REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 17 OF 2014

IN THE MATETR OF ARTICLE 20, 21, 22(1) & (2) & 23 (1) & (3) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 2(4),2 (6), 10, 27, 28, AND 53 OF THE CONSTITUTION OF KENYA

AND IN THE MATTER OF SECTIONS 12 OF THE BIRTHS AND DEATHS REGISTRATION ACT CAP 149 LAWS OF KENYA

AND

SECTION 2(B), 24(1),24(2),26, 27(1),27(2),94, 102, 158(4) (b) and 158(4) (c) OF THE CHILDREN ACT CAP 141 LAWS OF KENYA

AND

SECTION 3(2) & 3(3) OF THE LAW OF SUSSECCION ACT CAP 160 LAWS OF KENYA

AND

BETWEEN

NSA .....1ST PETITIONER

FEDERATION OF WOMEN

LAWYERS KENYA (FIDA- K)-.....2ND PETITIONER

VERSUS

CABINET SECRETARY FOR, MINISTRY

OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

ATTORNEY GENERAL .....2ND RESPONDENT

J U D G M E N T

1. The 1st petitioner is a female resident of Luanda in Vihiga County and a mother of two children born out of wedlock. She has instituted this petition on her own interest under Article 22(2) of the Constitution of Kenya 2010.

2. The 2nd petitioner needs no introduction. They are a non- governmental organization that for many years has been advocating for the rights of women in Kenya. They have brought this petition in public interest under Article 22(2) of the Constitution of Kenya.

3. The petitioners filed the petition on 15th September, 2014 citing various infractions of the constitution of Kenya, national legislation and international law. They are challenging discrimination by the law on children born out of wedlock and unmarried women on the basis of birth, sex and marital status. They are seeking for the following reliefs:-

1) A declaration that Section 12 of the Births and Deaths Registration Act, is invalid on the grounds that it violates the constitutional , regional and international rights of:

i. Children born out of wedlock to equality, dignity , a name and parental care and protection, including equal responsibility of the mother and father to provide for them; and of

ii. Unmarried mothers to equality dignity, and to have father's share equal responsibility in providing for the child.

2) An order prohibiting the Respondent from enforcing Section 12 of the Births and Deaths Registration Act.

3) A declaration that the language in section 2(b) of the definition of "relative", sections 24(1), 24(2),26,27(1),27(2),94,102,158(4) (b) and 158(4) (c) of the Children Act, are invalid on the grounds that they violate constitutional, regional and international rights of children born out of wedlock and unmarried mothers.

4)An order of prohibition prohibiting the Children's Court and Children's officers from enforcing the language in Section 2(b) of the definition of "relative", section 24(1),24(2),26,27(1),27(2),94,102, 158(4) (b) and 158 (4) (c) of the Children Act, that violates the constitutional and international law.

5) A declaration that the language in Section 3(2) and 3 (3) of the Law of Succession Act are invalid on the grounds that they violate constitutional, regional and international rights of children born out of wedlock and unmarried mothers.

6) An order of prohibition prohibiting the High Court and magistrate's court with jurisdiction over probate and administration matters from enforcing sections 3(2) and 3(3) of the Law of Succession Act.

7) An order directing the 1st Respondent to:-

i. Cancel the birth certificate issued in respect of EA issued on the 26th February,2013 and reissue one in which the father of the child is named ; and

ii. Issue a birth certificate in respect of NT in which the father of the child is named.

8) The costs of the petition be borne by the respondent herein.

9) Any other relief as this Honourable Court may deem fit and just to grant.

The petition-

3. The petition is supported by the affidavit of the 1st petitioner sworn on 11th September, 2014. It is also supported by the affidavit of **Christine Atieno Ochieng**, the Executive Director of the 2nd Petitioner and is also support by the submissions of the advocates for petitioners, **Odongo Awino & Co. Advocates**. The Attorney General appearing for the respondents opposed the petition.

4. The 1st petitioner contends in her affidavit that she was cohabiting with one **PM** as a result of which they were blessed with two issues, EA and NF, out of wedlock. That she has had serious challenges getting the name of the father of the children inserted in the childrens' birth certificates as he has declined to have his name inserted therein and thus denying the minors identify. That EA was issued with a birth certificate which had markings xxx on the place meant for the father's name. That NT is yet to be issued with one.

