

19th October 2022

BALANCING THE SCALES OF INHERITANCE RIGHTS IN KENYA

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Women have been subjected to decades of limitation and at times outright restriction of their rights to inherit and own property in the same capacity as men.

Article 27 (1) of the new **Kenyan Constitution** promulgated in the year 2010 created an opportunity for both our legislature and judiciary to balance the scales and provide both men and women with equal inheritance rights in Kenya.

Although massive strides in legal reform have been made and continue to be made in a bid to introduce (and fortify) legal protections for women, the **Law of Succession Act Cap. 160 (the “LSA”)** continues to fall short in effectively remedying the gender imbalances regarding inheritance rights which remains skewed against women.

Gender Discrimination under the LSA

The LSA contains provisions which may in some instances be deemed as discriminatory against both men and women. To illustrate, under **Section 29 (c) of the LSA** a widower can only be deemed to be a dependant of his late wife if his wife maintained him immediately prior to the date of her death. On the other hand, **subsection (a)** of the same section does not require a wife or a former wife to be maintained immediately before her husband or former husband's death to be deemed a dependant.

Women are, however, more afflicted as highlighted below:

a. The legal standing of widows and widowers as codified under Sections 35 (1) to (5) and 36 (1) of the LSA remains unequal

Under the proviso to **Section 35** of the **LSA** once a widow remarries, she forfeits her life interest in her former spouse's intestate estate.

The highlighted proviso does not extend to a widower as he is allowed to continue to benefit from a life interest in the Estate of his late wife/wives while widows are denied a corresponding right.

This imbalance indirectly qualifies a widow's freedom of choice on re-marriage and denies her the right to enjoy the fundamental right to marriage and property as provided under **Articles 40 and 45 (2)** of the **Constitution**.

b. Fathers enjoy preferential treatment over mothers under Section 39 (1) (b) of the LSA

Section 39 (1) of the LSA gives a father preference over a mother of a person who dies without a Will, spouse and children.

Legal Reform

The **Law of Succession (Amendment) Bill 2019 (the “Bill”)** signified a commendable move towards balancing the rights of both men and women's inheritance rights under the LSA. Most notably, the Bill adopted gender neutral language by:

- a. Replacing the term “wife” or “husband” to “spouse” in **Sections 29, 35, 36 of the LSA**; and
- b. Replacing the term “father” or “mother” to read “parents in equal share” or “surviving parent” as regards **Section 39 of the LSA**.

The Bill demonstrated an intention to extend and balance inheritance rights for both men and women in Kenya.

The Law of Succession (Amendment) Act 2021 was assented to on 17th November 2021 and brought into force on **7th December 2021** pursuant to **Special Issue Kenya Gazette Supplement No. 211 (Acts No. 11)**.

Unfortunately, the only amendment to actually take effect under the **Law of Succession (Amendment) Act** was the introduction of the definition of the term “Spouse” under **Section 3** of the **LSA**. The rest of the highlighted proposed amendments failed to make it to the **Law of Succession (Amendment) Act**.

The Courts

Given the highlighted deficiencies in the law and the legislative failure to cure these glaring provisions in the LSA, the burden has fallen upon the Courts to issue progressive jurisprudence regarding these outdated and discriminatory legal provisions.

In this regard, the Courts have held that the proviso to **Section 35** should be read in the spirit of the Kenyan Constitution, and should thus be applied to widowers who re-marry in similar manner to widows. This was indeed the holding **In the Matter of The Estate of the Late Rose Wanjiku Njoroge (Deceased) [2014] eKLR** where the High Court sitting in Nakuru held that since the widower in question had re-married after the death of his spouse, he too, like a widow, would lose his right to a life interest in the Deceased's estate.

More recently **Constitution Petition No. E017 of 2022** the High Court sitting in Meru and presided by **Hon. Justice Edward Murithi** determined that **Sections 35 (1) (b) and 36 (1) (b) of the LSA** are unconstitutional to the extent that they inherently discriminate against widows based on their gender.

Conclusion

The decision by **Hon. Justice Edward Murithi** is a positive step in the march towards gender equality in Kenya, particularly in respect to inheritance rights for women.

Further legal reform is however needed by way of legislative and judicial processes to ensure that the discriminatory legal provisions that subsist in the LSA are expunged. The goal should be for the LSA to reflect the current societal and gender dynamics which place both men and women on equal footing.

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