



Ripples International v Attorney General & another; FIDA (Interested Party) (Constitutional Petition E017 of 2021) [2022] KEHC 13210 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E017 OF 2021**

EM MURIITHI, J

SEPTEMBER 29, 2022

**IN THE MATTER OF CONTRAVENTION AND ALLEGED
CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS AS
ENSHRINED UNDER ARTICLES 27 AND 45 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE CONSTITUTIONALITY OF SECTIONS 32,
35(1), 36(1) AND 39(A) AND (B) OF THE LAW OF SUCCESSION ACT**

AND

**IN THE MATTER OF DEFENCE OF THE CONSTITUTION
UNDER ARTICLES 3(1) OF THE CONSTITUTION**

AND

**IN THE MATTER OF INTERPRETATION, ENFORCEMENT
AND PROTECTION OF BILL OF RIGHTS UNDER ARTICLES
19, 20, 22, 23, 24, 165, 258 AND 259 OF THE CONSTITUTION**

BETWEEN

RIPPLES INTERNATIONAL PETITIONER

AND

THE HONORABLE ATTORNEY GENERAL 1ST RESPONDENT

THE SPEAKER, THE NATIONAL ASSEMBLY 2ND RESPONDENT

AND

FIDA INTERESTED PARTY



Some sections of the Law of Succession Act declared unconstitutional for being restrictive to the women and female children's right to inherit in equal measure and circumstances as their male counterparts.

Reported by Kakai Toili

Constitutional Law - constitutionality of statutes - constitutionality of sections 35(1)(b), 36(1)(b) and 39(1)(a) and (b) of the Law of Succession Act - whether sections 35(1)(b), 36(1)(b) and 39(1)(a) and (b) were restrictive of the women and female child's right to inherit in equal measure as the men and male child and thus unconstitutional - Law of Succession Act, Cap 160, sections 35(1)(b), 36(1)(b) and 39(1)(a) and (b).

Constitutional Law – fundamental rights and freedoms – freedom against discrimination – provision that exempted the application of intestacy laws to agricultural land and livestock in various districts – claim that the law was discriminatory to women and children - whether sections 32 and 33 of the Law of Succession Act (that exempted the application of intestacy laws to agricultural land and livestock in various districts) discriminated against women and children – Constitution of Kenya article 27; Law of Succession Act, sections 22 and 33.

Civil Practice and Procedure - doctrine of mootness - applicability of the doctrine of mootness - whether the doctrine of mootness and want of real dispute or controversy applied to public interest litigation under article 258(1) of the Constitution which gave every person a right to approach the court - Constitution of Kenya, article 258(1).

Jurisdiction - jurisdiction of the High Court - jurisdiction to compel the Attorney General to ensure the enactment of a legislation - whether the High Court could compel the Attorney General to ensure that a legislation had been enacted - Constitution of Kenya articles 109(1), 119, and 156(1) and (4).

Brief facts

The petitioner filed the instant petition and contended that various provisions to wit sections 32, 33, 35(1), 36(1) and 39(a) and (b) of the Law of Succession Act (the Act) had brought inequalities based on gender and violated the rights of women, girls and vulnerable members of the society by preventing them from enjoying the fruits borne by the progressive Constitution of Kenya, 2010 (Constitution). The inequalities had been brought about by the unequal treatment of women when compared to their male counterparts within the same provisions of the Act.

The petitioner sought to challenge the constitutionality of sections 32, 35(1)(b), 36(1)(b) and 39(1)(a) and (b) of the Act. The petitioner contended that the exceptions created by sections 32 and 33 of the Act were problematic since they denied the people of Kenya, especially women and the girl child of Kenya the right to property, food, shelter and the much-needed gender equality and even equal protection from adverse customary practices. The petitioner further contended that section 39 of the Act was discriminatory against women, in that it gave exclusive right, in intestacy to a father of a deceased who left no surviving spouse or children to inherit all the property of the deceased.

Issues

- i. Whether sections 35(1)(b), 36(1)(b) and 39(1)(a) and (b) of the Law of Succession Act were restrictive of the women and female child's right to inherit in equal measure as their male counterparts and thus unconstitutional.
- ii. Whether the doctrine of mootness and want of real dispute or controversy applied to public interest litigation under article 258(1) of the Constitution which gave every person a right to approach the court.
- iii. Whether the High Court could compel the Attorney General to ensure that a legislation was enacted.
- iv. Whether sections 32 and 33 of the Law of Succession Act (that exempted the application of intestacy laws to agricultural land and livestock in various districts) discriminated against women and children.



Relevant provisions of the Law

Law of Succession Act, Cap 160

Section 33 - Law applicable to excluded property

The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be.

Section 35 - Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

Section 36 - Where intestate has left one surviving spouse but no child or children

(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to-

(a) the personal and household effects of the deceased absolutely; and

(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and

(c) a life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.

Section 39 - Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

Held

1. A petitioner in a constitutional petition was required to not only cite the provisions of the Constitution which had been violated, but the manner in which they had been violated. In demonstrating the manner in which there had been a violation of their rights or of the Constitution, the petitioner should present before the court evidence or a factual basis on which the court could make a determination whether or not there had been a violation.
2. The court should not deal with hypothetical and academic issues. The jurisdiction to interpret the Constitution conferred under article 165(3)(d) of the Constitution did not exist in a vacuum, it was not exercised independently in the absence of a real dispute. It was exercised in the context of a dispute or controversy. The instant dispute fell squarely within the province of article 258 of the Constitution.
3. The doctrine of mootness did not apply in the instant application, the court had jurisdiction to consider and determine the challenge on the constitutionality of the impugned sections of the Law of Succession Act against the backdrop of the constitutional protection against alleged discrimination engendered by the impugned statutory provisions. The rule on mootness and want of real dispute or controversy could apply with special force in cases of private dispute for enforcement of rights but not in public interest litigation under article 258(1) of the Constitution, which gave every person a right to approach the court.
4. The text of sections 35(1)(b), 36(1)(b) and 39(1)(a) and (b) of the Law of Succession Act (the Act) were restrictive of the women and female child's right to inherit in equal measure and circumstances as the



- men and male child. Sections 35(1)(b) and 36(1)(b) restricted a widow's life interest in the property of her deceased spouse when she remarried unlike the widower who remarried. Section 39(1)(a) and (b) gave priority to the father ahead of mother over the property of a child who died intestate, unmarried and childless. Article 27(4) of the Constitution prohibited discrimination on the grounds of sex and marital status among other grounds. The differential treatment of the female as against their male counterparts was indefensible, and the Act which predated the Constitution, had no explanation for the latent discrimination and restriction. Article 45(3) of the Constitution recognised the equality of men and women in marriage set up.
5. A determination of the invalidity of sections 32 and 33 (that exempted the application of intestacy laws to agricultural land and livestock in various districts) on account of discrimination required a study on evidence of the various customs and practices of the various tribes in the region to ascertain whether the provision as to special provision for administration and inheritance of the property in the nature of agricultural land and produce and livestock resulted in discrimination of women. The several tribes occupying the regions to which section 33 applies may have different customs on inheritance. Concrete evidence on a particular case was necessary to establish the discrimination of women and female child.
 6. The power to make laws, including amendment lay with Parliament under article 109(1) of the Constitution. The role of the 1st respondent (Attorney General) was defined in article 156(1) and (4) of the Constitution and, as the principal legal adviser to the Government, was limited in legislative matters. It would be wrong to require the Attorney General to take steps and report on progress towards enactment or amendment of law a process he had little control over. The 2nd respondent, Speaker of the National Assembly, presided over the National Assembly under article 106 of the Constitution, but he did not initiate Bills and he had no vote.
 7. The petitioner could exercise his right under article 119 of the Constitution in terms that every person had a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. The court could not compel promulgation of a law or an amendment. The court had to defer to Parliament on legislative matters, and there was no basis for compelling the Attorney General to ensure legislation was enacted. There was obligation as there existed in some articles of the Constitution requiring the enactment of particular laws.
 8. There was no evidence of how the impugned provisions had discriminated against the persons, of other tribes, allegedly living in the gazetted areas. The court did not find that evidence had been adduced as to discrimination of women under the customs and practices of the peoples in the areas set out in section 33 of the Law of Succession Act with regard to the inheritance matters relating to the property set out in section 32 to warrant any intervention by the court.
 9. The interpretation of sections 35, 36 and 39 of the Law of Succession Act had to be interpreted in a manner that gave effect to the equality of women and men with regard to the protections and benefits accruing under sections 35, 36, and 39. Indeed, clause 7(1) of the transitional and consequential clauses under article 262 of the Constitution provided for such adaptation.

