IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, MUSINGA & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 121 OF 2018

BETWEEN

1. CKC

2. CC (Suing through their mother and next friend JWN).........APPELLANTS

AND

ANC..RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Mombasa (Thande, J.) dated 15th December 2017

in

HCSC No. 436 of 2004)

****

JUDGMENT OF THE COURT

At issue in this appeal is the proper interpretation and application of ***Articles 24(4)*** and ***27*** of the ***Constitution of Kenya, 2010,*** as they relate to equality and freedom from discrimination. Article 27 guarantees every person equality before the law, equal protection of the law, and equal benefit of the law. The equality that the Constitution guarantees includes the full and equal enjoyment of all the rights and freedoms set out in the Bill of Rights. The Constitution further guarantees both men and women the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. It also prohibits the State and every person, in very express terms, from discriminating 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.

But our Constitution is not a mere treatise on logic. It is a charter for the living, an amalgam that seeks to accommodate and balance legitimate interests that are sometimes competing, inconsistent and incongruent. The Constitution ultimately is an embodiment of compromises, which are manifested in promises and guarantees that nevertheless admit to qualifications and exceptions to accommodate the interests of persons that would otherwise be excluded or uncatered for. The Supreme Court stated this stark reality as follows in ***Speaker of the Senate & Another v. Hon. Attorney-General & Others [2013] eKLR***:

> ***"The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship."***

One such instance of compromise is the exception that the Constitution has made in Article 24(4) to its guarantee of equality before the law and freedom from discrimination. That Article provides that the constitutional guarantee of equality is qualified to the extent strictly necessary for the application of Muslim law before the Kadhi's courts to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

There are a number of constitutional and statutory provisions that actualize and give full effect to Article 27 as read with Article 24(4). The first is ***Article 169*** of the Constitution, which creates the Kadhi's court as a subordinate court in Kenya. The second is ***Article 170 (5)***, which confers jurisdiction on the Kadhi's court in the following terms:

"The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts."

As regards the statutory provisions, ***section 5*** of the ***Kadhi's Court Act***, ***cap 11 Laws of Kenya,*** reiterates the jurisdiction of the Kadhi's Court as follows:

"A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it."

Lastly is the ***Law of Succession Act***, ***cap 160 Laws of Kenya***, which mirrors the constitutional compromise written in Article 27 as read with Article 24(4). ***Section 2 (1)*** of the Law of Succession Act declares the Act to constitute the universal law of Kenya in respect of all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of the Act and to the administration of their estates. However, ***section 2(3)*** delivers a qualification worded as follows:

"(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991."

This appeal raises a significant question, namely whether the appellants, children born of a Muslim father and a non-Muslim mother who were not formally married, can inherit the estate of their deceased father. The appellants contend, through their mother and next friend, ***JWN (J)***, that they can because being non-Muslim, Islamic law has no application to them. On the other hand the respondent, ***ANC (A)***, the mother of the deceased, contends that Islamic law applies to the estate of the deceased by virtue of the constitutional and statutory provisions we have quoted above and that under that law, illegitimate children are not entitled to inherit from their Muslim father.

The short background to the appeal is as follows. ***SCB (S)*** died on 18th December 2012. He was a Muslim and was buried according to Islamic rites. During his lifetime, S lived with ***J*** as husband and wife from 1992 until his death in 2012. There is no evidence on record that they contracted any marriage under Islamic law. They however had two children, ***the appellants, CKC***, a daughter born on 13th December 1994 and ***CC,*** a son born on 8th August 2005. S lived with J and the two children in ***Mtwapa, Kilifi County***, in a house belonging to his father, ***CBH (H)***, and also in Nairobi. During his lifetime, S supported and provided for J and the two children.

It appears that S did not have any property of his own, save for a share of property that he expected to inherit from his father, H, who predeceased S on 2nd August 2004. After the death of H, S, his mother ***A*** and his brother, ***ACB,*** were appointed administrators of the estate of his father on 21st June 2005 vide ***Mombasa High Court Succession Cause No. 436 of 2004***. The grant was confirmed on 20th July 2007 with a total of 19 persons, including S, identified as beneficiaries of the estate of H.

