



THE SUPREME COURT OF KENYA

FATUMA ATHMAN ABUD FARAJ Vs RUTH FAITH MWAWASI & OTHERS

SC PETITION NO. E035 of 2023

DATE OF JUDGMENT: 30TH JUNE, 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court dismisses the appeal.

Background

The dispute arose from the question of whether children born out of wedlock to a Muslim father can inherit under Muslim law from their deceased father. Article 24(4) of the Constitution allows the application of Muslim law in matters of personal status, marriage, divorce, and inheritance for parties who profess the Islamic faith.

Salim Juma Hakeem Kitendo (the deceased) and Fatuma Faraj (the appellant) celebrated an Islamic marriage and were subsequently, blessed with four children. Thereafter, the deceased commenced cohabitation with Ruth Mwavasi (the 1st respondent) and during the course of their cohabitation they were blessed with three children. It is after the birth of the three children that the deceased and the 1st respondent got married under Islamic law. Similarly, the deceased also cohabited with Marlin Pownall (the 3rd respondent) and later celebrated an Islamic marriage with her. About less than 6 months after the deceased's marriage with the 3rd respondent, they were blessed with a son. Following the demise of the deceased, a dispute arose as to whether the 1st and 3rd respondents' children were entitled to inherit the deceased under Muslim law. In particular, the appellant claimed that the 1st respondent's children were born prior to the celebration of her Islamic marriage with the deceased. Therefore, under Islamic law, the said children are considered illegitimate and incapable of inheriting from the deceased who professed the Islamic faith at the time of his death. Additionally, the appellant argued that the same position applied to the 3rd respondent's son, as not only was he born a few months after her alleged Islamic marriage to the deceased but also that the 3rd respondent's Islamic marriage to the deceased was a nullity. There was no dispute concerning the appellant's children since they were born within her Islamic marriage with the deceased.

The High Court held that the applicable law to the deceased's Estate was Muslim law as long as it was not repugnant to justice and morality since the deceased was a Muslim at the time of his demise. However, the court held that where a Muslim man during his lifetime sires a child out of wedlock, such a child should be treated as a dependant and/or beneficiary to his Estate. This is because the trial court found that such a child should not be prejudiced because of his/her parents' choices and the consequences thereof. The Court of Appeal also found that denying children born out of wedlock the right to inherit, while allowing those born within a marriage to benefit, would constitute unjustifiable and unfair discrimination contrary to Article 27 and 53 of the Constitution. As a result, the appellate

court found that the 1st and 3rd respondents' children were entitled to benefit from the deceased's Estate.

The following issues arose for consideration by the Supreme Court:

- i. *Whether the Court of Appeal improperly limited the application of Article 24(4) of the Constitution, and in doing so, misconstrued the relationship between Articles 24(4) and 27 of the Constitution;*
- ii. *Whether the Court of Appeal failed to give effect to the mandatory application of Muslim law as provided under Section 2(3) of the Law of Succession Act; and*
- iii. *What orders should issue?*

Upon consideration, the Supreme Court dismissed the appellant's appeal for the reasons that:

1. **Issue 1:** The Supreme Court interpreted the phrase "to the extent strictly necessary" in Article 24(4) as requiring the application of the principle of proportionality. In other words, any departure from the general constitutional guarantee of equality must be narrowly tailored, reasonable, justifiable, and necessary. This means that Article 24(4) is not a blanket exemption allowing Islamic law to override the right to equality under Article 27 of the Constitution. Instead, it permits only limited and justified exceptions in strictly necessary circumstances. Denying children born out of wedlock by the same parents the same benefits accorded to children born within wedlock, on the basis of the alleged "sins" of their parents, is unreasonable and unjustifiable. Further, Article 53(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Therefore, any attempt to exclude children born out of wedlock from benefitting from their father's Estate is unreasonable and unjustifiable.
 2. **Issue 2:** The Court of Appeal interpreted the relevant rule of Islamic law in a manner that harmonized it with the values and rights enshrined in the Bill of Rights. The Court of Appeal's approach was consistent with the requirements of Article 20 (3)(a) and (b) of the Constitution, which provides that in applying a provision of the Bill of Rights, a court shall: (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favors the enforcement of a right or fundamental freedom.
 3. **Issue 3:** The matter was remitted to the High Court at Mombasa for determination of respective entitlements of the beneficiaries by a Judge other than *Onyiego, J.* on a priority basis.
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