

Rights of Excluded Dependants in Succession Law in Kenya



Issue 3

Introduction

Dependency is a fundamental concept in succession law, ensuring that individuals who relied on a deceased person for financial or other forms of support are not left destitute upon their passing. In Kenya, being excluded from a will as a dependant is not the end of the road. The law recognizes that, in some cases, a deceased person may fail—intentionally or unintentionally—to provide for those who depended on them.

Fortunately, the Law of Succession Act (Cap 160) provides remedies for such situations even if all the assets of the deceased have been bequeathed in a will.



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Who is a dependant?



A dependant, as defined under Section 29 of the Law of Succession Act (Cap 160) of Kenya, refers to individuals who rely on the deceased for financial or other forms of support. The Act categorizes dependants into different groups, with Section 29(a) specifically covering *the wife or wives of the deceased, Former wife or wives, and Children of the deceased*, whether or not they were maintained by the deceased before their death.

In this category, there is no requirement to prove maintenance. This means that:

- Any biological child of the deceased is automatically recognized as a dependant regardless of whether they were financially supported before his death.
- Any wife or wives of the deceased automatically qualify as dependants, regardless of whether they were financially supported before his death.

The Controversy Surrounding Former Wives

The inclusion of former wives in Section 29(a) has sparked debate. Some argue that former wives are rightfully placed in this category, ensuring they are not unfairly left out, especially if they had a long-standing relationship with the deceased. Others contend that a former wife should only be considered a dependant if she was receiving alimony or some form of maintenance at the time of the deceased's death.

Courts have generally taken a case-by-case approach, considering factors such as whether:

- The former wife was receiving maintenance or alimony.
- There were ongoing financial obligations between the deceased and the former wife.
- The former wife had any special circumstances warranting dependency.

The second group of dependants, as defined under Section 29(b) and (c) of the Law of Succession Act (Cap 160), includes:

- Parents, step-parents, and grandparents of the deceased.
- Grandchildren and step-children of the deceased.
- Children whom the deceased had taken into their family as their own (informal adoption).
- Siblings, including brothers, sisters, half-brothers, and half-sisters.
- The husband of a deceased woman, but only if he was being maintained by her prior to her death.

Unlike the first category under Section 29(a), where wives, and children automatically qualify as dependants, this second category must prove that they were being maintained by the deceased immediately prior to their death.



Approaching the Court for Reasonable Provision



In order to approach the Court as a dependant, there must be a valid and uncontested will written by the deceased. It is important to note that outright exclusion of a dependant from a will does not invalidate the will.

A dependant who feels that they have not been adequately provided for in a will or under the laws of intestacy can seek legal recourse for reasonable provision in the estate of the deceased. This is provided for under Sections 26, 27, and 28 of the Law of Succession Act (Cap 160).

Steps to Approach the Court:

Filing an Application

Rule 45 of the Probate and Administration Rules provides the framework for filing such claims.

- ***If a Grant of Probate Has Been Issued but Not Confirmed***

Where a grant of probate or letters of administration has been issued but has not yet been confirmed, the dependant must apply through:

- Summons for Reasonable Provision using Form 106 of the Probate and Administration Rules.
- A Supporting Affidavit in the form of Form 16 of the Probate and Administration Rules, stating the facts of dependency and the need for reasonable provision.

- ***If No Grant Has Been Applied for***

Where no one has applied for probate or letters of administration, the dependant must:

- File a Petition for Reasonable Provision using Form 96 of the Probate and Administration Rules.
- Attach a Supporting Affidavit in the form of Form 15, outlining their claim, financial situation, and dependency on the deceased.

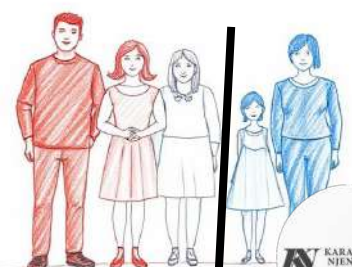
Court's Discretion in Making an Order

If the court finds merit in the application, it has wide discretion to order:

- A specific share of the estate to be given to the dependant.
- Periodic maintenance payments from the estate.
- A lump sum payment.
- Any other provision deemed necessary.

Factors Considered by the Court

- The value of the deceased's estate.
- The financial situation of the dependant.
- The dependant's current and future needs
- Any past gifts advanced by the deceased to the dependant.
- The conduct of the dependant towards the deceased.



What Happens When All Assets Are Already Bequeathed in the will?



It is important to note that exclusion from a will does not invalidate it. However, if all the assets have already been bequeathed and the dependants were unjustly excluded, reasonable provision cannot be made under the will.

The Court of Appeal in a similar situation in the case of ***Marete v Marete & 3 others* [2024] KECA 371 (KLR)** noted thus:

In the circumstances, even if the impugned Will is valid, the mode of distribution is so skewed so as to render the beneficiaries of the first house literally disinherited. The impugned Will failed to meet the guidelines set out under Section 28, leaving some beneficiaries wholly disinherited. Since all of the deceased's free property was distributed in the impugned Will, it is our view that the only way that the Court can make reasonable provision for all the dependants of the deceased, including the respondents, is to invalidate the last written Will of the deceased and distribute the properties that comprised the estate of the deceased under the intestacy laws of the Law of Succession Act.

As a result, the will is invalidated, and the estate administered as if the deceased had died intestate to ensure fair distribution.

• Conclusion

Kenyan succession law seeks to balance testamentary freedom with the obligation to provide for dependants. While a testator has the right to distribute their estate through a will, this right is subject to legal safeguards that ensure no rightful dependant is left without reasonable provision. Section 26 of the Law of Succession Act empowers courts to intervene when a will unfairly excludes dependants. If there are available assets, the court may adjust the distribution to accommodate them. However, as seen in ***Marete v. Marete***, where all assets have already been bequeathed, and no reasonable provision can be made, the court may invalidate the will and administer the estate under intestacy laws.

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