



REPUBLIC OF KENYA



KENYA LAW
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**Adew & 3 others v Anyango (Civil Case E006 of 2025)
[2025] KEHC 8540 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E006 OF 2025**

A MABEYA, J

JUNE 13, 2025

BETWEEN

JAPHETH MANYALA ADEW 1ST PLAINTIFF
EVERLINE AWUOR MANYALA 2ND PLAINTIFF
VIOLET ACHIENG MANYALA 3RD PLAINTIFF
IMELDA AUMA MANYALA 4TH PLAINTIFF

AND

SELINE ADHIAMBO ANYANGO DEFENDANT

RULING

1. This ruling determines the defendant's Preliminary Objection dated 30/4/2025. The plaintiffs moved court vide their Chamber Summons dated 3/4/2025 seeking an order restraining the defendant from becoming an administrator of the estate of one Fredrick Odhiambo and further restraining her from withdrawing any money from any of the deceased's Bank or M-Pesa accounts.
2. The plaintiffs brought the application under Article 22 & 23 of *the Constitution* as well as Order 39 of the Civil Procedure Rules.
3. The application was opposed by the defendant vide her Preliminary Objection raising the following points: -
 - a. That the suit affects the mandatory provisions of section 66 and 82 of the *Law of Succession Act* Cap 160 Laws of Kenya.
 - b. That both the suit and the application offend the settled constitutional Doctrine of Avoidance.
4. The parties made oral submissions to dispose the Preliminary Objection.



5. Mr. Omondi for the respondent submitted that section 66 of the *Law of Succession Act* provides for the priority of administrator; that the plaintiffs sought to lock out the deceased's spouse from taking part in proceedings relating to her spouse.
6. That the plaintiffs lacked a grant and thus capacity to bring their suit and further that the application offended the Principle of Constitutional Avoidance as there are settled ways of dealing with Estates thus the suit ought to be struck out.
7. On their part, Mr. Manyala, the 1st plaintiff submitted that they brought their suit under Article 22 of *the Constitution* and as such the Court should not deal with procedural technicalities. That their case dealt with rights and not an Act of Parliament and as such the Court ought to dismiss the Preliminary Objection and proceed to determine their application.
8. I have carefully considered the parties' pleadings and oral arguments. The issue for determination is whether the preliminary objection meets the threshold.
9. A preliminary objection was defined in the case of Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd (1969) EA to consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.
10. The first point is that the suit offends the provisions of section 66 of the *Law of Succession Act* on the priority to administration of estates. The section provides: -
 - a. Surviving spouse or spouses, with or without association of other beneficiaries.
 - ...
11. From the forgoing, it is clear that a spouse has the priority in the order of seeking a grant of letters of administration for a deceased's estate. To the extent that the suit and application sought to exclude the respondent from the administration, the suit is bad in law.
12. Turning to the second objection raised, whether the petition offends the doctrine of constitutional avoidance, the respondent argued that the suit and application do not raise a constitutional issue but issues to do with a deceased's estate which are adequately dealt with within the provisions of the Law of Succession.
13. The doctrine of constitutional avoidance does not divest this Court of the jurisdiction to hear and determine this matter. What the doctrine means is that, while this Court can indeed hear and determine this matter, it restrains itself from hearing the same because there is another appropriate forum that can hear and determine the matter effectively.
14. The question as to what constitutes a constitutional question was determined in the case CNM V WMG [2018] eKLR where J Mativo (as he was then) stated:
 20. In my view, this Petition does not raise constitutional questions at all. When determining whether an argument raises a constitutional issue, the court is



not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. The issues raised here will only require the Court to examine defamation law.

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* in which Justice O'Regan recalling the Constitutional Court's observations in *S vs Boesak* notes that: -

'The Constitution provides no definition of 'constitutional matter.'
What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: If regard is had to the provisions of *the Constitution*, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State, the interpretation, application and upholding of *the Constitution* are also constitutional matters. So too, is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.

...

“Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.”

15. Accordingly, for one to determine whether the argument raises a constitutional issue, the Court should consider whether the argument forces the Court to consider constitutional rights or values.
16. In the present case, the petitioners seek to bar the respondent from making an application to become an administrator to her deceased's husband estate and further from accessing any of the deceased's monies either in the bank or M-Pesa. They allege that the deceased used to take care of their financial needs in line with the provisions of Article 57 of *the Constitution*.



17. The doctrine of constitutional avoidance has been addressed in quite a number of decisions by our courts. It was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. Where court held as follows: -

“(256) The appellants in this case are seeking to invoke the ‘principle of avoidance’, also known as ‘constitutional avoidance’. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

‘I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.’

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

18. In *Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others* [2021] eKLR, the court stated;

“So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court. In that regard, the Supreme Court observed as follows in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.”

19. In the case of *Godfrey Paul Okutoyi & others v Habil Olaka & Another* (2018) eKLR Chacha, J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated: -

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

20. The petitioners alluded to Article 57 of *the Constitution* in their pleadings stating that the deceased used to provide for them as enshrined therein. They asserted that by dint of Articles 19, 22 & 23, they had the right to approach this court for the reliefs sought.



21. I do not think so. The issues raised by the petitioners are purely issues that are to be determined by the Family Court in a Succession Cause. It will be an interpretation of sections 29 and 66 of the [Law of Succession Act](#). Nothing constitutional turns on the petitioners' allegations.
22. In the premises, I find that this application and suit offends the doctrine of constitutional avoidance and does not raise a constitutional question. Let the petitioners file their claim before the correct forum.
23. The upshot is that the preliminary objection succeeds and the suit and application are struck out with costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE

