



Reconciling Faith and Equality

Supreme Court Settles Debate on Muslim Succession

In the Spreme Court Petition No. E035 of 2023 – **Fatuma Athman Abud Faraj v. Ruth Faith Mwawasi & 2 Others**, the central issues revolved around a succession dispute involving the estate of a deceased Muslim man, Salim Juma Hakeem Kitendo, and raised questions on:

- Inheritance rights of children born out of wedlock, and
- The application of Muslim law vs. constitutional principles to wit equality and children's rights

When Salim Juma Hakeem Kitendo, a devout Muslim, passed away in February 2015 in Tanzania, he left behind no will, only a legacy tangled in affection, faith, and a fiercely contested claim to inheritance. His death did not just trigger grief; it also set off a chain of litigation among three women, each of whom claimed to be his widow, and among children, some of whom the law was reluctant to call his own.

At the heart of the dispute was Fatuma Athman Abud Faraj, a woman who said she had married the deceased under Islamic law in 2006. Their union, she claimed, was solemn, lawful, and blessed with four children. Shortly after Salim's death, Fatuma filed succession proceedings at the Kadhi's Court in Mombasa, naming herself and her children as the sole beneficiaries of the estate. To her, there was no question: she was the only lawful wife, and her children, born within wedlock, were the rightful heirs.

But her claim was not without challenge.

Ruth Faith Mwawasi, the first respondent, entered the fray. She alleged that she and the deceased had lived together as husband and wife since the year 2000, well before Fatuma's Islamic marriage. Ruth had also borne four children, all during their years of cohabitation. In 2011, she converted to Islam and celebrated an Islamic marriage with the deceased under her new name Warda Imani Mwawasi.

Alongside her sister, Judith, Ruth filed a separate petition at the High Court, seeking recognition and a share of the estate for herself and her children.

Then came the third woman, Marlin Coram Pownali, who also claimed to have married Salim after converting to Islam. She bore him a son. However, Fatuma raised a serious objection: Marlin had previously entered into a civil marriage with another man that had never been lawfully dissolved. In fact, Marlin had once been charged with bigamy, making her claim of a valid Islamic marriage questionable.

With three women and nine children at stake, the courts had no choice but to unravel a web of personal histories, birth certificates, marriage records, and religious principles. The matter was consolidated before the High Court, which had to decide three major things:

- Who were the lawful wives?
- Who were the legitimate children under Muslim law?
- Could children born before marriage or even out of wedlock inherit the property of a deceased muslim father?

Fatuma argued passionately that only children born within a lawful Islamic marriage could inherit under Muslim law. She insisted that Ruth's children who were born before her 2011 nikah were illegitimate, and Marlin's son was similarly not entitled. She also attacked the validity of Ruth's marriage on the basis of name discrepancies between her conversion and marriage certificates.

The High Court, in a thoughtful decision, declared Fatuma and Ruth as lawful widows, but struck out Marlin's marriage for being void due to her subsisting civil marriage. It held that Fatuma's children were legitimate heirs, while Ruth and Marlin's children, whose paternity was contested, were to undergo DNA testing.

But Ruth appealed and the Court of Appeal overturned the DNA testing order, reasoning that no party had even requested for it. More importantly, it declared that the status of a child’s birth, whether within or outside wedlock should not determine their right to inheritance. The court found it unjust to exclude children merely because their parents had not formalized their union at the time of birth.

Still dissatisfied, Fatuma turned to the Supreme Court. She argued that Muslim law was clear, only children born within lawful Islamic marriage could inherit, and that the Constitution, under Article 24(4), allowed for such religious exceptions. She warned the court against applying secular equality principles to override Quranic mandates.

At The Supreme Court

When the matter reached the Supreme Court, it raised not just legal questions, but moral, religious, and constitutional dilemmas. On one side stood Fatuma, holding firmly to the tenets of Muslim inheritance law, arguing that only children born within wedlock could inherit from a Muslim father. On the other side was the claim not just of Ruth and Marlin but of children, real and present, who had known the deceased as their father, lived under his roof, and been raised in his love. The Supreme Court elucidated that this was more than a private family dispute. It was a test of the Constitution’s promise to all Kenyans of equality, dignity, and justice, even in the face of religious norms.

The Court first sought refuge in the wording of Article 24(4) of the Constitution which permits the application of Muslim law in matters of inheritance. The Court however noted that this does not give a free pass to override the Bill of Rights. Specifically, the Article states that ***the provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage,divorce and inheritance.***

The phrase "to the extent strictly necessary," the Court said, was not decorative. It was a limitation, a demand for restraint. The Court examined the submissions of Fatuma and Ruth, the constitutional texts, the principles of Islamic law, and even international human rights precedents from Botswana, Mali, and the European Court of Human Rights. They appreciated that religious accommodation, while valuable, could not be used as a sword to deny children recognition, care, and inheritance especially when the father had accepted them in life.

The judges acknowledged the importance of Muslim personal law in Kenya’s legal jurisprudence. But they insisted that such law must be applied through the lens of the Constitution, which promises every child whether born in or out of wedlock equal treatment and protection. They rejected the idea that a child’s rights could be limited by the decisions or mistakes of their parents.

The Court explained that Article 24(4) must be interpreted narrowly and proportionately. It must serve justice, not override it. Even Islamic law, they observed, was not meant to be a tool of exclusion but of equity, compassion, and continuity. They noted that the deceased had treated these children as his own, and that the Constitution required them to be treated not just as legal facts, but as human beings with rights.

And so the Court concluded: the children born out of wedlock, if sired by the deceased and treated by him as his own, were entitled to benefit from his estate. Not because they were dependants in a Western sense, and not because Islamic law was erased, but because the Constitution demands that no child be punished for the circumstances of their birth.

The judges upheld the Court of Appeal’s decision, quashed the DNA orders, and declared that Fatuma’s, Ruth’s and Marlin’s children were rightful dependants, other than Ruth’s eldest (who was proven not to be the deceased’s), were entitled to inherit. In a final act of prudence, the Court remitted the case back to the High Court, for fresh distribution of the estate but before a different judge. And mindful of the nature of the dispute, they ordered each party to bear their own costs.

What this means

In Kenyan succession law, Article 24(4) of the Constitution allows Muslim personal law to apply in matters of inheritance for Muslims, but only “to the extent strictly necessary.” This means that while Islamic law governs how a Muslim estate is distributed as stated in the Law of Succession Act, its application is not absolute. The Constitution still requires that all laws, including religious ones, respect fundamental rights such as equality and the best interests of the child. Therefore, a child cannot be denied inheritance simply for being born out of wedlock, even under Muslim law, unless such exclusion can pass a strict constitutional test of necessity and proportionality.

