



**Asola & another v Attorney General (Civil Appeal 100 of 2017)
[2021] KECA 201 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KECA 201 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 100 OF 2017
S OLE KANTAI, HA OMONDI & M NGUGI, JJA
NOVEMBER 19, 2021**

BETWEEN

NORAH AUMA ASOLA 1ST APPELLANT

FEDERATION OF WOMEN LAWYERS 2ND APPELLANT

AND

ATTORNEY GENERAL RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu (Hillary Chemitei J) dated 23rd July, 2014 in High Court Petition No. 11 of 2012)

JUDGMENT

1. In their petition dated 15th October 2012, the appellants had sought various declarations from the High Court pertaining to alleged violations of the 1st appellant's constitutional rights. The petition was lodged under the provisions of Articles 2 (1), (4), (5) and (6), 21(1) and 23 of the *Constitution of Kenya, 2010*. It challenged the validity of sections 32, 33, 35(1)(b), 35(5) and 36(1)(c) of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya. It was their case that the said provisions are inconsistent with Articles 27 and 60 of the Constitution and are therefore null and void. The appellants further alleged violation of the 1st appellant's right to freedom from discrimination guaranteed under Article 27 of the Constitution.
2. In its decision dated 23rd July 2014, the trial court concluded that there was no violation of the Constitution by the respondents, nor were the impugned provisions of the *Law of Succession Act* in conflict with the Constitution. It was its finding, further, that there was insufficient evidence established by the appellants to show that the 1st appellant had attempted and failed to succeed to the estate of her deceased husband. The trial court accordingly found the petition to be without merit and dismissed it with no order as to costs.



3. The appellants were dissatisfied with the decision of the trial court. Pursuant to leave to file their appeal out of time granted on 19th March 2015, the appellants filed the present appeal in which they raise the following grounds of appeal:
 - i. That the learned Judge erred in law in holding that Section 32,33,35 and 36 of the Law of Succession Act does not contravene Article 27 and 60(1)(b) of the Constitution of Kenya 2010.
 - ii. That the learned Judge erred in law in failing to critically evaluate the evidence tendered in court thereby arriving at a wrong decision that the petition filed lacked evidence or a factual basis upon which the court could make a determination whether or not there had been a violation of the 1st Appellant’s fundamental rights.
 - iii. That the learned Judge erred in law in failing to award the 1st petitioner compensation as provided for under provisions of Article 23(3)(e) of the Constitution of Kenya 2010.
 - iv. That the learned Judge erred in law by failing to critically evaluate the provision of section 32, 33, 35(1)(6), 35(5) and 36(1)(k) of the Succession Act Cap 160 Laws of Kenya to find that they are discriminatory against women and repugnant to justice.
 - v. That the learned Judge erred in law by failing to make a finding that the practice of widow eviction is discriminatory and violates the fundamental rights of the appellant and the other women as enshrined in the Constitution of Kenya 2010, *Maputo Protocol and CEDAW*.
 - vi. That the learned Trial Judge erred in law by failing to critically evaluate the evidence tendered and thus failing to order and direct the Respondent to advise and/or recommend to the executive and legislature to review and amend the Law of Succession Act to make more effective, enforceable and to conform with the constitution of Kenya and international and regional human rights instruments.
 - vii. That the learned Judge erred in his evaluation of the evidence thus failed to find that the state had a positive obligation to prevent and sanction private violation of human rights.
 - viii. That the Hon trial Judge erred in law in failing to critically evaluate the general rules of International Law, applicable as read with the provisions of Article 2(5) and 6 of the Constitution of Kenya 2010 thereby arriving at the wrong decision.
 - ix. That the judgment delivered was against the weight of the evidence tendered.
4. The duty of this court in dealing with an appeal from a decision of the High Court exercising its original jurisdiction is set out in rule 29 of the *Court of Appeal Rules*. The court is required to re-appraise the evidence presented before the trial court and draw inferences of fact. Further, as was held in *Selle v Associated Motor Boat Company Ltd [1968] EA 123*:

“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
5. The facts forming the basis of the petition as presented to the trial court are set out in the affidavit of the 1st appellant filed on 16th October 2012 and the affidavit sworn on behalf of the 2nd appellant by Grace Maingi Kimani, then its Executive Director, on 15th October 2012. The 1st appellant averred that she and her husband, who had two wives who predeceased him, were married under Luo customary law. They established their home in Nyalunya Location, Nyakach in Kisumu County. Their union was blessed with one surviving issue, a girl. The 1st applicant’s husband died on 8th November 2010.



