

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO. 11 OF 2012

NORAH AUMA ASOLA.....1ST PETITIONER

FEDERATION OF WOMEN LAWYERS.....2ND PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

J U D G M E N T

The petitioners brought this petition under Articles 2 (1) (4) (5) and (6), 21(1) and 23 of the Constitution of Kenya, 2010 challenging the constitutional validity of Sections 32,33,35(1)(b), 35(5) and 36(1)(c) of the Law of Succession Act in so far as they are inconsistent with Articles 27 and 60 of the Constitution. The Petitioners also allege that the 1st petitioner's freedom against discrimination as enshrined under Article 27 of the Constitution has been violated.

The 1st petitioner is a widow, her husband's demise occurred on 8th November 2010. It is her allegation that immediately after the demise of her husband she and her young daughter were evicted from her matrimonial home by her in-laws. She left behind her step son who was a minor. She reported the matter to the Area chief and the Police at Sondu- Miriu police Station but received no assistance. The 1st Petitioner thus sought the assistance of the 2nd petitioner, an Organisation involved in lobbying for women's rights in Kenya. The 2nd petitioner wrote several letters to the Provincial administration offices seeking assistance to no avail.

Petitioners' case

In brief, the petitioners contend that she was discriminated upon due to her gender and marital status and was immediately upon the demise of her husband kicked out of her matrimonial home yet she had co-existed peacefully with her husband and in-laws before the tragedy. Further that the local provincial administration refused to come to her aid when she sought for assistance.

It is the petitioners' averment that, though the Constitution guarantees protection of the rights and freedoms such as, freedom from discrimination, some provisions of the Law of succession Act contravene Article 27 of the Constitution by permitting discriminative customary laws to govern succession matters. They faulted Sections 32, 33, 35 and 36 of the Law of Succession Act for being unconstitutional and submitted that the 1st petitioner was entitled to compensation by the respondent.

The petitioners sought several prayers as outlined in the petition.

Respondent's case

In response counsel for the respondent submitted that the petition was premature as avenues through which the 1st petitioner could seek assistance were not closed and the Local provincial administration was willing and had indeed tried to assist her by writing the introductory letter that she required to file a succession cause. It was counsel's argument that the 1st petitioner was not entitled to compensation as she had not exhausted the avenues of seeking remedy.

Issues arising

1. **Whether sections 32, 33, 35 and 36 of the Law of Succession Act are unconstitutional**
2. **Whether there is a case for discrimination on the part of the 1st petitioner**
3. **whether the 1st petitioner should be compensated by the state**

Analysis of the Issues

Constitutionality of Provisions of the Law of Succession Act

Article 27 of the Constitution provides for freedom from discrimination. Sub-Article 3 and 4 provide thus:

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

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 4 origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

It was the petitioners' submission that sections 32, 33, 35 and 36 of the Law of Succession Act contravened the above sub-Article as they were discriminative towards women in succession matters.

Section 32 of LSA exempts certain gazetted areas from application of the rules of succession in respect of agricultural land and crops thereon or livestock. Section 33 provides that the law applicable to the property listed under section 32 shall be the law or custom applicable to the deceased's community or tribe. It is the petitioners' case that the sections are unconstitutional because the customs so applicable are usually discriminative towards women. For that reason, it is the petitioners' case that sections that 32 and 33 are void in so far as they are inconsistent with Article 27 which guarantees a person's freedom from all forms of discrimination.

On the other hand, section 35(1)(b) provides that a widow has a life interest in the whole residue of the net estate. However, the section has a proviso that the life interest shall determine upon her re-marriage to any person. Section 36(1)(c) also provides that the right of a widow to the residue of the net estate determines after her re-marriage or death.

While the submissions by counsel for the petitioners are detailed and well researched, it is my view that this Court cannot purport to make any findings with regard to the constitutionality or otherwise of the provisions of sections 32, 33, 35 and 36 of the Law of Succession Act.

The reason for this are apparent from the petition itself, the submissions of the petitioner, and the jurisdiction of the Court as can be discerned from the Constitution and judicial precedents.

Having read the affidavit sworn by Norah Auma Asola, the 1st petitioner, it is discernible that she is mostly aggrieved by two reasons. First, that she was evicted from her matrimonial home by her in-laws after the demise of her husband and second that the local provincial administration failed to write the necessary introductory letter required to assist her file for succession of her late husband's estate. The second affidavit is sworn by Grace Maingi- Kimani who makes various depositions with regard to her knowledge of gender related issues and the achievements of the 2nd petitioner in its fight for gender equity and equality. Further she deposes on statistics of the cases handled by the 2nd Petitioner on matters gender and related issues.