Petition partly allowed.

Orders

- i. *Section 35(1)(b) of the Law of Succession Act was declared unconstitutional.*
- ii. *Section 36(1)(b) of the Law of Succession Act was declared unconstitutional.*
- iii. *Sections 39(1)(a) and (b) of the Law of Succession Act were unconstitutional as they failed to give both father and mother equal priority in inheritance of their child's property that died intestate and had no surviving wife or children.*
- iv. *As regards sections 32 and 33 of the Law of Succession Act, the prayer for declaration of invalidity was declined.*



- v. *The prayers directing the Attorney General and Speaker of National Assembly to take measures for requisite legislative reforms and to produce quarterly progress reports thereon were declined. A copy of the judgment to be transmitted to the office of the Attorney General for information and action.*
- vi. *No order as to costs.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic (No 1)* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] KLR 154; [1976-80] 1 KLR 1272 - (Mentioned)
2. *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR); [2012] 2 KLR 261 - (Explained)
3. *Githunguri v Republic* [1986] KLR 1 - (Explained)
4. *In Re The Estate of Lerionka Ole Ntutu (Deceased)* Miscellaneous Succession Cause 1263 of 2000; [2008] KEHC 3913 (KLR) - (Explained)
5. *Kaminja, Daniel & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* Judicial Review 441 of 2018; [2019] KEHC 2059 (KLR) - (Explained)
6. *Katungi, Tau v Margrethe Thorning Katungi & another* Succession Cause 1040 of 1991; [2014] KEHC 3226 (KLR) - (Explained)
7. *Mboya, Apollo v Attorney General & 2 others* Petition 472 of 2017; [2018] KEHC 6933 (KLR) - (Explained)
8. *Muigai, Douglas Njuguna v John Bosco Maina Kariuki & another* Civil Appeal 131 of 2012; [2014] KECA 753 (KLR) - (Explained)
9. *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR) (Petition 3 of 2016) [2019] KESC 83 (KLR) - (Explained)*
10. *Muriithi, Samson Mutonga v Kenneth Matekwa* Succession Cause 370 of 2009; [2016] KEHC 1775 (KLR) - (Explained)
11. *Muthinja, Geoffrey & another v Samuel Muguna Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Explained)
12. *Mwau & 3 others v Attorney General & 2 others* [2012] 1 KLR 73 - (Explained)
13. *Non-Governmental Organizations Co-ordination Board v EG & 5 others* Civil Appeal 145 of 2015; [2019] KECA 902 (KLR) - (Explained)
14. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 22; [2008] 1 KLR (EP) 425 - (Explained)
15. *William, Agnes Nanjala v Jacob Petrus Nocolas Vander Goes* Civil Appeal 127 of 2011 - (Explained)

Texts

Currie, I., et al (Eds) (2005), *Bill of Rights Handbook* Johannesburg: Juta Publishers

