



Equal in Death

Section 29(c) of Law of Succession Act Struck Down

In a landmark decision rendered by the High Court in **Dennis Kivuti Mungai v. Attorney General**, the Court declared Section 29(c) of the Law of Succession Act (Cap 160, Laws of Kenya) unconstitutional, null, and void. The judgment marks a significant development in succession jurisprudence by aligning the statute with the constitutional principles of equality and non-discrimination.

Section 29(c) previously required a widower—defined as the husband of a deceased wife—to establish that he was dependent on the deceased prior to her death in order to qualify as a beneficiary of her estate. The petitioner challenged the provision on the basis that it imposed a condition on widowers that is not similarly applied to widows, thereby amounting to gender-based discrimination.

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The Court agreed with the petitioner, holding that the differential treatment of surviving spouses based on gender violates Articles 27 (equality and freedom from discrimination) and 45(3) (equal rights of parties to a marriage) of the Constitution. The Court emphasized that while the concept of proving dependency is not per se unconstitutional, its selective application to widowers alone—while exempting widows—renders Section 29(c) discriminatory and therefore unconstitutional.

The Attorney General had argued that the petitioner ought to have first sought legislative reform through Parliament and invoked the doctrine of constitutional avoidance. The Court, however, rejected these arguments, affirming its jurisdiction to assess the constitutionality of statutory provisions and stating that the doctrine of avoidance could not be invoked where a law was clearly inconsistent with the Constitution.

The judgment clarified that:

“This finding should not be understood to mean that the Court is outlawing ‘proof of dependency’ ... it is unfair to impose such a condition on the widower while not requiring the same on the widow. If the requirement applied equally to either spouse, it would be permissible, as

dependency is a question of fact and anyone claiming reliance should be prepared to establish it. However, such a requirement cannot be applied discriminatorily.”

Ultimately, the Court held:

“Section 29(c) of the Law of Succession Act is discriminatory and is thus unconstitutional, null and void for advocating differential treatment of the man in respect of a deceased wife who has died intestate, as opposed to the woman whose husband has died intestate.”

This judgment is timely and consequential. It affirms the constitutional imperative of gender equality and reinforces the judiciary’s mandate to harmonize pre-2010 legislation with the Constitution of Kenya, 2010. Estate administrators are now guided by the principle that a surviving husband, like a surviving wife, need not prove dependency to qualify as a beneficiary of a deceased spouse’s estate.