



REPUBLIC OF KENYA



**Mungai v Attorney General (Petition E416 of 2023) [2025] KEHC 8544 (KLR)
(Constitutional and Human Rights) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E416 OF 2023

LN MUGAMBI, J

JUNE 19, 2025

BETWEEN

DENNIS KIVUTI MUNGAI PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

Section 29(c) of the Law of Succession Act requiring a widower to prove dependency on his deceased wife before benefiting from her estate is discriminatory and unconstitutional

The petitioner challenged the constitutionality of section 29(c) of the Law of Succession Act. The petitioner argued that it was unconstitutional for requiring a widower to prove dependency on his deceased wife before inheriting, while widows faced no such burden. The court held that the doctrine of constitutional avoidance did not apply as the petition raised a genuine constitutional issue and that the petitioner was not obliged to first petition Parliament before filing the petition in court. The court held section 29(c) to be discriminatory and inconsistent with articles 27(4) and 45(3) of the Constitution and thus declared it unconstitutional. The court further held that it could not issue a mandatory injunction compelling Parliament to pass law or amend it in a particular way for that would offend the doctrine of separation of powers.

Reported by Kakai Toili

Constitutional Law – constitutionality of statutes – constitutionality of section 29(c) of the Law of Succession Act – where section 29(c) required a man to prove dependency in order to benefit from the estate of a deceased wife while omitting to impose a similar condition on a wife of a deceased husband - whether section 29(c) was discriminatory and thus unconstitutional – Constitution of Kenya, article 27; Law of Succession Act (cap 160), section 29(c).

Constitutional Law - doctrine of constitutional avoidance – applicability of the doctrine of constitutional avoidance - whether the doctrine of constitutional avoidance was applicable in a petition challenging the constitutionality of a statute - Constitution of Kenya, article 165(3)(d)(i).



Constitutional Law – constitutional petitions - constitutional petitions challenging the constitutionality of statutes – procedure to be followed - whether a petitioner challenging the constitutionality of a statute was first required to petition Parliament to consider amending the law before approaching the court.

Jurisdiction – jurisdiction of the High Court – jurisdiction to issue mandatory injunctions - whether the High Court could issue a mandatory injunction compelling Parliament to pass law or amend it in a particular way.

Words and Phrases -constitutional avoidance – definition of constitutional avoidance - the doctrine that a case should not be resolved by deciding a constitutional question if it could be resolved in some other fashion - Black's Law Dictionary Tenth Edition.

Brief facts

The petition challenged the constitutionality of section 29(c) of the Law of Succession Act which required a husband to a deceased wife to prove dependency on his wife prior to her demise to be considered a beneficiary of the estate of his late wife. The petitioner argued that that condition was a violation of article 27 of the Constitution on equality and freedom from discrimination because it did not apply on the wife in case the departed was the husband. The petitioner sought for among other orders; a declaration that section 29(c) was unconstitutional to the extent that it placed pre-conditions on widowers to prove dependence on their late wives as a condition to be deemed as dependents worthy of benefiting from succession.

Issues

- i. Whether section 29(c) of the Law of Succession Act was discriminatory for requiring a man to prove dependency in order to benefit from the estate of a deceased wife while omitting to impose a similar condition on a wife of a deceased husband and thus unconstitutional.
- ii. Whether the doctrine of constitutional avoidance was applicable in a petition challenging the constitutionality of a statute.
- iii. Whether a petitioner challenging the constitutionality of a statute was first required to petition Parliament to consider amending the law before approaching the court.
- iv. Whether the High Court could issue a mandatory injunction compelling Parliament to pass law or amend it in a particular way.

Relevant provisions of the Law

Constitution of Kenya

Article 27 – Equality and freedom from discrimination

(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.

Law of Succession Act (cap 160)

Section 29 - Meaning of dependant

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Held

1. The doctrine of constitutional avoidance underscored that the Constitution should not be invoked to resolve ordinary disputes whose remedies were available either under the common law or statutes or other applicable legal principles. From the way the petition was framed, the issue before the court was



- not a dispute over the distribution of property. If it were so, the cause to follow was application of the provisions of the Law of Succession Act.
2. The petitioner was questioning the constitutionality of section 29(c) of the Law of Succession Act. That was the essence of the petition, not the distribution of estate of the deceased which was only pleaded for purposes of laying a background of the petition. In the prayers, the petitioner had only limited himself to the constitutional question on unconstitutionality of section 29(c) of the Law of Succession Act. The petitioner had not made any prayers in regard to the distribution of the estate of the deceased which was governed under the Law of Succession Act, he only questioned the constitutionality of section 29(c).
 3. The constitutionality of a legislation could not be determined without reference to the Constitution hence that was not a matter whose remedy only lay in the statute. It raised a constitutional question hence the doctrine of constitutional avoidance did not apply. The court had jurisdiction to determine the matter under article 165(3)(d)(i) of the Constitution which gave it authority to determine the question of whether any law was inconsistent with or in contravention of the Constitution. The contention that the dispute offended the doctrine of constitutional avoidance failed.
 4. The argument that failure by the petitioner to take the option of petitioning Parliament to consider amending the law prior to filing the instant petition that challenged its constitutionality could not hold. The provision relating to petitioning of Parliament did not oust the jurisdiction of the court or take away the right of a party to petition the court to declare a law that was inconsistent with the Constitution unconstitutional as the court was the ultimate authority on constitutional interpretation.
 5. Section 29 of the Law of Succession Act was a vital provision as it determined who was to benefit from the estate of a deceased person's property. It delineated between a spouse who was a man and a woman for women, section 29(a) applied, the dependants did not only include the wife or wives, or former wife or wives, and the children of the deceased and proceeded to add emphasis that whether or not maintained by the deceased immediately prior to his death. Contra-distinguish that with section 29(c) where the deceased spouse was the wife while the surviving spouse was the man. Section 29(c) took effect, by stating thus: 'where the deceased was a woman, her husband' but with a rider that 'if he was being maintained by her immediately prior to the date of her death'.
 6. In regard to spouses in family set, the Constitution was categorical in article 45(3) of the Constitution that parties to a marriage were entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. Although that constitutional clause was on marriage, its relevance the emphasis on the principle that governed such relationship, it was founded on equality meaning discriminatory treatment based on gender in marriage was prohibited. That theme transcended issue into inheritance rights as pertained the property of deceased spouse, be it be deceased husband or deceased wife, applying different standards as was evident in section 29(c) of the Law of Succession Act discriminated against the man in the relationship based on sex which was a prohibited ground under article 27(4) of the Constitution and also undermining the spirit of equality reinforced under article 45(3) as the dominant principle for such unions.
 7. There was discriminatory definition of the word dependant whereby section 29(c) of the Law of Succession Act required the husband of a deceased wife to prove dependency while no such condition was required under section 29(a) of the Law of Succession Act on a deceased husband's wife hence section 29(c) could not stand constitutional scrutiny. That provision was unconstitutional to the extent that it discriminated between the man and woman with regard to intestate succession by expressly requiring the man to prove dependency in order to benefit from the estate of the deceased wife while omitting to impose a similar condition on a wife or wives of a deceased husband.
 8. The court was not outlawing proof of dependency; the court's pronouncement was restricted to the current state of the law and it was unfair to impose such a condition on the widower while not



- requiring the same requirement on the widow. Otherwise, if the requirement for proof by either spouse claiming to be a dependant was not discriminatory, it would be in order because dependency was a question of fact and anyone claiming to rely on another should be able to establish that fact. Such a requirement should however not apply discriminatively between spouses.
9. Section 29(c) of the Law of Succession Act was discriminatory and thus unconstitutional, null and void for advocating differential treatment of the man in respect of deceased wife who had died intestate as opposed to the woman whose husband had died intestate.
 10. Under article 94(1) of the Constitution, the legislative authority of the Republic was derived from the people and, at the national level, was vested in and exercised by Parliament. Under article 94(5), the Constitution declared that no person or body, other than Parliament, had the power to make provision having force of law in Kenya except under authority conferred by the Constitution or by legislation.
 11. The power to make law was not vested on the Attorney General. The court could not, even assuming that Parliament was a party in the case, issue a mandatory injunction compelling Parliament to pass the law or amend it in a particular way for that would offend the doctrine of separation of powers that underscored deference to other constitutional organs.

Petition partly allowed.

Orders

- i. *A declaration was issued that section 29(c) of the Law of Succession Act was unconstitutional, null and void.*
- ii. *No orders as to costs.*

Citations

Cases

Kenya

1. *Andare, Geoffrey v Attorney General & 2 others* Petition 149 of 2015; [2016] KEHC 7592 (KLR) - (Explained)
2. *Brookside Dairy Limited v Mohamed & another* Constitutional Petition E339 of 2022; [2022] KEHC 13627 (KLR) - (Mentioned)
3. *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)
4. *COD (suing on his behalf and on behalf of his children (both minors) MMOD and CHAD) & another v Nairobi City Water & Sewerage Co Ltd* Petition 419 of 2015; [2015] KEHC 7762 (KLR) - (Explained)
5. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2014] KESC 53 (KLR) (Consolidated) - (Explained)
6. *Council of County Governors v Attorney General & another* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Explained)
7. *Council of Governors & 3 others v Senate & 53 others* Petition 381 & 430 of 2014; [2015] KEHC 6965 (KLR) - (Explained)
8. *Faraj & 3 others v Police & 2 others* Constitutional Petition 165 of 2020; [2022] KEHC 287 (KLR) - (Explained)
9. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
10. *Kenya National Commission on Human Rights v Attorney General & another* Constitutional Petition 132 of 2013; [2015] KEHC 7634 (KLR) - (Explained)
11. *Maliti, Francis v County Assembly of Machakos & 2 others; Governor, Machakos County (Interested Party)* Constitutional Petition 17 of 2018; [2019] KEHC 8811 (KLR) - (Explained)
12. *Mambo, Rose Wangui & 2 others v Limuru County Club & 17 others* Constitutional Petition 160 of 2013; [2014] KEHC 7683 (KLR) - (Mentioned)



13. *Ndemo, Bitange v Director of Public Prosecutions & 4 others* Miscellaneous Civil Application 192 of 2016; [2016] KEHC 1384 (KLR) - (Explained)
14. *Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1976- 80] KLR 1272 - (Explained)
15. *Pharmaceutical Society of Kenya & another v Attorney General & 3 others* Petition 85 of 2018; [2021] KEHC 85 (KLR) - (Explained)
16. *Ripples International v Attorney General & another; FIDA (Interested Party)* Constitutional Petition E017 of 2021; [2022] KEHC 13210 (KLR) - (Mentioned)
17. *Rugamba, Beatrice Ciamutua v Fredrick Nkari Mutegi & 5 others* Miscellaneous Succession Cause 12 of 2016; [2016] KEHC 3911 (KLR) - (Explained)
18. *The County Government of Nyeri & another v Ndungu* Civil Appeal 2 of 2015; [2015] KECA 1011 (KLR) - (Explained)

Tanzania

Ndyanabo v Attorney General [2002] 3 LRC 541 - (Explained)

Uganda

Olum and another v Attorney General (2002) 2 EA - (Explained)

South Africa

Doctors for Life International v Speaker of the National Assembly and others (CCT12/05); (2006) ZACC 11 - (Explained)

United Kingdom

Pearlberg v Varty (1972) 1 WLR 534 - (Explained)

India

Hamdarddawa Khana v Union of India Air 1960 AIR 554, 1960 SCR (2) 671, AIR 1960 SUPREME COURT 554, 1960 SCJ 611, 1960 2 SCR 671, 1960 MADLJ(CRI) 358 - (Explained)

United States

US v Butler 297 US 1 (1936) - (Explained)

Canada

1. *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 - (Explained)
2. *R v Big M Drug Mart Ltd* 1985 CR 295 - (Explained)

Texts

Garner, BA., Black, HC., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

Statutes

Kenya

1. Constitution of Kenya articles 2(4); 22; 27; 45(3); 94; 109(1); 119(1); 156; 165(3)(d); 258 - (Interpreted)
2. Law of Succession Act (cap 160) section 29 (c) - (Unconstitutional)
3. Petition To Parliament (Procedure) Act (cap 7E) sections 4, 5 - (Interpreted)

Advocates

None mentioned



JUDGMENT

Introduction

1. The petition dated October 17, 2023 is supported by the petitioner's affidavit in support.
2. The petition challenges the constitutionality of section 29(c) of the Law of Succession Act which requires a husband to a deceased wife to prove dependency on his wife prior to her demise to be considered a beneficiary of the estate of his late wife. The petitioner argues that this condition is a violation of article 27 of the Constitution because it does not apply on the wife in case the departed is the husband.
3. The petitioner thus seeks the following reliefs against the respondent:
 - a. A declaration be issued that in so far as section 29(c) of the Law of Succession Act places preconditions on widowers to prove dependency on their late wives as a condition to be deemed as dependents worthy of benefiting from succession, it infringes on the petitioner's constitutional guarantee of equality before the law and matrimonial equality as guaranteed under articles 27 & 45(3) of the Constitution.
 - b. A declaration be issued that section 29(c) of the Law of Succession Act is unconstitutional, null and void to the extent that it places preconditions on widowers to prove dependence on their late wives as a condition to be deemed as dependents worthy of benefiting from succession.
 - c. A mandatory injunction be y issued directing the respondent to take the necessary measures & 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.
 - d. Costs of this petition be provided with interests at the court's rate.
 - e. Any other order that this court deems fit and just in the circumstances.

Petitioner's Case

4. The petitioner deponed that he was the husband of the late Caroline Wawira Njagi. Their marriage was contracted under the Kiambu Customary Law in April 2002.
5. They were blessed with two children IM aged 14 years and CM aged 13 years.
6. They later on separated in 2022 but they maintained a cordial relationship and jointly took care of their two children.
7. Unfortunately, Caroline Wawira passed away on July 24, 2023.
8. The deceased's partner began the burial preparation without involving the petitioner. The said partner planned to bury the deceased in Meru notwithstanding the deceased had during her lifetime requested the petitioner to burry her at their matrimonial home in Njakairi Village, Gaturi South, Embu.



9. The petitioner was disturbed as it meant that together that with their children, they could not attend the funeral or visit the deceased's grave site or pay homage as such arrangement might be opposed by the deceased's partner. The Petitioner accordingly filed a suit at Mavoko Law Courts where he obtained orders allowing him to bury the deceased wife being her legitimate husband.
10. He assails the provisions of section 29(c) of the Law of Succession Act for being prejudicial to his interests as the husband as it requires him to prove that he was a dependent of his late wife prior to her death to be considered a beneficiary yet there is no corresponding a similar requirement for wives when their husbands die. Consequently, he contends that section 29(c) of the Law of Succession is discriminatory against husbands in that regard and is therefore unconstitutional.
11. Further, he points out that the Act which was enacted in 1981 and ought to be aligned to the current Constitution.

Respondent's Case

12. The respondent in rejoinder to the petition filed grounds of opposition dated May 28, 2024 on the basis that:
 - i. The respondent has been wrongfully joined in this petition. The respondent has no mandate in enacting and amending legislation. Moreover, repealing a law does not fall in the purview of the functions of the Attorney General and that a petition to sue him as a party when it comes to challenging the constitutionality of a legislative authority is misconceived.
 - ii. In as much as the petition alleges that section 29(c) of the Law of Succession Act is unconstitutional, the source of the instant dispute relates to the administration of the estate of the deceased, one Caroline Wawira Njagi, which puts the dispute squarely in the purview of the Family Division of the High Court.
 - iii. The disposition of the instant petition will require an interrogation into the nature of petitioner's relationship with the deceased, which jurisdictions can be duly exercised by the Family Division of the High Court.
 - iv. The petitioner has failed to state with precision and demonstrate how the alleged rights were infringed by the Respondent as required in law as the holding in Anarita Karimi Njeru v Republic (1979) KLR 1.
 - v. There is a general presumption that every Act of Parliament is constitutional and the burden of proof lies on everyone who alleges otherwise.
 - vi. The power to make laws including amendment thereof lie with Parliament under article 109(1) of the Constitution that "Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President."
 - vii. The role of the respondent 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 and there is no basis for compelling the Attorney General to ensure legislation is enacted as was held in Ripples International v Attorney General & another; FIDA (Interested Party) (Constitutional Petition E017 of 2021) (2022) KEHC 13210 (KLR).



- viii. Every person is empowered by article 119(1) of the *Constitution* to petition Parliament to enact, amend or repeal any legislation. There is an established statutory procedure to ventilate the issues brought out in the petition.
- ix. The petitioner has totally failed to tender sufficient evidence necessary to substantiate their allegations of infringement of their constitutional rights by the respondent.
- x. The petition is otherwise incompetent, misconceived, frivolous, misinterprets the application of Customary Law and an abuse of the court process as the petitioner's rights and the orders sought therein are untenable and it ought to be dismissed with costs to the petitioner.

Petitioner's Submissions

13. The petitioner through Wambui Shadrack and Associate Advocates filed submissions dated May 28, 2024. Counsel submitted that section 29(c) of the *Law of Succession Act* defines a dependent to among others as:

“Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death”

14. Counsel submitted that this provision requires a husband to prove that he was being maintained by his wife prior to her death yet the same precondition is not placed on the wife where the deceased is the husband. Counsel contended that this differentiation is discriminatory and denies husbands equal benefit of the law as envisaged under article 27 of the *Constitution*.
15. Reliance was placed in *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 where the Supreme Court of Canada held that:

“Discrimination is a distinction which, whether intentional or not (is) based on grounds relating to personal characteristics of the individual or group, (and) has effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.”

16. Like dependence was placed in *Rose Wangui Mambo & 2 others v Limuru County Club & 17 others* (2014) eKLR.
17. Consequently, counsel stressed that this provision perpetrates an unconstitutional differentiation which is archaic and with no legal justification. Considering this, counsel urged the court to adopt an interpretation that includes husbands or former husbands as beneficiaries, whether or not they were being provided by their wives.

Respondent's Submissions

18. On July 10, 2024, state counsel, Jackline Kiramana filed submissions for the respondent.
19. Counsel submitted that the issue raised herein relates to intestate succession which is a preserve of the Family Court, a division of the High Court which is competent to hear and determine the questions raised in this matter. As a result, Counsel argued that the petition violates the principle of constitutional avoidance.



20. Reliance was placed in [*Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others*](#) Petitions 14A, 14B & 14C of 2014 of (2014) eKLR where the Supreme Court held that:

“105. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. [*Black’s Law Dictionary*](#), 10th Edition at page 377 defines it as:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

106. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in [*Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others*](#) Petitions 14A, 14B & 14C of 2014 of (2014) eKLR held:

256 ..The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

21. Like dependence was placed in [*Brookside Dairy Limited v Mohamed & another*](#) (2022) KEHC 13627 (KLR).

22. On the constitutionality of the impugned section, counsel submitted that the petition offends presumption of constitutionality as discussed by the Supreme Court of India in [*Hamdarddawa Khana v Union of India Air*](#) (1960), the court stated as follows:

“In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment.”

23. Furthermore, counsel argued that the constitutionality of the impugned section was litigated upon in [*Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others*](#) (2016) eKLR where the court referring to sub-section (b) and (c) underscored that primarily a dependant must prove that he or she was being maintained by the deceased prior to his death. As such, counsel reasoned that it is not the mere relationship that matters but proof of dependance. Considering this, counsel asserted that the provision cannot be said to be discriminatory.

24. Counsel in addition submitted that the petition as drafted is flawed as the petitioner failed to enjoin the Parliament on the proceedings being the body mandated to amend the law as held in [*Ripples International*](#) (*supra*). Counsel as well pointed out that the petitioner had failed to petition the Parliament as provided under article 119 of the [*Constitution*](#).

Analysis and Determination

25. It is my humble view that the issues that arise for determination in this matter are:

- i. Whether the petition offends the doctrine of constitutional avoidance.
- ii. Whether the petitioner ought to have petitioned the Parliament.
- iii. Whether section 29(c) of the [*Law of Succession Act*](#) is inconsistent with the [*Constitution*](#).



- iv. Whether the petitioner is entitled to the relief sought

Whether the petition offends the doctrine of constitutional avoidance.

26. The respondent contended that source of the instant dispute is the administration of the estate of the deceased, one Caroline Wawira Njagi, and the determination of the same will also delve into inquiring the nature of petitioner’s relationship with the deceased, which is a jurisdiction to be exercised by the Family Division of the High Court. It was thus argued by the respondent that the petition offends the doctrine of constitutional avoidance.

27. The doctrine of constitutional avoidance underscores that the *Constitution* should not be invoked to resolve ordinary disputes whose remedies are available either under the common law or statutes or other applicable legal principles. *Black’s Law Dictionary* Tenth Edition defines ‘Constitutional avoidance rule’ as follows:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

28. In *Faraj & 3 others v Police & 2 others* (2022) KEHC 287 (KLR) the court observed as follows:

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. 9 As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.11 The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and another* in which Ebrahim JA said the following: -

...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights...”

26. Also relevant is the decision in *S v Mhlongu* 14 which laid out constitutional avoidance as a general principle in the following terms: -

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

29. Similarly, in *COD & another v Nairobi City Water & Sewerage Co Ltd* (2015) eKLR the Court held as follows:

“13. It was further observed in the case of *Minister of Home Affairs v Bickle & others* (1985) LRC Const (per (Georges CJ);

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline



to determine whether there has been in addition a breach of the Declaration of Rights.”

30. The court thus concluded:

“ 15. the Constitution cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under article 165 of the Constitution: See *Harrikissoon v A-G* (1979) 3 WLR 62. Where it is possible to decide any case or dispute, civil or criminal, without reading a constitutional issue then that is the course that should be followed. The court sitting as a constitutional court must through the doctrine of avoidance steer clear of determining such disputes as if there were constitutional questions being raised: see *S v Mblungu* (1995) 3 SA 867 (CC) and also *Ashwander v Tennessee* 297 US 288.”

31. The respondent’s contention is that this matter is grounded on facts relating administration of the estate of the deceased is should offends the doctrine of Constitutional avoidance as it ought to have been determined in the Family Division.

32. From the way the Petition is framed, the issue before me is not a dispute over the distribution of property. If it were so, I would have agreed that the cause to follow is application of the provisions of the Law of Succession Act.

33. The petitioner herein is questioning the constitutionality of section 29(c) of the Law of Succession Act. That is the essence of the Petition, not the distribution of Estate of the deceased which is only pleaded for purposes of laying a background of the Petition. In the prayers, the petitioner has only limited himself to the constitutional question on unconstitutionality of section 29(c) of the Law of Succession Act. The petitioner has not made any prayers in regard to the distribution of the Estate of the deceased which is governed under the Law of Succession Act, he only questions the constitutionality of section 29(c) of the Act.

34. The constitutionality of a legislation cannot be determined without reference to the Constitution hence this is not a matter whose remedy only lies in the Statute. It raises a constitutional question hence the doctrine of constitutional avoidance does not apply. This court has jurisdiction to determine the matter under article 165(3)(d)(i) of the Constitution which gives it authority to determine the question of whether any law is inconsistent with or in contravention of the Constitution.

35. The respondent’s contention that the dispute offends the doctrine of constitutional avoidance inescapably fails.

Whether the petitioner ought to have petitioned the Parliament

36. Article 119 of the Constitution provides as follows:

1. Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.
2. Parliament shall make provision for the procedure for the exercise of this right.

37. The petitions to Parliament (Procedure) Act provides under section 4 and 5 as follows:



Procedure for presenting petition

1. A petition to the National Assembly or the Senate shall be—
 - a. submitted to the Clerk of the relevant House by the petitioner; or
 - b. presented by a member of the National Assembly or the Senate on behalf of a petitioner, with the consent of the relevant Speaker.
2. Notwithstanding section 4(1)(b), a member of the National Assembly or the Senate shall not be eligible to present a petition on his own behalf.
3. The Clerk of the relevant House shall, within seven days of the date of receipt of the petition, review the petition to ascertain whether the petition meets the requirements of this Act.
4. Where the Clerk of the relevant House of Parliament considers that a petition does not comply with section 3, the Clerk may give such directions as are necessary to ensure that the petition is amended to comply with that section.
5. A petition shall not be rejected merely because it is not addressed to the Clerk of the relevant House of Parliament, and where a petition is addressed to the Clerk of a House that has no authority to deal with the matter; the Clerk of that House shall refer the petition to the Clerk of the other House.

Consideration of petition

1. The Clerk shall, if satisfied that the petition meets the requirements of this Act, forward the petition to the Speaker of the relevant House for tabling in the House.
2. A petition that is tabled in Parliament under this Act shall be considered in accordance with the standing orders of the relevant House.
3. The Clerk of the relevant House of Parliament shall, within fifteen days of the decision of the relevant House, in writing, notify the petitioner of the decision of the House.

38. Discussing the implication of this article in *Pharmaceutical Society of Kenya & another v Attorney General & 3 others* (2021) KEHC 85 (KLR) the court determined as follows:

“38. The High Court has on a number of occasions pronounced itself on the right to petition Parliament under the article 119 of the *Constitution*. In the case of *Katiba Institute & another v Attorney General & another* (2017) eKLR the court held that:

“103. We emphasize that under article 2(4) of the *Constitution*, any law, including customary law, that is inconsistent with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of the *Constitution* is invalid. Under article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the *Constitution* including the determination of the question whether any law is inconsistent with or in contravention of the *Constitution*; and, the question whether anything said to be done under the authority of



the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

104. Therefore, whereas the legislative authority vests in Parliament and the County Assemblies, where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution, the High Court is the institution constitutionally empowered to determine the issue. This is of course subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. There is nothing like supremacy of the legislative assembly outside the Constitution...
115. It is therefore clear that the mere fact that Parliament has the power pursuant to a petition under article 119 of the Constitution to enact, amend or repeal legislation, does not bar this court from carrying out its constitutional mandate; or, to fashion out an appropriate remedy.”
39. Likewise, in the case of Council of Governors & 3 others v Senate & 53 others (2015) eKLR it was held that:
- “71. It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of article 119(1) of the Constitution. The AG submits that the petitioners ought to have approached Parliament in accordance with the provisions of article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms:
- “Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation.
2. Parliament shall make provision for the procedure for the exercise of this right.”
72. The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the court under article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including “the question whether any law is inconsistent with or in contravention of” the Constitution,....
73. In our view, the answer must be in the negative. Doubtless, article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that article 119 is not intended to cover situations such as is presently before this court. The question of the constitutionality of the impugned CGAA was raised with Parliament prior to its enactment. As deposed by Mr Charles Nyachae, the Chairman of CIC, in his affidavit sworn on September 19, 2014, the issue had been brought to the attention of Parliament through CIC’s Advisory Opinion in the month of August 2014, prior to the enactment of the CGAA. Parliament, nonetheless, appears to have disregarded the concerns raised regarding its conformity with the Constitution and proceeded to enact the legislation.



74. It would therefore be, in our view, for the court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and articles 2(4) and 165(3(d)(i) mandate this court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution.”

40... The authority of Parliament includes the enactment, amendment and repeal of legislation. That is one avenue for rectifying unconstitutional legislations that may have genuinely slipped through the keen eyes of parliamentarians. This remedy does not, however, oust the constitutional authority of this Court to determine the constitutionality of any enactment by the legislature. While the court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or statute, that procedure should be followed, the court takes note of the fact that the right to petition the court is a fundamental constitutional prescription which cannot be deemed to be of lesser effect than the right to petition Parliament. It is upon the parties to opt for what they deem to be the most effective and efficient remedy. I therefore find no merit in the assertion by the 1st and 2nd respondents that the petitioners failed to exhaust a statutory remedy...”

39. The respondent’s argument that failure by the petitioner to take the option of petitioning Parliament to consider amending the law prior to filing this petition that challenges its constitutionality cannot thus hold in the light of the above precedents which assert that the provision relating to petitioning of Parliament does not oust the jurisdiction of the court or take away the right of a party to petition the court to declare a law that is inconsistent with the Constitution unconstitutional as the court is the ultimate authority on constitutional interpretation.

Whether section 29(c) of the Law of Succession Act is inconsistent with the Constitution.

40. The principles for constitutional interpretation were emphasized by the Supreme Court *in the Matter of the Interim Independent Electoral Commission* (2011) KESC 1 (KLR) as follows:

“(86)”The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). the Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

(87) In article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill



of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

- (88) These constitutional imperatives must be implemented in interpreting the provisions of article 163(6) and (7), on Advisory Opinions. Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.
- (89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.”
41. Equally, the Court of Appeal in Center for Rights Education and Awareness & another v John Harun Mwau & 6 others (2012) KECA 249 (KLR) determined as follows:
- a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by article 259.
 - b. The spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
 - c. It must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.”
 - d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).”
42. On the other hand, there are a number of well-established principles employed in the interpretation of an Act of Parliament. The first is that there is a general presumption that every Act of Parliament is constitutional. This principle was captured by the Court of Appeal of Tanzania in Ndyanabo v Attorney General (2001) EA 495 being a restatement of the law in the English case of Pearlberg v Varty (1972) 1 WLR 534 that:
- “Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”
43. Secondly, in R v Big M Drug Mart Ltd 1985 CR 295 as cited with approval in the case of Geoffrey Andare v Attorney General & 2 others (2016) KEHC 7592 (KLR) the court underscored as follows:
- “Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized



through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.”

44. This principle was also applied by the Constitutional Court of Uganda in *Olum and another v Attorney General* (2002) 2 EA, where it was noted that:

“To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional...”

45. Furthermore, the Court of Appeal in *County Government of Nyeri & another v Cecilia Wangechi Ndungu* (2015) KECA 1011 (KLR) stated as follows:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

46. Furthermore, in the persuasive authority of *US v Butler* 297 US 1 (1936) as cited with approval in *Kenya National Commission on Human Rights v Attorney General & another* (2015) KEHC 7634 (KLR) the court observed as follows:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”

47. Furthermore, in *Council of County Governors v Attorney General & another* (2017) KEHC 6395 (KLR) the court highlighted another principle as follows:

“A law which violates the Constitution is void. In such cases, the court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the Constitution, what the court has to consider is the “direct and inevitable effect” of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the



county governments, and the judiciary must exercise this power only in accordance with the Constitution.”

48. It is necessary that I set out the impugned statutory provision as I embark on the task of determining its constitutionality or otherwise.
49. Section 29 of the Law of Succession Act, cap 160 provides:
Meaning of dependant
‘For the purposes of this part, “dependant” means—
- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - b. such of the deceased’s parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.’
50. Section 29 is a very vital provision in the Law of Succession Act as it determines who is to benefit from the Estate of a Deceased person’s property. It delineates between a spouse who is a man and a woman for women, section 29(a) applies, the dependants do not only include ‘the wife or wives, or former wife or wives, and the children of the deceased’ and proceeds to add emphasis that ‘whether or not maintained by the deceased immediately prior to his death.’
51. Contradistinguish that with section 29(c) where the deceased spouse is the wife while the surviving spouse is the man. Section 29(c) takes effect, by stating thus: ‘where the deceased was a woman, her husband’ but with a rider that ‘if he was being maintained by her immediately prior to the date of her death.’
52. The effect of this provision must be considered against the constitutional provisions that the petitioner cited in asserting that this provision fosters discriminatory treatment based on gender which the Constitution out rightly forbids.
53. Article 27(4) of the Constitution provides:
- “(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.”
54. In regard to spouses in family set, the Constitution is categorical in article 45(3) that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. Although this constitutional clause is on marriage, its relevance the emphasis on the principle that governs such relationship, it is founded on equality meaning discriminatory treatment based on gender in marriage is prohibited. That theme in my view transcends issue into inheritance rights as pertains the property of deceased spouse, be it be deceased husband or deceased wife, applying different standards as is evident in section 29(c) discriminates against the man in the relationship based on sex which is a prohibited ground under article 27(4) of the Constitution and also undermining the spirit of equality reinforced under article 45(3) as the dominant principle for such unions.



55. When Justice Edward Murithi determined in *Ripples International v Attorney General & another* that section 35(1), 36(1) and 39(a) & (b) of the *Law of Succession Act*, cap 160 were unconstitutional, the Judge reasoned thus:

“(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...”

(38) ... 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...”

56. By parity of reasoning. I find that there is discriminatory definition of the word ‘dependant’ whereby section 29(c) of the *Law of Succession Act* requires the husband of a deceased wife to prove dependency while no such condition is required under section 29(a) of the Law of Succession on a deceased husband’s wife hence section 29(c) cannot stand constitutional scrutiny. The said provision is unconstitutional to the extent that it discriminates between the man and woman in regard to intestate succession by expressly requiring the man to ‘prove dependency’ in order to benefit from the Estate of the Deceased wife while omitting to impose a similar condition on a wife or wives of a deceased husband.

57. This finding should not be understood to mean that the court is outlawing ‘proof of dependency’ the court pronouncement is restricted to the current state of the law, it is unfair to impose such a condition on the widower while not requiring the same requirement on the widow. Otherwise, if the requirement for of proof by either spouse claiming to be a dependant was not discriminative, I would find it in order because dependency is a question of fact and anyone claiming to rely on another should be able to establish that fact. Such a requirement should however not apply discriminatively between spouses.

58. For now however, my finding is that the current section 29(c) of the *Law of Succession Act* is discriminatory and is thus unconstitutional, null and void for advocating differential treatment of the man in respect of deceased wife who has died intestate as opposed to the woman whose husband has died intestate.

Whether the petitioner is entitled to the relief sought

59. The Petitioner prayed for various reliefs but including the relief that a mandatory injunction should issue directing the Respondent, that is, the Attorney General to take necessary measures and steps to ensure legislative reforms are enacted to amend and/or repeal the *Law of Succession Act* to purge the above provision of the Act in order to bring conformity of the Act with the *Constitution* of Kenya 2010.



60. Under article 94(1) of the Constitution, the legislative authority of the Republic is derived from the people and, at the National level, is vested in and exercised by Parliament. Under article 94(5), the Constitution declares that no person or body, other than Parliament, has the power to make provision having force of law in Kenya except under authority conferred by the Constitution or by legislation.
61. The power to make law is not vested on the Attorney General as confirmed by the above provision. Secondly, the court cannot, even assuming that Parliament was a party in this case, issue a mandatory injunction compelling Parliament to pass the law or amend it in a particular way for this would offend the doctrine of separation of powers that underscores deference to other constitutional organs.
62. The Constitutional Court in South Africa discussed the principle of separation of powers in Doctors for Life International v Speaker of the National Assembly and others (CCT12/05) (2006) ZACC 11 where it held thus:
- “The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised.’”
63. Correspondingly, in Francis Maliti v County Assembly of Machakos & 2 others; Governor, Machakos County (Interested Party) (2019) eKLR the court said:
- “The broad principle of “separation of powers”, certainly, incorporates the scheme of “checks and balances”; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate & 2 others (2013) eKLR where Njoki, SCJ opined that:
- “The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting *ultra vires* the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, (their) limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided.”
64. The above precedents serve to confirm and demonstrate why the order mandatory order sought by the petitioner on legislative action that ought to be taken cannot be granted in this case.



65. Nevertheless, the court is of the considered view that a declaratory relief will serve the purpose given its effect as explained in *Bitange Ndemo v Director of Public Prosecutions & 4 others* (2016) eKLR:

“A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law.”

66. In view of the foregoing, I grant the following reliefs:

1. A declaration is hereby issued that section 29(c) of the *Law of Succession Act*, cap 160 Laws of Kenya is unconstitutional, null and void.
2. This being a public interest litigation, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE, 2025.

.....
L N MUGAMBI

JUDGE