Statutes

Kenya

1. Constitution of Kenya articles 10(2)(b); 27(1)(4); 45(3); 109(1); 119(1); 156(1)(4); 165(3)(d); 258(1); 262 - (Interpreted)
2. Law of Succession (Amendment) Act, 2021 (Act No 11 of 2021) In general - (Cited)
3. Law of Succession Act (cap 160) sections 32, 33 - (Interpreted)
4. Law of Succession Act (cap 160) 35(1)(b); 36(1)(b); 39(1)(a)(b) - (Unconstitutional)
5. Marriage Act (cap 150) In general - (Cited)



Instruments

Commonwealth (Latimer House) Principles on the Three Branches of Government, 2003

Advocates

Mr Kamiru for the petitioner

Ms Kedogo h/b for *Ms. Lumaras* for the interested party

JUDGMENT

- [1] The petitioner, a non-profit Christian organization, committed to foster promotion and protection of rights of women and children, filed a petition dated 16/8/2021 praying for specific reliefs as follows:
- a. A declaration be and is hereby issued that section 35(1)(b) of the *Law of Succession Act* be declared unconstitutional.
 - b. A declaration be and is hereby issued that section 36(1) (b) of the *Law of Succession Act* be declared unconstitutional.
 - c. A declaration be and is hereby issued that section 32 and 33 of the *Law of Succession Act* be declared unconstitutional.
 - d. A declaration be and is hereby issued that section 39(1)(a) and (b) of the *Law of Succession Act* are unconstitutional as they fail to give both father and mother equal priority in inheritance of their child's property that dies intestate and has no surviving wife or children.
 - e. That a mandatory injunction be and is hereby issued directing the 1st and 2nd respondents herein to take the necessary measures and steps to ensure the requisite Legislative Reforms are enacted to amend and/or repeal the *Law of Succession Act* to purge the above provisions of the Act in order to bring conformity of the Act with the *Constitution* of Kenya, 2010.
 - f. That this Honorable court orders and/or directs the 1st and 2nd respondents herein to bring before this honorable court quarterly Report on the progress made towards amending and/or repealing the provisions cited in (a), (b), (c) and (d) above of the *Law of Succession Act* to conform the Act with the *Constitution* of Kenya, 2010.
 - g. That each party bears its own costs, as the petitioner has brought this petition in the public interest.

Petitioner's Case

- [2] The petitioner, a non-governmental Christian Trust committed to protecting and promoting respect for the rights of women and children, contends that various provisions to wit sections 32, 35(1), 36(1) and 39(a) and (b) of the *Law of Succession Act* (henceforth called the Act) have brought the inequalities cited above based on gender, and which have continued to violate the rights of women, girls and vulnerable members of our society by preventing them from enjoying the fruits borne by our progressive Constitution. These inequalities have been brought about by the unequal treatment of women when compared to their male counterparts within the same provisions of the Act. Further, those inequalities have also been brought about by the impugned and also repugnant customary laws which are promoted by the current patriarchal society which has prevented women from enjoying their guaranteed rights and freedoms under the *Constitution*. The petitioner thus seeks to challenge the constitutionality of sections 32, 35(1)(b), 36(1) (b) and 39(1)(a) and (b) of the Act. The petitioner contends that the exceptions created by sections 32 and 33 of the Act are problematic since they



deny the people of Kenya, especially women and the girl child of this country the right to property, food, shelter and the much needed gender equality and even equal protection from adverse customary practices. The petitioner contends that section 39 of the Act is discriminatory against women, in that it gives exclusive right, in intestacy to a father of a deceased who left no surviving spouse or children to inherit all the property of the deceased. Priority being given to fathers over mothers is discriminatory, as both are parents of the deceased and should both be entitled to the estate. In practice, what these provisions mean is that as long as the father to the deceased is alive, the mother cannot inherit any part of a deceased estate who has died without leaving any spouse and/or children. The petitioner avers that the provisions of section 39(1)(a) and (b) of the Act contravene articles 27 and 45(3) of the Constitution.

The 1st Respondent's Case

- [3] The 1st respondent opposed the petition vide grounds of opposition filed on November 17, 2021, that the petition is otherwise incompetent, misconceived, misplaced, moot, frivolous, vexatious, misinterprets the application of Customary Law and an abuse of the court process as the petitioner's rights and fundamental freedoms have not been breached as alleged or at all and the same ought to be dismissed; the petition does not demonstrate with sufficient clarity the nature and scope of the violations of fundamental rights guaranteed in the Constitution; and every person is empowered by article 119(1) of the Constitution to petition Parliament to enact, amend or repeal any legislation.
- [4] The 2nd respondent and the interested party did not file any responses to the petition.

Petitioner's Submissions

- [5] The petitioner submits that the impugned provisions of the Act violate the provisions of article 27 of the Constitution as they directly discriminate against widows. It submits that impugned provisions indicate that where the surviving spouse is a widow, they lose the life interest in the whole of the remainder of the deceased's net intestate estate upon remarriage whereas the same exception does not apply to widowers when they remarry. Reliance was placed on Tau Katungi v Margrethe Thorning Katungi & another [2014] eKLR, Douglas Njuguna Muigai v John Bosco Maina Kariuki & Another [2014] eKLR, Samson Mutonga Muriithi v Kenneth Matekwa [2016] eKLR, Re Estate of Lerionka ole Ntutu (Deceased) [2008] eKLR and Apollo Mboya v Attorney General & 2 others [2018] eKLR. It faults the respondents failing to take the necessary actions to prevent and possibly eliminate any and every form of discrimination against women. It submits that the application of section 32 of the Act has resulted in the promotion of harmful practices such as eviction, asset stripping and use of patrilineal practices in distribution of assets. It submits that the assumption that all persons living in the gazetted areas under section 32 of the Act are pastoralists and they share the same customs, is inaccurate because the areas today have many economic dynamics that require people to live in different areas due to various economic reasons, and it also violates the rights of other persons to own property in those areas. It submits that section 39(1)(a) and (b) of the Act is discriminatory against women since it grants the father of a deceased person, who died intestate leaving no surviving spouse or children, the priority in inheriting the property of the deceased. It submits that the petition is brought in the public interest aimed at entrenching justice and fairness in the application of the Act with respect to widows, who have for a long time been victims of the impugned provisions. It submits that it has satisfactorily demonstrated that the application of the Act and specifically the impugned provisions has resulted in the discrimination of women in matters succession since 1981. The court is urged to intervene to ensure the respondents are compelled to take the necessary actions and measures such as spearheading and coordinating the amendment of the impugned provisions, in order to end and stamp out the toxic cycle of discrimination of women perpetrated by the application of the impugned provisions.



1st Respondent's Submissions

- [6] The 1st respondent submits that there is an established statutory procedure to ventilate the issues brought out in the petition, and relies on *Non-Governmental Organization Coordination Board v EG & 5 others* [2019] eKLR, *Speaker of the National Assembly v Karume* [2008] 1 KLR 425, *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR and *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR. It submits that the petition is moot and academic with no live cause of action for determination and relies on *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR. It submits that the petition is otherwise frivolous, vexatious and an abuse of the court process which it prays to be dismissed with costs.

Interested Party's Submissions

- [7] It submits that both parties to a marriage have equal rights before, during and at the dissolution of marriage as enumerated under article 45(3) of the *Constitution*. It relies on article 10(2)(b) of the *Constitution* which recognizes equality and non-discrimination as national values and principles of governance that bind all state organs, state officers and public officers. It submits that the impugned provisions of the Act go against the constitutional provisions enumerated under article 60(f) of the *Constitution* which encourages elimination of gender discrimination in law, customs and practices related to land and property. It submits that the impugned provisions of the Act fail to recognize equal protection of rights of widows who were previously married once they remarry. Reliance was placed on *Githunguri v Republic* KLR (1986) 1, *Agnes Nanjala William v Jacob Petrus Nocolas Vander Goes* MSA CA Civil Appeal No 127 of 2011 (UR), *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* (2012) eKLR. It submits that the application of the impugned provisions has resulted to social injustices which need to be remedied, failure to which the *Constitution*, which encourages equal protection and realization of rights, will have been contravened.