6. Following his demise, she and her young daughter were evicted from her matrimonial home by her in-laws, leaving behind her step son who was a minor. The 1st petitioner reported the matter to the area Chief and the police at Sondu- Miriu Police Station but received no assistance. She therefore sought the assistance of the nd appellant, an organization involved in lobbying for women's rights in Kenya. The 2nd appellant wrote several letters to the Provincial Administration offices seeking assistance to no avail.
7. The appellants contended before the trial court that the 1st appellant was discriminated against due to her gender and marital status. She had been removed from her matrimonial home immediately upon the death of her husband yet she had co-existed peacefully with her husband and in-laws before his death. The Provincial Administration had refused to come to her aid when she sought for assistance.
8. In her affidavit, Ms. Grace Maingi Kimani made depositions regarding various studies done that showed the problems women in Kenya face when it comes to property inheritance, land ownership, succession and matrimonial property. The affidavit also made reference to various studies done on the provisions of the Law of Succession Act that failed to protect widows from rights violations. Annexed to her affidavit were four affidavits sworn by four different women who, like the 1st appellant, averred that they too had been evicted from their matrimonial homes following the demise of their spouses.
9. It was the appellants' case that although the Constitution guarantees protection of rights and freedoms such as freedom from discrimination, some provisions of the Law of Succession Act contravene Article 27 of the constitution by permitting discriminatory customary laws to govern succession matters. The appellants cited specifically sections 32, 33, 35(1)(b), 35(5) and 36(1)(c) of the Act which they contended were unconstitutional. They urged the trial court to find that the 1st appellant was entitled to compensation from the respondent.
10. The respondent opposed the petition. He filed an affidavit sworn by one Walter Oyasi Ouya, the area Chief of Kabodho West Location, Nyakach Sub-county. The respondent's averments were that the 1st appellant had been assisted by a police officer from Sondu Miriu Police Station. The police officer rescued her when she was being evicted and she left for her home in Kano. The area Chief had also written a letter to enable the 1st appellant undertake the succession process.
11. The respondent's case before the trial court therefore was that the petition was premature as avenues through which the 1st appellant could seek assistance were not closed; the local provincial administration was willing and had indeed tried to assist the 1st appellant by writing the introduction letter that she required to file a succession cause; and the 1st appellant was not entitled to compensation as she had not exhausted the avenues available for seeking a remedy.
12. The parties filed written submissions in support of their respective positions on the appeal. In their submissions dated 12th July 2021, the appellants submit that their plea before the trial court was that the 1st appellant had been discriminated against and not treated with equality and dignity contrary to Article 27 and 28 of the Constitution. The trial court had therefore erred in holding that the appellant's husband did not hail from a pastoralist community and that section 33 of the Law of Succession Act did not apply to her.
13. The appellants further submit that the trial court erred in finding that the appellants were just apprehensive and that their petition was based on their belief and apprehensions that may occasionally arise. They submit that the finding was not based on the pleadings filed, noting in particular the averments by the 2nd appellant regarding the discrimination faced by various indigent women in Kenya and how it is interwoven with discriminatory law, in particular the impugned sections of the Law of Succession Act. They submit that section 32 and 33 of the Act clearly discriminate against women on



- the basis of ethnic and social origin, while section 35(1), (5) and 36(1)(c) discriminate against widows as they lose inherited property should they re-marry.
14. The appellants submit that the trial court erred in dismissing the 1st appellant's case on the basis that her husband did not belong to a pastoralist community, that she had not carried out the succession process and that she was not entitled to compensation from the state. It is their submission that the area Chief had deliberately refused to issue her with the letter required for succession. He had only issued one two years after the filing of the petition. His actions were therefore in breach of Articles 10, 47 and 232 of the Constitution. She had a right to live in dignity after the death of her spouse, but was evicted from her home by her in-laws. While the eviction was done by her in-laws, the state had a duty under Article 21(1) to 'observe, respect, protect and fulfil' the rights in the Bill of Rights. The trial court had erred in failing to award her compensation despite the violation of her rights.
 15. The appellants impugn the decision of the trial court for finding that the issues raised in their petition were hypothetical scenarios. They submit that a central pillar of their case was that the practice of widow eviction and threat of widow eviction was discriminatory and a violation of fundamental rights enshrined in the constitution and international conventions, among them the Maputo Protocol and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). They urge this court to issue a declaration that widow eviction is a violation of the provisions of these conventions.
 16. In his submissions dated 14th July 2021, the respondent submits that the appellants have not demonstrated how sections 32, 33, 35 and 36 of the Laws of Succession Act contravene Articles 27 and 60(1)(b) of the Constitution. It is his submission therefore that there is no basis for the court to interfere with the independent constitutional legislative mandate of Parliament. In the respondent's view, the provisions of sections 32, 33, 35 and 36 of the Laws of Succession Act are not discriminatory against women. That the true essence of sections 32 and 33 lies in the fact that the lands within the districts exempted in the sections are communally owned. As for sections 35 and 36, the respondent submits that they protect a widow until she re-marries or dies, and the children of the deceased who, in the respondent's view, are the absolute beneficiaries of his estate, remain protected by the law.
 17. It is also the respondent's submission that the trial court made its decision after critically considering the evidence before it. The respondent invites this court to consider the evidence presented by the appellants and find that it did not meet the balance of proof required in a civil suit, namely on a balance of probabilities. In particular, the evidence presented did not demonstrate how the impugned provisions violate Articles 27 and 60(1)(b) of the Constitution; how they are discriminatory and repugnant to justice; or how they contribute to widow eviction.
 18. The respondent answers the question whether the trial court erred in not awarding compensation to the 1st appellant for violation of her rights in the negative. This court is invited to be guided by the words of the court in *Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others [2013] eKLR* with regard to what is required of a petitioner alleging violation of constitutional rights and seeking vindication in respect of such violations.
 19. The respondent submits that the 1st appellant's husband did not hail from the districts covered under sections 32 and 33 of the [Law of Succession Act](#). Further, the appellants did not adduce evidence that he did; nor did they show how her rights had been violated in relation to sections 35 and 36 of the [Law of Succession Act](#). It is his submission that the appellants were asking the trial court to award compensation on the basis of a hypothetical situation, there being no real dispute for the court to adjudicate upon.



20. Finally, regarding the appellants' contention that the trial court erred in not finding that the practice of widow eviction is discriminatory, the respondent submits that the appellants have failed to show how the respondents failed in their duty to the 1st appellant, and they had not linked the respondent to her eviction. The respondent had given the 1st appellant police protection when she was being evicted from her home, and the area Chief had written a letter for her which she required for purposes of applying for succession to her husband's estate; If there was a claim of discrimination against the 1st appellant, then it should be directed at those who had subjected her to discrimination. The respondent asks this court to dismiss the present appeal for lack of merit.
21. We have considered the record of appeal, the judgment of the trial court, the pleadings of the parties and the respective submissions of the parties. The appellants had filed a constitutional petition alleging violation of the 1st appellant's constitutional rights, primarily under Article 27 of the Constitution which prohibits discrimination on any ground. They alleged discrimination against the 1st appellant on the basis of her gender as a woman and her status as a widow. They alleged that sections 32, 33, 35(1)(b), 35(5) and 36(1)(c) of the Law of Succession Act are unconstitutional for violating the non-discriminatory provisions of the Constitution, and they asked the trial court to make declarations in that regard. They also contended that the practice of widow eviction is discriminatory, and they sought damages against the respondent with regard to these alleged violations.
22. Consequently, since the matter before the trial court was a constitutional petition alleging, first, violation of the constitutional rights of the 1st appellant and, secondly, that various provisions of a statute were unconstitutional, the appellants had certain obligations to meet in order for the court to make findings in their favour. The respondent has referred to the decision in *Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others (supra)* in which the court stated as follows:
- “ 32. As a basic minimum, the petitioners are required to not only cite the provisions of the constitution which have been violated, and the manner in which they have been violated with regard to them-see *Anarita Karimi Njeru* (1976-80) 1 KLR 1272 and *Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court* Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.”
23. In determining the present appeal, therefore, we address the question first, whether the appellants presented before the trial court evidence on the basis of which the court could properly find that there was a violation of the constitutional rights of the 1st appellant. Secondly, whether there was a sufficient basis for finding that the impugned provisions of the Law of Succession Act are unconstitutional for being in conflict with the provisions of Article 27 and 60 of the Constitution.
24. The appellants' case before the trial court was that there was a violation of the 1st appellant's rights under Article 27. The evidence in support of this was that she had been discriminated against on the basis of her gender as she had been evicted from her deceased husband's home after his death. On the basis of the 1st appellant's situation, the appellants asked the trial court to declare that sections 32, 33, 35(1) and (5) and 36(1)(c) of the Law of Succession Act are unconstitutional for being in conflict with Article 27. The trial court found this not to be the case.
25. We have considered the factual basis of the petition presented before the trial court, and we find that there is no basis for faulting the conclusion arrived at by the trial court that there was no basis for finding



that the impugned provisions were unconstitutional. First, as the trial court found, the 1st appellant's deceased husband did not come from the area specified under sections 32 and 33. Section 32 excludes agricultural land and crops thereon as well as livestock from various districts exempted in the Schedule to the Act, namely West Pokot, Wajir, Samburu, Lamu, Turkana, Garissa, Isiolo, Kajiado, Marsabit, Tana River, Mandera and Narok.

26. Under section 33, the law applicable to the property in the districts specified in section 32 shall be the law or custom applicable to the deceased's community or tribe. The 1st appellant's husband was a member of the Luo community, a resident of Nyakach, Kisumu County, outside the exempted areas. Accordingly, there were no facts on the basis of which the trial court could consider the constitutionality or otherwise of section 32 and 33 of the *Law of Succession Act*.
27. The appellants also asked the trial court to declare the provisions of sections 35(1), (5) and 36(1)(c) of the Act unconstitutional for being discriminatory against women. Section 35 provides for situations where a person who dies intestate has left one surviving spouse and child or children. Sub-section 1 and 5 provide as follows:
- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
 - (a) ...
 - (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person....
 - (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.
28. Section 36(1)(c) provides that:
36. Where intestate has left one surviving spouse but no child or children
- (1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—
 - a ...
 - b ...
 - c a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.
29. The effects of these provisions is that widows have only a life interest in the property that they inherit from their deceased spouses, an interest that terminates on death or re-marriage. No such limitation is placed on the interest that widowers acquire in the property that they inherit from their deceased spouses.
30. In the circumstances of the case presented before the trial court and the facts presented before it, we are unable to fault its reasoning in reaching the conclusion that the provisions in question are not



unconstitutional. The 1st appellant's case was not that she had been deprived of her life interest under section 35(1), 5(5) and 36(1)(c) of the Law of Succession Act. That was not an issue that the facts before the trial court called for determination of. The 1st appellant was aggrieved by her eviction from her deceased's husband's home. The question of whether or not she had a life interest, or that such interest would terminate on her re-marriage, which would not apply in the case of a man, was not before the court.

31. From the averments on behalf of the 2nd appellant and the submissions before us, it seems that the appellants, particularly the 2nd appellant, sought to cast the net a lot wider than the individual claim of the 1st appellant. In analysing the averments by the appellants, the trial court observed:

“The second affidavit is sworn by Grace Maingi- Kimani who makes various depositions with regard to her knowledge of gender related issues and the achievements of the 2nd petitioner in its fight for gender equity and equality. Further she deposes on statistics of the cases handled by the 2nd Petitioner on matters gender and related issues.

...

32. The trial court went on to consider its jurisdiction under Article 22 of the Constitution and concluded that:

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

33. We fully agree with the conclusion reached by the trial court in this regard. It may well be that, on consideration of a proper factual foundation, the provisions of section 35 and 36 of the Law of Succession Act which differentiate between the interest that a widow and a widower obtain in the estate of a deceased spouse may be found unconstitutional. We take this view as such differentiation appears to have its basis only on gender, In this case, however, much as the experience and studies undertaken by the 2nd appellant may suggest this to be the case, the trial court would have embarked on a hypothetical journey had it entered into an analysis of the constitutionality of the provisions on the basis of the facts before it.
34. The appellants were aggrieved by the failure of the trial court to award compensation to the 1st appellant for alleged breach of her constitutional rights. They submit that the area Chief had refused to issue the letter that she required to enable her apply for succession to her deceased husband's estate. The area Chief was therefore in breach of her rights under Articles 10 and 47 of the Constitution.
35. In finding that there was no breach of the 1st appellant's rights and therefore no entitlement to compensation, the trial court observed as follows:

“The petitioners seek compensation on behalf of the 1st petitioner from the state on the basis that the state failed in its duty to protect her from her in-laws. The petitioners relied on Article 23(3)(e) which provides that the court may grant appropriate relief where there has been a violation and one such relief is compensation. It is really pitiful as it may be true that the 1st petitioner was indeed evicted from her matrimonial home by her in-laws. However,



on the basis of the application made before the court and the Articles relied upon it would be hard to order compensation and more so from the state. The appropriate prayer perhaps would have been to seek protection for the 1st petitioner to return to her matrimonial home and to facilitate and offer her the necessary assistance needed to acquire grant of letters of administration of the estate of her late husband.

36. The trial court noted that as was held in *Musa vs- Musa [2002]1 EA 182* production of a letter from the Chief before applying for letters of administration was not required under the *Law of Succession Act*. It was, rather, a:

“ requirement made out of good practice since the provincial administration is always on the ground and at times it reduces fraud and objections once the beneficiaries are aware that there are succession proceedings in respect to the estate.”

37. The trial court went on to observe that there was a letter dated 19th May 2014 from the Chief of Kabodho West Location Chief addressed to the Deputy Registrar of the High Court. The appellants argue, however, that the letter from the Chief was issued as an afterthought, long after the petition had been filed. This may well be the case.

38. However, there is no indication that the 1st appellant had made an application for letters of administration to the estate of her deceased husband and the application had been rejected solely on the basis that she did not have a letter from the Chief. In our view, the trial court was correct in finding that there was no violation of the 1st appellant’s constitutional rights as a result of the alleged failure by the Chief to issue a letter regarding the beneficiaries of the estate of the deceased.

39. In dismissing the petition, the trial court concluded that it had not been able to find a violation of the Constitution, nor were the provisions of the *Law of Succession Act* that the appellants complained of in conflict with the Constitution. We agree that on the facts of the case before the trial court, inconsistencies between sections 32, 33, 35(1)(b), 35(5) and 36(1)(c) of the *Law of Succession Act* and the Constitution had not been made out. However, the constitutionality of the provisions is still open for consideration in an appropriate case.

40. We say this having noted that one of the affidavits annexed to the affidavit of Grace Maingi Kimani in support of the appellants’ case was sworn by one Ann Akuyen, a woman from Lodwar. Ms. Akuyen avers that she was disinherited on the basis that she was a woman and under Turkana customary law, she had no right to inherit. Turkana is one of the districts exempted from the application of the *Law of Succession Act* under section 32 of the Act. The deponent, however, was not a petitioner in the case before the trial court, and the court did not therefore have a factual basis for considering the provisions at issue. It could therefore not engage in a hypothetical consideration of the issues regarding the constitutionality of the sections.

41. In the circumstances, in light of our analysis above, we find no merit in this appeal.

It is hereby dismissed but with no order as to costs.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

S. ole KANTAI

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JUDGE OF APPEAL

H. OMONDI



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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

