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LEGAL ALERT

**HIGH COURT STRIKES DOWN PARTS OF THE LAW
OF SUCCESSION ACT AS UNCONSTITUTIONAL**

Last Will

HIGH COURT STRIKES DOWN PARTS OF THE LAW OF SUCCESSION ACT AS UNCONSTITUTIONAL

In the case of *Ripples International v The Attorney General & Others* (Constitutional Petition No. E017 of 2021), the High Court sitting in Meru vide Judgment dated 29th September 2022, declared certain sections of the Law of Succession Act (Cap. 81) Laws of Kenya (“the Act”) unconstitutional, on the grounds that the said provisions contravened the Constitution of Kenya 2010 (“the Constitution”) and infringed on Kenyan women’s right to marry and enjoy equal treatment under the law.

Ripples International initiated the public interest petition to protect women who they contended are discriminated against and denied the right to property by dint of sections 35 (1) (b), 36 (1), and 39 (1) (b) of the Act. These provisions denied a widow the right to enjoy a life interest in her deceased husband’s estate should she remarry and gave priority to fathers over mothers in the line of succession where a child died intestate.

The issues raised in the petition had previously been raised and recently, had been proposed in the Law of Succession (Amendment) Bill 2021 (“the Amendment Bill”) which was assented to on 17th November 2021. However, the Amendment Bill only amended the definition of spouse but failed to remedy other apparent discriminatory provisions in the Act.

Restriction on Widows’ Inheritance in Intestate Succession

Section 35 (1) (b) of the Act provided that:

- (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) the personal and household effects of the deceased absolutely; and
 - (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.”

A plain reading of this provision is that a widower can remarry without losing the enjoyment of a life interest whereas a widow’s right to enjoy a life interest would immediately stand extinguished upon her remarriage.

Similarly, section 36 (1) of the Act provided that:

“(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) the personal and household effects of the deceased absolutely; and
- (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and
- (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.”

These provisions restricted a widow’s life interest in the

property of her deceased spouse when she remarried but did not place a similar restriction on a widower. The Petitioner argued that this inequality in the law was brought about by regressive customary laws which prevented women from enjoying the rights and freedoms guaranteed by the Constitution.

Previously, in the Court of Appeal case of [Douglas Njuguna Muigai v John Bosco Maina & another \(2014\) eKLR](#), stated that section 35 (1) of the Act was discriminatory to the female gender and specifically, the widow of the deceased and urged the legislature to consider the section for amendment.

In line with the reasoning of the Court of Appeal, Hon. Mr. Justice Muriithi found this differential treatment of women as against their male counterparts indefensible and declared the same unconstitutional on the grounds that it contravened Article 27 of the Constitution which protects the rights of women and men to have equal treatment and provides that the State shall not discriminate directly or indirectly on the basis of sex or marital status. The provisions violate Article 27 of the Constitution by directly discriminating against widows.

Justice Muriithi declared the sections unconstitutional and directed that in light of the transitional and consequential provisions of the Constitution set out under Article 262, the impugned sections should be interpreted in a manner that gives effect to the equality of women and men with regard to the protections and benefits accruing under the said provisions.

Priority of Fathers where a Child dies Intestate

In the same vein, the Court declared Section 39 (1) (a) and (b) of the Act unconstitutional. This provision gave priority to a father over a mother in succession where a child dies intestate.

Section 39 (1) (a) and (b) of the Act provided that:

“(1) Where an intestate has left no surviving spouse or children, **the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority**
(a) **father; or if dead**
(b) **mother; or if dead**”

On this issue the Court found that the discrimination of women is clear and in terms of Article 27(1) of the Constitution of Kenya, this provision is unconstitutional for failing to provide equal protection and benefit under the law to women as it does for men.

Conclusion

The decision of the Court is laudable as it strikes a blow for equality of women in the context of Succession law in Kenya, who for generations have suffered the ignominy of discrimination. In this day and age, there is no plausible reason why certain provisions of the law should favour one gender over the other. All persons, regardless of their gender, are entitled to equal protection and benefit of the law, as per the dictates of Article 27 of the Constitution.

Disclaimer

This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact John Mbaluto, FCI Arb (john@oraro.co.ke), Claire Mwangi (claire@oraro.co.ke) or your usual contact at our firm, for legal advice.



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