Analysis and Determination

- [8] Having considered the petition, the grounds of opposition and the written submissions together with the authorities cited therein, the only issue for determination is whether the petition is merited based on the contention of discrimination of women and female child by the *Law of Succession Act*.
- [9] This court wishes to first set out in verbatim the impugned provisions of the Act. Section 33 of the Act provides for the law applicable to excluded property as follows: "The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be."
- [10] Section 32 of the Act provides as follows: "The provisions of this Part shall not apply to — (a) agricultural land and crops thereon; or (b) livestock, in various Districts set out in the Schedule: West Pokot, Wajir, Samburu, Lamu, Turkana, Garissa, Isiolo, Kajiado, Marsabit, Tana River, Mandera, Narok."
- [11] Section 35(1) of the Act provides as follows: "Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to — (a) the personal and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person."



- [12] Section 36(1) provides that, “Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to — (a) the personal and household effects of the deceased absolutely; and (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.”
- [13] Section 39(1) of the Act provides that, “Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority — (a) father; or if dead (b) mother; or if dead brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”
- [14] All the issues raised in the petition had been proposed in the Law of Succession (Amendment) Bill 2021. However, the [Law of Succession \(Amendment\) Act](#), which was assented to on 17th November 2021 only amended the definition of a ‘spouse’ as a ‘husband or a wife or wives recognized under the [Marriage Act](#)’

Discrimination Question

- [15] Article 27 of the [Constitution](#) provides for equality and freedom from discrimination as follows: “(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4). (6) To give full effect to the realisation of the rights guaranteed under this article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”
- [16] Article 45 of the [Constitution](#) provides for equal rights to the parties to a marriage as follows: “The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State. (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. (3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”
- [17] The petitioner avers that sections 32 and 33 of the Act are discriminatory in that they assume that the people living the gazetted areas are pastoralists sharing the same customs, yet the current residents in those areas are from various tribes, who do not share the customs of these areas.
- [18] The petitioner contends that, by treating men preferentially from women, in intestacy of a deceased who left no surviving spouse or children, the provisions of section 39 of the Act are in contravention of article 27 of the [Constitution](#) which out rightly outlaws any form of discrimination. The Petitioner object to the priority being given to fathers over mothers in matters of inheritance of their deceased child’s property, as both are parents of the deceased and should both be entitled to the estate. Additionally, it urged by the petitioner that Sections 35 and 36 of the Act are discriminatory against



women in that they provide that the life interest of a widow shall determine upon her re-marriage, whereas a widower continues to enjoy life interest even after he re-marries.

- [19] The 1st respondent is firm that the petition is moot, because it does not raise a live cause of action for determination.

Determination

- [20] It is trite that a petitioner in a constitutional petition is required to not only cite the provisions of the Constitution which have been violated, but the manner in which they have been violated with regard to them. (see *Anarita Karimi Njeru* (1976-80) 1 KLR 1272). In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the petitioner should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.

Doctrine of Mootness

- [21] In *John Harun Mwau & 3 others v Attorney General & 2 others* [2012] eKLR (per Lenaola, Mumbi (as they then were) & Majanja JJ) while agreeing with a submission on mootness as follows:

“ 118. We also agree with the submissions of Prof Ghai that this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy. In this case the dispute before the court falls squarely within the province of article 258 of the .”

I respectfully agree.

- [22] The court found that it had jurisdiction to deal with the issue of the election date for the 2013 General Elections and distinguished cases of enforcement of fundamental human rights and freedoms from applications for interpretation of the Constitution as follows:

“ 114. In cases concerning the enforcement of fundamental rights and freedoms under the Bill of Rights and enforcement of the Constitution a party seeking the court’s relief must plead his case with precision. We agree with the dicta in *Republic v Truth Justice & Reconciliation Commission & another ex parte Augustine Njeru Kathangu and others* (*supra*) that an applicant has to clearly set out the acts and/or omission that, in his or her view contravene the Constitution. He or she must specify the provisions of the Constitution that those acts or omissions contravene and the prayers or the reliefs he or she seeks. In the cases before us we find that the pleadings were of sufficient particularity for the court and the respondents to know the provisions infringed and the acts and omissions that lead to the infringement of the Constitution. None of the parties before us were prejudiced or unable to respond to the allegations set out in the pleadings in any way.

115. It will also be noted that the first issue framed for determination is when the first elections under the Constitution can lawfully be held. The issue of a lawful election strikes at the core of the rule of law and any person is entitled to move the court under article 258 of the Constitution. An unlawful election is a



real threat to the Constitution. We therefore consider that this matter is firmly within the jurisdiction of this court.”

- [23] Commenting on the matter of mootness, the Learned Authors of The Bill of Rights Handbook (2005) by Iain Currie and Johaan de Waal at pp 95-6 point to a significant exception to the rule on mootness as follows:

“Even though a matter may be moot as between the parties that does not necessarily constitute an absolute bar to its justiciability. The court has a discretion whether or not to consider it. This was the gloss put on the Freedom of Expression Institute decision in the subsequent case of *Independent Electoral Commission v Langeberg Municipality*” The Constitutional Court shed further light on the standard governing the exercise of this discretion. The discretion, it was held, must be exercised according to the interests of justice. 85 A prerequisite for deciding an issue that is no longer live is that any order that the court may make must have some practical effect on the parties or someone else. Other relevant factors include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument that has been advanced by the parties.

Moreover, even if the court has determined one moot issue arising in an appeal it is not obliged to determine all other moot issues” It will follow that in class actions, or litigation in the public interest, the issues raised are much less likely to be considered moot since, even if the applicants no longer require relief, the decision is likely to have a practical effect on many others. 87 In other words, where there is a compelling public interest that the constitutionality of a statutory provision be determined, the doctrine of mootness should be less strictly applied.”

- [24] The present petition seeks the interpretation of specified provisions of the Law of Succession Act and their alleged discriminatory effect on the rights of women and female persons generally as a sex and gender contrary to the right to protection from discrimination under article 27 of the Constitution. It is a petition squarely falling under the provisions of article 258 of the Constitution rather than a limited article 22 petition for the enforcement of individual rights and fundamental freedoms. I do not consider that the doctrine of mootness applies in this application, and the court has jurisdiction to consider and determine the challenge on the constitutionality of the impugned sections of the Law of Succession Act against the backdrop of the constitutional protection against alleged discrimination engendered by these statutory provisions.

- [25] In my respectful view, the rule on mootness and want of real dispute or controversy” may apply with special force in cases of private dispute for enforcement of rights but not in public interest litigation under article 258(1) of the Constitution, which gives every person a right to approach the court, s follows:

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”

- [26] The text of sections section 35(1)(b), section 36(1)(b) and section 39(1)(a) and (b) of the Law of Succession Act, as set out above are clear restrictive of the women and female child’s right to inherit in equal measure and circumstances as the men and male child.

- [27] Sections 35(1)(b) and 36(1)(b) of the Act restricts a widow life interest in the property of her deceased spouse when she remarries unlike the widower who remarries.



- [28] Section 39(1)(a) and (b) gives priority to the father ahead of mother over the property of a child who dies intestate, unmarried and childless.
- [29] Article 27(4) of the Constitution prohibits discrimination of the grounds of sex and marital status among other grounds as follows:
- “ (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”
- [30] The differential treatment of the female as against their male counterparts is indefensible, and the Law of Succession Act which predates the Constitution of Kenya 2010, has no explanation for the latent discrimination and restriction. Article 45(3) of the Constitution clearly recognises the equality of men and women in marriage set up as follows:
- “Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”.
- [31] As regards section 32 and 33 of the Law of Succession Act, a determination of invalidity on grounds of discrimination requires a study on evidence of the various customs and practices of the various tribes in the region to ascertain whether the provision as to special provision for administration and inheritance of the property in the nature of agricultural land and produce and livestock does result in discrimination of women. Moreover, the several tribes occupying the regions to which section 33 applies may have different customs on inheritance. In such circumstances, concrete evidence on a particular case is necessary to establish the discrimination of the women and female child. The court does feel fully served on the requisite evidence to make the declarations sought by the petitioner in that regard.
- [32] The power to make laws including amendment thereof lie with Parliament under article 109(1) of the Constitution providing that “(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.”
- [33] The role of the 1st respondent Attorney General is defined in article 156(1)(4) of the Constitution and, as “the principal legal adviser to the government” is limited in legislative matters. It would be wrong to require the Attorney-General to take steps and report on progress towards enactment or amendment of law a process he has little control over. The 2nd respondent, Speaker of the National Assembly, presides over the National assembly under article 106 of the Constitution but he does not initiate Bills and he has no vote.
- [34] Moreover, the petitioner may exercise his right under article 119 of the Constitution in terms that “Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.”
- [35] Most significantly, the court cannot compel promulgation of a law or an amendment thereof. The Commonwealth (Latimer House) Principles On The Three Branches of Government, 2003 as regards Judiciary and Parliament provides as follows:
- “ II) Parliament and the Judiciary
- (a) Relations between parliament and the judiciary should be governed by respect for parliament’s primary responsibility for law making on the one hand and



for the judiciary’s responsibility for the interpretation and application of the law on the other hand.

- (b) Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.”

[36] The court must defer to Parliament on legislative matters, and there is no basis for compelling the Attorney General to ensure legislation is enacted. There is obligation as there exists in some articles of the Constitution requiring the enactment of particular laws.

Conclusion

[37] There is no evidence of how the impugned provisions have discriminated against the persons, of other tribes, allegedly living in the gazetted areas. The court does not find that evidence has been adduced as to discrimination of women under the customs and practices of the peoples in the areas set out in section 33 of the Law of Succession Act with regard to the inheritance matters relating to the property set out in section 32 thereof to warrant any intervention by the court.

[38] However, the discrimination of women and female children under the impugned provisions of sections 35, 36 and 39 of the Law of Succession Act is textually clear, and in terms of article 27 (1) of the Constitution these provisions of the Law of Succession Act are unconstitutional for failing to provide equal protection and benefit of the law to women as with the men.

[39] Having so declared, the interpretation of the sections 35, 36 and 39 of the Law of Succession Act must be interpreted in manner that gives effect to the equality of women and men with regard to the protections and benefits accruing under the said provisions. Indeed, clause 7(1) of the Transitional and Consequential Clauses under article 262 of the Constitution of Kenya 2010 provides for such adaptation in the instructions as follows:

- “(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

The consequential adaptation which must be made to the Law of Succession Act, 1981 is that women and men, male and female children, married and unmarried shall have equal protection and rights on administration and succession of Estates of deceased persons under the Act.

Orders

40. Accordingly, for the reasons set out above, the court makes the following orders:

1. A declaration is hereby issued that section 35(1)(b) of the Law of Succession Act is declared unconstitutional.
2. A declaration is hereby issued that section 36(1)(b) of the Law of Succession Act is declared unconstitutional.
3. A declaration is hereby issued that section 39(1)(a) and (b) of the Law of Succession Act are unconstitutional as they fail to give both father and mother equal priority in inheritance of their child’s property that dies intestate and has no surviving wife or children.
4. However, as regards sections 32 and 33 of the Law of Succession Act, the prayer for declaration of invalidity is declined.



5. The prayers directing the Attorney General and Speaker of National Assembly to take measures for requisite legislative reforms and to produce quarterly progress reports thereon are declined. A copy of the Judgment herein shall however be transmitted to the office of Hon Attorney General for information and action as he may deem fitting.
6. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr Kamiru for Petitioner.

N/A for the Respondent.

Ms. Kedogo for Ms. Lumaras for the Interested Party.

