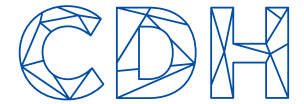


Real Estate Law

ALERT | 12 September 2024



In this issue

KENYA

I have someone at home: Is your marriage *de facto* or *de jure*?



For more insight into our
expertise and services

REAL ESTATE ALERT ALERT

I have someone at home: Is your marriage *de facto* or *de jure*?

A story is told of a lawyer who asked a client if they were married to determine whether spousal consent was needed. The client's response was, "*I have someone at home.*" This answer highlights a common uncertainty about whether simply cohabiting and sharing a life qualifies as a marriage under the law. It is a distinction that carries significant consequences, as it can mean the difference between legal recognition and a relationship left in legal limbo.

In light of this uncertainty, the recent High Court ruling in *JTO v AP (Appeal E128 of 2022) [2024] KEHC 10464 (KLR)*, delivered on 29 August 2024, has sparked widespread discussion for its far-reaching implications on spousal rights and property ownership. The decision firmly reinforced the registration requirements under the Marriage Act, 2014 (Act) and shed light on the legal consequences for couples in unions that were valid and recognised by law prior to the commencement of the Act, and the implications for real estate and property transactions that rely on spousal consent obtained from them.

De facto v de jure marriage

Before delving into the ruling, it is important to address the distinction between *de facto* and *de jure* marriages. A *de facto* marriage refers to a relationship where two individuals who live together consider themselves married, even though they have not formalised their union through legal channels such as registration or a religious ceremony. These marriages are real in fact but lack formal legal recognition.

On the other hand, a *de jure* marriage is one that has met all legal requirements, including registration. It is recognised by law, and the rights and obligations associated with the marriage are fully enforceable.

Provisions of the Marriage Act

The Act provides a clear framework for proving marriage through various means, including a certificate issued under Kenyan or relevant laws, a certified copy of such a certificate, or an entry in a marriage register maintained under these laws. Proof can also be provided through records from specific religious communities or entries in registers maintained by those communities. For marriages that took place in a public place of worship where registration was not required, proof may be established through an entry in the register of that place or a certified copy of it.

Customary marriages, in particular, must be registered within six months of their celebration or within three years for those contracted before the Act came into force, with an extension allowed until 2020.

Importantly, section 98(1) of the Act ensures that subsisting marriages valid under previous law remain valid under the current legal framework, even if registration has not yet occurred. The implication of this provision is that the commencement of the Act did not affect the substantive validity of a marriage that was valid at the time it was contracted. Therefore, it would mean that registration is intended to facilitate easier proof of the marriage for legal purposes, but failure to register does not negate the existence of the marriage.

REAL ESTATE ALERT ALERT

I have someone at home: Is your marriage *de facto* or *de jure*?

CONTINUED



Even so, section 12(e) of the Act is clear that a voluntary union of a man and a woman, whether in a monogamous or polygamous union, is voidable if there is a failure to register the marriage. In legal terms, a voidable contract is a valid agreement that can be either upheld or rejected at the option of one of the parties, unlike a void contract which is not legally enforceable from the outset.

Legitimacy of pre-existing marriages

In most legal systems, laws do not have retrospective effect, meaning they do not apply to events that occurred before the law came into force. Transitional provisions in the Act were designed to allow pre-existing marriages to remain valid, ensuring legal continuity. Some may argue that the legislative intent behind the transitional provisions of the Act was to create an administrative process for recognising existing marriages for legal purposes, without delegitimising them. There is no language in the Act explicitly stating that unregistered marriages within the given timeframe would be considered void or non-existent.

Marriages contracted under customary law or previous statutory laws were recognised before the Act's commencement, and their validity remains intact. However, couples who fail to register their unions may face complications in asserting spousal rights, especially in contexts like property transactions.

Spousal consent

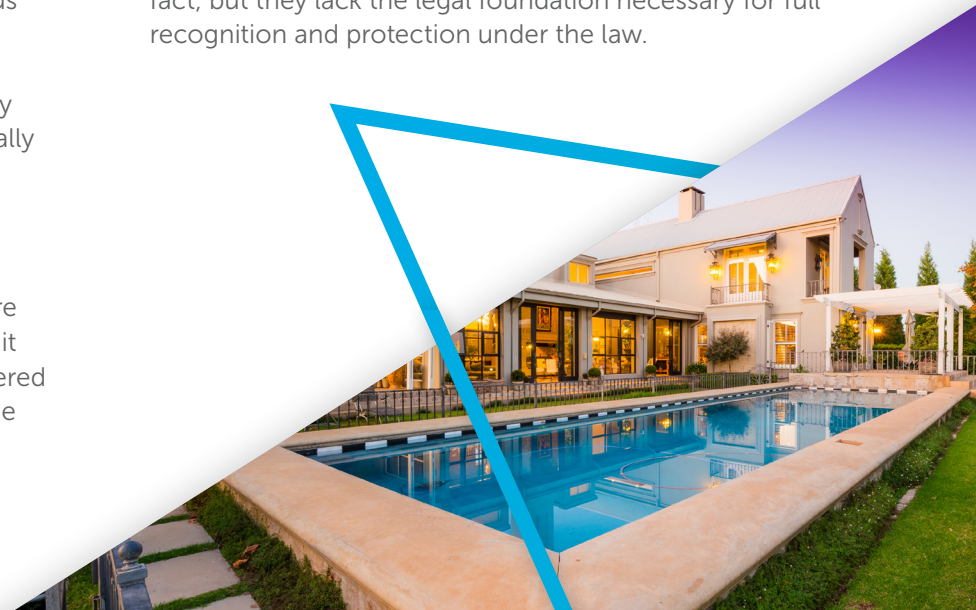
Spousal consent has now become a pivotal issue in property transactions, particularly where marriages are unregistered. If a marriage is not recognised because it has not been registered, a spouse may not be considered legally entitled to give or withhold consent, putting the transaction at risk.

As demonstrated in the court's reasoning, customary marriages that were once valid but have since gone unregistered are particularly vulnerable to these legal challenges. In cases of inheritance or joint ownership, the absence of a registered marriage certificate could complicate or even jeopardize property rights.

Key legal points from the judgment

In *JTO v AP*, the appellant claimed to be in a Luo customary marriage that was unregistered. The court held that since the marriage had not been registered within the required period, the appellant could not prove the existence of marriage for purposes of divorce.

The legal interpretation was clear that while long-term cohabitation is a reality for many, the law requires formal registration for marriages to be recognised. The court further acknowledged the inequity of dismissing a union that spanned over 20 years of cohabitation, but nonetheless emphasised that legal compliance cannot be waived. Marriages that are unregistered may exist in fact, but they lack the legal foundation necessary for full recognition and protection under the law.



REAL ESTATE ALERT ALERT

I have someone at home: Is your marriage *de facto* or *de jure*?

CONTINUED



The way forward

The inclination to keep outsiders out of personal unions is understandable. Many believe that their marriage thrives best when free from external interference. However, in today's legal environment, disregarding the Registrar of Marriages would be akin to submitting to a marriage that is tenuous at best, leaving it unanchored in the eyes of the law. Without legal recognition, your marriage remains fragile and unprepared to weather the eventualities that every relationship must face, whether through death, divorce or succession.

This is particularly poignant in polygamous unions, where failure to register may leave one spouse at a legal disadvantage compared to a co-wife whose marriage has secured the necessary legal status. The result would be potentially compromised rights and weakened legal standing.

Understanding the law is about safeguarding rights, not undermining a bond between spouses. By formalising your union, you are not just adhering to a bureaucratic process but rather securing your legal rights. The Registrar of Marriages is there to ensure your union stands the test of time legally. In an age where the law must work hand-in-hand with love, registering your marriage is one of the most significant steps you can take for your future.

Conversely, for those who can tolerate risk, the provision on voidable marriages could suggest that lack of registration simplifies or lowers the threshold for divorce, potentially making it more accessible or "*cheaper*", given that the grounds for dissolving an unregistered marriage are less stringent, or that the legal hurdles typically associated with divorce have been eased.

Lydia Owuor



OUR TEAM

For more information about our Real Estate Law practice and services in South Africa and Kenya, please contact:



Muhammad Gattoo
Practice Head & Director:
Real Estate Law
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



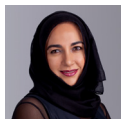
Bronwyn Brown
Director:
Real Estate Law
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Mike Collins
Director:
Real Estate Law
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



Simone Franks
Director:
Real Estate Law
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Fatima Gattoo
Director:
Real Estate Law
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Simone Immelman
Director:
Real Estate Law
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



Lydia Owuor
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E lydia.owuor@cdhlegal.com



Muriel Serfontein
Director:
Real Estate Law
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



John Webber
Director:
Real Estate Law
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Alex de Wet
Director:
Real Estate Law
T +27 (0)11 562 1771
E alex.dewet@cdhlegal.com



Natasha Fletcher
Counsel:
Real Estate Law
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



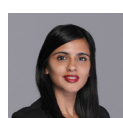
Samantha Kelly
Counsel:
Real Estate Law
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com



Kirsty de Sousa
Professional Support Lawyer:
Real Estate Law
T +27 (0)11 562 1747
E kirsty.desousa@cdhlegal.com



Bridget Witts-Hewinson
Senior Associate:
Real Estate Law
T +27 (0)21 481 6447
E bridget.witts-hewinson@cdhlegal.com



Lutfiyya Kara
Senior Associate:
Real Estate Law
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com



Sune Kruger
Senior Associate:
Real Estate Law
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com



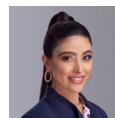
Lulama Lobola
Senior Associate:
Real Estate Law
T +27 (0)21 481 6443
E lulama.lobola@cdhlegal.com



Ceciley Oates
Senior Associate:
Real Estate Law
T +27 (0)11 562 1239
E ceciley.oates@cdhlegal.com



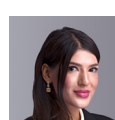
Henry Omukubi
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E henry.omukubi@cdhlegal.com



Fatima Essa
Associate:
Real Estate Law
T +27 (0)11 562 1754
E fatima.essa@cdhlegal.com



Muneerah Hercules
Associate:
Real Estate Law
T +27 (0)11 562 1579
E muneerah.hercules@cdhlegal.com



Zahra Karolia
Associate:
Real Estate Law
T +27 (0)11 562 1701
E zahra.karolia@cdhlegal.com



Asisipho Kozana
Associate:
Real Estate Law
T +27 (0)21 405 6168
E asisipho.kozana@cdhlegal.com



Ebun Taigbenu
Associate:
Real Estate Law
T +27 (0)11 562 1049
E ebun.taigbenu@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2024 13903/SEP