Before his death, S petitioned the Kadhi's court in Mombasa in ***Succession Cause No. 82 of 2012*** for determination of the shares of the heirs of H in accordance with Islamic law. After the death of S, ACB took over and prosecuted the matter in the Kadhi's court. J was not aware of those proceedings and therefore did not participate in them. By a judgment dated 29th August 2013, the Principal Kadhi held that S was not legally married to J and that her two children were born out of wedlock. He further held that under Islamic law J and her two children were not entitled to inherit S's share in the estate of H, which was subsequently determined to be 9.21 % of the estate.

On 17th March 2014, J applied to the Kadhi's court to set aside its judgment on the basis that she was denied an opportunity to be heard and that Islamic law did not apply in the case because she and her children were not Muslims. By a ruling dated 2nd October 2014, the Principal Kadhi held that the Kadhi's court had jurisdiction because the dispute involved determination of the estate and heirs of a deceased Muslim. Although he found that J was not heard in the proceedings, he reiterated that being non-Muslims she and her children could not inherit from S. He however allowed them to take their dispute to the High Court and in the meantime issued conservatory orders restraining distribution of S's share and the eviction of J and her children from the house that they were occupying, belonging to the estate of H.

On 11th March 2015 J, on behalf of the appellants, moved to the High Court seeking determination of Swauriqy's 9.21% share in the estate of H, and an injunction restraining the administrators of the estate from distributing or alienating the said share. She reiterated that being non-Muslims Islamic law did not apply to the appellants. She also challenged that law as discriminatory and unconstitutional under Article 27 of the Constitution to the extent that it prohibits a non-Muslim wife from inheriting from her Muslim husband and children born out of wedlock from inheriting from their Muslim father. She urged the court to uphold the best interest of the children above all else and in the alternative to presume a marriage between herself and Swauriqy.

In opposition to the application, the respondent contended that as J was not legally married to S, neither her nor her children were entitled under Islamic law to inherit his estate. In her view that did not constitute discrimination because the Constitution had made an express exception for application of Islamic law. She added that no marriage could be presumed between S and J because the presumption of marriage was unknown in Islamic law. As to the occupation by J and the appellants of the house in Mtwapa, the respondent maintained that it was purely on humanitarian grounds.

Thande, J. heard the application and held that the right to equality and freedom from discrimination guaranteed by the Constitution was

limited in matters of personal status, marriage, divorce and inheritance as regards persons who profess the Islamic faith. She also agreed that the presumption of marriage was unknown in Islamic law. The learned judge concluded:

> ***"The court appreciates the zealous submissions on behalf of the applicants. Indeed referring to any child as illegitimate in this day and age appears to be outrageous. However, as long as the estate herein belongs to a deceased Muslim and as long as Article 24(4) remains in our Constitution and further as long as section 2(3) remains in the Law of Succession Act, the court's hands are tied."***

Ultimately the learned judge concluded that the exclusion of J and her children from S's share of the estate of H was not inconsistent with the provisions of the Constitution. She accordingly dismissed the application but made no order on costs.

That is the ruling that has aggrieved the appellants, leading to this appeal. The ruling is challenged on some 9 grounds of appeal, some of which are overlapping. Essentially the appellants contend that the learned judge erred by holding that they were not legitimate children of Swauriqy; by holding that they were not entitled to inherit from his estate; by discriminating against them on the ground of religion contrary to Article 27 of the Constitution; by failing to enforce fundamental rights and freedoms; by failing to hold that the Islamic law in question was inconsistent with the Constitution and therefore null and void; and by failing to hold that S was not subject to Islamic law by reason of his marriage to J, a non-Muslim.

