



LEGAL ALERT

PROGRESSIVE REFORMS IN KENYA'S LAW OF SUCCESSION: A LOOK AT RECENT COURT JUDGMENTS

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Introduction

Kenya's Law of Succession Act, Cap 160, has long been a cornerstone of the country's legal framework for the administration of deceased persons' estates. However, the Act, enacted decades before the progressive 2010 Constitution, contains several provisions that have been a source of legal and social conflict. In the absence of comprehensive legislative reform, the Kenyan Judiciary has stepped into the breach, issuing landmark rulings that have effectively "amended" the legal landscape through the power of constitutional interpretation. These judicial pronouncements are steering succession law towards greater gender equality and social justice, dismantling discriminatory provisions that have long disadvantaged women and other dependents.

The evolving legal framework: Constitutional supremacy vs. legislative inertia

The promulgation of the Constitution of Kenya in 2010 marked a turning point for succession law. The Constitution, as the supreme law of the land, provides a yardstick against which all other laws must be measured. Key provisions, such as Article 27 on equality and non-discrimination and Article 45(3) on equal rights of spouses, have provided the legal ammunition for challenging antiquated aspects of the Law of Succession Act. While Parliament has passed some amendments, notably the Law of Succession (Amendment) Act of 2021, significant gaps have remained, leaving it to the courts to harmonize the old statutory provisions with modern constitutional principles. This article delves into the judicial amendments that have been instrumental in overhauling outdated provisions of the Law of Succession Act.

1. EQUALIZING THE POSITION OF SURVIVING SPOUSES

A recent High Court judgment in **Mungai v Attorney General (Petition E416 of 2023) (2025)KEHC 8544(KLR)** tackled the discriminatory nature of Section 29(c) of the Law of Succession Act that required a widower (to prove that he was financially dependent on his wife to be considered a beneficiary. No such requirement existed for a widow under Section 29(a), which automatically recognized her as a dependant. This created a glaring legal imbalance, placing a heavy and often difficult burden on men who had lost their wives.

The court declared Section 29(c) unconstitutional, null, and void. The court found that placing a different burden of proof on surviving spouses based solely on gender was a clear violation of Articles 27 and 45(3) of the Constitution. The ruling emphasized that the constitutional guarantee of equality before the law prohibits such discriminatory treatment, regardless of whether the discrimination affects men or women. The court's decision was a powerful affirmation that constitutional principles must prevail over outdated statutory provisions. The ruling aligns the Law of Succession Act with the progressive spirit of the 2010 Constitution, bringing much-needed gender-neutrality to intestate succession. It removes a significant legal barrier for widowers, simplifying the process of claiming their rightful share of their deceased wife's estate and affirming their position as equal partners in marriage.



2. UPHOLDING THE BEST INTERESTS OF A CHILD.

On June 30, 2025, the Supreme Court of Kenya issued a landmark ruling in **SC Petition No. E035 of 2023, Fatuma Athman Abud Faraj v Ruth Faith Mwawasi & 2 Others**, that fundamentally reshaped the legal landscape for Muslim succession in Kenya. The Court's decision unequivocally affirmed the right of children born out of wedlock to inherit from their deceased Muslim father's estate, provided that paternity is established and the children were acknowledged by the father during his lifetime. The court ruled that while Article 24(4) of the Constitution allows for the application of Muslim law in matters of inheritance, this provision is not a blanket exemption. Any such application must be "strictly necessary" and must not violate the fundamental rights enshrined in the Bill of Rights. The blanket exclusion of children based on their birth status was found to be an unreasonable and unjustifiable form of discrimination, directly violating **Article 27** (equality and non-discrimination) of the Constitution.

The court strongly emphasized Article 53(2), which states that the best interests of the child are paramount in every matter concerning the child. The judges reasoned that denying children inheritance due to their parents' marital status is unjustifiable and penalizes a child for circumstances beyond their control. This principle was key to the court's decision to include all acknowledged children of the deceased as beneficiaries, regardless of their parents' marital status.

3. STRIKING OUT PATRIARCHAL INHERITANCE PRIORITIES

The High court in **Ripples International v The Attorney General & Others (Constitutional Petition No. E017 of 2021)**, delivered a significant blow to patriarchal biases in Kenyan succession law.

The petition specifically challenged **Section 39(1)(a) and (b)** of the Law of Succession Act. This provision established a clear order of inheritance priority where an individual died without a spouse or children, giving the deceased's father first priority, followed by the mother. The court found this provision to be an overt discriminatory practice, stating that it failed to provide equal protection and benefits under the law to women as it did for men. The court reasoned that placing the father in a superior position to the mother was an indefensible act of gender discrimination, directly violating Article 27 of the 2010 Constitution. The ruling served as a direct blow to the patriarchal biases that had been embedded in Kenyan law for decades, reinforcing the judiciary's role in advancing social justice and gender equality. This judgment, along with others in succession law, sends a powerful message that the constitutional principles of equality must take precedence over outdated statutory provisions.

4. ENDING PUNITIVE MEASURES FOR REMARRYING WIDOWS

The same judgment in **Ripples International v The Attorney General & Others (Constitutional Petition No. E017 of 2021)** also invalidated provisions that unfairly penalized remarrying widows.

The petition specifically challenged **Sections 35(1) and 36(1)** of the Law of Succession Act, which stipulated that a widow would lose her life interest in her deceased husband's estate upon remarriage. Crucially, this was a restriction not applied to widowers, who could remarry without consequence. The court found this differential treatment to be unconstitutional, citing **Article 27** on equal treatment before the law. It also held that the unequal treatment of widows and widowers was an "indefensible" form of discrimination. This decision removes a discriminatory and unjust burden placed solely on widows, allowing them to remarry without fear of losing their inheritance rights. The ruling was a significant victory for gender equality, striking down a legal provision based on outdated, regressive customary beliefs that sought to control women's lives after the death of their spouses.



Conclusion

This judicial rulings demonstrates the judiciary's vital role in correcting discriminatory legal provisions and aligning statutes with the constitutional values of equality and non-discrimination. By declaring unconstitutional those parts of the Law of Succession Act that do not meet the standards of the 2010 Constitution, the courts have become a powerful engine of legal reform.

While these decisions cannot compel Parliament to legislate, they set binding precedents that guide the application of the law. As Kenya's society and family structures continue to evolve, the judiciary's interpretative function will remain critical in ensuring that the Law of Succession keeps pace with the constitutional promise of a more equitable and just society. For legal practitioners, these cases underscore the need to constantly monitor constitutional jurisprudence to provide the most current and accurate legal counsel on succession matters.

Should you have any questions on this legal alert, please do not hesitate to contact us,



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