice for the parties to a relationship who might be more vulnerable or who contribute less in financial terms than their partners..."***

5. **No automatic rights if the relationship dissolves.** This applies across various divides, when a married couple divorces and one was dependent on the other, the court can make an order for provision of alimony cushioning the vulnerable person as they go separate ways, for cohabiting couples, such an order can only be made after a presumption of marriage is established.

The Law of Succession Act, Cap 160 Laws of Kenya gives automatic protections to the spouse, until their demise in the future. Cohabiting partners have no automatic right to an estate, they have to prove their claim amidst strong contention from the family of the deceased.

Similarly, a cohabiting partner does not have the right to administer the estate of the deceased until a court finds on a balance of probabilities that such person could be deemed as having been married to the deceased.

Further, where the deceased had a will which does not provide for the person they have been cohabiting with, such persons need to litigate before the court to show their right or claim in the deceased's estate.

Such difficulty is unheard of where one is a spouse of the deceased.

6. **Unequal power dynamics.** Where one party to the union has less financial muscle than the other, the fact of having to litigiously litigate before a marital relationship can be established and/or their proprietary interest is determined discourages most from pursuing their interests.

7. **Injustice especially for non-monetary contributions.** In most societies, informal agreements are reached for one party, often the woman in our context to work within the family, taking care of the children, nurturing the family and other household duties which outside of the provisions of the Matrimonial Property Act 2013, may be challenging to quantify as equal contribution.

8. **Legal costs.** The court had 1st to settle the question on whether a presumption of marriage arose in order for the Respondent to claim his rights under the Matrimonial Property Act 2013. Such lengthy litigation comes at a hefty legal cost due to the legal team that it daintily making arguments to balance all interests.

WHAT NEXT?

We opine that it may be prudent for parties who intent to cohabit without marriage to have a Cohabitation Agreement prepared by competent legal counsel. Such agreements would define the nature of the relations, the rights and obligations that may arise from such relations and provide a tailor-made solution for when such relationships come to an end by choice or demise of either party.

While such agreement is not specifically envisioned under Kenyan Law, legal contracts are recognized by law and by the Honourable Courts.

CONCLUSION

There is a misconception with deep roots that after living with a partner for more than 6 months, that such union qualifies as a legal marriage recognized under Kenyan law. It would not be appropriate to belabor the confines within which a presumption of marriage finding may be made by a court for one to enjoy Marital rights and obligations. It is necessary for parties who intend for their relationship to be recognized as a marriage either register their customary marriage or conduct a Christian, Civil, Hindu or Islamic Marriage as per their belief systems and recognizing the recognized nature of such marriages.

The advice of a seasoned family advocate would be crucial for parties in such unions to help them not only define the relationship dependent on their joint intention and further rights and obligations that may arise from such unions.

HOW CAN WE HELP?

At **CM Advocates LLP**, the Private Wealth, Family Law, Family Business & Global Mobility Advisory Services understand the complexities and potential pitfalls of cohabitation in Kenya. With the Supreme Court's clear pronouncements on the presumption of marriage, and the absence of specific legislation for cohabiting partners, it is more critical than ever to proactively define your relationship and protect your interests.

We offer comprehensive guidance and support to help individuals and couples navigate these intricate legal landscapes, including:

- **Drafting Cohabitation Agreements:** We help you create tailor-made, legally sound agreements that clearly define the nature of your relationship, the rights and obligations of each party, and provide a clear roadmap for asset division, financial arrangements, and other crucial matters should the relationship end or one-party pass away. This proactive step can prevent lengthy, costly, and emotionally draining disputes.

- **Advising on Presumption of Marriage Claims:** Whether you are seeking to establish a presumption of marriage or to rebut such a claim, our seasoned family law advocates provide strategic advice and robust representation based on the latest legal precedents and the specific evidence of your cohabitation.

- **Protecting Proprietary Rights:** We assist cohabiting partners in asserting their proprietary rights, particularly concerning non-monetary contributions to jointly acquired assets, utilizing legal principles such as constructive trusts where applicable.

- **Estate Planning for Cohabiting Couples:** Recognizing the lack of automatic inheritance rights for cohabiting partners, we guide you through essential estate planning to ensure your partner's interests are protected and your wishes regarding asset distribution are respected in the event of your demise.

- **Resolving Disputes Efficiently:** Where disputes arise, we champion alternative dispute resolution mechanisms like mediation to address issues of relationship recognition, property division, and other arising conflicts in a more cost-effective, confidential, and less adversarial manner, avoiding the prolonged litigation often associated with these cases.

Don't leave your future to legal ambiguity. Our team is dedicated to providing clear, practical advice and solutions that safeguard your interests and bring peace of mind, allowing you to define your relationship on your own terms.

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