The appellants' learned counsel, ***Mr. Gikandi*** and ***Ms. Gathongo*** submitted that S and his extended family accepted J as his wife and the appellants as his legitimate children to the extent that S and his family lived in a house belonging to his father, H. It was therefore contended that upon the death of S, his children whom he had accepted and provided for, could not be declared illegitimate. Counsel relied on the judgments of this Court in ***John Mburu v. Consolidated Bank of Kenya [2015] eKLR*** and ***Sakina Sote Kaitany & Another v. Mary Wamaitha [1995] eKLR*** and submitted that the respondent is estopped by justice and equity from claiming the appellants, whom she had accepted and recognized during S's life, were illegitimate children after his death.

It was counsel's further contention that the Kadhi's court and the High Court were in error in concluding that the appellants were illegitimate children of S whilst their status in law was independent of the relationship or status of their parents. They cited the persuasive decision of the Supreme Court of India in ***Revenassiddappa & Another v. Mallikarjun & Others*** (31 March 2011, arising out of Special Leave Petition (C) No. 12639/09) and submitted that irrespective of the circumstances of birth, under the Constitution all children must be treated equally and accorded all their rights.

Learned counsel next submitted that Islamic law did not apply to J and her children because they were not Muslims. It was contended that before Islamic law could apply to matters of personal status, marriage, divorce or inheritance under Articles 24(4) and 170 (5) of the Constitution and section 5 of the Kadhi's Court Act, all the parties must profess the Islamic faith. Relying on the decisions of the High Court in ***Ahmed Shariff Swaleh & 3 Others v. Abdulgader Sharif Swaleh & 3 Others [2014] eKLR*** and ***Mariam S. Swaleh & 4 Others v. The Chief Kadhi & 3 Others [2013] eKLR,*** it was submitted that a non-Muslim cannot be compelled to submit to the jurisdiction of the Kadhi's Court.

Next the appellants faulted the learned judge for failing to give effect, as required by Article 2 (5) and (6) of the Constitution, to various treaties and conventions ratified by Kenya pertaining to the rights of women and children, such as the ***UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,*** and the ***UN Convention on the Elimination of All Forms of Discrimination Against Women***. It was contended that those instruments prohibit discrimination against women and children on various grounds such as birth or the parents' status and demand that in all decisions the best interest of the child should be taken into account.

Counsel urged us to invoke ***Article 259*** of the Constitution in interpreting and applying the Bill of Rights so as to eschew a legalistic interpretation in favour of a purposive and generous interpretation that would lead to enjoyment rather than denial of the appellants' rights as children of S. The High Court's decision in ***Kituo cha Sheria v. The Attorney General [2013] eKLR*** was invoked in support of the contention.

The respondent, represented by ***Mr. Khatib,*** learned counsel, opposed the appeal. She submitted that Islamic law applied to inheritance of the estates of H and S by virtue of section 2(3) of the Law of Succession Act and Articles 24(4) and 170(5) of the Constitution because they lived and died as Muslims. The respondent added that all the heirs of H were Muslims who submitted to the jurisdiction of the Kadhi's court. She relied on the decision of the High Court in ***In the Matter of the Estate of Ishmael Juma Chelanga (Deceased) [2002] eKLR*** in support of the contention that a non-Muslim is not permitted to inherit the estate of a Muslim. The respondent also cited the judgment of this Court in ***Saifuden Mohamedali Noorbhai v. Shehnaz Adamji [2011] eKLR*** and submitted that Swauriqy was at liberty to make bequests to the appellants as non-Muslims by way of will, which he did not do. Having not provided for them by will, the respondent contended, the appellants could not otherwise inherit under Islamic law.

Next the respondent submitted that application of Islamic law to the estate of S did not contradict or violate the provisions of the Constitution on equality and freedom from discrimination as well as those on the rights of the child because the Constitution itself provides for application of Islamic law. On the authority of the judgments of this Court in ***Attorney General & Another v. Andrew Kiplimo Sang Muge & 2 Others [2017] eKLR*** and ***County Government of Nyeri & Another v. Cecilia Wangechi Ndungu [2015] eKLR,*** the respondent submitted that the provisions of the Constitution must be construed as a whole and that no provision of the Constitution may be he held to be inconsistent with another. On the application of international treaties and conventions in Kenya, the respondent submitted that under Article 2 (5) and (6), treaties and conventions form part of the laws of Kenya but by virtue of Article 2(1) of the Constitution, they cannot override the provisions of the Constitution like those providing for application of Islamic law. It was the respondent's further contention that she never recognised the appellants as the children of S, and that she merely assisted them and Josephine on humanitarian grounds. In the circumstance, she

contended, no estoppel could arise.

Those are the respective positions articulated by the parties in this appeal. Before we consider the merits of this appeal, there are a few observations that this Court made in ***Saifuden Mohamedali Noorbhai v. Shehnaz Adamji*** (supra), a decision rendered on 2nd December 2011 after the promulgation of the Constitution of Kenya, 2010, regarding Islamic law that are worthy highlighting for proper context. In that appeal, the deceased, a *Shia Dawoodi Bohra* Muslim died without any surviving parent, grandparent, children, grandchildren, brothers or sisters. He bequeathed his entire estate to the respondent, his wife who was the closest surviving relative. The appellant, claiming to be a cousin of the deceased, challenged the Will as null and void on the basis that it was contrary to Islamic law on devolution of estates, which entitled him, as a cousin of the deceased, to three quarters of the estate of the deceased. In dismissing the challenge, the High Court held that under the Law of Succession Act, a person of sound mind was free to dispose of his property by reference to any secular or religious law of his or her choice. The appellant appealed to this Court contending, among others, that the High Court had erred by applying the Law of Succession Act in lieu of Islamic law.

In a wide-ranging review, this Court noted, a few basic principle pertaining to Islamic law. The first is that Islamic law is a moral doctrine at whose heart lie the values of justice and kindness translating into an ethic of care and compassion for the weak and vulnerable, especially among one's close relations. Secondly, in interpreting the Quran-inspired law, regard must be had to the Quran's moral teaching as a whole. Thirdly, Islamic law is dynamic and adapts to evolving social, political, cultural and economic conditions and realities and that ***"not all rules of inheritance are rigidly fixed for all times since the development of Muslim jurisprudence has been and continues to be a search for the good law to be applied in differing times and situations."*** Lastly, the Court stated that Islamic law does not constitute a single uniform code of law. On the contrary, its hallmark is legal pluralism and diversity, comprising a multiplicity of Muslim schools of law within the two major branches of *Sunni* and *Shia*.

Ultimately the Court held that in writing the Will and in making his disposition the deceased did not contravene any Quranic guidance. Its concluding words are instructive:

> ***"The respondent, Shehnaz, was the wife of the deceased, and, in the absence of ascendants or descendants, the closest relation of her husband. As noted above, Muslim courts, jurists and law makers have, when necessary, sought to ensure that the humane intention of the law be upheld, whether to protect the interests of widows or orphaned grandchildren whom, a rigid reading of the letter of the law, would have deprived of much needed and expected support. In construing the will of the deceased, therefore, the pertinent question to ask is whether he would have happily contemplated to see his widow and life-time companion, whose care and protection was a solemn duty imposed upon him by the Quranic teachings, deprived of three quarters of his estate in favour of a cousin, a person presumably of independent means, and a person who has not been shown to have had, or likely to have, any concern or interest in the welfare of the respondent. Nor can any court of law, acting in good conscience and charged with the duty of administering justice and equity, a duty which also resonates with the Quranic injunction emphasizing justice and kindness - entertain such a contemplation."***

The singular handicap that we face in this appeal is that the record does not show the Islamic school of thought that S belonged to. The principal Kadhi held that according to the Islamic law that was applicable to him, children born out of wedlock were not entitled to inherit from their father, which of course seems to be diametrically at variance with the principles of justice and kindness adverted to above. In support of the view that the appellants cannot inherit from the estate of Swauriqy because they were born out of wedlock, the High Court relied heavily on its previous judgment in ***In the Matter of the Estate of Ishmael Juma Chelanga (Deceased)*** (supra). One of the issues in that cause was whether two children of a deceased Muslim man, born out of wedlock, could inherit from his estate. In holding that they were illegitimate and incapable of inheriting from the deceased, the High Court stated:

> ***"...[T]he deceased was a person who professed the religion of Islam, accepted the unity of God and Mohammed as his prophet. The deceased was a Muslim, his personal law was Muslim Law for purposes of intestate succession of his estate. Under Islamic Law no non-Muslim is permitted to inherit the estate of a Muslim. This was ably verified in this court by the Kadhi of Nairobi Mr. Hammat Mohammed Kassim. It follows therefore that Chebet, who had conceded that she is a Catholic, cannot inherit a share of the estate of her deceased father, a Muslim, by reason of her being a non-Muslim. Secondly, an illegitimate child does not inherit the estate of his or her father but is permitted to inherit from his or her mother... It must then follow that, both Chebet and Nuru who are illegitimate children are not entitled to a share of the deceased's estate."***

The court found that to be the case even where the deceased had been supporting the children in question during his lifetime. It added:

> ***"A supplementary issue is where Chebet and Nuru, who clearly the deceased was caring for during his lifetime, can inherit his estate as dependants. On this point the Kadhi of Nairobi Mr. Hammat Mohammed Kassim stated as follows:-***
>
> > ***'Children who may have been supported by the deceased are still excluded because that alone (the deceased's support) is not enough unless the deceased wrote out an acceptable will to include them'.***
>
> ***I find favour with that testimony and I so hold that both Chebet and Nuru, as the deceased's dependants, are excluded from his estate and are not entitled to a share of the same by reason of the application of the principles of Islamic law***."

The above decision was rendered on 24th May 2002 under the former Constitution which expressly provided in ***section 82*** that the prohibition of discrimination by the Constitution did not apply to any law making provision for adoption, marriage, divorce, burial, devolution of property on death or other matter of personal law. Although it may be contended that Article 24 (4) of the Constitution closely mirrors section 82 of the former Constitution, there are significant differences, which we shall advert to shortly.

The Constitution of Kenya, 2010 has laid great emphasis on respect, enjoyment and protection of rights and fundamental freedoms of

all persons. Unlike the former Constitution, it does not readily admit to derogation from those rights and freedoms, except in clear, exceptional and tightly controlled circumstances. Thus for example, right from the *Preamble*, the Constitution adverts to the aspiration of all Kenyans for a government based on ***the essential values of human rights, equality,*** freedom, democracy, social justice and the rule of law. ***Article 10***, which sets out the notational values and principles of governance that bind all State organs, State officers, public officers and ***<u>all persons</u>*** whenever they apply or interpret the Constitution, enact, apply or interpret the law or make or implement public policy, expressly recognise human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized among those core values and principles. In ***<u>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate</u> [2012] eKLR,*** the Supreme Court stated that those national values and principles of governance signify a value system, an ethos, a culture, or political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. The same Court added in ***<u>Speaker of the Senate & Another v. Attorney General & Others</u> [2013] eKLR,*** that the national values and principles are also important anchors in the interpretation of the Constitution.

As for the Bill of Rights, which guarantees among others, the right to equality and freedom from discrimination, ***Article 19*** declares it to be an integral part of Kenya's democratic state and the framework for social, economic and cultural policies for the purpose of preserving the dignity of the individuals and communities and to promote social justice and the realization of the potential of all human beings. The Constitution further emphasizes that the rights and fundamental freedoms guaranteed in the Bill of Rights belong to each individual and are not granted by the State and are ***<u>subject only to the limitations allowed by the Constitution</u>***. Those rights and freedoms bind and must be respected by all persons including State organs and ***<u>are to be enjoyed to the greatest extent possible consistent with the nature of the right or fundamental freedom</u>***.

