

# Cohabitation and the Law Relating to Property Sharing in Uganda

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## Abstract

*This paper examines cohabitation and the law relating to property sharing in Uganda. The paper indicates that the law on property sharing is applicable to parties who have celebrated their marriage under the laws of Uganda, although the latter is silent on the issue of presumption of marriage. Today the trend has changed and this has been attributed to a number of factors such as the availability of finances, increased levels of education, literacy and advocacy; and the norm of courtship amongst others. With parties living together, property is acquired and upon separation, it is always contentious on whether the property acquired during the subsistence of that relationship is to be shared. The courts have attempted to interpret and apply the law using principles of equity and common law as the law on marriage, divorce and succession is inapplicable to such unions. The paper provides recommendations on the different strategies to be employed policy makers and cohabitantes towards having protection before the law regarding property obtained during the subsistence of such relations.*

**Key words:** Cohabitation, property rights, marriages by repute, presumption of marriage.

## A. Introduction

According to the customs and norms in Uganda, marriage is the socially and legally sanctioned form of union between a man and a woman. There are different forms of marriages recognised in Uganda and include Christian, Civil, Customary, Mohammad, Hindu and Bahai, and the law on property sharing is applicable to such persons who have celebrated their union under such laws. These unions are accompanied by a marriage celebration, certificate of marriage as proof of existence of such union, which is proof of marriage (evidence) upon dissolution of the relationship and parties use to claim a share to property acquired during its subsistence. A few decades ago in Uganda, living together without formalizing a relationship was a taboo and unthinkable given the existing strong cultural,

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moral and societal norms.<sup>1</sup> However, the trend has changed as cohabitation, is commonly practiced today, much as it is not a legally recognized form of union under the laws of Uganda regardless of the period of time a supposed “husband and wife” spend together.<sup>2</sup>

The paper therefore makes a discussion on cohabitation and its growing trends with specific reference to Uganda. Secondly, the paper makes a discussion of the Uganda’s legal framework on property rights accruing from marriage vis-a-vis cohabitation. Thirdly, the paper examines the judicial interpretation of cohabitation. Lastly, the paper gives recommendations on how cohabiting parties can enjoy their property rights accruing from their relationship.

## B. Cohabitation and its trends in Uganda

Cohabitation also commonly known as “marriage by repute or presumption of marriage” is used to describe unmarried couples in a relationship and living together as husband and wife.<sup>3</sup> Ideally, cohabitation gives no general legal status to a couple, unlike marriage and civil partnerships from which many legal rights and responsibilities accrue,<sup>4</sup> and unfortunately, many people aren’t in the know of this fact.<sup>5</sup>

As such, recent studies have shown that cohabitation has and continues to exist in society. It has become a common practice at both social, class and ethical level. Cohabitation is now a prominent transition in which unmarried partners get to stay or live together as husband and wife though their relationship isn’t legally recognized under the law. Many studies done across the world even in Europe and America have shown to exhibit that couples have come to adopt cohabitation as an alternative to a legal marriage or take a step towards having a recognized marriage.<sup>6</sup> Undoubtedly, cohabitation today is the new modern lifestyle that has advanced within society. It is regarded as a normal way of life whether within the African traditional setting or in the modern world today.

1 *Hussein Kiganda*. How Ugandans are dealing with the trend of Cohabitation, The African Press Club <https://www.africanpressclub.com/stories/how-ugandans-are-dealing-with-the-trend-of-cohabitation/> (accessed 14 May 2023).

2 *Uganda Law Reform Commission*. Study report on the review of laws on succession in Uganda, July 2013, Pg.130 <https://www.ulrc.go.ug/sites/default/files/Final%20succession%20study%20report%20presented%20to%20Commissioners.pdf/> (accessed 20 May 2023).

3 *National Legal Service*. What is cohabitation? 07.06.2022 <https://nationallegalservice.co.uk/what-is-cohabitation/#:~:text=If%20you%20are%20living%20with,it%20is%20known%20as%20cohabitating/> (accessed 20 June 2023).