5. The 1st petitioner contends that the law requires consent of the father before his name is inserted in the childrens' birth certificates which according to her is discriminatory and violates her constitutional rights and that of the children to equal protection before the law, equality, dignity, a name, parental care and protection and equal responsibility of father and mother to provide for them.

6. The petitioners are contending that the language in some sections of the Children Act are discriminatory to children born out of wedlock and to unmarried mothers. They also content that section 12 of the Birth and Deaths Registration Act and sections 3(2) and 3(3) of law of Succession Act are discriminatory to children born out of wedlock.

The petitioners are hence challenging the provisions of sections 2(b), 24(1), 24(2), 26, 27(1), 27 (2), 94, 102,158(4) (b) and 158 (4) (c) of the Children Act, section 12 of the Births and Deaths Registration Act cap 149 of the laws of Kenya and Sections 3(2) and (3) (3) of the Law of Succession Act, Cap 160 Laws of Kenya.

It is appropriate at this stage to highlight the provisions of the impugned sections.

7. Section 12 of the Births and Deaths Registration Act provides as follows:

“ No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or , in accordance with some recognized custom.’

8. It was submitted by the advocates for the petitioners that the section is discriminatory in that there is no such provision regarding mothers of children born out of wedlock or married parents. That the section, denies children born out of wedlock and their unmarried mothers important constitutional, regional and international human rights instruments as follows:-

a) Children born out of wedlock and unmarried mothers are denied the rights to equality before the law and to equal protection and equal benefit of the law as provided for under Article 27(1) of the constitution and the parallel international rights. It also denied them their rights not to be directly or indirectly discriminated against on any ground, including sex or birth, under Article 27(4) of the constitution and the parallel international human rights instruments.

b) Unmarried mother are denied the right to have their dignity respected and protected under Article 28 of the constitution and the parallel regional and international human rights instruments.

c) Children born out of wedlock are denied the right to a name from birth under Article 53(1) (a) of the constitution and the right “ to know... his or her parent ()” under article 7(1) of the convention on the rights of the child.

d) Children born out of wedlock are denied the “ right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not” under Article 53(1) (e) of the constitution and the parallel regional and international human rights instruments.

e) unmarried mothers are denied the right to have fathers share” equal responsibility ..... to provide for the child, whether they are married to each other or not” under Article 53(1) (e) and the regional and international human rights instruments.

8. Section 2 (b) of the Children Act provides that:

“ relative”, in relation to a child, means any person related to the child, whether of the full blood, half blood or by affinity, and

a)where an adoption order has been made in respect of the child or any other person under this Act, any person who would be a relative of the child within the meaning of this definition if the adopted person was the child of the adopter born inside marriage;

or

(b) where the child is born outside marriage and the father has acknowledged paternity and is contributing towards the maintenance of the child, the father of the child within the meaning of this definition if the child was the child of his mother and father born inside marriage.”

9. Section 24(1) and (2) provide that:

(**1) Where a child’s father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.**

(2) Where a child’s father and mother were not married to each other at the time of the child’s birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.

10. Section 26 provides that:

“***(1*) a parental responsibility agreement shall have effect for the purposes of this Act if it is made substantially in the form prescribed by the Chief Justice.**

(2) A parental responsibility agreement may only be brought to an end by an order of the court made on application by—

(a) any person who has parental responsibility for the child; or

(b) the child himself with the leave of the court.

(3) The Court may only grant leave under subsection (2)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.”

11. Section 27(2) provides that:

"Where the father and mother of the child were not married at the time of the birth of the child and have not subsequently married each other—

(a) on the death of the mother of the child, the father of the child, if he has acquired parental responsibility under the provisions or this Act, shall if he is still living, have parental responsibility for the child either alone or with any testamentary guardian appointed by the mother or the relatives of the mother;

(b) on the death of the father of a child who has acquired parental responsibility under the provisions of this Act, the mother of the child shall exercise parental responsibility in respect of the child either alone, or with any testamentary guardian appointed by the father:..

12. Section 94 provides that when determining whether to order a father to make financial provision for his child born out of wedlock under section 94, the court shall be guided by, inter alia, by (i) "whether the (father) has assumed responsibility for the maintenance of the child..."

13. Section 102(1) provides that:

"For the avoidance of doubt, in this Part, "guardian" means a person appointed by will or deed by a parent of the child or by an order of the court to assume parental responsibility for the child upon the death of the parent of the child either alone or in conjunction with the surviving parent of the child or the father of a child born out of wedlock who has acquired parental responsibility for the child in accordance with the provisions of this Act."

14. Section 158(4) (b) and (c) provides that:

"Subject to section 159 an adoption application shall be accompanied by the following written consents to the making of an adoption order in respect of any child—

(a) the consent of every person who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child;

(b)in the case of a child born out of wedlock whose mother is a child, with the consent of the parents or guardian of the mother of the child.

(c) in the case of a child born out of wedlock whose father has acquired parental responsibility in respect of the child under the provisions of this Act, with the consent of the father."

15. Section 3(2) of the Law of Succession Act defines the term" child" for purposes of the Act as,

" in relation to a female person, a child born to her out of wedlock, and in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."

Section 3(3) of the Act provides that a

" child born to a female person out of wedlock, and a child as defined by subsection(2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock."

17. It is the petitioners' case that, the above said sections of the Children Act deny children born of wedlock and their unmarried mothers the following important constitutional rights and the parallel regional and international rights.

a) Section 2(subsection (b) of definition of "relative"), 24(1),24(2),26,27, 94 , 102 , 158(4) (b) , and 158(4) (c) of the Children Act deny children born out of wedlock and unmarried mothers the right to equality before the law and to equal protection and equal benefit of the law under Article 27(1) of the constitution and the parallel regional and international rights. They also deny them their rights to not be directly or indirectly discriminated against on any ground, including sex or birth, under Article 27(4) of the constitution and the parallel regional and international rights.

b) These sections also deny children born out of wedlock the " right to parental care and protection , which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not" under Article (1) (e) of the constitution and the parallel regional and international rights.

c) These sections also deny unmarried mother the rights to have fathers share" equal responsibility...to provide for the child, whether they are married to each other or not" under Article 53 (1) (e) and the parallel regional and international rights.

18. The petitioner also contend that the two sections of the Law of Succession Act deny children born out of wedlock and their unmarried mothers' important constitutional rights and the parallel international rights.

a) Section 3(2) and 3(3) of the Law of Succession Act deny children born out of wedlock and their unmarried mothers the

right to equality before the law and to equal protection and equal benefit of the law under Article 27(1) of the constitution and the parallel international rights. They also deny them their rights not to be directly or indirectly discriminated against on any ground, including sex or birth, under article 27(4) of the constitution and the parallel international rights.

b) These sections also deny children born out of wedlock the " right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not" under Article 53(1) (e) of the constitution and the parallel international rights.

c) These sections also deny unmarried mothers the right to have fathers share" equal responsibility..... to provide for the child, whether they are married to each other or not" under Article 53(1) (e) and the parallel international rights.

Submissions for the petitioners-

19.The advocates for the petitioners, **Odongo,Awino & Company Advocates,** submitted that the impugned provisions under the Children Act discriminates against women by creating a completely different regime of rights and responsibilities for unmarried mothers as compared with unmarried fathers. This scheme which they called " the optional paternity scheme" is unconstitutional because it violates the rights and fundamental freedoms of children born out of wedlock and unmarried women in the areas of birth, registration , parental responsibility and inheritance.

20. That the sections discriminates against children born out of wedlock on the basis of birth and child maintenance that is contingent on parental responsibility. That fathers without parental responsibility are not responsible for their children's maintenance. A father of such a child must first voluntarily accept parental responsibility. A father cannot be compelled to maintain his child. Such an option is not available to unmarried mothers. They violate the constitutional and international rights of unmarried mothers to have fathers share equal parental responsibility for their children, regardless of marital status.

It was submitted that the definition in section 2(b) of the Children Act 2001 means that children born out of wedlock enjoy relationships with the relatives of their fathers only if their fathers have assumed parental responsibility.

The advocates submitted that the provisions of sections 24(1), 24(2), 26, 27(1) 27(2), 94, 102, 158(4) (b) and 158(4)(c) of the Children Act stipulate that fathers of children born out of wedlock may opt out of all parental duties , financial or otherwise.

21. On the impugned provisions of the Succession Act the advocates submitted that section (2) of the Act distinguishes between unmarried mothers and fathers as regards the distribution of their property after death. For example that in a case of a child born out of wedlock who is being raised by the a single father, if his/her mother dies, the child would be considered her child for purposes of the Act, and would therefore be entitled to a share of her estate pursuant to part III and V of the Act even if she never acknowledged or raised the child during her lifetime. Further that section 3(2) of the Act is discriminatory on the basis of marital status and sex.

22. It was submitted that by imposing parental responsibility on unmarried mothers in the first instance but allowing fathers to avoid parental responsibility altogether. That the parental responsibility and maintenance provisions of the Children Act violates the constitutional right of unmarried mothers to have fathers share equal responsibility for their children, regardless of marital status.

23. That Article 53(1) of the constitution explicitly imposes an 'equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. That the definition of "parental responsibility in the Children Act includes a duty to protect children from negligence, abuse, and discrimination. Thus, while mothers will always be legally responsible for protecting their children, fathers without parental responsibility are immune to any liability for failing to protect their children from any such negligence, abuse or discrimination.

Submissions by the Respondents

25. The petition was opposed by the respondents vide the affidavit of **Shumary Malleon** , a Principal Civil Registration Officer in Civil Registration services of the 1st respondent. It was also opposed through the written submissions of the Hon. The Attorney General, the 2nd respondent. It was submitted that the provisions of section 12 of the Births and Deaths Registration Act has to be read together with the provisions of section 10 and 11 of the Act which provides for the mother giving a birth notification to enter the name of the child's father in the register. That where the mother does not declare the particulars of the child's father at birth on the reason that they are not married and that the mother would like the father's name to be included in birth certificate then the requirements of section 12 are invoked which require the name of the child's father born outside marriage to be entered on the register of births only with the consent of the father. That the mischief intended to be prevented by the section 12 is to avoid scenarios where malicious mothers for financial gain or moral reasons seek to have their children have statutorily recognized fathers to children who may not be the offspring of the fathers. The registrar has no other way of ascertaining the authenticity of declaration long after the birth of the child. That in so far as section 12 requires that the name of the child's father born outside marriage shall be entered in the register of births only with the consent of the father that provisions is not unconstitutional.

26. It was further submitted that the need to establish paternity particularly when registering births where the mothers are not married is accepted as a necessary requirement worldwide. Examples were given of the united kingdom in the Births and Deaths Registration Act of 1953, the states of Pennsylania and Ohio in the USA and in several African countries.

27. It was submitted that article 259 of the constitution requires that the constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. That the court is required to apply the proportionality test which requires the court to balance the interests of the society with those of the individual and groups in an effort to realize good governance.

That it is trite law that the presumption is that any law promulgated by the legislature is constitutionally sound and that it is upon the person alleging otherwise to prove it - **L.N.W. Vs Attorney General & 3 others 2016 eKLR** referred to.

28.That Article 119(1) of the constitution provides that any person has a right to petition parliament to consider any matter within its authority, including enacting, amending or repeal of any legislation. The petitioner ought to have approached parliament before filing the present petition.

29.That provisions of the constitution should be read as an integrated whole without any particular provision destroying the other but each sustaining the other – **Benard Njoroge & Another Vs The independent Electoral & Boundaries Commission & 2 others**. Further that legislative enactment ought to be construed as a whole and that in interpreting a statute, courts ought to adopt such a construction as will preserve the general legislative purpose underlying the provision – **Edward Mwaniki Gaturu & Another Vs Hon. Attorney General & 3 others (2013) eKLR** and **Republic Vs Lucal M. Maiha Chairman Betting & Licensing Board & 2 others** exparte **Interactive Gaming & Lotteries Limited (2015) eKLR .**

30. It was submitted that courts are hesitant to declare laws unconstitutional. Reliance was made on the case of **John Muraya Mwangi & 495 others Vs Minister for state for Provincial Administration & Internal Security & 4 others 92014) eKLR** where the court cited the **South African case of Prinsloo Vs Van Der Linde(1998) ILRC 173** which held

> ***" if each and every differentiation made in terms of the law amounted to unequal treatment .... or else constituted discrimination which had to be shown not to be unfair, the courts would be called upon to review the justifiability or fairness of just about the whole legislative program and almost all executive conduct... The court would be compelled to review the reasonableness or fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory" in the constitutional sense"***

The court went further to state in paragraph 44 that:

> ***" the law on equality does not mean that everyone should be treated the same way, that is, the sustentative law should be the same for all persons, or that the law should be applied to all persons equally without discrimination as this would not only be unreasonable but unjust."***

Analysis and Determination-

31.This court has inherent power and constitutional jurisdiction to interpret the constitution and specifically in this case the Bill of Rights and other laws on principles premised by Article 3,10,20(3),4 and 5, 21,24,159,165(3) (b) and (d), 258,259 and 260 of the constitution of Kenya 2010. Article 2 of the constitution provides for the supremacy of the constitution and states that:-

> **1) This constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.**
>
> **2) No person may claim or exercise state authority except as authorized under this constitution.**
>
> **3) The validity or legality of this constitution is not subject to challenge by or before any court or other state organ.**
>
> **4) Any law, including customary law that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid.**
>
> **5) The general rules of international law shall form part of the law of Kenya.**
>
> **6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.**

32. Article 24(1) of the constitution provides that:-

> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> **(a) the nature of the right or fundamental freedom;**
>
> **(b) the importance of the purpose of the limitation;**
>
> **(c) the nature and extent of the limitation;**
>
> **(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

33. Article 27 provides that-

(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.

34. Article 259 provides the manner in which the Constitution is to be interpreted. It requires that the Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance. Article 159(2) (e) the Constitution mandates the court, in exercising its judicial authority, to protect and promote the purpose and principles of the Constitution.

Case law

35. It is prudent to consider the factors that courts have been taking into consideration when interpreting the constitution. In **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011**, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) where he stated that:

> ***"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and ….aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."***

36. In the case of **Tinyefuza vs Attorney General of Uganda, Constitutional Petition No. 1 of 1997 (1997 UGCC 3)**, the Court held that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.

37.In the case of **Ndyanabo vs Attorney General of Tanzania [2001] EA 495** with regard to the constitutionality of a statute the court observed that there is a general presumption that every Act of Parliament is constitutional, and the burden of proving the contrary rests upon any person who alleges otherwise. However, the Court **in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR** stated that:

> **'…… the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 which we shall analyse in detail later in this judgment, there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article.'**

38. In the cases of **Murang'a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR** and **Samuel G. Momanyi vs Attorney General and Another High Court Petition No. 341 of 2011** the Courts stated that in determining whether an Act of Parliament is unconstitutional, consideration must be given to the objects and purpose of the legislation.

39. The case of **Re Kadhis' Court The Very Right Rev Dr. Jesse Kamau & Others vs The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004** also offers some guidance with regard to constitutional interpretation, particularly in so far as the provisions of the Bill of Rights are concerned. In that case, the Court expressed itself as follows:

> ***"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."***

40. In the case of **S vs Zuma & Others (1995)2 SA 642(CC)**[A3] the Court held that:

‘ a party alleging violation of a constitutional right or freedom must demonstrate t fundamental right has been impaired, infringed or limited. Once a limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation. As in this case, the State, in demonstrating that the limitation is justifiable, must demonstrate that the societal need for the limitation of the right outweighs the individual’s right to enjoy the right or freedom in question.’

41. In **Geoffrey Andare vs Attorney General & 2 others (2016) eKLR** the court cited the case of **U.S Vs Butler, 297 U.S. 1[1936]** where the court expressed the duty of a court in determining the constitutionality of a provision of a statute in the following terms:

“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. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.” (Emphasis added)’

42.The court went further to state:

‘It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself. The Supreme Court of Canada in R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle 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 the legislation’s 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.”

43. It is against these tests and guiding principles, as read together with article 24 of the constitution of Kenya that this court will consider the impugned provisions of the Children Act and the Law of Succession Act.

44. The rights of children are expressly anchored in Article 53(1) and 2 of the constitution of Kenya. Article 53 (1) states that every child has the right-

(a) to a name and nationality from birth;

(b) to free and compulsory basic education;

(c) to basic nutrition, shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and.....

45. Article 53(2) provides that a child’s best interests are of paramount importance in every matter concerning the child.

Article 53 is the reference point as far as the rights of children are concerned. It is the yardstick by which laws relating to children are to be measured. The plain meaning of the article is that fathers and mothers have equal responsibility to a child they bear, and this responsibility is not left to the volition of the man or woman. The bottom line is that both of them must take responsibility.

As stated above, in determining whether a law is inconsistent with the Constitution so as to make the said law invalid, a court needs *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.*

The Children Act

46. It is to be noted that the Children Act No. 8 of 2001 was enacted before the promulgation of the Constitution of Kenya 2010. There has been no review of the Act to align it with the new constitution. It is quite apparent that some of the provisions of the Act are inconsistent with the constitution.

47. Section 2(b) of the Children’s Act gives a father the discretion of choosing whether a child is to be his relative or not. A reading of the section has the meaning that if a father does not acknowledge paternity of a child or has not been contributing to the maintenance of the child, that child cannot be considered to be a relative of the father. It also means that children born inside wedlock have an automatic right to be the relatives of their fathers while those born outside wedlock have no such a right. This is discriminatory on the children born outside

wedlock on the ground of birth. This violates the right of equal treatment before the law to children born outside wedlock. The definition is thus against the spirit of article 53 of the constitution and offends the principle of the best interests of the child, which the constitution places at a higher pedestal than that of the father or mother. It is in the best interest of a child for the child to be recognized as a relative of his father's relatives whether the child's parents are married to each other or not. The definition of 'relative' in section 2(b) of the children Act is in contravention of articles 27(1) which provides for equal treatment before the law and Article 27(4) that bars discrimination on the ground of birth.

48. Section 24(1) and (2) places equal responsibility for a father and mother who are married either before or after a child's birth. This section is in line with Article 53(1) of the Constitution on equal responsibility of the father and mother whether they are married to each other or not. It has not been shown that the section is in contravention of the constitution.

49. Section 26 provides for parental responsibility agreements which agreements I find can only be vitiated like any other contract. I see nothing wrong in having parental responsibility agreements in so far as they are not in conflict with the constitution and relevant statutes.

50. Section 27(1) provides for transmission of parental responsibility to a father and mother who are married or have subsequently married after the birth of the child. The section provides for the doctrine of survivorship in case of death of either parent where responsibility of the child is transferred to the surviving parent. There is nothing wrong with this provision as a surviving parent continues to have responsibility towards their child.

51. Section 27(2) provides for transmission of parental responsibility of unmarried parents when either parent dies. It provides that the father can only take up responsibility after the death of the mother *'if he has acquired parental responsibility…..'*. This is against the principle of equal responsibility of parents under Article 53(1)(e) of the constitution which right cannot be qualified for reason that the father has or has not acquired parental responsibility. Parental responsibility is automatic and self-activating on parents upon the birth of a child and fathers cannot have the discretion of either accepting or rejecting that responsibility. It also means that a parent who has not acquired parental responsibility cannot do so after the death of the other parent. The section is therefore discriminatory to unmarried fathers on ground of marital status contrary to the provisions of Article 27(4) of the constitution.

52. Section 94(1) provides a guide as to the things that a court has to consider before making an order for financial provisions to a child by a step parent or father of a child born out of wedlock. The section states that the court shall be guided, inter alia, by

> **" (i) whether the respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period during which he has met that responsibility."**

The section implies that parents of children born out of wedlock have to assume parental responsibility before they can be ordered to pay maintenance towards their children. As stated above a parent cannot opt out of parental responsibility. The section is therefore in contravention of Article 53 (1)(e) of the constitution which commands equal responsibility of the mother and father to provide for the child whether they are married to each other or not.

53. Section 102(1) is inconsistent with the constitution in so far as the father of a child born out of wedlock needs to *'acquire parental responsibility'* for them to take up parental responsibility of the child upon the death of a mother. This court reiterates the automation of parental responsibility upon birth of a child, and the said responsibility is not left to the discretion of either the father or mother. The section is in contravention of Article 53 (1)(e) of the constitution.

54. Section 158 4(b) is inconsistent with the constitution in that in adoption proceedings it only provides for the consent of the parent or guardian of the mother of the child where the mother of a child born out of wedlock is a child but does not provide for the consent of the parents or guardian of the father where the father is a child. This is discriminatory on such fathers in that their parents or guardian are not required to give consent in adoption proceedings. The section is in contravention of Articles 27(1) and 27 (4) of the constitution on equality before the law.

55.Section 158 4(c) is inconsistent with the constitution in so far as the father of a child born out of wedlock needs *to 'acquire parental responsibility'* for them to take up parental responsibility and be regarded as a father for purposes of consenting to the adoption of the child. The section is discriminatory on fathers who have not acquired parental responsibility. The section has the implication of treating fathers differently based on whether one has acquired parental responsibility which is against the spirit of article 27(1) on equal treatment before the law.

The Law of Succession Act

56. Section 3(2) and 3 (3) of the Law of Succession Act, are inconsistent with the Constitution in so far as a 'child' born out of wedlock is regarded as such if the father…. *has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility'*. As stated before, a parent's responsibility to their child is mandatory and not discretionary. This section is in contravention of Article 53 (1)(e) which requires parents to provide for their children whether they are married or not .

57. Section 12 of the Births and Deaths Registration Act was invalidated by Lady Justice Mumbi Ngugi in **L.N.W v Attorney General & 3 others [2016] eKLR**. I am in agreement with the reasons given by the learned judge in that judgment. I accordingly also hold that the section is inconsistent with Article 27 and 53 of the constitution.

58.In light of the foregoing, this petition does succeed to the extent that the definition of 'relative" in section 2 (b), the provisions of sections 27(2), 94(1) (i), 102(1), 158 (4) (b) and 158 (4) (c) of the Children Act and Section 3(2) and 3(3) of the Law of Succession Act are inconsistent with the Constitution of Kenya, and thus null and void for infracting on the Constitution of Kenya.

59. The petitioners are asking that upon the court finding that the impugned sections are invalid to issue some prohibitory orders. Prayer 2 is to issue prohibitory order on the respondents to prohibit them from enforcing section 12 of the Births and Deaths Registration Act. Prayer 4 is to issue a prohibition order prohibiting the children's court and children's officers from enforcing the language in impugned sections of the children Act. Prayer 5 is to issue prohibition prohibiting the High Court and magistrate's court with jurisdiction over probate and administration matters from enforcing section 3(2) and 3(3) of the law of Succession Act. Prayer 7 is for an order to direct the 1st respondent to issue birth certificates to the children of the 1st petitioner in which the father of the children is named therein.

60. When Justice Mumbi Ngugi invalidated the provisions of section 12 of the Births and Deaths Registration Act she directed the Registrar of Deaths and Births, the 2nd respondent therein, to within 14 days put into place mechanisms to facilitate the entry into the birth register of names of father of children born outside wedlock. I think this is the proper way to go. Before such names are entered into the register there has to be some regulations in place. The petitioner did not inform the court whether such regulations have been put into place. Prayer 7 to order for birth certificate to be issued to the children of the 1st respondent indicating the name of their father cannot issue before the law is amended to cater for that.

61. The mandate of this court is to ascertain whether a law is inconsistent with the constitution or not. The court does not supervise other courts of equal jurisdiction. It cannot thereby issue prohibitory orders on other judges of the High Court. Even though the court has powers to supervise the magistrates' courts, it cannot issue orders that will be difficult to supervise or implement. The prayers to issue prohibitory orders on the High Court and magistrates' courts are thereby declined.

62. It is the view of this court that the Attorney should amend the impugned sections of Births and Deaths Registration Act, the Children Act and the Law of Succession Act to align them with the Constitution of Kenya 2010.

In the foregoing, I make the following orders and declarations:

1) A declaration that section 12 of the Births and Deaths Registration Act cap 149 of the laws of Kenya is inconsistent with articles 27, 53(1)(a) and (e) and 53(2) of the constitution of Kenya and is therefore null and void.

2) A declaration that the definition of a "relative" in section 2(b) of the Children Act and the provisions of sections 27(2), 94(1)(i), 102(1), 158(4)(b) and 158 (4)(c) of the Children Act are inconsistent with article 27(1) ,Article 53(1)(e) and 53(2) of the Constitution of Kenya and are therefore null and void.

3) A declaration that section (3) (2) and 3(3) of the Law of Succession Act are inconsistent with Article 53(1)(e) of the constitution of Kenya and thereby null and void.

4) I direct the Attorney General to within 90 days from the date hereof to amend the impugned sections in the Children Act and Law of Succession Act to align them with the constitution of Kenya 2010.

5) As for prayer (1) above orders to remain as ordered by justice Mumbi Ngugi in constitution petition No. 484 of 2014.

This is a public interest matter. I direct that each party bears its own costs.

Delivered, dated and signed at Kakamega this 7th day of February,2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kimitei HB Mr. Odongo ..... for petitioners

N/A.....for respondents

Parties:

1st petitioner.....absent.

2nd petitioner.....absent.

Respondents.....absent.

Court Assistant.....George.

30 days right of appeal.