Addressing the courts directly, the Constitution demands that in applying a provision of the Bill of Rights, ***<u>they must develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right and fundamental freedom</u>***. The courts must also promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and object of the Bill of Rights. As regards implementation of rights and fundamental freedoms, ***Article 21*** makes it the obligation of all State organs and all public officers to address the needs of vulnerable groups within society, including women and children and members of particular ethnic, religious or cultural communities. Next, ***Article 22*** gives all persons a broad and unrestricted right of access to the courts for the purposes of enforcement of rights and fundamental freedoms.

Lastly, on the interpretation of the Constitution, ***Article 259 (1)*** lays down important guidelines on how it must be interpreted. The Constitution is to be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance.

We have already adverted to Article 24, which provides the circumstances under which rights and fundamental freedoms may be limited. The provision prohibits limitation of rights and fundamental freedoms except by a law, which is clear and specific on the right and fundamental freedom to be limited and the nature and extent of the limitation. In addition such law must state expressly its intention to limit the right or fundamental freedom in question. The limiting law is further subject to strict controls that are intended to avoid facile or casual derogation. Thus for example, limitation is allowed only to the extent that it is reasonable and justified in an open and democratic society based on human dignity, equality and freedom and taking into account a host of considerations such as the nature of the right or fundamental freedom to be limited, the purpose of the limitation and its nature and extent and whether the purpose of the limitation could be achieved through less restrictive means. The limitation cannot derogate from the core or essential content of the right or freedom. Lastly, the burden is on the person seeking to justify limitation of a right or fundamental freedom to satisfy the court that the limitation in question satisfies the conditions for derogation set by the Constitution.

We have set out all the above provisions to demonstrate the centrality of rights and fundamental freedoms in Kenya's constitutional set up and the fact that derogation is a strict exception to the rule. Specifically as regards the right to equality and freedom from discrimination, which is implicated in this appeal, it may be noted that section 82 of the previous Constitution allowed derogation from the right to equality and freedom from discrimination in issues of adoption, marriage, divorce, burial, devolution of property on death or other matter of personal law. That derogation was allowed for all communities in Kenya. (See ***<u>Otieno v. Ougo & Another</u> [2008] 1 KLR 948).*** However, Article 24(4) has narrowed down the possibility of derogation and now allows that limitation of the right to equality and freedom from discrimination in matters relating to personal status, marriage, divorce and inheritance, only to the extent strictly necessary for the application of Muslim law before the Kadhi's courts, to persons who profess the religion. Although application of customary law in Kenya is recognised by ***section 3(2)*** of the ***Judicature Act, Article 2 (4)*** of the Constitution explicitly provides that any law, including customary law, that is inconsistent with the Constitution is null and void to the extent of the inconsistency.

A reading of Article 24(4) together with Article 170(5) of the Constitution shows strict conditions that must be satisfied before a person can invoke Islamic law to derogate from or limit the right to equality and freedom from discrimination. First, the derogation must be "***<u>only to the extent strictly necessary</u>".*** Second, the derogation must relate to matters of personal status, marriage, divorce and inheritance. Third, the persons involved must be persons who profess the Muslim faith. Fourth, as regards jurisdiction of the Kadhi's court, ***<u>all the parties</u>*** to the dispute must profess the Muslim faith and ***<u>submit to the jurisdiction of the Kadhi's court</u>***.

In our opinion, the above conditions must be strictly satisfied before Islamic law, which the Kadhi's court and the High Court found does not recognize the appellants as S's heirs purely on the basis of their status as "illegitimate" children born out of wedlock, can apply to them. That the appellants were born out of wedlock following a prolonged and open relationship between S and J is not a fault of theirs. The fault, if it be a fault at all, falls squarely on the shoulders of S and J. It is common ground that the appellants do not profess the Islamic faith and have not submitted themselves to the jurisdiction of the Kadhi's court. Professing the Islamic faith and voluntarily submitting to the jurisdiction of the Kadhi's court are absolute preconditions for application of Islamic law to the appellants. If it were otherwise, the words "***in proceedings in which <u>all the parties</u> profess the Muslim religion <u>and submit</u> to the jurisdiction of the Kadhi's courts"*** in Article 170(5) of the Constitution would be utterly meaningless. We cannot adopt an interpretation of the Constitution that renders otiose some of its clear provisions. Those preconditions have not been satisfied in this appeal and therefore the principles of Islamic law cannot be applied to the appellants.