These averments must be weighed against the jurisdiction of the Court under Articles 22, 23 and 165 of the Constitution. The Court's jurisdiction is to determine whether a right or fundamental freedom has

been denied, violated, infringed, or threatened .

In bringing a claim under Article 22, a party is required, as the Court held in **High Court Petition No. 385 of 2012 Consortium for the Empowerment & Development of Marginalized Communities and 2 Others vs The Chairman, the Selection Panel for Appointment of Chairperson and Commissioners to Kenya National Human Rights Commission and Others**, to show which provisions of the Constitution have been violated, and the manner of violation:

“As a basic minimum, the petitioners are 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 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the petitioners 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.” (underlining mine)

A closer look at section 32 of Laws of Succession Act reveals that the exempted districts are occupied by pastoralist tribes who own land communally and by clans. The 1st petitioner's husband did not hail from any of the gazetted districts and neither does he belong to a pastoralist community. Section 33 does not therefore apply to her situation.

Further, subsections in sections 35 and 36 are only applicable where a widow has the net residue of the deceased estate decides to re-marry or dies. In the present case, there is no grant of letters of administration. It would appear to me that the petitioners are just apprehensive. The 2nd petitioner is asking the Court to declare an Act unconstitutional, to basically render an academic pronouncement on its constitutionality or otherwise, on the basis of their belief and apprehensions that that occasion may arise. What the petitioner is asking the Court to do is address its mind to a purely hypothetical situation. Should the court do that?

In the case of **John Harun Mwau and Others v Attorney General and Others, Nairobi Petition No. 65 of 2011** the Court, while acknowledging the jurisdiction of the High Court to examine the legality of any act done pursuant to the Constitution and any law, nonetheless warned 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 the case of **Andrew Okiya Omtatah Okoiti & Others vs Attorney General Nairobi Petition No. 351 of 2012**, the Court observed as follows:

“The petitioners’ case is that the High Court should intervene to resolve raging controversies surrounding the Presidential power and capacity to be sued and related important questions that would have grave implications on the implementation of the Constitution. The jurisdiction of the High Court under Article 165 is wide but it does not exist in a vacuum to be exercised when a party requests the Court to answer to a “question.” The “question” contemplated in Article 165 must arise from a real controversy or case.

It is my opinion that the issues raised would be better dealt with through an advisory opinion under Article 163(6) of the Constitution, the caveat being that such advisory would have to be sought through the national government, state organ or county government.

Protection by the state

The petitioners seek compensation on behalf of the 1st petitioner from the state on the basis that the state

failed in its duty to protect her from her in-laws. The petitioners relied on Article 23(3)(e) which provides that the court may grant appropriate relief where there has been a violation and one such relief is compensation.

It is really pitiful as it may be true that the 1st petitioner was indeed evicted from her matrimonial home by her in-laws. However on the basis of the application made before the court and the Articles relied upon it would be hard to order compensation and more so from the state. The appropriate prayer perhaps would have been to seek protection for the 1st petitioner to return to her matrimonial home and to facilitate and offer her the necessary assistance needed to acquire grant of letters of administration of the estate of her late husband.

It is important to mention at this juncture that the court of appeal has held In **Musa vs.- Musa [2002]1 EA 182** that the production of a letter from the chief is not a requirement by the Law of Succession. The letter from the chief is a requirement made out of good practice since the provincial administration is always on the ground and at times it reduces fraud and objections once the beneficiaries are aware that there are succession proceedings in respect to the estate.

It is further interesting to note that despite the petitioners's allegations there is a letter dated 19-5-2014 from the Kabodho West location Chief addressed to the Deputy Registrar of this court.

For the reasons adduced above I do not find this petition meritorious. Infact I do not find any violation of the Constitution by the respondent or at all. The sections of the Succession Act chapter 160 Laws of Kenya complained of by the petitioner are not at all in conflict with the Constitution. Moreover, there is no sufficient evidence established by the petitioner which leads this court to believe that the petitioners attempted to succeed the estate of her husband and denied.

The same is otherwise dismissed with nor orders as to costs.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

H.K. CHEMITEI

JUDGE