4 *Catherine Fairbairn*. “Common law marriage” and cohabitation, Commons Library Research Briefing, 3 November 2022, Pg. 5 <https://researchbriefings.files.parliament.uk/documents/SN03372/SN03372.pdf/> (accessed 10 July 2023).

5 *Ibid.*

6 Regional Analysis, Pg. 2.

Uganda's legal system on marriage and divorce can be traced way back in 1904.<sup>7</sup> Marriage was/is solely premised on the British Common law system bearing in mind that Uganda was a British protectorate by the time it gained independence in 1962.<sup>8</sup> Much as Uganda was an independent British colony, customary law still played an important role in structuring the legal system of the country.<sup>9</sup> During the period of 1904 onwards till independence, Ugandan marriages were vastly celebrated on the existing customs, culture and tradition; and decisions were made by the clans under the local court jurisdictions. These focused on polygamous marriages, bride price and inheritance. With this, came the enactment of the Marriage Act of 1904 which mainly catered for marriages between the British resident in Uganda, though there were always clashes between these two legal systems.<sup>10</sup>

The 1904 Act precisely provided for church and civil marriages that took place in Uganda.<sup>11</sup> However, with time, there were legal gaps that manifested within the law which didn't recognize other existing forms of marriage such as Customary, Hindu and Moslem marriages. Dr. Sarah Ntiro, one of the activists at the time proposed a Private Member's Bill in 1949 so as to streamline the existing marriage laws with other existing marriages that were being practiced in Uganda.<sup>12</sup> This Private Member's Bill gave birth to the 1964–65 Kalema Commission on Marriage, Divorce and Status of Women in Uganda,<sup>13</sup> just two (2) years after Uganda had gained independence in 1962. The essence of this Commission was to make proposals for reform on the already existing marriage law. That is;

*"To consider the laws and customs regulating marriage, divorce and status of women bearing in mind the need to ensure that those laws and customs, while preserving existing traditions and practices as far as possible should be consistent with Justice and Morality, and appropriate to the position of Uganda as an independent nation; and make recommendations."*<sup>14</sup>

7 *Winifred Brown*. Marriage, divorce and inheritance: the Uganda Council of Women's movement for legislative reform (Cambridge African Monographs; 10) African Studies Centre, 1988, Pg. 1 <https://www.african.cam.ac.uk/system/files/documents/marriageinheritance.pdf/> (accessed 13 June 2023).

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid*, Pg. 39.

13 *Uganda Womens' Network (UWONET)*. A Policy Brief on the Marriage and Divorce Bill: Whys, How's and What's of the Marriage and Divorce Bill, 2009, Pg.1 <https://nru.uncst.go.ug/bitstream/handle/123456789/1049/A%20policy%20brief%20on%20the%20marriage%20and%20divorce%20bill%20Whys%2c%20hows%2c%20and%20whats%20of%20the%20marriage%20and%20divorce%20bill%2c%202009..pdf?sequence=1&isAllowed=y/> (accessed 20 June 2023).

14 *Ibid.*

Indeed the Commission made some recommendations such as having one law regulating all marriages and having them registered; on succession and inheritance; and surprisingly on cohabitation as well amongst others.<sup>15</sup> Indeed, over the years, the legal regime on succession and inheritance in Uganda has been amended to address the changing and current growing social, economic and cultural trends. The latest being the succession (amendment) act 2022 which has gone an extra mile to stipulate rights of ownership accruing to inheritance taking into account the socio-economic dynamics as well as address issues of gender equality.<sup>16</sup> However, the current marriage act and its subsequent proposed amendments have attracted a lot of backlash from different interest groups for various reasons. This is because the would be proposed changes such as divorce, cohabitation and property rights are being challenged by different actors.

In regards to cohabitation, the Kalema Commission recommended its recognition in absence of a marriage contract.<sup>17</sup> That where a man and woman;

*"have been living together or otherwise for a period of time of not less than 12 months as man and wife, it is should not be lawful for either party to deny the subsistence of a marriage between them, whenever the status is called into question by either party, and, therefore either party should be liable to disabilities if any and enjoy the privileges incidental thereto."*<sup>18</sup>

Indeed today, cohabitation is a common practice today though is very contentious as the Ugandan law does not recognize marriage by repute however long the period is. Courts have also clearly stipulated that for a marriage to be recognised or exist, a certificate of marriage must be in existence to provide proof of the union so as to lead evidence in any legal proceedings.<sup>19</sup>

With the law not being applicable to marriage by repute, this has created a lacuna in the law for persons in cohabiting relationships who aren't able to demand for their rights.<sup>20</sup> They aren't entitled to any legal rights accrued during the relationship.<sup>21</sup> Notably, children sired from these unrecognised unions are recognized under the law and enjoy rights such as

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ministry of Justice and Constitutional Affairs.* The Amended Succession Laws, August 2022 <https://www.gcic.go.ug/the-amended-succession-laws/#:~:text=The%20amendments%20in%20the%20Succession,of%20deceased%20persons%20in%20Uganda/> (accessed 30 June 2023).

<sup>17</sup> *Winifred Brown*, Pg. 40.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Jamil Ddamulira Mujuzi.* Presumption of marriage in Uganda, *International Journal of Law, Policy and The Family*, 2020, 34, 247–271, 6 December 2020, Pg. 254 <https://academic.oup.com/lawfam/article-abstract/34/3/247/6024926/> (accessed 15 May 2023).

<sup>20</sup> *Uganda Law Reform Commission*, Pg. 48.

<sup>21</sup> *Ibid.*

property inheritance as stipulated under the succession laws whereas the women and their contribution cease during inheritance.<sup>22</sup>

The Ugandan Parliament has on numerous efforts attempted to recognize marriage by repute under the marriage laws to harmonize the legal vacuum by tabling atleast three (3) marriage bills; and unfortunately, none has materialized. The first being the Domestic Relations Bill 2003 which aimed at reforming and consolidating marriage laws, separation and divorce, marital rights and duties, grounds for marriage breakdown, rights accrued to parties during dissolution and for other interrelated purposes.<sup>23</sup> However, it was opposed by different actors for various reasons, alluding that the concept of cohabitation is an attack on customary marriage and offends some moral, social, cultural and religious values resulting into undermining the marriage institution.<sup>24</sup>

To that, the Uganda Law Reform Commission revised and replaced it with the Marriage and Divorce Bill 2009, addressing the same objectives as specified in the Domestic Relations Bill.<sup>25</sup> The 2009 Bill attempted to recognize the rights of cohabitantes in property sharing upon termination of marriage by repute, though it categorically emphasized that the latter is not a recognized form of marriage in Uganda.<sup>26</sup> Like the 2003 Domestic Relations Bill, the 2009 Bill suffered the same fate and criticism; and consequently no action was taken since then, upto when it was returned as the Marriage Bill 2022. The 2022 Bill also sought to provide a comprehensive legal framework on matters relating to marriage considering that the current Marriage and Divorce Act 1904 has not been amended for the last 118 years considering the vast socio-economic and cultural changes today.<sup>27</sup>

With its return in 2023 by Honourable Sarah Opendi, Tororo Woman Member of Parliament, who argued that the current laws regulating the different types of marriages in Uganda have become outdated in light of the current Constitution, government policies and international best practices that have also evolved.<sup>28</sup> One interesting aspect was the proposed pronunciation of marriage after parties have lived together for a period of at least six (6) months,<sup>29</sup> making it the shortest time frame for presumption of marriage as compared to other jurisdictions such as United Republic of Tanzania and Malawi whose legal regimes

22 *Ibid.*

23 *The Parliament of Uganda*, Report of the Committee on Legal and Parliamentary Affairs on the Domestic Relations Bill 2003, March 2005, Pg.1 <https://www.parliament.go.ug/cmis/browser?id=cdf63ea8-4bab-44cc-b64b-254069daf074%3B1.0> (accessed 15 May 2023).

24 *Ibid*, Pg. 3.

25 *Uganda Law Reform Commission*, *Ibid.*

26 *Parliament of Uganda*, Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Marriage and Divorce Bill 2009, December 2012, Pg. 3 <https://www.parliament.go.ug/cmis/browser?id=165bf8cc-e910-45e3-9819-f8ea92c0c26%3B1.0> (accessed 17 May 2023).

27 *Parliament of Uganda*, Marriage Bill returns to Parliament. 21 July 2022 <https://www.parliament.go.ug/news/6044/marriage-bill-returns-parliament/> (accessed 17 May 2023).

28 *Ibid.*

29 *Ibid.*

recognise cohabitation as a legal union after a period of two and five years respectively. She argued that staying with someone's daughter without meeting the customary obligations is a sign of disrespect in the African setting.<sup>30</sup> This attracted mixed reactions from the public, with each having differing opinions.<sup>31</sup> For example, some were of the view that where a biological child is sired, the couple should be declared legally married; others opined that marriage shouldn't be forced; the proposed six (6) months' period is too short, and parties are still getting to know each other during that time, thus instead proposing atleast a period of about 3 to 6 years; and also the reforms are intended to protect women in the event of separation as the most affected party among others.<sup>32</sup> With these differing views, it implies that the Bill may suffer setbacks as there are many factors at hand impending marriage reforms, hence the need to develop other legal mechanisms to protect interests of cohabiting couples.

Elsewhere in Africa, for insistence in United Republic of Tanzania and Malawi, cohabitation is legislated and recognized as a form of marriage. In Malawi, the Constitution under family and marriage; recognizes marriages by repute and by permanent cohabitation.<sup>33</sup> The same is replicated under the Malawian Marriage, Divorce and Family Relations Act that defines cohabitation to mean a man and woman, unmarried to each other though staying together as, or as if they were husband and wife.<sup>34</sup> It further recognizes marriage by repute or permanent cohabitation as a legal union under section 12 of the Act.<sup>35</sup> The Act also provides a number of factors a court of competent jurisdiction can consider before pronouncing itself on the existence of marriage by repute or permanent cohabitation.<sup>36</sup> Such factors include;

*"the existence of the relationship for a period of not less than five years; the fact of cohabitation; existence of a conjugal relationship; degree of financial dependence or interdependence and any other agreement for financial support between the parties; ownership, use and acquisition of property; degree of mutual commitment to a shared life; whether the parties mutually have, care for, or support, children; reputation of the parties in the community as being married and the public display of aspects of their shared relation; and any other the court deems fit."*<sup>37</sup>

30 *Ibid.*

31 *Sylvia Katushabe*, Cohabiting couples weigh in on marriage reforms. The Daily Monitor, Thursday, May 18, 2023 <https://www.monitor.co.ug/uganda/news/national/cohabiting-couples-weigh-in-on-marriage-reforms-4238918/> (accessed 19 May 2023).

32 *Ibid.*

33 Article 22 (5), The Constitution, 1994 (rev. 2017).

34 Section 2, Interpretation, Act No.4 of 2015.

35 *Ibid.*

36 *Ibid.*, Section 13.

37 *Ibid.*

The same Act gives more discretionary powers to the Court to determine any other factors it may deem fit in determining the existence of marriage by repute or cohabitation. More so, divorce proceedings arising out of such marriages are handled by the High Court as observed in **Humphreys Malola vs. Alice Malola**.<sup>38</sup> The Court of Appeal emphasized that the High Court jurisdiction is statutory in nature and Magistrates courts have no power to handle the same, except where the customary law of the area accepts and recognizes such marriages.<sup>39</sup>

Furthermore, in the United Republic of Tanzania, a marriage is presumed to exist where a man and woman have lived together for a period of two or more years.<sup>40</sup> Such a relationship entitles parties to reliefs sought as any other legally recognized union upon dissolution of marriage or an order for separation.<sup>41</sup> Other orders accruing to divorce or separation such as maintenance and custody can be given by any court of competent jurisdiction. The Court has discretion to also award other reliefs as it deems fit.<sup>42</sup> Much so, for section 160 to apply, both parties must have the capacity to marry themselves, and the community they do reside should ideally infer to them as “husband and wife.”

### **C. Uganda's statutory framework on property rights accruing from marriage vis-a-vis cohabitation**

Uganda is a signatory and State Party to various international and regional human rights instruments which guarantee the principles of equality and nondiscrimination; notably the Sustainable Development Goals under SDG 5 on gender equality which aims at achieving gender equality and empowering all girls and women; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; The Convention on the Elimination of All Discrimination Against Women and its Optional Protocol, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa among others.

At regional level, the East African Community (EAC) upholds gender equality and aims at promoting gender equality as well as empower women for its development. The Community advocates for women and girls' equal rights, combat discriminatory practices and challenges, roles and stereotypes that advance inequalities and gender exclusion.<sup>43</sup>

At national level, the Constitution of the Republic of Uganda generally prohibits gender discrimination and enshrines the principle of equality before the law. It states that “all persons are equal before and under the law in all spheres of political, economic, social and

38 Civil Appeal Case No. 48 of 2016 <https://malawilii.org/akn/mw/judgment/mwhc/2016/638/eng@2016-10-14/> (accessed 19 May 2023).

39 *Ibid.*

40 Section 160 (1), Marriage Act.

41 Section 160 (2), *Ibid.*

42 *Ibid.*

43 *East African Community*. EAC Gender Policy, Arusha, Tanzania, May 2018.

cultural life”; that they “shall enjoy equal protection of the law”; and that a “person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.”<sup>44</sup>

With Article 33 of the Constitution pertaining specifically to the rights of women and elucidates that “The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement” that “Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities”; and that “Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.”

Article 26 provides that every person has a right to own property either individually or in association with others. The current marriage and divorce laws of Uganda neither provide any guidelines to regulate property sharing at divorce or judicial separation. The 2017 marriage and divorce bill proposed amendments intended to consolidate and reform marriage laws and rights accrued thereto as such marital rights and duties arising from marriage.<sup>45</sup> Such include matrimonial rights which are inclusive of property rights. Property rights give a spouse the right to own property as an individual during the subsistence of the marriage.<sup>46</sup> The bill attempts to provide what includes and excludes matrimonial property. That is matrimonial property to include the matrimonial home or homes and all other real and personal property and businesses acquired by either or both spouses before or during the marriage, held in joint ownership.<sup>47</sup> However, it excludes ancestral property, property acquired by a husband and a wife held in common by each in respect of property acquired during the marriage, and for any transaction to take place, consent of both spouses is a requisite.<sup>48</sup> More so, it introduces the concept of equal access in marriage where each spouse is entitled to the property in terms of usage, benefit and entry. Whereas under a polygamous marriage, matrimonial property acquired by both spouses is held jointly by the husband and wife in respect to the property acquired during the marriage.<sup>49</sup>

Unfortunately, the clause on cohabitation in relation to property sharing was dropped by legislators on grounds that it is an *illegality* that cannot be addressed under the marriage laws of Uganda, and contravened the Constitution, the religious sacred understanding of marriage and the African tradition.<sup>50</sup> More so, compromises were also made with the

<sup>44</sup> Article 21, Equality and freedom from discrimination. The 1995 Constitution of the Republic of Uganda (as amended).

<sup>45</sup> *Uganda Law Reform Commission*, *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *The Independent*. Law on property sharing in cohabiting couples in final stages, April 19, 2018 <https://www.independent.co.ug/law-on-property-sharing-in-cohabiting-couples-in-final-stages/> (accessed 22 May 2023).

religious leaders to drop the clause; with men alleging that women are *plotting* to steal their property.<sup>51</sup>

Nevertheless, Ugandan case law has eminently gone ahead to define what amount to matrimonial property and its without doubt that with marriage, there are rights accrued to it legally. However, many couples in cohabiting relationships in most cases lose out as there is no legal basis and protection upon which to claim a share to any property acquired together, unless a party ably proves the existence of a marriage as challenged by another.

For example, the Supreme Court of Uganda in the case of **Julius Rwabinumi vs. Hope Bahimbisomwe**,<sup>52</sup> cited with approval the case of Muwanga vs. Kintu High Court Divorce Appeal No.135 of 1997 (unreported), where Bbosa J observed that matrimonial property is understood differently by different people. There is always property which the couple choose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which parties chose to call home and which they jointly contribute to.

The decision in this case indicates that marriage laws are still very contentious in Uganda till to date. Nevertheless, this decision provides the current position of law on property acquired during the subsistence of a marriage and has been contributed too jointly by both parties, as well as providing guidelines for other courts of judicature on what constitutes matrimonial property. Undoubtedly, providing a remedy for the division of matrimonial property pending the amendment of the current marriage laws so as to accommodate the current social development trends such as cohabitation and other existing loopholes therein.

#### **D. Judicial Interpretation of Cohabitation**

From the above discussion, it's very clear that the Ugandan law provides no legal framework governing cohabitation or presumption of marriage or marriage by repute. Courts have come and shown that many people are staying together as husband and wife even without celebrating any form of union.<sup>53</sup> The increase in cohabitation has been attributed to a number of cross-cutting socio-economic, structural factors as well as cultural norms and values such as high bride price which is expensive and has become a form of commercialization of marriage celebrations; early pregnancies, increased levels of education, literacy and advocacy; and the norm of courtship among others raising the issue of their

51 *Mercy Nalugo*. Marriage Bill: We are tackling reality, The Saturday Monitor, March 17, 2013 – updated January 09, 2021 <https://www.monitor.co.ug/uganda/magazines/people-power/marriage-b-ill-we-are-tackling-reality--1538084> (accessed 22 May 2023).

52 (Civil Appeal No. 10 of 2009) [2013] UGSC 5 (20 March 2013) <https://ulii.org/akn/ug/judgment/u-gsc/2013/5/eng@2013-03-20> (accessed 30 May 2023).

53 *Jamil Ddamulira Mujuzi*, Pg. 247.

legal status and the rights accruing from such relationships.<sup>54</sup> Despite these, the courts of law have gone ahead to clarify that however long a relationship exists between two people without legally formalizing such union under the marriage laws of Uganda, such a union doesn't amount to a marriage,<sup>55</sup> except where the parties can and are able prove that a marriage ceremony took place.<sup>56</sup> However, an attempt to have a ceremony take place doesn't constitute a marriage.

The case of **Baryamureeba James vs. Kabakonjo Abwooli and Others**<sup>57</sup> is one where court had to deliberate on the issue of cohabitation and the property rights accrued from such a union. One of the issues the court determined was whether a marriage existed between the plaintiff and 1<sup>st</sup> defendant, as both parties had lived together for about 35 years since 1970 and had sired six (6) children, all adults by the time this matter was brought to court.<sup>58</sup> The plaintiff contended that he never married the 1<sup>st</sup> defendant as no bride price was given or ceremony conducted, while the 1<sup>st</sup> defendant alleged that a customary marriage was contracted with the plaintiff though she didn't inform court as to how the marriage was celebrated or performed.<sup>59</sup>

The Court first emphasized that for any marriage to be legal and recognized in Uganda, it has to be contracted under the different marriage laws which include the Marriage Act Cap. 251; Customary Marriages (Registration) Act Cap. 248; Marriage and Divorce of Mohammedans Act Cap. 252; Hindu Marriage and Divorce Act Cap. 250; and Marriage of African Act Cap. 253.<sup>60</sup> Therefore, the 1<sup>st</sup> defendant failed to adduce evidence of celebration of the said customary marriage as the law requires for such to be registered according to section 6(1) of the Customary Marriage (Registration) Act which states as follows;

*“...The parties to a customary marriage shall, as soon as maybe, but in any event not later than 6 months after the completion of the ceremonies of marriage, attend the office of the registrar of marriage district in which the customary marriage took place, with at least 2 witnesses to the marriage ceremonies, to register the details of the marriage...”*

In concluding, court found that despite the parties living together for over 35 years, there was no legally binding marriage, and as such they were cohabiting.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Civil Suit No.20/2013, High Court of Uganda at Kabale <https://ulii.org/akn/ug/judgment/ughccd/2020/27/eng@2020-01-17> (accessed 10 June 2023).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

However, in deciding on the question of property as the defendants alleged that the suit land the Plaintiff intends to sale is family land, and therefore consent needs to be sought for any transaction to take place.<sup>61</sup> The court's findings upon conclusion of the locus visit placed the suit land within the meaning of family land thus placing it under the provisions of section 38A of the land Act.<sup>62</sup> The court relied on section 38 A(4) of the Land (Amendment) Act 2004 to define family land to mean land on which a family ordinarily resides; one where the family ordinarily derives sustenance; and where the family freely and voluntarily agrees to be treated as family and belonging to the norms, culture, customs, traditions, or religion of the family.<sup>63</sup> Therefore, court concluded that consent had to be sought before any sale ought to have taken place. The court in protecting supposed "spouses" imputed section 38A which provides for security of occupancy on family land, and broadly gives security to spouses.

Much as no marriage existed between the two, court interpreted the section to broadly include even those persons who aren't legally married as per the Ugandan laws on marriage. it suffices to note that court avoided a strict interpretation of the section and definition of "spouse" to avoid absurdities, and explained that the intent of the legislation was protect people in cohabitation so as not to deprive them of their rights to property through claims that they aren't legally married. It imputed that the plaintiff and defendant had been constructively married for 35 years, bore children and derived sustenance on the land, thus fitting within the meaning of section 38A.<sup>64</sup>

Another case is that of **Bigala Frediman vs. Lornah Namuwonge**,<sup>65</sup> Court was tasked with deliberating on whether the plaintiff as a "co-habitant" had a right, upon dissolution of the relationship, to remuneration for expenses and contributions made during the subsistence of the union. Court found that the plaintiff had failed to prove that UGX. 43,000,000/= paid into the defendant's bank account was money for business purposes. The defendant argued that the money deposited by the plaintiff were accrued profits from the takeaway business and also used part of it to take care of their child and her while in Iganga. His purported agreement arose out of him thinking that there was a breach of promise to marry by the defendant. That agreements to marry are wholly dissimilar from ordinary contracts, and its thus imperative to consider the accompanying circumstances, emotions, motives and interests of the parties as there is no personal gain but mutual happiness between the latter.<sup>66</sup>

Furthermore, Court indicated that it cannot lend a helping hand to a plaintiff who is seeking revenge due to a failed relationship to recover money given during a relationship

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 Civil Suit No. 98 of 2020, High Court of Uganda at Kampala.

66 *Ibid.*

without clear consideration.<sup>67</sup> To that effect, Court advised unmarried couples to always draft agreements expressing their expectations and understandings regarding economic exchanges of value in their relationship, as it was noted that cohabitants rarely make comprehensive express written agreements ordering their economic relations. As such, these agreements easily become enforceable under the law once the relationship ceases to exist.<sup>68</sup>

#### **E. Conclusion**

As clearly noted above, marriages by repute, cohabitation or presumption of marriage are unrecognized under the marriage laws of Uganda. All marriages in Uganda have to be celebrated and registered. However, it is an undeniable fact that the practice of cohabitation is rampant in our society and has vast implications especially regarding property sharing upon dissolution of such unions. Many attempts have been made to amend the current marriage laws indicating the lack of political will by legislators, as well as its proponents facing stiff criticisms from different interest groups with each having different reasons. The intention of the amendments is to address the current changing social, economic and cultural trends.

It has been noted that cohabitation affects mostly women as compared to children; who in most cases lose out in such relationships as there is no legal claim arising from such union despite the number of years spent together. Much so, the Courts will impute a marriage where a party alleges that a marriage celebration took place and goes ahead to proof such ceremony. The Courts have gone an extra length to deliberate on such unions, by sometimes relying on common law principles of equity and the import of other laws to protect such affected parties. To further protect the supposed “spouses” interests especially regarding property rights, it is recommended that cohabiting couples expressly document their interests and intentions whether economical or not for ease of enforceability under the law upon dissolution.

#### **F. Recommendations**

As already discussed, that cohabitation is not a recognized form of marriage in Uganda, I advocate for the enactment of either a different law to cater for such supposed marriages by repute rather than being covered under the proposed Marriage Bill. It can either, be referred to as “joint unions” under the Bill as marriages are considered legal unions with legal implications upon separation or divorce on both parties and children.

Draft cohabitation agreements which can help to define the nature of rights and responsibilities to either parties so as to avoid potential future conflicts by understanding the

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

nature of the process from the outset and any other issues. In that, there are inheritable consequences that will arise from such relations; whereupon if either party doesn't understand the nature and effect of such an agreement, it can be varied or set aside on such grounds or courts may make reference to common law principles of equity. Nevertheless, it suffices to note that each party may have to disclose their assets and liabilities.

## G. References

1. *Catherine Fairbairn*. "Common law marriage" and cohabitation, Commons Library Research Briefing, 3 November 2022 (Available at <https://researchbriefings.files.parliament.uk/documents/SN03372/SN03372.pdf>).
2. *Hussein Kiganda*. How Ugandans are dealing with the trend of Cohabitation, The African Press Club (Available at <https://www.africanpressclub.com/stories/how-ugandans-are-dealing-with-the-trend-of-cohabitation/>).
3. *Jamil Ddamulira Mujuzi*. Presumption of marriage in Uganda, International Journal of Law, Policy and The Family, 2020, 34, 247–271, 6 December 2020 (Available at <https://academic.oup.com/lawfam/article-abstract/34/3/247/6024926/>).
4. *Mercy Nalugo*. Marriage Bill: We are tackling reality, The Saturday Monitor, March 17, 2013 – updated January 09, 2021 (Available at <https://www.monitor.co.ug/uganda/magazines/people-power/marriage-bill-we-are-tackling-reality--1538084>).
5. *Ministry of Justice and Constitutional Affairs*. The Amended Succession Laws, August 2022 (Available at <https://www.gcic.go.ug/the-amended-succession-laws/#:~:text=The%20amendments%20in%20the%20Succession,of%20deceased%20persons%20in%20Uganda.>).
6. *Silvia Katushabe*, Cohabiting couples weigh in on marriage reforms. The Daily Monitor, Thursday, May 18, 2023 (Available at <https://www.monitor.co.ug/uganda/news/national/cohabiting-couples-weigh-in-on-marriage-reforms-4238918>).
7. *The Independent*. Law on property sharing in cohabiting couples in final stages, April 19, 2018 (Available at <https://www.independent.co.ug/law-on-property-sharing-in-cohabiting-couples-in-final-stages/>).
8. *The Parliament of Uganda*, Report of the Committee on Legal and Parliamentary Affairs on the Domestic Relations Bill 2003, March 2005 (Available at <https://www.parliament.go.ug/cmis/browser?id=cdf63ea8-4bab-44cc-b64b-254069daf074%3B1.0>).
9. *The Parliament of Uganda*, Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Marriage and Divorce Bill 2009, December 2012 (Available at <https://www.parliament.go.ug/cmis/browser?id=165bf8cc-e910-45e3-9819-f8eaa92c0c26%3B1.0>).
10. *Uganda Law Reform Commission*. Study report on the review of laws on succession in Uganda, July 2013 (Available at <https://www.ulrc.go.ug/sites/default/files/Final%20succession%20study%20report%20presented%20to%20Commissioners.pdf>).

11. *Uganda Women's Network (UWONET)*. A Policy Brief on the Marriage and Divorce Bill: Whys, How's and What's of the Marriage and Divorce Bill, 2009 (Available at <https://nru.uncst.go.ug/bitsstream/handle/123456789/1049/A%20policy%20brief%20on%20the%20marriage%20and%20divorce%20bill%20Whys%2c%20hows%2c%20and%20whats%20of%20the%20marriage%20and%20divorce%20bill%2c%202009..pdf?sequence=1&isAllowed=y/>).
12. *Winifred Brown*. Marriage, divorce and inheritance: the Uganda Council of Women's movement for legislative reform (Cambridge African Monographs; 10) African Studies Centre, 1988 (Available at <https://www.african.cam.ac.uk/system/files/documents/marriageinheritance.pdf>.)