In addition, we are satisfied that the interpretation that we have adopted in this appeal is the one that most favours the enjoyment of the right to equality and freedom from discrimination by the appellants and also develops the law so as to give effect to that right and fundamental freedom as demanded by the Constitution. It is further an interpretation that promotes the purposes, values and principles of the Constitution and advances human rights and fundamental freedoms in the Bill of Rights.

That is the same approach that this Court took in ***Rose Mueni Musau v. Brek Awadh Mbarak*, CA. No. 267 of 2011**. The question in that case was whether the ***Married Women's Property Act, 1882***, then recognized as a statute of general application in Kenya, was applicable to a matrimonial dispute between a Muslim man and his divorced wife, who had subsequently converted from Islam. The man contended that the property in dispute was acquired during an Islamic marriage and therefore it was the Islamic law, which applied in the Kadhi's court. The woman however argued that it was the Married Women's Property Act, which applied because she was not a Muslim and that Islamic law was disadvantageous to her because most of the property would end up with the man. The High held that it was Islamic law, which applied. On appeal, a bench of five judges of this Court held that it was the High Court that had jurisdiction to hear and determine the dispute applying the provisions of the Married Women's Property Act, which was the applicable law at the relevant time. The Court delivered itself thus:

> ***"We think on our part, that the trial court, faced with such complexity, should have opted for the law that best accords with the Constitution and was protective of the interests of both parties. There was no paucity of such laws and the Kadhis' Courts Act, Cap 11 was not an impediment as it did not oust the jurisdiction of the High Court."*** (Emphasis added).

Clearly therefore, the fact that only one of the parties to the dispute professes the Islamic faith is neither the only, nor the weightiest consideration, in determining the forum and the law applicable to a dispute of this nature.

In light of the foregoing, we do not find it necessary to make any pronouncements, as invited by the appellants, on the presumption of marriage or the alleged unconstitutionality of the implicated principles of succession under Islamic law, save to note that where all the strict conditions we have adverted to are satisfied, the Constitution allows application of Islamic law even though it may be perceived as discriminatory. In the same vein we do not find it necessary to enter into the discourse on application of international treaties and instruments for the simple reason that they form part of the law of Kenya, which has to be consistent with the provisions of the Constitution of Kenya.

For all the foregoing reasons, it is the High Court that must determine the succession to S's estate under the Law of Succession Act because not all claimants to his estate are Muslims, and the appellants in particular, have not submitted to the jurisdiction of the Kadhi's court. If there are any other persons who claim to be dependants of S and entitled to inherit from his estate, their claims will be heard by the High Court together with that of the appellants. It is not lost to us that the Succession Cause, which gave rise to this appeal, was filed in the High Court under the Law of Succession Act. In ***Saifudean Mohamedali Noorbhai v. Shehnaz Abdehusein Adamji*** (supra) this Court stated as follows, which we fully agree with:

> ***"Kenyan courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi's court."***

That position is borne out in a number of decisions. Thus for example, in ***Ahmed Sheriff Swaleh & 3 Others v. Abdulgader Shariff Swaleh & 3*** Others (supra) the succession cause was filed in the Kadhi's court. Some of the beneficiaries of the deceased declined to submit to the jurisdiction of the Kadhi's court. The High Court allowed an application for transfer of the cause from the Kadhis's court to the High Court for hearing and determination under the Law of Succession Act. (See also ***Mariam S. Swaleh & Others v. The Chief Kadhi & 3 Others*** (supra) and ***Fauzi Said Ali & 3 Others v. Said Ahamed Ali & Another** **[2014] eKLR***.

Ultimately we allow this appeal in the above terms and direct each party to bear their own costs. It is so ordered.

Dated and delivered at Mombasa this 26th day of September, 2019

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR